Article

Rights of Complainants Before the European Commission—a Critical Analysis

Malgorzata Kozak* and Jacek Mainardi**

I. Introduction

Third-party complainants play a crucial role in the enforcement of competition rules.[1] As the European Commission itself noted, '[t]he complainant can help the Commission in supplying evidence of the anticompetitive practice and thus in establishing the infringement'.[2] Given the authority's limited resources, which result in a limited ability to conduct an ongoing screening of several markets, complaints are the most important source of information for the Commission. Unsurprisingly, the landmark decisions issued in recent years, e.g. *Google Shopping*, were driven by complaints filed by several market participants.[3]

Against this background, one should expect the legal position of complainants during antitrust proceedings before the Commission to be effectively protected. A lack of such protection can result in reduced incentive to file a complaint. This is even more relevant for less affluent victims for whom it is sometimes difficult to obtain specialised legal support or to make successful private enforcement claims and who are therefore even more dependent on the enforcement by the Commission. On the other hand, there are arguments for limiting the procedural rights of complainants, which are focused on the efficiency of proceedings and good management of resources.[4] In theory, a balance is struck between incentivising complaints and the usage of the Commission's resources through prioritising cases or choosing criteria to reject specific complaints.[5] We would like to take a critical view of this balance through the lens of effective judicial protection of complainants' rights.[6]

Key Points

- Handling of complaints remains one of the most vital issues in the management of the antitrust enforcement authority.
- The discretion of the authorities and their effectiveness should be balanced not only with the due process rights of incriminated undertakings but also with the fundamental rights of complainants, especially the right to the effective remedy.
- We reconstruct the standard of the right to effective remedy as prescribed by the Charter of Fundamental Rights and apply it to the context of the antitrust proceedings.
- We will draw conclusions relevant for the evaluation of the Regulation 1/2003.

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1 Anthony Dawes and Ekaterina Rousseva, *EU Antitrust Procedure* (Oxford Competition Law 2020) 306; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004) C 101/65.

2 European Commission (2012), Antitrust manual of procedures, ch. 21 'Handling of complaints', para. 13; Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU Text with EEA relevance [2011] OJ C308/6, para. 10; Case T-254/17, *Intermarché Casino Achats v. Commission*, EU: T:2020: 459, para. 222.

3 Over the course of 4 years, the Commission received more than 20 complaints from various entities. The description of complaints can be found in the Commission Decision of 27 June 2017 in *Google Search (Shopping)* (COMP/AT.39740) para. 39–62.

4 Ben van Rompuy, 'The European Commission's Handling of Non-Priority Antitrust Complaints: An Empirical Assessment' (2022) 45(2) World Competition 268.

5 Dawes and Rousseva (n 1) 306; Wouter Wills, 'Discretion and Prioritisation in Public Antitrust Enforcement' (2011) 34(3) World Competition 353.

6 Wouter Wills, 'Procedural rights and obligations of third parties in antitrust investigations and proceedings by the European Commission' (2022) 2 Concurrences 12.

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Therefore, the research question analysed in this paper is what the standard of rights of complainants before the European Commission is in light of the Charter of Fundamental Rights (CFR, or Charter) and how it is reflected in Regulation 1/2003.[7] This question is particularly relevant in the context of the Commission's ongoing review of Regulation 1/2003,[8] as well as the different model of handling complaints adopted in the Digital Markets Act (DMA).[9] We are focusing on complaints against anticompetitive actions of other undertakings and not on matters related to the actions of Member States,[10] which are subject to infringement procedures and not antitrust ones.

To answer this question, we discuss the standard of protection of complainants' rights under the CFR and the Commission's incentives to lower this standard to enhance the efficiency of proceedings. We then provide a thorough analysis of complainants' rights under Regulation 1/2003 and Regulation 773/2004.[11] Subsequently, we analyse those rights against the background of the multilayer system of EU competition law enforcement. In the end, we provide critical conclusions.

II. Right of complainants and effectiveness of authority's actions

A. Rights of complainants as prescribed by the Charter

The European Commission's enforcement powers are instrumental to policy objectives, whereas the legal position and rights of companies are protected through the safeguard function of the law. It is beyond a shadow of doubt that there is a tension between these as, on the one hand, if the instrumental function becomes primordial, it could affect the rights of undertakings engaged in the proceedings, while on the other hand, if there is too much focus on the safeguarding of rights of those entities, the effectiveness of the proceedings can deteriorate.[12] Against this background, we would like to analyse the complainant's rights.

With respect to the safeguard function, different legal safeguards would apply, depending on the stage of the procedure. Article 41 of the Charter concerning the so-called right to good administration applies to proceedings before the Commission.[13] Conversely, the right to appeal a decision and procedural safeguards during proceedings before the CJEU are guaranteed by the right of effective legal protection prescribed by Article 47 of the Charter.[14]

Article 41 of the Charter guarantees every person the right to have their affairs handled impartially, fairly and within a reasonable time. The impartiality of the European Commission has never been questioned (contrary to several of its national counterparts).[15] Fairness requires the authority to thoroughly consider arguments raised by the parties and provide an extensive justification. We discuss the specific obligations of the Commission in this respect in Section III. Finally, even if it is not discussed further, we need to mention that the obligation to handle an affair within a reasonable timeframe remains controversial. Legal scholars insist that a 'reasonable timeframe' means complying with the time limits prescribed by the secondary law.[16] If this were the case, the Commission should be deemed to violate complainants' fundamental rights since proceedings regarding complaints take 26 months on average,[17] while the prescribed deadline is 4 months.[18]

The right to effective remedy under Article 47 CFR requires that individuals should be able to enforce their rights under EU law before a court. This right has evolved to the constitutional principle from the 'procedural' principle used mainly to check national procedures while dealing with individuals claiming rights guaranteed in EU law.[19] This is considered a general principle of EU law derived from constitutional traditions shared by the Member States (embodied in Articles 6 and 13 of the ECHR).

7 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ 1/1.
8 By the call for evidence dated 30 June 2022 (Ares (2022) 4783198), the Commission initiated the consultation process regarding the efficiency of the Regulation 1/2003 covering inter alia the handling of complaints.
9 The procedural position of the complainants in the DMA proceedings, despite being an important issue, lies outside of the scope of this paper.
10 Case T-416/13, *Stanleybet Malta Ltd and Stanley International Betting Ltd v. Commission*, ECLI:EU:T:2014:567.
11 Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18.
12 Eva Lachnit, *Alternative Enforcement of Competition Law* (Eleven International Publishing 2016) 61–62; Anetje Ottow, *Market and Competition Authority: Good Agency Principles* (Oxford University Press 2015).
13 Case T-54/99 *max.mobil Telekomunikation Service*, ECLI:EU:T:2002:20, para. 48.
14 Ibid, para. 56.
15 Kati Cseres, 'Rule of Law Challenges and the enforcement of EU competition law. A case study of Hungary and its implications for EU law' (2019) CLR 14(1); Maciej Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law* (2022) Cambridge University Press.
16 See, for instance: Krystyna Kowalik-Bańczyk, 'Komentarz do Art. 41 Karty Praw Podstawowych' in Andrzej Wróbel (ed.) Karta Praw Podstawowych Unii Europejskiej. Komentarz (2020) CH Beck, para. 45.
17 Van Rompuy (n 4) 286–287.
18 Notice on handling of complaints (n 1).
19 Matteo Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) Review of European Administrative Law 12 (2) 36–37; Case C-64/*16 Associação Sindical dos Juízes Portugueses tegen Tribunal de Contas*, ECLI:EU:C:2018:117.

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The right to effective remedy is an 'umbrella principle'[20] and consists of the following three elements[21]: (i) existence of legal remedies that allow individuals to effectively enforce their EU law rights, (ii) actual and effective access to a competent court, and (iii) a guarantee that the process before the court is safeguarded by fundamental institutional and procedural prerequisites such as the independence of judges, fair trial and reasonable time limits.[22] In this paper, we would like to focus on the first of those conditions, namely, the existence of an effective remedy for rights of victims of EU competition law infringements. The second and the third elements are related to the general regulation of legal standing before EU Courts and their organisation and have no additional specific characteristics in the area of competition law.

So far, in EU competition law, the principle of effective legal protection is widely used by undertakings who are the subject of the Commission's decision in direct cases against the Commission.[23] However, there is no reason why the rights of complainants should be excluded from its scope. What is surprising in this respect is that actions for annulment taken by complainants are notorious for their lack of success (with *PGNiG* case[24] decided in February 2022 being the first successful action since 2010). Another important point to note is that no complainant who managed to have a decision annulled persuaded the Commission to initiate proceedings when the case returned to the Commission. This is well illustrated by one of the last cases in which the Court annulled the Commission's decision, namely, the *CEAHR*. By the decision dated 10 July 2008, the Commission rejected the complaint of the CEAHR—a European non-profit organisation consisting of several national associations of watch repairers. CEAHR had alleged that watch producers were abusing their dominant position or engaged in anticompetitive agreements by refusing to sell spare parts for watches and that their selective distribution systems should not be exempted.[25] The Commission rejected the complaint based on insufficient Community interest (we refer to it as Union interest). It noted that national authorities or courts are better placed to review such complaints. The Commission found in particular that aftermarkets for aftersales services of watch repairs and spare parts for watches do not constitute separate markets and[26] the General Court found that the Commission made a manifest error of assessment.[27] However, the General Court held that the Commission's manifest error of assessment was not enough for a complainant to have the rejection decision annulled. Complainants applying for the annulment of a rejection decision must show that the manifest error made by the Commission might have affected the result of the proceedings.[28] In the case of the CEAHR, it was possible to show that the Commission is better suited to deal with the case because the alleged infringement occurred in five member states and none of the alleged infringers was headquartered in the EU.[29] However, following the judgment, the Commission adopted a new decision in which it rejected the complaint[30] because of the low likelihood of finding an infringement. This decision followed a detailed examination of facts and was argued at length. The CEAHR once again challenged the Commission's decision[31] and this time its action was dismissed because the CEAHR was unable to prove in any of its pleas that the Commission had made a manifest error of assessment.[32] This shows that the judicial review sets the bar very high for the complainants, as the only thing successful complainants can obtain in the Court is having their complaint rejected for a second time, but with slightly more detailed reasoning.

Another example to illustrate the issue whether there is an effective legal protection of complainants' rights is the case of the International Skating Union (ISU).[33] As the later and ongoing developments showed, the case had raised very important issues related to the enforcement of EU competition law against sporting associations. However, it fell outside of the scope of the Commission's priorities. Political action of the complainants, the famous athletes, allowed them to gain support of several notable people who have sent a mass of tweets forcing the Commissioner herself to react.[34] Moreover, the Commissioner

20 Sacha Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in Paulussen Ch., T. Takacs, V. Lazic and B. van Rompuy (eds), *Fundamental Rights in International and European Law* (Springer 2015) 149.

21 Rolf Ortlep, Rob JGM Widdershoven, 'Judicial protection' in Jan H Jans, Sacha Prechal, Rob JGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2015) 333.

22 See Article 47 of the Charter of Fundamental Rights 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'

23 Case 53/85 *AKZO*, EU:C:1986:256; Case C-389/10 P *KME*, EU:C:2011:816.

24 Case T-399/19 *Polskie Górnictwo Naftowe i Gazownictwo v European* Commission, ECLI:EU:T:2022:44.

25 Commission Decision of 10 July 2008 in *Independent Watch Repairers* (Case COMP/E-1/39097) para. 3.

26 *Ibid*, para. 17, 40–42.

27 Case T-472/08 *CEAHR v. Commission*, ECLI:EU:T:2010:517, para. 119.

28 *Ibid*, para. 161.

29 *Ibid*, para. 176.

30 Commission Decision of 29 July 2014 in *Watch Repairs* (Case AT.39097).

31 Case T-712/14 *CEAHR v. Commission*, ECLI:EU:T:2017:748.

32 *Ibid*, para. 70, 81, 116, 124, 132.

33 Commission Decision of 8 December 2017 in *International Skating Union's Eligibity Rules* (Case AT.40208); currently under appeal.

34 Ben Van Rompuy, 'What can EU competition law do for speed skaters?' (2016) https://www.leidenlawblog.nl/articles/what-can-eu-competition-law-do-for-speed-skaters.

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was urged to take the case by one of the Members of the European Parliament.[35]

The fact that the complainants needed to create the whole political action supporting their complaint is deeply concerning. First, such an approach of the Commission will inevitably lead it to enforce competition laws mostly in the areas that are likely to win it a broad support. This will likely cause a severe underenforcement of competition laws in most of industries. Second, it limits the complainants' access to justice. Only those complainants who are popular (or, as a case may be, deep-pocketed) enough to build a social media or lobbying community around their goals will be likely to successfully get the proceedings initiated. At the same time, the standard for analysing the right to effective remedy established by the ECtHR provides that, while the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress raises an issue under Article 13.[36]

Since the rights established by Article 13 of the ECHR are also enshrined in Article 47(1) CFR, the Court of Justice has a duty—under Article 52(3) CFR—to interpret Article 47(1) of the Charter in accordance with Article 13 of the ECHR.

Thus, these cases show that the Commission enjoys discretion so broad that the complainants are at the Commission's mercy, even though they are entitled to an effective judicial protection.

Despite those two different legal bases, namely, Articles 41 and 47 CFR, an effective system of legal protection cannot be considered solely through its separate administrative and judicial elements, but must be viewed as a whole and the interrelationship between them must be taken into account. This approach is confirmed in the judgment on the asylum system in Ireland, in which the Court stated that:

> the effectiveness of remedies, including with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State viewed as a whole.[37]

The same holistic view should be applied to antitrust complaints before the Commission. Therefore, one should treat judicial proceedings as an effective guarantor of the complainant's rights during the administrative stage. In fact, in the *max.mobil* case, the Court stated that:

> [it] must next be observed that, in so far as the Commission is required to undertake such an examination, the fulfilment of that obligation must be amenable to judicial review. It is in the interests both of the sound administration of justice and of the proper application of the competition rules that natural or legal persons who request the Commission to find an infringement of those rules should be able, if their request is rejected either wholly or in part, to institute proceedings in order to protect their legitimate interests.[38]

Finally, those principles included in the Charter are not absolute and can be limited only to the conditions embodied in Article 52(1) of the Charter, namely: must be provided for by law and respect the essence of those rights and freedoms, be necessary and proportionate to the legitimate aim and meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

This is especially important given that 'law' sets only vague general principles related to the procedural rights of complainants, while most of the specific rules are established by the Commission itself via soft law measures (such as the Notice on the handling of complaints). Without entering into a discussion on a character of soft law,[39] these soft law measures cannot be considered law in the context of Article 52(1)[40] because—contrary to the provisions of the Charter—they are not binding *erga omnes*. As such, the binding and primary provision of the Charter cannot be limited by a non-binding Notice.[41]

B. The requirements of effective enforcement

Nevertheless, like every other authority, the Commission faces several organisational constraints. First, one must note that competition authorities operate under significant budgetary constraints and their human resources

35 *Ibid.*

36 *M.S.S. v. Belgium and Greece* 30696/09 [2011], para. 394; *Kudla v. Poland* [GC] [2000] 30210/96, para. 157.

37 Case C-175/11, *H.I D. and B.A. v Refugee Applications Commissioner and Others*, ECLI:EU:C:2013:45, para. 102.

38 *max.mobil Telekomunikation Service* (n 13) (annulled by the Court of Justice, because the complaint regarded non-directly applicable Art 90(3) [106(3)] TFEU and the Commission had therefore no obligation to act); Cf. Case 26/76 *Metro v. Commission*, ECR 1875, para. 13.

39 In the context of EU law, see: Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) 21 European Law Journal, 68–96; Oana Stefan, 'Soft-law and the Enforcement of EU Law' in Dmitry Kochenov, Andras Jakab (eds.) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017); Jan Klabbers 'The Undesiberality of Soft Law' (1998) 67 Nordic Journal of International Law, 381–391; in the broader context of public international law, see: Kenneth W. Abbot and Duncal Sincal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization, 421–456.

40 Andrzej Wróbel, 'Komentarz do art. 52 Karty Praw Podstawowych' in Andrzej Wróbel (ed.) *Karta Praw Podstawowych Unii Europejskiej. Komentarz* (CH Beck 2020), para. 12.

41 It is a long-established doctrine of the Court that the soft law measures cannot create any enforceable rights (cf. Case C-322/88 *Grimaldi*, ECLI:EU:C:1989:646, para. 16). A contrario, they are also unable to limit such rights. See also Case C-75/05 P *Germany v. Kronofrance and Commission*, ECLI:EU:C:2008:482, para. 61 in which the Court confirmed that soft law measures must be compliant with primary law.

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are scarce.[42] This is particularly important in the case of the European Commission, which besides antitrust, merger control and state aid cases will take on an additional workload related to the DMA[43] and the Foreign Subsidies Regulation.[44] Insight from other jurisdictions where competition authorities have experienced a blurring of their mandates[45] suggests that those new tasks will further decrease the Commission's capabilities in the area of competition law enforcement.

Thus, it must be concluded that it is not advisable to initiate proceedings in the case of every competition law violation.[46] Quite the contrary, the Commission has to be selective in terms of the cases it chooses to pursue.[47] The Commission believes that it fulfils the instrumental function of competition law through the prioritisation of cases. Subsequently, the literature points to a 'negative-priority' setting, in which it chooses which cases not to investigate.[48] The discretion of the Commission to choose which complaints are pursued is a natural consequence of this approach.[49] The ability to give different priorities to incoming cases is one of the conditions for effective operation and management of the resources at its disposal, and is widely accepted in literature.[50] It is also settled case law that the Commission can assign different priorities to specific complaints.[51] The Commission is not obliged to open proceedings or to adopt a specific decision on substance.

The discretion for the Commission to prioritise cases on the basis of Union interest was vested in the CJEU in the *Automec II* judgment[52] in which the Court held that the Commission, as an administrative authority acting in the public interest, is entitled to rely on the Community interest (now Union interest) when determining the degree of priority of the various cases coming before it.[53] Despite indicating the criteria for the analysis of that condition, the Commission is not bound by a minimum level or amount of criteria it must examine or regarding the specific criteria that must be taken into account, nor are any of the criteria a priority.[54] It is for the Commission to assess whether it is necessary to conduct a procedure and whether there is Union interest justifying such a procedure.[55]

Nevertheless, as there is a consensus on the possibility for the Commission to decide on the usage of its resources, the choice of cases through prioritisation needs to be legitimate under EU law, including EU law principles. The review of submitted cases should not be cursory.[56]

The Commission's discretion in the area of prioritisation also has political dimensions. First, the Commission can use prioritisation to pursue its own enforcement strategy. As Cseres and Brook rightly point out, every competition authority has to achieve a balanced portfolio of cases having different complexity and size. The authority also faces a choice between novel landmark cases and enforcement against well-established principles.[57]

The second political dimension of prioritisation is related to the lower judicial scrutiny of prioritisation decisions. Therefore, as Brook has argued, whenever important policy considerations have to be taken into account when deciding a case, the Commission opts to make procedural decisions not to initiate proceedings instead of conducting proceedings requiring a much more demanding substantial analysis.[58] Nevertheless, this approach ignores possible input or signals from complainants that indicate societal problems and provides less clarity of law for all market participants.

In the context of our article, it must be noted that two important factors imply that complaints are increasingly important for effective enforcement. The first one is that following the digitalisation of the economy, we see more

42 Or Brook and Kati J. Cseres, *Priority settings in EU and national competition law enforcement* (2021) SSRN Working Paper https://ssrn.com/abstract=3930189 18 accessed 17 November 2022.

43 Which is likely to face a significant understaffing problem. Reuters reports that, although previously the Commission envisaged an enforcement team consisting of 80 people, it is now looking to establish a 40-person team. Moreover, it is rumoured that this team will be formed from officials who are handling antitrust investigations against Big Tech companies. F. Y. Chee, 'EU wants 40-man antitrust team to enforce new tech rule, official says' (Reuters, 27 October 2022) https://www.reuters.com/markets/europe/eu-wants-40-man-antitrust-team-enforce-new-tech-rules-official-says-2022-10-27/.

44 Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector [2022] OJ L 265/1; Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market OJ L 330/1.

45 Maciej Bernatt, 'Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law', para. 100–105.

46 Brook and Cseres (n 42) 10.

47 Ottow (n 12) 160–161.

48 Van Rompuy (n 4) 268; Brook and Cseres (n 42).

49 Brook and Cseres (n 42) 10.

50 Van Rompuy (n 4) 268–269.

51 Case T-24/90 *Automec v. Commission*, ECLI:EU:T:1992:97, para. 77; Case T-5/93 *Tremblay and Others v. Commission*, ECLI:EU:T:1995:12, para. 61; Case T-114/92 *BEMIM v. Commission*, ECLI:EU:T:1995:11, para. 63.

52 Van Rompuy (n 4) 270; Case T-24/90 *Automec v. Commission* (n 51).

53 See Case T-24/90 *Automec v. Commission* (n 51), para. 77 and 85; Case T-427/08; *CEAHR v. Commission* (n 27) para. 27; Case T-62/99 *Sodima v. Commission*, ECLI:EU:T:2001:53, para. 36. See also Regulation 1/2003, recital 18. Opinion of AG Ruiz-Jarabo Colomer of 11 January 2001 in Case C-449/98 P *IECC v. Commission*, ECLI:EU:C:2001:7, para. 57.

54 Case C-373/17 P, *Agria Polska v. Commission*, ECLI:EU:C:2018:756, para. 61; Case C-119/97 P, *Ufex*, EU:C:1999:116, para. 79.

55 Commission Decision of 20 October 2020 in *Polish biodiesel supplies* (Case AT.40562).

56 Case C-119/97 Ufex (n 54), para. 92; Case C-450/98P *IECC v. Commission*, ECLI:EU:C:2001:276 para. 57.

57 Brook and Cseres (n 42) 16.

58 Or Brook, '*Priority setting as a double-edged sword: how modernization strengthened role of a public policy*' (2020) 16 Journal of Competition Law and Economics 454–456.

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and more cases related to the abuse of dominance and less cartel cases—for unilateral infringements, there is no leniency procedure that was a frequently used source of information for the Commission in recent years. The second one refers to the fact that leniency is not available to victims—only to participants in illegal practices. Finally, even in the context of illegal agreements and concerted practices, leniency is no longer popular given the risks related to private enforcement claims.[59]

III. Rights of complainants before the Commission

A. Status of complainants

Under Regulation 1/2003, there are two legal provisions that refer to the status of complainants. First, according to Article 27(1) of Regulation 1/2003, complainants should be 'closely associated with the case'. Second, under Article 7(1) of Regulation 1/2003, the Commission can act on the basis of a complaint to find and terminate an infringement. In the latter case, if the Commission does not intend to take action on the basis of a complaint or a part thereof, the complainant has the right to receive a reasoned decision rejecting the complaint, which is subject to an appeal before the General Court of the European Union under Article 263 of the TFEU.

The procedural status of complainants was only introduced with regard to Article 7 of Regulation 1/2003.[60] According to Article 7(2) of Regulation 1/2003 and Article 5(1) of Regulation 773/2004, natural or legal persons who demonstrate a legitimate interest and Member States are entitled to lodge complaints.

According to case law, the requirement to demonstrate a legitimate interest means that a natural or legal person has to show that 'its economic interests have been damaged or are likely to be damaged' by an alleged infringement of Article 101 or 102 of the TFEU.[61] In addition, the complaint should contain the information required by Form C set out in the Annex to Regulation 773/2004.

B. Broad discretion of the Commission

According to the case law of the CJEU, the Commission is responsible for defining and implementing the direction of Union competition policy. Importantly, to carry out this task effectively, it is entitled to give different degrees of priority to complaints[62] brought before it in relation to the provisions of Article 105 (1) of the TFEU,[63] as was discussed above in Section II B.

The Commission's main reasons for rejecting complaints after careful examination are lack of legal interest in bringing a complaint, failure to demonstrate an infringement of EU law (or lack of evidence in the proceedings) and lack of Union interest. Other reasons justifying rejections are *inter alia* parallel proceedings before the national competition authorities, or lack of substantiation of the complaint.[64]

The Commission may also decide that the complaint would be better dealt with by the relevant National Competition Authority (NCA), who is better placed (closer) to the alleged infringement on the basis of Article 13 Regulation 1/2003. The General Court also held that the criteria discussed above are not binding on the Commission in situations where the relevant NCA is more competent than the Commission. Such jurisdiction may be justified by the proximity of the relevant evidence, the extent of the markets affected by the notified practices, or past knowledge of those markets and practices.[65] Under Article 13 Regulation 1/2003, when the Commission (and the NCA) receives a complaint that has already been dealt with by another competition authority, they can reject it.[66] An analysis of relations between the Commission and the NCAs is included in Sections IV A – IV B below.

Finally, the General Court accepts that it is not for the Commission under Article 7 of Regulation 1/2003 to challenge an erroneous (in the light of EU law) national judicial practice. The Commission should—in such a case—initiate an infringement procedure—under Article 258 of the TFEU.[67]

C. Legal situation of complainants

The broad discretion of the Commission obviously affects the procedural rights of the complainant. There is no question that the legal situation of a complainant is different from that of an undertaking who is subject to the

59 See for instance Bundeskartellamt Yearly Report: Tatigkeitsbericht des Bundeskartellamtes 2019/2020, p. XI, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20Tätigkeitsbericht%202019_2020.pdf?__blob=publicationFile&v=5. See also J. Ysewyhn, S. Kahmann, 'The decline and fall of leniency applications in Europe' [2018] Concurrences 44–59.

60 Wils (n 6) 8.

61 Wils (n 6) 9. Joined cases T-213/01 and T-214/01, *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v. the Commission*, EU:T:2006:151, para. 114 and 115.

62 Case C-344/98 *Masterfoods and HB Ice Cream,* ECLI:EU:C:2000:689, para. 46; Case C-119/97 P, *Ufex* (n 54) para. 88; Case T-24/90, *Automec v. Commission* (n 51) para. 73–77.

63 Notice (n 2), para. 8; Case C-344/98, *Masterfoods v. HB Ice Cream* (n 62), para. 46; Case C-119/97 P, *Ufex* (n 54), para. 88; Case T-24/90, *Automec v. the Commission*, ECR II-2223, para. 73–77.

64 Manuel Kellerbauer and Alfonso Lamadrid de Pablo, *Rejection of Complaints* in Luis Ortiz Blanco (ed), *EU Competition Procedure* (Oxford University Press, 4th ed), Oxford Competition Law, access: 17.6.2022.

65 Case T-791/19, *Sped-Pro v. Commission* ECLI:EU:T:2022:67 para. 58.

66 Decision AT.40665—Toyota.

67 Case T-83/97, *Sateba v. Commission* EU:T:1997:140, para. 39. Case C-373/17 P *Agria Polska* (n 54), para. 97.

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proceedings. Its scope is also limited by the rights of the due process of undertakings covered by investigations.[68] As will be seen, the complainant does not have the power to make a demand for the initiation of proceedings that would be binding for the Commission, let alone to request the Commission to issue a decision finding an infringement of Article 101 or 102 of the TFEU. The complainant is, however, entitled to receive a non-confidential version of the statement of objection.

The fact that the decision is appealable means that, despite being broad, the Commission's discretion is not unlimited.[69] We will briefly discuss its responsibilities.

Pursuant to Article 7(1) of Regulation 773/2004, where the Commission intends to reject a complaint, it shall inform the complainant about their intention to reject the complaint in a 'pre-rejection letter' and set a time limit for the complainant to respond in writing. As held in the *PGNiG case*, the pre-rejection letter needs to explicitly address the points raised by a complainant and not an implicit justification. Nevertheless, this infringement can cause the annulment of the rejection decision only when it is shown that the procedure in question could have had a different outcome.[70]

The Commission is not obliged to take into account any further written submissions received after the expiry of that time limit. If the opinion provided by the complainant still does not, in the Commission's view, lead to a different assessment of the complaint, the Commission will reject the complaint by a decision. If no opinion is provided, the complaint shall be deemed to have been withdrawn.

As indicated by Van Rompuy, 'in approximately half of the cases, complainants implicitly withdrew their complaint after receiving the pre-rejection letter'.[71] In such a case, no appealable decision is adopted. This raises two interesting issues. First of all, what the specific information required by the Commission from the complainant is. Second, only the most persistent complainants will receive a decision that can be appealed.

In the first case, as the Commission is not required to carry out a detailed investigation, it falls on a complainant to show evidence and formulate specific arguments in a situation of an asymmetry of information at the detriment of a complainant. This is particularly relevant, and difficult, for small and medium enterprises facing dominant companies. The second issue, namely, the lack of appealable decision and the need for the complainant to present additional information, also creates an additional burden for smaller companies.

As case law shows,[72] actions taken by the Commission should ensure the complainant that the Commission has examined its complaint in depth. Hence, the Commission's discretion to prioritise the application of Articles 101 and 102 of the TFEU is subject to the following limitations: (i) the obligation to state why the Commission refuses to examine a complaint, and (ii) the obligation to assess the seriousness of the alleged infringements and the persistence of their effects, in particular: the duration and scope of the infringements, as well as their effect on competition throughout the Union.[73] In the first case, the statement of reasons should be sufficiently precise so that the Court can effectively verify the Commission's power to set priorities. In both cases, the Commission should set out the facts justifying the decision, as well as a legal analysis of the provisions on the basis of which it was adopted.

D. Rights of complainants during the proceedings

The legal position of complainants is different in situations when the Commission decides to reject the complaint and in situations where the Commission decides to proceed with the case. Under Article 8(1) of Regulation 773/2004, if the Commission intends to reject the complaint, the complainant can be granted the right of access to the documents on which the Commission has based its provisional assessment.

The problem with such a solution is that the Commission explicitly states that 'access to the documents on which the Commission made its provisional assessment' is different from 'access to file'[74] (i.e. access to

68 Wills (n 60) 9. See, to that effect, Case 142 and 156/84 *British American Tobacco and Reynolds Industries v. Commission* EU:C:1987:490, para. 19 and 20; Case T-108/07 and T-354/08, *Diamanthandel A. Spira v. Commission*, EU:T:2013:367, para. 59; Case T-574/14 *EAEPC v. Commission*, EU:T:2018:605, para. 93 and Case T-515/18 *Fakro v. Commission*, EU:T:2020:620, para. 41. In these judgments, the term 'right to a fair hearing' is used as shorthand for the more far-reaching procedural rights of the companies under investigation. In the light of the case law on the procedural rights of companies under investigation, the term 'rights of the defence' is arguably the best shorthand; see the excellent discussion and overview in A. Scordamaglia-Toussis, *An Overview of the Rights of the Defence in EU Antitrust Proceedings*, in A Dawes and E Rousseva (ed) (n 1) 337.

69 Case C-119/97 *Ufex* (n 54), para. 89–96.

70 Case T-399/19, *Polskie Górnictwo Naftowe i Gazownictwo v. Commission,* ECLI:EU:T:2022:44, para. 59.

71 Van Rompuy (n 4), 280.

72 Case 298/83 *CICCE v. Commission*, ECLI:EU:C:1985:150; Joined Cases 142 and 156/84 *BAT and Reynolds v. Commission* [1987] ECR 4487; Case C-119/97 *UFEX* (n 54); Case T-24/90 *Automec v. Commission* (n 51) para. 79; Case T-198/98 *Micro Leader v. Commission*, ECLI:EU:T:1999:341, para. 27; Case T-432/05 *EMC Development v. Commission*, ECLI:EU:T:2010:189, para. 59.

73 Case 210/83 *Schmidt v. Commission*, ECLI:EU:C:1985:150, para. 19; Case 298/83 *CICCE v. Commission* (n 72); Case C-119/97 *Ufex* (n 54), para. 86.

74 Notice on the access to file (n 2), para. 3.

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non-confidential versions of all documents). Regrettably, none of the legal acts (not even the Notice on the access to file) provide details on what is a document on which the Commission has based its provisional assessment—and the Commission has a broad discretion in defining it. As such, even though this right lets the complainant understand the Commission's thinking, at the same time it has limited practical meaning to allow the complainant to find any omissions made by the Commission (since the most likely place to spot any omissions is documents on which the Commission has *not* based its reasoning). Therefore, this procedural right is designed to support the Commission's views.

Such a design was accepted by case law in 1994,[75] i.e. before the Charter of Fundamental Rights was adopted. This interpretation, however, is very controversial given the wording of Article 41(2)(b) of the CFR prescribing that right to good administration guarantees the party to the administrative proceedings the right of access to its file, although this right can be limited only by legitimate interests of confidentiality or professional and business secrecy. Therefore, under the Charter standard, the complainant should be granted the complainant's right to access non-confidential versions of all documents.

An additional problem is that only complainants who explicitly requested access to documents will receive it. The obligation to make the request puts less affluent victims who are not represented by lawyers on a detrimental position. This is the design of the procedure that gives more power to those complainants who are more affluent.

Complainants who succeeded, i.e. the proceedings were initiated, will receive access to only one document, namely, the non-confidential version of the statement of objections.[76] From the CFR viewpoint, it seems reasonable. After initiating the antitrust proceedings, the case and the case file does not focus on the complainant anymore. The complainant can also request to participate in the hearing although the Commission can decide not to grant this right to the particular complainant.[77]

E. Conclusion

The examination of the rights of complainants before the Commission shows that efficiency takes precedence over complainants' rights. The Commission is entitled to reject a case because of the lack of Union interest, or any other justification they deem suitable, without taking the complainant's rights into consideration. The control exercised mainly by the General Court focuses on whether the Commission sufficiently provided reasons for rejecting a complaint and it cannot replace the Commission's assessment of specific criteria. Thus, under the current system, in a situation where the Commission refuses to investigate a case, there is no real prospect for the complainant to have their case heard at EU level. Therefore, the level of judicial protection for complainants raises serious doubts about its compliance with the standard established by Articles 6 and 13 of the ECHR and Article 47 of the CFR.

Furthermore, the procedure 'by-design' grants a better position to more affluent victims represented by lawyers specialising in EU competition law for several reasons. First, the complainant has to answer the pre-rejection letter to have a formal decision initiated. Therefore, a significant amount of work is needed just to obtain a formal decision. Furthermore, only those complainants who explicitly requested an access to file will receive such access to it. Moreover, as the case of ISU shows, given that political considerations are important for the Commission while making a decision to initiate the proceedings, those complainants who are able to receive support from the general public or politicians are better-off.

In the setting of competition laws that are designed to protect every person from market power, the less affluent victims are the most vulnerable ones. It seems that the design of the procedure does not contain enough safeguards to protect them.

IV. Rights of complainants in the multi-layer system of enforcement of Articles 101 and 102 of the TFEU

A. A system of parallel powers for the application of Articles 101 and 102 of the TFEU

The direct application of Articles 101 and 102 of the TFEU in individual cases takes place at EU level as well as at a national level, as introduced by Regulation 1/2003. Regulation 1/2003 creates a system of parallel powers for the application of Articles 101 and 102 of the TFEU though empowering the competition authorities and courts of Member States to apply Articles 101 and 102 of the TFEU in individual cases. In cases where the conditions for prohibition are not met, the competition authorities may decide that there are no grounds for action on their part.

Hence, depending on the nature of the complaint and the national competition regime, the complainant may bring it before the Commission, the competition authority of a Member State (designated under Article 35 Regulation 1/2003) or a national court.

75 Case T-17/93 *Matra-Hachette v. Commission*, ECLI:EU:T:1994:89, para. 34.
76 Article 6(1) of Regulation 773/2004.
77 Article 6(2) of Regulation 773/2004.

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At the same time, the division of work[78] between the Commission and NCAs, and among NCAs, is not carved in stone. This is a flexible and close cooperation[79] agreed between the ECN members, but more specifically framed by the Commission being *primus inter pares*,[80] e.g. the fact that national courts and NCAs cannot overturn the Commission's decisions.[81]

The Commission may reject a complaint if the effects of the infringements alleged in the complaint are essentially limited to the territory of one Member State, thus a delicate division of competences is delimited by an effect on EU trade criterion. Consequently, a single NCA is normally competent to deal with agreements or practices that substantially affect competition mainly within its territory, or the action of a single NCA is sufficient to put an end to the entire infringement. The Commission is well placed to deal with the case if one of a few conditions is met. First, the practice or agreement in question should affect more than three Member States. Second, the Commission should act if practice or agreement falls into the scope linked to other EU law provisions that can be applied exclusively by the Commission (e.g. Article 106 of the TFEU). Third, the Commission should act if the presented case raises issues that have not been dealt with by enforcers yet. Lastly, action on the centralised level would ensure effective enforcement.[82]

What is crucial to the Commission's discretion is the criterion of Union interest. In the absence of Union interest, the Commission has the right to reject the complaint, provided that 'the rights of the complainant will be sufficiently protected by the national authorities, which presupposes that they are in a position to gather factual evidence to determine whether the practices in question constitute an infringement of Articles 101 and 102 of the TFEU'.[83]

By contrast, the Commission is not an appeal body against a decision, or lack thereof, of a national competition authority. The Member State is obliged to ensure the rights of effective judicial protection of individuals. However, the CJEU pointed out that it concerns a situation where the 'likelihood of an infringement of Articles 101 and 102 TFEU is low'.[84]

The Commission also does not need to check whether the NCA that was contacted by the complainant has the capacity to deal with its tasks under Regulation 1/2003.[85] As indicated previously, it can be concluded that the complaint procedure is separated from other procedures of the Commission as the 'guardian of the Treaties'.

B. Mutual trust as a fundament of a multi-layer and decentralised enforcement system of EU competition law

A multi-layered and decentralised system requires trust between member states. Regulation 1/2003 does not include any detailed requirements for NCAs. It is left to the Member States to establish how the competition authorities should operate, subject to ensuring the full effectiveness of EU competition law.[86] The question of mutual trust in competition law is not analysed extensively in the literature.[87]

In the *Sped-Pro* judgment, the General Court recognised that the EU law principles of mutual trust apply to the relationships between the European Commission and the national competition authorities.[88] Mutual trust, however, is not blind trust. Although it is a principle of a constitutional nature in the EU[89], it has limitations.

As clarified by the Court of Justice[90] in the *N.S.* judgment regarding asylum policies, the Member States should not apply this principle when it can lead to a real risk of a violation of the right to life,[91] which can be considered the most important fundamental right. Although it might have seemed that such a far-reaching limitation of the principle of mutual trust is legitimate only to protect this most important fundamental right, the general rule derived from the *N.S.* judgment was

78 Notice on handling of complaints (n 2), para. 22.
79 Case T-339/04, *France Télécom SA v. Commission*, EU:T:2007:80, para. 79.
80 Sonia Jóźwiak, *Europejska Sieć Konkurencji—model: struktura i współpraca oraz kompetencje decyzyjne członków*, Warszawa 2011, p. 8, disponible at www.uokik.gov.pl [access: 24 April 2019]. Cseres, K., and Outhuijse, A., *Parallel Enforcement and Accountability: The Case of EU Competition Law* (30 June 2017). University of Groningen Faculty of Law Research Paper No. 2017-11, p. 11. Available at SSRN: https://ssrn.com/abstract=2995729 or http://dx.doi.org/10.2139/ssrn.2995729.
81 Christopher Townley, *A framework for European Competition Law, Co-ordinated Diversity* (Hart 2019), 348.
82 Notice on handling of complaints (n 1), para. 22.
83 Case T-458/04 *Au Lys de France v. Commission* [2007] EU :T :2007 :195, para. 83.
84 Case C-373/17 *Agria Polska* (n 54) para. 87; Decision AT.40665—Toyota Motor Poland.
85 Case C-373/17 *Agria Polska* (n 54) para. 69, Case T-201/11, *Si.mobil v. Commission*, EU:T:2014:1096, para. 57.
86 Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, EU:C:2010:739, para. 57.
87 Malgorzata Kozak, 'Mutual trust as a backbone of EU Antitrust Law' (2020) Market and Competition Law Review 4(1), https://doi.org/10.34632/mclawreview.2020.7476, 127–151.
88 Case T-791/19, *Sped-Pro v. Commission*, ECLI:EU:T:2022:67, para. 84–85.
89 Koen Lenaerts, *La vie après l'avis: exploring the principle of mutual (yet not blind) trust*, (2017) Common Market Law Review 806.
90 In fact, in this judgment the Court of Justice has complied with principles laid down by the ECtHR in the M.S.S. v. Belgium and Greece judgment (n 36).
91 Joined cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department & M.E. and others v. Refugee Applications Commissioner and others*, ECLI:EU:C:2011:865 para. 105–106.

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later used in a judgment related to European Arrest Warrants,[92] especially in the context of the Polish rule of law crisis (the so-called 'LM test'), concerning the right to effective remedy and fair trial.[93]

In *Sped-Pro*, the General Court agreed with the Commission to apply this settled case law in the context of competition law. The Court recalled that the Member States share the common values referred to in Article 2 of the TEU, including the rule of law. Those common values justify the existence of mutual trust that the values listed in Article 2 of the TEU will be respected and, consequently, that Union law, which gives effect to those values, will be respected. The Court also referred to the fundamental right to a fair trial before an independent tribunal under Article 47 of the CFR, also in the context of the effective application of Articles 101 and 102 of the TFEU. It recalled the Court's case law based on the second subparagraph of Article 19(1) of the T[F]EU that it is incumbent on the Member States to establish measures to ensure respect for the right to effective judicial protection in areas covered by Union law, including in the field of competition law. Consequently, the principle of mutual trust may only be departed from in 'exceptional circumstances'.

Consequently, as the General Court stated in *Sped-Pro*, the Commission is entitled to reject a complaint for lack of Union interest, provided that the rights of the complainant are sufficiently protected by the national authorities. In view of the complainant's indication of 'exceptional circumstances' and contrary to the position of the Polish government, the Court allowed, on the basis of the Commission's proposal, the application of a test analogous to the LM test in the context of determining the most appropriate competition authority to deal with a complaint alleging an infringement of Articles 101 and 102 of the TFEU.

For that reason, the Commission should, before rejecting a complaint for lack of Union interest, satisfy itself that the complainant's rights would be sufficiently protected before the national authority.[94] Importantly, in the view of the General Court, this concept covers both public administrative authorities and courts.

92 Joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu*, ECLI:EU:C:2016:198.

93 Joined cases C-216/18 PPU, *LM* ECLI:EU:C:2018:586; Joined cases C-354/20 and C-412/20 PPU, *L and P*, ECLI:EU:C:2020:1033; Joined Cases C-562/21 and C-563/21 PPU, *X and Y*, ECLI:EU:C:2022:100.

94 The court did not address or adjudicate the argument raised about the lack of independence of the Polish NCA.

C. The role of private enforcement of competition law

The General Court stated in *Agria Polska*,

> it was in any event open to the applicants to bring, before the national courts and under national law, actions for compensation in respect of alleged damage arising from the infringement, by the entities referred to in the complaint, of Articles 101 and/or 102 of the TFEU.[95]

Thus, it indicates that the Court recognises that private enforcement could be instrumental for complainants to obtain compensation and perceives it as an important building block of the optimal enforcement system. [96] Yet, from the perspective of the complainant's rights, it can be an interesting remedy if it fulfils the same goals and is effectively available.

As for the goals of private enforcement, the Commission underlines that, since the 1970s, Articles 101 and 102 of the TFEU have been considered directly applicable and can be relied on by a complainant before national courts. The adoption of the Damages Directive[97] aimed at linking maximum effectiveness of competition rules with proper functioning of the internal market within the EU.[98] The case law codified in the Damages Directive facilitated emergence of an additional branch of enforcement of EU competition law. The relation between those two systems is debated. Wils, before the adoption of Damages Directive, indicated that these are separate instruments, namely, public enforcement serving 'at clarification and development of the law and at deterrence' whereas private being aimed at compensation.[99] Dunne describes this relation with a threefold approach as 'a complementary duality that is encouraged to improve the effectiveness of competition law' (*public wrongs* and *private wrongs*) supplemented by a market failures correction objective.[100] Nagy indicates that 'EU private enforcement has never

95 Case C-373/17P *Agria Polska* (n 54) para. 90.

96 Case C-373/17P *Agria Polska* (n 54) para. 83, 87; Case T-791/19, *Sped-Pro* (n 65) para. 67; Case T-515/18 *Fakro v. Commission* (n 68), Case T-743/20 *Car Masters 2 v. Commission*, ECLI:EU:T:2022:33.

97 Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1 (Directive 2014/104).

98 Directive 2014/104, recital 7 preamble.

99 Wouter P.J. Wils 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32(1) World Competition, Available at SSRN: https://ssrn.com/abstract=1296458.

100 Niamh Dunne 'The Role of Private Enforcement within EU Competition Law' (2014) University of Cambridge Faculty of Law Research Paper No. 36/2014, King's College London Law School Research Paper No. 2014-37, Available at SSRN: https://ssrn.com/abstract=2457838 or http://dx.doi.org/10.2139/ssrn.2457838.

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been meant to replace public enforcement, but simply to complement and assist it'.[101]

The Commission's Notice explicitly in the title of Section IIB indicates the complementary character of private and public enforcement.[102] In *Skanska*, the Court emphasised that 'actions for damages for infringement of EU competition rules are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct'.[103] Next to a compensatory function, a complementary role of private enforcement (to a public one) in a deterrent function was also mentioned in the opinion of the Advocate General of *Skanska*.[104]

Unsurprisingly, this short analysis shows that private enforcement is aimed mainly at compensation whereas the objectives of complainants can go beyond it. Moreover, in some instances a monetary redress is impossible to obtain due to, e.g., limitation status or other procedural obstacles even in jurisdictions that are perceived as favourable for private enforcement litigations.

In addition, it needs to be acknowledged that a level playing field in the private enforcement of EU competition law has not been reached and in some countries it is still difficult, if not impossible, to obtain damages for violations of Articles 101 and 102 of the TFEU.[105] Even though the Commission receives from the national courts all judgments applying Articles 101 and 102 of the TFEU, official statistics on the number of cases do not exist, as even the Commission in their short report on the implementation of the Damages Directive[106] uses Laborde's impressive (non-official) research in this respect. The most recent judgments from Slovakia and Germany on the Commission's official database of judgments are from 2015.[107]

Thus, even if the objectives of private enforcement in the eyes of complainants are the same as the public one, the effectiveness of this remedy in some Member States needs to be questioned.[108] The Commission considers the implementation process to be fulfilled and 'is now examining whether all national transposing rules implement the Directive completely and correctly'.[109] In addition, the view that a damages action is an effective remedy is challenged both by the case law of the European Court of Human Rights [110] and the opinions of the Advocates General of the Court of Justice presented in areas other than competition law.[111] Finally, in *Agria Polska*, the Court emphasised the fact that, under Polish law, decisions of the NCA to reject complaints do not give rise to an obligation on the part of the Commission to examine the complaint submitted to it. It is not the Commission's task to remedy—by way of initiating antitrust proceedings—any lack of effective judicial protection at national level (in respect to public enforcement). So, again the Court perceives the role of the Commission as an enforcer separated from its role as a guardian of the Treaties.

In the light of the above, we consider that the effectiveness of a private litigation as an alternative remedy for complaints cannot be taken for granted and assumed and needs to be treated in a more nuanced way while dealing with complaints. Nevertheless, in light of the absence of verification of this possibility for complainants, the Commission should more actively monitor the

101 Csongor István Nagy 'What Role for Private Enforcement in EU Competition Law? A Religion in Quest of Founder' in Tihamer Tóth ed., *The Cambridge Handbook of Competition Law Sanctions* (Cambridge University Press, 2022) 218–229. Available at SSRN: https://ssrn.com/abstract=4154371 or http://dx.doi.org/10.2139/ssrn.4154371.

102 Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/5, para. 12.

103 Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy and Others*, ECLI:EU:C:2019:204, para. 45.

104 Case C-724/17, *Skanska* (n 103), para. 81.

105 Jean-François Laborde, 'Cartel damages actions in Europe: how courts have assessed cartel overcharges' (Concurrences, 2019). www.concurrences.com/en/review/issues/no-4-2019/law-economics/cartel-damages-actions-in-europe-how-courts-have-assessed-cartel-overcharges-en; Jean-François Laborde, 'Cartel damages actions in Europe: how courts have assessed cartel overcharges (2021 Ed)' (2021) Concurrences N° 3-2021, Art. N° 102086, 232–242.

106 Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Lesley Hannah, Anna Stellardi, 'The EU Commission publishes a report on the implementation of the 2014/104/EU Damages Directive' (e-Competitions December 2020) Art. N° 100182.

107 https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/index.cfm#searchResults.

108 Jurgita Malinauskaite and Caroline Cauffman, 'The transposition of the Antitrust Directive in the Small Member States of the EU—A Comparative Perspective' (2018) 14 Journal of European Competition Law & Practice 496; Urszula Jaremba and Małgorzata Kozak, 'The implementation of EU Antitrust Damages Directive in Poland in Light of the Principle of Effective Judicial Protection' (2019) Global Competition Litigation Review; Urszula Jaremba and Laura Lalikova, 'Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland' (2018) 14 Journal of European Competition Law & Practice; Katalin J. Cseres, 'Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions' (2015) 8 Yearbook of Antitrust and Regulatory Studies; Agata Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6 Yearbook of Antitrust and Regulatory Studies.

109 https://ec.europa.eu/competition/antitrust/actionsdamages/transposition_en.html.

110 *MN and Others v. San Marino* App no. 28055/12 para. 81 (ECHR, 7 July 2015).

111 Opinion of AG Ćapeta in Case C-626/21 *Funke sp. z o.o*, ECLI:EU:C:2022:954, para. 74; Opinion of AG Kokott in Joined cases C-245/19 and C-246/19 *État du Grand-duché de Luxembourg*, ECLI:EU:C:2020:516, para. 102.

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implementation of the Damages Directive and trigger the infringement procedure of Article 258 of the TFEU.

D. Review of Regulation 1/2003

Regulation 1/2003 was adopted in 2002 and started to apply in 2004. In June 2022, the Commission openly called for evidence regarding the functioning of the enforcement.[112] Unsurprisingly, in the abovementioned call for evidence, the Commission explicitly requested organisations and citizens to provide their feedback regarding the handling of complaints. Forty-three submissions were made via the EU Survey system, eleven were made via the Better Regulation website and eight through the functional mailbox.[113] Only about half of them were published on the Commission's website,[114] which puts the representativeness of the feedback analysed below into doubt. Moreover, the Commission has explicitly excluded contributions submitted by means other than the EU Survey system from the scope of the factual summary of contributions,[115] which puts the representativeness of the feedback analysed by the Commission into doubt as well.[116]

Moreover, only a few submissions explicitly considered handling complaints. Furthermore, three of them[117] relate mostly to notions of 'legitimate' and 'sufficient interest' that are rarely used by the Commission to reject a complaint.[118] Moreover, one entity that made submission suggested that the Commission requires complainants to gather a lot of evidence, while most of small and medium enterprises are unable to do so.[119] One of the respondents suggest that the Commission should be bound to deadlines prescribed for dealing with complaints.[120] One of respondents suggested how the recent case law on the notion of 'EU interest' and legal standards developed by the European Courts in CEAHR[121] and Sped-Pro[122] should be reflected in amended regulations.[123] On the other hand, there were no stakeholders arguing for restricting the scope of complainants' rights (e.g. establishing a system that—similarly to the DMA—strips complainants of the right to initiate an action for annulment of the rejection decision). To the contrary, the ability to challenge a rejection decision was praised by one of the respondents.[124] Given the above, it is hard to argue that the feedback gathered led the Commission to conclude that, according to stakeholders, the current system for handling complaints is sufficient.

V. Conclusion

In this article, we attempted to analyse the standard of rights of complainants in the proceedings regarding violations of Articles 101 and 102 of the TFEU before the Commission. We believe that those rights should be strengthened.

First, there is always a trade-off between complainants' rights during antitrust proceedings and the ability of the competition authority to operate effectively under several constraints. Therefore, finding an optimal level of protection for complainants is an exercise in striking a balance. As explained in *max.mobil*, the bare minimum under the Charter of Fundamental Rights is the appealability of rejection decisions.[125] However, such a minimal standard—and the practice of the Commission—raises severe doubts regarding its compliance with fundamental rights. First, most rules limiting procedural rights of complainants guaranteed by the Charter are the Commission's self-made rules (implementing regulations or soft law instruments), which seem non-compliant with Article 52(1) of the Charter. Moreover, the Commission's broad discretion and limited review of grounds for rejection by the General Court seem incompatible with

112 Call for evidence—Ares(2022)4783198 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/feedback_en?p_id=31248659.

113 Factual summary of the contributions received during the public consultation on the evaluation of Regulations 1/2003 and 773/2004—Ares(2022)8359727 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en, 1.

114 In total, as of 30 March 2023, 19 submissions made via the EU Survey system and 11 submissions made via the Better Regulation website were published.

115 Factual summary (n 113), 2.

116 For instance, NGO Article 19 submitted via the Better Regulation website an interesting submission regarding the inability of NGOs to participate in the proceedings and making complaints and the priority-setting. See Submission made by NGO Article 19 on behalf of a few societal organizations, available at: https://www.article19.org/wp-content/uploads/2022/10/A19-submission-Reg-1_2003-consultation.pdf.

117 Austrian Chamber for Workers and Employees (*Bundesarbeitskammer Österreich*), Client Earth (both available for download at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en) and Article 19 (n 116).

118 Rousseva (n 1) 310.

119 FIGIEFA (available for download at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en).

120 The German bar (*Bundesrechtsanwaltskammer*) (available for download at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en).

121 Case T-427/08; *CEAHR v. Commission* (n 27).

122 Case T-791/19, *Sped-Pro* (n 65).

123 Linklaters LLP (available for download at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en).

124 The Austrian Bar (*Österreiches Rechtsanwaltskammertag*) (available for download at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F_en).

125 Despite being bound by the Charter, several member states (e.g. Austria, Denmark, Poland) do not provide an opportunity to appeal rejection decisions. See: Brook, Cseres (n 42), 34.

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Article 47 of the Charter, read in conjunction with Article 13 ECHR. Furthermore, the Commission often bases its argumentation on a flawed presumption regarding the complementarity of private and public enforcement of competition law. This is simply not true, especially for smaller, less affluent and therefore more vulnerable complainants. Furthermore, the Commission largely ignores the context of the enforcement of competition laws by the national competition authorities and, therefore, further limits complainants' rights. Most importantly, the grounds for rejection are defined vaguely and render several procedural obligations (such as providing a justification for a decision) moot.

Despite these flaws significantly affecting complainants' fundamental rights, changes to procedures related to the handling of complaints are not widely discussed. The low number of responses to the Commission's call for evidence concerning Regulation 1/2003 suggests that either the procedural rights of parties to antitrust proceedings are neglected and underdiscussed or there was a serious communication issue in the consultation process.

However, the fact that these are mostly the Commission's self-made rules, there is a risk of this level deteriorating in the future (e.g. because of other tasks faced by the Commission). Therefore, in the context of the currently pending revision of procedural regulations, we suggest putting complainants' procedural rights into the text of the regulation and defining vague terms so that the judicial scrutiny of rejection decisions is more efficient. Another possibility is to establish more effective supervision over the procedure for rejecting complaints within the Commission, to ensure that the rights of complainants are safeguarded.

Finally, we would like to point out that complaints seem to be a burden for the Commission whereas, except for obviously unfounded ones, they should be treated as a signal of issues that helps the Commission improve its efficiency in enforcing Articles 101 and 102 of the TFEU.

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