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Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making

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I. Introduction

In June 2023, DG Competition celebrated 20 years of EU antitrust enforcement under Regulation 1/2003. During a conference reflecting on the Regulation's achievements and challenges, Directorate-General Olivier Guersent revealed that the European Commission ('Commission') is considering abolishing its system of formal complaints. The current system, according to the Directorate-General, is 'unsatisfactory for everyone'. Given the 'long and painful process of rejecting a complaint by a decision', complaints require a 'sizable' portion of the Commission's resources; and after this long process, in most times complainants 'don't get any answer in the end anyway'.[1]

According to this proposal, third parties would still be able to informally tip off the Commission and submit 'market information' (also known as informal complaints). Yet, the proposal would remove the existing procedural safeguards incentivising undertakings and citizens to come forward with information about possible infringements of Articles 101 and 102 TFEU. The Commission would not be bound to respond to such information by a formal decision, and third parties would not have the full procedural rights currently granted to formal complainants. Only in the event the Commission decides to open proceedings could they request to be heard as an 'interested third party'.

Key Points

- In this paper, we argue that the European Commission should reconsider its recent proposal to abolish the mechanism of formal complaints.
- The rules and constitutional principles underlying the participation of formal complainants in EU antitrust procedures were developed by the case law of the EU Courts, and served as a blueprint for other areas of EU administrative law enforcement.
- The Commission's proposal can be justified on procedural efficiency grounds; however, it raises serious concerns about the legitimacy, transparency, and accountability of the Commission's administrative decision-making.
- We propose three alternative ways to optimise the current complaint handling system.

The Commission's proposal may be justified by the need for procedural efficiency to accurately deal with technically complex issues. At the same time, it raises serious concerns about the legitimacy, transparency, and accountability of the Commission's administrative decision-making. Formal complaints serve different functions in antitrust enforcement.[2] First, formal complainants are important 'watchdogs' who can assist competition authorities in monitoring the good functioning of markets.[3] Their knowledge of the day-to-day operation of markets make them important information

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1 A recording of the speech is available at https://vimeo.com/user126290491/review/840005687/ea689de96e. Similar statements have been made on other occasions. See e.g. Kirk/Bongartz, DKartJ 2023, 36, available at https://www.d-kart.de/en/blog/2023/05/19/conference-debriefing-36-eu-competition-conference/.

2 Joana Mendes, *Participation Rights* (Oxford University Press 2011). Pablo Ibáñez Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook of European Legal Studies 165.

3 They may include (small and medium) undertakings or association of undertakings that are competitors or customers of the undertakings being investigated, but also end-consumers, consumer organisations, and civil society organisations.

providers.[4] Second, the possibility to lodge a complaint and participate in the (subsequent) administrative procedures fulfils an important deterrent function. Finally, formal complaint handling is an important aspect of transparency and accountability that enhances the legitimacy of the proceedings and the final decision-making. The participation of formal complainants functions as a complement to judicial review because third parties are given the opportunity to contradict the possible decision of the competition authority, invoking errors, flaws, or mistakes that could ultimately lead to the illegality of the final decision.[5] Furthermore, the formal complaint procedure is an essential oversight mechanism scrutinising the competition authority's use of discretionary powers to set priorities.

This article critically investigates the Commission's proposal and explores the scope for reforming the formal status that the current EU antitrust procedural framework grants to third parties lodging complaints. It is structured as follows. Section 2 sets out the constitutional principles underlying third parties' participation in the EU legal system and the ways this procedural framework currently guarantees transparency and accountability and enhances the legitimacy of the Commission's decision-making. Furthermore, it identifies the inevitable trade-offs between functional efficiency and the capacity of authorities to effectively tackle complex technical issues. Section 3 argues that the implementation of the Commission's proposal will result in uneven legal protection of third parties across the internal market because some complainants and third parties would enjoy considerably higher procedural safeguards in certain national proceedings, while others will not have access to either the National Competition Authorities' ('NCAs') or Commission's procedures, leaving them without meaningful access to justice. Section 4 suggests that implementing the Commission's proposal might also seriously jeopardise the effective judicial protection available to complainants and interested third parties at the national level, in light of the rules and case law on the allocation of cases in the European Competition Network (ECN). Finally, Section 5 discusses the trade-offs the Commission needs to consider and make recommendations for a balanced approach taking account of efficient technocratic expertise and the rule of law requirements of accountability and transparency.

4 Katalin J. Cseres and Joana Mendes, 'Consumers' access to EU competition law procedures: outer and inner limits' (2014) 51 Common Market Law Review 483.
5 Mendes (n 2).

II. The history of formal complainants' participation and procedural rights in the Commission's antitrust proceedings

A. The constitutional framework of formal complaints

Administrative procedures are the foundation of efficiently functioning and legitimate administrative decision-making in any modern democratic polity. In the following sections, we present the constitutional processes that underlined the development of procedural safeguards for the participation of formal complainants in the EU antitrust procedures ever since the adoption of Regulation 17 in 1962.[6] These processes and their outcomes remain important building blocks of EU administrative law today, even beyond competition law enforcement. We demonstrate that the procedural rules of EU competition law were developed as an exceptional area of EU law. Since their inception in 1962, they have equipped the Commission with a comprehensive set of administrative framework for the direct administration of competition rules, thus forming the archetype of administrative procedures in all areas of EU law.[7] Their development through the Court's case law has shaped the constitutionalisation of key procedural guarantees beyond the enforcement of competition rules, for example in case of the right to access to information or the duty to give reason.[8]

Regulation 17/62 granted the Commission far-reaching supervisory and investigative powers, allowing it to 'intrusively' intervene in the legal spheres of private persons.[9] The procedural rules set out in Regulation 17/62 and the Commission's implementing Regulation 99/63[10] were the first to impose constitutional constraints on the use of such public power, aiming to protect the incriminated undertakings against unlawful violations of individual rights and freedoms.[11] While the drafters of these Regulations were more concerned with the goal of market integration and efficient policy implementation than the protection of individual procedural rights and transparency considerations,[12] these procedural rules

6 Council Regulation (EEC) No 17/1962 of 21 February 1962 First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13.
7 Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Bloomsbury Publishing 1999) 44.
8 Mendes (n 2).
9 Ibid.
10 Commission Regulation No. 99/63 of 25 July 1963 on the Hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [1963] OJ 127.
11 Nehl (n 7) 44–45.
12 Ibid.

were developed as a result of the EU Courts' judicial activism into robust procedural safeguards.

EU competition law procedures became the blueprint for the EU's administrative procedures. This can be observed, for example, by the constitutionalisation of the right to access the file,[13] which together with a general right of access to information[14] through the EU Courts' jurisprudence became a fundamental procedural right and an inherent element of EU citizenship based on democratic principles.[15] The constitutionalisation and the strengthening of the right of access to information in the case law of the EU Courts[16] can be explained by a supportive political climate in the 1990s, calling for more transparency to address the EU's democratic deficit.[17] The transparency debate of the late-1990s, underlying the need 'to reduce the opacity of its decision-making processes',[18] has albeit implicitly, contributed to this procedural constitutionalisation process. These broader political processes explain why a general right of access to information, as well as the duty of careful and impartial examination of complaints discussed below, developed into fundamental procedural rights for citizens in the EU legal order and how procedural rights in administrative proceedings were, in general, given a 'democratic' and 'public accountability' rationale.[19]

In this article, we argue that when considering the possible abolition of formal complaints, these fundamental constitutional safeguards and their broader EU law context should not be overlooked.

B. Complaints under the old enforcement system of Regulation 17/62

During the formative years of EU antitrust enforcement, the Commission acted as a 'morally and institutionally' bound administrative decision-maker who had to investigate all complaints that were brought to it.[20] Complainants encountered minimal threshold requirements. Under Regulation 17/62, any 'natural or legal persons who claimed a legitimate interest' could request the Commission to find an infringement of Article 101 and/or 102 TFEU.[21] The concept of 'legitimate interest' was interpreted broadly as any person who could plausibly show to have suffered harm as the result of an infringement.[22] There were no other conditions of admissibility and the Commission only *invited* complainants to use a designated form. Stressing that 'a complaint should ideally contain as much information as possible', the only formal requirement was disclosing the identity of the complainant.[23]

As a response to a mounting backlog of notifications on which no decision had been taken,[24] towards the end of the 1980s the Commission initiated a practice of giving different degrees of priority to complaints and of rejecting complaints of low priority. Unsurprisingly, the Commission's final letters or decisions rejecting such complaints were challenged before the EU Courts. This led to the landmark *Automec II* judgment, in which the General Court established the basic parameters within

13 Ibid, 56–59

14 Laid down in European Parliament and Council Regulation 1049/2001 of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents [2001] *OJ L 145*.

15 These rights have later developed, completed, and strengthened by the Courts' case law, through which the right to be heard—the acknowledged cornerstone of the rights of the defence—seconded by the right to access the file and the duty to give reasons, acquired the status of a general (or fundamental) principle of EU law. Both the right to be heard and the other procedural guarantees mentioned are now enshrined in Articles 41(1) and (2) of the Charter of Fundamental Rights, which crystallises previous case law. Also see Mendes (n 2); Nehl (n 7) 58.

16 Case C-51/92 P *Hercules Chemicals v Commission*, ECLI:EU:C:1999:357, para. 54. Cases T-30/91, T-31/91 and T-32/91 *Solvay v Commission*, ECLI:EU:T:1995:115; Case T-36/91 and T-37/91 *ICI v Commission*, ECLI:EU:T:1995:118.

17 The Commission White Paper on European Governance COM(2001) 428 has recognised citizen participation as a crucial pillar of good governance well beyond the social policies. It underlined citizen participation as fundamental principle to ensuring the quality, relevance, and effectiveness of EU policymaking and was thus instrumental to improving efficiency and effectiveness of European policymaking. In the field of competition law, The Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty COM/99/0101 justified the decentralisation of the enforcement of EU competition law by pointing to the political objective of bringing 'the decision-making process closer to citizens' through allowing consumers to address national enforcers. This argument was comprehended as an important component to provide a stronger and more democratic political support to the EU competition policy.

18 Nehl (n 6), 58.

19 Ibid, 60.

20 Ian Forrester and Christopher Norall, 'The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law is and Could be Applied' (1984) 21 Common Market Law Review 11.

21 Regulation 17, Article 3(2).

22 This could include bodies representing such persons, such as consumer organisations or trade associations. See e.g. Case T-114/92 *BEMIM v Commission*, ECLI:EU:T:1995:11; Case T-712/14; Case T-37/92 *Bureau Européen des Unions des Consommateurs (BEUC) v Commission*, ECLI:EU:T:1994:54; *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, ECLI:EU: T:2017:748; Case T-574/14 *European Association of Euro-Pharmaceutical Companies (EAEPC) v Commission*, ECLI:EU:T:2018:605.

23 European Commission, Practical guide to Articles 85 and 86 of the treaty establishing the EEC and their enforcement regulations (1962); EC, Dealing with the Commission: Notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty (1997), available at http://aei.pitt.edu/36272/1/A2482.pdf. See also Regulation 17; Commission Regulation (EEC) No 1629/69 of 8 of August 1969 on the form, content, and other detail of complaints pursuant to Art. 10, applications pursuant to Art. 12 and notifications pursuant to Art. 14 (1) of Council Regulation (EEC) No 1017/68 of 19 Jul. 1968 [1969] OJ L 209/1.

24 At the end of 1989 a backlog of 3239 notifications waiting for a formal or informal decision. See Claus-Dieter Ehlermann, 'The Modernization of EC Antitrust Policy. A Legal and Cultural Revolution' (2000) 37 Common Market Law Review 537.

which the Commission may exercise its administrative discretion in this regard.[25]

First, the Court clarified that even though the Commission is under a duty to carefully *examine* each complaint, it is not bound to *adopt a decision* as to the existence of the alleged infringement. A complainant, in other words, cannot compel the Commission to open proceedings and conduct an in-depth investigation.[26]

Second, the Court found that the Commission, as an administrative authority that must act in the public interest, is entitled to set priorities, and thus to reject complaints based on the degree of 'Union interest' they raise. The Commission cannot, however, avoid judicial review by merely referring to the Union interest in the abstract: it must motivate its decisions in a precise and detailed manner. The Court went on to endorse the different grounds that the Commission had used in the decision under appeal, including the consideration that the case concerned a contractual dispute that the complainant had already brought before the national court.[27]

Encouraged by the General Court's ruling, in 1993 the Commission issued a Notice addressing the division of responsibilities between itself and the national courts. It stressed that it intended to focus on complaints 'having particular political, economic or legal significance for the EU', and in the absence of these features, a complaint should, as a rule, be handled by the national courts or authorities.[28] In 1997, the Commission also published guidelines on cooperation with the NCAs, primarily aiming to reduce the number of complaints it received. The Guidelines were intended to direct non-priority complaints to the national level, as far as the relevant NCA would be able to adequately protect the complainant's rights and agree to investigate the case.[29] The Notice and the Guidelines had only limited effect in practice, as complainants remained reluctant to turn to national authorities or courts.

To constitutionally constrain the Commission's discretion to reject complaints, the EU Courts developed individual rights for complainants based on the duty of care and insisted on greater procedural safeguards and judicial protection. If the Commission intended not to pursue a complaint, it had to give complainants the opportunity to submit observations on its preliminary position, which the Commission was obliged to carefully consider.[30] The Commission's procedural rules allowed it to then close the procedure informally.[31] Yet, the Courts insisted that a complainant could not adequately protect its rights if it was not entitled to receive, within a reasonable time, a definitive decision rejecting its complaint.[32]

The procedural safeguards attached to the handling of complaints under this old enforcement system entailed an increased workload. In fact, in the decade prior to modernisation, decisions rejecting complaints accounted for *over half* of the formal decisions adopted by the Commission.[33]

C. The 'formal complainant' status of Regulation 1/2003

In 1999, when the Commission proposed to fully decentralise the enforcement of Articles 101 and 102 TFEU, it deliberately chose to maintain the system of formal complaints. The Commission expected to rely on NCAs and national courts to deal with matters with no clear Union interest, yet did *not* foresee that decentralisation would lead to a decrease in the volume of complaints it would receive.[34] On the contrary, the Modernisation White Paper envisioned that following reform, complaints would assume 'an even greater importance than at present'.[35] The abolition of the notification system for restrictive agreements and practices was expected to enable the Commission to focus its enforcement efforts on the most serious restrictions of competition (which are difficult to detect), but also bared the risk of creating an information gap. The submission of complaints, therefore, was encouraged.[36]

In May 2004, Regulation 1/2003 maintained the system of Regulation 17/62 allowing for persons claiming a 'legitimate interest' to lodge a complaint with the

25 Case T-24/90 *Automec Srl v Commission*, ECLI:EU:T:1992:97.
26 Ibid, para. 75–76.
27 Ibid, para. 88–96.
28 Commission Notice on Cooperation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty [1993] OJ C 39/6.
29 Commission Notice on Cooperation between National Competition Authorities and the Commission in Handling Cases Falling within the Scope of Articles 85 or 86 of the EC Treaty [1997] OJ C 313, 45–46.
30 See e.g. Case T-64/89 *Automec v Commission*, ECLI:EU:T:1990:42 para. 47; Case T-28/90 *Asia Motor France and Others v Commission*, ECLI:EU:T:1992:98, para. 29.
31 Regulation 99/63, later replaced by Commission Regulation (EC) No 2842/98 of 22 December 1998 on the Hearing of Parties in Certain Proceedings under Articles 85 and 86 of the EC Treaty [1998] OJ L 354 did not provide that the Commission was under an obligation to close the procedure with a formal decision.
32 See e.g. Case C-282/95 P *Guérin automobiles v Commission*, ECLI:EU:C:1997:159, para. 36–37.
33 Modernisation White Paper (n 15), para. 117–118.
34 Luc Gyselen, 'Comments Made by L. Gyselen' in Jules Stuyck, Hans Gilliams, and Elke Ballon (eds.), *Modernisation of European Competition Law: The Commission's Proposal for a new Regulation Implementing Articles 81 and 82 EC* (Intersentia 2002), 82–84.
35 Modernisation White Paper (n 15), para. 117–118.
36 Ibid.

Commission.[37] It also introduced a new ground for the rejection of complaints: aiming to avoid duplication of work within the ECN. Article 13 of Regulation 1/2003 allows the Commission and NCAs to dismiss a complaint in cases it is being dealt with, or has already been dealt with, by another authority.

As elaborated below, Regulation 1/2003 redefined the complaint handling process, aiming to achieve two partially contradictory policy objectives.[38] On the one hand, the Commission sought *to encourage* undertakings and citizens to come forward with information about allegedly anticompetitive practices. Accordingly, it granted admissible complainants a formal status and procedural rights to participate in the investigation, including access to the file, and the possibility to appeal a Commission's decision not to take up a case. The Commission also introduced an indicative time limit of 4 months to inform complainants of the action it proposed to take. On the other hand, the Commission preserved its broad discretion to focus on priority cases and limited the scope of admissible complaints in a bid to improve their quality (in terms of information provided). The Commission, accordingly, introduced stricter conditions of admissibility, outlined a procedure for the rejection of complaints, and published guidance on the prioritisation criteria it intended to use to *discourage* the submission of complaints of poor quality or those related to non-priority areas.

This is elaborated in the following subsections, discussing the functioning of the current system and focusing on the procedural (participation) rights arising from the status of 'formal complainant'.

1. Admissibility conditions

Regulation 773/2004 tightened the requirements for lodging formal complaints.[39] Complainants not only must demonstrate that they have a legitimate interest,[40] but must also use a specific complaint form (Form C) that demands the submission of a comprehensive information, including details of the alleged infringement, of the markets and persons affected, and copies of relevant supporting evidence.[41] Complaints that do not meet these requirements do not trigger the formal complaints procedure and do not enjoy any procedural rights. In such an event, the information they provide could only be treated as general market information.[42]

The status of a formal complainant is not granted easily.[43] The form imposes a considerable burden on the complainant that requires specific legal and economic expertise and an investigatory capacity.[44] The Commission, moreover, commonly examines the complaints solely based on the information provided without taking additional investigatory measures.[45]

2. Priority complaints

When the Commission decides to act upon a formal complaint and open an investigation, the complainant is 'associated closely' with the proceedings.[46] Antitrust proceedings are adversarial procedures between the Commission and the undertakings under investigation, who intervene in the capacity of defendants. Complainants do not enjoy a similar set of far-reaching procedural rights as the parties under investigation. Still, as they may 'suffer the incidental effects of the decision',[47] complainants enjoy certain participation rights to defend their legally protected interest. First, when the Commission issues a Statement of Objections (SO) relating to a matter covered by a complaint, it provides the complainant with a non-confidential version of the SO and invites them to submit written observations.[48] Second, complainants may request to participate in the oral hearing—should the addressees of the SO request one—and express their views.[49]

37 Council Regulation (EC) No 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 L1/1, Article 7(2).

38 Julia Behrens, Petra van Nierop, Miriam Deodato, and Laura Eid, 'Ex-post Evaluation of Key Procedural Aspects of Regulation (EC) no. 1/2003: Access to File and Complaints-final report' (Publications Office of the European Union 2016); European Commission, 'Terms of Reference: Ex-post evaluation of key procedural aspects of Regulation 1/2003 - access to file and complaints', COMP/2014/05 (Ref.2014/02). See also e.g. Mario Monti, 'Proactive Competition Policy and the role of the Consumer' (European Competition Day, Dublin, 29 April 2004).

39 Commission Regulation (EC) No 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 123.

40 Member States do not need to demonstrate their legitimate interest. See Regulation 1/2003, Article 7(2).

41 Regulation 773/2004, Article 5.

42 It remains at the discretion of the Commission whether it uses that information to open an investigation on its own initiative. See, the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101, para. 32.

43 I. Pereira Alves, 'Complaints' in Kris Dekeyser, Céline Gauer, Johannes Laitenberger, Wouter P.J. Wils, Luca Prete, and Nils Wahl, *Regulation 1/2003 and EU Antitrust Enforcement—A Systematic Guide* (Kluwer Law International 2023).

44 The Commission may, however, decide to waive the need to satisfy certain information requirements, in particular to facilitate complaints by consumer associations. See Commission Notice on the handling of complaints (n 42), para. 31.

45 Ben Van Rompuy, 'The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45 World Competition 284–285.

46 Regulation 1/2003, Article 27(1). Also see Regulation 773/2004, Preamble 8.

47 Case T-290/94, *Kaysberg SA v Commission*, ECLI:EU:T:1997:186, para. 107; see, however, Case T-224/10, *Association belge des consommateurs Test-achats ASBL v Commission,* ECLI:EU:T:2011:588, para. 43. These cases regard the interpretation of the EU Merger Control Regulation, but this procedure is constructed on the same premises.

48 Regulation 773/2004, Article 6.

49 Ibid.

Other third parties may also be heard, but their participation rights are far more limited than those of complainants. The Hearing Officer is empowered to grant, upon application, an 'interested third party' status to any natural or legal persons that can show 'a sufficient interest' in the outcome of the procedure.[50] If admitted to the proceedings, such interested third parties have a right to be informed of the nature and subject matter of the procedure, often via a concise letter or summary. Yet, they have no right to obtain a non-confidential version of the SO,[51] or to participate in the oral hearing. The decision of whether it is 'appropriate' to admit an interested third party to the oral hearing is up to the Hearing Officer,[52] based on its possible contribution to clarifying the relevant facts of the case.[53]

3. Non-priority complaints

When the Commission decides not to act upon a formal complaint, the complainant has the right to receive a reasoned decision. This procedural right, codified in Regulation 773/2004, allows the complainants to understand the reasons for rejecting their submission and for the EU Courts to exercise their power of review. Beyond this constitutional function, the duty to reason the rejection of a complaint also functions as a self-control mechanism, encouraging the Commission to examine each complaint carefully and impartially.[54]

Regulation 773/2004 sets out a two-step procedure for the rejection of complaints. If the Commission comes to the preliminary conclusion that a complaint does not merit further investigation, it must, as a first step, send the complainant a 'pre-rejection' letter explaining its decision.[55] The complainant has the opportunity to submit written observations and to request access to the documents on which the Commission bases its provisional assessment.[56] The second stage of the procedure is triggered only when the complainant upholds the complaint and replies to the pre-rejection letter within the set time limit.[57] If the additional elements or arguments brought forward by the complainant do not alter then Commission's proposed course of action, it must prepare and adopt a decision rejecting the complaint.

Article 7(3) of Regulation 773/2004 provides that a complaint is deemed withdrawn if the complainant does not respond to the pre-rejection letter in a specified period. In practice, however, approximately half of the complainants do submit written observations. This rarely prompts the Commission to take any (additional) investigatory measures or to change its assessment, but it does trigger the need for the Commission to adopt a decision.[58]

According to the right to good administration, a general principle of EU law also codified in the Charter of Fundamental Rights, decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time.[59] Therefore, the Commission cannot indefinitely prolong its review of a complaint. Unless the complaint is withdrawn, the Commission is obligated to complete the process within a reasonable time frame.[60] In practice, however, the decision-making process is lengthy and slow. Between 2009 and 2021, the Commission adopted 86 rejection decisions—on average seven decisions per year.[61] In the cases where the Commission rejected the complaint for lack of Union interest pursuant to Article 7(2) of Regulation 773/2004, the time spent between the submission of the complaint and the adoption of the rejection decision ranged from 9 months to 9 years. The median length of the procedure was 32 months. Even in the cases where the Commission rejected the complaint on the rather procedural grounds that another competition authority is dealing or has dealt with the case, pursuant to Article 13 of Regulation 1/2003, the procedure typically lasted 22 months.[62] The Commission attributes this to overstretched staff resources, which implies that case handlers can spend limited time on the file.[63]

50 Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29, Article 5. According to Regulation 773/2004, recital 11, Consumer associations that request to be heard should typically be considered to have a sufficient interest if the proceedings involve products or services used by end-consumers or products or services that are a direct input to such products or services.

51 Wouter Wils, 'Procedural Rights and Obligations of Third Parties in Antitrust Investigations and Proceedings by the European Commission' (2022) 45 World Competition 3; European Commission, Antitrust Manual of Procedures (2019), available here: https://competition-policy.ec.europa.eu/system/files/2023-02/antitrust_manproc_11_2019_en.pdf, chapter 13 (right to be heard).

52 Decision 2011/695/EU, Article 6(2).

53 Ibid, Recital 13.

54 Joana Mendes, 'The Foundations of the Duty to Give Reasons and a Normative reconstruction' in Elizabeth Fisher, Jeff King, and Alison Young (eds.) *The Foundations and Future of Public Law* (Oxford University Press 2020) 306–308.

55 Regulation 773/2004, Article 7(1). If the Commission intends to reject the complaint not on priority grounds, but on the grounds that another authority is dealing or has dealt with the case, the Commission may inform the complainant of its preliminary view by telephone or e-mail. It is not obliged to issue a formal letter.

56 Regulation 773/2004, Article 8(1).

57 Ibid, Article 7(3).

58 Van Rompuy (n 45) 279–285.

59 EU Charter of Fundamental Rights, Article 41(1).

60 *Guérin automobiles* (n 30), para. 36.

61 Van Rompuy (n 45).

62 Ibid.

63 See, for example, Behrens et al (n 38), 109–111.

A Commission's decision rejecting a complaint is susceptible to challenge under Article 263 TFEU. The EU Courts recognised the Commission's broad discretion in setting enforcement priorities and therefore conduct only a marginal review of the exercise of that discretion. The focus of that review rests on 'whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers'.[64] A 2016 study reported that most of the interviewed DG Competition officials identified such actions for annulment as the most time-consuming aspect of the current complaint handling system. The length of the process and implausibility of success would make these proceedings disproportionally costly for all parties involved.[65]

This is also demonstrated by observing the success rates of appeals against the Commission's decisions to reject complaints. Complainants frequently make use of this legal remedy. For instance, between 2009 and 2021, 21 out of the 86 rejection decisions (24 per cent) were appealed to the General Court. In four cases, further appeals were lodged before the Court of Justice.[66] Only two of these actions were successful.[67] Moreover, in the limited number of cases where complainants managed to overturn a decision rejecting their complaint, the Commission subsequently adopted a new rejection decision. However, we suggest that the value of judicial review should not only be measured by its outcomes, but also by how it compels the Commission to meet its duty of care and duty to state reasons.

III. Decentralised enforcement: the gap between the participation and procedural rights in proceedings in front of the Commission's and NCAs

The Commission's proposal and its implications concerning the legitimacy of EU antitrust enforcement as well as the effective judicial protection of complainants' rights as laid down in Article 47 of the Charter of Fundamental Rights of the EU, must be viewed in the context of the decentralised enforcement of EU competition law. In this section, we argue that the Commission's proposal, if adopted, will create a gap between the procedural rights granted to complainants and other interested third parties in the procedures of the Commission and those of the NCAs.

According to the principle of procedural autonomy, the procedural rules governing third parties' access and participation rights, are determined by national laws. Despite various measures facilitated by the Commission to harmonise procedural divergences across the Member States,[68] there is currently no convergence with regard to the rules surrounding handling of complaints. In 2019, the ECN+ Directive has introduced a minimum level of harmonisation by requiring all Member States to grant their NCAs the powers to set priorities and reject complaints on priority grounds.[69] However, the Directive has not specified the conditions for such decisions.

As demonstrated by a comprehensive comparative study across all EU Member States which is summarised below,[70] Member States grant diverging procedural safeguards to control the handling and rejection of complaints by their NCAs. Hence, the implementation of the Commission's proposal will result in an uneven legal protection of third parties. Some complainants and third parties would enjoy considerably higher procedural safeguards from their NCAs than from the Commission, but others would have no access to either the NCA or Commission procedures, and therefore no participation rights. The following three examples can demonstrate such gap.

First, many Member States, as well as the Commission's current regime, control the rejection of complaints by requiring their NCAs to take a formal decision, which is subject to judicial review. Some are obliged to reason and to publish their decisions like the Commission. There are, however, also Member States who do not require the adoption of a formal decision for rejecting complaints, and some of them also do not require them to reason and publish such decision. Table 1 demonstrates that the

64 See e.g. Case T-699/14, *Topps Europe v Commission*, ECLI:EU:T:2017:2, para. 66.
65 Behrens et al (n 38), 114.
66 Van Rompuy (n 45).
67 Case T-791/19 *Sped-Pro S.A. v Commission*, ECLI:EU:T:2022:67; Case T-399/19 *Polskie Górnictwo Naftowe i Gazownictwo S.A. v Commission*, ECLI:EU:T:2022:44.
68 European Competition Network, 'Investigative Powers: Report' and 'Decision Making Powers: Report' of 31 October 2012, available at ec.europa.eu/competition/ecn/documents.html; ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information, available at http://ec.europa.eu/competition/ecn/recommendation_powers_to_investigate_enforcement_measures_sanctions_09122013_en.pdf; European Commission, 'Commission Staff Working Document SWD (2014) 231—Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues', SWD(2014) 230, available at https://ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf.
69 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11, Article 4(5).
70 Or Brook and Katalin J. Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' (2021) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189.

Table 1: Type of decision, reasoning, and publication of complaints

	Reasoned and published	Unreasoned and unpublished	Reasoned and partly or fully unpublished
Formal decision	BG, DE, DG COMP, ES, FI, FR, HR, HU, LT, MT		NL,[a] BE, CY, EE, GR, IT, LU, NL, PT, RO
Informal decision	UK	DK, IE, LV, PL, SE, SK	AT, CZ, SI

Table 1 was originally published in Brook and Cseres (n 70). Reproduced with permission of the authors. [a]There are two types of decisions concerning case initiation. One is originating from so-called enforcement request (*handhavingsverzoek* defined in Article 1:3 (3) of Dutch Administrative Act) and as such they will always take the form of formal decisions that are reasoned and partly or fully published. The other type of decision concerns informal signals that are only internally reasoned and not published.

form and rules governing the publication differ. Adopting the Commission's proposal will eliminate this type of control at the EU level. The Commission will no longer be required to adopt a formal decision which is available for public and judicial scrutiny. Moreover, those potential complainants who could, in the current system submit a complaint to the Commission because they could not access their NCA's procedure or the national courts, will be left without access to justice and effective judicial protection of their affected economic interests.

Second, the Commission's proposal will also eliminate important participation rights for third parties in the Commission's procedure and for those third parties who, in the absence of formal complainant status in national law, could turn to the Commission. The nature and scope of these rights considerably differ across the Member States. As Table 2 illustrates, there are three groups of enforcers of EU competition law: those who provide participation rights to all third parties, including complainants (allowing them to exercise high control over the proceedings), those who provide rights only to those meeting formal criteria for qualifying as complainants (medium control); and those who do not grant any formal or other rights to third parties. While the Commission currently falls within the second group (medium control), accepting its proposal will considerably limit the participation rights of third parties (no external controls) leaving them without an effective way to protect their affected interests by the decision-making.

Finally, and related to the above, accepting the Commission's proposal will limit the important role consumer associations and other civil society organisations can play in the competition law procedures. Some Member States and NCAs provide such organisations privileged status in launching or participating in antitrust proceedings.[71] For example, in certain Member States such bodies are presumed to have a relevant interest to access and participate in the proceedings (e.g. France, Germany, Greece, and DG COMP). In Greece, consumer organisations who have signed a memorandum of understanding with the NCA are offered additional 'bonus' points under the national point-based prioritisation system for competition law cases.[72] In other Member States, consumer organisations have a right to demand opening an investigation (e.g. Lithuania, Romania, and Bulgaria with respect to suppliers of agricultural products and foodstuffs). In the UK, the super-complaint tool offers a fast-track system, ordering the CMA and sector regulators to investigate and publish within a tight time-limit complaints launched by consumer bodies designated by the Secretary of State for Trade and Industry by order.[73] This tool seeks to encourage launching well-researched and substantial complaints on behalf of groups of consumers who would not find it as easy to make such complaints individually.[74] The process of designation acts as a filter. It aims to ensure that super-complaints are launched by bodies that are motivated by the interests and detriment suffered by the group of consumers and are capable to effectively represent such interest.[75] A similar super-complaint system also applies in Malta.[76]

In light of the above, accepting the Commission's proposal would create a significant gap between the procedural safeguards and legal protection of third parties in some Member States without being able to 'compensate' such gap by turning to the Commission's procedures. Moreover, the proposal would raise concerns that the Commission's procedure might no longer be in line with the good governance and rule of law standards developed by many of the Member States.

71 For an overview of the EU's Member States, see Brook and Cseres (n 70), figure 7.

72 Ibid, 39.

73 UK Enterprise Act, Section 11(1). Also see OFT, Super complaints: guidance for designated consumer bodies (2003), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284441/oft514.pdf.

74 Explanatory Memorandum, The Enterprise Act 2002 (Bodies Designated to make Super-complaints) (Amendment) Order 2009 2009 No. 2079, para. 7.10.

75 BERR, Super complaints: guidance for bodies seeking designation as super complainants (March 2009), available at https://webarchive.nationalarchives.gov.uk/ukgwa/20090413113352/http://www.berr.gov.uk/whatwedo/consumers/enforcement/super-complaints/page17902.html.

76 Malta Competition Law, Article 14A.

Table 2: Participation rights of third parties and complainants

	Relevant third parties (including complainants): high external control	Rights only for formal complainants: medium external control	No formal status for third parties and/or complainant: no external control
Full rights as rights of defence	ES, IT	EE, NL	AT, DK, IE, MT, PL, SE,[a] SI
Access to the full file	FI, LU, PT		
Access to a non-confidential version of the statement of objections	BE, BG, GR, HU, LV, LT, RO, UK	CY, DE, DG COMP, FR, RO	
Participation in hearing, express opinions, and submit written observations	BG, CY, LU, LT, GR, SK, UK	DE, DG COMP, FR, RO	
Participation in hearing	BE, LV		
Express an opinion and submit written observations	BE, FI, HR, HU, PT		

Table 2 was originally published in Brook and Cseres (n 70). Reproduced with permission of the authors. [a] While there is no formal status for third parties or complainants under national law, in practice the NCA involves them in the procedure. The NCA believes that this fits the Swedish tradition in which the conduct of administrative authorities is highly scrutinised.

IV. The interdependence of the Commission's and NCA's handling of complaints

Implementing the Commission's proposal can also seriously jeopardise the effective judicial protection available to complainants and interested third parties at the national level, in light of the rules and case law on the allocation of cases among the European Competition Network (ECN).

As discussed, Article 13 of Regulation 1/2003 entitles the Commission to reject complaints on the ground that a competition authority of a Member State is dealing or has already dealt with the same case. This standalone rejection ground was introduced to ensure that a case is handled by a single authority, who is 'the most appropriate'.[77] However, in a series of judgments, the EU Courts have interpreted this ground in a very broad way. For instance, the Courts clarified that the Commission is entitled to reject a complaint even if a NCA decided, after a preliminary examination, to reject the complaint on priority grounds rather than lack of merits.[78] Similarly, the Commission is entitled to take the view that a NCA 'is dealing with' a complaint as soon as that authority confirms it has taken follow-up steps, such as inviting the complainant for a meeting.[79] Article 13 does not impose any duty on the Commission to ascertain whether the approach followed by the NCA is well founded or whether that NCA has adequate institutional, financial, and technical means to fulfil the tasks entrusted to them by Regulation 1/2003.[80]

Also when rejecting complaints on priority grounds, the Commission routinely invokes the ground that the national courts and authorities are well placed to handle the issues raised. According to the EU Courts' case law, the Commission may 'presume that the national authorities ha(ve) the ability to implement effectively the rules, standards and policies forming the EU legal framework'.[81] Arguments raised by complainants in relation to the capacity or expertise of a NCA have been systematically dismissed as irrelevant and unsubstantiated.[82]

In more recent case law, the General Court appears to limit the Commission's discretion. In *Sped-Pro*, it held that before rejecting a complaint for lack of Union interest, the Commission must guarantee that the national authorities are capable of adequately protecting the complainant's rights. The EU Courts have already formulated that condition in their case law concerning national courts, albeit using a different yardstick (evidence-gathering powers). According to that jurisprudence, the Commission may reject a complaint for lack of Union interest not only because the complainant has already brought proceedings before a national court, but also because the complainant *could* bring such an action to assert their rights. The Commission cannot merely rely on the fact that the national courts are competent to apply Articles 101 and 102 TFEU. It must also consider

77 Regulation 1/2003, recital 18. See also e.g. Case T-201/11 *Si.mobil v Commission*, ECLI:EU:T:2014:1096.

78 It is not necessary that the NCA has adopted a formal decision within the meaning of Article 5 of Regulation 1/2003. Case T-531/18 *LL-Carpenter s. r. o. v Commission*, ECLI:EU:T:2020:91, para. 54; Case T-355/13 *easyJet Airline v Commission*, ECLI:EU:T:2015:36, para. 33.

79 Case T-201/11 *Si.mobil telekomunikacijske storitve d.d. v Commission*, ECLI:EU:T:2014:1096, para. 57.

80 Ibid.

81 Case T-574/14 *European Association of Euro-Pharmaceutical Companies (EAEPC) v Commission*, ECLI:EU:T:2018:605, para. 127.

82 Ibid; see also e.g. Commission Decision of 20 October 2020 in Case AT.40562—Polish biodiesel supplies, C(2020)7347 final; Commission Decision of 3 October 2020 in Case AT.40690—Polish fuel app, C(2020)8689 final; Commission Decision of 21 February 2019 in Case AT.40498—Polish sands, C(2019)1593 final; Commission Decision of 12 September 2019 in Case AT.40265—Greek horse race betting, C(2016)5841 final.

whether the national courts are 'reasonably able', in view of the complexity of the case, to gather the information necessary to determine whether the conduct complained of constitutes an infringement.[83] Where an investigation at the EU level would be more effective than enforcement action at the national level, the Commission thus cannot exclusively rely on the ground that the case can be dealt with by the national courts.[84]

Abolishing the duty to reason and publish a decision underlying the Commission's current formal complaints procedure, will limit the possibility for judicial—and public—oversight of the interpretation of these conditions.

In addition, given the interdependency between the Commission's and NCAs' decisions to reject a complaint, implementing the Commission's proposal could run the risks of jeopardising the effective judicial protection available to complainants and interested third parties at the national level. NCAs could invoke Article 13(2) of Regulation 1/2003 to reject a complaint against an anticompetitive practice that has 'already been dealt with' by the Commission via an unpublished and unreason internal decision,[85] which provides only limited rights to the complainants and other interested third parties.

Implementing the Commission's proposal, therefore, calls for careful assessment of how national systems guarantee effective judicial protection of individuals who seek to become formal complainants and their access and participation rights as well as the procedural safeguards available under the Commission's and NCAs procedures.

V. Conclusions and recommendations

The Commission's proposal to abolish the formal complaint system appears to be based on a cost–benefit analysis. As the current system is administratively burdensome, and most complaints submitted to the Commission are considered non-priority cases, limiting the participation rights of complainants and the obligation imposed on the Commission to reject complaints by a formal decision may be understandable in terms of keeping the procedure effective, swift, and efficient.[86]

Procedural efficiency is essential for addressing complex problems and for managing high-pace technological changes in today's markets,[87] but is only one of the relevant considerations for modern public administration. In this article, we highlighted the constitutional value the procedural safeguards granted to formal complainants have and the role they play in making the Commission's decision-making more legitimate, transparent, and accountable. An informal complaint system would remove those important procedural safeguards and would jeopardise the legitimacy of the Commission's decision-making.

The current procedural framework, undoubtedly, could be further improved. This was also observed in a 2020 European Court of Auditors' report noting that the Commission's obligation to carefully consider all antitrust complaints, many of which 'not necessarily reflect the most important competition problems in the internal market', has hampered its ability to monitor markets and pursue cases on its own initiative.[88] Although the report did not recommend the Commission to change its treatment of complaints, it advocated for more pro-active enforcement: that the Commission should continue to encourage the submission of complaints, but should also do more to detect high-impact cases on its own. However, like other administrative authorities, the Commission has limited financial, technical, and human resources at its disposal.

We believe that the abolishment of the institution of formal complaints is not the appropriate solution. The proposal does not comply with EU's administrative and constitutional framework. The formal complaint systems in national laws, at least where they exist, would not be able to fully compensate the abolishment of formal complaints at the EU level. Instead, to create a better balance between procedural efficiency and transparency, we offer the following three sets of recommendations to improve the system of formal complaints in the Commission's antitrust procedures.

First, a more nuanced differentiation between types of complaints could streamline the procedure and filter out unsubstantiated complaints. One option would be

83 See e.g. Case T-427/08 *CEAHR v Commission*, ECLI:EU:T:2010:517, para. 173 See also Ben Van Rompuy, 'Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, Sped-Pro v Commission' (2022) 13 JECLAP 413.

84 Case T-427/08 *CEAHR v Commission*, ECLI:EU:T:2010:517, para. 175–176.

85 For the application of Article 13 of Regulation 1/2003 it is not necessary that the authority has rejected the complaint with a formal decision. Case T-531/18 LL-Carpenter s. r. o. v Commission, ECLI:EU:T:2020:91, para. 54; Case T-355/13 *easyJet Airline v Commission*, ECLI:EU:T:2015:36, para. 33.

86 On trade-offs between efficiency and transparency and accountability, see Brook and Cseres (n 70).

87 Åse Gornitzka and Cathrine Holst, 'The Expert-Executive Nexus in the EU: An Introduction' (2015) 3 Politics and Governance 1, 2.

88 European Court of Auditors, The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight (2020), available at https://www.eurosai.org/handle404?exporturi=/export/sites/eurosai/.content/documents/SR_Competition_policy_EN.pdf, 40.

to introduce more stringent admissibility conditions for formal complaints, meaning that the Commission will only need to respond with a formal decision to complaints meeting a higher informational threshold. Indeed, a number of Member States have good experience with narrowing down the category of formal complaints by increasing the evidentiary threshold for such submissions.[89]

Another option would be to grant a special status to certain categories of complainants, who are representative organisations acting in the public interest. The Commission could also introduce a procedure similar to the UK's super-complaints, which was detailed in Section 3 above. Adopting a similar system for proceedings in front of the Commission could allow designated consumer and civil society organisations to file a 'super-complaint' about alleged anticompetitive conduct, which would direct the Commission to prioritise the handling of the complaint by adopting a formal decision in a transparent, fast-track procedure.[90] This would partly offset the disadvantages that a higher evidentiary threshold of admissibility for formal complaints would create for final consumers or other complainants that do not have the necessary resources and investigatory capacity to satisfactorily meet such a burden.

Besides these legal rules, the role of civil society organisations and other representative organisations could be supported through financing and organising of capacity building trainings for such organisations to support higher quality complaint filings

Second, the Commission could limit the number and type of complaints submitted to it by clarifying what constitutes a priority case and by better signalling to market actors and broader society what those priorities are. Like the practice of many NCAs,[91] the Commission could adopt a yearly agenda—identifying certain sectors or anticompetitive practices as a priority. In addition, the Commission could give meaning to its prioritisation criteria by clarifying, in its press releases announcing the opening of a new investigation, why it decided to take up that case. Moreover, as the responsible body for all different policy areas of the EU, the Commission could better explain how it considers other policies and values of the EU being balanced with the substantive and core criterium of prioritisation: the 'Union interest'. These policy documents could signal to potential complainants what type of conduct is (not) likely to be taken up by the Commission.

Better guidance has the benefit of safeguarding the procedural rights of complainants in high-priority cases, allowing complainants to challenge the Commission's guidelines and their application in front of EU Courts. It would also increase the transparency of the Commission's allocation of enforcement efforts, while reducing the submission of complaints of low priority or quality.

Third, the Commission could recommend complainants to contact them informally before filing a complaint that triggers the formal procedure. This preliminary process, modelled after the pre-notification contacts that are common in merger and State aid control cases, would allow complainants to test the waters and discuss with the Commission the information that would need to be provided in a formal complaint. The Commission could also indicate at this early stage whether it believes that a NCA is better placed to deal with the case. However, we do stress that the Commission should also pay greater attention to ensuring the legal protection of complainants and third parties across the EU in the context of the application of Article 13 of Regulation 1/2003. Involving the NCA in the informal preliminary process could help to adequately safeguard that complainants' procedural rights. While the procedural rights in competition law proceedings before NCAs and national courts are limited by national administrative laws and traditions, the Commission should be mindful of their impact when considering complaints at the EU level. It is therefore essential that complainants still have the right to file a formal complaint even after participating in the pre-track process.

https://doi.org/10.1093/jeclap/lpad056
Advance Access Publication 10 November 2023

89 See Hungary's example in Section 3 and Brook and Cseres (n 70), 30.
90 Similar to the mechanism that exists in the United Kingdom and has been proposed by the government in Australia.
91 Brook and Cseres (n 70), 20.