THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

GW Competition & Innovation Lab Working Paper Series

No. 2021/01

The Curious Case of the European Commission's Missing Antitrust Jurisprudence: Lessons from Abandoned Article 102 Investigations

Mathew Heim

The GW Competition & Innovation Lab
Suite 621, 6th Floor, 805 21th Street NW
Washington, DC 20052
gwucil@email.gwu.edu

THE CURIOUS CASE OF THE EUROPEAN COMMISSION'S MISSING ANTITRUST JURISPRUDENCE: LESSONS FROM ABANDONED ARTICLE 102 INVESTIGATIONS

Mathew Heim[1]

ABSTRACT

The European Commission is undertaking a review of its approach to unilateral conduct cases, including a revision of Regulation 1/2003 in order to modernise competition law enforcement. This paper shows that a high percentage of antitrust investigations that the Commission had formally prioritised (and at times even issued a Statement of Objections) have been closed without any finding - 20% of Article 102 investigations over a 20-year span of Regulation 1/2003. This paper explores the reasons why these investigations closed and finds that while around half were closed due to insufficient evidence the remainder were closed following a cessation of impugned behaviour, informal 'remedies`, settlements with complainants or other regulatory solutions. This paper therefore fills a gap in the literature and provides insight into the Commission's enforcement practices. Such closures provide an opportunity to the Commission to give additional guidance in appropriate cases to market participants and National Competition Authorities on its enforcement priorities. The paper explores these opportunities and offers recommendations.

[1] Senior Fellow at the Competition and Innovation Lab of the George Washington University. In previous capacities, he was actively involved in two of the cases referred to in this paper; the Mobile Roaming and Qualcomm investigations. Many thanks to Onyeka Aralu for his assistance on the paper and to Professors Pinar Akman and Ben Van Rompuy for their insights on earlier drafts. All errors or omissions are the author's own.

I. INTRODUCTION

The European Commission's antitrust enforcement decisions provide dynamic guidance to economic actors, enhancing legal and commercial certainty. What may not be fully appreciated, however, is that a significant number of formally initiated investigations into alleged abuse of dominance under Article 102 TFEU are closed down by the Commission with no finding. This paper seeks to help fill a void in the literature by drawing lessons from the Commission's use of its discretionary power to close such investigations.[2]

The decision to formally investigate alleged anticompetitive conduct ("initiate proceedings") implies that the Commission has *prima facie* concerns that an antitrust abuse may have occurred. As could be expected, the majority of such investigations end with an enforcement decision, whether a finding of infringement or negotiated commitment decisions to remedy antitrust concerns. Yet a significant percentage of formal Article 102 investigations are abandoned without any any finding or reasoned decision. According to the Commission's own case database, in the twenty years since the entry into force of the antitrust Regulation 1/2003[3] (i.e. between 1 May 2004 and 1 May 2024), 21 formal abuse of dominance investigations were abandoned, being over 20% of the Commission's caseload in that period.[4] This is a surprising and significant figure, worthy of exploration.

The data therefore does not support a view that the initiation of a formal investigation will almost certainly result in a finding of infringement by the commission.[5] Rather, the data suggests that the Commission comes at investigations with an open mind and can be convinced that no wrong-doing has occurred. However, research also shows that there are a broad range of reasons why the Commission may abandon such investigations, beyond a lack of (sufficient) evidence of wrong-doing. These include investigations closed

---

[2] This study does not review the Commission's practice of rejecting formal complaints. Article 2(4) of Regulation 773/2004 relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 notes that "The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings". For a discussion of the Commission's practice of rejecting complaints, see Ben Van Rompuy, The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment, 45 World Competition 265 (2022).

[3] 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 O.J. (L 1) 1, art 11(6) (hereinafter "Regulation 1/2003").

[4] The Commission formally initiated in the region of 100 investigations with an Article 102 component, from the entry into force of Regulation 1/2003 on 1 May 2004, until 1 May 2024. This means that the Commission abandon around 20% of all its formal Article 102 investigations. Source: DG Competition online database, at https://competition-cases.ec.europa.eu/search. See explanation of research methodology in the Annex.

[5] See Frances Dethmers & Jonathan Blondeel, EU enforcement policy on abuse of dominance: Some statistics and facts, 38 EUROPEAN COMP. L. REV. 147, 160 (2017); "Once a formal investigation is set in motion, it is very likely if not certain what the outcome will be since the analysis of dominance and abuse often leaves little scope for argumentation."

following to unilaterally adopted remedial actions, informal settlements with complainants, interceding national antitrust investigations or other regulatory "solutions".

This paper first sets out the relevant legal framework to the closing of formal investigations. It then explores the different reasons that Article 102 investigations have been abandoned. The paper concludes with a discussion and possible way forward.

II. THE LEGAL FRAMEWORK

The opening ("initiation") of antitrust proceedings under Article 11(6) of Regulation 1/2003 is a formal act of the Commission, which the Commission can only undertake "*with a view to adopting a decision*"[6] under Chapter III of Regulation 1/2003 i.e. finding of abuse (Article 7), a settlement with the company under investigation through the commitments process (Article 9), or a determination that Article 102 is not applicable where the public interest requires (Article 10).[7] Each of these provisions requires the Commission to issue a reasoned decision.

The Commission's 2011 Notice on Antitrust Best Practices provides that the Commission will open proceedings "*when the initial assessment leads to the conclusion that the case merits further investigation and where the scope of the investigation has been sufficiently defined*".[8] The Commission's Manual of Procedures ("ManProc") further notes that, given the legal consequences attached to the opening of proceedings, the Commission's intention to initiate proceedings "*must be underpinned by a certain number of objective factors*" and there must be "*reasonable indication*s" of a likely infringement.[9] The initiation of proceedings is therefore a significant legal step, undertaken only where there appears to be a prima facie breach of Article 102, for which the Commission intends to adopt a decision.

The formal initiation of proceedings also "s*ignals a commitment on the part of the Commission to further investigate the case as a matter*

---

6 2011 Best Practices Notice, supra note 3.

7 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 O.J. (L 123), 18–24. Article 10 has never been applied by the Commission (see further below).

8 Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6, s 2.3 para 17 ("2011 Best Practices Notice").

9 Antitrust Manual of Procedure, Internal DG Competition Working Documents on Procedures for the Application of Articles 101 and 102 TFEU, EUROPEAN COMM'N (2019) at 3 (ManProc), available at, https://competition-policy.ec.europa.eu/document/download/e5c542b5-0ecd-48f8-ba52-cbc5858721b4_en?filename=ATC_manproc_compilation-all-modules.pdf.

of priority" and therefore to allocate the necessary resources to the investigation and endeavour to deal with it in a timely manner.[10]

When the Commission formally initiates antitrust proceedings into potentially abusive practices, the Commission is required to publicly state, per its 2011 Best Practices Notice, that the opening of a formal proceedings does not prejudge the outcome of the investigation: "*It should be emphasised that the opening of proceedings does not prejudge in* ***any way*** *the existence of an infringement. It* ***merely*** *indicates that the Commission will further pursue the case*" (emphasis added).[11] The Commission may also state, although it does not do so in every instance, that the opening of proceedings "*does not mean it has conclusive proof of antitrust violations*".[12]

The 2011 Best Practices Notice recognises that one of the possible outcomes of the investigation phase is the conclusion, "*that there are no grounds to continue the proceedings with regard to all or some of the parties and close the proceedings accordingly*".[13] The reference to "*no grounds to continue the proceeding*" is obviously broader in scope than an investigation being inconclusive due to lack of evidence. The ManProc also notes, "*However, it may be that in the end no such* [Art. 7, 9 or 10] *decision is adopted, for instance if it appears that there is not sufficient evidence to find an infringement or if a complaint has been withdrawn*.[14] The ManProc therefore indicates that there may be a number of different reasons for closing an investigation.

Yet when the Commission closes a formal investigation, it is under no obligation to explain its reasoning. The ManProc notes that decisions to close formal investigations "*are usually brief, giving no details as to the substance, but will simply state the fact of closure*."[15] In its 2011 Best Practices Notice, the Commission has committed to note the closure of formal investigations on its website, even if the closure decision is often just a statement to that effect.[16] The Commission, per the 2011 Best Practices Notice, does have the option to issue a press release on closure in those cases, where the opening of proceedings had been made public.[17]

---

[10] 2011 Best Practices Notice, para 18. The initiation of proceedings automatically relieves the competition authorities of the Member States of their competence, per recital 17 and Article 11(6) of Regulation 1/2003. Conversely, "…if the Commission decides to close its proceedings without giving a decision on the infringement, the national competition authority concerned may, in principle, decide to reopen its proceedings". See Case C-57/21, RegioJet a.s. v České dráhy a.s., 2023, ECLI:EU:C:2023:6, para 89.

[11] 2011 Best Practices Notice, supra note 7, para 22.

[12] See e.g. Press Release, European Commission, Antitrust: Commission probes Credit Default Swaps market, IP/11/509, (29.04.2011), https://ec.europa.eu/commission/presscorner/detail/en/ip_11_509.

[13] Id., at Section 2.13.

[1414] ManProc, supra note 8, at Chapter 23, para 4.

[15] ManProc, supra note 8, at Chapter 23, para 5.

[16] 2011 Best Practices Notice, supra note 7, para 150.

[17] Id., at paras 76 and 114. The same applies in cases where proceedings have not been formally opened but the Commission has already made public its investigation (e.g., by confirming that inspections have taken place).

III. REVIEW OF CLOSED INVESTIGATIONS

There are usually few details of any value on the Commission's DG Competition website or public case register on the reasoning behind the closure of formal investigations. In practice, the Commission has provided *ad hoc* information of its thinking in statements, speeches and articles - yet these are unfortunately sporadic. It is not surprising, therefore, that in a number of abandoned investigations the Commission provides no meaningful information on the reasons for closure.[18] However, from a review of public sources a picture starts to emerge of the Commission's practice. While "lack of evidence" (with some nuances) appears to be the reason in over half of the cases identified for the Commission to abandon an investigation, the reasons may be far broader.

Section III of this paper provides a review of those formal article 102 investigations subsequently closed by the Commission and seeks to draw conclusions from them. The analysis is based on public information and assumes that such information correctly describes the Commission's and parties' underlying incentives. In these cases, much information remains confidential known only to the Commission and the parties under investigation. The review focuses on the Commission's reasoning for closing investigations, it is not intended to be a detailed review of each investigation or the substantive issues raised.

1. INVESTIGATIONS CLOSED DUE TO LACK OF EVIDENCE

When the Commission closes an investigation, the most obvious conclusion is that the company under investigation did not breach the antitrust rules, because there of insufficient evidence of wrong doing. However, the Commission's statements range from finding no evidence, to a lack of evidence, to evidence not indicating the existence of anticompetitive conduct, to concerns not being confirmed.

The Commission took this view most clearly in the *Internet Connectivity cases (AT. 39951)*, involving T*elefonica (AT.40092)*, *France Telecom (AT.40090)* and *Deutsche Telekom (AT.40089)*. The Commission closed its investigation in 2014 having come to the "*provisional view that the observed practices do not appear to breach EU antitrust law with a view to shutting out competitors from either the internet transit market or internet content markets*".[19] In its press release, the Commission noted that after an impartial assessment of the information collected through inspections "*This sometimes leads, as today, to the closure of a case for lack of evidence of anti-competitive*

[18] See e.g. Microsoft (Interoperability) (Case AT.39294); GlaxoSmithKline (Case AT.38574); The MathWorks (Case AT. 39840); Electrabel (Long-term electricity contracts in Belgium) (Case AT.39387) and; Credit Default Swaps (Clearing) (Case AT.39730).

[19] Press Release, European Commission, Antitrust: Commission Closes Investigation into Internet Connectivity Services but will Continue to Monitor the Sector (Oct. 02, 2014), https://europa.eu/rapid/press-release_IP-14-1089_en.htm.

conduct".[20] Yet the reference to "lack of evidence" or practices not appearing to breach EU antitrust law are more equivocal to the statement that following in the Commission's press release; "…***the Commission found no evidence*** *of behaviour aimed at foreclosing transit services from the market or at providing an unfair advantage to the telecoms operators' own proprietary content services*" (emphasis added). [21] Such a definitive statement would appear to exonerate the companies in relation to those specific allegations investigated.

In *AstraZeneca/Nycomed*,[22] the Commission investigated concerns that the two companies (acting individually or jointly) may have sought to delay generic entry for a particular heartburn drug.[23] The Commission's statement on closing its investigation made no mention the weight of evidence gathered or its assessment, but rather sought to emphasize the Commission's general focus on practices that delay generic market entry. Contemporaneous news reports of the closure did, however, quote the Commission's competition spokesperson stating: "*We consider no infringement could be established, simply because the evidence was not there*".[24] It is not the only time that additional Commission statements provide clearer reasons for the Commission's decision to abandon investigations,¡ than the formal press release.

In *Velux (AT.39451),* [25] the Commission initiated an *ex officio* investigation in 2007 into the roof windows manufacturer to see whether Velux's rebates or other benefits provided to Velux distributors, as well as alleged predatory practices, had foreclosed the market. This investigation was sparked by a complaint originally lodged by a leading competitor to Velux, FAKRO, with the Polish Competition in 2006, which the authority had communicated the Commission. In January 2009, the Commission closed its investigation. The Commission's database includes no press release either on the initiation of proceedings nor its closure. However, subsequent related proceedings. [26] This was confirmed by the European General Court in rejecting FAKRO's appeal of the Commission's rejectionshed light on the Velux closure. On 14 June 2018, the Commission rejected a formal complaint lodged by on FAKRO (Case AT.40026) making new allegations against Velux.[27] In its rejection, the Commission noted that it had closed its *ex officio*

---

[20] Id.

[21] Id.

[22] No case number could be located.

[23] Press Release, European Commission, Antitrust: Commission Confirms Unannounced Inspections in Pharmaceutical Sector (Dec. 02, 2010), https://ec.europa.eu/commission/presscorner/detail/en/memo_10_647. No case number could be identified.

[24] Yun Chee Foo, EU drops antitrust probe into AstraZeneca, Nycomed, REUTERS (Mar. 01, 2012), https://www.reuters.com/article/astrazeneca-eu/update-1-eu-drops-antitrust-probe-into-astrazeneca-nycomed-idUSL5E8E12GV20120301/.

[25] The DG Competition database does not provide details on this investigation on Velux (AT.39451).

[26] Id.

[27] Case AT.40026 – Velux (2018), https://ec.europa.eu/competition/antitrust/cases/dec_docs/40026/40026_850_3.pdf.

Velux investigation because the evidence gathered did not support FARKO's allegations of "*the existence of an anticompetitive strategy* [by Velux] *to exclude competitors from the market*.[28] The court also noted that Velux had ceased the practice of retroactive discounts before the closure of the Commission's investigation.

On 26 July 2012, the Commission decided to close its investigation of certain provisions in claim-sharing and joint-reinsurance agreements between the *Protection and Indemnity Clubs (AT.39741)*. The Commission closed the investigation noting that: "*The market investigation was not sufficiently conclusive to confirm the Commission's initial concerns.*"[29] The Commission's decision on the closure of the case is more definitive, however. It noted that, following an in-depth market investigation with shipowners, brokers and commercial insurers to assess the need for adopting a formal decision under Regulation No 1/2003, "*no such need was identified based on the information available to the Commission*".[30] Rather than refer to the lack of evidence, the Commission referred to the legal requirement to close an investigations where the Commission no longer intends to take an enforcement decision under Regulation 1/2003.

The Commission closed its *IBM Mainframes Tying (AT.39511)* investigation in September 2011, following the withdrawal of three complainants; T3, TurboHercules and Neon in August of that year.[31] The Commission did so, while announcing the market testing of remedies in a parallel mainframe maintenance services investigation.[32] In a short paragraph, the Commission noted that it; "**…** *examined allegations of alleged tying of IBM's mainframe hardware with its operating system after complaints made by rival software vendors T3 and Turbo Hercules and a related later complaint by Neon Enterprise Software. Following an in-depth investigation of these allegations, the Commission has decided to close these proceedings. The three complaints have been withdrawn*.[33] There was no information on why the investigation was ultimately abandoned; no references to lack of evidence or allegations not being established. Rather the implication was that the withdrawal of the complaints ended the investigation.

---

[28] Case T-515/18, Farko v. Commission, 2020, ECLI:EU:T:2020:620 at paras 4 and 93. Farko appealed the General Court's decision in Case C-149/21. On 30 June 2022, the European Court upheld the General Court's decision to dismiss FAKRO's appeal against the Commission's rejection of Fakro's complaint. The court also confirmed, at para 7, that "Au mois de janvier 2009, la Commission a conclu que les preuves recueillies n'indiquaient pas l'existence d'un comportement anticoncurrentiel de la part de ces sociétés et a clos cette enquête".

[29] Case AT. 39741 – P&I Clubs (2010), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39741/39741_1608_9.pdf .

[30] Id.

[31] Yun Chee Foo, Three firms drop EU antitrust complaints against IBM, REUTERS (Aug. 03, 2011), https://www.reuters.com/article/technology/three-firms-drop-eu-antitrust-complaints-against-ibm-idUSTRE7722PT/.

[32] Press Release, European Commission, Antitrust: Commission market tests IBM's commitments on mainframe maintenance and closes separate case into alleged unlawful tying (Sept. 19, 2011), https://ec.europa.eu/commission/presscorner/detail/en/ip_11_1044.

[33] Id.

Unlike the *Microsoft Interoperability* or *Boehringer Ingelheim (AT.39246)* investigations, where complainants withdrew their complaints following informal remedial measures, the Commission made no such implication in its press release. Nor did it highlight the complexity of the investigation and impact on resource allocation, as it did in the *Qualcomm (AT.39247)* investigation (see further below). However, over a year later, the then Director General for Competition, Alexander Italianer, highlighted that; "*When our concerns are not confirmed, we close cases – and we have done so, for example, in cases regarding IBM mainframes or Qualcomm".*[34]

This is an important clarification for the *Qualcomm* case, as the Commission had stated on the closure of that investigation that "*it has not as yet reached formal conclusions"*,[35] which was unusual language in the context of an investigation closure. Although this might suggest that the Commission was not entirely satisfied with the outcome, then Commissioner for Competition Neelie Kroes, in a speech on the case foreshadowing the case closure, noted the need to have a *"a clear and coherent evidence base*" to satisfy the requisite standard of proof.[36] However, Director General Italianer's subsequent clarification is a clearer statement of why that investigation was closed.

In the *LNG Supply* (*AT.40416)* investigation (2018-2022) the Commission expressed concerns about whether supply agreements between Qatar Petroleum companies (now QatarEnergy) and European importers hindered the free flow of liquefied natural gas ("LNG") within the European Economic Area (EEA).[37] As relates to Article 102, the Commission was concerned whether Qatar Petroleum's long-term LNG supply agreements (typically 20 or 25 years) contained territorial restrictions, notably restricting EEA importers from selling the LNG in alternative destinations within the EEA. On 31 March 2022, the Commission closed proceedings stating that "*Today's closure decision is based on a thorough analysis of all relevant evidence, including information received from Qatar Energy and the European gas importers. The Commission concluded that the*

[34] Alexander Italianer, Dir. Gen. Competition, European Comm'n, Level-playing Field and Innovation in Technology Markets, Prepared Remarks to the Conference on Antitrust in Technology Palo Alto (Jan. 28, 2013), in Competition Speeches Archive (1995 – 2020), https://competition-policy.ec.europa.eu/about/news/competition-speeches-archive-1995-2020-2020-01-01_en.

[35] Press Release, European Commission, Antitrust: Commission market tests IBM's commitments on mainframe maintenance and closes separate case into alleged unlawful tying (Sept. 19, 2011), https://ec.europa.eu/commission/presscorner/detail/en/ip_11_1044.

[36]".. any antitrust enforcer has to be careful about overturning commercial agreements without a clear and coherent evidence base". Neelie Kroes, European Commissioner Comp. Pol'y, Address at Harvard Club of Belgium, "De Warande" Brussels Belgium: Setting the Standards High (Oct. 15, 2009), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_475

[37] Press Release, European Commission, Antitrust: Commission opens investigation into restrictions to the free flow of gas sold by Qatar Petroleum in Europe (June 20, 2018), https://ec.europa.eu/commission/presscorner/detail/en/ip_18_4239.

evidence collected did not confirm its initial concerns and has therefore decided to close its investigation".[38]

The Commission's rationale for closing the *LNG Supply* investigation seems clear. However, it may be relevant that the closure of proceedings came at a time when the EU was looking to reduce its reliance on Russia and secure alternative sources of LNG imports. Earlier in the year, Reuters had reported that the Qatari government had argued that the European Union should restrict the resale of LNG outside the EEA in order to prevent a short-term supply crisis and that the Commission's *LNG Supply* investigation should be "resolved", in order for the EU to be benefit from the security of long-term contracts.[39] When the investigation closed, media sources speculated that the Commission had dropped the investigation following Qatar's request in order to facilitate emergency gas provisions.[40] The Commission denied any connection between gas supply issues and the antitrust investigation.

On 10 November 2016, the Commission opened a formal investigation into concerns that the Czech state-owned rail incumbent, *České dráhy* (ČD) *(AT.40156)*, was engaged in predatory pricing.[41] This followed a complaint by Leo Express and involved unannounced inspections at ČD's premises in April 2016. On 30 October 2020, the Commission issued a Statement of Objections ("SO") setting out its preliminary view that between 2011 and 2019, ČD had engaged in predatory pricing on the Prague-Ostrava route and beyond, offering services at prices that were not a true reflection of the cost of providing those services, with the intention of hindering competition following the rapid expansion of two new railway undertakings, RegioJet and Leo Express.[42] On 29 September 2022, the Commission closed the investigation, stating that "*following a careful assessment of all relevant evidence, including information received from ČD, the Commission concluded that the evidence did not confirm its initial concerns and has, therefore, decided to close its investigation*".[43] In

[38] Press Release, European Commission, Antitrust: Commission closes investigation into LNG supply agreements between Qatar Energy and European importers (Mar. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_2204.

[39] Dmitry Zhdannikov, EXCLUSIVE Qatar Seeks EU Guarantees Emergency Gas Stays Within EU – source, REUTERS (Jan. 31, 2022), https://www.reuters.com/business/energy/exclusive-qatar-seeks-eu-guarantees-emergency-gas-stays-within-eu-source-2022-01-31/.

[40] Yun Chee Foo, EU regulators close antitrust investigation into Qatar Energy, REUTERS (Mar. 31, 2022), https://www.reuters.com/business/energy/eu-regulators-close-antitrust-investigation-into-qatar-energy-2022-03-31/.

[41] Press Release, European Commission, Antitrust: Commission Investigates Practices of Czech Railway Incumbent České Dráhy in Passenger Transport (Nov. 9, 2016), https://ec.europa.eu/commission/presscorner/detail/en/ip_16_3656.

[42] Press Release, European Commission, Antitrust: The Commission sends Statement of Objections to České dráhy for alleged predatory pricing (Oct. 29, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2017.

[43] Press Release, European Commission, Antitrust: Commission closes predatory pricing investigation into Czech railway incumbent České dráhy (Sept. 30, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_5911. When the Commission issues an SO, it clearly believes that an abuse has occurred and that it

the same year, the Commission used similar language when it closed its investigation into *Google (AT.4077)*'s potential abuse of dominance concerning the so-called "Jedi Blue" agreement for online display advertising services.[44]

As noted, over half of abandoned investigations were closed by the Commission due to lack of evidence to establish the alleged abuse, rather than e.g. a intervening "remedy" addressing any concerns.[45] There could well be a presumption that, where cases are indeed closed and notably closed without any clarifying statement, that there was no evidence to confirm the initial concerns or possibly insufficient evidence that would satisfy the requisite burden of proof to establish an abuse under Article 102.[46] However, these cases demonstrate that there are nuances in the Commission's often limited, public reasoning. Reasons range from an investigation finding no evidence, insufficient evidence or being inconclusive, to concerns not being confirmed, that no infringement could be established, to the impugned practices not breaching EU antitrust law. These are all subtly different and lead to different implications, notably for potential related private actions.[47]

---

has the evidence to prove it. It is therefore not surprising that investigations are rarely abandoned after an SO is issued, at least not without a clear alternative "remedy" such as the mobile roaming investigations, as described below. In this regards, the ČD case is unique in being the only investigation closed after the issuing of an SO, with no ostensible "remedy".

[44] See Press Release, European Commission, Antitrust: Commission sends Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace (Dec. 18, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728. Whilst closing the investigation, the Commission noted that "a separate investigation into Google's possible abuse of dominance in the ad tech sector is still ongoing", and on the same day, the Commission sent an SO to Meta in a separate investigation over tying its online classified ads service, Facebook Marketplace, to its personal social network, Facebook. At the same time, the UK's Competition Market Authority ("CMA") launched its own investigation into the Jedi Blue agreement and whether Google's abused a dominant position in header bidding services. The CMA closed its investigation on 10 March 2023 merely noting that the investigation was closed "on grounds of administrative priorities". The CMA further noted that it was continuing to investigate whether Google has abused a dominant position in relation to header bidding services, which it combined with its Google ad tech investigation. In September 2024, the CMA issued an SO against Google. See Press Release, CMA investigates Google and Meta over ad tech concerns (Mar. 11, 2022), https://www.gov.uk/government/news/cma-investigates-google-and-meta-over-ad-tech-concerns; CMA, Investigation into Suspected Anti-Competitive Conduct by Google in Ad Tech, GOV.UK (last updated, Sept. 06, 2024), https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google-in-ad-tech.

[45] i.e. Velux (AT.39451); Qualcomm (AT.39247); IBM (Mainframes) (AT.39511); AstraZeneca/Nycomed; P&I Clubs (AT.39741); Internet Connectivity (AT.39951) (and 3 other cases); The Mathworks (AT.39840); LNG Supply (AT.40416); and České dráhy (Czech Rail) (AT.40156).

[46] The cases explored above cover a range of theories of harm, mainly exclusionary conduct. What these cases may say about evidentiary burden and standard of proof is beyond the scope of this paper.

[47] In the context of the ČD investigation, both RegioJet and Leo Express initiated civil antitrust damages litigation against ČD. Following the Commission's SO, Leo Express reportedly double the amount of damages it was seeking. This would imply that RegioJet's viewed the issuing of an SO as significantly increasing the value of the

As will be seen further below, there are a number of instances where the Commission abandoned investigations, where it felt that its concerns had been addressed satisfactorily. However, what can be stated with a level of confidence is that in the region of 10% of formal investigations are abandoned by the Commission without any clear alternative 'remedy' indicating that the Commission's prioritisation criteria plays a important role in the Commission's thinking.

2. "GUIDANCE" FROM COMMISSION OFFICIALS

As noted above, in January 2009, the Commission closed its *ex officio* investigation into *Velux (AT.39451)* issuing no press release or statement. However, in the same year two Commission officials, Albaek and Claici, published an article in the Commission's Newsletter detailing the Commission's approach in the case.[48] The authors compared the Commission's approach in assessing Velux's rebates to the Commission's guidance on exclusionary rebates schemes, set out in its Guidance on its enforcement priorities in applying Article 82 to abusive exclusionary conduct. Based on documents provided by Velux and its distributors, the Velux schemes do not appear to be individualised to specific distributors and, therefore, conformed to the description of pro-competitive rebates described in the Guidelines. Albaek and Claici conclude that: "*This case shows how the approach advocated in the Commission's Article 82 Guidance paper can be applied in practice. The Guidance paper states that "the Commission will focus on those types of conduct that are most harmful to consumers" and the Velux decision is therefore in line with the enforcement priorities set out in the Article 82 Guidance paper the Commission...*"[49]

No other closed investigation benefits from such a detailed review from the Commission, even if informal. The article is useful in understanding the Commission's practices and priorities, in particular as relates to the 2009 Guidance paper. Using the closure of cases to provide guidance on enforcement priorities can be of immense help to businesses. Unlike formal explanations, however, that the insight provided in the Velux case came from officials writing in a personal capacity, which provides limited legal certainty.

3. GUIDANCE IN MORE "COMPLEX" CASES

judicial claim. See Brian Kenety, Leo Express suing Czech Railways for over CZK 1 billion in damages, CZECH RADIO (June 11, 2020), https://english.radio.cz/leo-express-suing-czech-railways-over-czk-1-billion-damages-8699340. In July 2023, Leo Express and RegioJet agreed to end all legal proceedings relating to the competition dispute and in April 2024, ČD and RegioJet reached a similar agreement. See Railway Gazette International, ČD and RegioJet competition dispute settled, 8 April 2024, https://www.railwaygazette.com/d-and-regiojet-competition-dispute-settled/66269.article.

[48] Svend Albaek & Adina Claici, The Velux case – an in-depth look at rebates and more, COMP. POL'Y NEWSLETTER 44 (2009).

[49] Id., at 47. See also See Damien Neven & Miguel de la Mano, Economics at DG Competition, 2009–2010, 37 REV. IND. ORG. 309 (2010).

In November 2009, the Commission closed its investigation into *Qualcomm (AT.39247)* that it had formally initiated 2 years earlier. The investigation was based on 6 complaints by Broadcom, Ericsson, NEC, Nokia, Panasonic and Texas Instruments and focused on allegations of exploitative abuse for licensing of patents essential to WCDMA/3G technologies.[50] On closing formal proceedings, the Commission issued a press statement providing a series of reasons for its decision.[51]

Firstly, as noted in the section above, DG Competition lacked the "coherent evidence base" needed to confirm its concerns.[52]

Secondly, the Commission explained that it "*committed time and resources to this investigation in order to assess a complex body of evidence*". In her speech foreshadowing the investigation closure Commissioner Kroes also highlighted the difficulties in bringing excessive pricing cases: *"[I]n practice, such assessments may be much more complex than this brief description of the issues implies…".*[53] Therefore, a significant effort had been undertaken that failed to yield concrete evidence of abuse. The Commission also noted that it needed to decide where best to focus its resources and priorities, and that it did not consider it appropriate to invest further resources in the case.[54]

Thirdly, the Commission also noted that "[a]*ll complainants have now withdrawn or indicated their intention to withdraw their complaints".*[55] The Commissioner Kroes added in her speech that" *any antitrust enforcer has to be careful about overturning commercial agreements*",[56] which implied that the subject matter of the investigation (patent portfolio licensing terms) were likely to be a

---

[50] See Damien Neven & Miguel de la Mano, Economics at DG Competition, 2009–2010, 37 REV. IND. ORG. 309 (2010).

[51] Press release, European Commission, Antitrust: Commission closes formal proceedings against Qualcomm (Nov. 23, 2009), https://ec.europa.eu/commission/presscorner/detail/en/memo_09_516.

[52] Alexander Italianer, Dir. Gen. Competition, European Comm'n, Level-playing Field and Innovation in Technology Markets, Prepared Remarks to the Conference on Antitrust in Technology Palo Alto (Jan. 28, 2013), in Competition Speeches Archive (1995 – 2020), https://competition-policy.ec.europa.eu/about/news/competition-speeches-archive-1995-2020-2020-01-01_en.

[53] Neelie Kroes, European Commissioner Comp. Pol'y, Address at Harvard Club of Belgium, "De Warande" Brussels Belgium: Setting the Standards High (Oct. 15, 2009), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_475

[54] Press release, European Commission, Antitrust: Commission closes formal proceedings against Qualcomm (Nov. 23, 2009), https://ec.europa.eu/commission/presscorner/detail/en/memo_09_516.

[55] Id. While the Commission does, in large part, depend on the support of complainants, the lack of formal complainants would not necessarily prevent the Commission from taking cases forward.

[56] Id. In July 2008 Qualcomm and Nokia entered into a broad settlement agreement including a patent license agreement covering multiple technologies, including 3G, and the withdrawal of Nokia's antitrust complaint before the Commission. See joint Qualcomm and Nokia press release, Nokia and Qualcomm Enter Into a New Agreement, Companies Agree to Settle All Litigation, 22 July 2008. https://www.qualcomm.com/news/releases/2008/07/nokia-and-qualcomm-enter-new-agreement.

commercial issues, rather an antitrust ones.[57] In other words, competition authorities must be wary about being instrumentalised and find themselves being drawn into cases that are essentially commercial disputes. The withdrawal of complaints relieved the Commission of the obligation to formally reject complaints, thereby giving the Commission a freer hand.

Soon after the closure of the investigation, in May 2010, the Commission began a revision of the Guidelines on Horizontal Cooperation Agreements, adopted in January 2011,[58] which included a significantly expanded section on standardization, including possible methodologies to calculate fair, reasonable and non-discriminatory royalties for the licensing of standards essential patents. This last point is important, as it implies that the Commission may also have an eye to alternative policy "solutions" or remedies to the issues they are confronting. These are explored below.

4. CLOSING INVESTIGATIONS FOLLOWING "REMEDIES"

A number of investigations were closed after complaints were withdrawn following a change of practices by the investigated company. Interestingly, these cases involve a unilateral change of practices, a bilaterally negotiated change without the Commission's involvement, and one with Commission involvement. Such settlements naturally say little about the alleged abuse or whether there might have been sufficient evidence available to pursue an investigation to decision; they merely demonstrate that addressing complaints' concerns allows the Commission to deprioritise the investigation.

(i) Unilateral Remedies: On 21 December 2007, the Commission initiated formal investigations against *Microsoft (AT.39294)* based on third party complaints, concerning two distinct categories of alleged infringements.[59] The first, based on a complaint by the European Committee for Interoperable Systems (ECIS), related to concerns that Microsoft was not providing interoperability information across a range of products, including information on Microsoft's Office suite and server products. The second, based on a complaint *inter alia* by Opera, related to concerns that Microsoft was tying its Internet

[57] Press release, European Commission, Antitrust: Commission closes formal proceedings against Qualcomm (Nov. 23, 2009), https://ec.europa.eu/commission/presscorner/detail/en/memo_09_516.

[58] Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C/11) 1, updated in 2023; see Communication from the Commission – Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2023 O.J. (C/259) 1.

[59] Press Release, European Commission, Antitrust: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position (Jan. 13, 2008), https://ec.europa.eu/commission/presscorner/detail/en/memo_08_19.

Explorer product to its dominant Windows operating system.[60] In December 2009 Microsoft decided to voluntarily disclose some interoperability information as well as follow interoperable technical standards. On 11 June 2010, ECIS announced that, following their analysis of Microsoft's changes, they were withdrawing their complaint, given that the "remedy" addressed ECIS members' concerns.[61] On 25 June 2010, the Commission closed the first investigation without issuing a press release. Although the Commission "took note" of Microsoft's announcement,[62] it does not seem to have been involved in fashioning the Microsoft remedy, nor did it seek to enshrine these changes in the commitment decision under Article 9 of Regulation 1/2003, as it had done in the Microsoft (Tying) (AT.39530) case just some months before.[63]

(ii) Bilaterally negotiated settlements: The Commission investigated Philip's joint *CD-R Disc Licensing (AT.38767)* from 2003 to 2006, following a complaint by the Federation of Interested Parties in fair Competition in the Optical Media sector (FIPCOM), an association of European manufacturers of CD-Recordable discs. FIPCOM alleged that Philip's licensing terms (including Sony and Taiyo Yuden patents which Philips administered) violated both Article 81 (now Article 101) and Article 82 (now Article 102) of the European Treaties. Following commercial negotiations with FIPCOM, to which the Commission does not seem to have been directly involved, Philips revised the licensing programmes to FIPCOM's satisfaction. FIPCOM then withdrew its complaint. The Commission closed the investigation, publicly acknowledging that there were separate negotiations between Philips and FIPCOM and essentially approving the changes undertaken by Philips, recognising them as pro-competitive.[64]

(iii) Settlement with Commission oversight: The *Boehringer Ingelheim (AT.39246)* investigation, initiated in 2007, related to new treatments for chronic obstructive pulmonary disease. The Commission investigated whether Boehringer had misused the patent system through the use of "blocking" patents and whether Boehringer had been granted patents by the European Patent Office (EPO), despite providing the EPO with misleading information in its application. During the investigation, Boehringer and Almirall reached a settlement whereby Boehringer agreed to remove its blocking positions in Europe, with licenses granted outside Europe and ceasing any pending litigation between the parties. In July 2011, the Commission closed the investigation and concluded that a settlement between the parties not only addressed its own concerns but was the most efficient and speedy way to ensure that consumers benefit from

---

[60] This investigation resulted in issuance of a Statement of Objections on 17 January 2009 and Article 9 commitment decision on 16 December 2009.

[61] Jim Brunsden, Complaint against Microsoft Withdrawn, POLITICO (June 11, 2010), https://www.politico.eu/article/complaint-against-microsoft-withdrawn/.

[62] id.

[63] European Commission Press Release: Commission welcomes Microsoft's roll-out of web browser choice, Mar 2, 2010, https://ec.europa.eu/commission/presscorner/detail/en/ip_10_216.

[64] Press Release, European Commission, Competition: Commission closes investigation following changes to Philips CD-Recordable Disc Patent Licensing (Feb. 08, 2006), https://ec.europa.eu/commission/presscorner/detail/en/ip_06_139.

Almirall's product.[65] As a result, the Commission no longer felt it needed to pursue the case.

The title of the Commission's Press release announcing the closure of the investigation focused on the settlement: "*Commission welcomes improved market entry for lung disease treatments.*" [66] The Commission implied that it was actively involved in bringing the parties to the table, stating that it had "*suggested to Boehringer and Almirall to find a mutually acceptable solution to their dispute, within the limits of EU antitrust rules*".[67] The Commission's press release also provides significant information on the facts underlying the investigation and indeed some of the Commission's thinking relating to "blocking" patents and abuse of the patenting process. Boehringer had originally succeeded in obtaining a European patent for one of its combination products, but it was subsequently revoked by the EPO in March 2011. The Commission noted that, had Boehringer appealed the EPO's revocation decision, this "*would have kept the contested patent in force until the appeal had been decided*."[68] The Commission added that Boehringer could have also reactivated dormant divisional patent*s "and thus (have) prolong(ed) the patent dispute*."[69] As noted by Lugard and Ryu Na, "*Although the Commission did not extensively spell out its competition concerns in relation to the divisional patents in question due to the matter having been settled between the parties, it is clearly an aspect of the case which it gave some thought to when announcing the closure of the investigation*".[70] Given how complex the interplay between competition and patent law can be, especially the need to ensure respect for property rights and access to courts, it is helpful that the Commission used the press release to provide some additional insight into its thinking.

Closing investigations following bilateral negotiations between the complainant(s) and the company under investigation raises two concerns; first is the danger a public authority is being used to create a favourable commercial negotiating environment for the complainant. Bilateral settlements may benefit the parties, but may not address broader competition policy concerns. The second concern is that the Commission appeared willing at the time to acknowledge informal remedies outside the formal Article 9 Regulation 1/2003 "commitment" process, potentially excluding the involvement of legitimate third parties, undermining procedural transparency and limiting judicial oversight.

---

[65] Press Release, European Commission, Antitrust: Commission welcomes improved market entry for lung disease treatments (July 15, 2011), https://ec.europa.eu/commission/presscorner/detail/en/ip_11_842.

[66] Id.

[67] Id.

[68] Id.

[69] Id.

[70] Paul Lugard & Christine Ryu Na, On the Interface of Intellectual Property and Antitrust: The Case of Divisional Patent Applications in the Pharmaceutical Sector, BAKER BOTTS (Oct. 19, 2021), https://www.bakerbotts.com/thought-leadership/publications/2021/october/on-the-interface-of-intellectual-property-and-antitrust.

5. ALTERNATIVE SOLUTIONS; PARALLEL INVESTIGATIONS

It appears that the Commission has been willing to close a number of investigations where parallel national competition investigations were seen as an alternative to address perceived antitrust abuses.

Little public information is available on the *GlaxoSmithKline/Synthon (AT.38574)* investigation, which was closed on 2 March 2012. The Commission focused on possible anticompetitive practices aimed at delaying or excluding competition from generic drug manufacturers. GlaxoSmithKline confirmed that the Commission had carried out an on-site inspection in 2005, focusing on Seroxat (the trade name for the antidepressant drug Paroxetine). The investigation was based on a complaint by Synthon, which eventually withdrew its complaint.[71] While the closure of the investigation might suggest that the Commission could not find sufficient evidence to support Synthon's allegations, it is notable that the Dutch and UK competition authorities were also investigating GlaxoSmithKline. In August 2011, the UK's Office of Fair Trading ("OFT") opened a formal investigation into GlaxoSmithKline and a generics manufacturer, Generics UK, to see whether there were anticompetitive litigation settlements or "pay-for-delay" agreements in relation to paroxetine. GlaxoSmithKline confirmed that the subject matter of the OFT's investigation was the same as the Commission's. Ultimately, the OFT came to a different conclusion to the Commission; on 12 February 2016 the OFT's successor, the Competition and Markets Authority, fined GlaxoSmithKline and two generic companies, Generics UK and Alpharma, £45 million for anti-competitive conduct and agreements in relation to the supply of Paroxetine.[72]

The Commission's investigation into *AstraZeneca* and *Nycomed* began in January 2008, on the suspicion of individual or joint action to delay the market entry of generic medicines competing with AstraZeneca's heartburn medicine, Nexium. In November 2010, the Commission conducted unannounced onsite inspections at the premises of AstraZeneca and Nycomed. The Commission closed the investigation in March 2012, although the Commission's press release provides little on why the investigation was closed.[73] However, a Commission spokesman clarified in a press statement that "*Our investigation did not enable us to conclude that AstraZeneca and Nycomed had infringed EU antitrust rules*."[74] In 2011, prior to the Commission's closure of its investigation, the Dutch competition authority launched a parallel investigation into the sales of generic medicines competing with AstraZeneca's Nexium. It may not be a

---

[71] Reuters, EU regulator drops GSK antitrust investigation, 2 March 2012, https://www.reuters.com/article/glaxosmithkline-synthon-eu-idUSL5E8E237G20120302/.

[72] Press Release, CMA, CMA Fines Pharma Companies £45 Million (Feb. 12, 2016), https://www.gov.uk/government/news/cma-fines-pharma-companies-45-million

[73] Press Release, European Commission, Antitrust: Commission closes investigation in pharmaceutical companies AstraZeneca and Nycomed (Feb. 29, 2012), https://ec.europa.eu/commission/presscorner/detail/en/ip_12_210.

[74] Biospace, EU Regulators Drop Antitrust Probe Into AstraZeneca PLC, Nycomed, 1 March 2012, https://www.biospace.com/eu-regulators-drop-antitrust-probe-into-astrazeneca-plc-nycomed.

coincidence that around the same time that the Commission dropped its investigation, the Dutch competition authority alleged that AstraZeneca foreclosed the market for competing heartburn medicines. This may have provided some "cover" for the Commission in closing its case. However, in December 2014 the Dutch competition authority also dropped its investigation into the matter.

The *AstraZeneca/Nycomed* and *GlaxoSmithKline/Synthon* investigations were closed within a day of each other. This led to questions about why Commission closed these investigations despite the anticompetitive concerns identified during the Commission's 2009 Pharmaceutical sector inquiry. For example, it was speculated that the Commission closed the *AstraZeneca/Nycomed* and *GlaxoSmithKline/Synthon* investigations due to difficulties in defining the correct market in pharmaceuticals, which "*does not necessarily coincide with the traditional definition of the relevant market*" and given difficulties in establishing a viable theory of harm to show anticompetitive effects.[75] However, the Commission's significant record of enforcement in this area[76] would imply that such analytical issues may not have been at the root of why these investigations were closed.

6. ALTERNATIVE SOLUTIONS; POLICY AND REGULATION

There are a number of cases where the Commission looked to regulatory solutions as a means to address perceived competition concerns.[77]

The *Protection & Indemnity Clubs (AT.39741) case*, highlighted above, is essentially part of a sector review. The Commission had initiated an investigation, following the expiration, on 20 February 2009, of a 1999 Commission Decision exempting the shipping sector from European competition rules. Indeed, that 1999 Decision had itself come into effect following an investigation by the Commission into the sector and an agreement by International Group Agreement participants to change practices, after the issuance of an SO against

---

[75] Sven Gallasch, Does the closure of the EU "pay-for-delay" investigations against AstraZeneca and GSK mark the end of pharmaceutical antitrust in Europe?, https://competitionpolicy.wordpress.com/2012/04/11/does-the-closure-of-the-eu-pay-for-delay-investigations-against-astrazeneca-and-gsk-mark-the-end-of-pharmaceutical-antitrust-in-europe/.

[76] See Directorate-General for Competition, Update on Competition enforcement in the pharmaceutical sector (2018-2022) – European competition authorities working together for affordable and innovative medicines, 26 January 2024, (the EC Pharma Report, 2018–2022), https://competition-policy.ec.europa.eu/system/files/2024-01/kd0223117enn_pharma_report_2018-2022_e-version_en.pdf and EC, Directorate-General for Competition, Competition enforcement in the pharmaceutical sector (2009-2017) – European competition authorities working together for affordable and innovative medicines, 20 May 2020, https://data.europa.eu/doi/10.2763/218954.

[77] One could add the Qualcomm investigation to this list, as it was closed without any finding, but the subsequent adoption of Horizontal Co-operation Guidelines covered some of the issues raised during the investigation and shows that the Commission was looking to policy solutions as an alternative means of providing guidance to the market.

them in 1997. And that investigation had also followed a previous 1985 exemption, upon the expiry of which the Commission launched its first in-depth investigation to assess how the International Group Agreement, as well as the Pooling Agreement, concluded within the International Group, had functioned. It is not a surprise that the Commission had been monitoring the market and reserved the right to re-examine the situation if the market evolved. The implication is therefore that the 2010 investigation was a review of the exemption regime that the sector was under for over 2 decades.

The most striking example, however are the *Vodafone UK, O2 UK, Vodafone Germany and T-Mobile Germany* (*Roaming)* investigations regarding the roaming tariffs applied to other European mobile network operators. In July 2004, the Commission had initiated formal Article 102 proceedings against Vodafone UK and O2 UK and in February 2005 against Vodafone Germany and T-Mobile Germany. The Commission was concerned that wholesale roaming tariffs charged to other European mobile network operators between 1997/8 and 2003 were excessive and an abuse of the companies' dominant positions. In July 2007, the Commission closed its investigations because the European Roaming Regulation, which addressed the Commission's concerns, had entered into force on 30th June 2007.[78]

The Commission's press release highlighted some tensions between antitrust enforcement in individual cases versus regulation; it noted that the Regulation applies to all EU countries, to all mobile phone operators and also addresses these issues for the future. Indeed, the Commission's 2006 proposal for the Mobile Roaming Regulation cites, as its general context, that concerns of high roaming charges for mobile customers travelling in Europe were first identified back in mid-1999 when the Commission carried out its sector inquiry and which had led to the initiation of the original antitrust proceedings.[79]

Despite these original investigations, the Commission faced mounting political pressure from national regulators, the European Parliament and finally the European Council to address mobile roaming charges, notably as existing mechanisms seemed insufficient. The proposal for a Mobile Roaming Regulation noted the weakness of competition law instruments which can only address activities of individual undertakings, in a restricted procedure which "*therefore cannot provide a solution that safeguards the interests of all e-communications users and market players within the Community*".[80] Therefore, a year before the antitrust investigations closed, the Commission was already voicing concern at the inability of competition law remedies to address what was in reality a sectoral

[78] Press Release, European Commission, Antitrust: Commission closes proceedings against past roaming tariffs in the UK and Germany (July 17, 2007), https://ec.europa.eu/commission/presscorner/detail/en/ip_07_1113.
[79] Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community and Amending Directive 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services COM 2006 (383) final (July 12, 2006) (hereinafter "2006 Proposal").
[80] Id., at 3.

problem. Indeed, the Commission's press release announcing the closing the investigations recognised the weaknesses of Article 102 enforcement tools in dealing with sectoral issues. This would indicate that in certain instances competition law is not the right tool for regulating sectors.

The mobile roaming investigations are not the only example where antitrust enforcement appears to have effectively act as a "*fact finding exercise or as a regulatory kick starter"* that leads to regulatory solutions.[81] A further case, that falls outside the date-range of our dataset, still deserves a mention as it highlights how regulatory solutions can intervene in antitrust investigations. In June 2020, the Commission initiated proceedings against *Apple (AT.40716)*, concerning Apple's mandating the use of its proprietary in-app purchase mechanism ("IAP") to app developers and Apple's restrictions on the ability of app developers to inform iPhone and iPad users of alternative, cheaper purchasing possibilities available outside the App Store ("steering"). Almost two years to the day, in June 2024, the Commission closed proceedings. The Commission noted in it the press release that since the initiation of proceedings Apple had been designated as a "gatekeeper" in relation to its App Store under the Digital Markets Act (DMA) and this covered the scope of the Article 102 investigation.[82] The DMA imposed specific prohibitions on Apple which "*must not obligate app developers to use its IAP and must refrain from imposing monetary and non-monetary restrictions on steering"*.[83] It may not be surprising that the Commission also noted that "*The closure of an investigation is not a finding that the conduct in question complies with EU competition rules*",[84] as the Commission was of the preliminary view that Apple was in breach of the DMA. As with the Mobile Roaming investigations, a regulatory solution intervened, permitting the Commission to deprioritise that case.[85]

The review of cases in the section above shows that the Commission considers the broader commercial, legal, enforcement, policy and the regulatory environment and looks across the spectrum of levers when seeking to adjust behaviour that raises competition concerns.

---

[81] Nicolas Petit, Competition Cases Involving Platforms: Lessons from Europe (SSRN Paper, Oct. 17, 2018), https://dx.doi.org/10.2139/ssrn.3285277.

[82] Press Release, European Comm'n, Commission closes antitrust investigation into Apple's rules for in-app payment system and steering (June 24, 2024), https://ec.europa.eu/commission/presscorner/detail/en/mex_24_3444.

[83] Id.

[84] Id.

[85] It is notable that, on 25 March 2024, the Commission opened a DMA non-compliance proceedings against Apple to assess whether Apple's new contractual requirements for third-party app developers and app stores, including Apple's new "Core Technology Fee", inhibited app developers from "steering" consumers to alternative channels for offers and content, outside Apple's app stores, free of charge. Given that the non-compliance decision covered the same scope of Art 102 investigation, the Commission closed the antitrust investigation "to avoid multiple investigations into the very same conduct". See Press Release, European Comm'n, Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act (Mar. 24, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689.

IV. CLOSURES UNDER ARTICLE 101

Although the focus of this paper is on the closure of Article 102 investigations, a quick review of Article 101 closures is instructive.[86] Within the relevant 20-year date range, the DG Competition database highlights 16 additional Article 101 investigations that were closed without a prohibition decision. It is not surprising that we see a level of consistency in the public rationale given for these closures, despite the general dearth of details. Indeed, for 11 of these case, the DG Competition database provides limited information.[87] For example, in *Insurance and re-insurance in the aviation sector* (Zeplin) (AT.40501) the Commission merely noted that the investigation was closed "*for priority reasons*".

However, 6 cases demonstrate consistency in the Commission's approach. In 2018 the Commission closed its investigation into *Brussels Airlines/TAP Air Portugal code share agreement* (AT.39860), as the Commission concluded that there was insufficient evidence to confirm its initial concerns. However, Commission also noted that, as of 2014, new airlines had begun to compete with the parties on the relevant Brussels-Lisbon route. Likewise, in *Airline ticket distribution (Sabre)* (AT.40618) and *(Amadeus)* (AT.40617), the Commission concluded "*that the evidence collected is not sufficiently conclusive to justify pursuing the investigation further*". Yet the Commission felt the need to stress that a closure was "*not a finding that the agreements in question comply with the EU competition rules*"[88] and also noted that it was examining the full range of policy

---

[86] None of the cases reviewed in this section appear to have been closed following a successful Article 101(3) defence. Or Brook notes that the Commission provided little or no information on its reasons for the closure of Article 101 investigations, which makes it difficult to determine if and how objective economic justifications or public policy considerations under Article 101(3) affected the Commission's analysis in those cases. See Or Brook, Priority Setting as A Double-Edged Sword: How Modernization, Strengthened the Role of Public Policy, 16 J. COMP. L. & ECON. 435 (2020).

[87] International airline passenger services (AT.39419), closed 10.11.2011; Marchés de l'eau et de l'assainissement en France (AT.39756), closed 30.04.2013; Cement and related products (AT.39520), closed 14.08.2015: Bioethanol (AT.40244), closed 10.04.2017; Exhaust systems (AT.40170), closed 28.04.2017; Sports media rights (AT.40544), closed 22.09.2020; Insurance and re-insurance in the aviation sector (Zeplin) (AT.40501), closed 18.11.2020; Refrigerants (AT.39822), closed 25.10.2017. Wood pulp (AT.40763), closed 15.06.2023; Construction of networks and treatment plants for drinking and wastewater (AT.40581), closed 15.06.2023; and High-end fashion industry (AT.40797), closed 02.04.2024. The search results also highlighted certain hybrid Article 101/102 investigations that were abandoned, and these are already captured in the Article 102 analysis i.e. LNG supply to Europe (AT.40416); Google-Facebook (Open Bidding) agreement (AT.40774); P&I Clubs (AT.39741); CDS (Credit Default Swaps) - Clearing (AT.39730); Long term electricity contracts in Belgium (AT.39387); Microsoft (ECIS) (AT.39294); and Boehringer (AT.39246). [chek names]

88 Press Release / Memo of 20.07.2021: Commission closes investigation into airline ticket distribution services (Multilingual)

options in its review of the Regulation governing the relationship between airlines, booking system providers and travel agents.[89]

In three further cases, the investigated parties updated the practices under investigation, allowing the Commission to de-prioritise those cases. In Baltic Max Feeder scheme (AT.39699), the Commission closed the investigation within only a few months of its initiation because the planned scheme had been abandoned and there was therefore no reason to further investigate the matter.90 During the course of the European Payments Council (EPC) online payments (AT.39876) investigation, the EPC announced its decision to stop the development of the e-Payments Framework and any other standardisation initiatives that would have had the object or effect of excluding new entrants. As a result, Sofort AG, withdrew its complaint allowing the Commission to close the investigation. The Commission also flagged ongoing legislative efforts to establish objective and non-discriminatory rules in the e-payments market. 91 In iTunes (AT.39154) the Commission closed proceedings after Apple announced it would equalise prices for downloads of songs from its iTunes online store across Europe, ending discriminatory treatment for UK consumers. Although notionally an Article 101 investigation, the Commission's press release noted that the investigation clarified that it is not agreements between Apple and the major record companies which determined how the iTunes store was organised in Europe and consequently the Commission did not intend to take further action in this case.[92]

V. DISCUSSION

In his assessment of the Commission's first experiences with the Regulation 1/2003, between 2003 and early 2008, Gippini-Fournier noted a multiplicity of reasons why the Commission could close investigations without a formal decision. These include where *(i) a complaint is withdrawn; (ii) devoting resources to an investigation appears disproportionate at an advanced stage; and (iii) the alleged infringement has ceased, so that there is no legitimate interest in adopting a formal decision under Article 7* [infringements] *or Article*

---

89 Regulation (EC) No 80/2009 on a Code of Conduct for computerised reservation systems. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009R0080.

90 Antitrust: Commission closes investigation into Baltic Max Feeder scheme, europa.eu/rapid/pressReleasesAction.do?reference=IP/10/374&format=HTML&aged=0&language=EN&guiLanguage=en.

91 Commission closes investigation of EPC but continues monitoring online payments market (Memo for Website Publication 19.06.2013) (EN), europa.eu/rapid/press-release_MEMO-13-553_en.htm.

92 Press Release / Memo of 03.04.2007: Competition: European Commission confirms sending a Statement of Objections against alleged territorial restrictions in on-line music sales to major record companies and Apple, europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en (EN).

9 [commitments]*".*[93] Gippini-Fournier also noted that these examples are "*where the Commission cannot rule out the existence of an infringement, but that pursing an investigation to formal decision appears 'impossible or inappropriate.'* [94]The Commissions practice has evolved.

The Commissions practice of rejecting formal complaints is also insightful. In his paper on the topic, Van Rompuy helpfully enumerates[95] why the Commission may find insufficient grounds for pursuing a complaint for lack of Union interest. It may not be surprising that there are overlaps with the Commission's closing of proceedings, reflecting consistent approach to its prioritisation principles.[96]

The review of the Commission's practice in abandoning formal investigations points to seven broad reasons why the Commission may decide to close a particular investigation.

- First, are cases where the Commission can find no evidence or insufficient evidence, to satisfy it's concerns to the standard of proof required. There are, of course, a range of thresholds that the Commission must establish to take an investigation forward, including having sufficient evidence to prove a dominant position, wrongdoing and anticompetitive effect.
- Second, the Commission must assess whether the resources required to establish abuse in a complex investigation are proportionate overall. This assessment is connected to the Commission's obligation to manage its scare resources responsibly and, focus on enforcement priorities (e.g. on strategic sectors or serious abusive practices), in order to protect the Union interest. This is also one of the bases for rejecting complaints, where the Commission must consider the likelihood of establishing an infringement, including the complexity of the case, against time and resources required to do so.
- Third, as identified by Gippini-Fournier, are those instances were complaints are withdrawn. This removes critical support for a Commission investigation (and often relieves pressure on the Commission from having to issue a rejection decision that could be appealed). A withdrawal of a complaint would indicate that key players are no longer concerned by the allegedly anti-competitive practices. From the examples explored in the previous section, companies often withdraw their complaints after commercial agreements are struck. It is also true that the

[93] Eric Gippini-Fournier, Community Report to the FIDE Congress 2008, in THE MODERNISATION OF EUROPEAN COMPETITION LAW: FIRST EXPERIENCES WITH REGULATION 1/2003 (Heribert Franz Koeck & Margit Maria Karollus, eds., 2008).

[94] Id.

[95] Ben Van Rompuy, op. cit. There are two other basis for the Commission to reject complaints; the absence of a significant effect of the alleged infringement on the functioning of the internal market or where the Commission has already acted (or is in the process of acting) against similar conduct. The Commission would presumably assess either of these factors when considering an initiation of proceedings.

[96] See also Wouter Wils, Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement, 34 WORLD COMPETITION 353, 377–380 (2011).

withdrawal of a complaint does not dwell on the facto remove the Commission's jurisdiction. Indeed, if the Commission considers that the case is a matter of priority, it can continue its investigation despite complaints being withdrawn.

- Fourth, the Commission may close an investigation where a company under scrutiny has changed its behaviour, thereby addressing preliminary concerns. This includes unilateral changes or informal settlements, if there are complainants.
- Fifth, the Commission may close investigations where alternative solutions can either alleged anti-competitive practices through policy or regulation e.g. policy guidance following the Qualcomm investigation or the European regulation addressing mobile roaming prices. It is clear that the broader regulatory and industrial policy context can be a critical factor when the Commission exercises its discretion to pursue or close Article 102 investigations.
- Sixth, the existence or potential for parallel national antitrust investigations may provide the Commission with a legitimate reason to close the investigation, knowing it will be dealt with.[97] However, as the AstraZeneca case shows, national investigations can also be abandoned. This also a basis for the Commission to reject a complaint, if a complainant has an alternative remedy, including bringing an action before a national courts or competition authorities.
- Seventh, where the investigation has been found to be legally or procedurally flawed (whether for substantive, jurisdictional or procedural reasons) the Commission would have no choice but to close the investigation once a flaw has been discovered. This last reason seems hypothetical.

VI. THE WAY(S) FORWARD

A 2024 Commission survey on the evaluation of Regulations 1/2003 and 773/2004 found that "[a]*pproximately one third of study interviewees call for greater clarity and guidance, particularly as to whether a decision to close a case is due to a potential lack of resources on the Commission's side or to its unproblematic nature from a substantive competition law perspective"* (emphasis added).[98] As the Commission undertakes in-depth investigations into each formally initiated case, factoring in very different case- and sector-specific circumstances, the provision of information on the closure of cases can be particularly helpful opportunity for the Commission to give guidance to market participants and National Competition Authorities ("NCA"). These provide opportunities to for the Commission out its enforcement priorities in the context of the concerns initially identified (e.g. where business practices are

[97] See also Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance), EU Official Journal C 101 , 27/04/2004 P. 0043 - 0053.

[98] See Commission Staff Working Document, Final Evaluation of Regulations 1/2003 and 773/2004 {SWD(2024) 217 final}, Brussels, 5.9.2024. Available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation_en.

industry-wide or where practices raise particular concerns, such as pharmaceutical patent settlements) and potentially how to assess them (e.g. where informal corrections or remedies were taken that address concerns). As relates the standard of proof or evidentiary burden, the Commission could also shed light on those facts which counteract a suspicion of abuse.[99]

The Commission can provide indication of its thinking and prioritisation, as it did in the *Velux* or *Qualcomm* cases. Yet in a number of closures no formal Commission statement was provided, beyond a short line in the file. The information made available by the Commission, and the form that information is provided in, is erratic at best. The Commission has variously used official press releases, press statements, speeches or policy briefs to communicate to market participants. One obvious option to increase transparency and predictability would therefore be for the Commission to issue more detailed press releases as a matter of policy. Per the Best Practices Notice, the Commission should give closure announcements at least similar prominence to the initiation of proceedings. The Commission could also state, if need be that it reserves the right purse its investigation in future if enforcement priorities change, including if further evidence received.

In appropriate cases, the Commission could also published Policy Briefs, as it did in the Velux case, despite the fact that the investigation was closed with no decision. In fact the Commission has recently dome so in relation to the Amazon/iRobot merger review, in a case where Amazon had withdrawn the notification and and the Commission had closed its in-depth investigation without issuing a formal decision. The authors of the Policy Brief note that despite the fact that no final decision was adopted, the article "provides some lessons learnt from this (discontinued) in-depth investigation" exploring market definition and potential theory of harm.[100]

Dethmers and Blondeel noted that "*it is unfortunate that the Commission does not issue decisions in which no infringement was found, as these would provide useful insights and a much needed counterweight against the infringement decisions*".[101] In the context of the revision of Regulation 1/2003[102] it is worth exploring whether the

---

[99] "Also note that we are not aware of any press releases where the Commission mentioned the facts that may counteract a finding of an abuse". See Frances Dethmers & Jonathan Blondeel, EU Enforcement
Policy on Abuse of Dominance: Some Statistics and Facts, 38 EUROPEAN COMP. L. REV. 147, 157 (2017).

[100] Rosa Aldonza Rubio, Liam Biser, Pilar Córdoba Fernández, Amazon/iRobot: Keeping competition in robot vacuum cleaners spotless, European Commission, Competition merger brief, Issue 2/2024, <September. https://competition-policy.ec.europa.eu/document/download/4e7dcad9-4787-4cef-885b-dcc5f8f1244c_en?filename=kd0124001enn_mergers_brief_2024_2.pdf.

[101] Frances Dethmers & Jonathan Blondeel, EU Enforcement Policy on Abuse of Dominance: Some Statistics and Facts, 38 EUROPEAN COMP. L. REV. 147, 158 (2017).

[102] See Commission Press Release, Commission publishes findings of evaluation of EU antitrust enforcement framework, 5 Sep 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4550.

Commission should have the option to issue a more formal and detailed closure decisions. The most obvious options are the ability of issuing "*no grounds for actio*n" decisions, similar to those that NCA can issue under Article 5 of Regulation 1/2003, or decisions under Article 10 of Regulation 1/2003. These are briefly explored in turn.

Under Article 5 of Regulation 1/2003, National Competition Authorities ("NCA") have the ability to issue a decision for "*no grounds for action*", "*where on the basis of the information in their possession the conditions for prohibition are not met, they may likewise decide that there are no grounds for action on their par*t". The European Competition Network´s 2021 Recommendation on the Power to Set Priorities highlights how flexible this tool is: "*The methods of closing a case on priority grounds differ and range from informal means (simple closure, information to the complainant by letter) to formal decisions setting out the priority considerations for not pursuing the case. In addition, many jurisdictions leave it to the discretion of the Authority to adopt formal decisions that go further depending on the circumstances of a case (no-grounds-for-action decisions, e.g. to illustrate the policy of the Authority in a given field)*".[103] Amending Regulation 1/2003 to grant the Commission the power to issue "*no grounds for actio*n" decisions appear to be an option worth considering. Any amendment should maintain the Commission's discretion to decide which cases deserve a more reasoned decisions, in order to maximise the Commission's administrative efficiency.

As noted above, the Commission has the ability, under Article 10 of Regulation 1/2003, to issue a decision that Article 102 TFEU does not apply to the matter under investigation, where this is in the public interest to do so. The exclusive competence to issue Article 10 findings rests solely with the Commission; NCAs are not granted this power under Regulation 1/2003.[104] Recital 14 of Regulation 1/2003 provides further colour to Article 10 Decisions; that (i) these must be exceptional case where the Union "public interest" so requires (being the common public goal of ensuring a system of undistorted competition);[105] (ii) it may be expedient for the Commission to clarifying the law to ensure consistent application throughout the Community; and (iii) in particular do so "*with regard to new types of agreements or practices that have not been settled in the existing case-*

[103] Recommendation on the Power to Set Priorities, EUROPEAN COMP. NETWORK (2021), https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation_priority_09122013_en.pdf. See also Alexandr Svetlicinii et al., The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After Tele2 Polska, 43 EUROPEAN L. REV. 424 (2018).
[104] Regulation 1/2003, recital 38. See also Case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA (Tele2 Polska), 2011, EU:C:2011:270 at para 27.
[105] ManProc, 1.2, Chapter 18. Decision finding inapplicability (Article 10 Decision). Id. footnote 8.

law and administrative practice".[106] To date the Commission has not issued an Article 10 decision.[107]

Some have argued that the Article 10 procedure should become a guidance instrument if amended and reinterpreted.[108] By loosening the *exceptional cases* threshold, Article 10 could help to clarify the law for new types of agreements or practices that have not been settled in case-law or administrative practice. However, the Commission should be rightly cautious when deciding that a particular situation permits a derogation from the Treaty. As described above, formal investigations have been closed for a range of reasons, including lack of evidence or withdrawal of complaints. The Commission closed those investigations following a balancing exercise involving consideration of the Union interest and prioritising its limited enforcement resources, amongst other things. Many closed cases would therefore likely not reach public interest threshold. In addition, not all closed investigations require a broad clarification of the law or deal with new types of agreements or practices, notably if closed because of lack of evidence, rather than intervening factors such as formal settlements. An amended Article 10 does not seem an ideal candidate as a blanket tool. Although Article 10 could be applied to those rare cases where the facts would warrant its application, administrative consistency would argue for a more coherent solution.

Regulation 1/2003 also permits the Commission to issue the informal guidance, in lieu of other mechanisms. Recital 38 notes: "*Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission*.". [109] In October 2022, the Commission published a revised Informal Guidance Notice relating to novel or unresolved questions concerning Articles 101 and 102 TFEU arising in individual cases, for which there is insufficient legal clarity or

---

[106] Tobias P. Maass & Annemarie ter Heegde, Article 10: Finding of Inapplicability, in REGULATION 1/2003 AND EU ANTITRUST ENFORCEMENT (Kris Dekeyser et al., 2023).

[107] The 2024 Commission Staff Working Document, Final Evaluation of Regulations 1/2003 and 773/2004 noted that the extensive efforts of the European Competition Network in promoting the coherent application of EU competition rules have made the use of Article 10 unnecessary to date. Op. cit.

[108] "Considering the importance of providing additional guidance to undertakings, Article 10 decisions could be an additional, appropriate instrument to increase legal certainty in specific, suitable cases, as a means of ensuring the uniform and coherent application of Articles 101 and 102 TFEU, insofar as they go beyond what would have been achieved by Member States (NCAs and national courts) acting alone. Article 10, although not used by the Commission, appears to be an effective tool that creates EU added value." European Commission Staff Working Document, Final Evaluation of Regulations 1/2003 and 773/2004.

[109] Press Release, European Commission, Competition: Commission adopts a more flexible antitrust Informal Guidance Notice; withdraws Antitrust COVID Temporary Framework (Oct. 02, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5887. On the same day that the Commission published its Notice, it withdrew its temporary guidance on the application of European competition rules given the unprecedented market conditions created by the COVID-19 pandemic and the need for urgent cooperation across industries.

publicly available guidance at Union level. The Commission noted that it may issue informal guidance in the form of a written statement ("guidance letter") "*where it considers it appropriate and subject to its enforcement priorities*". [110] The Commission retains a broad discretion in whether or not to provide guidance sought by individual undertakings.

However, as with Article 10, the Informal Guidance Notice also include thresholds that many closed investigations appear unlikely to fulfil. First, it is for the party to request the informal guidance, which may not be in their interest to seek. Second, the Commission must be convinced of two cumulative conditions. That there is no existing legal clarity nor general guidance on the issue. Although some closed investigations gave rise to novel areas of law, many did not and were more concerned with whether evidence existed to establish an abuse. The Commission must also be convinced that there is interest in providing additional legal certainty, for example, given the economic importance of the goods or services concerned; whether the issue at stake is relevant for the achievement of the Commission's priorities or Union interest; the magnitude of relevant investments made or to be made; or how wide the usage of the agreement or practice is. Again, many of the past closed investigations probably would not qualify. Third, the Commission will not consider hypothetical questions or issue guidance on agreements or unilateral practices that are no longer being implemented by the parties, which would exclude cases where informal remedies address concerns. It seems, therefore, that this option is not the most appropriate.

VII. CONCLUSION

The closure of formally initiated investigations demonstrates that the Commission is open-minded and includes effective internal controls. This means that the checks and balances applied by the Commission during Article 102 investigations, including the Legal Service, Chief Economists Office, use of Peer Review Panels etc., can help to weed out "bad" cases. It is particularly important from a due process perspective that targets of investigations know to that they have the chance of convincing the Commission during a formal phase that no wrong doing occurred (or has been addressed); if were a perception that a finding of abuse invariably followed from an initiation of proceedings, then the onus on defendants would be to make arguments in the informal phase, when allegations are largely unsubstantiated and parties under investigation have no formal rights of defence.

Closing investigations should not be seen as an enforcement failure - quite the opposite. The ability of officials to translate their

[110] European Commission, Antitrust Manual of Procedures, August 2024, Para 4. The ManProc also makes a clear distinction between Informal Guidance and Article 10 decisions, as these have different objectives and assessment frameworks. Informal guidance is at the request of market players, in relation to particular agreements and/or practices contemplated and is therefore in their particular interest. On the other hand, the use of Article 10 process remains at the sole discretion of the Commission and should be taken exclusively if it is in the (broader) EU public interest.

investigative efforts into some sort of observable decisional output and thereby justify past activities (especially in abandoned cases), is an important factor that affects incentives structures.[111] Officials should know that their investigation efforts are relevant to their "constituents" and are recognised as helping guide market players, even if those efforts do not result in "classic" enforcement measures. Most importantly, increasing the status of closures may provide the opportunity for the Commission to engage in more investigations, knowing that there is an escape valve available where the reasons for continuing an investigation are not warranted. Extracting value from closed investigation should therefore help to address concerns of confirmation, hindsight or policy bias.[112]

As set out above, by being more transparent in the closure of formal investigations the Commission can provide guidance to market players, sharpen its policy and enforcement toolkit while increase efficiency. It can do so simply by being more consistent and more fulsome in the form and content of its public statements, while exploring whether a revised Regulation 1/2003 can enhance these benefits and fill the gap in the existing guidance processes.

ANNEX: METHODOLOGY EXPLAINED

We relied mainly the DG Competition online database to identify those formally initiated Article 102 (ex. Article 82) investigations, subsequently dropped by the Commission.[113] Using a date range from the entry into force of Regulation 1/2003, on 1 May 2004, to 1 May 2024. We found 21 such cases (see below).

We also looked at the total number of Article 102 investigations starting and ending within the date range, including all abandoned cases, those closed with a finding of violation (Article 7) or commitment (Article 9) decision. We excluded investigations which had not been concluded by the end of the date range, even if no subsequent actions had been taken by the Commission. Our research found that the Commission formally initiated a total of 98 Article 102 investigations during that date range. However, for the reasons given below, we accept that there has to be a margin of error, notably where the Commission's database does not provide definitive information.

---

111 Wils notes that the European Court's decision in Tele2 Polska (Case C-375/09), which prevents NCAs from crafting negative decisions, created a risk that national officials' incentive structures are altered, as they may no longer be able to justify past activities. He noted, for example, that "officials might now be increasingly reluctant to "take" complex, difficult cases, including cases which raise novel questions of law, whose outcome is uncertain. NCAs might in turn prioritize their enforcement resources on "easy" cases, regardless of the public interest". See Wouter P.J. Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, 27 WORLD COMPETITION 201 (2004).

112 See also Ian S. Forrester, Due process in Europe Competition Cases, 34 EUROPEAN L. REV. 817 (2009).

113 See European Commission Competition case search database at ec.europa.eu/competition/elojade/isef/.

Isolating exact figures is not straight forward. Up to the year 2009, abuse of dominance cases were formally initiated at the same time that an SO was issued, so that the search results for "initiation of proceedings" or "opening of proceedings" do not necessarily capture such cases. In addition, a number of Article 102 cases were initiated through unannounced onsite inspections ("dawn raids"), that would not necessarily have been publicly announced.

Furthermore, it is also not unusual for initiation of proceedings to refer to concerns of abuse under both Article 102 and Article 101, until the Commission has more clarity about the scope of its investigation. A good example of such a "hybrid" case is the *Honeywell and DuPont (Refrigerants) (AT.39822)* case, initiated under both Articles 101 and 102, with an SO focused on Article 101 concerns [114] and the investigation being subsequently closed on 25 October 2017 without a finding. Such cases, including those where the Commission drops the Article 102 portion but proceeds with the Article 101 portion to full decision, are excluded from our data set. In addition, the 2017 *Amazon/Apple (audiobooks)* investigation, under Article 101 and 102, saw an informal remedy that the Commission welcomed, implying the closure of the case (which was confirmed by an Audible spokesperson), yet as the Commission's database indicates neither an initiation nor closure of proceedings this case was excluded from our dataset.

To complicate matters some investigations, such the M*obile Roaming* or the *Internet Connectivity Services* investigations, consist of a number of of individual investigations. Some cases, such as the *IBM (Mainframes)* case, relate to two separate grounds of investigations (own initiative investigation and complainant-led) leading to separate results, yet these are listed in the database as one. However, acknowledging this and for simplicity, we follow the DG COMP database numbering. Yet we also needed to make adjustments, as the DG COMP database can be incomplete or inconsistent in the information provided. For example, the database does not include an entry for the *Velux* investigation, yet procedural information on *Velux* can be found in a subsequent rejection of a related complaint and in court rulings. Nor does the database include an entry for the *AstraZeneca/Nycomed* investigation, yet there is an official Commission pre-release announcing closure of that investigation. For these reasons, we include those two cases in the dataset.

As the Commission is only required to provide limited information on closing of investigations, the information available is often sparse. Research was therefore supplemented by public sources on individual cases, in order to garner further details of the Commission's thinking into why formal investigations may be closed, abandoned, withdrawn, terminated or dropped.

[114] Press Release: Commission sends Statement of Objections to Honeywell and DuPont regarding cooperation on new refrigerant used in car air conditioning systems, 21 October 2014. See https://ec.europa.eu/commission/presscorner/detail/en/ip_14_1186.

Article 102 investigations formally initiated by the Commission and closed without any finding under Article 7 or 9 of Regulation 1/2003, between 1 May 2004 and 1 May 2024

Case	Initiated	Closed
Philips CD- Disc Patent Licensing (AT.38767)	2003	9.2.2006
UK Roaming (Vodafone UK, O2 UK) (AT.38097)	22.7.2004	18.7.2007
Germany Roaming (Vodafone Germany and T-Mobile Germany) (AT.38098)	10.02.2005	18.07.2007
Velux (AT.39451)	30.4.2007	January 2009
Qualcomm (AT.39247)	01.10.2007	24.11.2009
Microsoft (ECIS) (AT.39294)	21.12.2007	25.06.2010
Long term electricity contracts in Belgium (Electrabel & EdF) (AT.39387)	26.07.2007	03.02.2011
Boehringer (AT.39246)	29.03.2007	06.07.2011
IBM (Mainframes) (AT.39511)	26.7.2010	30.09.2011
AstraZeneca & Nycomed [No file number located]	3.11.2010	1.3.2012
GlaxoSmithKline & Synthon (AT.38574)	2005	2.03.2012
P&I Clubs (AT.39741)	26.8.2010	27.7.2012
The Mathworks (AT.39840)	29.02.2012	02.09.2014
Internet connectivity services (AT.39951)	09.07.2013	3.10.2014
Telefonica (part of Internet connectivity services investigation) (AT.40092)	09.07.2013	3.10.2014
France Telecom (part of Internet connectivity services investigation) (AT.40090)	09.07.2013	3.10.2014
Deutsche Telekom (part of Internet connectivity services investigation) (AT.40089)	09.07.2013	3.10.2014
Credit Default Swaps – Clearing (AT.39730)	20.4.2011	4.12.2015
LNG Supply (AT.40416)	21.06.2018	04.08.2022
České dráhy (Czech Rail) (AT.40156)	16.10.2016	29.09.2022
Google Open Bidding (AT.40774)	11.03.2022	19.12.2022

Article 101 investigations formally initiated by the Commission and closed without any finding under Article 7 or 9 of Regulation 1/2003, between 1 May 2004 and 1 May 2024

Case	Initiated	Closed
Insurance and re-insurance in the aviation sector (Zeplin) (AT.40501)		9.2.2006
International airline passenger services (AT.39419)		10.11.2011
Marchés de l'eau et de l'assainissement en France (AT.39756)		30.04.2013
Cement and related products (AT.39520)		14.08.2015
Bioethanol (AT.40244)		10.04.2017
Exhaust systems (AT.40170)		28.04.2017
Sports media rights (AT.40544)		22.09.2020
Insurance and re-insurance in the aviation sector (Zeplin) (AT.40501)		18.11.2020
Refrigerants (AT.39822)		25.10.2017
Wood pulp (AT.40763)		15.06.2023
Construction of networks and treatment plants for drinking and wastewater (AT.40581)		15.06.2023
High-end fashion industry (AT.40797)		02.04.2024
Brussels Airlines/TAP Air Portugal code share agreement (AT.39860)		
Airline ticket distribution (Sabre) (AT.40618)		
A*irline ticket distribution (Amadeus)* (AT.40617)		
Baltic Max Feeder scheme (AT.39699)		
European Payments Council (EPC) online payments (AT.39876)		
iTunes (AT.39154)		