Policy Report
Priority setting in EU and national competition law enforcement[1]

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EXECUTIVE SUMMARY

Effective enforcement of competition law is vital for the functioning of competitive markets. As competition authorities are constrained by scarce financial and human resources, it is neither possible, nor desirable, to enforce every possible competition law infringement. Hence, the power to set priorities – that is the competition authorities' legal competence and *de facto* ability to choose which cases to pursue and which to disregard - is a precondition for preserving society's resources to tackle the most harmful infringements.

Credible enforcement priorities build independent and accountable competition authorities. A degree of discretion to set enforcement priorities, therefore, serves a double purpose of effective allocation of scarce resources and the concretisation of the open-ended and broadly formulated competition law norms. At the same time, the exercise of such discretion is subject to external and internal constraints and influenced by substantive, procedural, and institutional rules guiding the authorities' course of action.

Despite its importance, the theoretical foundations and practices underlying the setting of enforcement priorities in competition law are vastly unexplored in Europe: they remain largely overlooked by policy and decision-makers; there is no clear set of definitions or criteria to guide prioritisation; and effective accountability mechanisms to evaluate and reform prioritisation choices remain underdeveloped or are completely absent.

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In particular, the question of priority setting had limited relevance in the enforcement of EU competition law for many years. Under the pre-2004 notification based and centralised regime, the Commission had devoted much of its resources to respond to notifications, leaving only limited room to devise its enforcement strategy. Even after the shift to the decentralised enforcement regime, which enabled the Commission and national competition authorities to set their priorities, there are few EU law provisions to guide the priority setting principles and practices of the competition authorities. This remains valid even after the implementation period of the ECN+ Directive has ended.

This Policy Report fills this gap by offering four main contributions: first, it introduces a new theoretical framework, developed by the authors to establish a common typology to guide the analysis of priority setting rules and practices. More specifically, the Report identifies seven different legal, economic, and political aspects of setting priorities for competition law enforcement, each of which may be subject to external or internal control. Those seven aspects include: (i) setting an enforcement agenda; (ii) legal (*de jure*) competence to prioritise; (iii) (*de facto*) ability to prioritise; (iv) procedural rules framing the prioritisation decision; (v) substantive criteria that determine which cases are priority and which are not; (vi) alternative enforcement mechanisms: instrument and outcome discretion; and (vii) impact assessment.

Second, the Report provides a systematic and comprehensive mapping of the procedural and substantive priority setting rules and practices guiding the competition authorities of the 27 EU Member States, the United Kingdom, and the EU Commission according to the proposed typology. Pointing to a great divergence in this regard, it demonstrates that each competition authority's priority setting powers and practices are deeply embedded in, and directly shaped by its respective administrative law systems and constitutional and political order. Accordingly, the Report classifies the competition authorities into four representative models on the basis of their specific rules and practices to set their enforcement priorities.

Third, the priority setting rules and practices are evaluated against a set of administrative law principles of good governance, including effectiveness, efficiency, independence, transparency, and accountability. The Report demonstrates that each of the four representative models entail a different trade-off between those administrative law principles.

Fourth, based on the above, the Report provides policy options (a “checklist”) on how legislators and CAs could review and if necessary, reform their existing practices or design new priority setting rules and practices to meet the administrative law principles of good governance. Notably, the Report does not intend to provide a single best model for priority setting. Rather, it offers competition authorities legal and practical solutions on how to design and apply priority setting in a way that fits their respective legal framework and mandate, thereby offering country-specific trade-offs.

TABLE OF CONTENTS

1. INTRODUCTION

Effective enforcement of competition law is vital for the functioning of competitive markets. All around the world, competition authorities are responsible for enforcing the competition rules, be it of their national competition laws or supranational (EU) competition laws. However, competition authorities ("CAs") are often constrained by scarce human, financial, and technical resources and thus cannot investigate and enforce all possible infringements of the competition rules. Therefore, they must decide which cases to pursue and which to disregard, and which enforcement instruments they will use.

Setting clear priorities is an essential precondition for reserving society's resources to the most harmful law infringements. Credible enforcement priorities shape independent and accountable CAs, which form fundamental building blocks of our economies. CAs are expected to prioritise matters that are serious and important and inform the public about the choices they make. In this way, CAs account for their performance and increase their output legitimacy.

For this purpose, CAs enjoy various degrees of administrative discretion to set their enforcement priorities. These discretionary powers are structured and constrained by respective national legal norms, principles, and values that administrative action is expected to concretise.[2] More importantly, the exercise of their administrative discretion to set priorities must be subject to the rule of law and to fundamental administrative law principles of good governance, such as effectiveness, efficiency, independence, accountability, and transparency.

Despite the significance of prioritisation decisions, they have been largely overlooked by both EU and national policy makers. At the EU level, the question of what types of competition law infringements the European Commission ("Commission") and the Member States' national competition authorities ("NCAs") should prioritise and how such priority-setting decisions should take place have not been addressed in detail. The scope, substance, and procedure for setting enforcement priorities have not been fully harmonised by the EU legislator. Likewise, the EU Courts have, so far, only addressed questions relating to the EU Commission's rights and duties when rejecting complaints.[3] At the level of the Member

[2] (Mendes 2017), 444.

[3] Case T-24/90 *Automec Srl v Commission of the European Communities* ECLI:EU:T:1992:97, para 85. Also see para 77, holding that "[i]n that connection, it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law where those priorities have not been

States, priority setting is often overlooked by national decision-makers and legislators. As a result, there is a considerable divergence in the priority setting powers and practices of the Commission and the various NCAs.

The lack of guidance concerning priority setting in the EU has partially been remedied by the adoption of the ECN+ Directive in early 2019.[4] Article 4(5) of the Directive imposes an obligation on the Member States to empower their respective CAs to set their enforcement priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU. In particular, Article 4(5) empowers NCAs who are obliged to consider formal complaints under national law to reject complaints that they do not consider to be an enforcement priority.[5] This new legal obligation has, however, not been complemented by hard or soft EU law to guide Member States or NCAs on setting the enforcement priorities.

Moreover, questions on priority setting have scarcely been investigated by legal scholars and the epistemic community. There are a handful of studies that have analysed the effectiveness of priority setting practices of CAs or offered a theoretical/doctrinal framework to guide the enforcement.[6] International organisations, such as the International Competition Network ("ICN"),[7] the United Nations Conference on Trade and Development ("UNCTAD"),[8] and the Organisation for Economic Co-operation and Development ("OECD")[9] have discussed priority setting in the context of institutional design and the European Competition Network ("ECN") drafted a report on the basis of country-specific

determined by the legislature is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law".

[4] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L11 ("ECN+ Directive").

[5] Also see Recital 23.

[6] Some notable exceptions are Petit, who comprehensively studied the scope and limits of NCAs' administrative discretion (Petit 2010); Ottow's work evaluating how priority setting is part of good agency principles, and linking to measures of independence and accountability (Ottow 2015); Jennings, who examined the social-historical and political factors that influence priority setting and priority setting in developing and developed countries (Jennings 2015); Wils, discussed discretion and prioritisation in public antitrust enforcement, in particular in the enforcement of EU competition law (Wils 2011) and the impact of the ECN+ Directive proposal on prioritisation (Wils 2017); Kovacic, analysing case selection and prioritisation as a crucial part of CAs' effectiveness (Kovacic 2018); Kreifels, assessing the Commission's priority setting practice when rejecting complaints (Kreifels 2019); and Brook, investigating how the Commission's and NCAs' priority setting practices have shifted following the modernisation of EU competition law and how this has affected the role of public policy considerations in substantive law (Brook 2020).

[7] (ICN 2010a).

[8] (UNCTAD 2013).

[9] (OECD 2013a).

analysis.[10] Yet, none of these studies address the question of priority setting as a stand-alone problem area. The theoretical foundations and the legal, political, and economic implications of prioritisation choices, as well as the CAs' actual practices, are vastly unexplored.

This Policy Report fills this gap, by offering four main contributions: First, the Report introduces a newly developed theoretical framework to guide the analysis of priority setting rules and practices. It defines seven different aspects of priority setting and provides a first typology of the legal, economic, and political aspects of setting the enforcement priorities.

Second, the Report offers a comprehensive mapping of the procedural and substantive priority setting rules and practices of the 27 NCAs, the UK CMA, and the EU Commission when applying Articles 101 and 102 TFEU and their equivalents in national law. The collection of the data was conducted on the basis of desk research of the publicly available legislation and policy documents in each jurisdiction, further complemented by answers received through a written questionnaire completed by officials of the CAs and discussed during semi-structured interviews with those officials.[11]

The cut-off date for the collection of the data is December 2020, that also marks the end of the implementation period of the ECN+ Directive. Since this date, some Member States – such as Croatia, Spain, and Slovakia – have introduced major reforms of their priority setting rules and practices, which are not reflected in this study. However, most Member States have implemented no or minor revisions relevant to their priority setting rules and practices as a result of the Directive.

Third, the identified priority setting rules and practices are evaluated against a set of benchmarks drafted on the basis of good governance principles, including effectiveness, efficiency, independence, accountability, and transparency.

Fourth, based on the above, the Report provides policy options on how legislators and CAs could review and if necessary, reform their existing rules and practices to meet the administrative law principles of good governance. It should be noted from the outset, that this Report does *not* intend to provide a single best model for priority setting. As each CA's priority setting powers and practices are deeply embedded in, and directly shaped by their respective administrative law systems and constitutional and political orders, such a single

[10] (ECN 2012b).

[11] The empirical study was undertaken pursuant to the approval of the Ethics Committee of the University of Amsterdam. Questionnaires and/or interviews have been conducted with staff members of all 29 CAs, with the exception of Bulgaria in the period 2019-2021.

solution is unfeasible. Instead, this Report aims to offer CAs various policy options that can guide them in deciding how to design and apply priority setting in a way that fits their respective legal framework and mandate.

The remainder of this Report is structured as follows. Section 2. defines what priority setting is and introduces the importance of setting enforcement priorities as a necessary precondition for an effective allocation of scarce resources and as a form of norm concretisation. Sections 3. and 4. map the development of the Commission's and NCAs' priority setting rules and practices, in particular, in the context of the decentralised enforcement regime of EU competition law and the reform brought about by the ECN+ Directive. Section 5. outlines the five administrative law principles of good governance, used in this Report as benchmarks for evaluating priority setting rules and practices. Section 6. presents a first typology of priority setting - developed by the authors by making use of insights from interdisciplinary studies in the field of criminology and political science – and the empirical findings on the CAs' priority setting practices in each one of those aspects. Finally, Section 7. concludes by presenting the normative implications of the empirical analysis and by offering policy options.

2. WHAT IS PRIORITY SETTING?

The power to set priorities refers to the legal competence and *de facto* ability of CAs to choose which cases to pursue and which to disregard. Such powers are subject to external and internal constraints and influenced by substantive, procedural, and institutional rules guiding the CA's course of action. Administrative authorities generally use priority criteria as filters to help them translate strategic objectives into operational priorities. CAs cannot do everything: it is neither possible, nor desirable, to enforce every breach of (competition) law.

The CAs' prioritisation choices are an expression of the CAs' *administrative discretion*.[12] Enforcement discretion is a manifestation of delegating law enforcement to specialised authorities that are independent of both the government and elected politicians.[13] CAs offer the necessary expertise to enforce the highly technical field of competition law by providing continuity and efficiency. Administrative discretion entails that the authorities have

[12] (Mendes 2017), 444.
[13] (Petit 2010), 45.

the freedom to choose their own course of action.[14] It is the ability to make choices that best fulfils the public interest that the law protects.[15]

Conferring CAs a degree of discretion to select their enforcement priorities serves the double purpose of effective allocation of scarce resources and norm concretisation:

First, with limited financial, technical, and human resources CAs have to make choices which cases they can effectively investigate. Prioritisation frees the CAs from the need to respond to all possible infringements of the law and afford them the capacity to effectively focus on matters of genuine economic and doctrinal importance. Priority setting, therefore, is a basic tool allowing public administrative authorities to rationalise resource allocation and to optimally deal with resource limitations. Through prioritisation, CAs direct resources, time, and energy to those projects that are deemed most relevant to achieving the objectives laid out in their strategic plans.[16]

Notably, effective deterrence does not require that every infringement be investigated and sanctioned by a CA. Rather, an effective enforcement regime must ensure that the expected fine the undertakings receive exceeds the expected gain.[17] To this end, prioritisation affords the authorities the capacity to focus on matters influencing behaviour that poses the greatest threat to the process of competition and to consumers.[18] In parallel, CAs can decide not to pursue other potential infringements, such as those that have insignificant effects on markets and consumers, but that would otherwise require significant investigatory resources. Potential infringers are likely to be deterred by other enforcement mechanisms such as private enforcement or an investigation by a different regulatory authority.

Second, Articles 101 and 102 TFEU, like most competition provisions in other jurisdictions, are drafted broadly and based on general norms. Through setting priorities, the CAs concretise the norms of the competition law prohibitions by choosing the focus of the enforcement. Hence, setting enforcement priorities is not merely a matter of procedure but also involves setting substantive criteria of what *is* and what *is not* a priority.

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[14] (Black 2001), 1.
[15] (Mendes 2017), 463.
[16] (ICN 2010a), 29; Commission, 'Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' 2017/0063 (COD) ("ECN+ Directive Proposal"), Preamble 17. Also see (ICN 2009), 6; (Blanco and De Pablo 2012), 60.
[17] (Petit 2010), 47; (Brook 2020), 484.
[18] (ECN 2013), para 1.

An effective setting of enforcement priorities is, hence, essential for developing and clarifying the scope of the competition rules. Prioritisation controls the development of case law, and the application of other policy tools and, as such, strengthens agency performance and improves public policy. A prominent example is found in the Commission's Article 102 TFEU enforcement priorities Guidance, declaring that although both exclusionary and exploitative conduct falls within the scope of this Article, the Commission will only focus on the former, which is typically more harmful to consumers.[19]

However, unrestrained enforcement discretion can also lead to risks. Unconstrained discretion to set priorities, for example, may foster the adoption of sub-optimal or politically-strategic choices which do not serve the public interest.[20] Accordingly, the nature and limits of CAs' enforcement discretion are structured and controlled *externally*, by EU and national constitutional and administrative laws as well as *internally*, by soft law principles or other informal guidance developed by the CAs.[21] Hence, the exercise of prioritisation discretion is subject to government oversight and political and judicial control to ensure their compliance with the administrative law principles of good governance.[22] As the Report will explicate below, the CAs' priority setting competences, practices, and the respective external and internal controls through which CAs are held accountable for their prioritisation choices greatly diverge. Before moving to explore these differences, the following two sections summarise the rules governing the setting of enforcement priorities in the EU. Section 3. focuses on the rules governing the Commission's practice and Section 4. on the CAs of the EU Member States.

3. THE COMMISSION'S PRIORITY SETTING POWERS

For many years, the question of priority setting had limited relevance in EU competition law. Under the enforcement regime of Regulation 17/62, all potentially anti-competitive agreements had to be notified to the Directorate-General for Competition of the Commission ("DG COMP") prior to their implementation. The Commission had to address all notified agreements, either by issuing a formal decision or by means of comfort letters. The

[19] Communication from the Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' OJ C 45 ("Commission's Article 102 TFEU Guidance"), para 7-8.
[20] See, for example, (Brook 2020), 454-456.
[21] The notions of external and internal controls are explained in Section 6. below.
[22] (Scholten, Maggetti, and Versluis 2017), 355.

Commission had enjoyed the discretion to choose between those two legal instruments. It also had the discretion to reject complaints and direct its enforcement efforts to *ex-officio* investigations. Nevertheless, the burden of responding to all notifications had consumed much of the Commission's resources, leaving only limited room to devise its enforcement strategy.

Over the years, the EU Courts have developed a number of principles governing the Commission's priority setting and its margin of discretion when it decides to pursue an investigation or disregard a matter. Originally laid down in *Automec II,*[23] these principles are currently enshrined in the 2004 Notice on the Handling of Complaints and still guide the Commission's priority setting when enforcing Articles 101 and 102 TFEU.[24]

These principles can be summarised through three main points. First, when deciding whether to pursue or reject specific complaints, the Commission is entitled to classify them according to different degrees of priority based on the Union interest.

Second, the right to file a complaint does not include the right to obtain a decision from the Commission, but the Commission is under an obligation to examine carefully the factual and legal particulars brought to its notice by the complainant.[25]

Third, the Commission's action is not removed from the scope of judicial review. Article 296 TFEU obliges the Commission to provide a statement of reasons and thus the Commission cannot merely refer to the Union interest in the abstract.[26] The Commission must set out the legal and factual considerations that led it to conclude that there was insufficient Union interest to justify investigating the case.[27]

Regulation 1/2003, which has abolished the notification obligation in favour of the self-assessment regime, has intended to enhance the Commission's priority setting powers as to allow it to "refocus its activities on the most serious infringements of Community law in cases with a Community interest".[28] It aimed to reduce the number of complaints addressed to the Commission in cases where NCAs could effectively deal with them. Delegation of enforcement powers to national authorities was envisioned to tackle the slow progress of

[23] *Automec II* (n 3).
[24] Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004, C 101 ("Commission Notice on the Handling of Complaints"), para 44.
[25] *Automec II* (n 3), paras 79,83-84.
[26] *Ibid*, para 85.
[27] *Ibid*.
[28] White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ C123 (1999), para 13.

decentralised enforcement by NCAs as well as complainants' reluctance to resort to national courts.[29] At the same time, on the assumption that they cannot investigate all complaints, CAs were to set priorities and reject complaints accordingly.[30]

4. NCAs' PRIORITISATION POWERS

In parallel to the Commission's new powers, the decentralisation has also entrusted NCAs with powers to fully enforce Articles 101 and 102 TFEU side by side to their national competition laws.[31] Priority setting takes different forms at the national level, depending on the CAs' specific mandate and powers laid down in their respective national administrative and constitutional laws. Pursuant to the EU principle of procedural autonomy, the enforcement of the EU competition rules by the NCAs is governed by their national laws. The powers, scope, and limits for setting the priorities, therefore, is a matter of national (administrative) law.

Until recently, there were no provisions of EU law to guide the priority setting principles and practices of the NCAs. This has resulted in a considerable divergence. While some Member States have mostly converged to the Commission's wide priority setting powers under Regulation 1/2003's regime, others have limited their NCAs' priority setting powers. As the lack of a uniform set of priority setting principles has begun to raise concerns, the Commission and NCAs started to recognise the need for minimum harmonisation of the NCAs' priority setting powers under the decentralised enforcement regime.[32]

The need for greater uniformity was endorsed within the cooperation mechanism of the ECN. The ECN's 2013 Recommendation on the Power to Set Priorities had explained that "[f]urther convergence on the ability of the Authorities to set priorities would help enhance effectiveness and efficiency in the enforcement (…) by allowing them to focus their action on the most serious infringements/sectors and areas most in need of their action, thereby increasing the impact of their action for the benefit of consumers".[33] The Commission

[29] *Ibid*, para 36-39. Commission Notice on the Handling of Complaints, para 21, 24-25. The Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State CA is dealing or has dealt with the case.
[30] Commission Notice on the Handling of Complaints, para 8.
[31] (Brook 2020), 451-454.
[32] In 2009, for example, the Communication from the Commission to the European Parliament and the Council, 'Report on the functioning of Regulation 1/2003' COM (2009) 206, para 33 shortly pointed out that the NCAs priority setting powers were an important aspect of divergence that "may merit further examination and reflection".
[33] (ECN 2013), para 4.

had supported this approach, noting a year later that "[i]t is necessary to ensure that all NCAs have a complete set of powers at their disposal", including "the right of NCAs to set enforcement priorities".[34]

These soft law approaches have been codified in 2019 by the ECN+ Directive that forms the first step in formally harmonising the NCAs' priority setting powers. The Directive, nevertheless, only addresses the following three aspects of priority-setting:

First, Article 4(5) of the Directive lays down an obligation for Member States to enable their NCAs to have the power to set their priorities for carrying out tasks related to enforcing Articles 101 and 102 TFEU.[35] This provision has only limited effect, as also prior to the Directive all of the NCAs were already competent to open *ex-officio* investigations.[36]

Second, the Directive states that NCAs should have the power to reject complaints on priority grounds. Accordingly, a duty to investigate all complaints, the so-called "legality principle", (elaborated in Section 6.2. below), would no longer be compatible with EU law.

Third, the Directive declares that NCAs should set their enforcement priorities independently, i.e., without taking instructions from public or private entities.[37] The Directive adds, that this "is without prejudice to the right of a government of a Member State to issue to national administrative competition authorities general policy rules or priority guidelines" as long as they are not related to a specific Article 101 or 102 TFEU enforcement proceeding.[38] Despite this first step of empowering NCAs to set their enforcement priorities, the ECN+ Directive leaves core aspects of prioritisation unaffected. Most importantly, it leaves the procedural framework and the substantive criteria of priority setting unaddressed.

Section 6. below demonstrates that even after the adoption of the Directive there is little guidance directing the NCAs' prioritisation policies and practices. Before turning to discuss such empirical findings, the next section will present the underlying principles that guide administrative authorities' and thus CAs' enforcement efforts.

5. PRINCIPLES FOR GOOD PRIORITY SETTING

[34] Communication from the Commission to the European Parliament and the Council, 'Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives' COM(2014) 453, para 34.
[35] ECN+ Directive (2019), Preamble 23 and Article 4(5).
[36] (Idot 2015), 51; (Wils 2017), 56.
[37] ECN+ Directive (2019), Preamble 23; ECN+ Directive Proposal (2017), Explanatory Memorandum, 2.
[38] ECN+ Directive (2019), Preamble 23.

Priority setting, as a manifestation of administrative discretion, forms a core value of good administration. As such, it must comply with the normative criteria laid down in EU[39] and national administrative laws, such as proportionality, fairness, predictability, and the duty to provide justification.[40] These general administrative law rules are further enriched by good governance principles formulated by national[41] or supranational (OECD,[42] IMF[43]) organisations.

For the purpose of this Report, we draw on these normative criteria and apply five key principles for evaluating the CAs' priority setting practices: the principle of effectiveness, efficiency, independence, transparency, and accountability. There are important trade-offs between these criteria and making specific choices remains a highly complex exercise, which depends on and varies according to national administrative and constitutional rules. We discuss these trade-offs in Section 7. below.

5.1. ***Effectiveness***

In order to be effective, competition law enforcement must be able to meet the goals set by legislation for oversight and allow the interventions needed to achieve these goals.[44] Unlike sector regulators who often have a clearly defined scope of intervention (e.g., telecommunications or energy), CAs need to assess the behaviour and interactions of a large range of economic agents across most sectors of the economy.[45]

In the context of EU competition law, Articles 101 and 102 TFEU have as their objective the protection of the competitive process.[46] Regulation 1/2003, which was adopted to implement these provisions, aims to ensure that Articles 101 and 102 TFEU are applied effectively throughout the Union so that competition in the internal market is not distorted. [47] In order to achieve this objective, the CAs should be able to prioritise their enforcement

[39] The right to a good administration is laid down in Article 41 of the EU Charter of Fundamental Rights. EU case law has defined the core of this principle as the duty of careful and impartial examination of the factual and legal circumstances of each case. See (Mendes 2009), 3.
[40] (Ottow 2015), 54.
[41] (Mendes 2009), 12.
[42] (OECD 2012).
[43] (Elliott et al. 2012).
[44] (Ottow 2015), 87, argues that the structure of the supervisory space has a major influence on the overall effectiveness of oversight. It requires a sufficiently clear mandate, optimal agency design, clear and efficient decision-making, appeal procedures and effective tools and instruments.
[45] (Jennings 2015), 29.
[46] Regulation 1/2003, Preamble 9. Also see Case C-8/08 T-Mobile Netherlands and Others ECLI:EU:C:2009:343, para 38.
[47] ECN+ Directive, Preamble 3.

efforts and focus on preventing and bringing anti-competitive behaviour that distorts competition to an end.

As already mentioned in Section 2. above, effective enforcement is essential for both ensuring deterrence and concretising the vague provisions of competition law. Accordingly, an effective prioritisation must strive to achieve a balanced portfolio of cases. It should involve a mix of cases with various levels of complexity, size, and risk, balance between enforcing "classic" infringements and pursuing landmark cases that set a precedent and have a much greater multiplier effect,[48] and between cases carrying short- and long-term effects.[49]

Limiting the CAs' priority setting powers, therefore, may prevent them from attaining a balanced portfolio of cases. Yet, also unrestricted priority setting powers may lead to ineffective results if they are not exercised to pursue matters of economic and doctrinal importance. Effective priority setting decisions should be grounded on data and evidence, and the outcomes of such choices should be evaluated regularly through impact assessments.[50]

5.2. ***Efficiency***

As already mentioned above, CAs have scarce financial, technical, and human resources and they cannot do everything. Priority setting, therefore, is a basic tool for public administrative authorities to rationalise resource allocation and to optimally deal with resource constraints. As acknowledged by the ECN+ Directive, priority setting forms a crucial part of law enforcement, which is intrinsically linked to their institutional performance and their ability to take action.[51]

5.3. ***Independence***

The independence of administrative agencies has been traditionally justified by the technical complexity of regulated markets and thus the need for expert decision-making.[52] The concept of independence builds on the regulator's legal and functional separation from market parties and its independence from the legislative and executive powers. Although they are neither elected by the people, nor directly managed by elected officials, independent administrative

[48] ECN+ Directive Impact assessment, part I, 46.
[49] (Ottow 2015), 160.
[50] *Ibid*, 151, 156.
[51] ECN+ Directive, Preamble 5, 23.
[52] (Maher 2009), 419; (Barkow 2010), 26; (Barkow 2016), 1147; (Guidi 2016), 96.

authorities are expected to increase the credibility of political commitments and safeguard against frequent changes in policy based on frequent alternation in government.[53]

In particular, the ability to set priorities requires a degree of independence from undue political influence that could distort the priorities of a CA and impair its impartiality and effectiveness. Setting a clear mission and priorities, built around a transparent strategy, enhances credibility, both within and outside the CA.[54] Independence is necessary to ensure that a CA will focus on strategically important sectors and cases from a competition law perspective and will not investigate a large number of complaints that are not aligned with the CA's priorities. Moreover, some suggest that to safeguard independence, each CA's litigation budget must be separated from its normal budget. Otherwise, an authority may be inclined to choose "easy" cases, where litigation risks are low.[55]

The degree of formal (*de jure*) and informal (*de facto*) independence varies considerably across the CAs reflecting the structure of the national economy as well as other institutional factors.[56] The ECN+ Directive has identified a minimum degree of priority setting powers as an important instrument for guaranteeing the NCAs' independence from external intervention and political pressure from governments and other private or public entities. It seeks to ensure that the CAs will not lack adequate human and financial resources or operational independence in order to prevent them from taking any action or limiting their enforcement actions.[57]

5.4. ***Transparency***

Competition law procedures must be fair, accessible, and open. The decisions and interventions of CAs must be based on sound justification, as well as on legal and economic reasoning. This requirement of transparency encompasses the sub-values of procedural accountability, predictability, and participation.

First, transparent and fair procedures are not only fundamental standards CAs must comply with, but also form a crucial mechanism of *procedural accountability*.[58] By following transparent procedural rules, CAs provide sufficient evidence and grounds to justify their

[53] (Majone 1996); (Thatcher and Sweet 2002), 2.
[54] (Ottow 2015), 76.
[55] *Ibid*, 160
[56] (Guidi 2016), 93-135.
[57] ECN+ Directive (2019), Preamble 3, 5, 8, 17-22. Also see (Brook 2022).
[58] (Ogus 1994), 111.

interventions and the effectiveness of their actions.[59] Clearly formulated, communicated, and published priorities are, therefore, important indicators of legitimate law enforcement.[60] Publishing the CAs' agendas, substantive criteria for prioritisation, and practices informs the public on how the authorities intend to implement their legal and political mandate. This facilitates legislative oversight of the CA and public debate about its policy making, while increasing the transparency of the CAs' operation.

Second, transparency in setting the enforcement priorities increases *predictability*, allowing undertakings to better assess whether a certain behaviour is likely to result in intervention by the CAs.[61]

Third, transparency also encompasses *participation* and consultation as a tool for gathering information and for providing stakeholders with the opportunity to give their input to the decision-making process in order to underpin the justification for the choices CAs make and to balance different interests against each other fairly and proportionally.[62] For example, participation in the form of submitting complaints can demonstrate the CA's openness, prevent capture, and require the CA to reflect on its own position by taking account of its critics, and thus possibly also preventing mismanagement or misuse of powers. At the same time, there are important trade-offs and potential conflicts between pursuing the aims of participation (i.e., dealing with all or most complaints) on the one hand, and expert and efficient decision-making on the other.

5.5. ***Accountability***

Independence is relative. While many countries render a degree of discretion to governmental bodies for setting priorities, many agree that such discretion should be controlled.[63] CAs are subject to government oversight and their decisions are subject to judicial review by the courts. Moreover, they are expected to be accountable not only to their political institutions and judiciary but also to the undertakings they supervise as well as to citizens.[64] Accordingly,

[59] (Ottow 2015), 85-86, 156.
[60] (Black 2008), 147.
[61] Commission's Article 102 TFEU Guidance, para 2.
[62] (Ottow 2015), 86.
[63] (Davis 1969), 194-195; (Black 2001), 2.
[64] (Kovacic 2018), 15.

while a CA may enjoy autonomy in devising its enforcement priorities, it remains accountable for its action and use of its scarce resources.[65]

In many cases, transparency is a prerequisite for accountability. In particular, the EU Treaty and national administrative laws oblige the CAs to state reasons for their decisions and set out the legal and factual considerations that led them to conclude that there were insufficient grounds to justify investigating the case.[66] Such transparency obligations require the CAs to explain the decisions taken or give the public access to the authorities' decision records.

6. TYPOLOGY AND EMPIRICAL FINDINGS

In the following sub-sections, the Report introduces a new theoretical framework that guides the analysis of priority setting rules and practices. It defines seven different aspects of priority setting: (i) setting an enforcement agenda; (ii) legal (*de jure*) competence to prioritise; (iii) (*de facto*) ability to prioritise; (iv) procedural rules framing the prioritisation decisions; (v) substantive criteria that determine which cases are priority and which are not; (vi) alternative enforcement mechanisms: instrument and outcome discretion; and (vii) impact assessment.

The rules governing each of the seven aspects, and hence – the discretion left to each CA to prioritise – can be constrained by external and/or internal controls. *External controls* can be defined as rules imposed on the CA by supranational organisations such as the EU institutions, national governments, national parliaments or the judiciary that limit or influence the setting of the enforcement priorities. *Internal controls* take various forms and are applied by the CA itself in order to legitimise the prioritisation choices made.[67] Despite the lack of formal legal status, internal controls may have an important effect on the prioritisation discretion, especially when only limited external controls are available. In turn, as internal controls may have the effects of law, they need to be legitimate and comply with principles of democratic accountability and be visible through the conceptual frame of transparency. They should be used to expose the decision markers' black box to ensure scrutiny and accountability.[68]

[65] (UNCTAD 2013), 9.
[66] *Automec II*. (n 3), para 85.
[67] Those constraints are internal, in the sense that oversight from the legislator or judiciary does not affect the choices. See (Miller and Wright 2008), 129.
[68] *Ibid*, 133; (Davis 1969), 97-98.

Figure 1 provides an overview of the seven aspects of priority setting, and the way they are governed by external and internal controls. As elaborated in the following sub-sections, in some countries certain aspects of prioritisation are only subject to external control while in other countries they are only bound by internal controls. Some jurisdictions do not prescribe any oversight by either external or internal controls.

Figure 1: typology of priority setting

Stage	Aspects of priority setting	External controls (legislator; judiciary)	Internal controls (CA)
Pre-decision	Agenda-setting	X	X
	Competence to prioritise (*de jure*)	X	
	Ability to prioritise (*de facto*)	X	
Decision stage	Procedure to prioritise	X	X
	Substantive criteria	X	X
	Alternative mechanisms: instrument and outcome discretion	X	X
Post-decision	Impact assessment	X	X

6.1. ***Agenda setting***

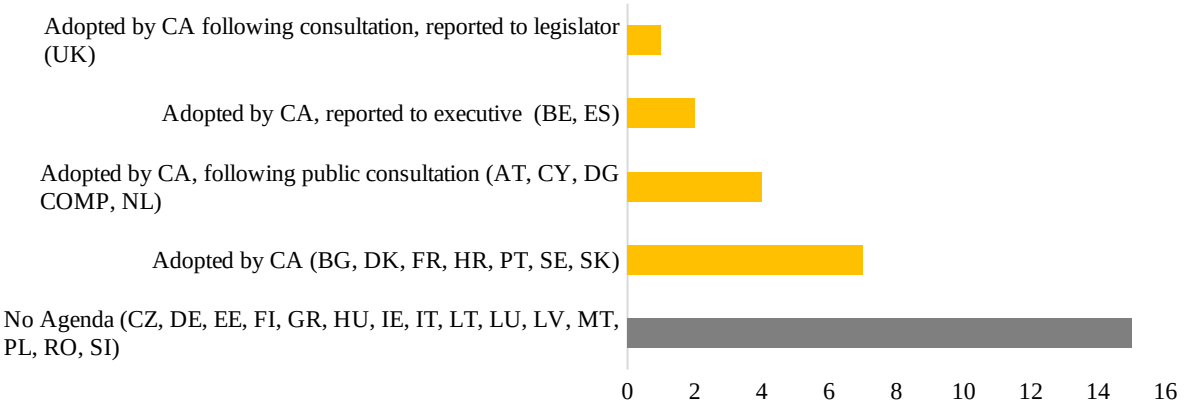
A list of *ex-ante* periodic enforcement agenda, publicly declaring that certain sectors (e.g., digital markets, construction industry) or practices (e.g., bid-rigging, cartels) are an enforcement priority. Also known as "annual/action/work plan" (HR, ES, UK, SE), "enforcement priorities" (AT, BG, CY, DK), or "strategy statement" (IE, HU).

An enforcement agenda allows a CA to focus its enforcement efforts on specific sectors or practices. However, many CAs are not guided by an enforcement agenda. The empirical findings reveal that only 48% of the CAs have adopted enforcement agendas. Setting such an agenda can increase the efficiency and effectiveness of the CAs' enforcement by directing their resources, time, and energy to those projects that are deemed most relevant to achieving

their objectives.[69] Moreover, an agenda can help to guide the authorities' staff members in deciding whether to open an *ex-officio* investigation or to reject a complaint, and what enforcement tools to use in such cases.[70]

Setting an agenda requires the CAs to pronounce in advance their enforcement strategies, explaining how they plan to make use of their enforcement powers and budget. Therefore, it can strengthen the accountability and predictability of the CAs' enforcement and foster a proactive enforcement strategy, instead of following a reactive strategy that mainly focuses on responding to complaints or leniency applications.

Figure 2: agenda setting



The empirical findings show that all the enforcement agendas that were adopted by CAs take the form of internal controls. Setting an agenda by CAs helps to enhance their independence and legitimacy by allowing them, as expert-driven independent decision-making bodies, to select their strategies freed from political and external intervention. Although all the agendas were adopted by the CAs as a form of internal control, the ECN+ Directive does not stand in the way of adopting agendas by government and parliaments as a means of external control.[71]

One can differentiate between various types of agendas, on the basis of whether the CAs have legal obligation to adopt an agenda, the requirements of reporting set by national law and whether stakeholder consultation is available in the process of agenda setting.

[69] (ICN 2010a), 29; ECN+ Directive Proposal (2017), Preamble 17. Also see (ICN 2009), 6; (Blanco and De Pablo 2012), 60.
[70] See Sections 6.5. and 6.6. below.
[71] ECN+ Directive, Preamble 23, acknowledges the power of the NCAs to set their enforcement priorities without prejudice to the rights of national governments to issue "general policy rules of priority guidelines", in so far as they are not related to specific enforcement proceedings. Also see Article 4(2)(b).

According to those characteristics, the Member States can be categorised into the following groups:

- *Legal obligation to adopt an agenda*: 28% of the CAs are obliged to adopt an agenda as a matter of national law (including AT, BE, CY, ES, GR, IE, PT, UK). In **Portugal**, national competition law entrusts the CA to identify specific types of practices as priorities, but explicitly prohibits identifying specific sectors as a matter of priority.[72] Although some other CAs are not required by law to adopt an agenda, they have done so on their own initiative.
- *Reporting requirements set by national law*: some of the authorities that are obliged to adopt an agenda as a matter of national law are also required to report their agendas to their national parliaments (3%) or governments (7%). While this may constrain their independence, reporting requirements can increase the accountability and legitimacy of their enforcement choices.
- *Stakeholder consultation*: 17% of the CAs adopt an agenda following a public consultation. In the **Netherlands**, the CA emphasises the importance of such consultation: it actively invites stakeholders to comment on its draft agenda, *via* roundtable meetings, a dedicated online website, and social media. In addition to contributing to the quality of the agenda and increasing its effectiveness, third parties' participation in agenda setting also promotes the accountability and transparency of the CA's enforcement.

While agenda setting mostly carries a positive effect on transparency as a principle of good governance, an authority must also ensure that its agenda does not hinder the effectiveness of the enforcement. In fact, the impact of agenda setting on deterrence is disputed. On the one hand, it can increase deterrence among undertakings operating in the identified sectors or practices. On the other hand, publishing an enforcement agenda could reduce deterrence by allowing undertakings involved in the targeted practices or sectors an opportunity to conceal evidence of infringements.[73] It is for this reason, that even though the CA in **Greece** has adopted an internal priority document on its own initiative since 2020, these priorities are not published so that they do not hinder the effectiveness of the CA's enforcement.

[72] Portuguese Competition Law, Article 7(3).
[73] (Jenny 2016), 52.

Moreover, an enforcement agenda that is not updated periodically or focuses on a limited number of sectors and practices also risks reducing deterrence. Therefore, if CAs adopt an enforcement agenda, there should be periodic review and revision of their agendas so as to ensure that certain practices and sectors that have a serious impact on markets do not consistently remain untouched by the enforcement. An occasional departure from the enforcement agenda may foster a degree of flexibility necessary to allow the authority to be responsive to new and topical competition law concerns.

6.2. ***Legal competence to prioritise (de jure)***

The CA's legal competence (based on law) to choose which cases to pursue and which to disregard.

Until recently, EU law did not address the question of whether an NCA had the legal competence to set priorities, that is to choose which cases to pursue and which to disregard.[74] Consequently, the scope and competences of their prioritisation powers were mostly defined by national law. The ECN+ Directive is the first piece of EU legislation to address these questions by linking the *de jure* competence to the principles of efficiency, effectiveness, and the independence of NCAs.[75] It requires NCAs to have the power to set priorities and to reject complaints on priority grounds. However, it neither indicates the degree of such priority setting discretion nor creates uniform prioritisation competences across the NCAs.

The CAs' *de jure* competence needs to be differentiated according to the rules that apply to the handling of complaints and the rules guiding their competence to set priorities in other types of proceedings (e.g., *ex-officio*, responding to notifications, references, or leniency applications). Three categories emerge from the empirical findings: CAs who are bound by the opportunity principle (high degree of discretion), CAs who are subject to a public interest test (medium degree of discretion), and those who must comply with the legality principle (low degree of discretion):

- *Opportunity principle:* CAs that are bound by the opportunity principle enjoy a full *de jure* competence to choose which cases to pursue and which ones to disregard. This principle allows CAs to direct scarce resources to combat the most harmful behaviours and thus focuses on efficiency, and guarantees CA's expertise to authorise selective

[74] See Sections 3. and 4 above.
[75] ECN+ Directive (2019), Preamble 23 and Article 4(5).

enforcement that maximises deterrence. **DG COMP** is a prominent example. Similarly, in **Lithuania** and **Portugal**, national competition laws stipulate that the CAs should refuse to open an investigation when a possible infringement does not correspond to their enforcement priorities.[76] In **Greece** and **Latvia**, the law lays down a point-based system to select cases for prioritisation.[77]

- *Public interest test:* Some CAs who generally enjoy the discretion to prioritise their cases, are obliged to take up a case that is in the public interest. Different rules may apply in this regard: in the **Czech Republic**, the CA may sustain from initiating proceedings *ex officio* after a preliminary examination of the matter reveals that there is "no public interest in its proceedings due to the low level of detrimental effects of the conduct on competition".[78] In **Croatia**, the CA shall adopt a reasoned decision that there is no public interest in pursuing a case if it finds that the potential infringement that was brought to it by an initiative does not significantly distort competition.[79] In **Hungary**, the CA shall initiate an investigation if the alleged infringement falls within its competence, it is likely to constitute an infringement, and if "the protection of the public interest necessitates the conducting of a competition supervision proceeding".[80] In **Austria**, the Cartel Act provides that the Cartel Court is obliged to find that an infringement existed even if it was brought to an end "if there is a legitimate interest in doing so".[81]
- *Legality principle*: other CAs do not have the competence to set priorities and must initiate an investigation into any potential infringement that comes to their attention.[82] The choice to limit the CAs' *de jure* competence and to adhere to the legality principle is typically justified by safeguarding the principle of equality before the law, and for upholding the concept of general deterrence.[83] Prior to the end of the transposition period of the ECN+ Directive, for example, the CA in **France** was obliged to open a formal investigation unless a case was deemed inadmissible (e.g., falls outside the CA's competence) or manifestly lacks supporting evidence.[84] Similarly, in **Spain**, the CA had

[76] Lithuanian Competition Law, Article 24(4)(8); Portuguese Competition Law, Article 7.
[77] Greek Competition Law, Article 14(2)(xiv)(aa) and (Hellenic Competition Commission 2019), Article 14(2)(xv); (Competition Council of the Republic of Latvia 2015).
[78] Czech Republic Competition Law, Article 21(2).
[79] Croatian Competition Law, Articles 37-38.
[80] Hungarian Competition Law, Article 67(2).
[81] Austrian Cartel Act, Article 28.
[82] We have included in this category also CAs which are competent to reject a case if there is no indication or sufficient evidence to support findings of a violation.
[83] (Tak 1986), 30
[84] French Commercial Code, Articles 462-5 and 462-6.

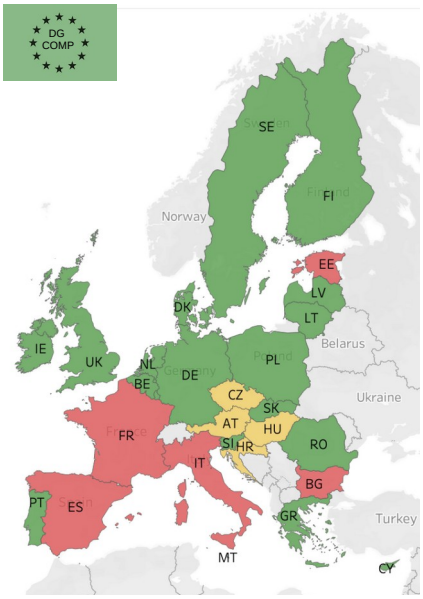
to institute proceedings "when rational signs were observed of the existence of prohibited conduct".[85] In **Bulgaria**, the law defined the grounds for refusing to open a case in which prioritisation choices were not included.[86] While such systems put great emphasis on the accountability and transparency of the CAs' procedure, they are no longer compatible with the ECN+ Directive, and are being modified.

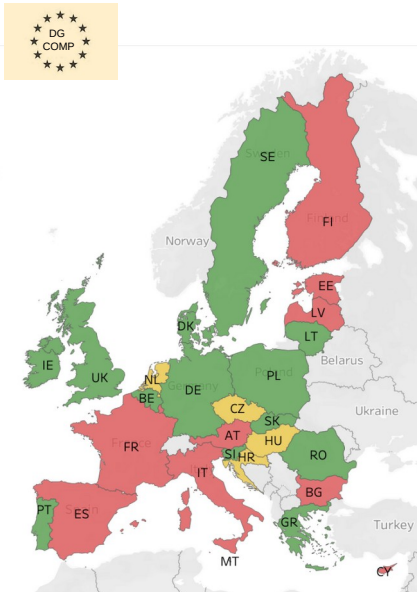
Some CAs that generally enjoy a wide discretion to set priorities under the opportunity principle or the public interest test are less independent when assessing *complaints*. Such an approach limits the scope of their *de jure* competence in favour of enabling third parties' participation, and at the same time, it balances the efficiency and effectiveness requirements with safeguards of accountability and transparency.

In **Finland**, for example, while the CA enjoys a wide discretion to prioritise, it will reject a complaint when the "matter is manifestly unjustified".[87] In **Cyprus**, while the competition law gives the CA the power to "push-back in the line" a complaint on priority grounds, the CA cannot reject it altogether.[88] In the **Netherlands,** the CA's competence to set priorities is constrained by a "duty to enforce" (*beginselplicht tot handhaving*), a general obligation requiring administrative authorities to take enforcement action against all potential law violations except for special circumstances. The Dutch Council of State explained that even though administrative authorities are free to set enforcement priorities, this may not lead to a situation where they never enforce the law in cases of low priority, except for exceptional circumstances.[89] The Dutch courts have interpreted this duty as imposing an increased requirement on the Dutch CA to motivate its decisions when it rejects complaints and does not pursue a case.[90] A more constrained example is present in the **UK**, where the CA is bound to assess "super-complaints", namely a complaint launched by a designated consumer body.[91]

Figure 3: de jure competence

[85] Spanish Competition Law, Article 49(1).
[86] Bulgarian Competition Law, Articles 38 and 41.
[87] Finnish Competition Law, Article 32(3).
[88] Cyprus Competition Law, Article 35.
[89] ECLI**:**NL:RVS:2014:1982.
[90] ECLI:NL:CBB:2010:BN4700, para 7.2.5.1; ECLI:NL:RBROT:2019:7189.
[91] UK Enterprise Act, Section 11.





As will be elaborated in the next section, the legal competence to set priorities also influences the CA's *de facto* ability to set its priorities and the scope for third parties' participation. An obligation to investigate a potential infringement under the legality principle, may leave an authority only limited resources to pursue other cases.

6.3. ***Ability to set priorities (de facto)***

The practical (human, financial, and technical resources), institutional capacity, or organisational capabilities that affect a CA's ability to effectively pursue its enforcement priorities.

Effective law enforcement does not only depend on the CA's *de jure* competence to choose its enforcement targets, but also on practical and institutional factors that may hamper the authority's ability to enforce certain infringements. The CA's *de facto* competence to set the enforcement priorities is also essential for ensuring each CA's independence, as it allows it to decide on the allocation of the budget for the purpose of carrying out its duties, without prejudice to national budgetary rules and procedures.[92]

Our interviews with staff members of the CAs have identified a number of hurdles concerning their ability to pursue certain infringements:

[92] ECN+ Directive, Preamble 25.

- *Legal framework:* the CA's ability to effectively set priorities depends on the CA's legal competence and on the available procedural tools. An obligation to respond to notifications, complaints, or referrals may leave the CA only limited capacity to autonomously seek to reveal anti-competitive practices by means of *ex-officio* proceedings and to issue infringement decisions. Moreover, the availability of certain procedural tools such as whistleblowing, leniency applications, and settlements may also induce a CA to favour a reactive prioritisation strategy.[93]

  Six CAs have reported that they mostly rely on such reactive detection policies to instigate investigations, and that they do not hold sufficient resources allowing them to open *ex-officio* investigations. This is a source of concern. Such a strategy may hamper the deterrent effect of the CA's enforcement.

- *Resources*: CAs must secure sufficient funding to guarantee the quality and integrity of their decision-making process, including for acquiring expert reports.[94] The **UK** CA emphasises that prioritisation decisions are not taken in isolation, and that it is always "a relative question which necessitates considerations of the CMA's overall portfolio and resources available at that time".[95]

  The ECN+ Directive confirmed the strong link between the budget available to a CA and its level of enforcement.[96] Yet, the budget of the CAs varies considerably,[97] even in between countries having similar GDP.[98] Therefore, those budgets are not easily comparable given the different sizes of countries and the differing competences CAs have.

  While the ECN+ Directive acknowledges the importance of adequate human, financial, technical, and technological resources, it does not set a quantitative minimum standard with which the Member States must comply with. It merely imposes a general obligation to ensure that NCAs have the necessary resources to perform their tasks noting that

[93] (Petit 2010), 46; (ICN 2010b), 6-20; (Ortiz Blanco and Lamadrid de Pablo 2012), 60-61; (OECD 2013b), 12. Also see Regulation 1/2003, Articles 5 and 7.
[94] ECN+ Directive Impact assessment, part I, 27; (Jenny 2016), 38.
[95] (CMA 2014), para 2.2
[96] ECN+ Directive Impact assessment, part I, 28.
[97] (Jenny 2016), 39 found that the CAs in the UK, Sweden, Germany, France, Italy, and Spain have budget of over US$20 Million; in Norway, Denmark, and Greece of between US$10-15 million; in Hungary, Poland, Ireland, Portugal, Belgium, the Czech Republic between US$5-10 million; in Cyprus, Austria, the Slovak Republic, Lithuania and Latvia between US$1-3 million; and in Slovenia, Malta, Estonia budget lower than US$1 million.
[98] ECN+ Directive Impact assessment, part I, 27-30.

different means of financing might be considered.[99] The Directive introduces a system of national external controls, by requiring NCAs to submit periodic reports on their activities and resources to national governments or parliamentary bodies. Aiming to foster accountability and transparency, those publicly available reports should include information about the resources that were allocated in the relevant year, and any changes compared to previous years.[100]

- *Organisation and structure of CA*: the institutional design of the CAs can influence their capacity to prioritise. For example, setting priorities may be more complex in a multi-function authority than in an authority with the single function of enforcing competition law. A multi-function authority must allocate resources across a broader range of activities, some of which may involve obligatory (e.g. regulatory) tasks, while others may be more discretionary but nevertheless important. This may be viewed as both an opportunity and a challenge; while specialisation may bring greater focus to the CA's work, a combination of functions may bring economies of scope and greater resource flexibility in workload.[101] This will be further examined in Section 6.6. below.

  Some CAs have directly addressed the question of how to allocate their enforcement resources between their competition law and other law enforcement mandates. The CA in **Hungary,** for example, consciously allocates resources within its CA across its various fields of competences by using a "resource-impact analysis".[102] According to the decisional practice of the Hungarian Competition Council, the public interest requires the Hungarian CA to use its resources in an efficient way for detecting and investigating practices illustrating distortive effects on competition.[103] The ECN+ Directive also addresses these concerns, noting that in the event that the duties and powers of NCAs under national law are extended, Member States should ensure that NCAs have sufficient resources to perform those tasks effectively.[104]
- *CA Staff's skills and competences:* the staff members of CAs must hold the necessary expertise to effectively gather information and enforce a wide array of infringements in various sectors. The expertise of the available staff may directly influence the decision

[99] ECN+ Directive, Preamble 26. Also see ECN+ Directive Impact assessment, part I, 46.
[100] ECN+ Directive, Article 5(4) and Preamble 27.
[101] (OECD 2015).
[102] (GVH 2013), 3.4.
[103] Hungarian CA Decision Vj-154/2001/17 *Tamburello Kereskedelmi és Szolgáltató Kft* (2001).
[104] ECN+ Directive, Preamble 24.

whether to pursue or disregard a case. In **Hungary**, for example, the CA declares that it takes into account its internal know-how in assessing whether pursuing a case will allow for swift and effective enforcement.[105] The ECN+ Directive includes a general statement on staff's skills and competences, noting that NCAs "should have sufficient resources, in terms of qualified staff able to conduct proficient legal and economic assessments, financial means, technical and technological expertise and equipment including adequate information technology tools, to ensure they are able to perform their tasks effectively".[106]

The limited consideration of the *de facto* ability to prioritise in EU law is also reflected in the General Court's judgment in *Si.mobil*. In this case the Court examined whether the **Commission** must take into account considerations related to *de facto* ability to prioritise when deciding to reject a complaint on the basis of Article 13 of Regulation 1/2003, on the grounds that an NCA is dealing with the case. The Court rejected this argument, noting that the Commission is not required to verify whether the CA concerned has the institutional, financial, and/or technical means to effectively handle the case.[107] This means that while NCAs may formally be competent to pursue such complaints, they may nevertheless lack the *de facto* ability to do so.

6.4. ***Procedure to prioritise***

The procedural requirements and the institutional setting for deciding whether to pursue or not to pursue a specific case.

In addition to the legal competence to prioritise and to the practical ability to do so, the prioritisation discretion of the CAs also varies according to differences in national procedural laws. This section examines four aspects related to the procedure that impact prioritisation choices: the type of prioritisation decisions (in terms of reasoning, publication, and time limits); the possibility for judicial review of prioritisation decisions; the participation of third parties; and the institutional setting of the priority decision-making.

[105] (GVH 2013), 4.
[106] ECN+ Directive, Article 5(1). Also see Preambles 5 and 8 and Article 1.
[107] Case T-201/11 *Si.mobil v. the Commission*, ECLI:EU:T:2014:1096, para 28-78. Moreover, the Court noted that from the available evidence, it did not appear that the relevant NCA had suffered from any institutional shortcomings.

6.4.1. Type of prioritisation decisions, reasoning, publication, and time limits

There is great divergence across CAs according to the procedures they follow when they adopt a prioritisation decision in a specific case. **Figure 4** shows the differences among CAs as to the type of decision they take (i.e., formal/informal), whether they provide reasoning, and the publication requirements. It demonstrates that one group of CAs is bound by external controls, requiring them to adopt a *formal, reasoned,* and *published* decision explaining why they decided to disregard a specific case. Although such controls may decrease the efficiency of the CA's enforcement, they certainly make the prioritisation decision more transparent and hold CAs accountable. Other CAs' prioritisation decisions are *informal, unreasoned,* and are *not published*.[108] As detailed by Figure 4, a number of other CAs are bound by a mix of these external controls.

Figure 4: type of decision, reasoning, and publication

	Reasoned & published	Unreasoned & unpublished	Reasoned & partly or fully unpublished
Formal decision	BG; EE; ES; HR; LT	FR*	CY*; CZ; GR; IT; NL;[109] RO*
Informal decision		AT*; BE*; DE*; DK; DG COMP*; FI*; HU*; IE; LU*; LV; PL*; PT*; SE*; SI*; SK; MT*; UK[110]	NL*

Note: * Those CAs adhere to different rules when rejecting complaints

Figure 4 also demonstrates that in some competition law systems, decisions rejecting *complaints* are subject to different procedural rules, which often impose stricter external controls. In some jurisdictions, CAs that are not required to publish and reason their prioritisation decisions, may be required to do so when they assess complaints.[111] While such CAs are not required to investigate each complaint, they do have a duty to examine all

[108] Some of the CAs that take informal, unreasoned, and not published prioritisation decisions, still keep an internal record that reasons and justifies their decision and may notify the complainants.
[109] There are two types of decisions concerning case initiation in the Netherlands. One is originating from so-called enforcement request (*handhavingsverzoek,* defined in Article 1:3 (3) of Dutch Administrative Act) and as such they will always take the form of formal decisions that are reasoned and partly or fully published. The other type of decision concerns informal signals that are only internally reasoned and not published.
[110] With the exception of the rejection of super-complaints. See the text accompanying footnote 91 above.
[111] (ECN 2012a), 71-72.

matters of fact and law brought to their attention and provide reasoning for their decisions.[112] This rule applies, for example, with respect to the **Commission**.[113]

The importance of the type of decision taken by CAs is also reflected by the presence or absence of judicial review: formal, published and reasoned decisions are generally open to judicial review. Judicial review is further discussed below in the next sub-section.

Some national systems, such as those of **Hungary**, **Poland** and **Latvia** have reformed their case selection procedure in the past years by introducing a distinction between formal and informal complaints to reduce the workload of the authorities and to allow them to better prioritise important cases.[114] According to such a procedure, the CAs must, on the one hand, respond to all *formal complaints*, namely those which are submitted in a pre-defined manner providing a complete set of information concerning the alleged infringement (e.g., relevant market, conduct complained of, identification of the undertakings) as well as the affected interests of the potential complainants. On the other hand, those CAs have the discretion to decide whether they respond to *informal complaints*. Informal complaints may be based on anonymous and unstructured submission and have no or limited participation rights. These developments show a re-balancing between efficient priority setting and transparency, whereby the CA can be held accountable through a formal and reasoned decision that can be reviewed by a court.

The empirical findings also point to the important implications of national rules setting time limits for adopting prioritisation decisions. While most CAs are not bound by such time limits, 11 CAs are subject to external or self-imposed internal time constraints

[112] With respect to the Commission's duty, see *Automec II.* (n 3); Case C-450/98P *IECC v Commission* ECLI:EU:C:2001:276, para 57; Case T-355/13 *easyJet Airline v Commission* ECLI:EU:T:2015:36, para 18; Case T-480/15 *Agria Polska and Others v Commission* ECLI:EU:T:2017:339, para 36. Also see (Wils 2017), 38.

[113] Regulation 1/2003, Recital 18 and Preamble 13; Commission Regulation 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, O.J. 2004 L 123 ("Regulation 773/2004 relating to the Conduct of Proceedings"), Article 7; Commission Notice on the Handling of Complaints, para 41; Case C-210/81 *Demo-Studio Schmidt v Commission* ECLI:EU:C:1983:277, para 19; *Automec II.* (n 3), para 77, 85; C-119/97P *Ufex and Others v Commission* ECLI:EU:C:1999:116, para 86; Case T-219/99 *British Airways v Commission* ECLI:EU:T:2003:343, para 68. Also see (Cseres and Mendes 2014), 491-494.

[114] Reform of Hungarian Public Administrative Procedure Act 2005; In Poland, the current procedural set-up of competition proceedings dates back to 16 February 2007, when a new Act on Competition and Consumer Protection was introduced. Amongst other changes to the procedure, the Act revolutionised the participatory status of complainants and third parties in competition proceedings in front of the Polish CA by eliminating the obligation of the Polish CA to initiate proceedings based upon a complaint as well as limiting third parties' access to participation in the proceedings; Amendments to the Latvian Competition Law entered into force in 2016, also see (Competition Council of the Republic of Latvia 2017), 14.

(DK; EE; GR, HR; HU; IT; LT; NL; PL; RO; SK).[115] The duration and scope of such limits vary considerably. In **Croatia, Hungary**, and **Romania** the national competition laws provide that if the CAs decide to reject a complaint they must do so within 6 months (Croatia), 2 months (Hungary), or 60 working days (Romania).[116] In **Slovakia,** the CA must inform the complainant within two months, but it may still reject the complaint later.[117]

In **Greece**, the CA must evaluate and rank low priority complaints as soon as possible, which was interpreted by the CA as setting an indicative time limit of 4 months.[118] Furthermore, if the CA decides to reject a complaint it must do so within 5 months if the complaint does not fall within its competences and 9 months if the complaint is manifestly unfounded.[119] In **Lithuania**, the CA must decide whether to open an investigation within 30 days of the submission of the application.[120] The CA in **Poland** is bound by a one month time limit that can be extended at the CA's discretion subject to accountability rules against abuse.[121]

In **Italy**, the CA's resolution to initiate an investigation into possible infringements of the competition rules must indicate the deadline for completing the proceedings, which are determined by the CA on a case-by-case basis.[122] Italian case law has linked this obligation to the right to a fair trial as laid down in Article 6 of the European Convention on Human Rights and to the right to good administration in Article 41 of the EU Charter of Fundamental Rights. Accordingly, failure to start an investigation within this reasonable time period may lead to the annulment of the CA's decision.[123] In **Denmark**, the CA has committed to complete its investigation into complaints where it is obvious that no further investigation is necessary within two weeks. No time limit is set for other cases that require further investigation.[124]

[115] In Spain, while there are no fixed deadlines to decide whether a case should not be pursued for priority reasons, if an investigation is formally commenced and it is later decided that the case should be closed for priority reasons, that decision would have to be adopted within 18 months since opening the procedure.
[116] Croatian Competition Law, Article 38(5) and (6); Hungarian Competition Law, Article 43H(7); Romanian Competition Law, Article 41(2).
[117] Slovakian Competition Law, Article 19(2).
[118] Greek Competition Law, Article 36(5), as interpreted by (Hellenic Competition Commission 2019), para 26.
[119] Greek Competition Law, Article 37(1) and (2).
[120] Lithuanian Competition Law, Article 24(3).
[121] Polish Administrative Procedural Code, Articles 35 (1) (3a) and 36 (1). Handling of a complaint is regulated by Part I, Chapter 7.
[122] Italian Competition Law, Section 14(1); Italian Presidential Decree no. 217/98 Regulation of investigation procedures pursuant to section 10(5) of the Competition and Fair Trading Act, Section 6(3).
[123] See, for example, TAR Lazio, I, n. 08779, 27.07.2020, 20-22 (under appeal).
[124] (KFaT 2017), 4.

Although setting a time limit can increase the efficiency of the prioritisation process, a too long limit can be a legally anchored way to delay it. At the same time, a too short time limit may lead CAs to refrain from investigating complex cases, and thus influence the type of cases being pursued.

6.4.2. Judicial review of prioritisation decisions

Judicial review is a fundamental way to control the administrative discretion CAs have when they take prioritisation decisions. However, as illustrated by **Figure 5**, the level of judicial protection of potentially affected parties' interests - and thus the availability and degree of judicial review - differs significantly across jurisdictions.

Figure 5: availability and degree of judicial review

	Only complaints	All prioritisation decisions	Indirect challenges of prioritisation decisions
Judicial review	BE, CY, DE, DG COMP, EE, ES, FI, FR, GR, HU, LU, NL PT, RO, MT	BG, IT, LT	CZ, HR, SK, MT[125]
No judicial review	AT, DK, IE, LV, PL,[126] SE, SI, UK		

These differences are directly related to the type of prioritisation decisions, the reasoning and publication requirements presented in the previous sub-section, i.e., whether the prioritisation is a formal or informal decision and whether the CA has to give reasons for its decision and make the decision public. As a general rule and as illustrated in **Figure 4**, formal, published, and reasoned decisions are susceptible to judicial review while informal, unreasoned, and unpublished decisions are not. This latter category is, in fact, unreviewable by national courts and as such raises concerns of transparency in the priority decision-making and may call for greater application of other forms of accountability mechanisms.[127] Even where judicial review is available, it often remains unclear exactly which parts of the priority setting process can be reviewed by national courts.

[125] While only complaints are subject to judicial review in Malta, other types of proceedings may be challenged on the basis of the Code of Organisation and Public Procedure, Article 496.
[126] While prioritisation decisions are not subject to judicial review, the CA's rejection letter of a complaint can be appealed to the Polish Prime Minister. Polish Administrative Procedural Code, Part VIII, Chapter 2 regulate the oversight rules in administrative procedure (right to submit a grievance).
[127] (Barkow 2016), 1130.

Judicial review of prioritisation decisions is not limited to direct appeals against such decisions. **Figure 5** demonstrates that some national legal systems provide alternative, indirect ways to challenge the prioritisation decision of the CA. In **Croatia**, while the procedural order to start a proceeding by the CA cannot be appealed, the procedural order (conclusion) might be challenged by filing a complaint for an administrative dispute at the High Administrative Court.[128] In **Slovakia**, a decision on termination of the proceedings may not be appealed, but a person who feels her rights had been breached may submit a complaint to the prosecutor's office. The prosecutor does not have the power to order the CA to investigate the case, but can launch a proceeding in court.[129] In the **Czech Republic**, an action against the CA for inaction can be launched if it fails to pursue a case.[130]

Judicial review is also interlinked with the model of intra-agency structure integrating or separating decision-making and investigation and prioritisation as discussed below in Section 6.4.4.. Competition law enforcement in which a court is involved in the primary decision-making (AT, DK, SE, FI) has been argued to have the advantage of increased legitimacy through due process procedures, which may, in turn, reduce the relevance of judicial review of prioritisation decisions. The judicial decision-making process is often more transparent than the administrative process, and thus more credible.

The empirical findings show that even though there are a number of national courts who exercise control over the procedure and competence to prioritise, in practice such decisions are subject to no or very limited judicial scrutiny. There is currently very little case law on judicial review of prioritisation decisions. One exception is the **Netherlands**, where the courts have specifically obliged the CA to apply a high standard of reasoning when it rejects a complaint on priority setting grounds. The courts emphasised that because complainants have insufficient possibilities to protect themselves through legal means against violations of competition law, the discretion of the CA whether to investigate a complaint is limited by the principles of good administration. When the CA rejects a complaint, it cannot do so by just referring to its general priority policy but is obliged to explain how the criteria of prioritisation are applied in the specific case. This requires substantive assessment of the case at hand. From this case law it follows that although the Dutch CA may set its priorities

[128] Croatian Competition Law, Article 67(3).
[129] Czech Act No. 153/2001 Coll on Prosecution.
[130] Czech Code Act No. 150/2002 Coll on Administrative Justice, Article 4.

and refuse to take on a case, it must reason this sufficiently and argue why further investigation is not required.[131]

6.4.3. Participation of third parties, complainants and consumer organisations

The participation of third parties in competition law proceedings is grounded on the instrumental function of their intervention. Third parties may increase the effectiveness of the enforcement by providing valuable information that can be relevant for the accurate representation of the factual situation, enabling the CA to reach a materially correct decision in correspondence with the truth of the facts. They facilitate the administrative procedure by rendering the enforcement more accurate and they help to concretise the public interest.[132]

The **Commission**'s experience in non-cartel cases for which leniency is not available illustrates the importance of complaints to expose anti-competitive conduct. Such complaints, for example, have instigated investigations into infringements of Article 102 TFEU in *Microsoft*[133] and *Telefonica*,[134] and provided valuable information concerning possible Article 101 TFEU infringements in the field of financial services in the context of the Single European Payments Area.[135]

Despite the importance of such complaints, CAs often enjoy discretion to grant or deny access for complainants to the procedure.[136] For example, in proceedings in front of the

[131] Judgment of the Trade and Industry Appeals Tribunal (CBb) of 20 August 2010, *LJN* BN4700, para 7.2.5.1; Rechtbank Rotterdam, ECLI:NL:RBROT:2019:7189.
[132] (Mendes 2011), 32.
[133] A complaint by Sun Microsystems, initiated the proceeding leading to the Commission Decision in *Microsoft* (COMP/C-3/37.792); A complaint by ECIS, initiated the proceeding leading to the Commission Decision in *Microsoft* (COMP/C-3/39.294).
[134] Commission Decision in *Wanadoo Espana vs. Telefonica* (COMP/38.784).
[135] Commission Press Release IP/09/468 of 24 March 2009.
[136] (Cseres and Mendes 2014).

Commission[137] and the CAs of **France**,[138] **Germany,**[139] **Greece**,[140] **Italy,**[141] the **Netherlands**,[142] and the **UK**,[143] any person who submits a written and reasoned complaint can obtain formal complainant status if their interests are likely to be materially affected by the conduct that is the subject matter of the proceedings. However, the CAs have the power to limit access to the proceedings by determining whether the complaint is a priority.

The participation of third parties and complainants also carries an important task in enhancing the transparency and accountability of competition law procedures and functions as an important external control of prioritisation. Third parties' participation complements judicial review as third parties are given the opportunity to challenge the CA's potential decision and invoke errors that could ultimately lead to the illegality of the final decision.[144] As such, it enhances the legitimacy of the procedure and the priority decision-making.

Although third parties' participation can enhance the transparency and accountability of the CAs' decision-making, their competence to *reject* complaints on priority grounds is also a vital element of their priority setting powers. As was elaborated in section 6.2 above, the ECN+ Directive requires NCAs not only to have the power to positively set their priorities, but also the power to reject complaints on priority grounds. Even though the Directive will allegedly result in further harmonisation of NCAs' ability to reject low-priority complaints, its main goal is to compel NCAs to rationalise resource allocation to optimally deal with financial and human resources constraints. The Directive neither harmonises the exact criteria for rejecting and handling of complaints, nor does it set rules on the rationale or function of third parties' and complainants' participation. Such criteria are left to be defined

[137] Regulation 1/2003, Articles 27(1) and (3); Regulation 773/2004 relating to the Conduct of Proceedings, Articles 6 and 13.
[138] French Commercial Code, Article L462-8.
[139] German Competition Law, Article 54.
[140] Regulation for the Internal Operation and Management of the HCC (Joint Ministerial Decision, 117/16.1.2013), Article 23. For complainants' participation rights, see Greek Competition Law, Articles 15 (9) and 36; Regulation for the Internal Operation and Management of the HCC (Joint Ministerial Decision, 117/16.1.2013); HCC Decision No. 546/2012 on the format, type and means of submission of complaints and HCC Notice on the handling of complaints (2012). For third parties' participation, see Greek Competition Law, Article 23.
[141] Presidential Decree no. 217/98, Section 6(4) states that complainants should have a direct, immediate, and present interest in the investigation.
[142] Dutch General Administrative Act, Article 1:2 (1), states that "[i]nterested party' means a person whose interest is directly affected by an order".
[143] (CMA 2019), para 12.6.
[144] (Mendes 2011), 33.

by national laws, which as Figure 4 above demonstrated, varies considerably across jurisdictions.

Those national differences manifest in the legal status each competition law system awards to third parties. Whereas the predominantly instrumental rationale of the intervention of third parties in the competition law procedures is well established in relation to complainants,[145] there are diverging national approaches on whether this applies also to other interested third parties.

A first group of CAs, does not distinguish between complainants and other third parties (e.g., **Italy, Lithuania**, and the **UK)**, or distinguish between them while providing them essentially the same procedural rights (e.g., **Belgium**, **Croatia**, **Czech Republic**, **Finland**, and **Spain**). The relative broad participation afforded to third parties in this procedural model serves as a high level of external control over the CA's priority setting practices.

A second group of CAs mostly recognises a specific legal status and procedural rights for *formal* complainants – that is, those who comply with the formal requirements of submitting the information to the CA (e.g., **the Commission,**[146] **Cyprus**, **France**, and **Germany**). This procedural model entails a medium level of external control over the CAs' priority setting practices as only the specific group of formal complainants enjoy access and certain procedural rights.

Finally, a third group of CAs does not award special status or rights to complainants or third parties at all. Accordingly, in **Austria**, **Denmark**, **Ireland**, **Poland**, **Malta**, and **Slovenia** third parties do not exercise any external control over the priority setting practices of the CA.

The above national approaches to third parties' participation are summarised in **Figure 6.**

Figure 6: Participation rights of third parties and complainants

	Relevant third parties (including complainants): high	Rights only for formal complainants: Medium external	No formal status for third parties and/or complainant: no

[145] See, among others, Regulation 773/2004 relating to the Conduct of Proceedings, Recital 5; Commission Notice on the Handling of Complaints, para 3; (Cseres and Mendes 2014), 484.

[146] Uniquely, in the Commission's procedures, complainants are defined as holders of a "legitimate interest" and third parties are holders of "sufficient interest". However, third parties, who are the holders of sufficient interest only have a right to be informed in writing of the nature and subject matter of the procedure to the extent that they apply to be heard. See Regulation 773/2004, Article 13.

	external control	control	external control
Full rights as rights of defence	ES, IT	EE, NL	AT, DK, IE, MT, PL, SE,[147] SI
Access to the full file	CZ, FI, LU, PT		
Access to a non-confidential version of the statement of objections	BE, BG, GR, HU, HR, LV, LT, RO, UK	CY, DE, DG COMP, FR	
Participation in hearing, express opinions, and submit written observations	BG, CY, LU, LT, GR, SK, UK	DE, DG COMP, FR, RO	
Participation in hearing	BE, LV		
Express an opinion and submit written observations	BE, CZ, FI, HR, HU, PT		

The empirical study has also investigated the position of consumers, who are important watchdogs assisting CAs in monitoring markets. Consumers' knowledge of the day-to-day functioning of markets, in particular those in mass consumer good markets, make consumers and consumer organisations (and often NGOs) important information sources for CAs by way of bringing complaints.[148] **German** competition law, for example, foresees the participation of final consumers where their "interests will be substantially affected," with collective consumer organisations having to show that "a wide range of consumers"[149] are impacted by a specific decision. German case-law has clarified that such "interest" will usually require complainants and third parties to show a "pressing individual interest" that cannot be satisfied by alternative measures.[150] The German *Amazon*[151] and *Facebook*[152]

[147] While there is no formal status for third parties or complainants under national law, in practice, the CA involves complainants in the procedure. The CA believes that this fits the Swedish tradition in which the conduct of administrative authorities is highly scrutinised. Complainants and third parties regularly avail themselves of the general public's extensive right to access public documents, which provides for a high level of external control of administrative proceedings.

[148] The Commission Notice on the Handling of Complaints, para 3 underlines that it "wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules".

[149] German Competition Law, Article 54.

[150] BGH Decision KVR 55/14 Trinkwasserpreise; OLG Frankfurt a. M 04.09.2014-11 W 3/14.

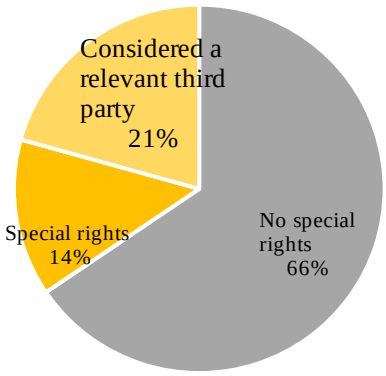
[151] Bundeskartellamt press release of 29 November 2018, 'Bundeskartellamt initiates abuse proceedings against Amazon, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.pdf?__blob=publicationFile&v=2; Bundeskartellamt press release of 17 July 2019, 'Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces', available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html.

[152] Bundeskartellamt press release of 7 February 2019, 'Bundeskartellamt prohibits Facebook from combining user data from different sources', available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2019/07_02_2019_Facebook.html.

investigations were started on the basis of consumer complaints. Similarly, in **Romania,** the Competition Council informed its investigation into retail banking from consumer complaints.[153]

By bringing complaints before CAs, and by participating in the respective administrative procedures, consumers contribute to the public enforcement pursued by CAs, deterring undertakings from law infringements and inducing them to comply with the law. This is particularly true when it comes to consumer organisations. Nevertheless, **Figure 6** points to the limited participation rights of consumer organisations in competition law enforcement.

Figure 6: consumer organisations



The figure shows that in most jurisdictions, consumer organisations do not enjoy a special status as complainants. In other jurisdictions, while they do not enjoy special rights, they are assumed to be a relevant third party in the proceedings (DG COMP, FR, GR, HR, IT, NL). In **Greece**, for example, consumer organisations and associations are recognised as third parties even if they have not submitted a complaint. Moreover, since December 2019, consumer organisations who have signed a Memorandum of Understanding with the Greek CA, are offered additional "bonus" points under the national point-based prioritisation system when they bring a complaint to the CA.

A limited number of national laws award consumer organisations special rights. For example, in **Lithuania**, associations or unions representing the interests of consumers have the right to demand to open an investigation for competition law violations.[154] In **Romania**, consumer associations may file a complaint provided that they have the right to represent the interests of its members and that the denounced behaviour is likely to harm the interests of at

[153] (Consiliului Concurenței 2016).
[154] Lithuanian Competition Law, Article 23(1)(3). According to Article 23(3), consumers whose interests are violated also have the right to request initiation of an investigation.

least two members of the association.[155] In **Bulgaria**, following the implementation of the ECN+ Directive, the competition law recognises a special category of complainants for suppliers of agricultural products and foodstuffs, their professional associations, and members.[156] In the **UK**, super complaints are a powerful enforcement mechanism. They can be submitted by a designated consumer body against ”any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers”[157] and oblige the CA to either take enforcement action under the competition law or to publicly explain how it proposes to deal with the complaint within 90 days. A similar complaint procedure can be launched by qualified consumer organisations in **Malta**.[158]

6.4.4. Institutional setting of the priority decision-making

CAs' decisions to prioritise or disregard cases are not only shaped by the competition law procedures, but also by the institutional organisation of the CAs.[159] The institutional characteristics of CAs function as external or internal controls over their decision-making and hence, the process of prioritisation.

This sub-section examines two aspects of institutional design that may influence priority setting: the CAs' internal organisation of decision-making, and the specific way priority decision-making is organised; as well as the leadership (single or collective) model they adhere to. Section 6.6. below, which is dedicated to alternative enforcement instruments, will further discuss a third aspect, the question whether CAs have the single function of enforcing competition laws or they have multiple functions in other regulatory areas (e.g., consumer protection).

The *internal organisation of decision-making* differs greatly across CAs and their specific design has an impact on the actual outcomes and the decisions they make. The decision to separate or integrate decision-making from other enforcement tasks involves

[155] Romanian Competition Law, Articles 23(3) and 28; Order no. 499/2010 of the Romanian Competition Council President for the implementation of Regulation on the analysis and settlement of complaints regarding the violation of the provisions of art. 5, 6 and 9 of the Competition Law no. 21/1996, republished and the provisions of art. 101 and 102 of TFEU, Article 2(3).
[156] Bulgarian Competition Law, Article 38(9).
[157] UK Enterprise Act, Section 11(1).
[158] Malta Competition Law, Article 14A.
[159] (Schinkel, Tóth, and Tuinstra 2020).

trade-offs between the swiftness of decision-making and expertise *vis-à-vis* quality control and legitimacy.[160] Tighter integration can accelerate investigation and resolution, by placing the key tasks in the hands of a body with specialised expertise within the CA. However, integration can create difficulties with quality control, and can undermine procedural fairness.

In an integrated agency model, the tasks of investigation, prosecution, and decision-making are in the hands of a single institution and a commission/council within the authority makes the first-level adjudication. About one third of the CAs adhere to an *integrated model with functional separation* (BE, BG, ES, FR, GR, HR, HU, IT, LU, LV, NL, RO): even though one institution is responsible both for investigating a case and for making a decision, different and separate groups or directorates within the CA have the task of investigating the case or of making the final decision. A similar number of the CAs adhere to *the fully integrated model* (CY, CZ, DE, DG COMP, EE, LT, PL, PT, SI, SK, UK**)**, where the tasks of investigation, prosecution, and decision-making are in the hands of a single institution.

Other jurisdictions divide the tasks of investigation and decision-making (adjudication) between two different institutions.[161] In a so-called *bifurcated judicial model*, the CA must bring a case to a court to issue an enforcement decision (AT; DK; FI; IE; MT; SE[162]).[163] In this model, courts and external tribunals control the decision to impose sanctions, which may in turn, also influence their enforcement priority decisions. This model, however, carries the risk of setting aside the CA's priorities. In **Austria**, for example, any undertaking and association of undertakings that have a legal or economic interest in the decision can submit an independent application asking the Court to impose a fine, without the involvement of the CA (so-called "individual procedure").[164]

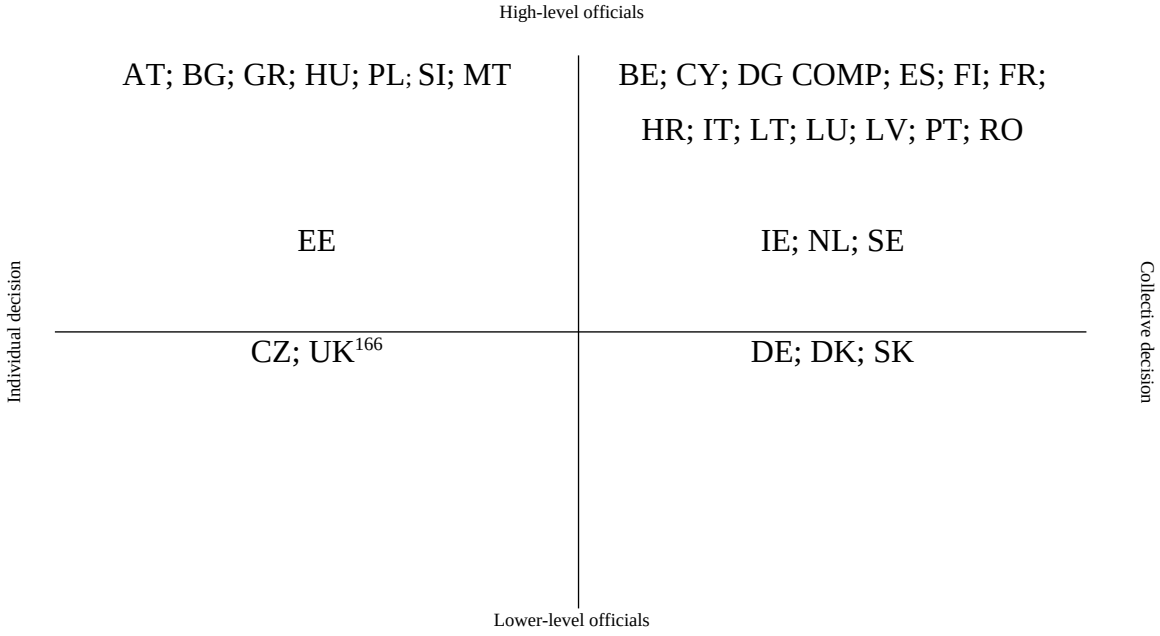
Leadership models: *multi-member board or unitary executive model*.[165] The structure of the CA's leadership can influence matters of case selection and prioritisation, too. In some CAs, prioritisation choices are adopted by a single person, such as the head of the CA or of a

[160] *Ibid*.
[161] (Trebilcock and Iacobucci 2010), 459-464.
[162] Until March 2021, the Swedish CA had to apply to the court for the purpose of imposing fines, but could order an undertaking to bring an infringement to an end and decide to make commitments binding. From March 2021, the CA can also independently impose fines.
[163] The bifurcated judicial model applies differently across the various jurisdictions. In Austria and Ireland, national courts decide on the merits of the case, and hence act as decision-making NCA. In Denmark, Finland, and Sweden up until March 2021, the courts only review the findings adopted by the CA, and have exclusive power to impose penalties.
[164] Austrian Cartel Act, Article 36(4)(4). This is mostly used in abuse of dominance cases.
[165] (Kovacic and Hyman 2012), 531. Also see (Jenny 2016), 30.

specific unit. This unitary executive model may have the advantage of a faster and consistent decision-making process. In other CAs, the decision is taken by a group of staff members, allowing for greater expertise to be present in the decision-making process. Such a decision-making design is also less easily captured by business or political interests.

Figure 7 illustrates the different institutional designs of priority setting decisions. It classifies CAs according to the level at which staff adopts the decisions concerning which cases they will pursue (high/lower level officials) and the nature of the decision-making mechanism (individual/collective decision).

Figure 7: institutional design of priority decisions



Mechanism of priority decision-making: In CAs that take a collective decision on priority setting, some take a decision by vote, while others take such decision after reaching a consensus. There are CAs who adopt a decision on the basis of a combination of these procedures. For example, in the **UK**, prior to issuing a Statement of Objections, the Senior Responsible Officer decides whether to close a case on priority grounds. After a Statement of Objections has been issued, decisions to close a case are taken by the Case Decision Group.[167] In **Belgium**, the order in which cases are to be dealt with is determined by the competition

[166] Yet, after a Statement of Objections has been issued, case closure decisions are the responsibility of the Case Decision Group. See (CMA 2019), para 5.1, 9.7 and the next paragraph.
[167] *Ibid*.

prosecutor general following the advice of the chief economist.[168] In **Slovenia**, the decision is taken by informal consultation, but the final decision is taken by the Director of the CA.

Some CAs have created dedicated bodies for priority setting decisions. In **Germany**, decisions of the CA are taken by one of the 13 Decision Divisions ("Beschlussabteilungen"). These highly independent units within the CA are organised according to sectors, 3 units for cross-sector prosecution of cartels and one unit for consumer protection. They take all decisions relating to an individual case, including those related to prioritisation. The decision divisions are highly independent: they are construed in a court-like way; consisting of a chairperson and several associate members, all either lawyers or economists. Decisions are taken by the chair and two associate members in the rank of case handlers. Their decisions are taken by a majority vote, but – due to many advisory meetings prior to the final vote – decisions will usually be taken by consensus.[169] In **Sweden**, prioritisation decisions are adopted by a dedicated group of staff, comprised of the heads of units or their deputies, who select cases on the basis of the prioritisation criteria. Also CAs which follow the unitary executive model may involve other staff members in the decisions. In some CAs, the decision is set by the leadership (the head of the unit or the CA) often after extensive discussions with staff (e.g., CZ, GR, HU, PL, SI).

*6.5. **Substantive criteria***

External or internal criteria guiding the CA's decision whether to pursue or disregard a specific case.

When a CA enjoys a degree of *de jure* and *de facto* prioritisation discretion, it must decide on the basis of substantive criteria which cases to pursue and which to disregard. EU law does not offer substantive criteria to guide the enforcement of the NCAs. Some of the CAs substantive criteria are guided by a set of national rules or soft law guidelines. Unlike agenda setting, such substantive criteria do not generally refer to a specific sector or type of anti-competitive practice, but to the specific characteristics and potential implications of the alleged infringement. As elaborated below, substantive criteria typically focus on the likely impact of the conduct on consumer welfare or the economy, and institutional and/or

[168] Belgium Competition Law, Article IV.26(2)(3).
[169] German Competition Law, Article 51. The Decision Divisions are also independent in selecting the cases they pursue. Hence, the Bundeskartellamt does not publish an agenda on a regular basis.

procedural considerations such as availability of evidence and the likelihood of bringing an infringement to an end.

Setting substantive criteria to streamline the exercise of the CAs' enforcement discretion may carry significant benefits to the efficient use of the authorities' scarce resources, and to effectively direct the enforcement efforts to enhance deterrence and clarify the rules. Such criteria may combat the over-exclusiveness of the competition law provisions (e.g., the broad wording of Articles 101 and 102 TFEU), thereby refraining from enforcing practices having only limited impact on consumers and markets. Publishing substantive criteria can increase the accountability and predictability of the enforcement as it requires the authority to pronounce its strategy in advance by explaining how it plans to make use of its enforcement powers and budget.

Figure 8 reveals that 38% of the CAs are guided *by external substantive criteria*, set by the national legislature, government, or judiciary as a form of external control (CZ, DG COMP, DK, FI, FR, HU, LV, MT, NL, PT, RO). Setting external substantive criteria limits the independence of the CA to prioritise, but allow CAs to better comply with the principles of accountability and transparency. External substantive criteria do not only enhance the CAs' accountability towards political institutions, but may also leave more room for stakeholders' participation in setting priorities. Moreover, it creates the possibility to implement certain public interests in the enforcement of (EU) competition law.[170]

Figure 8: external substantive criteria adopted by the legislature or government

[170] (Brook and Cseres 2019).

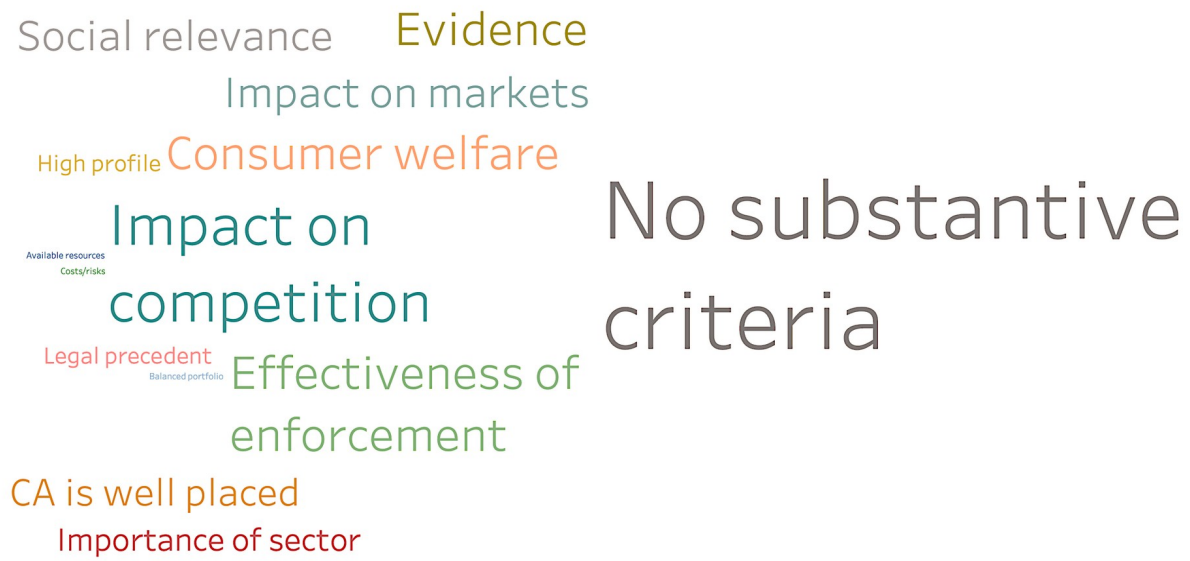


Figure 9 further shows that 68% of the CAs are guided by *internal substantive criteria*, adopted by the CA itself as a form of internal control. Some of those rules are published and publicly available (BE, CY, CZ, DG COMP, DK, FI, GR, HU, IE, LT, LV, NL, PT, SE, SI, SK, UK), while others are merely internal rules (AT, FR, IT).

Figure 9: Internal criteria adopted by the CA

20% of the CAs are *not guided* by a clear set of external or internal substantive criteria. This may not come as a surprise, as many of these CAs are guided by the legality principle or the public interest test, meaning that they only have limited room for *ex officio* investigations. These are the type of proceedings where the prioritisation criteria apply, such

as **Bulgaria**, **Croatia**, and **Estonia**. Yet, even some CAs that are guided by the opportunity principle and have broader discretion to prioritise their enforcement efforts – such as **Germany, Luxembourg**, and **Poland** – are not bound by either internal or external substantive criteria. In those Member States, the choice of prioritisation is analogous to a "black box", with crucial implications for the transparency of the CAs' enforcement actions.

The empirical findings display the diverse criteria that guide the enforcement priorities. Our interviews have confirmed that in practice, the CAs often take into account the following considerations:

- *Cost-benefit analysis:* some CAs are required to balance the likely costs and benefits of the enforcement of a specific case. When rejecting complaints, for example, the **Commission** must balance the significance of the alleged infringement against the probability of establishing the existence of the infringement and the scope of the investigation required.[171] Similarly, in **Hungary**, there is detailed guidance on how the CA calculates the possible costs and benefits of intervention and the impact on its resources.[172] In **Lithuania**, the CA's economic analysis group carries out a cost-benefit analysis of starting an investigation and gives its preliminary views on the theory of harm.[173] In the **UK**, the CA has to balance the strategic significance of the case with its possible risks and available resources.[174] In particular, the CA is expected to deliver a target of direct financial benefit to consumers of at least ten times its relevant costs to the taxpayer.[175]
- *Harm caused by the suspected infringement*: some CAs focus on the seriousness of the infringement and the harm caused by the suspected infringement on competition, consumer welfare, markets, and/or society. The competition law of the **Czech Republic**, for example, declares that the CA may decide not to initiate proceedings after a preliminary examination of the matter indicated a "low level of detrimental effects of the conduct on competition" in light of the relevant market and the number of affected consumers.[176] The authority's guidelines add that it will take into account the duration of the economic disruption on the competitive process and the way in which the effects have

[171] *Automec II* (n 3), para 85.
[172] (GVH 2020).
[173] The cost-benefit analysis consists of estimation of expected cost of human resources and expected benefit to consumers (based on the Competition Council's impact assessment methodology).
[174] (CMA 2014), para 2.1, 3.7-3.8, 4.18-4.22.
[175] (CMA 2020), para 1.2.
[176] Czech Republic Competition Law, Article 21(2).

already been eliminated.[177] Similarly, in **Slovakia**, the CA will take account of the geographical impact and the duration of the possible infringement, the number of affected consumers (and particularly of disadvantaged consumers of everyday products), and the impact on consumers' and businesses' trust in the functioning of markets.[178]

In **Denmark**, the CA will take into account the gravity of the case in relation to the competition law violation and the expected impact on the market, on the competition culture, and on the economy as a whole.[179] In **Finland**, the CA will examine if markets are likely to correct themselves even without intervention and whether competition on the relevant market functions as a whole, irrespective of the suspected infringement.[180] In **Sweden**, the authority also considers whether the suspected infringement raises concerns regarding corruption or other behaviour which undermines trust.[181]

- *Effectiveness of the enforcement*: some CAs focus on the effectiveness of the enforcement in bringing an infringement to an end and on establishing a legal precedent. In the **Netherlands**, the authority will examine whether an investigation is likely to be effective, in the sense of assessing whether the use of an appropriate enforcement instrument can lead in the short term to a desired market situation or satisfactorily come close to such a situation.[182] In **Sweden** and **Slovakia**, in addition to the possibility to remedy the infringement effectively, the authorities take into account considerations of deterrence and the importance of securing guiding precedent to clarify the law.[183]
- *Institutional and practical concerns:* Some CAs - for example those in the **Hungary**, **Netherlands**, and the **UK** - are explicitly required to review their current workload when deciding which new projects and infringements to investigate.[184]
- *Alternative enforcement institution:* a number of CAs are required to examine if they are the best placed to act. In particular, many CAs provide for the possibility to reject a complaint on the basis of the possibility for complainants to seek and obtain effective

[177] (UOHS 2013), para 6-7.
[178] (Protimonopolný úrad Slovenskej Republiky 2020), 5.
[179] (KFaT 2017).
[180] Finnish Competition Law, Section 32.
[181] (Konkurrensverket 2020), 1.
[182] (ACM 2016), 2.
[183] (Konkurrensverket 2020), 1, 3; (Protimonopolný úrad Slovenskej Republiky 2020), 6.
[184] (CMA 2014), para 2.3; (ACM 2016), 2; (GVH 2013), 3-4.

relief before national courts (e.g., the **Commission**,[185] **Hungary**,[186] **Netherlands**,[187] and the **UK**[188]) or another sector regulator (e.g., **Sweden**[189]). Moreover, in the context of the decentralised enforcement of EU competition law, Article 13 of Regulation 1/2003 allows the Commission or an NCA to reject a complaint on the grounds that it has already been dealt with by another NCA.

6.6. Alternative enforcement mechanisms: instrument and outcome discretion

The legal competence to address anti-competitive conduct by employing alternative enforcement instruments and tools.

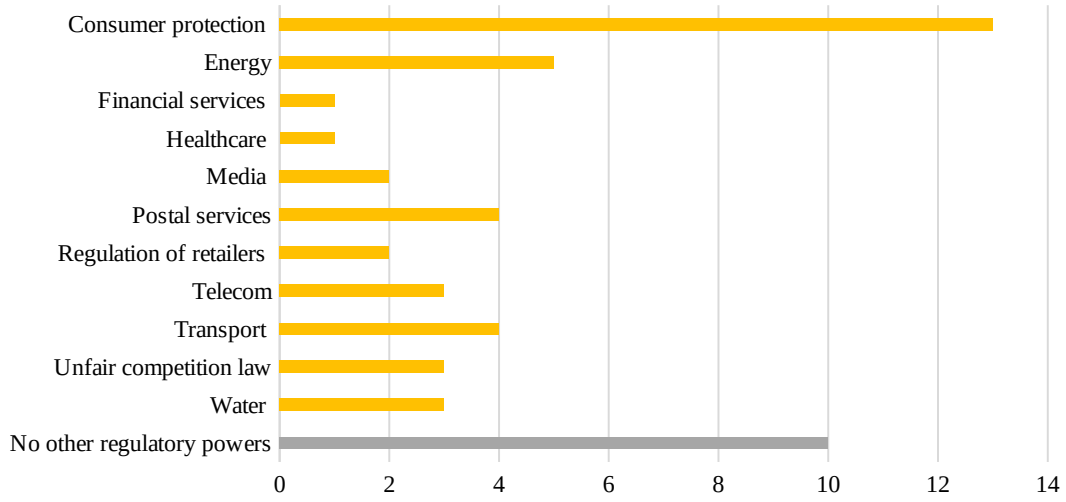
CAs may not only have the power to refrain from enforcing the competition rules, but can also address anti-competitive conduct by using alternative enforcement instruments and tools other than the "classic" infringement procedure. This is known as instrument and outcome discretion that function as extensions of the CAs' priority setting powers.[190]

Instrument discretion refers to the possibility of using alternative regulatory mechanisms to assess anti-competitive conduct. The magnitude of instrument discretion, as a form of external control, depends on each CA's competence under its respective national law. For instance, all CAs have the power to undertake *market inquiries* (i.e., sector inquiries or market studies), 44% of the CAs have the power to issue an *informal ex-ante opinion*, instead of pursuing an investigation. The CAs in **Ireland, Poland**, and the **UK** may also issue a *warning letter*. Even though such informal opinions and letters can save CAs significant resources, they do raise questions of transparency and accountability towards other market participants and the broader public.

Moreover, CAs with multiple functions, such as enforcement powers in sector regulation or consumer law, may also allocate their resources to the application of *other enforcement* powers instead of the competition cases. Figure 10 demonstrates that the majority of CAs have one or more regulatory powers in addition to competition.

Figure 10: multi-function CAs

[185] Commission Notice on the Handling of Complaints, para 16-18;
[186] (GVH 2007), point 1.37.
[187] This condition is explicitly mentioned in the priority setting document of the ACM's predecessor, see (NMa 2012), 2.
[188] (CMA 2014), para 3.5. Also see (Cseres and Mendes 2014), 494-501.
[189] (Konkurrensverket 2020), 3.
[190] (Brook 2022). Also see (Petit 2010); (Protimonopolný úrad Slovenskej Republiky 2020), 6.



Single function CAs can provide a clear enforcement focus and facilitate effective prioritisation, thereby improving the overall effectiveness of law enforcement. Sharing staff's expertise in various regulatory areas can improve the CA's effectiveness in dealing with complex regulatory issues such as joint intelligence concerning consumer exploitation in digital markets.[191] Many CAs – for example in **Denmark, Hungary, Italy**, **Ireland, Finland,** and the **Netherlands -** have positive experience in integrating the enforcement powers of consumer protection and competition law within one authority. Having competences in various regulatory areas can bring CAs synergies and lower the costs of enforcement and of policy coordination.[192] A wide range of enforcement instruments may enhance the efficiency and effectiveness of the enforcement, allowing to match the best tool to the legal and factual circumstances of each case.[193]

However, multi-function CAs can also undermine the efficient allocation of resources. While the multiplicity of functions can be a safeguard against capture, it can also weaken the CA's coherent policy-making and expert function. For example, the differences in the nature of consumer and competition law enforcement pose relevant limits on fully integrating the two fields of law enforcement in practice. Separate authorities are able to better prioritise and differences in the substance and enforcement tools of consumer law and competition law call

[191] (Cseres 2020), 36.
[192] The benefits of integration are the possibility to have a single portfolio of policy instruments by achieving economies of scope in access to resources and in the efficiency of monitoring, developing, and sharing expertise as well as gaining wider visibility to society and improving accountability processes.
[193] Reduction of administrative costs was advanced as the main policy argument for the institutional merger in the Netherlands. See, Parliamentary Papers (Kamerstukken II, 2011-2012, 31 490, nr. 69); Kamerstukken 2011-2012, 33 186 nr. 2 Implementation Act Authority for Consumer and Market (Instellingswet Autoriteit Consument en Markt); Proposal for aligning market supervision ACM (Wetsvoorstel stroomlijning markttoezicht ACM), June 2012.

for separating enforcement powers and emphasise the advantages of specialised and separate authorities.[194]

As mentioned above, setting priorities may be more complex in a multi-function authority than a single function CA. A multifunction authority must allocate resources across a broader range of activities, some of which can be mandatory (e.g., regulatory) tasks, while others may be more discretionary but nevertheless important. A multi-function authority must therefore expend effort to ensure that adequate resources are allocated to each of its various functions without detracting from its important competition mandate.[195] **Finland** illustrated the problem it faced with regard to setting priorities, by pointing out that while the CA has the power and even the obligation to prioritise in the field of competition law, there are no such provisions on prioritisation in the field of consumer protection. Therefore, the CA's enforcement has to be targeted at all the areas that are defined as being under the competence of the Consumer Ombudsman.[196]

Outcome discretion refers to the power to select from a wide array of competition law procedures as alternatives to infringement procedures. Instead of adopting an infringement decision, some CAs are competent under national law to choose from a toolbox of negotiated remedies, such as formal and informal commitments or settlements.

The degree of outcome discretion is mostly a matter of national law. However, the ECN+ Directive requires all Member States to entrust their respective NCAs with the discretion to accept *commitments* where it is appropriate.[197] Prior to the implementation of the Directive, most NCAs have enjoyed this power. However, this provision raises concerns in **Austria** and **Ireland,** which are based on the bifurcated judicial model and only empower the national courts to accept commitments.[198]

68% of the CAs have the power to accept *settlements* i.e., to offer undertakings a fine reduction in return for admitting to the CAs' objections. In **Austria** and **Malta** (bifurcated judicial model) settlements can only be adopted by national courts. Commitments and settlements have become an attractive enforcement tool for many CAs for reasons of flexibility, effectiveness, and efficient use of resources. Both enforcement instruments allow

[194] *Ibid*, 28.
[195] (OECD 2015), 3.
[196] (OECD 2014b), 16.
[197] ECN+ Directive, Preamble 39 and Article 12.
[198] On the bifurcated judicial model, see Section 6.4.4. above.

the CAs to correct market failures in a timely way and conserve resources.[199] However, they also raise serious concerns of transparency and accountability[200] and ultimately serve as unreviewable prioritisation practices of CAs.

In order to improve the transparency of outcome and instrument discretion, national legislators can establish procedural safeguards that enable third parties' participation in adopting settlements. Similarly, to the procedure for adopting commitments, third parties could challenge settlement agreements on the ground that the agreed terms are too weak or require their CAs to publish provisional settlement terms and accompanying explanations for public comment.[201]

6.7. ***Impact assessment***

Ex-post periodic assessment of the effects of the CA's prioritisation choices.

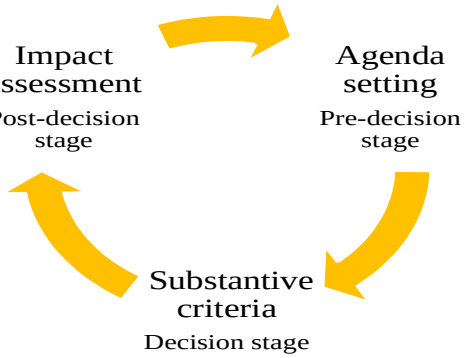
Impact assessments are widely recognised as a key instrument for improving the quality and transparency of regulatory decision-making, and hence play a crucial role in promoting good governance. The evaluation of CAs' law enforcement can show whether the resources they have spent were justified, whether their interventions in markets resulted in increased competitiveness, and whether the larger public and consumers benefited from these actions.[202] Conducting impact assessments periodically, and publishing the results also promote the administrative accountability of CAs towards stakeholders, markets, politicians, and peer groups (such as other CAs and international organisations) and increases transparency.[203]

In the context of priority setting, impact assessments are valuable feedback mechanisms that allow CAs to assess whether they have appropriately implemented their agenda (set *ex ante* priorities), the robustness of their substantive criteria by providing evidence on the actual impact of specific decisions on markets and on consumers, and compare it with the outcomes of their intervention *ex post*. It provides CAs with a better sense of how to shape priorities and align their legal and policy commitments with their resources.[204] Accordingly, impact assessment can rationalise the process of priority setting by

[199] (Petit 2010), 56.
[200] (Cengiz 2011); (Dunne 2020).
[201] (Kovacic 2018), 16.
[202] (Kovacic 2005), 506.
[203] (OECD 2014a), 3; (OECD 2016), 4, 11-12.
[204] (Ilzkovitz and Dierx 2014), 35-38.

transforming it into an enforcement cycle, by which the exercise of the CAs' discretion in setting their priorities are regularly reviewed.

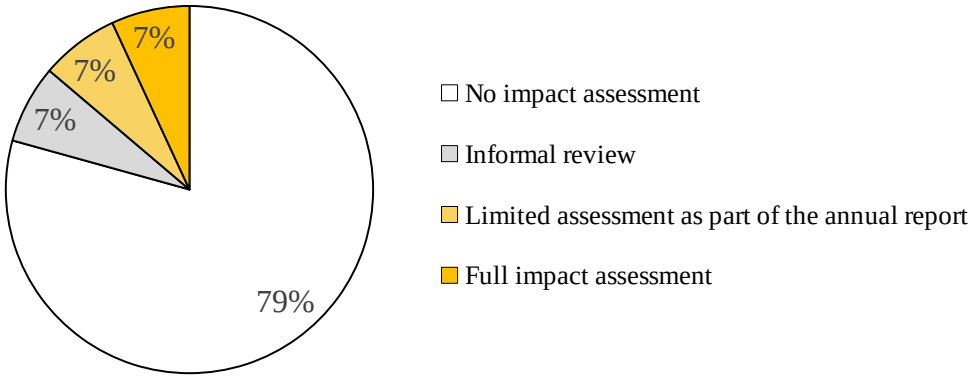
Figure 11: the enforcement cycle



A study commissioned by DG COMP in 2015 has found that while CAs and academic researchers have become increasingly interested in studying *ex-post* evaluations of competition law enforcement, most of the existing work focuses on measuring the effects of specific mergers and cartels decisions on prices. Only limited attention was awarded to other areas of *ex-post* assessment in general and to priority setting in particular.[205]

This is reflected by the empirical findings. As summarised by **Figure 12**, only a few CAs have conducted impact assessments of their priority setting practices. Moreover, some of those assessments are informal and unpublished or consist of rather limited review as part of their annual reports. Impact assessments, thus, remain a weak spot in the oversight system.

Figure 12: impact assessment of priority setting decisions



One reason for the limited availability of impact assessment of priority setting may be associated with methodological challenges. While calculating the direct effects of competition interventions or non-interventions (the effects of a specific enforcement action in

[205] *Ibid*, 10-11.

terms of its impact on prices, innovation, variety) is already a complex exercise, it is even more difficult to calculate indirect effects attributed to increased deterrence and other macroeconomic variables (such as growth, productivity, or employment).[206] For this reason, the **Hungarian** CA explains that while it conducts an impact assessment quantifying the impact of its cartel and merger cases, the results are not suitable for assessing the effectiveness and efficiency of its priorities.[207]

Nevertheless, some CAs do attempt to assess the impact of their priority setting practices. A small number of jurisdictions perform a full impact assessment. In the **Netherlands**, pursuant to its national law governing independent administrative bodies, the Dutch CA is evaluated every 5 years.[208] The evaluation is based on a set of criteria laid down in a government vision document - including efficiency, selectivity, transparency, professionality, independence, collaboration, and effectiveness – which considers priority setting as one of the cornerstones of good supervision.[209] In **Malta**, an impact assessment for the period of 2014-2018 specifically mentioned that it quantifies indirect effects of its enforcement, inter alia, for the purpose of deciding which cases to prioritise on the basis of the expected economic benefits.[210]

In other jurisdictions, the impact assessment of the exercise of priority setting powers is part of the CA's annual reports. In the **UK**, this is mandated as part of the CA's general obligation to report its activities and performance every year to the Secretary of State.[211] The CA must assess the extent to which its main objectives and priorities for the year as set out in the annual plan have been met, report the allocation of its financial resources to its various activities during the year, and evaluate its performance and practices in relation to its enforcement functions. In **Latvia**, the assessment included in the annual report is more limited, and is linked to performance indicators in terms of meeting a quota of enforcement targets.[212]

Finally, **Austria** and **Italy** have reported that they undertake an internal/informal assessment of their prioritisation practices, which are not published.

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[206] (OECD 2016), 5.
[207] (GVH 2020), paras 7 and A.72.
[208] Dutch Independent Public Bodies Framework Act, Article 39. For the latest evaluation of the Dutch CA, including its priority setting practices, see (Andersson Elffers Felix 2020).
[209] (Dutch House of Representatives 2001), para 4.3.
[210] (MCCAA 2020).
[211] UK Enterprise Act, Section 4.
[212] See for example, (Competition Council of the Republic of Latvia 2020), 21, 24.

7. POLICY OPTIONS

This section summarises the empirical findings set out above, discusses their normative implications, and offers various policy options for shaping and improving priority setting practices. It should be noted from the outset, that this Report does not intend to provide a single best model for priority setting. As each CA's priority setting powers and practices are deeply embedded in, and directly shaped by their respective administrative and constitutional law systems and their political orders, such a single solution is unfeasible. Instead, this Report aims to offer CAs legal and practical options on how to design and apply priority setting in a way that fits their respective legal mandate. By doing so, the choices they make must be subject to external and internal legal controls on the basis of the administrative law principles of effectiveness, efficiency, independence, transparency, and accountability. The enforcement choices they make will not be complying equally with all these principles but will need to make country-specific trade-offs and find a suitable balance.

Nevertheless, one key design choice we find important to underline is the fact that each CA must be *de jure* able to set its own priorities for enforcement and select the cases it considers the most important to investigate in order to achieve its primary goals. Hence, this Report fully supports the ECN+ Directive requirement that all Member States must empower CAs to set priorities. We believe that the empirical findings presented in this Report demonstrate that the power to choose which cases to pursue and which to disregard is a necessary precondition for effective, credible, and transparent competition law enforcement and for achieving the goals set forth in EU and national competition laws.

This section is structured in two parts. The first part presents representative models of priority setting practices in the CAs, demonstrating that each entails a different trade-off between the administrative law principles of good governance. The second part provides concrete policy options for CAs on how to enhance compliance with those principles, while complying with the external constraints imposed on their powers by national laws.

7.1. ***Four representative models of CA's priority setting***

The Report examined the CAs' priority setting rules and practices on the basis of a typology consisting of seven different aspects: agenda setting, *de jure* competence, *de facto* ability,

procedure to prioritise, substantive criteria, alternative enforcement mechanisms, and impact assessment. These seven aspects are often interdependent; design choices concerning one aspect of prioritisation affect other aspects, too. For example, a low degree of *de jure* competence to set priorities frequently entail a formal procedure of priority setting and limits the CA's ability to *de facto* select cases and pursue an active enforcement strategy. Pursuing an independent and efficient priority setting practice may decrease the transparency and accountability of the CA by limiting third parties' and complainants' participation as well as the possibility for judicial review.

By highlighting these crucial interdependencies across the seven different aspects of priority setting, this sub-section presents four representative models that are distilled from the empirical findings. The selection of each model entails a different trade-off between effectiveness, efficiency, independence, transparency, and accountability. These models can serve as guidance for a specific jurisdiction, and allow enforcers and policy makers to reflect, evaluate, implement and change, various rules and practices concerning prioritisation.

Model I - high degree of prioritisation, with external or internal constraints:

Under this model, CAs enjoy a relatively high degree of prioritisation powers. They have both *de jure* competence and *de facto* ability to choose which cases to pursue and which to disregard. In parallel, the discretion of such CAs is limited by formal or informal rules that control and justify the exercise of their powers. Such rules can either be imposed by law (e.g., Greece) or jurisprudence (e.g., Netherlands) as a form of external control, or be adopted by the CA itself as a means of internal control (e.g., Finland, the Netherlands, UK). Such control mechanisms can focus on various aspects of the prioritisation decision-making procedure (e.g., the prioritisation taking body and selection process, publication and reasoning requirements) or its substance (e.g., agenda and the substantive criteria for selecting cases).

Control mechanisms can also encourage third parties' participation by involving stakeholders in the adoption of the agenda, granting rights to complainants, and involving relevant interested parties and consumer organisations in the procedure. To this end, we believe that by distinguishing between formal and informal complaints, the CAs can reduce their workload while in parallel better prioritise important cases. This allows them to strike an adequate balance between efficient priority setting and transparency, whereby the CA can be

held accountable through a formal and reasoned decision that can be reviewed by a court (see Section 6.4.1. above).

While such internal and external constraints may hamper the efficiency of the enforcement and the independence of those CAs to the extent it requires reasoning and consultation, they are likely to facilitate a balanced selection of cases that is clearly communicated and justified to the relevant stakeholders and the larger public. Despite the presence of external or internal constraints under this model, most CAs under this model are only subject to very limited or no judicial review of prioritisation decisions. By exposing priority setting practices, this Report notes that judicial review of prioritisation decisions could further enhance the transparency, accountability, and robustness of priority setting rules and practices.

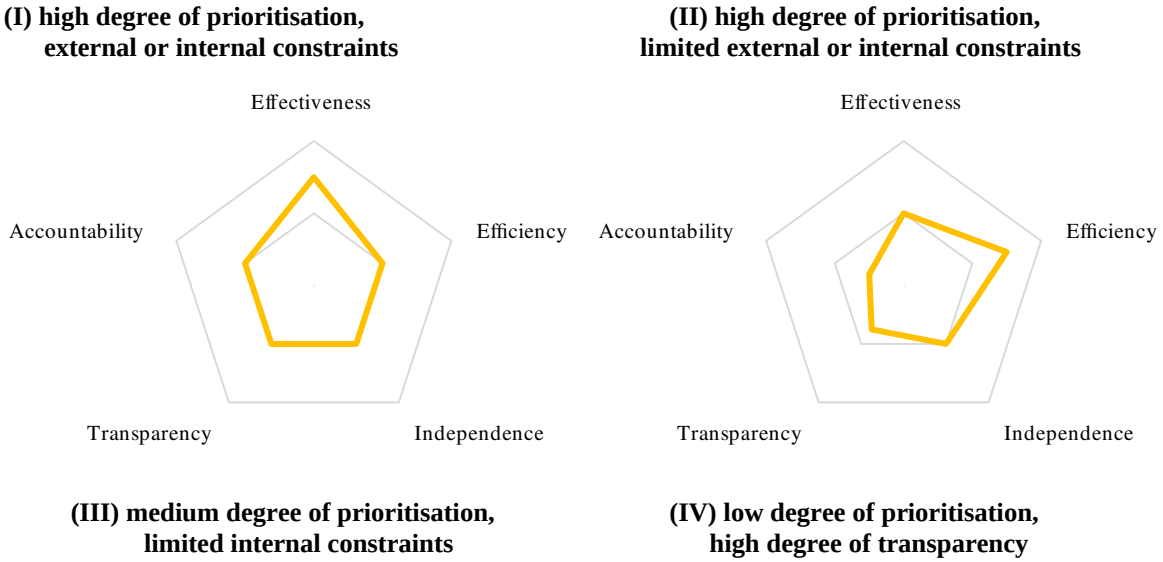
Model II - high degree of prioritisation, limited external and internal constraints:
Similarly to the first model, CAs under Model II enjoy a high degree of *de jure* and *de facto* prioritisation discretion. However, unlike the first model, those CAs are bound by little or no external and internal control mechanisms (e.g., the Commission, Germany). The lack of such control mechanisms can certainly increase the efficiency of their prioritisation decision-making, but at the same time, can significantly decrease the transparency of their prioritisation decisions and their accountability. Moreover, there is a risk that prioritisation choices may be taken in a sub-optimal manner without the CA being exposed to external pressures of legitimisation.

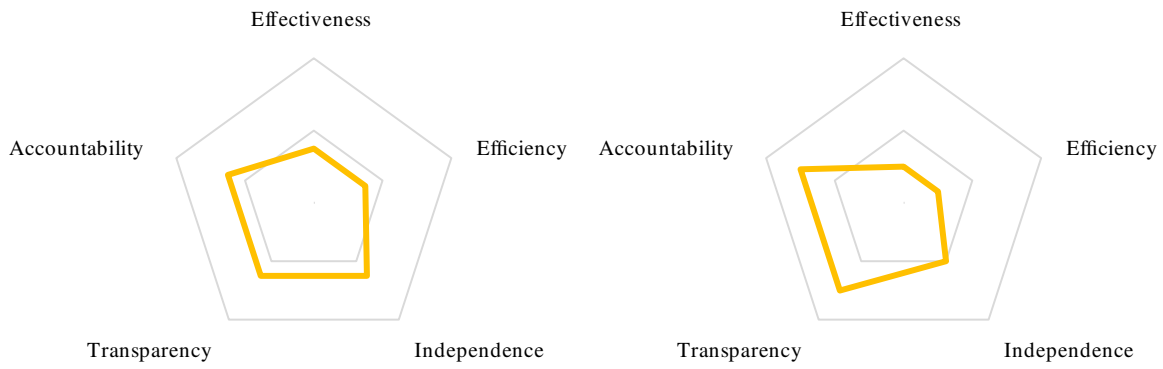
Model III - medium degree of prioritisation, limited internal constraints:
Under this model, CAs have only limited prioritisation powers on the basis of national law. Accordingly, while they can prioritise cases, these choices are bound to the criterion of public interest and subject to requirements of reasoning and publication (e.g., Croatia, Czech Republic). CAs under this model provide extensive participation rights to third parties. Such external constraints can, in turn, limit the CAs' independence and *de facto* ability to pursue a proactive enforcement strategy. Moreover, it reduces the need for developing substantive internal intelligence and rules to guide their prioritisation decisions, such as an enforcement agenda or substantive criteria. Accordingly, while such systems are characterised by a relatively high degree of accountability and transparency, their prioritisation is less

independent and their enforcement efforts may not be guided by the most effective selection criteria and thus are not fully efficient.

Model IV - low degree of prioritisation, high degree of transparency:
The CAs following this model have very limited priority setting powers, as they are required by law to investigate every possible law infringement and to respond to referrals from other governmental bodies and/or consumer organisations. As a result, they only have limited *de facto* ability to start *ex officio* investigations and adopt a proactive enforcement strategy (e.g., France and Spain prior to the ECN+ Directive). These enforcement decisions must, moreover, be taken formally, and are subject to the obligation of reasoning and publication. As a result, even if such authorities adopt an enforcement agenda and substantive criteria of priority setting, such internal controls have merely limited effect on their enforcement efforts. The enforcement of these CAs is characterised by a high degree of accountability and transparency and lower degrees of independence. As a result, they are less effective enforcers due to their limited prioritisation powers.

Figure 13: good governance benchmarks





*7.2. **Enhancing prioritisation rules and practices within the existing models***

The previous sub-section pointed to four different models defining the CAs' competences when they set their enforcement priorities representing different balances between effectiveness, efficiency, independence, transparency, and accountability. This sub-section moves on to examine a separate question, that is, how CAs can align their priority setting practices with each of those principles of good governance, while operating within their existing national legal and institutional frameworks. It offers the CAs a "checklist" that helps to assess whether their informal and internal policies with regard to each of the seven aspects of prioritisation comply with the five principles of good governance examined in this report.

Figure 14: checklist for good prioritisation rules and practices

[see separate file – to be added in landscape orientation]

8. REFERENCES

ACM. 2016. *Prioritization of Enforcement Investigations by the Netherlands Authority for Consumers and Markets*.

Andersson Elffers Felix. 2020. *Evaluatie van de Autoriteit Consument En Markt, Evaluatieperiode 1 April 2015 Tot En Met 31 Maart 2020*.

Barkow, Rachel E. 2010. "Insulating Agencies: Avoiding Capture Through Institutional Design." *Texas Law Review* 89:15–79.

Barkow, Rachel E. 2016. "Overseeing Agency Enforcement." *George Washington Law Review* 84(5):1129–86.

Black, Julia. 2001. "Managing Discretion. Dissertation." Paper Presented at the Australian Law Reform Conference on: Penalties: Policy, Principles and Practice in Government Regulation, Sydney.

Black, Julia. 2008. "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes." *Regulation & Governance* 2(2):137–64.

Blanco, Luis Ortiz and Alfonso Lamadrid De Pablo. 2012. "EU Competition Law Enforcement Elements for a Discussion on Effectiveness and Uniformity." *Annual Proceedings of the Fordham Corporate Law Institute* 2012:45–104.

Brook, Or. 2020. "Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy." *Journal of Competition Law & Economics* 16(4):435–487.

Brook, Or. 2022. *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU*. Cambridge University Press.

Brook, Or and Katalin Cseres. 2019. "Member State Interest in the Enforcement of EU Competition Law: A Case Study of Article 101 TFEU." in *Between compliance and particularism: Member State interests and European Union Law*, edited by M. Varju. Springer Berlin Heidelberg.

Cengiz, Firat. 2011. "Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa." *Competition Law Journal* 7(1):127–53.

CMA. 2014. *Prioritisation Principles for the CMA*.

CMA. 2019. *Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases CMA8*.

CMA. 2020. *Impact Assessment 2019/20 CMA121*.

Competition Council of the Republic of Latvia. 2015. *Case Prioritisation Strategy Guidelines*.

Competition Council of the Republic of Latvia. 2017. *Annual Report 2016*.

Competition Council of the Republic of Latvia. 2020. *Annual Report 2019*.

Consiliului Concurenței. 2016. *Concluzii Preliminare Ale Investigației Sectoriale Pe Piața Serviciilor Bancare de Retail Declanșate Prin Ordinul Președintelui Consiliului Concurenței Nr.424/10.06.2016*.

Cseres, Katalin. 2020. "Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law." *SSRN Electronic Journal*.

Cseres, Katalin and Joana Mendes. 2014. "Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits." *Common Market Law Review* 51(2):483–521.

Davis, Kenneth Culp. 1969. *Discretionary Justice: A Preliminary Inquiry*. LSU Press.

Dunne, Niamh. 2020. "A 'Tunney Act for Europe'? Settlement and the Re-Judicialisation of European Commission Competition Enforcement." *Journal of European Competition Law & Practice* 11(8):423–29.

Dutch House of Representatives. 2001. *Kaderstellende Visie Op Toezicht*.
ECN. 2012a. *Decision Making Powers Report, ECN Working Group Cooperation Issues and Due Process*.
ECN. 2012b. *Investigative Powers Report, ECN Working Group Cooperation Issues and Due Process*.
ECN. 2013. *Recommendation on the Power to Set Priorities*.
Elliott, Jennifer A., José Vinãls, Pierluigi Bologna, Jonathan Fiechter, Michael Hsu, Aditya Narain, and Ian Tower. 2012. "The Making of Good Supervision: Learning to Say 'No.'" Pp. 83–100 in *Building a more resilient financial sector: Reforms in the wake of the global crisis*, edited by A. Narain, I. Ötker, and Ceyla Pazarbasioglu. International Monetary Fund.
Guidi, M. 2016. *Competition Policy Enforcement in EU Member States*. Springer.
GVH. 2007. "Fundamental Principles of Competition Policy as Applied by the GVH."
GVH. 2013. *He GVH's Strategy to Start Competition Law Proceedings ("A GVH Versenyfelügyeleti Eljárás Indítási Stratégiája")*.
GVH. 2020. *Quantifying Welfare Gains Achieved by the GVH (Ex-Ante Impact Assessment), Cases Involving Anticompetitive Practices and Mergers, 2013-2018*.
Hellenic Competition Commission. 2019. *Decision No. 696/2019 on the Determination and Quantification of the Criteria for Priority Setting upon the Basis of a Point System*.
ICN. 2009. *Seminar on Competition Agency Effectiveness*.
ICN. 2010a. *Agency Effectiveness, Competition Agency Practice Manual: Strategic Planning and Prioritisation*.
ICN. 2010b. *Anti-Cartel Enforcement Manual: Cartel Case Initiation*.
Idot, Laurence. 2015. "Reform of Regulation 1/2003: Power to Set Priorities." *Concurrences* 3–2015:51–58.
Ilzkovitz, Fabienne and Adriaan Dierx. 2014. *Ex-Post Economic Evaluation of Competition Policy Enforcement: A Review of the Literature. Publications Office of the European Union.*
Jennings, Hilary. 2015. "Prioritisation in Antitrust Enforcement - a Finger in Many Pies." *Competition Law International* 1:29.
Jenny, Frederic. 2016. "The Institutional Design of Competition Authorities: Debates and Trends." Pp. 1–57 in *Competition Law Enforcement in the BRICS and in Developing Countries*, edited by F. Jenny and Y. Katsoulacos. Springer, Cham.
KFaT. 2017. *Prioritization and Transparency in 2017*.
Konkurrensverket. 2020. *The Swedish Competition Authority's Prioritisation Policy for Enforcement*.
Kovacic, William E. 2005. "Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities." *Journal of Corporation Law* 31(2):503–48.
Kovacic, William E. 2018. "Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness." *Competition Law Review* 13(9):9–22.
Kovacic, William E. and David A. Hyman. 2012. "Competition Agency Design: What's on the Menu?" *European Competition Journal* 8(3):527–38.
Kreifels, Stephan. 2019. *Die Prioritätensetzung Der Europäischen Kommission Beim Aufgreifen Kartellrechtlicher Fälle: Eine Analyse Der Rejection Decisions*.
Maher, Imelda. 2009. "Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network." *Comparative European Politics* 7(4):414–34.

Majone, Giandomenico. 1996. *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions*.
MCCAA. 2020. *Economic Impact Assessments: Estimating the Economic Impact of the Office for Competition within the Malta Competition and Consumer Affairs Authority*.
Mendes, Joana. 2009. *Good Administration in EU Law and the European Code of Good Administrative Behaviour*.
Mendes, Joana. 2011. *Participation in EU Rule-Making: A Rights Based Approach*. Oxford University Press.
Mendes, Joana. 2017. "Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU." *The Modern Law Review* 80(3):443–72.
Miller, Marc L. and Ronald F. Wright. 2008. "The Black Box." *Iowa Law Review* 94(1):125–96.
NMa. 2012. *Prioritization of Enforcement Investigations by the Netherlands Competition Authority ("Prioritering van Handhavingsonderzoeken Door de Nederlandse Mededingingsautoriteit"), Nr. 2151, 14 Feb. 2012*.
OECD. 2012. *Principles for the Governance of Regulators*.
OECD. 2013a. *Evaluation of Competition Enforcement and Advocacy Activities: The Results of an OECD Survey*.
OECD. 2013b. *Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels*.
OECD. 2014a. *Guide for Helping Competition Authorities Assess the Expected Impact of Their Activities*.
OECD. 2014b. *Roundtable on Changes in Institutional Design of Competition Authorities, Note by Finland DAF/COMP/WD(2014)92*.
OECD. 2015. *Summary Record: Annex to the Summary Record of the 123rd Meeting of the Competition Committee: Key Points of the Roundtables on Changes in Institutional Design*.
OECD. 2016. *Reference Guide on Ex-Post Evaluation of Competition Agencies*.
Ogus, Anthony I. 1994. *Regulation: Legal Form and Economic Theory*. Bloomsbury Publishing.
Ottow, Annetje. 2015. *Market and Competition Authorities : Good Agency Principles*. Oxford Scholarship Online.
Petit, N. 2010. "How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment." *Concurrences: Revue Des Droits de La Concurrence* 1:44–62.
Protimonopolný úrad Slovenskej Republiky. 2020. *Prioritisation Policy of the Antimonopoly Office of the Slovak Republic*.
Schinkel, Maarten Pieter, Lukáš Tóth, and Jan Tuinstra. 2020. "Discretionary Authority and Prioritizing in Government Agencies." *Journal of Public Administration Research and Theory* 30(2):240–56.
Scholten, Miroslava, Martino Maggetti, and Esther Versluis. 2017. "Political and Judicial Accountability in Shared Enforcement in the EU." in *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability*, edited by M. Scholten and M. Luchtman. Edward Elgar Publishing.
Tak, Peter JP. 1986. *The Legal Scope of Non-Prosecution in Europe. Helsinki Institute for Crime Prevention and Control, Vol. 8*.
Thatcher, Mark and Alec Stone Sweet. 2002. "Theory and Practice of Delegation to Non-Majoritarian Institutions." *West European Politics* 25(1):1–22.
Trebilcock, Michael J. and Edward M. Iacobucci. 2010. "Designing Competition Law

Institutions: Values, Structure, and Mandate." *Loyola University Chicago Law Journal* 41:455–71.
UNCTAD. 2013. *Prioritization and Resource Allocation as a Tool for Agency Effectiveness, Note by the UNCTAD Secretariat*.
UOHS. 2013. *Notice on Alternative Solutions to Competition Problems and Case Postponing*.
Wils, Wouter P. J. 2011. "Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement." *World Competition* 34(3):353–82.
Wils, Wouter P. J. 2017. "Competition Authorities: Towards More Independence and Prioritisation?" *Romanian Review of European Law* 2017(2):56–92.