Priority Setting: the neglected cornerstone of effective EU competition law enforcement

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1. Priority setting and Regulation 1/2003's reform

With the growing need for regulatory responses to emerging digital technologies and the development of new regulatory frameworks to address the risks of large-scale technological changes, the workload of regulatory authorities is increasing. This is especially true for the European Commission, which will enforce in a centralized manner the new Digital Markets Act. However, regulatory authorities cannot do everything: it is neither possible, nor desirable, to enforce all possible violations of the law. Prioritisation choices are necessary for an *effective allocation of scarce resources*.

In the case of competition law, prioritisation frees the competition authorities from the need to respond to all possible infringements of the law and affords them the capacity to effectively focus on matters of genuine economic and doctrinal importance. Through prioritisation, competition authorities direct resources, time, and energy to those projects that are deemed most relevant to achieving the objectives laid out in their strategic plans.

Prioritisation is an expression of their administrative discretion and it also functions as *norm concretisation*. Articles 101 and 102 TFEU are drafted broadly and based on general norms. Through setting priorities, competition authorities concretise the norms of the competition law prohibitions by choosing what would be the focus of the enforcement and what (potential) infringements will not be enforced. Setting enforcement priorities, in other words, is not merely a matter of procedure but also involves setting substantive criteria of what is and what is not a priority.

As regulatory authorities are non-majoritarian unelected institutions, they lack input legitimacy. Therefore, the need for control through external and internal constraints defined by substantive and procedural rules and institutional designs determining the competition authorities' course of action is inevitable. In this way, competition authorities account for their performance and increase their output legitimacy.

Despite the growing significance of priority setting, EU (competition) law has provided little guidance on the exercise of priority setting and imposed limited external and internal constraints. In fact, the relevance of prioritisation has been largely overlooked by both EU and national policy makers. At the *EU level*, the

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question of what types of competition law infringements the Commission and national competition authorities ("**NCAs**") should prioritise and how such priority setting decisions should take place has not been addressed in detail. The scope, substance, and procedure for setting enforcement priorities have not been 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 *Member States'* level, matters of priority setting have not been addressed by national policy-makers and legislators and are often regulated in diverging ways. As a result, there is great divergence in the priority setting powers and practices of the Commission and the various NCAs, which was only partially remedied by the adoption of Directive 1/2019 in early 2019 (the "**ECN+ Directive**").

In our study, '**Policy Report: Priority setting in EU and national competition law enforcement**' ("**Report**"),[4] we conducted a systematic and comprehensive mapping of the procedural and substantive rules and practices that define the way competition authorities of 27 EU Member States, the United Kingdom, and the EU Commission set their priorities. We defined priority setting broadly, as the legal competence and *de facto* ability of competition authorities to choose which cases to pursue and which to disregard. The data was collected by combining desk research of the publicly available legislation and policy documents in each jurisdiction with a written questionnaire completed by officials of the competition authorities and semi-structured interviews with those officials. The Report presents a new typology of priority setting and evaluates the priority setting practices against a set of administrative law principles of good governance.

The following sections summarise our main arguments by discussing the influence of Regulation 1/2003 on the setting of enforcement priorities in terms of the removal of the notification obligation (Section 2); effectiveness (Section 3); and uniformity (Section 4).

2. Priority setting is the cornerstone of effective enforcement, yet is not (fully) regulated

Under the enforcement regime of Regulation 17/62, the question of setting the enforcement priorities had limited relevance because all potentially anti-competitive agreements had to be notified to the European Commission prior to their implementation. The Commission had to address all notified agreements, either by issuing a formal decision or by means of comfort letters. While the Commission enjoyed discretion to choose between those two legal instruments and could reject complaints, the burden of responding to all notifications had consumed much of the Commission's resources, leaving only limited room to devise its enforcement strategy.

Setting the enforcement priorities has come to the forefront with the entry into force of Regulation 1/2003. With the aim to enable the Commission to "refocus its activities on the most serious infringements of Community law in cases with a Community interest",[5] the Regulation sought to reduce the number of complaints addressed to the Commission in cases where NCAs could effectively deal with them and enhance its priority setting powers.

Parallel to the Commission's increased priority setting powers, decentralisation also entrusted NCAs with powers to fully enforce Articles 101 and 102 TFEU. The delegation of enforcement powers to national authorities was envisioned to tackle the slow progress of decentralised enforcement by national competition

[3] Case T-24/90 *Automec Srl v Commission of the European Communities* ECLI:EU:T:1992:97, paras 77, 85.
[4] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189.
[5] White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ C123 (1999), para 13.

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authorities as well as complainants' reluctance to resort to national courts. At the same time, on the assumption that they cannot investigate all complaints, competition authorities were to set priorities and reject complaints. Pursuant to the EU principle of procedural autonomy, the enforcement of EU competition rules by the NCAs is governed by their national laws. Our empirical mapping shows that the powers, scope, and limits for setting the priorities take different forms at the national level, depending on the NCAs' specific mandate and powers laid down in their respective national administrative and constitutional laws.

Despite the growing urgency of priority setting, there are no EU-wide rules (hard or soft) guiding the principles and practices of the Commission and NCAs. This, as our study demonstrates, has resulted in a considerable divergence across all seven aspects of priority setting, namely: (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 a priority and which are not; (vi) alternative enforcement mechanisms: instrument and outcome discretion; and (vii) impact assessment to evaluate the effects of the priorities chosen. While some Member States have mostly converged to the Commission's wide discretionary powers to set priorities under Regulation 1/2003's regime, others have limited their NCAs' discretion.

The ECN+ Directive has introduced new obligations for the Member States with respect to priority setting by NCAs. Article 4(5) of the Directive requires the Member States to empower their respective competition authorities to set enforcement priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU. It also 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. Yet, the obligations set by the Directive are drafted in a general manner and provide no further guidance directing the NCAs' prioritisation policies and practices.

3. Effective enforcement depends on effective priority setting

Articles 101 and 102 TFEU, according to Regulation 1/2003, have as their objective the protection of the competitive process. To achieve this objective, as reflected also by the ECN+ Directive, the Commission and NCAs should be able to prioritise their enforcement efforts and focus on preventing and bringing anti-competitive behaviour that distorts competition to an end.

We argue that an effective prioritisation must strive to achieve a balanced portfolio of cases so as to achieve the twin objective of ensuring deterrence and concretising the vague provisions of competition law (see Section 1 above). It should involve a mix of cases with various levels of complexity, size, and risk, a balance between enforcing "classic" infringements and pursuing landmark cases that set a precedent and have a much greater multiplier effect, and between cases carrying short- and long-term effects. The composition of the portfolio of cases should be periodically assessed, by conducting an impact assessment of what cases have been pursued, and which have not.

Effective enforcement also calls for placing controls on the administrative discretion of the competition authorities. In our study, we distinguish between *external constraints* that are imposed by the legislator, government, or judiciary and *internal constraints* that are adopted by the competition authorities themselves to structure and check the exercise of discretion. Our research cautions that leaving competition authorities either limited or unlimited priority setting powers might hamper the full effectiveness of the enforcement of Articles 101 and 102 TFEU. Given the impact of such constraints and the great divergence across national legal systems, we call for more EU-level guidance and (external and internal) controls for setting enforcement priorities.

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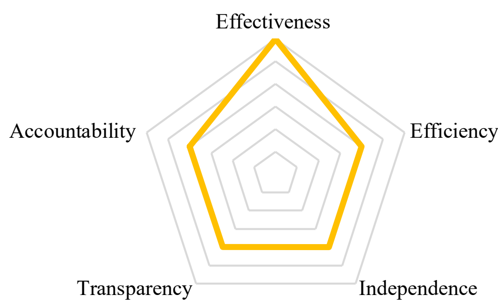
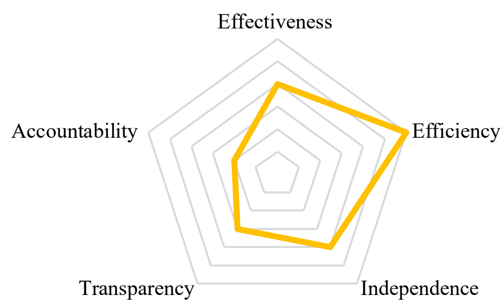
Our report identifies starting points for the outline and main components of such guidance by offering a new theoretical and normative framework to guide the analysis of priority setting rules and practices. We define the above-mentioned seven different aspects of priority setting (See section 2 above), and evaluate the rules and practices in each of those seven aspects against a set of administrative law principles of good governance, including effectiveness, efficiency, independence, transparency, and accountability. Based on such classifications, our study clusters the Commission and NCAs into four representative models that describe the characteristics of priority setting rules and practices of each relevant authority (the "**four models**"): (i) competition authorities having a wide margin of discretion to set priorities, that is limited by external or internal constraints; (ii) competition authorities having a wide margin of discretion to set priorities, but which are not limited by significant external or internal constraints; (iii) competition authorities having a medium degree of discretion to set priorities, that is limited by external or internal constraints; and (iv) competition authorities having a limited margin of discretion to set priorities.

While there is no single, "best" model, we show that each model entails a different trade-off between effectiveness, efficiency, independence, transparency, and accountability.

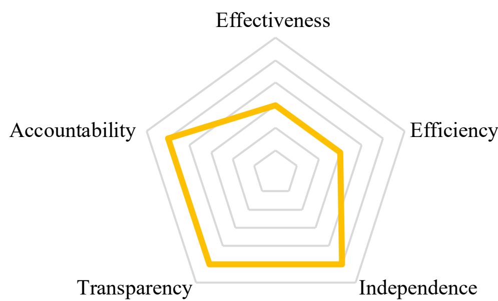
(I) high degree of prioritisation, external or internal constraints



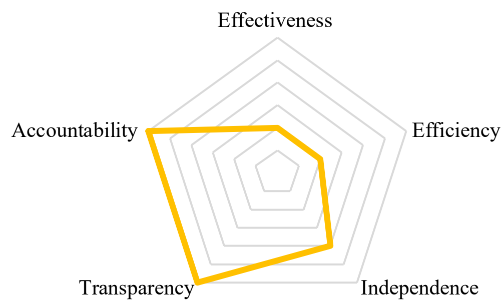
(II) high degree of prioritisation, limited external or internal constraints



(III) medium degree of prioritisation, limited internal constraints



(IV) low degree of prioritisation, high degree of transparency



The Commission is an example of an authority falling within the second model. Namely, the rules and practices governing the setting of the enforcement priorities by the Commission, result in a system by which the Commission enjoys a high degree of enforcement discretion that is subject to only limited external and internal constraints. This model has some clear strengths: high priority setting powers have the potential of increasing the efficiency in handling low-priority cases, thereby allowing the Commission to focus its efforts on matters of legal or doctrinal importance. The authorities that fall within this model do dedicate too many resources to comply with external and internal controls and enjoy greater flexibility in their prioritisation practice. In this way, the influence from national parliaments, governments, and the general public is

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considerably limited and protects such authorities from external pressure, thereby increasing their independence.

Yet, this model has also some weaknesses: lack of such external controls significantly decreases the transparency of the prioritisation decisions and the competition authorities' accountability towards political and market actors and society at large. Moreover, there is a risk that prioritisation choices may be taken in a sub-optimal or discriminatory manner without being exposed to external pressures of legitimisation, review, and reform. Adopting internal controls, streamlining the process for taking prioritisation decisions, taking such decisions by a diverse collage including relatively senior staff members, and conducting regular impact studies might remedy some of these shortcomings.

We call for greater discussion on the impact of the four models on the effectiveness of EU competition law enforcement and the compliance with good governance principles, and for consideration of adopting EU-wide guidance to structure, control, and limit the exercise of the competition authorities' priority setting powers. In many cases, more transparency and accountability in the setting of enforcement priorities are likely to result in more effective rules. In our study, for example, we offer a 'checklist' by which each authority can increase its compliance with the good governance principles in light of the model it belongs to.

4. Lack of uniformity

Our report points to a great divergence in the priority setting rules and practices among the Commission and national competition authorities, across all seven different aspects of priority setting we discussed above in Section 2. Different authorities abide by significantly different rules meaning that competition law is not being fully and evenly enforced across the common market.

This results in uneven enforcement: while some jurisdictions are highly proactive and pursue a wide range of potential infringements, others adopt a mostly reactive policy focusing – for example – on addressing complaints or leniency applications or on a wide type of infringements. Shedding more light on the rules and practices guiding the setting of enforcement priorities by the Commission and NCAs is likely to facilitate more attention and debate to such concerns.

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