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# Priority Setting as the Blind Spot of Administrative Law Enforcement: A Theoretical, Conceptual, and Empirical Study of Competition Authorities in Europe

Or Brook* and Katalin J. Cseres†

Priority setting by independent regulatory agencies (IRAs) is an invisible, yet essential, component of regulatory law enforcement. The selection of which cases to enforce and which to disregard is vital given IRAs' finite resources, and due to the function of concretising open-ended administrative norms. Clear enforcement priorities allow IRAs to focus on matters of genuine economic, societal, and doctrinal importance, solve complex socio-economic problems and build credible, independent, and accountable authorities. However, as a blindspot of administrative discretion, to date neither a normative framework to assess IRAs' priority setting rules and practices nor a shared terminology to evaluate its different features has developed. This article fills this gap by developing a novel typology and normative framework to guide IRAs' priority setting, based on a historical, conceptual, and empirical study focusing on the case of independent competition authorities. It combines insights from top-down analysis of administrative and criminal law enforcement with bottom-up empirical research and engagement with IRAs using EU competition law enforcement as a case study.

## INTRODUCTION

### Priority setting: between expertise and the rule of law

Setting enforcement priorities by independent regulatory agencies (IRAs) is a crucial component of effective expert-driven enforcement, free from electoral politics. As IRAs are constrained by scarce financial and human resources, it is neither possible, nor desirable, that they enforce every possible law infringement. The power to choose which cases to pursue and which to disregard is a precondition for preserving society's resources to tackle the most harmful

*Associate Professor of Competition Law and Policy, Centre for Business Law and Practice (CBLP), University of Leeds.
†Associate Professor of Law, Amsterdam Centre for European Law & Governance (ACELG), University of Amsterdam. The collection of the empirical data and impact activities related to this study have been supported by funding of the UK ESRC Impact Acceleration Account. For more details see https://acelg.uva.nl/research/research-projects/current/rethinking-eu-and-national-competition-law-enforcement.html [https://perma.cc/PWS8-UYMR]. The impact activities were also supported by the Michael Beverley Innovation Fellowship, University of Leeds. We are grateful for the excellent research assistance of Ágnes Sipiczki and Michael Borgers, both LLM students of the Master European Competition Law and Regulation at the University of Amsterdam at the time, and to the insightful comments of the anonymous reviewers, as well as Marta Morvillo and Amit Zac on earlier drafts of this article. The authors have no conflicts of interest to declare.

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infringements. Such power affords authorities the autonomy to focus on matters of genuine economic, societal, and doctrinal importance and, hence, can contribute to credible enforcement priorities.

When setting priorities, IRAs exercise administrative discretion, that is, the power left to decision-makers to choose 'between different alternatives when concretizing legal norms with a view to achieving the ends that those norms identify'.[1] The nature of administrative rules entails that IRAs engage in complex technical assessment and adopt normative choices based on open-ended legal norms, lacking 'previously fixed, relatively clear, and binding legal standards'.[2] Prioritisation plays an important role in norm concretisation by setting substantive criteria of what *is* and what *is not* a priority.

Besides the merits of budget rationalisation and norm concretisation, priority setting is highly problematic from the perspective of the rule of law.[3] As aptly characterised by Judge Thurman Arnold, the power *not* to enforce the law 'appears to the ordinary citizen to *border on anarchy*'.[4] Undeniably, 'discretion not to enforce intrinsically involves discretion to discriminate – a power very dangerous to justice'.[5] It may lead to arbitrariness, inconsistencies, and unpredictability.[6]

While common to many areas of regulatory enforcement, these concerns are decisive for IRAs, whose very existence reflects the delegation of discretion from elected legislators to non-majoritarian institutions. Upon the delegation of prioritisation powers, the democratic legitimacy for allocating public spending and the use of coercive power of the state is diluted, and voters cannot hold IRAs accountable for the exercise of such power.[7]

Just like other discretionary powers, priority setting is largely informal and non-transparent. Appearing to outsiders as a 'black-box',[8] in many legal systems no or very few legal norms specify *how and why* IRAs set – and should set – their enforcement priorities. IRAs are often not required to publish or rea-

1 Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 80 MLR 463.
2 D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) 1.
3 We use the concept of the rule of law as a set of substantive and procedural rules that limit the exercise of public power. Administrative law, as a tool to control the exercise of public power vis-à-vis private persons, should be delineated by identifying the scope of the regulatory action, which may have direct impact on the legal sphere of private persons. See Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford: OUP, 2011) 3, 18.
4 Thurman W. Arnold, *The Symbols of Government* (New Haven, CT: Yale University Press, 1935) 151 (emphasis added).
5 Kenneth Culp Davis, 'American Comments on Antitrust Enforcement' in Kenneth Culp Davis (ed), *Discretionary Justice in Europe and America* (Champaign, IL: University of Illinois Press, 1967) 96-97.
6 Julia Black, 'Managing Discretion' as cited in Jonathan Dobinson, 'Penalties: Policy, Principles and Practice in Government Regulation' (2001) 79 *Australian Law Reform Commission Reform Journal* 1, 2. The scholarship and case law on priority setting and discretion will be discussed below.
7 Richard A. Epstein, 'The Perilous Position of the Rule of Law and the Administrative State' (2013) 36 Harv JL & Pub Pol'y 5; Susana Borrás, Charalampos Koutalakis and Frank Wendler, 'European Agencies and Input Legitimacy: EFSA, EMeA and EPO in the Post-Delegation Phase' (2007) 29 *European Integration* 583, 586-587.
8 Marc L. Miller and Ronald F. Wright, 'The Black Box' (2008) 94 Iowa L Rev 125, 183.


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son their choices, which remain outside the scope of judicial control. In those circumstances, how can one differentiate between prioritisation decisions being made in the public interest from those that advance the private interests of IRAs' officials, such as increasing the reputation of the IRA or its members (as opposed to the public interest as articulated by elected politicians) or self-enrichment?[9] How can one safeguard technical expertise and avoid unjustified prioritisation practices based on cherry-picking, regulatory capture,[10] revolving doors,[11] or populist initiatives?[12]

Despite these scholarly efforts, the role of priority setting is largely overlooked not only by 'ordinary citizens', but also by scholars, policymakers, and courts. IRAs were developed incrementally, as a 'historical accident'.[13] Lacking a clear regulatory philosophy, many were created to respond to specific political challenges. As elaborated below, the scope and nature of IRAs' priority setting powers were typically defined implicitly, corresponding to their national administrative, constitutional, and criminal law traditions. Moreover, priority setting rules and practices are also influenced by a complex matrix of non-legal factors, such as broader political and economic circumstances, bureaucratic and organisational norms, personal experiences, the decision makers' perceptions and attitudes, and moral and social norms.[14] At the same time, courts exercise only limited review over the exercise of priority-setting by IRAs, mostly ensuring that IRAs did not overstep their legislative boundaries.[15] They typically focus on cases IRAs select to pursue, and not on the process and the impact of case selection. Focusing on *formal actions* by IRAs, scholars, policymakers, and courts tend to overlook instances of *inaction* or *informal* action, even if the latter is estimated to characterise the vast majority (90 per cent) of the IRAs' efforts.[16]

9 Such questions were examined by rational choice theory scholarship, suggesting that the emergence of regulation in particular industries could best be explained as the product of powerful sectional interests, primarily powerful business interests and bureaucrats, rather than a need to protect the interests of the general public. See Karen Yeung, 'The Regulatory State' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford: OUP, 2010) 68; Martin Lodge and Kai Wegrich, 'Reputation and independent regulatory agencies' in Martino Maggetti, Fabrizio Di Mascio and Alessandro Natalini (eds), *Handbook of Regulatory Authorities* (Cheltenham: Edward Elgar Publishing, 2022) 241-254; Rebecca Schmidt and Colin Scott, 'Regulatory Discretion: Structuring Power in the Era of Regulatory Capitalism' (2021) 41 *Legal Studies* 454.

10 Theodore Lowri, *The End of Liberalism* (New York, NY: Norton, 1969); Willaim F. West, *Controlling the Bureaucracy: Institutional Constraints in Theory and Practice* (Armonk, NY: M. E. Sharpe, 1995) 10-13.

11 Jan Broulík, 'Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU' (2022) 45 *World Competition* 159.

12 Maciej Bernatt, *Populism and Antitrust: The Illiberal Influence of Populist Government on the Competition Law System* (Cambridge: CUP, 2022).

13 See text to n 50 below.

14 The presence of rules does not mean that rules will be the sole or even dominant factor influencing how discretion is exercised, and their absence does not mean the decision maker is unbound in his or her decision. Black, n 6 above, 2.

15 The so-called *ultra vires* principle, see text to n 72 below.

16 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, LA: Louisiana State University Press, 1969) 4; Schmidt and Scott, n 9 above, 460. In the field of competition law enforcement, see Or Brook, 'Do EU and U.K. Antitrust Law "Bite": A Hard Look at "Soft" Enforcement and Negotiated Penalty Settlements' (2023) 68 *The Antitrust Bulletin* 477.

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Accordingly, to date, no normative framework guides the assessment of IRAs' priority setting rules and practices and no shared terminology explains its different aspects. There are neither 'best-practices' nor control mechanisms for enforcement priorities, nor benchmarks for measuring their effects.

## Aims, methodology, and approach

This article aims to fill this gap by developing a novel typology and normative framework to guide priority setting by IRAs in an *ex post* enforcement context, based on a historical, theoretical, and empirical study. In a bid to capture the legal, institutional, and practical contexts of priority setting, it combines insights from top-down analysis of administrative and criminal law enforcement with bottom-up empirical research using competition law enforcement as a case study for *ex post* enforcement by IRAs. This mixed method approach is necessary to capture the institutional, substantive, and procedural issues surrounding enforcement processes by IRAs.[17]

The remainder of this article is organised as follows. The first section traces the historical origins of priority setting powers as they developed in the shadow of the modern regulatory state. It points to the diversity of IRAs' structures and priority setting powers across national legal orders, in particular between Anglo-Saxon jurisdictions and jurisdictions in the EU. Given the wide variety of IRAs, this section cannot explore all types of IRAs. Instead, the second section explores priority setting by using EU competition law as a case study. It discusses the emergence of competition authorities (CAs) in Europe and the evolution of their prioritisation powers following the 'modernisation' of the enforcement in 2004. This section demonstrates how priority setting powers were implicitly shaped and influenced by their national administrative, institutional, and political setting, and how they differ even between CAs despite applying the same substantive legal provisions.

The third section draws insights from the rich theoretical account of administrative discretion to propose normative benchmarks to guide the assessment of priority setting rules and practices. Departing from the narrow judicial review centred approach to control discretion (*ultra vires* principle), it advocates a broad public interest-based approach and identifies five good governance benchmarks: effectiveness, efficiency, independence, transparency, and accountability.

The fourth section introduces our typology to structure the understanding of priority setting, distinguishing between seven aspects of prioritisation in the pre-decision, decision, and post-decision stages of IRAs' decision-making. The degree of priority setting powers in each aspect is defined with reference to the external or internal controls imposed on the exercise of discretion. By presenting descriptive statistics and qualitative analysis of the operation of CAs in Europe, it demonstrates the rich diversity of priority setting rules and practices across each of the seven aspects and the implications of IRAs' specific choices on the attainment of good governance principles.

17 Miroslava Scholten, 'Enforcement' in Maggetti, Di Mascio and Natalini (eds), n 9 above, 398.


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The fifth section introduces four representative models of IRAs' prioritisation rules and practices emerging from the historical and theoretical analysis and discusses how our empirical findings concerning CAs can be generalised to other types of IRAs alongside possible limitations. We argue that as priority setting rules and practices are deeply embedded in and directly shaped by each CA's respective legal system, identifying a single 'best' model for prioritisation is unfeasible. Outlining the four models of CAs' prioritisation is, nevertheless, important as each model reflects a unique trade-off between good governance principles. The models identify and visualise how each CA could better align its priority setting practices to its powers as defined by law and hence, better comply with good governance principles. The sixth section concludes.

The empirical analysis is based on a systematic and comprehensive mapping ('coding') of the procedural and substantive rules and practices that define the way that CAs of 27 EU Member States, the United Kingdom (UK), and the EU Commission (Commission) set their priorities.[18] The data was collected through desk research of the publicly available legislation, case law, and policy documents in each jurisdiction combined with written questionnaires and interviews with officials of the CAs.[19] The cut-off date for the data collection was December 2020.[20]

The empirical findings were initially presented in a Policy Report,[21] which formulated policy recommendations for CAs, and invited feedback from policymakers. This article has been enriched with this subsequent feedback and insights received in various workshops with enforcers (including the Commission, European CAs, and international organisations), allowing us to place the findings in the context of regulatory enforcement and administrative discretion scholarship.

The article offers a number of unique contributions. First, it investigates the history of the emergence of IRAs' priority setting powers against the development of and the scholarship on the IRAs' mode of governance. Second, it offers a conceptual framework for evaluating priority setting as a form of administrative discretion. Third, it makes a novel empirical-based contribution to the scholarship on IRAs, using the case study of competition law.

We argue that CAs offer an important case study that could inform the development of a priority setting typology and framework for analysing rules and practices applicable to *ex post* enforcement by other types of IRAs. A case study is a research strategy and a methodology that is well suited to investigate

18 A copy of the questionnaires and the coding of the results is available upon request from the authors.

19 The empirical study was undertaken pursuant to the approval of the Ethics Committee of the University of Amsterdam. Furthermore, training seminars with European and international CAs enriched the insights gained.

20 This date also represents the end of the implementation period of Directive 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 [2019] OJ L 11/3 (the ECN+ Directive), which will be discussed below. Since this date, some Member States have reformed their priority setting rules and practices, which are not reflected in this study.

21 Or Brook and Katalin J. Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' at https://ssrn.com/abstract=3930189 [https://perma.cc/2JAY-9NDW].

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'a contemporary phenomenon in-depth within its real-life context, especially when the boundaries between the phenomenon and the context are not clearly evident'.[22] Our case study aims to explore priority setting in the broader regulatory space by demonstrating how priority setting rules and practices emerged incrementally and were shaped by each jurisdiction's own legal and economic traditions.[23] We argue that features of CAs render them to be a compelling case study for this purpose. First, CAs are the second most common IRAs globally,[24] and were among the first IRAs in the US and Europe, serving as a blueprint for other IRAs in terms of institutional structure, powers, and procedures.[25] In fact, the rules governing prioritisation in the field of competition law enforcement and the fundamental constitutional safeguards created by legislators and courts have fundamentally shaped the EU's administrative procedures in other fields of regulation.[26] Second, empirical studies found that, on average, CAs are characterised by a median degree of managerial autonomy, political independence, public accountability, and regulatory capabilities compared to other types of IRAs.[27] Hence, they offer a representative unit of analysis in terms of the similarities of the institutional form of their regulatory governance.

This case study also has limitations. Given the high degree of variation in the regulatory landscape, both in terms of sectors and jurisdictions, it is difficult to point to a coherent or stable analytical construct common to all IRAs.[28] Scholars commonly distinguish between four categories of IRAs, based on their type and sector, each sharing common features and characteristics: financial, social, utilities, and competition.[29] They also note that CAs and competition law enforcement have some unique characteristics compared to other types of IRAs given the diverging sectoral scope of application, temporal nature of the enforcement (*ex post* or *ex ante*), roles of the principles of efficiency and distributive justice, nature of the legal obligations imposed, dynamic versus static quality of these rules, and the qualitative nature of the infringements.[30]

22 Robert K. Yin, *Case Study Research and Application: Design and Methods* (Thousand Oaks, CA: Sage Publications, 2018) 15.

23 Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' (2016) *Law and Method* 1.

24 Jacint Jordana, David Levi-Faur and Xavier Fernández-i-Marín, 'The global diffusion of regulatory agencies: Channels of transfer and stages of diffusion' (2011) 44 *Comparative Political Studies* 1343, 1347.

25 See Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford: OUP, 2015) 159.

26 Or Brook, Katalin J. Cseres and Ben van Rompuy, 'Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making' (2023) 14 *Journal of European Competition Law and Practice* 497.

27 Xavier Fernández-I-Marín, Jacint Jordana and David Levi-Faur, 'The age of regulatory agencies: tracking differences and similarities over countries and sectors' in Maggetti, Di Mascio and Natalini (eds), n 9 above. The intermediate degree of independence of CAs compare to other IRAs was also reported by Fabrizio Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Cheltenham: Edward Elgar Publishing, 2008) 144-146; Igor Guardiancich and Mattia Guidi, 'Formal independence of regulatory agencies and Varieties of Capitalism: A case of institutional complementarity?' (2016) 10 *Regulation & Governance* 211.

28 Yeung, n 9 above, 76.

29 Jordana and others, n 24 above, 1346; Fernández-I-Marín and others, n 27 above, 83-84.

30 For an in-depth discussion see Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge: CUP, 2015) 41-48, and the rich scholarship referenced there.


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These CA features pose certain limitations in terms of the generalisability of the proposed typology and framework for understanding priority setting rules and practices applicable to setting *ex post* enforcement priorities by other IRAs. Such limitations are addressed in the relevant sections below. Yet, it should also be noted that the differences between CAs and other types of IRAs are often fluid and elusive.[31] From the perspectives of procedure and institutions, CAs have emerged in parallel to other IRAs worldwide and share many institutional features and enforcement discretion powers.[32] In terms of the temporal nature of enforcement, while competition law enforcement is traditionally perceived as *ex post* based, CAs dedicate an increasing amount[33] of enforcement efforts to *ex ante* tools with a regulatory nature, such as commitment decisions, market studies, sector inquiries, and more recently *ex ante* regulation of digital markets.[34] In parallel, a growing number of IRAs are engaged in *ex post* enforcement,[35] and some sector regulators may even have *ex post* competition enforcement powers.[36] Many multi-functional IRAs, moreover, must select how to allocate their priorities between *ex post* competition law or consumer protection enforcement and *ex ante* sector regulation powers. The combination of *ex post* competition supervisory and *ex ante* regulatory powers are becoming more frequent and, thus, the differences between the nature of enforcement by CAs and other types of IRAs are becoming blurred. This broadens the relevance of studying priority setting powers to other IRAs than CAs, as well as the need for keeping control over ways priorities are set both in *ex ante* and *ex post* enforcement practices. While regulatory enforcement by CAs is still generally characterised as *ex post* enforcement, their priority setting practices may inform other types of IRAs which are increasingly involved in similar tasks.

## HISTORICAL ORIGINS OF IRAS AND THEIR PRIORITY SETTING POWERS

The nature and scope of IRA discretion to set priorities are inherently tied to the rationales justifying the emergence of economic regulation and its enforcement mode by IRAs. This section explores the historical development of each of these layers, starting from the nineteenth century. As elaborated below, the emergence of IRAs was significantly influenced by two conflicting approaches to economic regulation: the Anglo-Saxon model of private own-

31 *ibid*, 41.
32 Mattia Guidi, 'Competition Authorities' in Maggetti, Di Mascio and Natalini (eds), n 9 above, 1140.
33 For an empirical study of the allocation of the enforcement efforts by the Commission, UK, Dutch, and German CAs see Brook, n 16 above.
34 Dunne, n 30 above, 263-315.
35 For the growing trend in the EU and Europe see Ton Duijkersloot and Rob Widdershoven, 'Administrative law enforcement of EU law' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Cheltenham: Edward Elgar Publishing, 2023) 38-55. For a review of IRAs with ex-post enforcement powers in the US, see Rory Van Loo, 'Regulatory Monitors' (2019) 119 *Columbia Law Review* 369, Appendix B.
36 See text to n 259 below.

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ership and the European model of public ownership. Consequently, this section will focus on the origin of economic governance modes, IRAs, and their priority setting powers in those jurisdictions. To this end, it analyses the degree to which IRAs' priority setting powers are governed by the external or internal controls imposed on the exercise of their discretion, adopted in parallel to their historical development.[37] *External controls* are the limits on the exercise of discretion imposed on the IRA by the legislator, government, or judiciary. *Internal controls* refer to self-adopted measures by the IRA overseeing and structuring the exercise of its discretion for example by adopting binding or non-binding guidelines.

This section shows that due to the incremental evolution of IRAs over time, so far, no normative framework has been developed to guide IRAs' priority setting rules and practices. It demonstrates that Anglo-Saxon jurisdictions have limited the external control over the exercise of administrative discretion by adopting the *ultra vires* doctrine, while many European countries have awarded only limited priority setting powers to their IRAs. Ultimately, these differences explain the emergence of four models of priority setting powers of IRAs, which are explored towards the end of this study.

### Anglo-Saxon model of private ownership, and the birth of IRAs in the US and UK

Economic governance in the US and the UK traditionally followed a private ownership model, leaving the ownership of industry to private market actors and limiting government intervention to cases of market failure.[38] The regulation of utilities and other privately-owned sectors called for dedicated institutions to administer and enforce the legal rules under their jurisdiction.

In the UK, until the mid-nineteenth century, utilities were commonly regulated by 'Commissioners', who were the forerunners of modern IRAs. Commissioners had judicial, administrative, and regulatory responsibilities, which like their organisational structure varied considerably from one sector to another.[39] The Commissioners' independence was seen as an important guarantee against arbitrary and unfair treatment by the British King and his ministers.[40] In the second part of that century, some of this independence was lost as many of these bodies were incorporated into central or local governmental departments, which were subject to ministerial and political supervision.[41] Yet, they retained some independence, as besides being loyal to the minister, every civil servant

37 This term is inspired by Miller and Wright, n 8 above, 128-129, referring to external and internal 'legal regulation' of discretion.

38 Market failures such as natural monopolies, public goods, or externalities. Giandomenico Majone, 'Regulation and its Modes' in Giandomenico Majone (ed), *Regulating Europe* (London: Routledge, 1996) 9-15.

39 *ibid*, 54-57.

40 Luc Verhey, 'British Agencies: Surveying the Quango State' in Tom Zwart and Luc Verhey (eds), *Agencies in European and Comparative Law* (Antwerpen: Intersentia, 2003) 19-36, 20.

41 *ibid*.


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was expected to be politically impartial.[42] In parallel, from the early twentieth century, a specialised tribunal system, operating outside the ordinary court system, was developed to handle disputes concerning matters of transport and competition, rent, and social insurance and assistance.[43]

These British institutions inspired the creation of modern IRAs. IRAs are an American regulatory innovation that did not emerge as an intentional category of institutions, but as a group of agencies sharing common legal status despite having diverging structural and statutory characteristics.[44] They appeared in the late-nineteenth and early-twentieth centuries with the rise of economic regulation. During that period, industrialisation and urbanisation stimulated economic growth given the increased mobility of workers and the expansion of regional and national markets. However, not all members of society felt they received a fair share. In particular, farmers, small businesses, and workers demanded government intervention to fight abusive practices by railroads. After legislation adopted by individual states failed, the 1887 Interstate Commerce Act (ICA) established the first federal independent regulator in the US: the Interstate Commerce Commission (ICC).[45] As the design of the ICC was inspired by the British Railways Commission, a semi-judicial tribunal,[46] it acted as an administrative tribunal, operating reactively following case-by-case adjudication.[47]

The establishment of the ICC as an independent body was the result of an evolution rather than of doctrinal theory.[48] During its first years of operation, it was not fully independent, but was placed under the US Department of the Interior.[49] Granting independence to the ICC was a 'historical accident', originating from the disappointment of the drafters of the ICA with the appointed ICC President.[50] Commentators point to various justifications for American IRAs' independence, including the quasi-judicial nature of the commissions, ie inde-

42 *ibid*.
43 Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 2016) 60-61.
44 This explains why key theories and insights of the regulatory processes find their foundations in the history of US independent regulators. See Cristopher Carrigan and Mark Febrizio, 'Tracing the Development of U.S. Independent Regulators' in Maggetti, Di Mascio and Natalini (eds), n 9 above.
45 *ibid*, 21.
46 On the British Railways Commission, see Craig, n 43 above, 332-333.
47 Colin Scott, 'Privatization and Regulatory Regimes' in Robert Goodin, Michael Moran and Martin Rein (eds), *The Oxford Handbook of Public Policy* (Oxford: OUP, 2008) 659; Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1966) 26-35; Robert L. Calhoun, 'The Interstate Commerce Commission: Cases, Rules, and Administrative Discretion' in Douglas H. Shumavon and H. Kenneth Hibbeln (eds), *Administrative Discretion and Public Policy Implementation* (New York, NY: Praeger, 1986) 265-283, 272-274.
48 Robert Eugene Cushman, *The Independent Regulatory Commissions* (New York, NY: Octagon Books, 1937) 4-5. '[M]ore a function of competing political forces within the legislative and executive branches than of any systematic analysis of its effectiveness', see Paul R. Verkuil, 'The Purposes and Limits of Independent Agencies' [1988] Duke LJ 257, 257.
49 The Secretary enjoyed general supervisory powers over housekeeping, budget, appointments, and staff compensation, see Verkuil, *ibid*, 257.
50 Hence, the grant of independence was not grounded on economic or legal theory, and the term 'independence' was absent from the ICC's legislative debate. See Bernstein, n 47 above, 23.

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pendence of regulatory agencies is akin to the independence of the judiciary;[51] developing independent expertise on technical and complex matters by separating regulatory functions and shielding IRAs from politics; advantages of geographical representation *vis-à-vis* executive departments; and taking up experimental tasks or tasks that did not fit with existing governmental departments.[52]

The prestige of the ICC stimulated the expansion of other IRAs.[53] The ICC's structural features served as a template for other IRAs, in particular, antitrust agencies. The Sherman Act, which was adopted three years after the Interstate Commerce Act, did not set up an administrative commission and relied on enforcement by the Department of Justice (DoJ) and the courts. Yet, in 1914 the Federal Trade Commission (FTC) was established. Following the ICC structure,[54] it was adjudication-based.[55]

The first coherent legal-economic philosophy underlying IRAs was the 1930s New Deal,[56] which fuelled the spread of IRAs. IRAs were delegated broad powers, substantial discretion, and served as independent technical experts by insulating public officials from partisan pressures in the service of a long-term public interest. In 1935, the Supreme Court in *Humphrey's Executor* recognised the constitutional status of independence, which distinguished IRAs from the executive.[57] Fixed terms, for-cause removal, and multi-member boards of experts were established as the cornerstones of IRAs.[58] Upon the expansion of new agencies, the Administrative Procedure Act 1946 standardised IRAs' administrative processes and controls, strengthening their powers and independence.[59]

51 Marshall Edward Dimock, *British Public Utilities and National Development* (London: Allen and Unwin, 1933).
52 Cushman, n 48 above, 10-11. More generally see Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1, 4.
53 *ibid*.
54 Domenique Custos, 'The Rulemaking Power of Independent Regulatory Agencies' (2006) 54 Am J Comp L 615, 616.
55 FTC received support from three distinct groups: advocates of stronger enforcement of antitrust rules; businesses that believed that a Commission could serve as an advisor to businesses and approve some restraints to trade; and those which believed that large interstate commerce should be regulated. See Cushman, n 48 above, 4-5; Verkuil, n 48 above, 263.
56 James O. Freedman, 'Expertise and the Administrative Process' (1976) 28 Admin L Rev 363.
57 *Humphrey's Executor* v *United States* 295 US 602 (1935), was a US Supreme Court case concerned with whether the US President had the power to remove executive officials of a quasi-legislative or quasi-judicial administrative body for reasons other than those allowed by Congress. The Court held that the President did not have this power: Carrigan and Febrizio, n 44 above, 13.
58 The Court ruled that the FTC was (1) non-political and non-partisan, (2) uniquely expert, (3) 'quasi-legislative', and (4) 'quasi-judicial' and as such was an IRA, rather than part of the executive. Hence, it remained one of the core judicial pillars of the technocratic, independent administrative system by grounding the constitutionality of FTC Commissioner immunity from presidential removal for political reasons. Also see Daniel A. Crane, 'Debunking Humphrey's Executor' (2016) 83 Geo Wash L Rev 1835.
59 Bernstein, n 47 above, 69. While it mostly governed the process of adopting regulations rather than enforcement, it introduced important provisions: Douglas H. Shumavon and H. Kenneth Hibbeln, 'Administrative Discretion: Problems and Prospects' in Shumavon and Hibbeln (eds), n 47 above, 5; Douglas F. Morgan and John A. Rohr, 'Traditional Responses to American Administrative Discretion' in Shumavon and Hibbeln (eds), *ibid*.


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During the 1960s and 1970s, the ICC and other IRAs transformed from reactive adjudicators into proactive rule-makers and regulators.[60] The focus on rulemaking responded to scholars' and judges' advocacy, arguing that the general and prospective characteristics of rulemaking were more fair and efficient than the incremental, time-consuming adjudicatory approach.[61] This proactive operational mode created priority setting powers, as it invited IRAs to set their regulatory agenda and granted them a functional advantage over the courts.[62]

Initially inspired by the British Commissions, these American IRAs influenced economic governance in the UK. Following the Second World War, the UK abandoned its previous private ownership model and nationalised large parts of the industry.[63] Government departments regulated and oversaw the operation of these nationalised sectors, aiming to ensure not only the functioning and competitiveness of those services, but also other public policies, such as employment, economic growth, stable prices, and a balance of payments.[64] These new tasks warranted new institutions. One early example was the British Monopolies and Restrictive Practices Commission (MRPC) in 1948, which responded to the 1944 Employment White Paper's call to introduce competition policy to achieve full employment.[65] Unlike its American counterparts, the MRPC was advisory in nature. It held investigative and recommendation-making powers, but action could only be taken by the minister responsible for the relevant sector. In 1956, the Restrictive Trade Practices Act created new institutions and enforcement powers. It established a Registrar of Restrictive Trading Agreements and imposed the duty to notify certain anti-competitive agreements. Adjudication powers were granted to the Restrictive Practices Court (RPC), a newly established judicial body, independent of political and economic pressure. In 1965, the MRPC was transformed into the Monopolies and Mergers Commission (MMC), upon expanding its powers of investigation also to merger controls.

As the management of public, private, and mixed entities became increasingly complex, a 1968 Report on the Civil Service was called on to assess which activities should be performed by governmental departments and which should be moved to independent external bodies.[66] Inspiration was drawn from how administration was organised in the US and France, where regulators involved scientists, engineers, and other specialists instead of the 'generalist' or 'amateur' British regulators.[67] By highlighting the way the Swedish gov-

60 Verkuil, n 48 above, 263-264.
61 *ibid*, 263-264; Custos, n 54 above, 629.
62 Verkuil, *ibid*, 263-264.
63 David Heald, 'The United Kingdom: Privatisation and its Political Context' (1988) 11 *West European Politics* 31, 31-36.
64 *The Report of the Committee on the Civil Service* Cmnd 3638 (1968) 10. Also see Craig, n 43 above, 334.
65 Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: Manchester University Press, 1999) 10; Andrew Scott, 'The evolution of competition law and policy in the United Kingdom' (2009) *LSE Law, Society and Economy Working Papers* 9/2009, 9.
66 *The Report of the Committee on the Civil Service* n 64 above, 10.
67 *ibid*, 13, 61.

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ernment was organised with public bodies enjoying independent status,[68] the report encouraged the creation of the Office of Fair Trading (OFT) in 1973, a non-ministerial government department governing consumer protection and competition law. Inspired by the independence of the American FTC and the German *Bundeskartellamt*, the OFT was conferred priority setting powers to start investigations and refer cases to the MMC.[69]

From the mid-1980s, the British economy was reorganised by privatising public utilities and liberalising others.[70] This reform, in turn, called for a new mode of governance and the establishment of sector-specific regulators. Similarly to the OFT, many of these regulators were headed by a single Director General, operating free from political pressure.[71]

**Priority setting of Anglo-Saxon IRAs: limited controls**

The transformation of the American and British IRAs into proactive regulators was a crucial step towards the emergence of their priority setting powers. Proactive operation invited IRAs to set their own agenda rather than reacting to cases brought in front of them. As elaborated below, this led to the development of the first priority setting governance models, defining IRAs' prioritisation powers and their controls.

The marginal attention devoted to the exercise of administrative discretion by Anglo-Saxon IRAs in general, and their priority setting powers in particular, can be explained by their history. In the early days of British tribunals, the *ultra vires* doctrine was the main *external control* limiting the exercise of administrative discretion. This principle emphasises the separation of powers and is based on a unitary concept of democracy.[72] Originating from Dicey, who alerted to administrative discretion as a threat to the rule of law in England in the 1800s,[73] when the legislator delegates its power to an administrative agency, judicial intervention centres on ensuring that the agency does not transgress the legislator's will. The *ultra vires* doctrine served both as a justification for judicial intervention and prescribed its limits: the exercise of judicial control is limited to ensuring an agency respects its legislative boundaries; and when it operates within the scope of its delegated powers, courts avoid substituting their own views with that of the authority.[74] The *ultra vires* doctrine was well-suited for English administrative law during the nineteenth century and the early American reactive-adjudicators agencies. These tribunals relied on adversarial systems, where private parties bring cases and evidence, leaving limited room for proactive action. Control over their operation was therefore similar to

68 *ibid*. In the years that followed, various British IRAs were established including the Civil Aviation Authority and the Health and Safety Commission. Also see Verhey, n 40 above, 19-36, 21.
69 M. J. Methven, 'The Role of the Office of Fair Trading' (1975) City London L Rev 7, 9.
70 Heald, n 63 above, 31-36.
71 *ibid*.
72 A. V. Dicey, 'Development of Administrative Law in England' (1915) 31 LQR 148. Also see Craig, n 43 above, 2-14.
73 A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1959).
74 Craig, n 43 above, 4-7.


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judicial review by ordinary courts and focused on ensuring the protection of the private interests of the parties to the dispute.[75]

Anglo-Saxon IRAs had limited competences to adopt *internal controls*. British tribunals, which inspired the emergence of the US IRAs, were bound by the *no-fettering rule*, prescribing that public bodies with discretionary power are not entitled to base their decisions on a pre-determined rule without considering the merits of the individual case.[76] This rule has two aims: to safeguard fair trials to ensure that individual cases are treated on their merits; and to promote administrative flexibility, adapting decisions to changing circumstances and priorities subject only to control of legality and reasonableness.[77] In *British Oxygen* v *Ministry of Technology* in 1971, the House of Lords held that IRAs were not prohibited from adopting internal controls if they retain discretion when applying them to a specific case.[78] Arguably, jurisprudence in the UK did not only permit, but actually required, the adoption of such internal controls.[79]

In the US, too, the operation of IRAs was subject to limited judicial control. Until the 1930s, courts were highly reluctant to review administrative decisions unless authorised to do so by the law under which these agencies operated.[80] Even after general reviewability of discretion was recognised, courts refrained from questioning both facts and policy choices made by IRAs limiting their scrutiny to questions of procedure and statutory interpretation.[81] The New Deal both confirmed the limited judicial control of IRAs and left the review of enforcement priorities unchecked. When IRAs adopted internal controls, they were often informal, not even binding the IRA itself.[82]

The limited external controls imposed on priority setting by British and American IRAs align with Anglo-Saxon traditions of criminal law granting wide, uncontrolled prosecutorial discretion.[83] Adhering to the *opportunity principle*, the state is granted a choice not to start an investigation, even when enforcement is technically and legally possible.[84] This broad enforcement discretion is justified by rationales of procedural economy.[85] As a 'first-come, first-serve' approach is undesirable, setting enforcement priorities is essential.[86] Yet, the opportunity principle is not only a response to pragmatic considerations but reflects the belief that enforcement priorities are necessary in a

75 *ibid*, 7-8.

76 *ibid*, 536-540; Aileen McHarg, 'Administrative Discretion, Administrative Rule-Making and Judicial Review' (2017) 70 *Current Legal Problems* 267, 270-271.

77 McHarg, *ibid*, 270-271.

78 *British Oxygen* v *Ministry of Technology* [1971] AC 610. Also see *ibid*.

79 McHarg, n 76 above, 291.

80 West, n 10 above, 3-5.

81 *ibid*.

82 Ellen S. Podgor, 'Department of Justice Guidelines: Balancing Discretionary Justice' (2003) 13 Cornell JL & Pub Pol'y 167, 170-175.

83 Davis, n 5 above, 63-67; Gerard Conway, 'Holding to Account a Possible European Public Prosecutor Supranational Governance and Accountability across Diverse Legal Traditions' (2013) 24 *Criminal Law Forum* 371, 376-380.

84 P. J. P. Tak, *The Legal Scope of Non-Prosecution in Europe* (Helsinki: Helsinki Institute for Crime Prevention and Control, 1986) 28-29.

85 Scarce human, financial, and technical resources mean that it is not possible to investigate and enforce all possible infringements, *ibid*, 30.

86 Roscoe B. Starek, 'Prosecutorial Discretion: A View from the Federal Trade Commission' (1997) 20 *Regulation* 24, 26.

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democratic society, as enforcement should be avoided when it is unjustified.[87] These justifications extend to administrative law enforcement, which is based on similar considerations of deterrence, seriousness of infringements, and norm concretisation.[88]

British and American competition authorities illustrate two distinctive governance models of priority setting. They are both characterised by limited *external controls* (thus, leaving IRAs wide discretion), but differ in the degree of their *internal controls*. In the first model, represented by the US antitrust system, the power to set priorities is not only uncontrolled by the legislator, but neither DoJ[89] nor FTC[90] adopted internal controls to guide their choices. This reflects a model of a high degree of prioritisation, with limited external and internal controls. As elaborated below, this model gives more weight to effectiveness, efficiency, and independence of IRAs over their transparency and accountability since such IRAs do not communicate or make explicit how they set their enforcement priorities or justify their case selection. In the second model, represented by the UK antitrust system, while few external controls are imposed on the exercise of the CA's priority setting powers, they are required to publish an annual plan, explaining their priorities for the respective year.[91] Moreover, they adopted internal prioritisation guidelines.[92] This model ensures greater transparency and accountability in comparison to the first model.

## European IRAs: origins and varying priority setting powers and controls

The control of key industries in Europe (beyond the UK) followed a *public ownership* model during the nineteenth century. Nationalisation of key industries empowered states to structure their economies by safeguarding the public interest against powerful private entities.[93] Public ownership dominated the governance of utilities such as energy, transport, telecommunications and postal services in the period after the Second World War. Having the characteristics of natural monopolies, public ownership was advocated to eliminate eco-

87 Charles D. Breitel, 'Controls in Criminal Law Enforcement' (1960) 27 U Chi L Rev 427, 427.
88 In practice, American scholars often make no distinction between enforcement discretion in criminal and administrative law, especially when sanctions are being imposed. See for example Fredrich H. Thomforde, Jr, 'Controlling Administrative Sanctions' (1975) 74 Mich L Rev 709; William F. Baxter, 'Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law' (1982) 60 Tex L Rev 661, n 91; Norman Abrams, 'Internal Policy: Guiding the Exercise of Prosecutorial Discretion' (1971) 19 UCLA L Rev 1, 7-8; Richard M. Thomas, 'Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance' (1992) 44 Admin L Rev 131.
89 For an interesting discussion see Davis, n 5 above, 98.
90 Robert A. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust* (Cambridge, MA: MIT Press, 1980); Starek, n 86 above, 24; Fabrizio Gilardi, 'The Institutional Foundations of Regulatory Capitalism: the Diffusion of Independent Regulatory Agencies in Western Europe' (2005) 598 *The Annals of the American Academy of Political and Social Science* 84, 85-86.
91 Enterprise Act 2022, c 40.
92 On agenda setting, see further below.
93 Majone, n 38 above, 9-15; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing, 2004) 265-271.

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nomic inefficiencies, protect consumers, fight excessive political power, stimulate growth, favour specific regions or groups, and ensure national security.[94]

However, by the 1980s many industrialised states abolished the public ownership model and moved towards privatisation, de-regulation, and liberalisation. These mechanisms required some form of regulatory oversight. Hence, in many countries the institutional answer was the establishment of IRAs. These deregulatory reforms also coincided with the completion of the Single European Market and the adoption of the Single European Act in 1986.[95] These new modes of governance transformed states' structure and their role in markets, replacing the 'positive state' with a new European regulatory space.[96] Following in the footsteps of the UK, the rise of neo-liberal policies, globalisation, and increased international competition pushed states to deregulate and liberalise markets, enact regulation and establish IRAs.[97] IRAs emerged in telecommunications, energy, and financial sectors, and spread to competition law.[98] The trend of establishing regulatory, arms-length agencies separated policy making from regulation and shifted from discretionary to rule-based instruments.[99]

These developments were deeply linked to the 'rise of the EU regulatory state',[100] the need to implement supranational EU rules in national legislation by the Member States,[101] and the EU's pressure to insulate national decision-making from national politics and favouritism.[102]

94 *ibid*.

95 Yeung, n 9 above.

96 Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 *Journal of Public Policy* 2, 139-167; Mark Thatcher, 'The Reshaping of Economic Markets and the State' in Desmond King and Patrock Le Galès (eds), *Reconfiguring European States in Crisis* (New York, NY: Oxford University Press, 2017) 179.

97 Gilardi, n 27 above.

98 First to France, the Netherlands, Spain, and other jurisdictions. See Mark Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 *West European Politics* 125, 128.

99 Schmidt and Scott, n 9 above, 456; Tony Prosser, 'Theorising Utility Regulation' (1999) 62 MLR 196; Colin Scott, Clare Hall and Christopher Hood, 'Regulatory Space and Institutional Reform: The Case of Telecommunications' in Peter Cass (ed), *Regulatory Review 1997* (London: Centre for the Study of Regulated Industries, 1998) 231, 250.

100 Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; Martin Loughlin and Colin Scott, 'The Regulatory State' in Patrick Dunleavy and others (eds), *Developments in British Politics, Bk 5* (London: Macmillan, 1997).

101 Loughlin and Scott, *ibid*, 133. Delegating those tasks to IRAs benefited national governments by shifting the reasonability of adopting and applying complicated or unpopular EU laws, especially when they counter national standards.

102 Majone, n 38 above, 6; David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12; Fabrizio Gilardi, Jacint Jordana and David Levi-Faur, 'Regulation in the Age of Globalization: the Diffusion of Regulatory Agencies Across Europe and Latin America' in Graeme A. Hodge (ed), *Privatization and Market Development: Global Movements in Public Policy Ideas* (Cheltenham: Edward Elgar Publishing, 2006); Thatcher, n 98 above, 133; Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2022) 25 *West European Politics* 148, 151. Delegating those tasks to IRAs benefitted national governments by shifting the reasonability of adopting and applying complicated or unpopular EU laws, especially when they counter national standards.

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IRAs in Europe are characterised by varying enforcement powers and institutional forms as a direct result of being deeply embedded in and directly shaped by their respective administrative law systems and constitutional orders. Some were explicitly made independent, while others operate as an institutional unit subject to the supervision of a ministry (for example the German *Bundeskartellamt*). Contrasting administrative traditions and competing theoretical perspectives explain why governments established IRAs and delegated particular combinations of powers to them.[103] Countries and political systems rely on various degrees of economic coordination and define the IRAs' roles and discretion accordingly. The 'varieties of capitalism'[104] framework provides a powerful analytic lens through which the existence of such distinct 'varieties of regulatory capitalism' has been assessed.[105] As different models of capitalism rely on particular institutions to pursue their goals, what Hall and Soskice call 'institutional complementarities'[106] explain that regulatory agencies are the institutions that more than any other characterise the relationship between state and market.[107]

National criminal law traditions also influence the priority setting powers of IRAs. Unlike the opportunity principle characterising Anglo-Saxon jurisdictions, many civil law jurisdictions adhered to the *legality principle*, requiring the state to act whenever sufficient evidence exists.[108] Compulsory prosecution reflects the twin objectives of equality before the law and enhancing general deterrence.[109] It prevents disregarding certain law infringements which make 'easy the arbitrary, the discriminatory, and the oppressive'.[110] Decisions not to prosecute could be overturned by courts.[111] From the 1960s, discretionary powers in criminal law expanded across European countries alongside embracing external and internal controls.[112]

Accordingly, the varieties of legal traditions resulted in different legal controls over administrative discretion. For example, the degree of judicial review of discretion is marginal in English courts, very restricted in German courts, and the intensity of control depends on the subject matter in France or the procedure in Italy.[113]

103 Wilks and Bartle, *ibid*, 151. These theories are as old as the study of modern administration.
104 Peter A. Hall and David Soskice, 'An Introduction to Varieties of Capitalism' in Peter A. Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: OUP, 2001). Also see Guardiancich and Guidi, n 27 above.
105 David Levi-Faur, 'Varieties of Regulatory Capitalism: Getting the Most Out of the Comparative Method' (2006) 19 *Governance* 367-382.
106 Hall and Soskice, n 104 above.
107 Guardiancich and Guidi, n 27 above.
108 Davis, n 5 above; Joachim Herrmann, 'The German Prosecutor' in Davis (ed), n 5 above. In Germany for example the legality principle was a key component of the establishment of the Reich in 1871. Tak, n 84 above, 2; Shawn Marie Boyne, 'The Cultural Limits on Uniformity and Formalism in the German Penal Code' (2012) 58 *Crime, Law and Social Change* 251, 252.
109 Tak, *ibid*, 30.
110 Breitel, n 87 above, 429.
111 For a classification of European countries criminal approaches, see Conway, n 83 above, 389; Tak, n 84 above, 33.
112 Tak, *ibid*, 27, 43-49.
113 English courts exemplified marginal review developing a doctrine of judicial self-restraint in deference to the sovereignty of parliament and democratic institutions. German courts restricted the margins of unchallengeable discretion allowed to executive authorities, recognising discretion


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Given the large variety of IRAs' institutional forms and powers, this article cannot investigate the emergence and priority setting powers of all kinds of IRAs across Europe. Instead, the next section focuses on the case study of competition law. It demonstrates that some CAs followed the US/UK models (high degree of prioritisation powers, either with or without controls), but others considerably limited their competition authorities' prioritisation powers. These authorities are either required to investigate all potential infringements or have limited prioritisation powers subject to various controls. While these models advance the legality principle, they come at the expense of IRAs' effectiveness, efficiency, and independence.

## CASE STUDY: COMPETITION LAW IN EUROPE

This section presents the emergence of competition authorities (CAs) in Europe and the evolution of their prioritisation powers. As elaborated below, procedural and institutional reforms significantly shaped the scope for priority setting both for national CAs and the European Commission as supranational enforcer. The modernisation of EU competition law in 2004 was a defining moment as was the ECN+ Directive in 2019.

This case study aims to illustrate how IRAs' priority setting powers are shaped and influenced by the national administrative laws and institutional and political setting.[114] The study of CAs in the EU demonstrates how the mix of influences from the Anglo-Saxon and European administrative law models shaped this regulatory space, and how four distinctive models of priority setting powers emerged as a result of varieties of local regulatory regimes despite the Commission and CAs applying the very same legal prohibitions. It also shows that priority setting rules and practices of IRAs tasked with significant *ex post* enforcement tasks – such as CAs – are often defined implicitly. They emerge endogenously as the result of national institutional and procedural choices, rather than further to an overarching prioritisation framework.

only when it is expressly granted by parliament. Even when German decision-makers enjoy some discretion (*Beurteilungssplielraum* and *Ermessen*), it is limited by fundamental rights and general principles of administrative action. The stringency of review by German courts is compensated by the strict limits placed on standing, which are articulated around rights only, not lesser interests, to give access to judicial protection. In France, the depth of judicial review varies according to the subject matter under review and, hence, discretionary power is reviewed with different degrees of intensity. Italian courts usually do not assess the merits of the case, but focus on matters of procedure and form which are consequently of great relevance. See Roberto Caranta, 'On Discretion' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford: OUP, 2008) 188, 188-192.

114 See text to notes 22-27 above.

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**The emergence of competition authorities in Europe**

Competition law and policy were traditionally not seen as core pillars of governments' economic governance in Europe.[115] Modern competition law was gradually introduced in the aftermath of the Second World War. While drawing inspiration from the US, European enforcement systems were home grown and differed considerably from one another. Still, CAs are the most important and long-established in most political systems, with a strong democratic legitimacy.[116]

Until the 1990s, there were hardly any independent CAs in Europe. Established in 1948, the British MRPC was the first CA, yet it had weak enforcement powers.[117] Yet, British competition law remained cautious, incomplete, and under-enforced until the late 1990s.[118] The Competition Act 1998 and the Enterprise Act 2002 were the first to introduce an effective competition regime, where investigation and decision-making powers are held by the OFT (and, since 2014, its successor, the Competition and Markets Authority, the CMA), and subject to appeal to the Competition Appeal Tribunal (CAT). In 1953 the French *Commission technique des ententes* was formed, yet only had an advisory role and was limited to cartels.

In 1957, the German Federal Cartel Office (*Bundeskartellamt*) was established as the second active competition authority in Europe under US pressure. Building on the Ordoliberal enforcement vision, the *Bundeskartellamt* was created as a highly independent CA, having sole responsibility for enforcement and being separated from the state bureaucracy.[119] Its independence was regarded as a *sine qua non* of the modern *Rechtsstaat*, and justified its position outside the regular administrative hierarchy.[120] Although placed under the supervision of the Ministry of Economics, it enjoyed a high level of independence from ministerial bureaucracy and political pressure given its juridical nature, internal organisation and procedures.[121]

Besides these early national examples, competition law enforcement was limited to and developed in the shadow of the supranational application by the

115 Majone, n 38 above, 50.

116 Mattia Guidi, *Competition Policy Enforcement in EU Member States: What Is Independence For?* (London: Palgrave Macmillan, 2016).

117 Heald, n 63 above, 38-39. Also see Giandomenico Majone, 'The Rise of Statutory Regulation in Europe' in Majone (ed), n 38 above, 47-48.

118 With the reforms of 1998 and 2000 the competition provisions in the Fair Trading Act 1973, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the Competition Act 1980 were swept away. See Scott, n 65 above.

119 The Ordoliberals' conviction that the office had to be autonomous was related to their experience during the Weimar period when economic power held by cartels and large corporations was used to exert political pressure on the executive branch. David Gerber, *Law and Competition in the Twentieth Century* (Oxford: OUP, 1998) 254-255.

120 Gerber, *ibid*, 282.

121 The independence of the *Bundeskartellamt* originated from its internal organisation and procedures that protect it from political influence, and its juridical nature, which is reflected in its special status that is placed outside the regular administrative hierarchy. The role of the *Bundeskartellamt* in the German economy and legal and political system is well illustrated by Gerber arguing that '[T]he GWB was not just another law, and the *Bundeskartellamt* was not just another administrative office. Together, they symbolised rejection of a failed regime and belief in a democratic alternative.' Gerber, *ibid*, 282.


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European Commission. Historically, competition policy was one of the most centralised and hierarchical EU policies and most Member States have, in fact, 'downloaded' it from the EU level.[122] Accordingly, this section focuses on the development of this centralised EU enforcement system as the driving force of competition law enforcement across the EU and its Member States.

The first supranational competition law provisions were included in the Treaty on the European Coal and Steel Community (ECSC) of 1951. When the Treaty of Rome was signed in 1957, none of the six signatory countries had modern competition rules prohibiting cartels and abuse of a dominant position.[123] When the enforcement of EU competition law was negotiated in 1961, Germany was the only Member State with experience and a clear enforcement vision. Therefore, German experience was prominent in drafting Regulation 17/62 and, in particular, the institutional design of Directorate-General for Competition of the Commission (DG COMP, formally DG IV) as a centralised, independent, quasi-judicial body.[124] From its early days, DG COMP stood out among other Directorates General because of its autonomy, judicial functions, and direct influence on the economy.[125] Yet, when compared to its American counterpart, it does not function as a fully independent IRA:[126] final decisions are adopted through votes of the Commissioners, who are political appointees of the Member States.[127] Suggestions to transform DG COMP into a fully independent IRA were consistently rejected.[128] Reflecting Ordoliberal views, Regulation 17/62 granted extensive enforcement powers to DG COMP. It established a centralised notification system, with the Commission examining all potentially anti-competitive agreements before implementation, and having the sole power to grant exemptions.

By the 1990s, competition law became a 'common core' in all EU Member States[129] due to successful market integration, the process of EU constitutionalisation, and strong supranational enforcement mechanisms under Regulation 17/62. In a wave of 'Europeanisation',[130] many Member States and candidate countries began to adopt national competition laws and created CAs during

122 Guidi, n 116 above.
123 That is, modern competition laws effectively assessing, and, if necessary, prohibiting, cartels and abuse of a dominant position. See Lorenzo Federico Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford: OUP, 2013) 54.
124 *ibid*, 66.
125 *ibid*. Hans von der Groeben, 'Competition in the Common Market', Speech during the debate on the draft regulation pursuant to Articles 85 and 86 of the EEC Treaty in the European Parliament, Strasbourg (19 October 1961) at http://aei.pitt.edu/14786/ [https://perma.cc/8ZL8-SP9M].
126 Laraine Laudati, 'The European Commission as Regulator: The Uncertain Pursuit of the Competitive Market' in Majone (ed), n 38 above, 229; Giandomenico Majone, 'The Future of Regulation in Europe' in Majone (ed), *ibid*, 270-273.
127 Council Regulation (EEC) No 17/62 of 6 February 1962 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L 230/10, Art 9.
128 Laudati, n 126 above, 231-236.
129 Michaela Drahos, *Convergence of Competition Laws and Policies in the European Community: Germany, Austria and Netherlands* (Alphen aan den Rijn: Kluwer, 2002).
130 Europeanisation is understood as 'the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance': Ian Bache and Andrew Jordan, 'Europeanization and Domestic Change' in Ian Bache and Andrew Jordan (eds), *The Europeanization of British Politics* (London: Palgrave Macmillan,

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| Jurisdiction | Date of establishment |
|---|---|
| UK | 1948 |
| France | 1953 |
| Germany | 1954 |
| EU | 1957 |
| Greece | 1977 |
| Finland | 1988 |
| Cyprus | 1990 |
| Italy | 1990 |
| Slovakia | 1990 |
| Poland | 1990 |
| Belgium | 1991 |
| Bulgaria | 1991 |
| Czech Republic | 1991 |
| Hungary | 1991 |
| Sweden | 1992 |
| Estonia | 1993 |
| Slovenia | 1994 |
| Malta | 1995 |
| Ireland | 1996 |
| Romania | 1996 |
| Croatia | 1997 |
| Denmark | 1998 |
| Netherlands | 1998 |
| Latvia | 1998 |
| Lithuania | 1999 |
| Austria | 2002 |
| Spain | 2002 |
| Portugal | 2003 |
| Luxembourg | 2004 |

Figure 1: Date of establishment of competition authorities in the EU

this time (see Figure 1). The spread of CAs coincided with processes of deregulation and privatisation and has been identified as a new form of 'regulatory capitalism' characterised by market liberalisation and accompanied by a proliferation of rules and authorities in charge of enforcing them.[131] It was tied to the renewed impetus for EU integration after the adoption of the Single

2006) 30; Adrian Künzler and Laurent Warlouzet, 'National Traditions of Competition Law: A Belated Europeanization through Convergence?' in Klaus Patel and Schweitzer (eds), n 123 above, 112.

131 Mattia Guidi, 'Delegation and varieties of capitalism: Explaining the independence of national competition agencies in the European Union' (2014) 12 *Comparative European Politics* 343.

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European Act and the Merger Control Regulation in 1989 that strengthened and broadened the scope of EU antitrust legislation.[132]

Competition policy has been extensively delegated to IRAs with broad enforcement powers earning the argument that 'delegation [is] a feature of competition policy' and, accordingly, administrative discretion too.[133] Enforcement is by far the most important aspect of competition policy making, hence it is crucial who enforces the rules, on the basis of which mandate, and how enforcement is controlled.[134] Competition enforcement in the EU is taking place in the shadow of hierarchy, determined by the legal and the historical pre-eminence of the European Commission. The decentralisation did not eliminate this; in fact, it may have strengthened it.[135]

Hence, these developments stimulated the 'modernisation' of EU competition law enforcement. Regulation 1/2003 created a multilevel enforcement system where the substantive EU provisions (Articles 101 and 102 TFEU) are enforced by the Commission and 27 national competition authorities (NCAs). The creation and empowerment of national CAs was a decisive factor influencing the Commission's decision to begin the 2003 reforms. At the same time, the reforms also incentivised a number of Member States that had not yet established a CA to create one, as Figure 1 illustrates.[136] The Regulation reformed the procedural rules governing the Commission's enforcement, however, it neither intervened with NCAs' procedures nor with their institutional design.[137] It merely obliged each Member State to designate a CA responsible for the application of Articles 101 and 102 TFEU.[138] The Regulation delegated enforcement powers to NCAs and granted them discretion to set their priorities, while respecting the EU principle of national procedural autonomy.

132 Kuenzler and Warlouzet, n 130 above; Katalin Cseres, 'EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding' in Carlo Maria Colombo, Mariolina Eliantonio and Kathryn Wright (eds), *The Evolving Governance of EU Competition Law in a Time of Disruptions: A Constitutional Perspective* (Oxford: Hart Publishing, 2024).

133 Competition policy is a field in which the delegation of extensive powers to independent regulators is the norm, see Wilks and Bartle, n 102 above, 148-172.

134 Guidi, n 116 above, 13.

135 *ibid*, 16.

136 *ibid*.

137 The Regulation, nevertheless, includes certain provisions affecting the powers of NCAs. Article 5 lists the powers of NCAs when they apply TFEU, Arts 101 and 102 and what type of decisions the NCAs can take in such cases, without harmonising the procedural rules to be followed by the NCAs. As national procedures for the application of TFEU, Arts 101 and 102 were not harmonised by the Regulation, they remained subject to general principles of EU law, in particular the principles of effectiveness and equivalence and the observance of fundamental rights enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. The procedural differences had been addressed to some extent in Regulation 1/2003, Arts 11 and 12 through the cooperation of the NCAs within the ECN. European Commission, 'Commission Staff Working Paper accompanying the Report on Regulation 1/2003' SEC (2009) 574 final, para 200; European Commission, 'Commission Staff Working Paper, Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues' COM (2014) 453, para 43.

138 These authorities could be administrative or judicial in nature, as long as they could guarantee that the provisions of Regulation 1/2003 were effectively complied with. Regulation 1/2003, Art 35; Point 2 of the Notice on cooperation; Case C-176/03, *Commission of the European Communities* v *Council of the European Union* ECLI:EU:C:2005:542 at [46]-[55].

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Fifteen years after modernisation, Directive 2019/1 of 2019 (the ECN+ Directive) harmonised NCAs' powers and institutional settings to a limited extent. Aiming to create more effective national enforcement, the Directive obliges Member States to provide NCAs certain investigative and enforcement powers, and introduces general provisions to safeguard NCA independence and accountability. For this purpose, it includes few provisions on priority setting, which will be discussed below. Nevertheless, beyond a minimum level of harmonisation, the Directive does not substantially converge national institutional and procedural settings.[139]

### Prior modernisation: limited attention to priority setting

Prior to modernisation, the centralised notification system limited the relevance of prioritisation. Given the lack of competition law culture and NCAs' limited powers, Member States hardly enforced the competition rules,[140] which in turn left prioritisation unaddressed. For the Commission, the burden of responding to all notifications led to reactive enforcement and consumed much of its resources, leaving few opportunities for *ex officio* investigations. During this period, the Commission's prioritisation was mostly limited to rejecting complaints,[141] and selecting the order and tools of responding to notifications (formal-binding decisions or informal comfort letters).[142] While the centralised-notification system left little room for priority setting, it guaranteed uniformity and legal certainty for firms while developing expertise in a sensitive supranational setting.[143]

Resembling the Anglo-Saxon model, the Commission's prioritisation was subject to limited *external controls*. The selection of enforcement targets was merely bound by the political control of the European Parliament and the Economic and Social Committee, which reviewed the Commission's activities as presented in its annual reports. Similar to American antitrust agencies discussed above, the Commission's prioritisation powers were not significantly overseen by *internal controls*. In 1963, the Commission adopted a resolution, set-

139 Katalin Cseres, 'The Implementation of the ECN+ Directive in Hungary and Lessons Beyond' (2019) 12 *Yearbook of Antitrust and Regulatory Studies* 55.

140 As NCAs and national courts had no power to exempt an agreement under TFEU, Art 101(3), companies were incentivised to notify their agreements to the Commission to get legal certainty concerning their compatibility with EU competition law. European Commission, *White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty* (Brussels: European Commission, 28 April 1999) para 6.

141 Case T-24/90 *Automec Srl* v *Commission* EU:T:1992:97 (*Automec*).

142 The power to choose the order of responding to notifications was confirmed by the GC in Case T-5/93 *Tremblay and Others* v *Commission* ECLI:EU:T:1995:12 at [60]; Case T-62/99 *Sodima* v *Commission* ECLI:EU:T:2001:53 at [36]. For the latter, the Commission had to choose between responding to a notification in a formal-binding decision or by means of informal comfort letters. It is estimated that approximately 96 per cent of the cases were resolved by informal means, see Ivo Van Bael, 'The Antitrust Settlement Practice of the EC Commission' (1986) 23 Common Market L Rev 61.

143 Carol Harlow and Richard Rawlings, *Process and Procedure in EU Administration* (Oxford: Hart Publishing, 2014) 199.


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ting informal-internal guidance for selecting its cases. Yet, given the Commission's reactive enforcement, this resolution had only limited impact.[144] As the resolution was not fully published, but merely summarised by the Commission's report,[145] it did not increase the Commission's accountability or transparency. The Commission, moreover, refrained from discussing its implementation in the subsequent years.

Nevertheless, the resolution is remarkable, as it demonstrated the complexity of the exercise. The Commission declared that it would give priority: (i) where a decision is required to bring an infringement to an end; (ii) when actions are pending before national courts; (iii) to discover and examine agreements that were not notified; and (iv) to respond to notifications. The Commission added substantive criteria, noting it would consider the 'type and gravity of the restriction of competition, its economic importance for the Common Market, an endeavor to spread the cases over the various economic sectors, and the effects of the subsequent decisions as a precedent for the interpretation and observance of the rules of competition, and thus for the clarity with which the law can be understood by enterprises'.[146]

The limited external and internal controls could also be explained by the Commission's institutional and procedural setting. While only limited information is available, at least up until the 1970s, choices not to bring a formal action were the responsibility of a single member of DG COMP's staff, and very few staff members were informed. Decisions to open an investigation, by comparison, were reviewed by at least 20 officials and were more likely to generate debate on the selection of cases.[147] This demonstrates how procedures influence case selection, as will be elaborated below.

The European Parliament pressured the Commission for greater transparency of its enforcement discretion. In 1986 for example, it called on the Commission to clarify the criteria for case selection (3,522 cases were pending at the end of 1986) and the choice between a formal decision or informal settlement procedure.[148] In response, the Commission disclosed its prioritisation practice in the following year's annual report. Suggesting that the 1963 Resolution was not fully respected, the Commission declared that it would give priority to cases involving 'questions of broad political significance' and take cases *ex officio* or respond to complaints with reference to the 'seriousness' of the alleged infringement. When assessing the order of responding to complaints and notifications it would consider the urgency of the matter, for example when national

144 As reported in Commission of the European Communities, *Seventeenth Report on Competition Policy* (Brussels, Luxembourg, 1988) 23-24.

145 EEC Commission, *Seventh General Report on the Activities of the Community* (1 April 1963-31 March 1964) 68-69. Also see Karl M. Meessen, 'The Application of the Antitrust Rules of the EEC Treaty by the Commission of the European Communities' in Davis (ed), n 5 above, 92.

146 *ibid*.

147 Davis, n 5 above, 97.

148 European Parliament, Resolution on the Sixteenth Report of the Commission on Competition Policy, Annexed to Commission Report, n 144 above, para 45.

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legal proceedings are pending, but would otherwise 'deal with them *chronologically*'.[149]

In a line of judgments in the 1990s, the EU Courts introduced important procedural controls on the Commission's discretion in handling complaints,[150] clarifying that the Commission had the power to reject complaints on priority grounds[151] despite the fact it had only begun to assign degrees of priorities to complaints at the end of the 1980s.[152] In its landmark *Automec II* judgment of 1992, the General Court (GC) discussed, for the first time, the Commission's priority setting powers and its limits.[153] The GC rejected the applicant's submission that the Commission was bound by the legality principle when assessing complaints,[154] acknowledging the Commission's wide discretion in this regard and explaining that the Commission could only effectively fulfil its task of implementing EU competition policy if it had the power to reject complaints.[155] The Court limited its review to checking whether the Commission complied with the duty of care, namely that it examined carefully the factual and legal particulars brought to its notice, and no manifest error of law, appraisal, or misuse of powers took place.[156] These principles were endorsed by the CJEU, in various later cases,[157] and are currently enshrined in the 2004 Notice on the handling of complaints.[158] Following *Automec II*, the Commission declared that it would use this 'discretion with moderation', referring complainants to national authorities or courts more often than before, particularly where it was clear that the national enforcement enabled complainants to resolve the matter.[159]

To conclude, aside from some fundamental procedural guarantees for the rejection of complaints and the European Parliament's pleas for greater transparency, matters of priority setting were overlooked in EU competition law enforcement prior to modernisation.

149 Commission of the European Communities, n 144 above, 23-24 (emphasis added).
150 Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: OUP, 1999); Hanns Peter Nehl, 'Good Administration as Procedural Right and/or General Principle?' in Herwig Hofmann and Alexander Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Cheltenham: Edward Elgar, 2009) 322, 329-331.
151 Ben Van Rompuy, 'The European Commission's Handling of Non-Priority Antitrust Complaints: An Empirical Assessment' (2022) 45 *World Competition* 270.
152 *ibid*.
153 *Automec* n 141 above at [79], [83]-[84].
154 *ibid* at [57]-[58].
155 *ibid* at [73]-[74].
156 *ibid* at [80]. To this end, the Commission 'should balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles [101] and [102] are complied with' *ibid* at [81]-[86].
157 Case C-344/98 *Masterfoods Ltd* v *HB Ice Cream Ltd* ECLI:EU:C:2000:689 at [46]; Case C-119/97P *Ufex and Others* v *Commission* ECLI:EU:C:1999:116 (*Ufex*) at [88]. Also see Van Rompuy, n 151 above.
158 Commission's Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101 (Commission Notice on the Handling of Complaints).
159 European Commission, *Twenty Third Report on Competition Policy* (1994) 120-121.


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**Following modernisation: wide priority setting powers and national divergence**

The entry into force of Regulation 1/2003 strengthened the Commission's competencies and ability to set priorities. Abolishing the notification system and granting NCAs enforcement powers allowed the Commission to select its cases and dedicate its resources to proactive enforcement. In particular, the Regulation aimed to reduce the number of complaints addressed to the Commission, when NCAs[160] could effectively deal with them, or when complainants could bring private actions before national courts.[161] Enhancing the Commission's and NCAs' priority setting powers was, however, not accompanied by controls over the exercise of such powers.

EU law does not impose external controls beyond codifying the jurisprudence on the Commission's powers to reject complaints, and the Commission refrained from adopting internal controls. One exception is its Guidance on Article 102 TFEU enforcement priorities.[162] Despite its title, it lists substantive criteria for applying Article 102, and does not set enforcement priorities.[163] Hence, following modernisation the Commission still follows the model of high degree of priority setting powers, with few controls.

Moreover, Regulation 1/2003 does not regulate NCAs' prioritisation powers. Pursuant to the EU principle of procedural autonomy,[164] the powers, scope, and limits for setting priorities are determined by national procedural, administrative, and constitutional laws. As mentioned above, in competition policy extensive powers have been delegated to NCAs, with often a high margin of enforcement discretion. Still, as our empirical findings show below, certain Member States granted wide priority setting powers to NCAs, either without controls, akin to the Commission and Anglo-Saxon IRAs, while others limited those powers by imposing external controls. In some Member States, NCAs adopted internal controls to structure their discretion, while others left the exercise of discretion uncontrolled.

The Commission first voiced concerns over this diverging landscape of prioritisation rules and practices in its 2009 report on Regulation 1/2003. It noted that the NCAs' priority setting powers were an important aspect of diver-

160 Commission Notice on the Handling of Complaints, n 158 above, para 8.

161 *ibid*, para 21, 24-25, 36-39. 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 with or has dealt with the case.

162 This informal and non-binding policy paper declares 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. See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (Commission Guidance on Article 102), para 7-8.

163 Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From *Inferno* to *Paradiso*?' (2010) 73 MLR 605, 609-611.

164 Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v *Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188.

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gence that 'may merit further examination and reflection'.[165] Later, it called for harmonisation within the cooperation mechanism of the European Competition Network (ECN). The ECN's Working Group on Cooperation Issues and Due Process was to monitor convergence among the Member States and provided an overview of the different systems.[166] In 2013, it adopted a Recommendation on the Power to Set Priorities, calling for harmonisation and converging towards the Commission's model. The Recommendation, however, neither indicated what analysis justified this choice, nor what its implications were. It simply argued that it would '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'.[167]

Subsequent to the Commission's public consultation on how to empower NCAs to be more effective enforcers,[168] the ECN+ Directive was the first to codify rules concerning NCAs' priority setting. However, these rules are limited to three aspects leaving core features of prioritisation unaffected. First, the Directive obliges Member States to enable their NCAs to have the power to set priorities for the enforcement of Articles 101 and 102 TFEU.[169] This has limited effect, as prior to the Directive all NCAs were legally competent to open *ex officio* investigations.[170] Second, NCAs should have the power to reject complaints on priority grounds. The legality principle, in other words, could no longer guide the rejection of complaints. Third, NCAs should set their priorities independently, ie without taking instructions from public or private entities.[171]

165 Communication from the Commission to the European Parliament and the Council, 'Report on the functioning of Regulation 1/2003' COM (2009) 206, para 33.

166 European Commission, 'Commission Staff Working Document SWD (2014) 231 – Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues' SWD (2014) 230 at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2014:0231:FIN:EN:PDF [https://perma.cc/JDZ6-V7C3].

167 ECN, 'Recommendation on the Power to Set Priorities' (2013), para 4 at https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation_priority_09122013_en.pdf [https://perma.cc/Z7Y5-FK2C].

168 European Commission, 'Empowering the National Competition Authorities to be More Effective Enforcers' at http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html (last visited 8 April 2024).

169 Directive 2019/1, Preamble 23 and Art 4(5).

170 Directive 2019/1, Art 4(5). See Laurence Idot, 'Reform of Regulation 1/2003: Power to Set Enforcement Priorities' [2015] *Concurrences* 51; Wouter P. J. Wils, 'Competition Authorities: Towards More Independence and Prioritisation? The European Commission's ECN Proposal for a Directive to Empower the Competition Authorities of the Member States to Be More Effective Enforcers' (2017) 2 *Romanian Review of European Law* 55, 56.

171 Yet, this independence is restricted. National governments are not precluded from issuing 'general policy rules or priority guidelines' that are not related to a specific Article 101 or 102 TFEU enforcement proceeding. Directive 2019/1, Preamble 23; 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), Explanatory Memorandum, 2.


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## NORMATIVE BENCHMARKS FOR A PUBLIC INTEREST-BASED APPROACH TO PRIORITY SETTING

Likely due to the incremental evolution of IRAs, so far no normative framework has been developed to guide IRAs' priority setting rules and practices. As their prioritisation powers are deeply embedded in their respective national administrative and constitutional laws and institutional settings, no 'best-practices' guide the setting or control of enforcement priorities either nationally or internationally.[172] Judicial oversight focuses on cases that IRAs decided to pursue, not on the process and the impact of selection. By comparison, in criminal law enforcement, the impact of choices of action and inaction are extensively analysed,[173] and there is wide consensus on the benefits of adopting guidelines to limit and control enforcement priorities.[174]

In the absence of a common benchmark to assess administrative prioritisation, this section examines two approaches for the oversight of administrative discretion in general: the narrow *ultra vires* doctrine and the broad public interest-based approach. We argue that the public interest-based approach is better suited for the examination of priority setting from the perspective of the rule of law, and that such an approach is justified given the institutional, practical, personal, and bureaucratic settings of priority setting.

### Public interest-based approach to priority setting

The narrow *ultra vires* doctrine was well-suited for the early reactive-adjudicatory IRAs. Yet, as IRAs became proactive regulators, by the late-1960s scholars warned against regulatory capture and private interest regulation emerging from the exercise of administrative discretion.[175] In 1969, Davis called for confining, checking, and structuring discretion to prevent injustice and for setting internal controls that are externally reinforced by courts, a 'discovery' that was known to those who have studied criminal law.[176] Davis, and

172 Some international organisations have explored matters related to priority setting in competition law enforcement. Yet, such works mostly pointed to the challenges associated with priority setting or to a specific aspect of priority setting and did not develop best-practice principles or a general framework. See for example UNCTAD, 'Prioritization and resource allocation as a tool for agency effectiveness' (2013) at https://unctad.org/system/files/official-document/ciclpd20_en.pdf [https://perma.cc/W8AY-MNYV]; ICN, 'Report on ICN Agencies' Case Prioritisation and Initiation' (2021) at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/04/AEWG_Report-on-Case-Prioritisation-and-Initiaiton-2021.pdf [https://perma.cc/RW68-ZL7H]; OECD, 'Priority setting and coordination of research agendas: lessons learned from COVID 19. Background paper' (2021) at https://web-archive.oecd.org/2021-09-16/598294-Draft%20background%20priority%20setting%20and%20coordination%20of%20research%20agendascs.pdf [https://perma.cc/BBU6-H29W].

173 There is wide consensus on the benefits of adopting guidelines to limit and control enforcement priorities, see Tak, n 84 above, 1.

174 *ibid*, 73-83.

175 Lowri, n 10 above, West, n 10 above, 10-13.

176 Davis, n 16 above. Also see Martin Shapiro, 'Administrative Discretion: The Next Stage' (1983) 92 *Yale Law Journal* 1487, 1489.

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other scholars,[177] advocated for a public interest-based approach making use of good governance principles to confine discretion.[178] This broad approach is grounded on standards of legality to prevent abuse of power by public, quasi-public, or private bodies with a degree of power.[179] Besides focusing on the legislative will, judicial intervention controls the principles guiding administrative discretion and interprets legislation in conformity with fundamental rights and the public interest.[180]

This shift in the oversight of administrative discretion is significant. The narrow *ultra vires* principle is rooted in a negative conceptualisation of discretion. Accordingly, discretion is characterised by the absence of legal norms, a choice not legally determined:[181] 'what is left of judicial control'.[182] The public-interest approach extends beyond this negatively construed view. It acknowledges the autonomy of the administrative decision-maker 'to choose between different alternatives when concretising legal norms with a view to achieving the ends that those norms identify'.[183] Instead of focusing on how far courts can go when they review discretion, it examines how legal norms operate in the spheres of discretion that those norms attribute to decision-makers and 'by virtue of absent or limited review, administrative discretion ought to be guided by legal-normative criteria'.[184]

This approach can rely to an extent on existing mechanisms embedded in administrative processes to incorporate the public interest dimension of discretion in decision-making,[185] such as the duty of careful and impartial examination and the duty to give reasons. The duty of care orders institutions to examine carefully and impartially '*all the relevant aspects* of the individual case', including the relevant public interests implicated in decision-making.[186] The duty to give reasons functions as a self-reflective tool for decision-makers, as it presupposes

177 See for example Black, n 6 above, 2; Joana Mendes, 'Good Administration in EU law and the European Code of Good Administrative Behaviour' (2009) *Working Paper, EUI Law* 2009/09, 432.

178 Craig, n 43 above, 15-26.

179 *ibid*, 15.

180 *ibid*, 15-17. Such an approach engages for example with reviewing the quality and expertise of the operation of IRAs, and that the regulatory science underpinning regulation is on par with acceptable standards. Marta Morvillo and Maria Weimer, 'Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It' (2022) 1 *European Law Open* 510.

181 Mendes, n 1 above, 461.

182 Caranta, n 113 above. Such an approach, as Mendes argued, fails to capture the complexity of the interaction between legal norms, discretion, and judicial review, *ibid*, 461.

183 Mendes, *ibid*, 462.

184 *ibid*.

185 What Mendes defends as a unitary concept of discretion stresses not only the autonomy attributed by legal norms, but also the bounded nature of that autonomy. This unitary approach emphasises the process of concretisation of normative programs delineated in legal norms. In this process, the delimitation and verification of the conditions of action – whether dependent on value concepts or primarily on tools developed in specific scholarly fields – co-determines the definition of the legal solution, *ibid*, 464.

186 A careful and impartial examination of technically complex factual circumstances needs to take into account and balance various public interests. Careful examination would refer not only to factual assessments, but also to public interest appraisals, given the way in which both aspects are intertwined in the exercise of discretion. Case C-269/90 *Technische Universität München* EU:C:1991:438 at [14]; Mendes, *ibid*, 466.


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consideration of various aspects in a given situation and the implications of the chosen option.

By compensating for limited judicial review of administrative procedural guarantees, the principles of good administration[187] function as an 'aid' to the procedural and substantive requirements a modern administration has to comply with. Hence, the principles of good administration can structure the exercise of discretionary powers and are used as a 'standard of practice serving the attainment of administrative justice' in compliance with Article 41 of the EU Charter of Fundamental Rights and CJEU case law.[188]

**Normative benchmarks guiding priority setting by IRAs**

Building on the public-interest approach, we suggest five key good governance principles for evaluating priority setting by IRAs: effectiveness, efficiency, independence, transparency, and accountability. These principles are commonly used to assess the behaviour of public administration and administrative discretion.[189] Given the extensive scholarship on good governance principles and their role in administrative procedures and the scope of this article, the following section merely introduces the implications of those principles in the context of priority setting. More specifically, as we explain below, we analyse which important trade-offs between these criteria are made in the various governance models of priority setting. As the case study of competition law enforcement in the next section demonstrates, making specific choices is a complex exercise in the context of the diverse national administrative and constitutional rules.

*Effectiveness*

Effective priority setting denotes IRAs' ability to meet the goals set by the legislation and focus its interventions on achieving these goals.[190] Setting clear

187 See Nehl, 'Good Administration as Procedural Right and/or General Principle?' n 150 above for an overview and in-depth study on good administration as a concept in EU law.

188 *ibid*, 338; Mendes, n 1 above, 5; Henk Addink, *Good Governance: Concept and Context* (Oxford: OUP, 2019) 251.

189 At the global level, good governance principals were formulated by supranational organisations. Promoted by the United Nations since the late 1980s, good governance has become an important benchmark for the assessment of the process of decision making by governments and agencies. See OECD, 'OECD Best Practice Principles on the Governance of Regulators' (2012) at http://www.oecd.org/gov/regulatorypolicy/governance-regulators.htm (last visited 21 February 2024); Jennifer A. Elliott and others, 'The Making of Good Supervision: Learning to Say No' in Aditya Narain, Inci Ötker, and Ceyla Pazarbasioglu (eds), *Building a More Resilient Financial Sector: Reforms in the Wake of the Global Crisis* (Washington, DC: International Monetary Fund, 2012).

190 Ottow, n 25 above, 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; Adrienne Héritier and Dirk Lehmkuhl, 'Governing in the Shadow of Hierarchy: New Modes of Governance in Regulation' in Adrienne Héritier and Martin Rhodes (eds), *New Modes of Governance in Europe: Governing in the Shadow of Hierarchy* (London: Palgrave Macmillan, 2011) 66.

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priorities that are built around a transparent strategy enhances the credibility of IRAs' action.[191] It is essential both for ensuring deterrence and for concretising the typically open-ended administrative provisions. Accordingly, the effectiveness of prioritisation should not only be assessed in quantitative terms (for example the number of cases or level of the fines imposed), but calls for a balanced portfolio of cases, involving a mix of cases with various levels of complexity, size, short- and long-term effects[192] and risk balancing, enforcing 'classic' infringements and landmark cases that set a precedent and have a greater multiplier effect.[193]

Identifying what amounts to 'effective' priority setting might be particularly challenging for IRAs governing social regulation and utilities. By their very nature, these IRAs are required to balance economic and social policies. While financial regulation and competition are also polycentric in nature (that is, aim to achieve multiple goals), utilities and social regulation often explicitly incorporate both economic efficiency and redistributive goals.[194] This may result in diverging standards of intervention and what is considered an effective selection of cases.[195]

*Efficiency*

IRAs are bound by scarce financial, technical, and human resources unable to detect, investigate, and sanction every possible law infringement. Efficient priority setting rationalises the allocation of resources to deal optimally with cases within a reasonable time. This includes, in addition to the selection of enforcement targets, the choice between (formal and informal) enforcement tools available to IRAs. While efficiency is an indispensable component of an independent modern administration due to the need for speedy technocratic decision-making in a context of rapid market changes and increasingly complex socio-economic and technical issues, overreliance on this principal limits other good governance aspects of priority setting, notably transparency and accountability.

*Independence*

IRAs' independence was traditionally justified by the technical complexity of regulated markets and the need for expertise.[196] Its core is the regulator's legal and functional separation from both market parties and legislative and execu-

191 Ottow, *ibid*, 76.
192 *ibid*, 160.
193 Commission Staff Working Document 'Impact Assessment' accompanying the document proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure (SWD/2017/0114 final, 22.3.2017) (ECN+ Impact Assessment) part I, 46.
194 Dunne, n 30 above, 44-45.
195 *ibid*.
196 Also see Imelda Maher, 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network' (2009) 7 *Comparative European Politics* 414, 419; Rachel E. Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design'


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tive influence,[197] including 'the degree to which the day-to-day decisions of regulatory agencies are formed without the interference of politicians and/or consideration of politicians' preferences'.[198]

The degree of IRAs' independence typically differs according to the type of regulator and largely depends on the local variety of regulatory capitalism in a given jurisdiction.[199] Financial regulators (for example, central banks, financial services, and securities and exchange regulators) enjoy in many jurisdictions the highest degree of independence in comparison to other types of IRAs, followed by CAs, and utility and social regulators, respectively.[200] However, the more independence is granted to an IRA, the less democratic bodies (for example, national parliaments and governments, and ultimately the voters) are able to control decision-making and the direction of the delegated policy. Hence, it is crucial to investigate how the 'accountability loss' created by independence can be remedied by way of improved decision-making.[201]

*Transparency*

Transparent priority setting entails that IRA's decisions of action and inaction are based on clear and openly communicated legal-economic justification. Originating from the procedural duty to give reasons, transparency functions as a key control of discretion.[202] Providing sufficient evidence and grounds to justify IRAs' interventions strengthens *procedural accountability*.[203] Clearly formulated, published, and reasoned priorities are important indicators of democratic and legitimate law enforcement.[204] Transparency in setting enforcement priorities, moreover, strengthens *predictability* and allows relevant stakeholders to assess whether a certain behaviour is likely to result in regulatory intervention and to encourage self-compliance.[205] Finally, transparency facilitates *participation*. Open consultations and formal complaints serve as information-gathering tools, justifying regulatory action and inaction, and help IRAs balance competing public interests.[206] Participation through submitting complaints can contribute to

(2010) 89 Tex L Rev 15, 26; Rachel E. Barkow, 'Overseeing Agency Enforcement' (2016) 84 Geo Wash L Rev 1129, 1147; Guidi, n 116 above, 96.

197 Christel Koop and Jacint Jordana, 'Regulatory independence and the quality of regulation' in Maggetti, Di Mascio and Natalini (eds), n 9 above, 212.

198 *ibid*, 212-213; Chris Hanretty and Christel Koop, 'Measuring the Formal Independence of Regulatory Agencies' (2012) 19 *Journal of European Public Policy* 198, 199. For a similar approach, see Martino Maggetti, 'Independent regulators in the post-delegation stage' in Maggetti, Di Mascio and Natalini (eds), *ibid*.

199 Guardiancich and Guidi, n 27 above.

200 Jordana and others n n 24 above; Xavier Fernández-I-Marín and others, 'The age of regulatory agencies: tracking differences and similarities over countries and sectors' in Maggetti, Di Mascio, and Natalini (eds), n 9 above.

201 Guidi n 124 above, 5-6.

202 Meessen, n 145 above, 87-88.

203 Ogus, n 93 above, 111; Ottow, n 25 above, 156.

204 Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 147. Also see Fillipo Lancieri, Eric A. Posner, and Luigi Zingales, 'The Political Economy of the Decline in Antitrust Enforcement in the United States' (2022) *National Bureau of Economic Research Working Paper* 30326, 53.

205 Commission Guidance on Article 102, n 162 above, para 2.

206 Ottow, n 25 above, 86.

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accurate and legitimate decision-making, prevent capture, and invite IRAs to reflect on their position to prevent mismanagement or misuse of powers.

*Accountability*

Besides being independent, IRAs should be accountable for their enforcement choices and allocation of resources.[207] IRAs are required to be 'vertically accountable' towards their political institutions, judiciary, regulatees, and the general public.[208] Often, they are 'horizontally accountable' towards regional or international networks of regulators.[209] Accountability can be understood formally through adopting procedural mechanisms to control the IRA's operation and informally, as a substantive requirement, focusing on meaningful interaction between the IRA and its audience.[210] Adopting internal controls and clear communication on priority setting can facilitate the IRAs' formal and substantive accountability.[211] These control mechanisms are especially crucial in light of the aforementioned 'accountability loss' that characterises IRAs who have been delegated extensive enforcement powers.

## TYPOLOGY OF ENFORCEMENT DISCRETION

The lack of attention concerning IRAs' priority setting powers is evident through the lack of shared terminology and benchmarks. Our empirical study and interviews with CAs reveal diverging understandings and interpretations of priority setting and numerous (sometimes conflicting) meanings and objectives. For example, when asked about prioritisation, many authorities have not distinguished between 'agenda setting' and 'substantive criteria' as we define them below.

This section introduces a new typology to guide the analysis of priority setting rules and practices. More specifically, it defines seven aspects of setting priorities and the possible external or internal controls guiding them, as summarised by Figure 2. The section presents how EU and national rules govern each of the seven aspects, their practical implementation and their impact on good governance principles.

As elaborated below, these seven aspects are interdependent: choices concerning one aspect often affect others. For example, limited *de jure* competence frequently entails a formal procedure of priority setting and limits the IRA's ability to *de facto* select cases. At the same time, pursuing an independent and efficient priority setting practice decreases transparency and accountability of

207 Sjors Overman, Thomas Schillemans and Machiel van der Heijden, 'Accountability and Regulatory Authorities' in Maggetti, Di Mascio, and Natalini, n 17 above.

208 William Kovacic, 'Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness' (2018) 13 *Competition Law Review* 9, 15.

209 Overman, Schillemans and van der Heijden, n 207 above, 258, 261.

210 *ibid*, 257.

211 Thatcher, n 98 above, 141-142.


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| Stage | Aspects of priority setting | External controls (legislator; judiciary) | Internal controls (IRA) |
|---|---|---|---|
| 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 |

Figure 2: Typology of priority setting

prioritisation by limiting third parties' participation as well as the possibility for judicial review.

The seven aspects were identified via a bottom-up approach, which systematically analysed the rules and practices of CAs in Europe. We argue that these aspects function as a starting point for assessing priority setting rules and practices applicable to IRAs who engage in *ex post* enforcement, albeit some of the particularities of the typology might differ, for example due to the sector specificity of IRAs who may use their agenda to identify priority practices rather than sectors.

**Agenda setting**

Agenda setting is a list of *ex ante* periodic enforcement agenda, publicly declaring that certain sectors or practices are a priority. It is often referred to as an annual/action/work plan, or a strategy statement.

Setting an agenda requires IRAs to pronounce their enforcement strategies in advance, explaining how they plan to make use of their enforcement powers and budget. It can strengthen the accountability, transparency, and predictability of their actions.[212] Agendas enhance IRAs' independence and legitimacy by allowing them, as expert-driven decision-making bodies, to select their strategies

212 Cass R. Sunstein and others, 'Predictably Incoherent Judgments' (2002) 54 *Stanford Law Review* 1153.

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free from external intervention. It fosters effectiveness and efficiency by encouraging proactive enforcement, instead of reacting to complaints or leniency applications regardless of their impact on markets and society.[213] An agenda guides staff members in deciding whether to open an *ex officio* investigation or to reject a complaint and what enforcement tools to use in respective cases.

The impact of an agenda on deterrence remains disputed. While an agenda may deter firms operating in the identified priority areas, it provides firms with an opportunity to conceal evidence of infringements.[214] The Greek NCA, for example, decided not to publish its internally-adopted agenda.[215] Moreover, deterrence is threatened when an agenda is not regularly updated, focuses on a limited number of sectors and practices, or when enforcement focuses primarily on the identified areas and neglects others. A degree of uncertainty may generate higher compliance levels.[216]

The debate on the merits of agendas is reflected by our empirical findings. Only 48 per cent of the CAs adopted agendas, all in the form of internal control.[217] Twenty-eight per cent of the Member States obliged NCAs to adopt an agenda as a matter of national law, from which three per cent had to report them to their parliament and seven per cent to their government.[218] Reporting obligations can constrain CAs' independence, yet increase their accountability and legitimacy. Seventeen per cent of the CAs adopt an agenda following a public consultation. The Dutch NCA, for example, invites stakeholders to comment on its draft agenda via roundtable meetings, a dedicated online website, and social media. Public participation improves the quality of the agenda, increases effectiveness, and promotes accountability and transparency.

213 ICN, *Agency Effectiveness Competition Agency Practice Manual March 2010, Chapter 1 Strategic Planning and Prioritisation* 29 at www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf [https://perma.cc/N9QA-NB77]; Commission, n 171 above, Preamble 17. Also see ICN, 'Report on the 2009 Seminar on Competition Agency Effectiveness' (2009) at www.internationalcompetitionnetwork.org/portfolio/2009-seminar-on-competition-agency-effectiveness/ [https://perma.cc/P3ER-4X47]; Luiz Ortiz Blanco and Alfonso Lamadrid De Pablo, 'EU Competition Law Enforcement Elements for a Discussion on Effectiveness and Uniformity' [2012] *Fordham 38th Conference on International Antitrust Law and Policy* 60.

214 Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' in Frederic Jenny and Yannis Katsoulacos (eds), *Competition Law Enforcement in the BRICS and in Developing Countries* (Switzerland: Springer, 2016) 30, 52.

215 Brook and Cseres, n 21 above, 23.

216 Tom Baker, Alon Harel and Tamar Kugler, 'The Virtues of Uncertainty in Law: An Experimental Approach' (2004) 89 *Iowa Law Review* 443, 443-494.

217 Brook and Cseres, n 21 above, figure 2. Directive 2019/1 does not stand in the way of adopting agendas by governments and parliaments as a means of external control. In fact, 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 Directive 2019/1, Art 4(2)(b).

218 Brook and Cseres, *ibid*, 21-23.


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

The *de jure* competence to prioritise refers to the IRA's ability based on law to choose which cases to pursue and which to disregard. Law enforcement theories distinguish between IRAs who follow the opportunity principle and enjoy full *de jure* competence with a high degree of discretion and those bound by the legality principle, obliging them to initiate an investigation into any potential infringement coming to their attention.[219] The degree of legal competence to prioritise reflects a jurisdiction-specific trade-off between efficiency and independence on the one hand, and equality before the law, accountability, and transparency on the other.

Our empirical findings identified a third, intermediate category of CAs whose discretion to prioritise is subject to a public interest test. Many Central and Eastern European CAs, including Hungary, Croatia, and the Czech Republic fall into this category. According to this approach, CAs can choose not to pursue a case only when such a decision complies with the public interest. This imposes both external and internal controls. What amounts to the public interest varies from one jurisdiction to another. The Dutch CA for example has a 'duty to enforce', a general obligation requiring administrative authorities to take action against all potential law violations except for specific circumstances. The Dutch Council of State acknowledged IRAs' powers to set priorities, as long as this does not lead to 'never enforcing' low-priority cases, save in exceptional circumstances.[220] Dutch courts interpreted this duty as imposing an increased duty on the Dutch CA to reason its decisions when it rejects complaints.[221]

As mentioned above, until recently the NCAs' legal competence to prioritise was not addressed by EU law. The ECN+ Directive now links *de jure* competence to efficiency, effectiveness, and independence of NCAs.[222] However, the obligations in the directive are drafted in general terms, leaving the degree of prioritisation discretion and concrete prioritisation competences to national preferences.

The empirical findings summarised in Figure 3 point to great divergence among jurisdictions and demonstrate that some CAs who generally enjoy wide prioritisation powers (opportunity principle or the public interest test) are limited when assessing complaints. This represents a trade-off between the effectiveness of broad *de jure* competence and the accountability and transparency embedded in third parties' participation. In Finland, for example, the authority enjoys a wide discretion to prioritise, but will reject a complaint only when the 'matter is manifestly unjustified'.[223] In Cyprus, the authority may 'push-back in the line' a complaint on priority grounds, but cannot reject it altogether.[224]

219 See text to n 84 above.
220 ECLI:NL:RVS:2014:1982.
221 ECLI:NL:CBB:2010:BN4700, para 7.2.5.1; ECLI:NL:RBROT:2019:7189.
222 Directive 2019/1, Preamble 23 and Art 4(5).
223 Finnish Competition Act (Law No 948/2011), Art 32(3).
224 Cyprus Competition Law, Art 35 (The Projection of Competition Laws of 2008 and 2014, 13(I) of 2008 41(I) of 2014).

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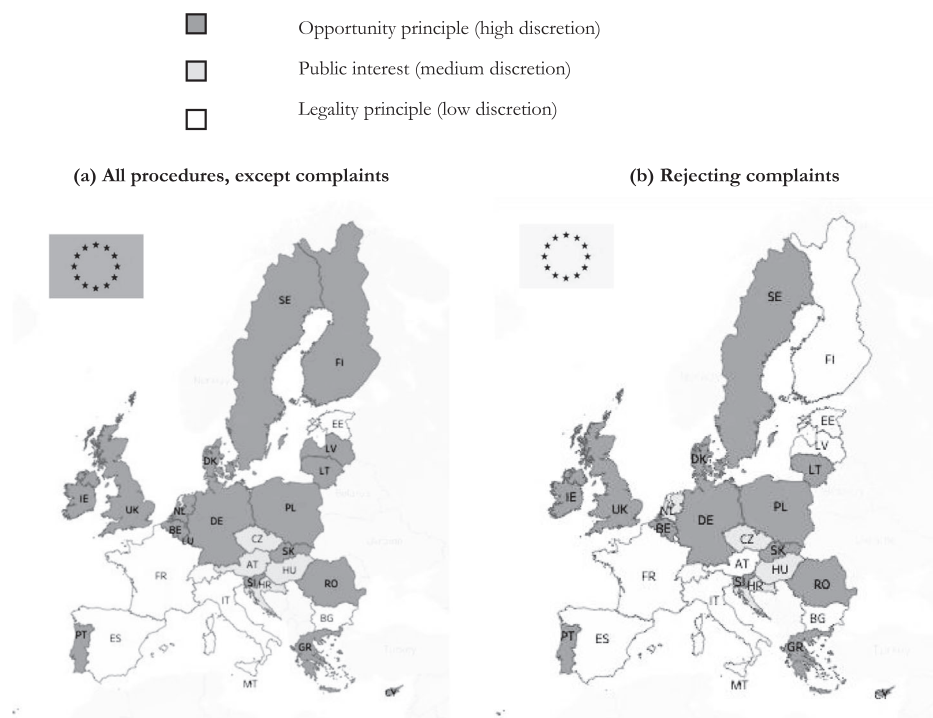


Figure 3: De jure competence (prior to the implementation of the ECN+ Directive)

A more subtle example is present in the UK, where the authority is bound to assess 'super-complaints' launched by a designated consumer body.[225]

## Ability to set priorities (*de facto*)

The power to set priorities is often implicitly constrained by practical settings in which decisions are made.[226] The *de facto* ability to set priorities refers to IRAs' practical (human, financial, and technical), institutional, and organisational capabilities that affect their course of action. Adequate resources and capabilities are not only essential for effective and efficient enforcement, but safeguard IRA's independence (ie, budget allocation without prejudice to national budgetary rules and procedures), transparency, and accountability.[227]

Beyond IRA's resources and its staff skills,[228] *de facto* ability is often tied to *de jure* competence. An obligation to respond to notifications, complaints, or referrals for example leaves IRAs limited capacity to autonomously select its

225 Enterprise Act 2022 c 40, s 11.

226 Schmidt and Scott, n 9 above.

227 cf E Biber, 'The Importance of Resource Allocation in Administrative Law' (2008) 60 Admin L Rev 1.

228 The available internal know-how for example is considered by the Hungarian CA when assessing whether pursuing a case will allow for swift and effective enforcement. GVH, '*A GVH Versenyfelügyeleti Eljárás Indítási Stratégiája*' (2013, on file with the authors).


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priorities. Their institutional design also influences *de facto* capacity. Prioritisation can be more complex in multi-function IRAs, which must allocate resources across a broader range of activities, some of which may involve obligatory (for example regulatory) tasks, while others may be more discretionary.[229]

Despite the importance of *de facto* ability and significant challenges reported during our interviews,[230] prioritisation is subject to limited control. The EU Courts confirmed that case allocation within the ECN does not take into account the actual ability of an NCA to deal with the case.[231] In addition, the ECN+ Directive acknowledges the link between the level of enforcement and NCAs' budget, skills,[232] and independence,[233] yet only prescribes a vague obligation, requiring Member States to ensure that NCAs have the 'necessary resources to perform their tasks'.[234] In practice, NCAs' budgets vary considerably,[235] even between countries with a similar GDP.[236] The Directive, nevertheless, introduced national external controls requiring NCAs to submit periodic reports on their activities and resources to national governments or parliaments. These publicly available reports should include information about the resources that were allocated in the relevant year, and any changes compared to previous years.[237]

### Procedure to prioritise

Administrative procedures and institutional processes significantly impact prioritisation choices, in particular those related to: (i) the type of prioritisation decisions (reasoning, publication and availability of judicial review); (ii) time limits; (iii) participation of third parties; and (iv) institutional setting of the decision-making.

First, the type of prioritisation decisions NCAs adopt and the external and internal controls imposed on the reasoning and publication of such decisions are assessed. As summarised by Figure 4, some CAs are required to adopt a *for-*

229 OECD, 'Annex to the Summary Record of the 123rd meeting of the Competition Committee: Key Points of the Roundtables on Changes in Institutional Design' at www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En (last visited 21 February 2024).

230 Brook and Cseres, n 21 above, 27.

231 Case T-201/11 *Si.mobil* v *the Commission* ECLI:EU:T:2014:1096 at [28]-[78].

232 Directive 2019/1, Art 5(1). Also see Preambles 5 and 8 and Art 1. ECN+ Impact Assessment, n 193 above, part I, 28.

233 Directive 2019/1, Preamble 25.

234 *ibid*, Preamble 26. Also see ECN+ Impact Assessment, n 193 above, part I, 46. Van Rompuy's study of the implementation of the Directive found that most Member States consider it unnecessary to adopt any specific implementing measure in this respect, despite the concern that NCAs lack sufficient resources to be effective, see n 151 above, 212-213.

235 Jenny found that the CAs in the UK, Sweden, Germany, France, Italy, and Spain have budgets 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 lower than US$1 million, see n 214 above, 39.

236 ECN+ Impact Assessment, n 193 above, part I, 27-30.

237 Directive 2019/1, Art 5(4) and Preamble 27.

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

Figure 4: Type of decision, reasoning, and publication

*mal*, *reasoned*, and *published* decision explaining why they disregarded a specific case. Such a decision is subject to judicial review. Prioritisation choices of other CAs are *informal*, *unreasoned*, and *not published*. As a matter of internal procedure, such choices are generally unreviewable by courts. The nature of prioritisation decisions represents a trade-off between efficiency, transparency, and accountability: taking a formal, reasoned, and published decision reduces efficiency, but helps communicate the IRA's position to the public and can be reviewed by courts.

Similar to the competence to prioritise, the figure shows that many CAs are subject to different procedural rules when they reject complaints. Some CAs are not required to investigate each complaint (see Figure 2), including the Commission,[238] and others are under the duty to examine all matters of fact and law brought to their attention and to provide reasons (CAs marked with asterisk in Figure 4).[239]

Second, prioritisation is affected by time limits for adopting such decisions. The effects of time limits vary; fixed limits may encourage an efficient prioritisation process, but also incentivise IRAs to refrain from investigating complex cases. Placing no – or very long – limits may provide a legally anchored way to delay proceedings. Around one-third of the CAs are subject to external or self-imposed time constraints, whose duration and scope vary considerably.[240] For example, the Italian CA is obliged to specify a deadline for completing investigation,[241] and failure to comply may lead to the annulment of the decision altogether.[242] Italian jurisprudence linked this obligation to the right to a fair trial (Article 6 of the ECHR) and good administration (Article 41 of the CFR).

238 Regulation 1/2003, Recital 18 and Preamble 13; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the Conduct of Proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, Art 7; Commission Notice on the Handling of Complaints, n 158 above, para 41; Case C-210/81 *Demo-Studio Schmidt* v *Commission* ECLI:EU:C:1983:277 at [19]; *Automec* n 141 above at [77], [85]; *Ufex* n 157 above at [86]; Case T-219/99 *British Airways* v *Commission* ECLI:EU:T:2003:343 at [68]. Also see Katalin J. Cseres and Joana Mendes, 'Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits' (2014) 51 *Common Market Law Review* 483, 491-494.

239 With respect to the Commission's duty, see *Automec ibid*; Case C-450/98P *IECC* v *Commission* ECLI:EU:C:2001:276 at [57]; Case T-355/13 *EasyJet Airline* v *Commission* ECLI:EU:T:2015:36 at [18]; Case T-480/15 *Agria Polska and Others* v *Commission* ECLI:EU:T:2017:339 at [36]. Also see Wils, n 171 above, 38.

240 Brook and Cseres, n 21 above, 31-32.

241 Italian Competition and Fair Trading Act (Law no 287), s 14(1); Italian Presidential Decree no 217/98 Regulation of investigation procedures pursuant to section 10(5) of the Competition and Fair Trading Act, s 6(3).

242 See for example TAR Lazio, I, n. 08779, 27.07.2020, 20-22 (under appeal).


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Third, third party participation also affects the selection of cases. In many jurisdictions, parties having a legally relevant interest can report a possible violation and participate in the decision-making procedure. They can appeal CAs' decisions not to pursue a case. Participation of third parties is grounded on the instrumental function of their intervention. It helps CAs to identify an accurate representation of the factual situation and reach a materially correct decision, corresponding to the facts and the public interest.[243] Participation rights serve as external controls enhancing the transparency and accountability of prioritisation. Complementing the function of judicial review, third parties may challenge the CA's proposed action and warn against errors.[244] While, granting third parties' access and participation rights comes at the expense of efficiency, it enhances transparency, accountability, deterrence, and law compliance.

The conditions of access to the procedure and third parties' participation rights during the CAs' procedures vary considerably from one legal system to another.[245] While many CAs have explicit rules on formal complaints,[246] national approaches diverge as to who would be recognised as an interested party and whether their participation rights also extend to other interested third parties.[247]

Finally, IRAs' institutional organisation also shapes priority setting, for instance, by how decision-making tasks are separated from or integrated with other enforcement tasks. Institutional choices involve trade-offs between the swiftness of decision-making and expertise *vis-à-vis* quality control, transparency and legitimacy.[248] The prioritising choices of IRAs whose investigation and decision-making (adjudication) tasks are divided between two different institutions (for example administrative authorities and courts, external tribunals) are already subject to review within this first stage of the procedure.[249]

Similar considerations arise from the leadership model of the authority.[250] For some IRAs, prioritisation choices are made by a single person, for example the agency head or a specific unit. This unitary executive model has the

243 Mendes, n 3 above, 32. In particular, consumers and consumer organisations can be important watchdogs assisting regulators in monitoring markets. The Commission Notice on the Handling of Complaints, n 158 above, 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'.

244 *ibid*, 33.

245 Brook and Cseres, n 21 above, 35-40.

246 See among others Regulation 773/2004, Recital 5; Commission Notice on the Handling of Complaints, n 158 above, para 3; Cseres and Mendes, n 238 above, 484.

247 This has been illustrated by the General Court in Case T-791/19 *Sped Pro S.A.* v *European Commission* ECLI:EU:T:2022:67, where a Polish complainant turned to the Commission as he could not rely on judicial review of the Polish NCA's decision given the Polish administrative rules.

248 *ibid*.

249 Michael J. Trebilcock and Edward M. Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate' (2009) 41 Loy U Chi LJ 455. In Austria and Ireland, national courts decide on the merits of the case, and hence act as the decision-making NCA. In Denmark, Finland, and Sweden up until March 2021, courts only reviewed the findings adopted by the CA and had exclusive power to impose penalties.

250 William E. Kovacic and David A. Hyman, 'Competition Agency Design: What's on the Menu?' (2012) 8 *European Competition Journal* 527, 531. Also see Jenny, n 214 above, 30.

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advantage of faster and more consistent decision-making. For other IRAs, including most EU NCAs, these decisions are made by a group of staff members – either the management or a designated group – by a vote, consensus, or a combination of these two. Multi-member decision-making allows for greater expertise, transparency, and legitimacy in the decision-making and may better shield against political influence.[251]

### Substantive criteria

Substantive criteria refer to external or internal criteria guiding IRAs' decisions on whether to pursue or disregard a case. Unlike agenda setting, this aspect does not refer to a specific sector or practice, but to case-specific circumstances.

Setting substantive criteria streamlines the exercise of the IRAs' discretion, promotes efficient use of resources, focusses enforcement efforts on deterrence and clarifies the rules. It prevents both under-enforcement (by encouraging enforcement in cases of legal, societal, or doctrinal importance) and over-enforcement (discouraging enforcing practices having only limited impact on consumers and markets). Publishing substantive criteria enhances IRAs' accountability and predictability, requiring them to articulate their strategy in advance by explaining how it plans to make use of its enforcement powers and budget. Imposing external substantive criteria limits IRAs' independence, but enhances their accountability towards political institutions and allows stakeholders' participation via public consultation.

In competition law, while EU law does not offer substantive criteria for Member States, some NCAs adopted such criteria. According to Figure 5, seven per cent of the CAs are guided only by *external substantive criteria*, set by the national legislature, government, or judiciary as external control, 34 per cent by only *internal substantive criteria*, adopted by CAs as internal control (mostly published and publicly available), 35 per cent by *both internal and external* substantive criteria, and 24 per cent are *not guided* by any external or internal criteria at all.

### Alternative enforcement mechanisms: instrument and outcome discretion

Alongside the discretion associated with the open-textured provisions of economic regulation, IRAs enjoy extensive discretion in selecting their enforcement tools.[252] Besides having the power to refrain from pursuing a case, IRAs can also address potential infringements by alternative enforcement instruments as an extension of their priority setting powers.[253]

251 See for example Katzmann, n 90 above, ch 4, suggesting that the involvement of economists or lawyers in the selection of cases affects the type of cases pursued. More generally see Lodge and Wegrich, n 9 above, 242.

252 cf Schmidt and Scott, n 9 above, 457.

253 Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge: CUP, 2022) 346-396. Also see Nicolas Petit, 'How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of Their Enforcement Activities? A


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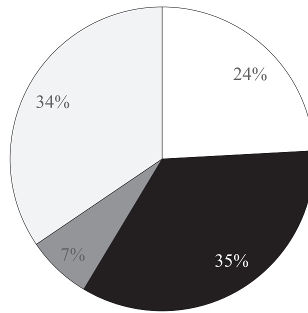


| | Internal criteria (No. of CAs) | External criteria (No. of CAs) |
|---|---|---|
| Gravity/seriousness of the infringement and its impact on competition | 12 | 13 |
| Excising evidence, ease of proof, information available | 10 | 5 |
| The need for precedent | 10 | 1 |
| Whether the CA is well-placed | 9 | 3 |
| Impact on the functioning of the economy/market | 9 | 4 |
| Other | 8 | 1 |
| Importance of sector | 7 | 2 |
| Impact on consumer welfare | 7 | 5 |
| Effectiveness of the enforcement | 6 | 5 |
| Cost/risks associated with enforcement | 5 | 1 |
| Social relevance or public interests | 4 | 4 |
| CA's available resources | 4 | 0 |
| Public profile case (e.g., flagged by the media) | 2 | 1 |
| A balanced portfolio of cases | 1 | 0 |

Figure 5: External and internal substantive criteria

Instrument discretion refers to the IRAs' power to choose between alternative regulatory mechanisms. For instance, some IRAs can undertake market inquiries instead of adopting infringement decisions, and multi-function IRAs may choose to use their powers under sector regulation or competition law. A broader range of enforcement instruments can enhance the effectiveness of enforcement, tailoring the tool to the legal and factual circumstances of cases.[254]

Multi-Jurisdictional Assessment' (2010) 1 *Concurrence* 44; Antimonopoly Office of the Slovak Republic, 'Prioritisation Policy' (January 2015, on file with the authors) 6.

254 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

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Similarly, sharing expertise across various regulatory areas (for example, digital markets) can improve effectiveness in dealing with complex regulatory issues, and lower costs of enforcement and policy coordination.[255] Yet, wide instrument discretion may also jeopardise the adequate allocation of resources across all mandates of IRAs.

Outcome discretion refers to IRAs' power to select from alternative procedures instead of adopting an infringement procedure. Some IRAs were granted powers to choose from a toolbox of negotiated remedies, such as formal and informal commitments or settlements. Having wide outcome discretion increases efficiency, offering IRAs flexible and quick ways to resolve cases. Alternative enforcement tools are often subject to limited judicial review or internal controls. However, these tools are highly problematic in terms of their transparency and accountability.[256] Hence, the effect of wide outcome discretion on effectiveness is controversial.[257] Some argue that informal enforcement tools can lead to greater legal compliance and focus the authority's scarce resources on serious infringement.[258] Others warn that overreliance on informal tools leads to insufficient deterrence and rule of law challenges.

While certain aspects of CAs' instrument and outcome discretion are regulated by EU law, CAs' competence to use alternative forms of external control depends on their respective national law. Concerning instrument discretion, our findings show that 66 per cent of CAs have multiple functions, combining the enforcement of competition law with sector regulation or consumer protection law.[259] In terms of outcome discretion, 44 per cent have power to issue warning letters instead of an infringement decision.[260] All CAs have powers to undertake market inquiries (ie sector inquiries or market studies), and some issue informal *ex ante* opinions. By requiring all NCAs to have the power to accept commitments, the ECN+ Directive remained limited concerning harmonisation.[261]

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.

255 Kati Cseres, 'Integrate or Separate: Institutional Design for the Enforcement of Competition Law and Consumer Law' (Amsterdam Law School Research Paper No 2013-03, Amsterdam Centre for European Law and Governance Research Paper No 2013-01, Last revised 8 April 2020) at https://ssrn.com/abstract=2200908 or https://doi.org/10.2139/ssrn.2200908 [https://perma.cc/6DS8-J99Q].

256 National legislators can establish procedural safeguards that enable third parties' participation allowing them to challenge commitments and settlements having excessively weak terms or by requiring the CAs to publish provisional terms and accompanying explanations for public comment.

257 Brook, n 16 above.

258 John Braithwaite, *To Punish or Persuade: The Enforcement of Coal Mine Safety* (Albany, NY: State University of New York Press, 1985). In the field of competition law, also see Philippe Choné, Saïd Souam and Arnold Vialfont, 'On the Optimal Use of Commitment Decisions under European Competition Law' (2014) 37 *International Review of Law and Economics* 169.

259 Brook and Cseres, n 21 above, figure 11.

260 *ibid*, 48.

261 Directive 2019/1, Preamble 39 and Art 12.


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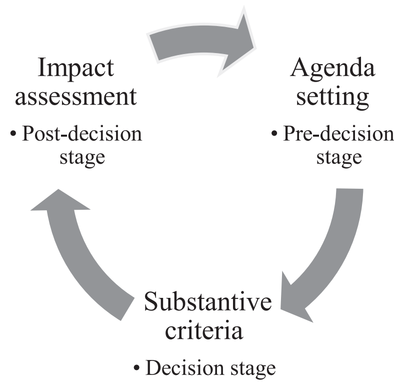


Figure 6: The enforcement cycle

**Impact assessment**

Impact assessment refers to *ex post* periodic assessment of prioritisation choices. Impact assessments are widely recognised as a key for improving the quality and transparency of decision-making and play a crucial role in promoting good governance. They determine whether the resources spent were justified, whether IRAs' interventions were effective, and whether the public benefited from these actions.[262] Impact assessments can function as a way to compensate for the democratic deficit characterising IRAs' operations.[263] Periodic and published impact assessments promote CAs' transparency and accountability towards stakeholders, politicians, and peer groups (international organisations).[264]

Impact assessments are valuable feedback mechanisms. They can rationalise the priority setting process by providing evidence on the actual impact of specific decisions and comparing it with the outcomes of their intervention *ex post*. It creates an enforcement cycle that helps to evaluate IRAs' exercise of discretion in setting priorities (see Figure 6). This can inform IRAs about the impact of implementing their agenda, the robustness of their substantive criteria, and provide authorities with a better sense of how to shape priorities and align their legal and policy commitments with available resources.[265]

Impact assessments, nevertheless, are rare. In competition law, few CAs examined the effects of their interventions in general, and priority setting in particular.[266] Our empirical findings indicate that only 21 per cent of the NCAs conducted impact assessments of their priority setting practices. Most of these

262 William E. Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2005) 31 J Corp L 503, 506.
263 Maggetti, n 198 above, 232-3.
264 OECD, 'Guide for Helping Competition Authorities Assess the Expected Impact of Their Activities' (April 2014), 3 at www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf [https://perma.cc/472Z-X49F]; OECD, 'Reference Guide on Ex-post Evaluation of Competition Agencies' (2016), 4, 11-12 at www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf [https://perma.cc/MKR3-KQDA].
265 Fabienne Ilzkovitz and Adriaan Dierx, *Ex-Post Economic Evaluation of Competition Policy Enforcement: A Review of the Literature* (Luxembourg: Publications Office of the European Union, 2014) 35-38.
266 *ibid*, 10-11.

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were informal and unpublished (seven per cent) or limited to a concise review as part of their annual reports (seven per cent).

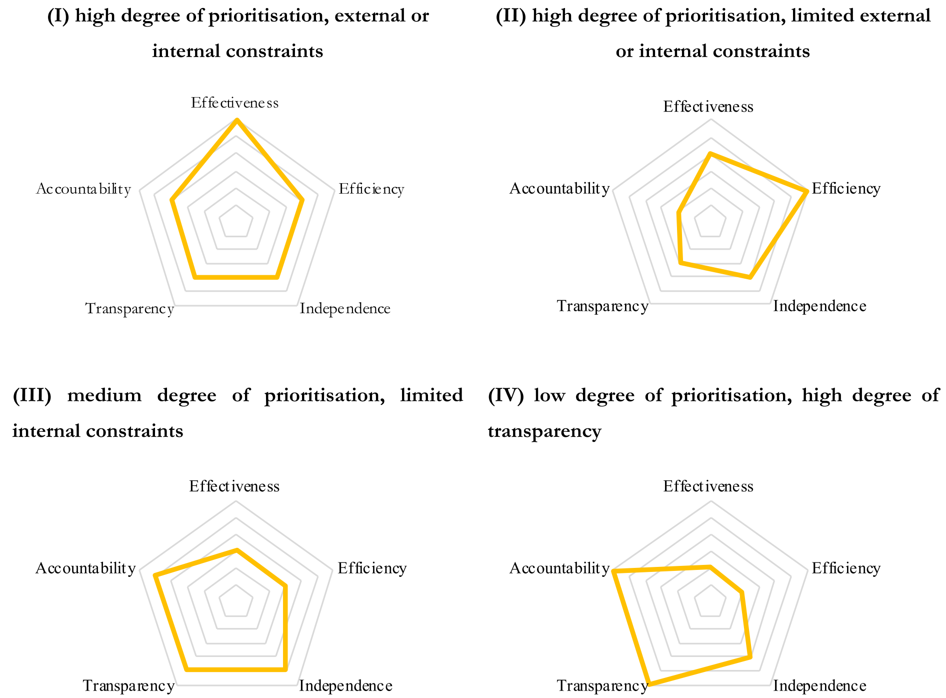


Figure 7: Four models of priority setting [Colour figure can be viewed at wileyonlinelibrary.com]

## FOUR MODELS OF PRIORITY SETTING AND THEIR IMPLICATIONS

The variety of choices made by jurisdictions across the seven aspects of priority setting profoundly affect how IRAs exercise their prioritisation powers and the way (internal and external) controls are imposed on them. As was elaborated above, priority setting powers and practices are deeply embedded in and directly shaped by each IRA's respective legal system, and reflect different preferences across the good governance principles. Due to these national variations, the effectiveness, efficiency, independence, transparency, and accountability of priority setting cannot all be realised at the same time. Identifying a single 'best' model for prioritisation is therefore unfeasible. Legislators, policy-makers, and IRAs may choose different trade-offs and balance across good governance principles of priority setting based on their national preferences and traditions.

To illustrate how these trade-offs are shaped by national rules and practices, Figure 7 points to four representative models of CAs' priority setting powers. Those models were identified via a bottom-up approach using CAs as a case study; they cluster CAs having similar characteristics, based on combining the powers of each CA across the seven aspects of prioritisation that were presented

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in the previous section. The figure demonstrates that each model reflects a different balance across the five good governance principles.

Identifying the four models does not aim to capture all possible configurations of IRAs' priority setting powers, but rather to demonstrate the effects of prioritsation choices on complying with the good governance principles and the functionality of this conceptual framework. Given the variety of IRAs across sectors and jurisdictions, and the differences between CAs and other types of IRAs,[267] not all IRAs fit into one of the four models presented by Figure 7. The classification of other types of IRAs and the existence of other types of priority setting models require further research.

### Model I – high degree of prioritisation, with external or internal constraints

Under the first model, IRAs enjoy a relatively high degree of prioritisation powers. They have both *de jure* competence and *de facto* ability to select cases. Their prioritisation discretion is, nevertheless, structured and controlled by a set of formal or informal rules, either imposed externally by law (Greek CA) or jurisprudence (Dutch CA), or adopted by IRAs internally (CAs in Finland, Netherlands, the UK). These control mechanisms may focus on various procedural aspects of prioritisation (for example, unit deciding on priorities, selection process, publication, and reasoning requirements) or substance (agenda and the substantive criteria for selecting cases).

A high degree of prioritisation powers allows IRAs to effectively select cases and reject low-priority complaints while focusing on matters of legal, societal, or doctrinal importance. Balanced case selection – based on carefully curated criteria that are clearly communicated to stakeholders and the larger public and which are subject to consultation and periodically reviewed – leads to more effective enforcement in the public interest, more legitimate prioritisation choices free from private interests, and increases IRAs' accountability and credibility.

The weakness of the model is the procedural cost associated with external and internal controls. Investigating complaints, public consultations, complying with duties to motivate and justify, and third parties' participation, reduce IRAs' enforcement efficiency and may lead to an ineffective and reactive regime, particularly for IRAs with limited resources.

The challenge of this model is therefore how to balance efficient priority setting and transparency, holding IRAs accountable through a formal and reasoned decision that can be reviewed by courts.

### Model II – high degree of prioritisation, limited external and internal constraints

Under this model, IRAs enjoy a high degree of *de jure* and *de facto* prioritisation discretion, with modest or no external or internal controls guiding

267 See text to notes 22-27 above.

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their prioritisation. The strength of this model lies in the efficiency resulting from strong prioritisation powers and the possibility to reject low-priority complaints. However, under this model, IRAs are not constrained by procedural or substantive controls and enjoy greater flexibility in selecting their cases. Being more independent from political actors and the general public in comparison to the first model can reduce external pressure and populist initiatives and increase their independence and expertise-based operation.

The weakness of this model is the lack of controls on IRAs' prioritisation decisions. Given restricted transparency, there is a risk that prioritisation choices are taken in a sub-optimal or even discriminatory manner without IRAs being held accountable by external pressures of legitimisation and review. Adopting internal controls to ensure prioritisation decisions are taken in the public interest, streamlining the process for taking prioritisation decisions, taking decisions by a multi-member board including various staff members, and conducting regular impact assessments can remedy these shortcomings.

### Model III – medium degree of prioritisation, strong external constraints, limited internal constraints

The third model is characterised by more limited prioritisation powers. While IRAs have some power to select their cases, they are bound by public interest criteria and/or subject to requirements of reasoning and publication (for example, many of the CEE CAs, including Croatia and the Czech Republic). Further external constraints may be imposed by legislation or case law. Under this model, third parties typically enjoy extensive access and participation rights and the procedure and substance of prioritisation decisions are subject to judicial review.

The strength of this model is increased accountability and transparency, which are expected to ensure that prioritisation decisions are taken in the public interest. Strong external controls and third parties' participation are important benefits, in particular, for newly established IRAs lacking strong reputation, legitimacy, or experience. The limitations placed on choices not to pursue a potential infringement may contribute to a balanced portfolio of cases, as long as the IRA's resources reasonably match its workload.

The weakness of this model is the costs of extensive external controls that reduce IRAs' independence (effectiveness and efficiency) and lead to a reactive enforcement system leaving little room for strategic planning. Such an effect could undermine IRA's power to use its expertise to select cases based on the public interest. When combined with limited resources, this model may result in wasting efforts on insignificant cases.

### Model IV – low degree of prioritisation

IRAs of the fourth model have limited priority setting powers. Bound by the legality principle, they are obliged to investigate every possible law infringement


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coming to their attention. These decisions must be taken formally, be reasoned and published, and are subject to judicial review.

The strength of this model is linked to the justification of the legality principle; safeguarding equality before the law and deterrence, including sensitive and complex cases. IRAs enjoy the highest degree of transparency and accountability and provide considerable room for third parties in the decision making.

The weakness of this model is the high procedural costs. The obligation to investigate all potential violations can lead to inefficient use of resources and often results in the limited *de facto* ability to start *ex officio* investigations. Even when IRAs decide to set an enforcement agenda or substantive criteria to guide priority setting, these will have limited effects in practice. Responding to every possible violation can reduce their independence and credibility.[268]

## CONCLUSIONS

Priority setting by IRAs is an invisible, yet essential, component of regulatory enforcement. Scholars, policy-makers, and enforcers 'implicitly assume that laws are somehow self-enforcing and that there is full compliance'.[269] As the blindspot of administrative discretion, they overlook how IRAs decide which cases they pursue and which they disregard. Still, those choices are vital given IRAs' finite resources and as a form of concretising open-ended administrative norms. The power to set priorities allows IRAs to effectively enforce regulations that require complex socio-economic and technical assessment, based on technocratic expertise, and free from external intervention.

This article opens the 'black-box' of priority setting. First, it makes priority setting discernible by shedding light on the historical development of IRAs' priority setting powers. No specific legal or regulatory theory defined this incremental and dispersed development of priority setting powers or could delineate the various aspects, aims, and controls of prioritisation. Early IRAs were delegated wide discretionary powers to provide expert decision-making by independently setting their own priorities and were subject to only limited external controls prescribed by the *ultra vires* principle. As IRAs expanded to Europe and beyond, new models emerged that were profoundly shaped by supranational policies and national administrative and criminal laws as well as by their non-legal context, such as their institutional setting. While many jurisdictions followed the Anglo-Saxon blueprint, others adhered to the legality principle and considerably limited their IRAs' prioritisation powers.

Second, the article deconstructs its composite nature by using EU competition law as a case study and offers a novel typology of seven aspects of priority setting that can be applied to IRAs' pre-decisional, decisional, and

268 In the field of EU competition law, prior to the implementation of the ECN+ Directive, Spain and France fell under this model. Yet, this model is no longer viable following the entry into force of the Directive.

269 Miller and Wright, n 8 above. P. Fenn and C.G. Veljanovski, 'A Positive Economic Theory of Regulatory Enforcement' (1988) 98 *The Economic Journal* 1055, 1055. Also see Bernstein, n 47 above, 217; Shumavon and Hibbeln, n 59 above, 4-6.

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post-decisional stages. Third, it defines normative benchmarks to analyse and evaluate CAs' priority setting rules and practices against the principles of good governance. While the oversight of priority setting rules and practices was negatively construed historically, focusing on control via judicial review, we advocate for a broad public interest approach. Complying with the rule of law, such an approach incorporates legal-normative criteria of good administration. It offers a framework to assess IRAs' priority setting, while being sensitive to differences between CA's mainly *ex post* and IRAs' mainly *ex ante* powers, its composite nature and national, institutional, practical, and bureaucratic embeddedness.

Our analysis points to four concluding observations. First, the Anglo-Saxon IRAs that emerged across Europe since the end of the nineteenth century and that significantly influenced prioritisation models elsewhere have been characterised by wide priority setting powers and a focus on independence, efficiency, and effectiveness, while vastly overlooking the democratic rationales of transparency and accountability. Besides being subject to limited external and internal controls, courts also refrained from reviewing their prioritisation decisions as long as IRAs stayed within the boundaries of their legislative mandate.

Second, our findings substantiate the idea that priority setting is not only defined and structured by law, but also shaped by non-legal factors such as institutional design and bureaucratic attitudes. As such, we believe that future research on priority setting must remain an interdisciplinary exercise, incorporating insights from various social sciences to capture and understand the broader context of law structuring such practices.

Third, on the basis of our case study of competition law we demonstrate that IRAs' prioritisation is profoundly shaped by national and supranational rules and by internal and external controls imposed by these laws. We identify four representative models across Europe, each representing a distinct approach to CAs' priority setting. The four models invite a debate and further research about the desired scope of prioritisation and the extent to which the practice of various types of IRAs comply with their specific legal framework structuring priority setting.

In Europe, following the modernisation of EU competition law in 2004, the Commission has been pushing CAs to converge towards its own prioritisation model, characterised by a high degree of priority setting powers, with few controls (model II).[270] Such 'Europeanisation' is evident from the Commission's policy papers since 2004,[271] the ECN initiatives,[272] and the ECN+ Directive.[273] Our framework demonstrates that these initiatives also emphasise the merits of effectiveness, efficiency, and independence, while transparency and

270 Clear evidence is the 2017 proposal for the ECN+ Directive that focused on effectiveness of priority setting. It was evidenced by various ECN documents, the Commission's preferred policy choice for NCAs. Also see Or Brook, Katalin J. Cseres and Ben Van Rompuy, 'Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission's Decision-Making' (2023) 14 *Journal of European Competition Law & Practice* 497.

271 European Commission, *Commission Staff Working Paper accompanying the Report on Regulation 1/2003* SEC (2009) 574 final.

272 ECN, 'Recommendation on the Power to Set Priorities' n 167 above.

273 Directive 2019/1, Art 5(1).


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accountability are less prominent. Moreover, they fail to explicate the strengths and weaknesses of this model and how it may interact with national legal and non-legal traditions.

Finally, our assessment shows that while discretion to set enforcement priorities is essential to guarantee efficient, effective, and independent decision-making by IRAs, the exercise of such discretion should be legally structured, confined and controlled. To comply with the rule of law and good governance principles, and to serve a democratic modern polity, priority setting rules and practices must be transparent and accountable to the public. While a single 'best' model is unfeasible given the different national legal and non-legal traditions, the article points to trade-offs across the good governance principles, which are visualised through the four representative models. These models can serve as a starting point for debate about the desired scope of prioritisation in a given legal system.

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