



Competition Law Enforcement at a Crossroad: Setting Enforcement Priorities in the Era of Digital Markets

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Published online: 9 May 2025
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1 Introduction: A Growing Task for Competition Authorities

With increasing pressure on competition authorities to tackle various economic and social issues, the way in which competition authorities select their cases for enforcement efforts (“priority setting”) carries immense socio-economic consequences for both economies and citizens’ welfare. This is especially true with respect to digital markets, where the introduction of new regulatory and policy frameworks necessitates pro-active, flexible and **highly discretionary** enforcement. As a result, while setting enforcement priorities has always been a complex and multifaceted task, digital markets introduce distinct challenges to the established legal frameworks and traditional constitutional safeguards that guide priority-setting in competition law enforcement. Especially because the process of priority-setting often slips through the legal and constitutional safeguards that could delineate administrative discretion, the emergence of digital markets raises crucial issues about the criteria of intervention and the substantive focus of selection criteria. Moreover, the regulatory issues these markets exhibit, push for a shift away from the consumer welfare standard for prioritisation, which has been the narrowly defined focus of many jurisdictions’ competition law enforcement over the past decades, towards broader economic and social considerations.

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This editorial examines how the challenges associated with digital markets influence – or should influence – the decision-making processes of competition authorities when setting enforcement priorities for the digital era.

2 The Changing Regulatory Context of Digital Markets

The rise of digital markets has prompted many competition authorities to [reconsider their tried and tested approach](#) to competition law, shifting from a [market-liberal to a more public-interventionist](#) governance mode. As traditional competition law instruments are often seen as unable to meet the demands of the new digital economy and society, this “regulatory gap” is quickly being filled with *ex ante* pro-competitive regulatory frameworks. In addition to the EU’s [Digital Market Act](#) (DMA), several EU Member States have created new tools in national law, including [Germany](#), [Italy](#), [Denmark](#), [Norway](#), and the [Czech Republic](#), with the [Netherlands](#) still in the design phase. These frameworks, known as “new competition tools”, enable the competition authorities to intervene in markets where there is a structural lack of competition, without the need to establish a competition law infringement.

These new competition tools aim to offer authorities timely, effective and future-oriented modes for intervention. Intervention is intended to be [fast and take place in an anticipatory manner](#) without having to engage in the legal and factual complexity that lengthy competition law investigations demand. Moreover, digital competition dynamics pose a crucial challenge to competition authorities, whose tasks are increasingly characterised by technical complexity due to technological change and specialisation, asymmetries in competence and information. Accordingly, high level expertise is required to sort out such complexities as [knowledge-based decision-making became indispensable in modern societies](#).

The [key distinctions](#) between competition law and regulation call for different governance approaches and distinct constitutional safeguards. These differences extend beyond the timing of the enforcement (competition law operates *ex post* and regulation *ex ante*), and encompass variations in the scope, precision, nature, and the procedure for interventions. Regulation tends to be narrow, detailed, and complex, whereas competition rules are more general, broad, and straightforward. The nature of legal obligations also diverges, with regulation imposing prescriptive-positive duties and competition law focusing on proscriptive-negative ones. Finally, the procedural frameworks for their implementation are distinct, with competition law generally following more legalistic and formalistic procedures.

3 Priority Setting

The epistemic community has largely praised the development of new competition tools. Yet, these new regulatory instruments also raise crucial questions concerning their compliance with the rule of law. They create potentially unpredictable enforcement environment for business, and often increase the European Commission’s

and the Member States' national competition authorities already considerable degree of discretion to choose how to select their enforcement and intervention priorities. This merits a closer examination of how competition authorities should set their priorities when applying the (old and new) competition tools, as well as selecting which tool to use to address a specific concern.

The selection of enforcement priorities by independent competition authorities is a crucial component of effective expert-driven enforcement, free from electoral politics. Our research on priority setting shows that as authorities are constrained by scarce financial and human resources, it is neither possible, nor desirable, that they enforce every possible law infringement.¹ The power to choose which cases to pursue and which to disregard, therefore, is a precondition for preserving society's resources to tackle the most harmful infringements. Such power affords authorities the autonomy to focus on matters of genuine economic, societal, and doctrinal importance not least in digital markets and, hence, can contribute to credible enforcement priorities. Moreover, prioritisation plays an important role in norm concretisation by setting substantive criteria of what is and what is not a priority.

The process of setting enforcement priorities is mostly informal and non-transparent. Inherently based on discretionary powers, only few legal norms structure and delineate competition authorities' selection of cases. The rules governing prioritisation are often not published, and are not subject to judicial review or other forms of public scrutiny. Still, when it comes to the traditional competition law enforcement tools, most EU jurisdictions have some form of structured legal framework that delineates priority setting as our empirical research shows.

However, in digital markets, the dynamics and structure of such enforcement changes. The new tools empower competition authorities to intervene through market studies and investigations without making an official finding of an infringement. The criteria for starting such interventions, therefore, depart from the established administrative law rules, or allow for more flexible grounds for intervention. For example, under Sec. 19a of the German Competition Act, the *Bundeskartellamt* enjoys discretion whether to intervene or not. As such, its role comes close to that of a regulatory authority. Similarly, in Denmark, the initiation of market investigation by the Competition and Consumer Authority is subject to approval by its board, the Competition Council who decides about the intervention. This means that many of these new powers and tools require more discretion (flexibility) from the authorities and may break with existing accountability mechanisms over competition authorities' priority setting. It also requires a new approach that looks at competition authorities more from the perspective of regulatory agencies. However, the necessary regulatory competence, technical expertise, flexibility, discretion and responsiveness in enforcement may fall short of delineating the scope of enforcers' regulatory actions.

¹ Or Brook and Katalin J. Cseres (2024) "Priority setting as the blind spot of administrative law enforcement: A theoretical, conceptual, and empirical study of competition authorities in Europe", *The Modern Law Review* 87(5):1209–1257. <https://doi.org/10.1111/1468-2230.12881>.

A clear normative framework has not been developed to guide the authorities' priority setting when applying the new competition tools. Moreover, the existing democratic accountability mechanisms such as "external controls" by judiciary, third parties and ministries and "internal controls" by the competition authority's themselves maybe shifting to new governance modes and structures that characterise regulatory authorities.

The lack of such a normative framework on prioritisation rules is surprising, as the demands for more flexible and discretionary enforcement in digital markets put increasing pressure on what has been called by political scientists the "democratic deficit" in regulatory decision-making. Competition authorities are non-majoritarian institutions who are considered to rely on [technical \(output oriented\) legitimacy](#) based on independent expert decision-making [technocratic expertise and performative conduct](#), while being unelected and [exempted from the accountability structures in the "chain of delegation" in democracy](#). Thus far, however, those debates have not extended to matters relating to how competition authorities should choose the target of enforcement of the new competition tools or how they should choose between a traditional competition law interventions to one which is based on the dedicated digital markets tools.

4 Structuring, Confining and Controlling Discretion

Our research [studying priority setting](#) in the traditional fields of competition law enforcement suggests that the concerns surrounding the increased powers of the competition authorities could be elevated by [structuring, confining and controlling](#) the exercise of their discretion when applying the new competition tools.

For example, the legislators and/or the competition authorities can adopt a periodical agenda, setting out the areas of law or the sectors of the economy that will be subject to enforcement in the next year(s). Similarly, the legislators and/or the competition authorities can adopt guidelines to inform the selection of individual cases, for example, based on their impact on citizens' welfare, the contestability and fairness of markets. Finally, the selection of cases in each period could be assessed with reference to explicit planning efforts and pre-determined criteria of what is considered effective and appropriate enforcement targets.

This could not only provide the necessary flexibility, but also reduce the risk of excessive discretion. Such framework can be designed following input from public consultations, and consultation with relevant stakeholders, such as consumer organisations or trade associations. Such strategic planning and periodical reflection on priority setting could increase the effectiveness of the application of the new competition tools, and delineate the necessary [administrative discretion](#) in implementing the powerful regulatory tools and increase transparency and accountability of the public intervention.

Accordingly, when national governments and the European Commission call for new digital regulatory frameworks and enforcement modes, competition authorities' technical expertise when implementing such measures must be structured and

delineated by legal safeguards and be balanced with the demand for democratic legitimacy and oversight.

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