

Priority Setting as the blind spot of administrative law enforcement:
Theoretical, Conceptual, and Empirical Study of Competition Authorities in
Europe

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ABSTRACT

Priority setting by independent regulatory agencies (IRAs) is an invisible, yet essential component of regulatory enforcement. The selection of which cases to enforce and which to disregard is vital given IRAs' finite resources, and due to its function of concretising open-ended administrative norms. Clear enforcement priorities allow IRAs to focus on matters of genuine economic 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 was developed to assess IRAs' priority setting rules and practices, nor a shared terminology exists to evaluate its different features.

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. 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.

Key words: priority setting; independent regulatory agencies; competition law, regulatory enforcement; administrative discretion; good governance; EU law.

INTRODUCTION

Priority setting: between expertise and the rule of law

Setting priorities by independent regulatory agencies ('IRAs') is a crucial component of effective expert-driven enforcement, free from 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 infringements. Such power affords authorities the autonomy to focus on matters of genuine economic 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 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 reason their choices, which remain outside the scope of judicial control. In those

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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 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, that may have direct impact on the legal sphere of private persons. Joana Mendes, 'Participation in EU Rule-making: A Rights-based Approach' (OUP, 2011), 3, 18.

⁴ Emphasis added. T.W Arnold, 'The Symbols of Government' (Yale University Press, 1935), 151.

⁵ K.C. Davis, 'American Comments on Antitrust Enforcement' in K.C Davis (ed), *Discretionary Justice in Europe and America* (University of Illinois Press, 1967), 96-97.

⁶ Julia Black, 'Managing Discretion' (2001), unpublished manuscript, London School of Economics, 2.

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(5) *European Integration* 583, 586-7.

⁸ Marc L. Miller and Ronald F. Wright, 'The Black Box' (2008) 94 Iowa L. Rev. 125, 183.

circumstances, how can one differentiate between prioritisation decisions being made in the public interest to those that advance private interests, such as increasing the reputation of the IRA or its officials (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 cheery-picking, regulatory capture,¹⁰ revolving doors¹¹, or populist initiatives?¹²

Some of the conceptual challenges common to priority setting by IRAs – such as the lack of clear legal standards, the democratic deficit of their operation, scarce resources, lack of information on non-compliance, and reputational effects – have already been explored. Scholarship on regulatory enforcement adapts enforcement strategies to specific cases, such as the ‘regulatory pyramid’ of Responsive Regulation,¹³ or Smart- and Risk-based Regulation.¹⁴ In the fields of taxation and environmental protection, the concept of ‘enforcement elasticity’ was developed to inform a cost-benefit based selection of enforcement targets.¹⁵ Research on administrative discretion identified it as ‘space within and between rules in which legal actors exercise choice’,¹⁶ and discussed how discretion can be delineated, structured and controlled.¹⁷ Political scientists examined the emergence and operation of IRAs as a process of delegation within principle-agent context.¹⁸ However, none of these strands of literature focused on IRAs’ enforcement priorities.

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’.¹⁹ Lacking a clear regulatory philosophy, many were created

⁹ Rebecca Schmidt and Colin Scott, ‘Regulatory Discretion: Structuring Power in the Era of Regulatory Capitalism’ (2021) 41(3) *Legal Studies* 454.

¹⁰ Theodore Lowry, ‘The End of Liberalism’ (Norton, 1969); William F. West, ‘Controlling the Bureaucracy: Institutional Constraints in Theory and Practice’ (ME Sharpe 1995), 10-13.

¹¹ J. Broulik, ‘Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU’ (2022), 45(2) *World Competition*, 159.

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

¹³ I. Ayres and J. Braithwaite, ‘Responsive Regulation’ (OUP, 1992).

¹⁴ Julia Black, ‘The Emergence of Risk-based Regulation and the new Public Risk Management in the United Kingdom’ (2005) *Public Law* 510; H. Rothstein, M. Huber, and G. Gaskell, ‘A Theory of Risk Colonisation’ (2006) 35 *Economy and Society* 91.

¹⁵ Michael Keen and Joel Slemrod, ‘Optimal Tax Administration’ *Journal of Public Economics* 152 (2017), 133; James L. et al, ‘Modeling Compliance to Environmental Regulation: Evidence from Manufacturing Industries’ *Journal of Policy Modeling* 19.6 (1997): 683.

¹⁶ Black n 6 above, 2.

¹⁷ Mendes n 1 above; Robert Caranta, ‘On Discretion’, in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008), 188-192; H.P. 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* (Edward Elgar, 2009).

¹⁸ For the state-of-the-art development of such literature, Fabrizio Gilardi, *Delegation in the regulatory state, Independent regulatory agencies in Western Europe* (Edward Elgar Publishing, 2008); Martino Maggetti, ‘Independent Regulators in the Post-delegation Stage’ in Martino Maggetti, Fabrizio Di Mascio, and Alessandro Natalini (eds.), *Handbook of Regulatory Authorities* (Edward Elgar Publishing, 2022), 227-239.

¹⁹ See text to note 42.

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.²⁰ At the same time, courts exercised only limited review over the exercise of priority-setting by IRAs, mostly ensuring that IRAs did not overstep their legislative boundaries.²¹ They typically focus on cases IRAs select to pursue, 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%) of the IRAs' efforts.²²

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' setting and controlling 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 IRAs' priority setting, 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 and engagement with IRAs. The empirical analysis is based on a systematic and comprehensive mapping ('coding') of the procedural and substantive rules and practices that define the way competition authorities ('CAs') of 27 EU Member States, the United Kingdom (UK), and the EU Commission ('Commission') set their priorities.²³ The data was collected through desk research of the publicly available legislation, case law and policy documents in each jurisdiction combined with

²⁰ 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 5 above, 2.

²¹ The so-called *ultra vires* principle, see text to note 65.

²² K.C. Davis, 'Discretionary Justice: A Preliminary Inquiry' (LSU Press, 1969), 4; Schmidt and Scott, n 9 above, 460. In the field of competition law enforcement, see Or Brook, 'Does EU and UK Antitrust Law "bite"' (The Antitrust Bulletin, forthcoming).

²³ A copy of the questionnaires and the coding of the results is available upon request from the authors.

written questionnaires and interviews with officials of the CAs.²⁴ The cut-off date for the data collection was December 2020.²⁵

Our typology and normative framework were presented in a Policy Report,²⁶ summarising the empirical findings and formulating policy implications for competition authorities. This article places the empirical findings and subsequent feedback to the Report from interviewees and workshops with enforcers (including the Commission, and European and international CAs) in the context of existing scholarship of regulatory enforcement and administrative discretion. The article further develops our findings, framework, and typology for the operation of various IRAs beyond competition authorities.

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 powers across national legal orders, in particular between Anglo-Saxon and European jurisdictions. The second 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 third section explores IRAs' priority setting by using EU competition law as a case study. It discusses the emergence of CAs in Europe and the evolution of their prioritisation powers following the 'modernisation' of the enforcement in 2004. EU competition law offers important insights into priority setting as CAs are the second most common IRAs globally,²⁷ and were among the first IRAs in the US and Europe, serving as a blueprint for other IRAs.²⁸ The fourth section

²⁴ 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.

²⁵ 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 reformed their priority setting rules and practices, which are not reflected in this study.

²⁶ Or Brook and Kati Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' Available at <https://ssrn.com/abstract=3930189> or <http://dx.doi.org/10.2139/ssrn.3930189>.

²⁷ Mattia Guidi, 'Competition Authorities' in Martino Maggetti, Fabrizio Di Mascio, and Alessandro Natalini (eds.), *Handbook of Regulatory Authorities* (Edward Elgar Publishing, 2022), 113-114.

²⁸ *Ibid.*, 115.

²⁸ Many IRAs have the power to regulate the behaviour of market parties *ex ante*, a power that other agencies usually do not have. Even though IRAs sometimes have a statutory duty to perform certain tasks (ie. requirement for market assessments in the telecommunications sector) unlike CAs, still, agencies largely have a considerable margin of discretion in setting their enforcement agendas. See Annetje Ottow, 'Market and Competition Authorities: Good Agency Principles' (OUP, 2015), 159.

introduces our typology to structure the understanding of priority setting, distinguishing between seven aspects of priority setting 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 the 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.

The fifth section introduces four representative models of IRAs' prioritisation rules and practices emerging from the empirical and theoretical study. We argue that as priority setting rules and practices are deeply embedded in, and directly shaped by each IRA's respective legal system, identifying a single 'best' model for prioritisation is unfeasible. Outlining the four models of IRAs' prioritisation is, nevertheless, important as each model reflects a unique trade-off between the good governance principles. The models identify and visualise how a specific IRA 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.

HISTORICAL ORIGINS OF IRAS AND THEIR PRIORITY SETTING POWERS

The nature and scope of IRAs' 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 ownership and the European model of public ownership. This section also 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.²⁹ *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.

²⁹ This term is inspired by Miller and Wright, n 8 above, 128-129, referring to external and internal 'legal regulation' of discretion.

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.³⁰ 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.³¹ The Commissioners’ independence was seen as an important guarantee against arbitrary and unfair treatment by the British King and his ministers.³² 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.³³ Yet, they still retained some independence, as besides being loyal to the minister, every civil servant was expected to be politically impartial.³⁴ In parallel, from the early twentieth century, a specialised tribunal system, operating outside the ordinary courts system, was developed to handle disputes concerning matters of transport and competition, rent, social insurance and assistance.³⁵

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.³⁶ 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

³⁰ Market failures such as natural monopolies, public goods, or externalities. Giandomenico Majone, ‘Regulation and its Modes’ in G Majone (ed) *Regulating Europe* (London: Routledge, 1996), 9-15.

³¹ *Ibid.*, 54-57.

³² FM Luc, ‘British Agencies: Surveying the Quango State’ in Tom Zwart and Luc Verhey (eds), *Agencies in European and Comparative Law* (Intersentia, 2003), 19-36, 20.

³³ *Ibid.*

³⁴ *ibid.*

³⁵ Paul P. Craig, ‘Administrative Law’ (Sweet & Maxwell, 2016), 60-61.

³⁶ This explains why key theories and insights of the regulatory processes find their foundations in the history of US independent regulators. See C Carrigan M Febrizio, ‘Tracing the Development of U.S. Independent Regulators in Martino Maggetti, Fabrizio Di Mascio, and Alessandro Natalini (eds.), *Handbook of Regulatory Authorities* (Edward Elgar Publishing, 2022).

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).³⁷ As the design of the ICC was inspired by the British Railways Commission, a semi-judicial tribunal,³⁸ it acted as an administrative tribunal, operating reactively following case-by-case adjudication.³⁹

The establishment of the ICC as an independent body was the result of an evolution rather than of doctrinal theory.⁴⁰ During its first years of operation, it was not fully independent, but was placed under the US Department of the Interior.⁴¹ Granting independence to the ICC was a ‘historical accident’, originating from the disappointment of the drafters of the ICA with the appointed ICC President.⁴² Commentators pointed to various justifications for American IRAs’ independence, including their quasi-judicial nature of the commissions, i.e. independence of regulatory agencies is akin to the independence of the judiciary;⁴³ 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.⁴⁴

The prestige of the ICC stimulated the expansion of other IRAs.⁴⁵ 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,⁴⁶ it was adjudication-based.⁴⁷

³⁷ *Ibid*, 21.

³⁸ On the British Railways Commission, see Craig, n 35 above, 332-333.

³⁹ Colin Scott, ‘Privatization and Regulatory Regimes’ in Robert E. Goodin, Michael Moran, and Martin Rein (eds), *The Oxford Handbook of Public Policy* (Oxford University Press, 2008), 659; Marver Hillel Bernstein, ‘Regulation Business by Independent Commission’ (Princeton University Press, 1966), 26-35; Calhoun, ‘The Interstate Commerce Commission: Cases, Rules, and Administrative Discretion’, in H. Douglas and H. Kenneth Hibbeln (eds), *Administrative Discretion and Public Policy Implementation* (Praeger, 1986), 265-283, 272-274.

⁴⁰ Robert Eugene Cushman, ‘The Independent Regulatory Commissions’ (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’. Paul R. Verkuil, ‘The Purposes and Limits of Independent Agencies’ (1988) *Duke LJ* 257, 257.

⁴¹ The Secretary enjoyed general supervisory powers over housekeeping, budget, appointments, and staff compensation. See *ibid*.

⁴² 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 39 above, 23.

⁴³ M. E. Dimock, ‘British Public Utilities and National Development’ (Allen and Unwin, 1933).

⁴⁴ Cushman, n 40 above, 10-11. More generally see Mark Thatcher and Alec Stone Sweet, ‘Theory and Practice of Delegation to Non-majoritarian Institutions’ (2002) 25(1) *West European Politics* 1, 4.

⁴⁵ *Ibid*.

⁴⁶ Dominique Custos, ‘The Rulemaking Power of Independent Regulatory Agencies’ (2006) 54 *Am. J. Comp.* 615, 616.

⁴⁷ 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

The first coherent legal-economic philosophy underlying IRAs was the 1930s New Deal,⁴⁸ 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*⁴⁹ recognised the constitutional status of independence, which distinguished IRAs from the executive.⁵⁰ Fixed terms, for-cause removal, and multi-member board of experts were established as the cornerstones of IRAs.⁵¹ Upon the expansion of new agencies, the Administrative Procedure Act of 1946 (APA) standardised IRAs' administrative processes and controls, strengthening their powers and independence.⁵²

During the 1960s and 1970s, the ICC and other IRAs transformed from reactive adjudicators into proactive rule-makers and regulators.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ Government departments regulated and oversaw the operation of these nationalised sectors, aiming to ensure not only the functioning

those which believed that large interstate commerce should be regulated. See Cushman, n 40 above, 4-5. Verkuil, n 40 above, 263.

⁴⁸ James O. Freedman, 'Expertise and the Administrative Process' (1976) 28 Admin. L. Rev. 363.

⁴⁹ 25 US 602

⁵⁰ 295 U.S. 602 (1935), was a Supreme Court of the United States case decided regarding whether the United States President has the power to remove executive officials of a quasi-legislative or quasi-judicial administrative body for reasons other than what is allowed by Congress. The Court held that the President did not have this power. Carrigan and Febrizio, n 36 above, 13.

⁵¹ The Court ruled that the FTC was (1) non-political and nonpartisan, (2) uniquely expert, (3) 'quasi-legislative', and (4) 'quasi-judicial' and as such was an IRA, rather than an executive. Hence, it remained one of the core judicial pillar 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.' Geo. Wash. L. Rev. 83 6 (2016): 1835-75.295 U.S. at 628.

⁵² Bernstein, n 39 above, 69. While, it mostly governed the process of adopting regulations, rather than enforcement, it introduced important provisions to render the agencies more accountable for their actions and for public participation. Douglas H Shumavon and H. Kenneth Hibbeln, 'Administrative Discretion: Problems and Prospects' in Douglas H Shumavon and H. Kenneth Hibbeln (eds) Administrative Discretion and Public policy Implementation (Praeger, 1986), 5; Douglas F., Morgan and John A. Rohr, 'Traditional Responses to American Administrative Discretion' in Douglas H Shumavon and H. Kenneth Hibbeln (eds) Administrative Discretion and Public policy Implementation (Praeger, 1986).

⁵³ Verkuil, n 40 above, 263-264.

⁵⁴ *Ibid*, 263-264; Custos, n 46 above, 629.

⁵⁵ Verkuil, n 40 above, 263-264.

⁵⁶ David Heald, 'The United Kingdom: Privatisation and its Political Context' (1988) 11(4) West European Politics 31, 31-36.

and competitiveness of those services, but also other public policies, such as employment, economic growth, stable prices, and a balance of payments.⁵⁷ 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.⁵⁸ 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 Civil Service, called to reassess which activities should be performed by governmental departments and which should be moved to independent external bodies.⁵⁹ 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.⁶⁰ By highlighting the way the Swedish government was organised with public bodies enjoying independent status,⁶¹ 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.⁶²

Delegating enforcement powers to IRAs was reinforced following the election of Thatcher's government. From the mid-1980s, the British economy was reorganised by privatising public utilities and liberalising others.⁶³ This reform, in turn, called for a new mode of governance and

⁵⁷ Report on Civil Service, mnd. 3638 (1968), 10. Also see Craig, n 35 above, 334.

⁵⁸ Stephen Wilks, 'In the Public Interest: Competition Policy and the Monopolies and Mergers Commission' (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.

⁵⁹ Report on Civil Service, n 51 above, 10.

⁶⁰ *ibid.*, 13, 61.

⁶¹ *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 32 above, 19-36, 21

⁶² M. J. Methven, 'The role of the Office of Fair Trading' (1975) City London L. Rev. 7, 9.

⁶³ Heald, n 56 above, 31-36.

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.⁶⁴

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 emergence 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 separation of powers and is based on a unitary concept of democracy.⁶⁵ Originating from *Dicey*, who alerted to administrative discretion as a threat to the rule of law in England in the 1900s,⁶⁶ 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.⁶⁷ 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 judicial review by ordinary courts and focused on ensuring the protection of the private interests of the parties to the dispute.⁶⁸

Anglo-Saxon IRAs had limited competences to adopt *internal controls*. British tribunals, who 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.⁶⁹ This rule has two aims: safeguarding a fair

⁶⁴ *Ibid.*

⁶⁵ Albert Venn Dicey, 'Development of Administrative Law in England' (1915) 31. LQ Rev. 148. Also see Craig, n 35 above, 2-14.

⁶⁶ Albert Venn Dicey, 'Introduction to the Law of the Constitution' (Macmillan, 1959).

⁶⁷ Craig, n 35 above, 4-7.

⁶⁸ *Ibid.*, 7-8.

⁶⁹ *ibid.*, 536-540; Aileen McHarg, 'Administrative Discretion, Administrative rule-making and Judicial Review' (2017) 70(1) Current Legal Problems, 267, 270-271.

trial 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.⁷⁰ In *British Oxygen* of 1971, the House of Lords held that IRAs are not prohibited from adopting internal controls if they retain discretion when applying them to a specific case.⁷¹ Arguably, jurisprudence in the UK did not only permit, but actually required, the adoption of such internal controls.⁷²

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.⁷³ 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.⁷⁴ The New Deal confirmed both 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.⁷⁵

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.⁷⁶ Adhering to the *opportunity principle*, the state is granted a choice not to start investigation, even when enforcement is technically and legally possible.⁷⁷ This broad enforcement discretion is justified by rationales of procedural economy.⁷⁸ As a ‘first-come, first-serve’ approach is undesirable, setting enforcement priorities is essential.⁷⁹ Yet, the opportunity principle is not only a response to pragmatic considerations but reflects the belief that enforcement priorities are necessary in a democratic society, as enforcement should be avoided when it is unjustified.⁸⁰ These

⁷⁰ *Ibid.*

⁷¹ *British Oxygen v Ministry of Technology* [1971] AC 610. Also see *Ibid.*

⁷² McHarg, n 69 above, 291.

⁷³ West, n 10 above, 3-5.

⁷⁴ *Ibid.*

⁷⁵ Ellen S. Podgor, ‘Department of Justice Guidelines: Balancing Discretionary Justice’ (2003) 13 *Cornell JL & Pub. Pol’y* 167, 170-175.

⁷⁶ Davis, note 5 above, 63-67; Gerard Conway, ‘Holding to Account a Possible European Public Prosecutor Supranational Governance and Accountability across Diverse Legal Traditions’ (2013) 24(3) *Criminal Law Forum*. 371, 376-380.

⁷⁷ Peter JP Tak, *The Legal Scope of Non-Prosecution in Europe* (Helsinki Institute for Crime Prevention and Control, 1986), 28-29.

⁷⁸ Scarce human, financial, and technical resources mean that it is not possible to investigate and enforce all possible infringements. *Ibid.*, 30.

⁷⁹ Roscoe B. Starek II., ‘Prosecutorial Discretion: A View from the Federal Trade Commission (1997)’, 20 *Regulation* 24, 26.

⁸⁰ Breitl, *Controls in Criminal Law Enforcement*, 27 *U. CHI. L. REV.* 427 (1960), 427.

justifications extend to administrative law enforcement, which is based on similar considerations of deterrence, seriousness of infringements, and norm concretisation.⁸¹

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 US, the power to set priorities is not only uncontrolled by the legislator, but neither DoJ⁸² nor FTC⁸³ adopted internal controls. This reflects a model of 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. In the UK, while few external controls are imposed on the exercise of the OFT/CMA's priority setting powers, they are required to publish an annual plan, explaining their priorities for the respective year.⁸⁴ Moreover, they adopted internal prioritisation guidelines.⁸⁵ This model forgoes effectiveness and efficiency, in favour of greater transparency and accountability.

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 endowed states to structure their economies by safeguarding the public interest against powerful private entities.⁸⁶ Public ownership dominated the governance of utilities such as energy, transport, telecommunications and postal services. Having the characteristics of natural monopolies public ownership was advocated to eliminate economic inefficiencies, protect consumers, fight excessive political power, stimulate growth, favour specific regions or groups, and ensure national security.⁸⁷

⁸¹ In practice, American scholars often made 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, footnote 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.

⁸² For an interesting discussion see Davis, note 5 above, 98.

⁸³ Robert A. Katzmann, 'Regulatory Bureaucracy: The Federal Trade Commission and Antitrust' (MIT Press, 1980); Starek, n 79 above, 24; Fabrizio Gilardi, 'The Institutional Foundations of Regulatory Capitalism: the Diffusion of Independent Regulatory Agencies in Western Europe' (2005) 598(1) The Annals of the American Academy of Political and Social Science 84, 85-86.

⁸⁴ Enterprise Act 2022 c. 40.

⁸⁵ On agenda setting, see below.

⁸⁶ Majone, n 30 above, 9-15; Anthony Ogus 'Regulation: Legal Form and Economic theory' (Hart Publishing, 2004), 265-271.

⁸⁷ Ibid.

This public ownership model meant that IRAs were created in Europe only by the late-1980s and 1990s with the ‘rise of the regulatory state’.⁸⁸ Following the footsteps of the UK, the rise of neo-liberal policies, globalisation, and increased international competition pushed states to deregulate and liberalise markets.⁸⁹ The trend of establishing regulatory, arms-length agencies separated policy making from regulation and shifted from discretionary to rule-based instruments.⁹⁰ Similar to the UK, IRAs emerged in telecommunications, energy, and financial sectors, and slowly spread to competition law.⁹¹ These developments are often traced back to the influence of American political-economy following the Second World War, but are also linked to the application of supranational EU rules in national legislation⁹² and to the EU’s pressure to insulate national decision-making from national politics and favouritism.⁹³

IRAs in Europe are characterised by varying institutional forms and powers. Some were explicitly made independent, while others operate as an institutional unit subject to the supervision of a ministry (eg the German *Bundeskartellamt*). Their nature and powers are deeply embedded in, and directly shaped by their respective administrative law systems and constitutional orders. Contrasting administrative traditions and competing theoretical perspectives explain why governments established IRAs and delegated particular combinations of powers to them.⁹⁴ Countries and political systems with different types of capitalism rely on various degrees of economic coordination and define the IRAs’ roles and discretion accordingly.⁹⁵

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.⁹⁶

⁸⁸ Majone, n 30 above.

⁸⁹ Fabrizio Gilardi, *Delegation in the Regulatory state: Independent Regulatory Agencies in Western Europe* (Cheltenham: Edward Elgar Publishing, 2008).

⁹⁰ G Majone ‘The rise of the regulatory state in Europe’ (1994) 17 *West European Politics* 77; M Loughlin and C Scott ‘The regulatory state’ in P Dunleavy et al (eds) *Developments in British Politics* 5 (London: Macmillan, 1997).

⁹¹ First to France the Netherlands, Spain and other jurisdictions. See Mark Thatcher, ‘Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation’ (2002) 25(1) *West European Politics* 125, 128.

⁹² *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.

⁹³ Majone, n 30 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* (Edward Elgar Publishing, 2006); Thatcher, n 91 above, 133; S Wilks and I Bartle, ‘The Unanticipated Consequences of Creating Independent Competition Agencies’ (2022) 25(1) *West European Politics*, 148, 151.

⁹⁴ *Ibid*. These theories are as old as the study of modern administration.

⁹⁵ P.A. Hall and D. Soskice ‘An Introduction to Varieties of Capitalism’ in P.A. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

⁹⁶ Davis, note 5 above; J. Herrmann, ‘The German Prosecutor’ in K.C Davis (ed), *Discretionary Justice in Europe and America* (University of Illinois Press, 1967). In Germany, for example, the legality principle was a key component of the establishment of the Reich in 1871. Tak, n 77 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.

Compulsory prosecution reflects the twin objectives of equality before the law and enhancing general deterrence.⁹⁷ It prevents disregarding certain law infringements which make ‘easy the arbitrary, the discriminatory, and the oppressive’.⁹⁸ Decisions not to prosecute could be overturned by courts.⁹⁹ From the 1960s, discretionary powers in criminal law expanded across European countries alongside embracing external and internal controls.¹⁰⁰ Nevertheless, the varieties of legal traditions resulted in different legal controls over administrative discretion. For example, the degree of judicial review of discretion is marginal by English courts very restricted by German courts; and intensity of control depends on the subject matter in France or the procedure in Italy.¹⁰¹

As the case study of competition law demonstrates below, some IRAs followed the American/British models (high degree of prioritisation powers, either with or without controls), 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.

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-practice’ principles guide the setting or control of enforcement priorities. 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

⁹⁷ Tak, n 77 above, 30.

⁹⁸ Breitel, ‘Controls in Criminal Law Enforcement’ (1960) 27 U. CHI. 427, 429.

⁹⁹ For a classification of European countries criminal approaches, see Conway, n 76 above, 389; Tak, n 77 above, 33.

¹⁰⁰ *ibid*, 27, 43-49.

¹⁰¹ 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 only when it is expressly granted by Parliament. Even when German decision-maker enjoy some discretion (*Beurteilungsspielraum* 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, 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, and 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 Caranta n 17 above, 188-192.

action and inaction were extensively analysed,¹⁰² and there is wide consensus on the benefits of adopting guidelines to limit and control enforcement priorities.¹⁰³

In the absence of a common benchmark to assess administrative prioritisation, this section fills this gap by examining 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 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.¹⁰⁴ 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.¹⁰⁵ Davis, and other scholars,¹⁰⁶ advocated for a public interest-based approach making use of good governance principles to confine discretion.¹⁰⁷ This broad approach is grounded on standards of legality to prevent abuse of power by public bodies, quasi-public, or private bodies with a degree of power.¹⁰⁸ 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.¹⁰⁹

This shift in the oversight of administrative discretion is significant. The narrow *ultra vires* principle is grounded on a negative conceptualisation of discretion. Accordingly, discretion is characterised by the absence of legal norms, a choice not legally determined:¹¹⁰ ‘what is left of

¹⁰² There is wide consensus on the benefits of adopting guidelines to limit and control enforcement priorities Tak, n 77 above, 1.

¹⁰³ *ibid*, 73-83.

¹⁰⁴ Lowri, n 10 above, West, 10 above, 10-13.

¹⁰⁵ Davis, n 22 above. Also see Martin Shapiro, ‘Administrative Discretion: The Next Stage’ (1983) 92(8) *The Yale Law Journal* 1487, 1489.

¹⁰⁶ See, for example, Black n 6 above, 2; Joana Mendes, ‘Good Administration in EU law and the European Code of Good Administrative Behaviour’ (2009) *EUI working papers. Law* 2009/09, 432.

¹⁰⁷ Craig, n 35 above, 15-26.

¹⁰⁸ *ibid*, 15.

¹⁰⁹ *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’ *European Law Open* 1.3 (2022) 510.

¹¹⁰ Mendes, n 1 above, 461.

judicial control'.¹¹¹ 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'.¹¹² 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'.¹¹³

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,¹¹⁴ 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.¹¹⁵ The duty to give reasons functions as a self-reflective tool for decision-makers, as it presupposes 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 administration¹¹⁶ 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'.¹¹⁷

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

¹¹¹ Caranta, n 17 above. Such an approach, as Mendes n 1 above, 461 argued, fails to capture the complexity of the interaction between legal norms, discretion, and judicial review.

¹¹² Mendes, n 1 above, 462.

¹¹³ *ibid.*

¹¹⁴ What Mendes defends as a unitary concept of discretion which stresses not only the autonomy attributed by legal norms, but also the bounded nature of that autonomy. This unitary approach emphasizes the process of concretization 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.

¹¹⁵ A careful and impartial examination of technically complex factual circumstances need to take into account and balance between 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 n 1 above, 466.

¹¹⁶ See Nehl, n 17 **Error! Bookmark not defined.** above for an overview and in-depth study on good administration as a concept in EU law.

¹¹⁷ *Ibid.*, 338; Mendes, n 106 above, 5; H Addink, 'Good Governance: Concept and Context (Oxford University Press, 2019), 251.

accountability. These principles are commonly used to assess the behaviour of public administration and administrative discretion.¹¹⁸ 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 a complex exercise against 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.¹¹⁹ Setting clear priorities that are built around a transparent strategy, enhances the credibility of IRAs' action.¹²⁰ 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 (e.g., 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 effects¹²¹ and risk balancing, enforcing 'classic' infringements and landmark cases that set a precedent and have a greater multiplier effect.¹²²

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

¹¹⁸ 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), <http://www.oecd.org/gov/regulatorypolicy/governance-regulators.htm>; Jennifer A. Elliott et al., '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* (International Monetary Fund, 2012).

¹¹⁹ Ottow, n 28 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; A. Héritier and D. Lehmkuhl, 'Governing in the Shadow of Hierarchy: New Modes of Governance in Regulation', in Héritier and M. Rhodes (eds.) *New Modes of Governance in Europe: Governing in the Shadow of Hierarch* (Palgrave Macmillan, 2011), 66.

¹²⁰ Ottow, n 28 above, 76.

¹²¹ *Ibid*, 160.

¹²² 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), part I, 46.

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 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 principle limits other good governance aspects of priority setting, for example, transparency.

Independence

IRAs' independence was traditionally justified by the technical complexity of regulated markets and the need for expertise.¹²³ Its core is the regulator's legal and functional separation from both market parties and legislative and executive influence,¹²⁴ 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'.¹²⁵

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 control of discretion.¹²⁶ Providing sufficient evidence and grounds to justify IRAs' interventions strengthens *procedural accountability*.¹²⁷ Clearly formulated, published, and reasoned priorities are important indicators of democratic and legitimate law enforcement.¹²⁸ 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.¹²⁹ Finally, transparency facilitates

¹²³ 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' (2010) 89 *Tex. L. Rev.* 15, 26; Rachel E. Barkow, 'Overseeing Agency Enforcement' (2016) 84 *Geo. Wash. L. Rev.* 1129, 1147; Mattia Guidi, 'Competition Policy Enforcement in EU Member States' (Springer, 2016), 96.

¹²⁴ Christel Koop and Jacint Jordana, 'Regulatory Independence and the Quality of Regulation' in Martino Maggetti, Fabrizio Di Mascio, and Alessandro Natalini (eds.), *Handbook of Regulatory Authorities* (Edward Elgar Publishing, 2022), 212.

¹²⁵ *Ibid.*, 212-3; Chris Hanretty, and Christel Koop, 'Measuring the Formal Independence of Regulatory Agencies' (2012), 19(2) *Journal of European Public Policy* 198, 199. For a similar approach, see Maggetti, n 18 above.

¹²⁶ K.M Meessen, 'The Application of the Antitrust Rules of the EEC Treaty by the Commission of the European Communities' in K.C Davis (ed), *Discretionary Justice in Europe and America* (University of Illinois Press, 1967), 87-88.

¹²⁷ Anthony I. Ogus, 'Regulation: Legal Form and Economic Theory' (Oxford University Press, 1994), 111; Ottow, n 28 above, 156.

¹²⁸ Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137, 147. Also see Filippo 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 w30326, 53.

¹²⁹ 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 2.

participation. Open consultations serve as an information-gathering tool, justifying regulatory action and inaction, and help IRAs balance competing public interests.¹³⁰ Participation through submitting complaints can contribute to an 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.¹³¹ IRAs are required to be ‘vertically accountable’ towards their political institutions, judiciary, regulates, and general public.¹³² Often, they are ‘horizontally accountable’ towards regional or international networks of regulators.¹³³ Accountability can be understood formally through adopting procedural mechanisms to control IRAs’ operation and informally, as a substantive requirement, focusing on meaningful interaction between the IRA and its audience.¹³⁴ Adopting internal controls and clear communication on priority setting can facilitate the IRAs’ formal and substantive accountability.¹³⁵

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 mentioned above, EU competition law offers important insights into priority setting as CAs are the second most common IRAs globally, and were among the first IRAs in the US and Europe, serving as a blueprint for other IRAs.¹³⁶ The modernisation of EU competition law in 2004 was a defining moment in the development of priority setting. Prior modernisation, there was limited consideration of priority setting. While the Commission was entrusted with a high degree of prioritisation powers, similar to American IRAs, matters of prioritisations only became prominent after the implementation of Regulation 1/2003. The new enforcement system opened the door for setting priorities by the Commission and national competition authorities (‘NCAs’) while imposing few controls on the exercise of such discretion.

¹³⁰ Ottow, n 28 above, 86.

¹³¹ Sjors Overman, Thomas Schillemans, and Machiel van der Heijden, ‘Accountability and Regulatory Authorities’ in Maggetti, Di Mascio, and Natalini, n 17 above.

¹³² William E. Kovacic, ‘Deciding What to Do and How to Do It: Prioritization, Project Selection, and Competition Agency Effectiveness’ (2018) 13(1) Competition Law Review 9, 15.

¹³³ Overman et al, n 131 above, 258, 261.

¹³⁴ *ibid*, 257.

¹³⁵ Thatcher, n 91 above, 141-142.

¹³⁶ See text to notes 27-28 above.

The emergence of competition laws and authorities in Europe

Competition law and policy were traditionally not seen as a core pillars of governments' economic governance in Europe.¹³⁷ Modern competition law was gradually introduced in the aftermath of the Second World War. While drawing inspiration from the US, European enforcement systems were homegrown and differed considerably from one another.

Accordingly, 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.¹³⁸ Yet, British competition law remained cautious, incomplete, and under-enforced, until late 1990s.¹³⁹ The Competition Act of 1998 and the Enterprise Act of 2002 were the first to introduce an effective competition regime, where investigation and decision-making powers are held by the OFT (from 2014 CMA), and subject to appeal to the Competition Appeal Tribunal (CAT).

In 1957, the German Federal Cartel Office (*Bundeskartellamt*) was established as the second competition authority in Europe under US pressure. Building on the Ordoliberal enforcement vision, the *Bundeskartellamt* was created as a highly independent CA, having the sole responsibility for enforcement and separated from the state bureaucracy.¹⁴⁰ Its independence was regarded as a *sine qua non* of the modern *Rechtsstaat*, and justified its position outside the regular administrative hierarchy.¹⁴¹ Although placed under 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.¹⁴²

Besides those two early national examples, competition law enforcement was limited to supranational application by the European Commission. 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

¹³⁷ Majone, n 30 above, 50.

¹³⁸ Heald, n 56 above, 38-39. Also see Giandomenico Majone, 'The Rise of Statutory Regulation in Europe' in G Majone (ed) *Regulating Europe* (London: Routledge, 1996), 47-8.

¹³⁹ 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 58 above.

¹⁴⁰ The Ordoliberals' conviction that the office had to be autonomous was related to their experience during the Weimar period when the capacity of cartels and large corporations to attempt control by putting political pressure on the executive branch. David Gerber 'Law and Competition in the Twentieth century' (Oxford University Press, 1998) 254-55.

¹⁴¹ Gerber n 137 above, 282.

¹⁴² 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 n 137 above, 282.

modern competition rules prohibiting cartels and abuse of a dominant position.¹⁴³ 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, its institutional design of Directorate-General for Competition of the Commission (DG COMP, formally DG IV) as a centralised, independent, quasi-judicial body.¹⁴⁴ From its early days, DG COMP stood out among other Directorates General because of its autonomy, judicial functions, and direct influence on the economy.¹⁴⁵ Yet, when compared to its American counterpart, it does not function as a fully independent IRA:¹⁴⁶ final decisions are adopted through Commissioners' vote, who are political appointments of the Member States.¹⁴⁷ Suggestions to transform DG COMP into a fully independent IRA were consistently rejected.¹⁴⁸ 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,¹⁴⁹ due to successful market integration, the process of EU constitutionalisation, and strong supranational enforcement mechanisms under Regulation 17/62. As a form of 'Europeanisation', Member States adopted competition laws and created CAs following the EU model.¹⁵⁰ 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)

¹⁴³ 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 University Press, 2013), 54.

¹⁴⁴ *Ibid*, 66.

¹⁴⁵ *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, available here <http://aci.pitt.edu/14786/>.

¹⁴⁶ Laraine Laudati, 'The European Commission as Regulator: The Uncertain Pursuit of the Competitive Market' in G Majone (ed) *Regulating Europe* (Routledge, 1996), 229-261; G Majone, 'The Future of Regulation in Europe' in G Majone (ed) *Regulating Europe* (Routledge, 1996), 270-273.

¹⁴⁷ 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, Article 9.

¹⁴⁸ Laudati, n 146 above, 231-6.

¹⁴⁹ M Drahos, 'Convergence of Competition Laws and Policies in the European Community: Germany, Austria and Netherlands' (Kluwer, 2002).

¹⁵⁰ 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'. I Bache and A Jordan, 'Europeanization and Domestic Change' in I Bache and A Jordan (eds), *The Europeanization of British Politics* (Palgrave Macmillan 2006) 30; Adrian Künzler and Laurent Warloutzet, 'National Traditions of Competition Law: A Belated Europeanization through Convergence?' in Kiran Klaus Patel and Heike Schweitzer (eds.) *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013), 112.

are enforced by the Commission and 27 CAs.¹⁵¹ The Regulation reformed the procedural rules governing the Commission's enforcement, however, it neither intervened with NCAs' procedures nor with their institutional design.¹⁵² It merely obliged each Member State to designate a CA responsible for the application of Articles 101 and 102 TFEU.¹⁵³ The Regulation delegated enforcement powers to NCAs and granted them discretion to set their priorities, while respecting the EU principle of national procedural autonomy.

15 years after modernisation, Directive 2019/1 (the 'ECN+ Directive') of 2019 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 NCAs' 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.¹⁵⁴

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 had scarce enforcement,¹⁵⁵ which in turn, left prioritisation unaddressed. For the Commission, the burden of

¹⁵¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. Also see K.J. Cseres 'Competition Law Enforcement Beyond the Nation-State: A Model for Transnational Enforcement Mechanisms?' in H-W Micklitz and A Wechsel (eds), *The Transformation of Enforcement* (Hart, 2015), 319–339. On the transformation of EU competition law, see F Cengiz, 'Regulation 1/2003 Revisited' (2009) 42 *TILEC Discussion Paper* 26, 30; K.J. Cseres and A. Outhuisje, 'Parallel Enforcement and Accountability: The Case of EU Competition Law' in M. Scholten and M. Luchtman (eds.), *Law Enforcement by EU Authorities: Political and Judicial Accountability in a Shared Legal Order* (Edward Elgar, 2017), 82-114.

¹⁵² The Regulation, nevertheless, includes certain provisions affecting the powers of NCAs. Article 5 lists the powers of NCAs when they apply Articles 101 and 102 TFEU 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 Articles 101 and 102 TFEU 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 Articles 11 and 12 of Regulation 1/2003 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.

¹⁵³ 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, Article 35. Point 2 of the Notice on cooperation. Case C-176/03, *Commission of the European Communities v Council of the European Union*, ECR I-7879, paras 46-55.

¹⁵⁴ K.J. Cseres, 'The Implementation of the ECN+ Directive in Hungary and Lessons Beyond' (2019) 12(20) *Yearbook of Antitrust and Regulatory Studies (YARS)* 55.

¹⁵⁵ As NCAs and national courts had no power to exempt an agreement under Article 101(3) TFEU, companies were incentivised to notify their agreements to the Commission to get legal certainty concerning compatibility of their

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 complaints¹⁵⁶ and selecting the order and tools of responding to notifications (formal-binding decision or informal comfort letters).¹⁵⁷ 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.¹⁵⁸

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, setting informal-internal guidance for selecting its cases. Yet, given the Commission's reactive enforcement, this resolution had only limited impact.¹⁵⁹ It was not fully published, hence did not increase the Commission's accountability nor transparency, and it merely summarised by the Commission's report,¹⁶⁰ and the Commission 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 where: (i) a decision is required to bring an infringement to an end; (ii) when actions are pending before national courts; (iii) to discover and examine agreement that were not notified; (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'.¹⁶¹

agreement with EU competition law. European Commission, *White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty* (Brussels, 28 April 1999), para 6.

¹⁵⁶ Case T-24/90 *Automec Srl v Commission* EU:T:1992:97

¹⁵⁷ 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, para 60; Case T-62/99 *Sodima v Commission*, ECLI:EU:T:2001:53, para 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% 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.

¹⁵⁸ C Harlow and R Rawlings, 'Process and Procedure in EU Administration' (Hart Publishing, 2014), 199.

¹⁵⁹ As reported in Commission of the European Communities, 'Seventeenth Report on Competition Policy' (1988), 23-24.

¹⁶⁰ EEC. Commission, Seventh General Report on the Activities of the Community (1 April 1963- 31 March 1964), 68-69. Also see Meessen n 126 above, 92.

¹⁶¹ *Ibid.*

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 was 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.¹⁶² 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 the Commission to clarify the criteria for case selection (3522 cases pending at the end of 1986) and the choice between a formal decision or informal settlement procedure.¹⁶³ In response, the Commission disclosed its prioritisation practice in 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 legal proceedings are pending, but otherwise 'deal with them *chronologically*'.¹⁶⁴

In a line of judgments in the 1990s, the EU Courts introduced important procedural controls on the Commission's discretion handling complaints¹⁶⁵ clarifying that the Commission had the power to reject complaints on priority grounds¹⁶⁶ despite the fact it only begun to assign degrees of priorities to complaints at the end of the 1980s.¹⁶⁷ 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.¹⁶⁸ The GC rejected the applicant's submission that the Commission was bound by the legality principle when assessing complaints¹⁶⁹ 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.¹⁷⁰ The Court limited

¹⁶² Decisions to open an investigation, by comparison, were reviewed by at least 20 officials, likely to generate more debate on the selection of cases. Davis, note 5 above, 97.

¹⁶³ European Parliament, Resolution on the Sixteenth Report of the Commission on Competition Policy, Annexed to Commission, n 159 above, para 45.

¹⁶⁴ Emphasis added. Commission, n 159 above, 23-24.

¹⁶⁵ H. Nehl, 'Principles of EC Administrative Law (OUP, 1999); Nehl, n 17 above, 322, 329-331.

¹⁶⁶ Ben Van Rompuy, 'The European Commission's Handling of Non-priority Antitrust Complaints: An Empirical Assessment' (2022) 45(2) World Competition 270.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Automec*, n 156 above, paras 79, 83-84.

¹⁶⁹ *ibid*, para 57-58.

¹⁷⁰ *ibid*, para 73-74.

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.¹⁷¹ These principles were endorsed by the CJEU, in various cases later,¹⁷² and are currently enshrined in the 2004 Notice on the handling of complaints.¹⁷³ 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.¹⁷⁴

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

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 a proactive enforcement. In particular, the Regulation aimed to reduce the number of complaints addressed to the Commission, when NCAs¹⁷⁵ could effectively deal with them, or when complainants could bring private actions before national courts.¹⁷⁶ Enhancing the Commission’s and NCAs’ priority setting powers was, however, not accompanied by EU 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 alike, the Commission refrained from adopting internal controls. One exception is its Guidance on Article 102 TFEU enforcement priorities.¹⁷⁷ Despite its title, it lists substantive criteria for applying the Article, and does not set enforcement

¹⁷¹ *ibid*, para 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’. *Automec*, n 156 above, para 81-86.

¹⁷² Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd.*, ECLI:EU:C:2000:689, para. 46; Case C-119/97P, *Ufex and Others v. Commission*, ECLI:EU:C:1999:116, para. 88. Also see Van Rompuy, n 166 above.

¹⁷³ Commission’s Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004, C 101 (‘Commission Notice on the Handling of Complaints’).

¹⁷⁴ European Commission, ‘Twenty Third Report on Competition Policy’ (1994), 120-121.

¹⁷⁵ Commission Notice on the Handling of Complaints, para 8.

¹⁷⁶ *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 or has dealt with the case.

¹⁷⁷ 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 Commission Guidance on Article 102, para 7-8.

priorities.¹⁷⁸ Hence, following modernisation the Commission still follows the model of high degree of priority setting powers, with little controls.

Moreover, Regulation 1/2003 does not regulate NCAs' prioritisation powers. Pursuant to the EU principle of procedural autonomy, the powers, scope, and limits for setting priorities are determined by national procedural, administrative, and constitutional laws. As our empirical research shows 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 divergence that 'may merit further examination and reflection'.¹⁷⁹ 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.¹⁸⁰ 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'.¹⁸¹

Subsequent to the Commission's public consultation on how to empower NCAs to be more effective enforcers,¹⁸² 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.¹⁸³ This has limited effect, as prior

¹⁷⁸ Pinar Akman, 'The European Commission's guidance on article 102 TFEU: from inferno to paradiso?' *The Modern Law Review* 73.4 (2010): 605-630, 609-611.

¹⁷⁹ Communication from the Commission to the European Parliament and the Council, 'Report on the functioning of Regulation 1/2003' COM (2009) 206, para 33.

¹⁸⁰ 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, available at ec.europa.eu/competition/antitrust/legislation/swd_2014_231_en.pdf.

¹⁸¹ ECN, 'Recommendation on the Power to Set Priorities' (2013), available here: https://competition-policy.ec.europa.eu/system/files/2021-07/recommendation_priority_09122013_en.pdf, para 4.

¹⁸² European Commission, 'Empowering the National Competition Authorities to be More Effective Enforcers' http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

¹⁸³ Directive 2019/1, Preamble 23 and Article 4(5).

to the Directive, all NCAs were legally competent to open *ex-officio* investigations.¹⁸⁴ Second, NCAs should have the power to reject complaints on priority grounds. The legality principle, in other words, could no longer guide rejection of complaints. Third, NCAs should set their priorities independently, i.e., without taking instructions from public or private entities.¹⁸⁵

TYPOLGY 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 revealed 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 1. These aspects were identified via a bottom-up approach systematically analysing rules and practices of CAs in Europe. The section presents how EU and national rules govern each of the seven aspects, their practical implementation and impact on good governance principles.

¹⁸⁴ Directive 2019/1, Article 4(5). See Laurence Idot, 'Reform of Regulation 1/2003: Power to Set Enforcement Priorities' (2015) N° 3-2015 *Concurrences*, 51-58, 51; Wouter PJ 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.

¹⁸⁵ 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.

Figure 1: typology of priority setting

Stage	Aspects of priority setting	External controls (legislator; judiciary)	Internal controls (IRA)
Pre-decision	Agenda-setting	X	X
	Competence to prioritise (<i>de jure</i>)	X	
	Ability to prioritise (<i>de facto</i>)	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

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

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 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 accountability, transparency, and predictability of their action.¹⁸⁶ Agendas enhance IRAs’ independence and legitimacy by allowing them, as expert-driven decision-making bodies to select their strategies free from external intervention. It fosters effectiveness and efficiency by encouraging proactive enforcement, instead of reacting to complaints or leniency applications

¹⁸⁶ Sunstein, C. R., Kahneman, D., Schkade, and D Ritov, I., ‘Predictably Incoherent Judgments’ (2002) *Stanford Law Review*, 54, 1153–1215.

regardless of their impact on markets and society.¹⁸⁷ 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 an opportunity to conceal evidence of infringements.¹⁸⁸ The Greek NCA, for example, decided not to publish its internally-adopted agenda.¹⁸⁹ 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.¹⁹⁰

The debate on the merits of agendas is reflected by our empirical findings. Only 48% of the CAs adopted agendas, all in the form of internal control.¹⁹¹ 28% of the Member States obliged NCAs to adopt an agenda as a matter of national law, from which 3% had to report them to their parliament and 7% to their government.¹⁹² Reporting obligations can constrain CAs' independence, yet increase their accountability and legitimacy. 17% 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.

Legal competence to prioritise (de jure)

The *de jure* competence to priorities refers to the IRAs' 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 high degree of discretion; and

¹⁸⁷ ICN, 'Agency Effectiveness, Competition Agency Practice Manual: Strategic Planning and Prioritisation' (2010), available here: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMStrategicPlanning.pdf, 29; Commission, n 185 above, Preamble 17. Also see ICN, 'Seminar on Competition Agency Effectiveness' (2009), available here: <https://www.internationalcompetitionnetwork.org/portfolio/2009-seminar-on-competition-agency-effectiveness/>; Luis Ortis 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.

¹⁸⁸ Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' (Springer, 2016), 30, 52.

¹⁸⁹ Brook and Cseres, n 26 above, 23.

¹⁹⁰ T. Baker, A. Harel and T. Kugler, 'The Virtues of Uncertainty in Law: An Experimental Approach' (2004) 89 *Iowa Law Review* 89 443, 443–494.

¹⁹¹ Brook and Cseres, n 26 above, figure 2. Directive 2019/1 does not stand in the way of adopting agendas by government 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 Article 4(2)(b).

¹⁹² Brook and Cseres, n 26 above, 21-13.

those bound by the legality principle, obliging them to initiate an investigation into any potential infringement coming to their attention.¹⁹³ 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 IRAs 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 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 exceptional circumstances.¹⁹⁴ Dutch courts interpreted this duty as imposing an increased duty to motivate on the Dutch CA when it rejects complaints and does not pursue a case.¹⁹⁵

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.¹⁹⁶ 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 as summarised in Figure 2 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’.¹⁹⁷ In Cyprus, the authority may ‘push-back in the line’ a complaint on priority grounds,

¹⁹³ See text to note 96.

¹⁹⁴ ECLI:NL:RVS:2014:1982.

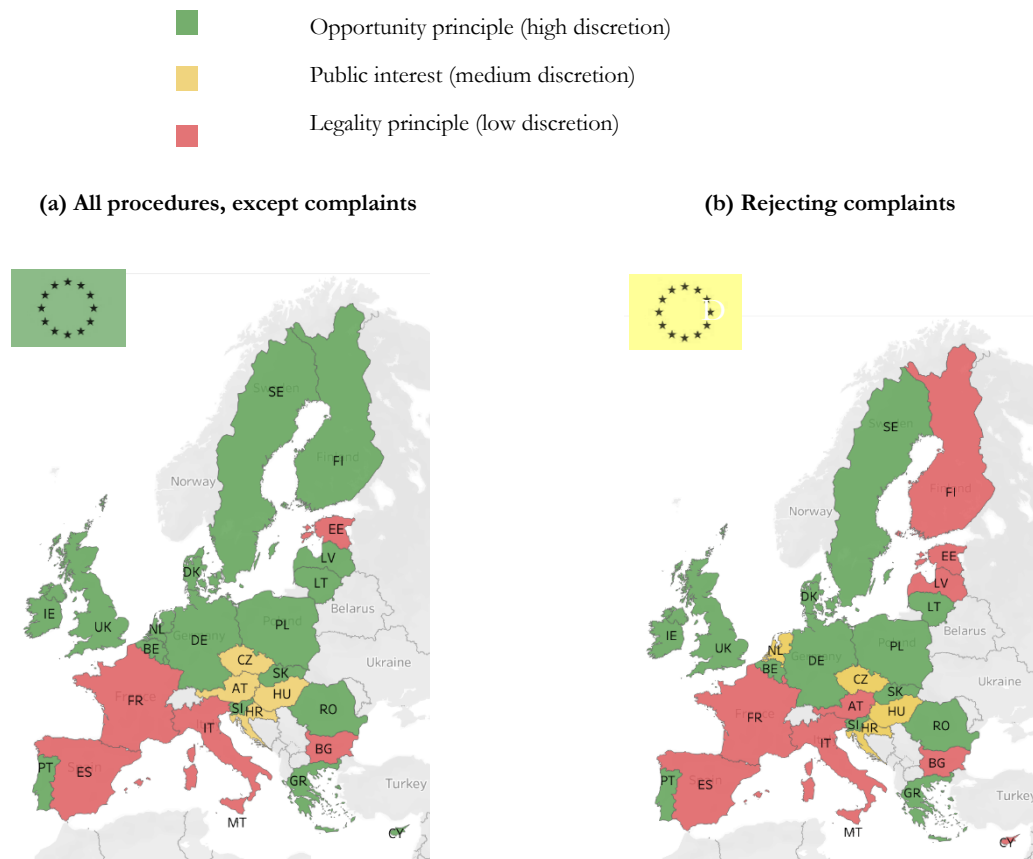
¹⁹⁵ ECLI:NL:CBB:2010:BN4700, para 7.2.5.1; ECLI:NL:RBROT:2019:7189.

¹⁹⁶ Directive 2019/1, Preamble 23 and Article 4(5).

¹⁹⁷ Finnish Competition Act (Law No 948/2011), Article 32(3). For English translation see, <https://www.kkv.fi/en/competition-affairs/competition-act/#:~:text=Purpose%20of%20Act,competition%20from%20harmful%20restrictive%20practices.>

but cannot reject it altogether.¹⁹⁸ A more subtle example is present in the UK, where the authority is bound to assess ‘super-complaints’ launched by a designated consumer body.¹⁹⁹

Figure 2: de jure competence (prior to the implementation of the ECN+ Directive)



Ability to set priorities (*de facto*)

The power to set priorities is often implicitly constrained by practical settings in which decisions are made.²⁰⁰ 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 (i.e., budget allocation without prejudice to national budgetary rules and procedures), transparency and accountability.²⁰¹

¹⁹⁸ Cyprus Competition Law, Article 35 (The Projection of Competition Laws of 2008 and 2014, 13(I) of 2008 41(I) of 2014). For English translation see [http://www.competition.gov.cy/competition/Competition.nsf/All/21234C251CB3FE9AC2257EC3003DF8DA/\\$file/THE%20PROTECTION%20OF%20COMPETTITION%20LAWS%20OF%202008%20AND%202014.pdf](http://www.competition.gov.cy/competition/Competition.nsf/All/21234C251CB3FE9AC2257EC3003DF8DA/$file/THE%20PROTECTION%20OF%20COMPETTITION%20LAWS%20OF%202008%20AND%202014.pdf)

¹⁹⁹ Enterprise Act 2002 c. 40, Section 11.

²⁰⁰ Schmidt and Scott, n 9 above.

²⁰¹ Cf. Eric Biber, ‘The Importance of Resource Allocation in Administrative Law’ (2008), 60 ADMIN. L. REV. 1.

Beyond IRA's resources and its staff skills,²⁰² *de facto* ability is often tied to the *de jure* competence. An obligation to respond to notifications, complaints, or referrals, for example, leave IRAs limited capacity to autonomously select its 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 (e.g. regulatory) tasks, while others may be more discretionary.²⁰³

Despite the importance of *de facto* ability, and significant challenges reported during our interviews,²⁰⁴ it 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.²⁰⁵ In addition, the ECN+ Directive acknowledges the link between the level of enforcement and NCAs' budget, skills,²⁰⁶ and independence,²⁰⁷ yet only prescribes a vague obligation, requiring Member States to ensure that NCAs have the 'necessary resources to perform their tasks'.²⁰⁸ In practice, NCAs' budgets vary considerably,²⁰⁹ even between countries having similar GDP.²¹⁰ The Directive, nevertheless, introduced national external controls requiring NCAs to submit periodic reports on their activities and resources to national governments or parliaments. Those publicly available reports should include information about the resources that were allocated in the relevant year, and any changes compared to previous years.²¹¹

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

²⁰² 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), available at

²⁰³ OECD, 'Annex to the Summary Record of the 123rd meeting of the Competition Committee: Key Points of the Roundtables on Changes in Institutional Design', available here: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M\(2015\)1/ANN9/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN9/FINAL&docLanguage=En).

²⁰⁴ Brook and Cseres, n 26 above, 27.

²⁰⁵ Case T-201/11 *Si.mobil v. the Commission*, ECLI:EU:T:2014:1096, para 28-78.

²⁰⁶ Directive 2019/1, Article 5(1). Also see Preambles 5 and 8 and Article 1. ECN+ Impact Assessment, n 122 above, part I, 28.

²⁰⁷ Directive 2019/1, Preamble 25.

²⁰⁸ *Ibid*, Preamble 26. Also see ECN+ Impact Assessment, n 122 above, part I, 46. Van Rompuy, n 166 above, 212-213 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.

²⁰⁹ Jenny, n 188 above, 39 found that the CAs in the UK, Sweden, Germany, France, Italy, and Spain have budget of over US\$20 Million; in Norway, Denmark, and Greece of between US\$10-15 million; in Hungary, Poland, Ireland, Portugal, Belgium, the Czech Republic between US\$5-10 million; in Cyprus, Austria, the Slovak Republic, Lithuania and Latvia between US\$1-3 million; and in Slovenia, Malta, Estonia budget lower than US\$1 million.

²¹⁰ ECN+ Impact Assessment, n 122 above, part I, 27-30.

²¹¹ Directive 2019/1, Article 5(4) and Preamble 27.

availability of judicial review; (ii) time limits; (iii) participation of third parties; and (iv) the institutional setting of the decision-making.

First, the type of prioritisation decisions NCAs adopts and the external and internal controls imposed on the reasoning and publication of such decisions are assessed. As summarised by Figure 3, some CAs are required to adopt a *formal, 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.

Figure 3: type of decision, reasoning, and publication

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

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

+ There are two types of decisions concerning case initiation in the Netherlands. One is originating from so-called enforcement request (*handhavingsverzoek*, defined in Article 1:3 (3) of Dutch Administrative Act) and as such they will always take the form of formal decisions that are reasoned and partly or fully published. The other type of decision concerns informal signals that are only internally reasoned and not published.

++ With the exception of the rejection of super-complaints.

Similarly, to the competence to prioritise, the figure shows that many CAs are subject to different procedural rules when they reject complaints. Some CAs that are not required to investigate each complaint (see Figure 2), including the Commission,²¹² 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 3).²¹³

²¹² 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, Article 7; Commission Notice on the Handling of Complaints, para 41; Case C-210/81 *Demo-Studio Schmidt v Commission* ECLI:EU:C:1983:277, para 19; *Automec*, n 156 above, para 77, 85; *Ufex* n 172 above, para 86; Case T-219/99 *British Airways v Commission* ECLI:EU:T:2003:343, para 68. Also see K.J. Cseres and Joana Mendes, ‘Consumers’ Access to EU Competition Law Procedures: Outer and Inner Limits’ (2014), 51(2) *Common Market Law Review* 483, 491-494.

²¹³ With respect to the Commission’s duty, see *Automec*, n 156 above; Case C-450/98P *IECC v Commission* ECLI:EU:C:2001:276, para 57; Case T-355/13 *EasyJet Airline v Commission* ECLI:EU:T:2015:36, para 18; Case T-480/15 *Agria Polska and Others v Commission* ECLI:EU:T:2017:339, para 36. Also see Wils, n 185 above, 38.

Second, prioritisation is affected by time limits for adopting such decisions. The effects of time limits vary; fixed limits may encourage 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.²¹⁴ For example, the Italian CA is obliged to specify a deadline for completing investigation,²¹⁵ and failure to comply may lead to the annulment of the decision altogether.²¹⁶ Italian jurisprudence linked this obligation to the right to a fair trial (Article 6 ECHR) and good administration (Article 41 CFR).

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.²¹⁷ Participation rights serve as external control enhancing the transparency and accountability of prioritisation. Complementing the function of judicial review, third parties may challenge the CAs' proposed action and warn against errors.²¹⁸ While, granting third parties' access and participation rights comes at the expense of efficiency, it enhances 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.²¹⁹ While many CAs have explicit rules in relation to formal complaints,²²⁰ national approaches diverge as to whom would be recognised as an interested party and whether their participation rights also extend to other interested third parties.²²¹

²¹⁴ Brook and Cseres, n 26 above, 31-2.

²¹⁵ Italian Competition and Fair Trading Act (Law no. 287), Section 14(1); Italian Presidential Decree no. 217/98 Regulation of investigation procedures pursuant to section 10(5) of the Competition and Fair Trading Act, Section 6(3).

²¹⁶ See, for example, TAR Lazio, I, n. 08779, 27.07.2020, 20-22 (under appeal).

²¹⁷ Mendes, n 3 above, 32. In particular, consumers and consumers organisations can be an important watchdog assisting regulators in monitoring markets. The Commission Notice on the Handling of Complaints, para 3 underlines that it 'wishes to encourage citizens and undertakings to address themselves to the public enforcers to inform them about suspected infringements of the competition rules'.

²¹⁸ *Ibid*, 33.

²¹⁹ Brook and Cseres, n 26 above, 35-40.

²²⁰ See, among others, Regulation 773/2004, Recital 5; Commission Notice on the Handling of Complaints, para 3; Cseres and Mendes, n 212 above, 484.

²²¹ This has been illustrated by the General Court in Case T-791/19 Sped Pro 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.

Finally, IRAs' institutional organisation also shapes priority setting, for instance, by how decision-making tasks are separated or integrated from other enforcement tasks. Institutional choices involve trade-offs between the swiftness of decision-making and expertise *vis-à-vis* quality control, transparency and legitimacy.²²² Prioritising choices of IRAs whose investigation and decision-making (adjudication) tasks are divided between two different institutions (eg administrative authorities and courts, external tribunals), are subject to review already within this first stage of the procedure.²²³

Similar considerations arise from the leadership model of the authority.²²⁴ Some IRAs, take prioritisation choices by a single person, e.g. the agency head or a specific unit. This unitary executive model has the advantage of faster and consistent decision-making. Other IRAs, most EU NCAs take decisions 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.²²⁵

Substantive criteria

Substantive criteria refer to external or internal criteria guiding IRAs' decisions 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, focus enforcement efforts on deterrence and clarify the rules. It prevents both underenforcement (by encouraging enforcement in cases of legal or doctrinal importance) and overenforcement (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,

²²² Ibid.

²²³ 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 decision-making NCA. In Denmark, Finland, and Sweden up until March 2021, the courts only review the findings adopted by the CA and have exclusive power to impose penalties.

²²⁴ William E. Kovacic and David A. Hyman, 'Competition Agency Design: What's on the Menu?' (2012) 8(3) *European Competition Journal* 527, 531. Also see Jenny, n 188 above, 30.

²²⁵ See, for example, Katzmann, n 83 above, chapter 4, suggesting that the involvement of economist or lawyers in the selection of cases affect the type of cases pursued. More generally see, Martin Lodge and Kai Wegrich, 'Reputation and Independent Regulatory Agencies' in Martino Maggetti, Fabrizio Di Mascio, and Alessandro Natalini (eds) *Handbook of Regulatory Authorities* (Edward Elgar Publishing, 2022), 242.

but enhances its accountability towards political institutions and allows stakeholders' participation via public consultation.

In competition law, while EU law does not offer substantive criteria, some Member States or NCAs adopted such criteria. According to

Figure 4, 38% of the CAs are guided *by external substantive criteria*, set by the national legislature, government, or judiciary as external control, 68% by *internal substantive criteria*, adopted by CAs as internal control (mostly published and publicly available), and 20% are *not guided* by any external or internal criteria at all.

Figure 4: external and internal substantive criteria

(a) External criteria (adopted by the legislature or government)

Social relevance Evidence
Impact on markets
High profile Consumer welfare
Impact on
competition
Effectiveness of
enforcement
CA is well placed
Importance of sector

No substantive
criteria

(b) Internal criteria (adopted by the CA)

High profile
CA is well placed
Available resources Legal precedent
Effectiveness of enforcement
Impact on competition
Costs/risks Impact on markets
Importance of sector Evidence
Consumer welfare
Social relevance

No substantive criteria

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.²²⁶ Besides having the power to refrain from pursuing a case, IRAs can also address potential infringements by alternative enforcement instruments as an extension to their priority setting powers.²²⁷

²²⁶ Cf. Schmidt and Scott, n 9 above, 457.

²²⁷ Or Brook, 'Non-competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU' (Cambridge University Press, 2022), 346-396. Also see Nicolas Petit, 'How Much Discretion Do, and Should, Competition

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.²²⁸ Similarly, sharing expertise across various regulatory areas (e.g. digital markets) can improve effectiveness in dealing with complex regulatory issues, and lower costs of enforcement and policy coordination.²²⁹ Yet, wide instrument discretion may also jeopardise 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 IRA 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.²³⁰ Hence, the effect of wide outcome discretion on effectiveness is controversial.²³¹ Some argue that informal enforcement tools can lead to greater law compliance and focus the authority's scarce resources on serious infringement.²³² 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, 66% of CAs have multiple functions, combining the enforcement of competition law with sector regulation or consumer protection law.²³³ In terms of

Authorities Enjoy in the Course of Their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) *Concurrence*; Antimonopoly Office of the Slovak Republic 'Prioritisation Policy' (2015). 6.

²²⁸ Reduction of administrative costs was advanced as the main policy argument for the institutional merger in the Netherlands. See, Parliamentary Papers (Kamerstukken II, 2011-2012, 31 490, nr. 69); Kamerstukken 2011-2012, 33 186 nr. 2 Implementation Act Authority for Consumer and Market (Instellingswet Autoriteit Consument en Markt); Proposal for aligning market supervision ACM (Wetsvoorstel stroomlijning markttoezicht ACM), June 2012.

²²⁹ 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, Available at SSRN: <https://ssrn.com/abstract=2200908> or <http://dx.doi.org/10.2139/ssrn.2200908>.

²³⁰ National legislators can establish procedural safeguards that enable third parties' participation allowing them to challenge commitments and settlements having too weak terms or by requiring the CAs to publish provisional terms and accompanying explanations for public comment.

²³¹ Brook, n 22 above.

²³² John Braithwaite, 'To Punish or Persuade: The Enforcement of Coal Mine Safety' (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.

²³³ Brook and Cseres, n 26 above, figure 11.

outcome discretion, 44% have power to issue warning letters instead of an infringement decision.²³⁴ All CAs have powers to undertake market inquiries (i.e., sector inquiries or market studies), and some issue informal *ex-ante* opinion. By requiring all NCAs to have the power to accept commitments, the ECN+ Directive remained limited concerning harmonisation.²³⁵

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.²³⁶ Impact assessments can function as a way to compensate for the democratic deficit characterising IRAs' operations.²³⁷ Periodic and published impact assessments promote CAs' transparency and accountability towards stakeholders, politicians, and peer groups (international organisations).²³⁸

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 5). 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.²³⁹

Figure 5: the enforcement cycle

²³⁴ *Ibid*, 48.

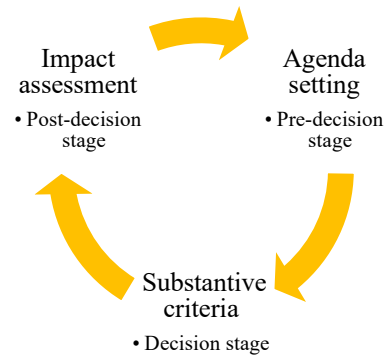
²³⁵ Directive 2019/1, Preamble 39 and Article 12.

²³⁶ William E. Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' (2005) 31 *J. Corp. L.* 31 503, 506.

²³⁷ Maggetti, n 125 above, 232-3.

²³⁸ OECD, 'Guide for Helping Competition Authorities Assess the Expected Impact of Their Activities' (2014), available here: <https://www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf>, 3; OECD, 'Reference Guide on Ex-post Evaluation of Competition Agencies' (2016), available here: <https://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>, 4, 11-12.

²³⁹ Fabienne Ilzkovitz and Adriaan Dierx, 'Ex-post Economic Evaluation of Competition Policy Enforcement: A Review of the Literature (Publications Office of the European Union, 2014), 35-38.



Impact assessments, nevertheless, are rare. In competition law, few CAs examined the effects of their interventions in general, and priority setting in particular.²⁴⁰ Our empirical findings indicate that only 21% of the NCAs conducted impact assessments of their priority setting practices. Most of these were informal and unpublished (7%) or limited to a concise review as part of their annual reports (7%).

FOUR MODELS OF PRIORITY SETTING AND THEIR IMPLICATIONS

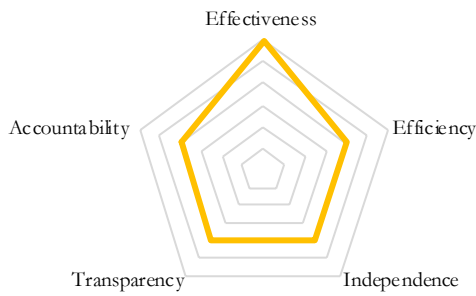
The variety of choices made by jurisdictions across the seven aspects of priority setting profoundly affect IRAs' exercise of prioritisation powers and the (internal and external) controls imposed on them. Priority setting powers and practices are deeply embedded in, and directly shaped by each IRA's respective legal system, and reflect different preferences across the good governance principles. Due to these national varieties, 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, hence, is 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 6 points to four representative models of IRAs priority setting powers. Those models were identified via a bottom-up approach; they cluster CAs having similar priority setting characteristics, based on combining the priority setting powers of each CA across the seven aspects that were presented in the previous section. The figure demonstrates that each model reflects a different balance across the five good governance principles.

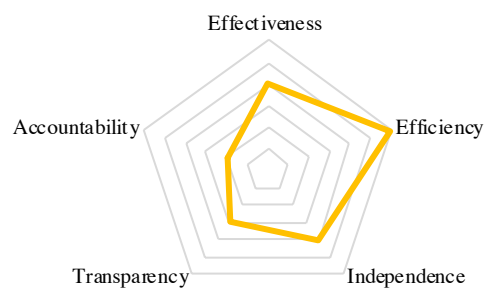
Figure 6: four models

²⁴⁰ *Ibid*, 10-11.

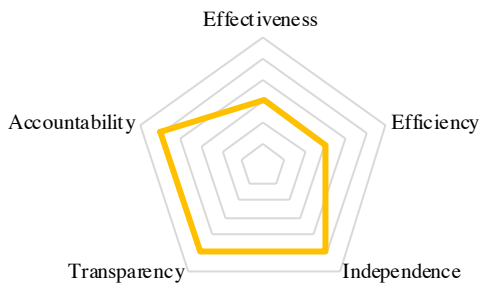
(I) high degree of prioritisation, external or internal constraints



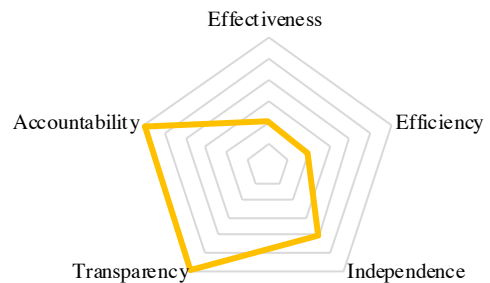
(II) high degree of prioritisation, limited external or internal constraints



(III) medium degree of prioritisation, limited internal constraints



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



While different models may characterise other types of IRAs, we believe that the case study of competition law demonstrates the impact of prioritisation choices on the trade-offs across the five good governance principles.

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, UK). These control mechanisms may focus on various procedural aspects of prioritisation (e.g., 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 or doctrinal importance. Balanced case selection - based on carefully curated criteria that are clearly communicated to stakeholders and the larger public; is 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 costs 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 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 to select 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 assessment 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 (e.g., 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 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 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.²⁴¹

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'²⁴² and, as the blindspot of administrative discretion, they overlook how IRAs

²⁴¹ 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.

²⁴² Miller and Wright, n 8 above. Paul Fenn and Cento G. Veljanovski, 'A Positive Economic Theory of Regulatory Enforcement' (1988) 98 *The Economic Journal* 1055, 1055. Also see Bernstein, n 39 above, 217. Shumavon and Hibbeln, n 52 above, 4-6.

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 regulation that require complex socio-economic and technical assessments, based on technocratic expertise, and free from external intervention.

Intertwined with the rise of the modern regulatory state, IRAs were born as a historical accident. They emerged from Anglo-Saxon adjudication-based 'Commissioners' and their priority setting powers were incrementally developed as IRAs transformed into proactive regulators. These early IRAs were delegated wide discretionary powers to provide expert decision-making by independently setting their own priorities and 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 national administrative and criminal laws as well as by their non-legal context, for example, institutional setting. While many jurisdictions followed the Anglo-Saxon blueprint, others adhered to the legality principle and considerably limited their IRAs' prioritisation powers. However, no specific legal or regulatory theory exist that shaped this incremental and disperse development of priority setting powers, and that could define the various aspects, aims, and controls of prioritisation.

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. Second, the article deconstructs its composite nature by offering a novel typology of seven aspects of priority setting in IRAs' pre-decisional, decisional, and post-decisional stages. Finally, it defines normative benchmarks to analyse and evaluate IRAs' priority setting rules and practices against the principles of good governance. While historically, oversight of priority setting rules and practices was negatively construed, focusing on control via judicial review, we advocate for a broad public interest approach. Complying with the rule of law, it incorporates legal-normative criteria of good administration. It offers an overarching approach to assess IRAs' priority setting, while being sensitive to its composite nature and to their national institutional, practical, and bureaucratic embeddedness.

Our analysis points to four concluding observations. First, the Anglo-Saxon and EU IRAs that emerged since the end of the nineteenth century and significantly influenced prioritisation models elsewhere, have been characterized 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 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 a field of interdisciplinary exercise, incorporating insights from various social sciences helping to understand the context of law structuring such practices.

Third, through our case study on competition law enforcement in Europe, 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 IRAs' priority setting. While a single 'best' model is unfeasible given the different national legal and non-legal traditions, the four models invite a debate about the desired scope of prioritisation and the extent to which IRAs' practices 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 high degree of priority setting powers, with few controls ('model II').²⁴³ Such 'Europeanisation' is evident from the Commission's policy papers since 2004,²⁴⁴ the ECN initiatives,²⁴⁵ and the ECN+ Directive.²⁴⁶ These initiatives also emphasise the merits of effectiveness, efficiency, and independence, while transparency and accountability are less prominent. Moreover, they fail to explicate the strength 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, good governance principles, and to serve a democratic modern polity, priority setting rules and practices must be transparent and accountable. 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.

²⁴³ Clear evidence is the 2017 proposal for the ECN+ Directive which focuses on effectiveness of priority setting etc Evidenced by various ECN documents, the Commission's preferred policy choice for NCAs.

²⁴⁴ European Commission, 'Commission Staff Working Paper accompanying the Report on Regulation 1/2003' SEC (2009) 574 final

²⁴⁵ ECN, 'Recommendation on the Power to Set Priorities' note 177 above.

²⁴⁶ Directive 2019/1, Article 5(1).