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Evaluation of Regulations 1/2003 and 773/2004: Position paper by Katalin Cseres and Or Brook (Annex to the general questionnaire)

1. Introduction

In this Position Paper we react to the Public Consultation of the European Commission on the Evaluation of Regulations 1/2003 and 773/2004.

We focus our reaction on the questions raised under points 5, 6 and 8 of the Questionnaire seeking input on whether the Regulations 1/2003 and 773/2004, (the "**Procedural Regulations**") have been relevant and effective in empowering the Commission to regulate certain aspects of proceedings for the application of Articles 101 and 102 TFEU and whether they have generally contributed to a timely and efficient enforcement of Articles 101 and 102 TFEU as well as whether the parallel enforcement led to more efficient enforcement across the EU.

Our submission examines the setting of enforcement priorities by competition authorities including the European Commission and the national competition authorities ("**NCAs**").

The insights presented in this position paper are based on an empirical study titled '**Policy Report: Priority setting in EU and national competition law enforcement**', available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189 (the "**study**"). In this study, we conducted a systematic and comprehensive mapping of the procedural and substantive rules and practices that define the way competition authorities of 27 EU Member States, the United Kingdom, and the EU Commission set their priorities. The data was collected by combining desk research of the publicly available legislation and policy documents in each jurisdiction with written questionnaire completed by officials of the competition authorities and semi-structured interviews with those officials. The policy paper presents a new typology of priority setting and evaluates the priority setting practices against a set of administrative law principles of good governance. In this position paper, we summarise the findings of our study that are of relevance for the Evaluation of Regulations 1/2003 and 773/2004.

We define **priority setting** as the legal competence and *de facto* ability of competition authorities to choose which cases to pursue and which to disregard. In fact, setting clear priorities is an essential precondition for reserving society's resources to the most harmful law infringements, and as such, a crucial element of effective, transparent, timely and efficient enforcement of competition rules such as Articles 101 and 102 TFEU. Credible enforcement priorities shape independent and accountable competition authorities, which form fundamental building blocks of the EU's and its Member States' economies. The European

Commission and the NCAs are, hence, expected to prioritise matters that are serious and important and inform the public about the choices they make.

Their powers of priority setting are subject to external and internal constraints defined by substantive and procedural rules and institutional designs determining the competition authorities' course of action (on controls, see Section 4 below). In this way, competition authorities account for their performance and increase their output legitimacy. In the following sections we analyse the influence of the Procedural Regulations on the setting of enforcement priorities in terms of the relevance of priority setting (Section 2); the removal of the notification obligation (Section 3); effectiveness (Section 4); and uniformity (Section 5).

2. Relevance of priority Setting

Competition authorities cannot do everything: it is neither possible, nor desirable, to enforce all possible violations of competition law. Hence, the prioritisation choices they make serve the purpose of **effective allocation of scarce resources**. With limited financial, technical, and human resources, competition authorities have to make choices which cases they can effectively investigate. Prioritisation frees the competition authorities from the need to respond to all possible infringements of the law and afford them the capacity to effectively focus on matters of genuine economic and doctrinal importance. Through prioritisation, competition authorities direct resources, time, and energy to those projects that are deemed most relevant to achieving the objectives laid out in their strategic plans.

Prioritisation is manifested in the competition authorities' freedom to choose their course of action and as such, it is an expression of their administrative discretion. Setting priorities also functions as **norm concretisation**. Articles 101 and 102 TFEU are drafted broadly and based on general norms. Through setting priorities, competition authorities concretise the norms of the competition law prohibitions by choosing what would be the focus of the enforcement and what (potential) infringements will not be enforced. Setting enforcement priorities, in other words, is not merely a matter of procedure but also involves setting substantive criteria of what is and what is not a priority. Therefore, an effective setting of enforcement priorities is essential for developing and clarifying the scope of the competition rules and to guide the development of case law, and the application of other policy tools and, as such, strengthens agency performance and improves public policy.

Despite the significance of priority setting, EU competition law in general – and Regulations 1/2003 and 773/2004 in particular – provide little guidance in this regard. The significance of prioritisation decisions has been largely overlooked by both EU and national policy makers. At the **EU level**, the question of what types of competition law infringements the European Commission and NCAs should prioritise and how such priority setting decisions should take place was not addressed in detail. The scope, substance, and procedure for setting enforcement priorities have not been harmonised by the EU legislator. Likewise, the EU Courts have, so far, only addressed questions relating to the EU Commission's rights and duties when rejecting complaints.[1] At the **Member States' level**, matters of priority setting have not been addressed by national policy-makers and legislators and are often regulated in a different manner than the European Commission's rules. As a result, there is great divergence in the priority setting powers and practices of the Commission and the various NCAs. **The lack of harmonisation and guidance** concerning priority

[1] Case T-24/90 *Automec Srl v Commission of the European Communities* ECLI:EU:T:1992:97, para 85. Also see para 77, holding that "[i]n that connection, it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law where those priorities have not been determined by the legislature is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law".

setting in the EU has only partially been remedied by the adoption of the ECN+ Directive in early 2019, which we discuss below.[2]

We believe that this lack of guidance on the manner in which the European Commission and NCAs should set their enforcement priorities stand in the way of the effectiveness, efficiency, relevance, coherence, and EU added value of the Procedural Regulations.

3. Removal of the notification obligation: priority setting becomes key, yet is not (fully) regulated

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

Setting the enforcement priorities **has come to the forefront with the entry into force of Regulation 1/2003**. Aiming to enhance the European Commission's priority setting powers as to allow it to "refocus its activities on the most serious infringements of Community law in cases with a Community interest",[3] the Regulation seeks to reduce the number of complaints addressed to the European Commission in cases where NCAs could effectively deal with them.

Parallel to the European Commission's increased priority setting powers, decentralisation also entrusted NCAs with powers to fully enforce Articles 101 and 102 TFEU. The delegation of enforcement powers to national authorities was envisioned to tackle the slow progress of decentralised enforcement by national competition authorities as well as complainants' reluctance to resort to national courts.[4] At the same time, on the assumption that they cannot investigate all complaints, competition authorities were to set priorities and reject complaints.[5] Pursuant to the EU principle of procedural autonomy, the enforcement of the EU competition rules by the NCAs is governed by their national laws. As we empirically map in our study, the powers, scope, and limits for setting the priorities take different forms at the national level, depending on the NCAs' **specific mandate and powers laid down in their respective national administrative and constitutional laws**.

Despite the growing importance of setting the enforcement priorities, there are no EU-wide hard or soft rules guiding the principles and practices of the European Commission and NCAs. This, as our study demonstrates, has resulted **in a considerable divergence across all seven aspects of priority setting**, namely: (i) setting an enforcement agenda; (ii) legal (de jure) competence to prioritise; (iii) (de facto) ability to prioritise; (iv) procedural rules framing the prioritisation decisions; (v) substantive criteria that determine

[2] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market OJ L11 ("ECN+ Directive").
[3] White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ C123 (1999), para 13.
[4] *Ibid*, para 36-39. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05) ("Commission Notice on the Handling of Complaints"), para 21, 24-25. The Commission may reject a complaint in accordance with Article 13 of Regulation 1/2003, on the grounds that a Member State CA is dealing or has dealt with the case.
[5] Commission Notice on the Handling of Complaints, para 8.

which cases are priority and which are not; (vi) alternative enforcement mechanisms: instrument and outcome discretion; and (vii) impact assessment to evaluate the effects of the priorities chosen. While some Member States have mostly converged to the European Commission's wide discretionary powers to set its priority setting under Regulation 1/2003's regime, others have limited their NCAs' discretion.

Directive 1/2019 has introduced some new obligations for the Member States with respect to the setting of priorities by NCAs (the "**Directive**" or "**ECN+ Directive**"). Article 4(5) of the Directive requires the Member States to empower their respective competition authorities to set enforcement priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU. It also empowers those NCAs who are obliged to consider formal complaints under national law to reject complaints that they do not consider to be an enforcement priority. Yet, as we show in our study, the obligations set by the Directive are drafted in a general manner and provide limited to no guidance directing the NCAs' prioritisation policies and practices.

4. Effective enforcement depends on effective priority setting

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

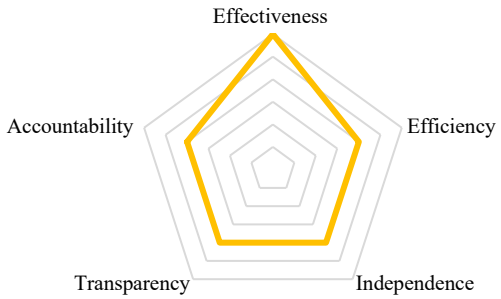
We argue that an effective prioritisation must strive to achieve **a balanced portfolio of cases** as to achieve the twin objective of ensuring deterrence and concretising the vague provisions of competition law (see Section 2 above). It should involve **a mix of cases** with various levels of complexity, size, and risk, balance between enforcing "classic" infringements and pursuing landmark cases that set a precedent and have a much greater multiplier effect, and between cases carrying short- and long-term effects. Moreover, we believe that the composition of the portfolio of cases should be **periodically assessed**, by conducting impact assessment of what cases have been pursued, and which have not.

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

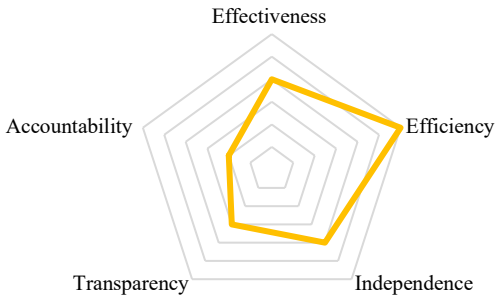
Our report identifies starting points for the outline and main components of such guidance by offering a new theoretical and normative framework to guide the analysis of priority setting rules and practices. We define the above-mentioned seven different aspects of priority setting (See section 3 above), and evaluate the rules and practices in each of those seven aspects against a set of administrative law principles of good governance, including effectiveness, efficiency, independence, transparency, and accountability. Based on such classifications, our study clusters the Commission and NCAs into four representative models that describe the characteristics of priority setting rules and practices of each relevant authority (the "**four models**"): (i) competition authorities having a wide margin of discretion to set priorities, that is limited by external or internal constraints; (ii) competition authorities having a wide margin of discretion to set priorities, but which are not limited by significant external or internal constraints; (iii) competition authorities having a medium degree of discretion to set priorities, that is limited by external or internal constraints; and (iv) competition authorities having a limited margin of discretion to set priorities.

While **there is no single, "best" model**, we show that each model **entails a different trade-off between effectiveness, efficiency, independence, transparency, and accountability**. This is summarised by the figure, and discussed in details in our study.

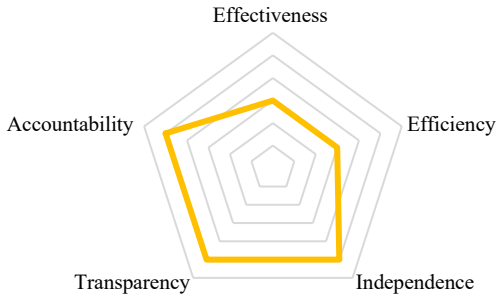
(I) high degree of prioritisation, external or internal constraints



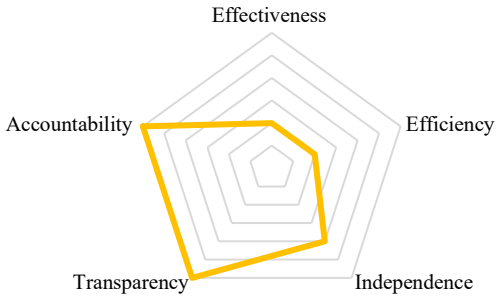
(II) high degree of prioritisation, limited external or internal constraints



(III) medium degree of prioritisation, limited internal constraints



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



The European Commission is an example of an authority falling within the second model. Namely, the rules and practices governing the setting of the enforcement priorities by the European Commission, result in a system by which the European Commission enjoys a high degree of enforcement discretion that is subject to only limited external and internal constraints.

This model has some clear **strengths**: high priority setting powers have the potential of **increasing the efficiency** in handling low-priority cases, thereby allowing the European Commission to focus its efforts on matters of legal or doctrinal importance. The authorities that fall within this model do dedicate too much resources to comply with external and internal controls and enjoy greater flexibility in their prioritisation practice. In this way, the influence from national parliaments, governments, and the general public is considerably limited and protects such authorities from external pressure, thereby increasing their **independence**.

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

As mentioned, EU law in general, and the Procedural Regulations, in particular, do not favour one of the four models. In fact, the matter is mostly unregulated in the EU level, and is subject to the procedural autonomy principle and the choice of each Member State. Hence, we call for greater discussion and debate on the impact of the four models on the effectiveness of EU competition law enforcement and the compliance with good governance principles, and for consideration of adopting EU-wide guidance to structure, control, and limit the exercise of the competition authorities priority setting powers. In many cases, more transparency and accountability in the setting of enforcement priorities are likely to result in more effective rules. In our study, for example, we offer a 'checklist' by which each authority can increase its compliance with the good governance principles in light of the model it belongs to.

5. Lack of uniformity

Our study, as mentioned, points to a great divergence in the priority setting rules and practices among the Commission and national competition authorities. Different authorities abide by significantly different rules meaning that competition law is not being fully and evenly enforced across the common market. In particular, we show that they diverge across seven different aspects of priority setting we discussed above in Section 3.

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

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Policy report: