Priority setting and discretionary powers of competition authorities

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Roundtable on "Priority setting and resource allocation as a tool for agency effectiveness"

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Issues to be discussed

1) Importance of the issue

2) Administrative discretion of competition authorities

3) Different objectives of prioritization of cases

4) How are case selection prioririties set

5) A critical view of administrative discretion and prioritization
   - 5-1) prioritization in detection of infringements
   - 5-2) prioritization of enforcement targets
   - 5-3) prioritization of enforcement efforts
   - 5-4) prioritization of outcomes

6) Prioritization and international cooperation

Conclusion

Long standing interest in prioritization issues

In multinational gatherings, the extensive attention given to the question of what competition agencies should do (give top priority to prosecuting cartels? apply a dominance test or a substantial lessening of competition standard in merger control?) has tended to overshadow the equally important question of how they should do it. In the formal meeting rooms, delegates often discuss whether superior to another**. In the conversations during breaks, meals, or social gatherings, the delegates frequently ask each other how their home agencies decide what to do and press for practical details about how common administrative tasks are carried out. There is considerable room for multinational bodies to serve their members interests by putting questions of management and internal procedure on the agenda more frequently and prominently.**

OECD Competition committee "Evaluation of the Actions and Resources of the Competition Authorities" 2005

Discretionary power of competition authorities

(T)arget discretion is the **ability of a CA to prioritize, shelve and even set-aside cases (including cases arising from complaints) on subjective, policy, grounds** (for instance, following a cost-benefit analysis or in times of economic crisis),52 **rather than on objective grounds** (for instance, incomplete submission, etc.), which **most CAs are entitled to do**.

Nicolas Petit, How much discretion do, and should, competition authorities enjoy in the course of their enforcement activities ? A multi-jurisdictional assessment, Concurrences, 1-2010

Discretionary power of competition authorities

The devolution of discretionary powers to CAs traditionally hinges on **three different justifications.**

First, **from a public administration standpoint**, a primary reason for delegating discretion to CAs is due to **their specialized knowledge or expertise**, as compared to elected politicians or other governmental organs.

(…) Second, **from a legal standpoint**, the discretion of CAs is often viewed as a necessary corollary of their "independence". **Entrusting CAs with discretionary powers erects roadblocks against the risks of undue interference from executive and majoritarian organs.**

Third, **from an economic standpoint, most CAs enjoy limited financial, technical and human resources**. **Faced with trade-offs, they must be able to make optimally efficient decisional, procedural and organizational arrangements, i.e. those which achieve the greatest economic return at the lowest possible cost.**

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Prioritization of cases

Most of the CAs set priorities in their work by identifying **activities** (e.g. fighting cartels) and **sectors** (e.g. construction) on which to concentrate their resources.

Some CAs are under an obligation to do so, while others do it voluntarily. The **choice** of these priorities is based on **different criteria and sources of information**, but the **aim** is to **allow CAs to organise their resources** so as to focus on those interventions that are most needed and/or are likely to have the highest impact.

Only three CAs (7%), out of the 46 CAs surveyed, appear **not to set priorities**. These are: l'Autorité in Belgium, ECA in Egypt and the AO in the Slovak Republic. However, the situation will soon change as the Slovak Republic is working on the prioritisation of its activities and Belgium is planning to start setting priorities.

Prioritization as a means to decrease the workload of the competition authority

The NMa receives many tip-offs and complaints. However, the NMa has only limited resources. Therefore, the NMa is simply unable to start an in-depth investigation into every tip-off or complaint it receives. **Using the criteria laid down in the new Prioritization Guidelines will enable the NMa to decide how it will allocate its resources for investigations.**

The Netherlands Competition Authority (NMa) issues new Prioritization Guidelines, Concurrences, e-Competitions | N° 46878, www.concurrences.com

The Swedish Competition Authority is careful to note that merely because it refrains from pursuing a matter or adopts a position that an issue or practice is not subject to further investigation, **affected parties may still pursue the matter in other fora (such as courts).**

Prioritization as a way to justify the refusal to investigate when such a decision can be challenged in court

The new guidelines have been revised in part as a result of the ruling of the Dutch Trade and Industry Appeals Tribunal in the case concerning a complaint by a Dutch traveller association about allegedly high air fares to and from Surinam according to which the NMa was ordered to carry out a more extensive investigation into the complaint and motivate its rejection in a more detailed manner.

The prioritization criteria apply to all tip-offs, online or by telephone, formal and informal complaints, and other indications that are submitted to the NMa. The NMa only has to issue a decision when it rejects a formal complaint on the basis of the Prioritization Guidelines or on substance.

The Netherlands **Competition Authority (NMa) issues new Prioritization Guidelines, Concurrences, e-Competitions | N° 46878, www.concurrences.com**

Setting priorities as a way to reduce the cost of false negatives and positives ?

For decades, **setting competition enforcement priorities has referred to concepts from decision theory**, **of assessing the relative costs of incurring and avoiding false positives and false negatives**. Guidelines for enforcement similarly state rules of thumb that are motivated by degrees of uncertainty about future effects. Possible impacts and their estimated probabilities are the elements of this calculation.

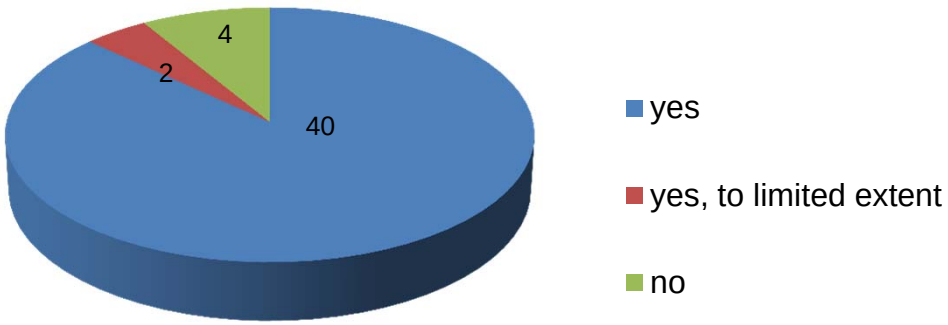
Mike Wise, FOSTERING COMPETITION IN THE CONTEXT OF RISK MANAGEMENT1, OECD, December 2008 meeting of the Group on Regulatory Policy

Most competition authorities set priorities

40 CAs (87%) set priorities to organise their work and allocate their resources.

Question: Do you set priorities in your work?

iAnswers include all 46 CAs surveyed.



OECD/ICN Evaluation of competition enforcement and advocacy activities: the results of an OECD Survay, Dec 2012

How are priorities set ?

Priorities can be set by law (as for example in Turkey), **formally set** through strategic planning (as is the case in the UK OFT), **or even informally agreed/defined and then communicated within the agency** (as is the case in Brazil (CADE) and Spain).

The OFT has a dedicated Strategy and Planning Team (S&P) to provide focus for OFT strategy and to plan delivery and implementation of strategy throughout the OFT. This involves the definition, development, refinement, and communication of strategy and its realization through the actions of the OFT as covered in organizational and functional plans. All business plans for each group, for example, are subject to a prioritization process by S&P.

ICN Agency Effectiveness Project Report, Kyoto, Japan, April 2008

How are priorities set ?

Whilst, in practice, it appears reasonable to assume that all CAs engage, to a certain extent, in priority-setting, **only a limited number of CAs follow specific, articulated, processes to this end**.

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Case prioritization: numerous criteria used:

- Gravity (ex: cartels)

-High impact (ex: the construction case in the UK)

-Importance of the sector to the consumers (ex: construction)

-High profile (ex: personal banking, bread, milk)

-Low resource case, ease of proof (ex: leniency applications)

-Test case (ex: tying and bundling, exchange of information)

-Type of practice (ex: abuse of dominance)

-Availability of remedies

-Competition authority best placed to act

-Social relevance of the cases (ex money lending, payday lending etc…)

Prioritization of enforcement targets: the ex of Belgium

In Belgium, the CA has designed and publicly disclosed a prioritization methodology known under the (odd) acronym MOSCOW ("Must have, Should have, Could have and Waste").

In a nutshell, the Belgian CA assigns a priority level to each case/complaint in light of "its **impact on the economy and competition** in Belgium, the **interest of the consumer**, [the] **availability of resources**, **proof**, **precedent value**, **gravity of the infringement**, **sector**: e.g. consumer goods, financial services, and liberalized sectors".

On this basis, each case/complaint may be classified as a **priority case, as an ongoing case which may be subject to suspension, or as a "standby" case which will be put on hold until some resources become available**. The Belgian CA seems, however, to enjoy a lesser degree of "target discretion" than the OFT, because it cannot close cases and dismiss complaints on grounds of lack of priority and available resources.

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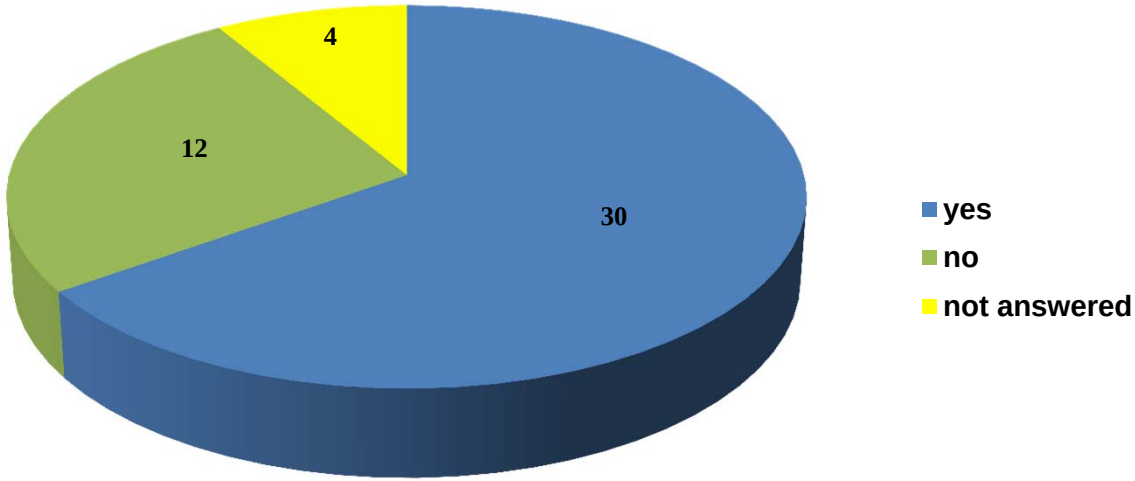
Most competition authorities make their priorities known

Thirty out of the 40 CAs that set priorities make them public in their annual report, or in other publications, or through speeches and presentations.



OECD/ICN Evaluation of competition enforcement and advocacy activities: the results of an OECD Survay, Dec 2012

Some NCAS assess the extent to which priorities have been met

It is hard to say how many CAs actually assess the extent to which these priorities have been met, because a considerable number of CAs have not provided this information. Only 27 have clearly said that they do so.

Answer	Number of CAs	Share of CAs (over total surveyed)
Yes	**27**	**58%**
Sometimes	**1**	**2%**
No	**5**	**9%**
Not answered	**13**	**31%**
Total	***46***	***100%***

OECD/ICN Evaluation of competition enforcement and advocacy activities: the results of an OECD Survay, Dec 2012

But priority setting does not stop at case selection: ex 1

Flexibility to reprioritise resources between commerce and consumer protection enforcement was found desirable because the two areas complement each other.

Having a well conceived competition policy and enforcement of that policy (in terms of the Commerce Act) is not of itself sufficient to achieve the objectives of competitive prices, better quality and greater choices for consumers. Competition laws may not always achieve these objectives because of lock-in and switching costs.

Moreover effective competition relies on honest and fair trading, but competition itself can create incentives to trade unfairly.

OECD Competition committee roundtable "Evaluation of the Actions and Resources of the Competition Authorities" 2005

But priority setting does not stop at case selection: ex 2

As we do not select our own cases, one could say that prioritization in the strict sense of the word is not an issue for us.

(…) **But, within those limitations, obviously we exercise control over what we do and how we do it**.

Once we have started the analysis on a case, we have to make various choices. Which specific aspects should we concentrate on? What theories of harm are relevant? How do we test them? What evidence do we collect and how do we weigh it? What is the overall policy context and does our statutory framework allow us to 'flex' the analysis if we believe that is needed?

And there are **organizational aspects** to consider. **How much resource do we put into policy work and into competition advocacy as opposed to casework?**

And in times of economic downturn, how can we ensure that we are flexible enough to further improve the efficiency and effectiveness of our cases, while minimizing any burden on businesses?

These are all important questions we face and, naturally, the balance can be expected to shift over time.

Areas of discretionary power of competition authorities in antitrust enforcement requiring prioritization

1) **detection of infringements**: reactive policies versus ex officio investigations

2) **selection of enforcement targets**,

3) **initiation of infringement proceedings,**

4) **outcome of the case**

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1) Detection of infringements: should competition authorities prioritize ex officio investigations over reactive policies ?

Because the regulatory framework does not incentivize, let alone require, CAs to carry out pro-active detection approaches, **most CAs have – deliberately or not – focused their resources on reactive detection techniques and, in particular, to the treatment of complaints.** This is, for instance, the case of Austria,24 Spain,25 Italy,26 France,27 Belgium,28 Hungary,29 Lithuania,30 Latvia,31 Sweden,32 Switzerland,33 and Estonia.

(….)

As observed by the International Competition Network ("ICN"), CAs must indeed "show ability to pursue cases proactively so that deterrence remains a credible threat". Otherwise, firms contemplating an infringement know that they are unlikely to be the target of an investigation unless they are denounced.

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Detection of infringements: should competition authorities prioritize ex officio investigations over reactive policies ?

(T)he majority of respondents identified themselves as either reactive, or a combination of reactive and proactive. **The main reason offered for the reactive nature of agency work was limited resources, many of which are devoted to merger review, particularly in agencies from developing and transition economies.**

Ten agencies considered themselves more reactive than proactive. Nine answered they are equally reactive and proactive. **In most of the cases, these "reactive" answers reflect the high number of merger reviews submitted to the authorities, which they considered as the principal element that restricts that agency's ability to be proactive.** The U.S. FTC, while recognizing that merger review requires a reactive approach, seeks to be proactive with respect to non-merger work by identifying sectors and conduct where its intervention is most likely to make a positive difference.

ICN Agency Effectiveness Project Report, Kyoto, Japan, April 2008

Detection of infringements: should competition authorities prioritize ex officio investigations over reactive policies ?

Brazil (SDE) was the only authority that classified itself as more proactive than reactive.

In 2003, Brazil (SDE) shifted towards a more proactive policy due to the prioritization of cartel cases and the introduction of a leniency policy. Such prioritization was combined with the creation of “fast track” procedures for simple merger cases and joint merger analysis by SDE and SEAE (the Secretariat for Economic Monitoring of the Ministry of Finance of Brazil, another body part of the Brazilian Competition Policy System), which freed up resources, allowing for more focus on cartel work.

ICN Agency Effectiveness Project Report, Kyoto, Japan, April 2008

2) Prioritization of enforcement targets

(T)arget discretion (…is) the ability of a CA to prioritize, shelve and even set-aside cases (including cases arising from complaints) on subjective, policy, grounds (for instance, following a cost-benefit analysis or in times of economic crisis), rather than on objective grounds (for instance, incomplete submission, etc.), which most CAs are entitled to do.

(T) arget discretion implies a **disputable choice to trade-off equality in return for efficiency.**

(M)any observers have painted a grim picture of CAs' discretion in selecting investigation targets. Commenting on the state of play in the EU, I. VAN BAEL lambasted the European Commission's discretion in alluding to a situation of "'à la carte' enforcement" of the competition rules. Other observers have mulled over the risk of "populism" in the launching of inquiries, career-based prosecution decisions, politically and ideologically-driven cases, etc

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Prioritization of enforcement targets in the UK

In the UK, for instance, the Office of Fair Trading ("OFT") has voluntarily published "Prioritisation Principles" which explain "how it prioritizes its work".

Those principles include "**the likely effect on consumer welfare, the strategic significance of the matter, the likelihood of successful outcome, and the OFT's resources".**

On the basis of those factors, the OFT may lawfully prioritize, delay, or close investigations and complaints.

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Prioritization of enforcement targets in Hungary

in Hungary, a text entitled “Principles concerning the freedom of competition followed by the Competition Authority” sets out a list of questions which the CA systematically reviews before deciding to launch, or not, proceedings: **is the effect on competition substantial, how many customers are affected, is the CA able to solve the issue, is the issue significant from a legal standpoint, may the proceedings send signals to the market, can the issue be solved through alternative means (private enforcement)**, etc.?

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Necessity of transparency in prioritization

Priority-setting is akin to a black-box in (a number of) jurisdictions. With the exception of intermittent disclosures in annual reports or of informal "comity" principles in markets subject to sector specific regulation, the question whether and how other CAs engage into priority-setting remains shrouded in mystery.

The principle that a CA enjoys target discretion should be enshrined, and framed, in the CA's constituent legislation (or in an equally ranking, binding, legal instrument). Indeed, target discretion entails trading-off the principle that all cases, markets, practices, firms and consumers are equal for other interests (e.g., economic significance of the impugned conduct, development of the case-law in new markets, costs of establishing an infringement,etc.).

The setting of priorities might thus lead CAs to violate general principles of law (e.g., the nondiscrimination principle) in differentiating between equally worthwhile cases. **A clear, publicized, legal basis for priority setting (and, possibly, prioritization criteria) thus appears warranted to eradicate risks of arbitrary discrimination.**

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3) Prioritization of enforcement efforts

Our survey demonstrates (…) that the **greater part of CAs enjoys significant discretion as regards procedural timelines**.

In most jurisdictions, the law does not require CAs to comply with deadlines, and where it does, CAs face protracted time horizons (in Belgium, the law sets a time limit of 5 years for the entire investigation).

Of course, in those jurisdictions, CAs' inertia can in principle (i) be challenged on the basis of conventional "failure to act" proceedings; or (ii) be brought to the attention of an ombudsman;and/or (iii) trigger actions for damages. However, most national respondents consider such actions to be devoid of any practical interest.

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Prioritization of enforcement efforts

(T)his study takes the view that CAs should draw inspiration from the practice of the Italian CA and, to a lesser extent, from the European Commission.

To eliminate, demonstrably, parts of the concerns ascribed to dormant cases, the Italian CA is required by regulation to set, on a case-by-case basis, a deadline in its formal containing the statement of objections. According to P. Lowe, the European Commission also experienced a similar mechanism for the first time in the 2004 Microsoft case.

In addition, to ensure compliance with such pre-defined time limits, CAs may be obliged to regularly publish information/statistics on deadlines observance (e.g., within annual reports).

Finally, **CAs should exceptionally be entitled pursue their review beyond the initial deadlines. In such cases, however, CAs should be under a duty to state adequate reasons for the extension of the proceedings.**

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4) Outcome of cases : remedies vs negative decisions

In recent years, CAs have increasingly espoused the view that they ought not to use a hammer when they need a screwdriver and have – sometimes with little nuance – praised the virtues of such alternative enforcement techniques and, in particular, of settlements.

Settlements are said to permit a n CA to correct market failures in a timely fashion, to devise innovative remedies that could not otherwise be achieved, and to tailor, as time lapses, the remedies to the evolving market situation.138

By contrast, positive enforcement seems to have attracted lower interest from CAs. Its merits appear nonetheless significant. Positive enforcement provides ex ante guidance to firms, which can comply voluntarily with the law, thereby limiting the amount of ex post intervention required on the part of CAs.

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Prioritization issues : remedies vs negative decisions

(T)his study considers that, as a matter of good administrative practice, all CAs should effectively devote a share of their resources to positive enforcement activities.

First, reasoned, positive, decisions can play an important role in shaping competition policy and encouraging business practices which are capable of improving consumer welfare.

Second, from the standpoint of resource-constrained CAs, the adoption of positive decisions may improve firms' ex ante compliance with the competition rules and, in turn, limit the costs incurred by CAs' for ex post enforcement activities. In addition, once the sunk costs of investigating a – groundless – case have been incurred, the incremental cost of adopting a reasoned positive decision is likely to be low in comparison with its future compliance returns.

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Prioritization and international coopearation

Requests for international cooperation in enforcement reflect the priorities of the requesting agency; but they do not necessarily fit with the priorities of the requested agency.

In that sense the desire to prioritize of each agency mays clash with the trend toward more volontary cooperation unless cooperation is itself one of the priorities of the agencies.

One gets the impression that there are very few agencies which include international cooperation on cases in their priorities and that, at least in some cases, requests for cooperation are turned down because they do not fit the priorities of the requested agencies.

Thus there is a need to further explore how one could ensure a higher level of compatibility between prioritization and international cooperation.

Conclusion

1) An important topic which deserves further research

2) The prioritization process needs to be more transparent and systematic to be considered legitimate by stake holders and/or courts (possible conflict between equality of access to justice and prioritization)

3) Great variety of goals and criteria of prioritization (no one size fits all)

4) Need to go beyond case selection in the prioritization process and explore the various areas where competition authorities have discretion

5) Priorities may be different depending on the time perspective

6) Need to solve the potential conflict between prioritization and the promotion of voluntary cooperation between NCAs