

**Thirteenth Session of the UNCTAD Research Partnership Platform**

**Intergovernmental Group of Experts**

**20 July 2022**

**Room XVII, Palais des Nations, Geneva**

**The Priority-setting Project:**

**Rethinking Competition Law Enforcement**

*Presented by:*

*Dr. Or Brook, University of Leeds*

*and*

*Dr. Kati Cseres, University of Amsterdam*

*This material has been reproduced in the language and form as it was provided. The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.*

# THE PRIORITY-SETTING PROJECT: RETHINKING COMPETITION LAW ENFORCEMENT

Or Brook  
University of Leeds  
[o.brook@leeds.ac.uk](mailto:o.brook@leeds.ac.uk)

Kati Cseres  
University of Amsterdam  
[K.J.Cseres@uva.nl](mailto:K.J.Cseres@uva.nl)

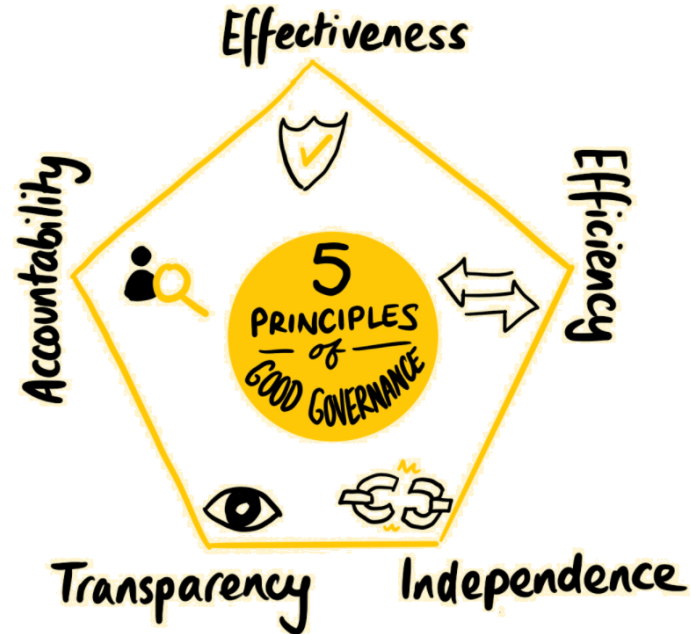
# The importance of priority setting



The legal competence and *de facto* ability of CAs to choose which cases to pursue and which to disregard

Effective allocation of scarce (human/financial) resources

Concretisation of legal norms; Administrative discretion



# The Priority Setting Project




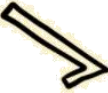

- ✓ **Theoretical framework**
- ✓ **Questionnaires + Interviews**
- ✓ **Study of national administrative and constitutional law of 27 NCAs +UK and EU**
- ✓ **Policy report and recommendations**
- ✓ **Next stage: developing countries**

**ESRC funding**



# Typology of priority setting: 7 aspects of prioritisation



Stage	Aspects of priority setting	External	Internal
 PRE- DECISION	Agenda setting Competence to prioritise (de jure) Ability to prioritise (de facto)	X X X	X
 DECISION	Procedure to prioritise Substantive criteria Alternative mechanisms	X X X	X X X
 POST DECISION	Impact assessment	X	X

# TYOLOGY OF PRIORITY SETTING: PRE-DECISION STAGE



## External constraints

(legislator; judiciary)

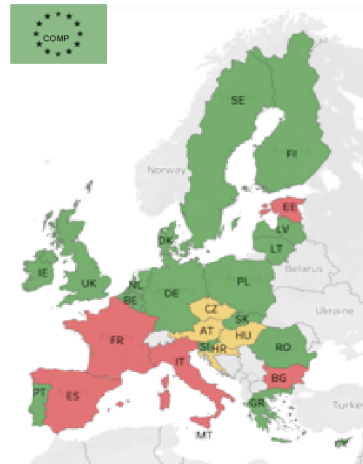
## Internal constraints

(CAs)

## 2. Competence to prioritise (de jure)

X

(a) All procedures, except complaints

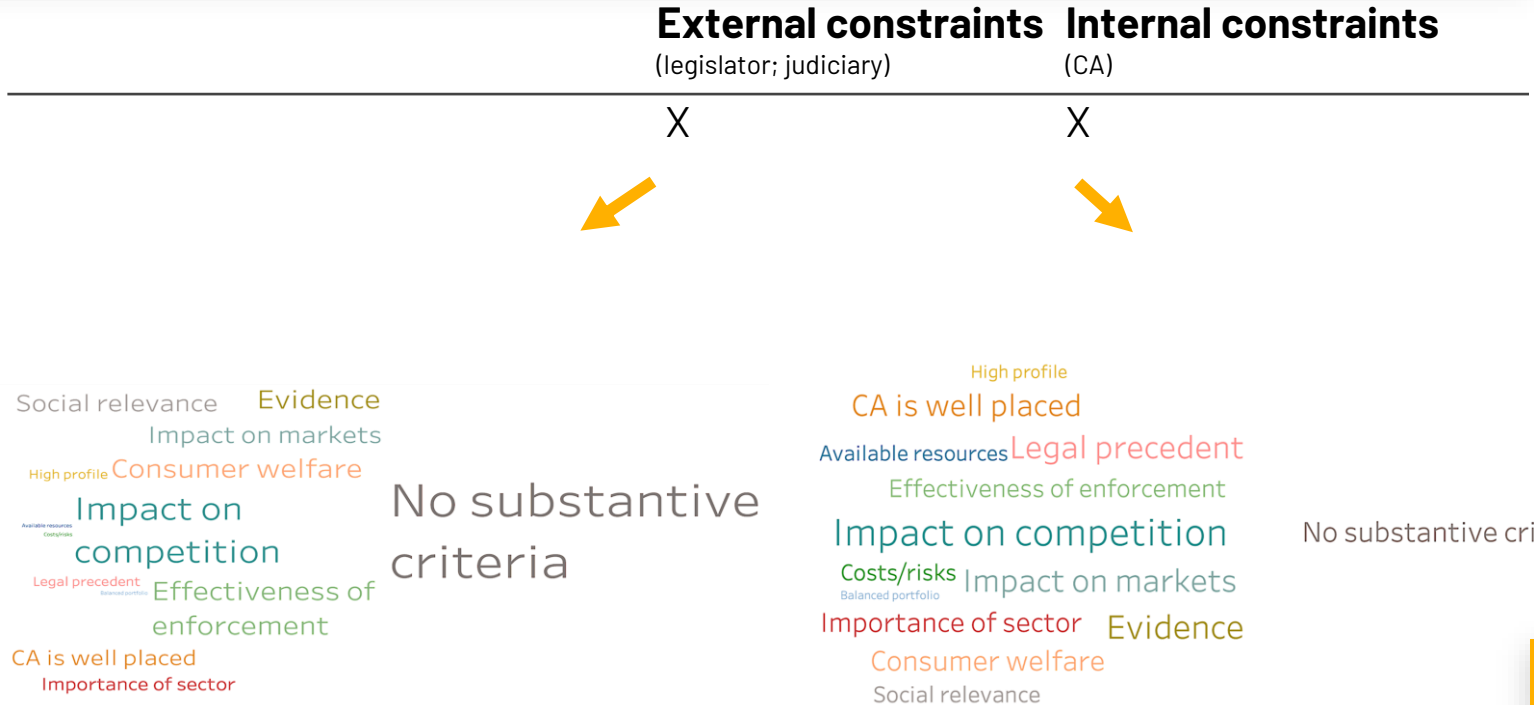


(b) Rejecting complaints



- Opportunity principle (high discretion)
- Public interest (medium discretion)
- Legality principle (low discretion)

# TYOLOGY OF PRIORITY SETTING: SUBSTANTIVE CRITERIA

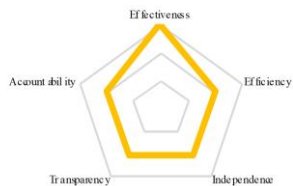




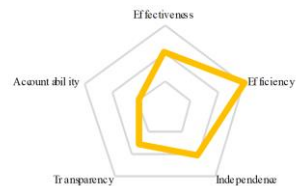
# EMPIRICAL FINDINGS: FOUR REPRESENTATIVE MODELS



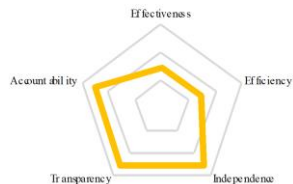
**(I)**  
high degree of prioritisation,  
external or internal  
constraints



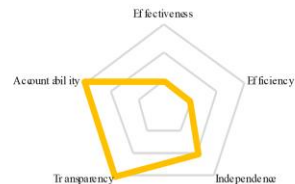
**(II)**  
high degree of prioritisation,  
limited external or internal  
constraints



**(III)**  
medium degree of  
prioritisation,  
limited internal constraints



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





# CHECKLIST: HOW TO IMPROVE PRIORITY SETTING?

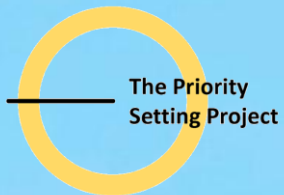


	Effectiveness	Efficiency	Independence	Transparency	Accountability	
Pre-decision	Agenda-setting	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt an agenda focusing on strategically important sectors and practices</li> <li><input type="checkbox"/> Consult stakeholders</li> <li><input type="checkbox"/> Align agenda with impact assessment</li> <li><input type="checkbox"/> Periodically review</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align agenda with CA's financial, technical, and human resources</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt internal agenda to guide CA's staff</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Clearly formulate, communicate and publish the agenda to the CA's staff and general public</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt an agenda following stakeholder consultation</li> </ul>
	Competence to prioritise ( <i>de jure</i> )	As noted in Section 7.1 above, each CA must be <i>de jure</i> able to set their own priorities for enforcement and select the cases they consider the most important to investigate in order to achieve the primary goals of the authority				
	Ability to prioritise ( <i>de facto</i> )	<ul style="list-style-type: none"> <li><input type="checkbox"/> Balanced use of reactive/proactive enforcement strategies</li> <li><input type="checkbox"/> Align resource allocation across multiple mandates of multi-function CAs</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align the selection of cases with the CA's human, financial and technical resources and staff's knowledge, skills, and expertise</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Independent and sufficient budget allocation within government's budget plans</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Clearly report the allocation of human, financial and technical resources</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Clearly report the allocation of human, financial and technical resources</li> </ul>
Decision stage	Procedure to prioritise (reason, publish, motivate)	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align prioritisation decisions with the agenda and substantive criteria</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align prioritisation decisions with the agenda and substantive criteria</li> <li><input type="checkbox"/> Create a template/checklist to quickly communicate decisions to close cases</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Create a clearly defined internal procedure for prioritisation decisions</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Reason and publish prioritisation decisions or provide informal summary</li> <li><input type="checkbox"/> Create a clearly defined internal procedure for prioritisation decisions</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Reason and publish prioritisation decisions, especially with regard to formal complaints</li> </ul>
	Complaints and third parties	<ul style="list-style-type: none"> <li><input type="checkbox"/> Allow for third parties' and complainants' participation</li> <li><input type="checkbox"/> Adopt a clear definition of third parties/complainants and their participation rights linked to the public interest</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Distinguish between formal and informal complaints (see Section 7.1 above)</li> <li><input type="checkbox"/> Reject formal low-priority complaints by a formal decision</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Create a clearly defined internal procedure for prioritisation of formal and informal complaints, which is aligned with the agenda and substantive criteria of the priority setting</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt clear criteria for rejecting and handling complaints</li> <li>Reason and publish rejection of all formal complaints</li> <li><input type="checkbox"/> Adopt a clear definition of third parties/complainants and their participation rights</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Allow for third parties and complainants participation including access to documents</li> <li><input type="checkbox"/> Allow for participation of NGOs and of consumer organisations</li> </ul>

# CHECKLIST: HOW TO IMPROVE PRIORITY SETTING?



	Effectiveness	Efficiency	Independence	Transparency	Accountability	
Decision stage	Institutional design	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt an internal procedure for priority setting decision-making</li> <li><input type="checkbox"/> Take decisions within a multi-member team, mix of high and low-level staff members</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt an internal procedure for priority setting decision-making</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Take decisions within a multi-member team</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt a clear decision-making process for prioritisation decisions</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt a clear process for prioritisation decisions</li> <li><input type="checkbox"/> Involve a mix of high and low-level staff members in the decision-making process</li> </ul>
	Substantive criteria	<ul style="list-style-type: none"> <li><input type="checkbox"/> Set substantive prioritisation criteria according to the objectives of the CA and national competition law</li> <li><input type="checkbox"/> Periodically review these criteria and conduct impact assessment</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align substantive criteria with CA's financial, technical, and human resources and its agenda</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Set substantive prioritisation criteria</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Clearly formulate and publish the substantive criteria</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt substantive criteria following stakeholders' consultation</li> </ul>
	Alternative mechanisms: instrument and outcome discretion	<ul style="list-style-type: none"> <li><input type="checkbox"/> Align the procedure and criteria for the use of alternative mechanisms with the agenda and substantive criteria</li> <li><input type="checkbox"/> Avoid over-reliance on alternative enforcement strategies</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt clear criteria on when cases are appropriate for alternative enforcement routes</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt clear criteria on when cases are appropriate for alternative enforcement routes</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt clear criteria on when cases are appropriate for alternative enforcement routes</li> <li><input type="checkbox"/> Adopt transparent decisions on the application of alternative enforcement routes</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt substantive criteria following stakeholders' consultation</li> <li><input type="checkbox"/> Report, motivate, and evaluate the use of such mechanisms in annual reports</li> </ul>
Post-decision	Impact assessment	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt periodic impact assessment of all the above six aspects of priority setting either formally or informally</li> <li><input type="checkbox"/> Create an "enforcement cycle" (see Section 6.7 above)</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Compare the expected use of resources with the actual expenses and the enforcement impact</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Adopt a uniform and clear format for reporting impact</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Publish a clear and detailed impact assessment</li> </ul>	<ul style="list-style-type: none"> <li><input type="checkbox"/> Use impact assessment to inform agenda and substantive criteria</li> <li><input type="checkbox"/> Involve stakeholders in the impact assessment process</li> </ul>



## Useful links:



### Policy report



### Animation video



Or Brook  
University of Leeds  
[o.brook@leeds.ac.uk](mailto:o.brook@leeds.ac.uk)

Kati Cseres  
University of Amsterdam  
[K.J.Cseres@uva.nl](mailto:K.J.Cseres@uva.nl)