

RESEARCH ARTICLE

Beyond consumer welfare: responsive priority-setting in the public interest in competition law enforcement

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(Received 28 August 2025; revised 17 November 2025; Accepted 03 February 2026)

Abstract

The enforcement priorities set by competition authorities carry significant socio-economic consequences: their decisions affect market structures, determine what constitutes legitimate business conduct, and influence how economic power and welfare are distributed. Yet, in most jurisdictions, priority-setting remains a largely reactive, insulated process, guided by a narrowly defined consumer welfare standard and disconnected from wider social, economic, and democratic concerns. Consequently, the benefits of enforcement, such as correcting market failures or enhancing consumer savings, are often unevenly distributed among members of society, and without specific accountability to the broader public. This issue is particularly pressing today, in a turbulent world shaped by geopolitics, geoeconomics, the politicisation of competition law and regulation, and growing pressure to deliver rapid and efficient results. By relying on insights from the theory of responsive regulation, social accountability of independent regulatory authorities, and deliberative and participatory governance models, the paper investigates how priority-setting can be theoretically rethought and practically restructured to be more responsive, strategic, and socially accountable to broader concerns. Our proposed approach remains within the scope of competition authorities' administrative discretion and does not entail changes to the current substantive, procedural, or institutional frameworks.

Keywords: priority-setting; responsive regulation; competition law; enforcement discretion; social accountability; consumer welfare standard

Introduction

Competition authorities are key institutions through which modern societies regulate markets and promote the efficient use of resources while protecting the freedom of market participants to engage in economic activities. Their primary function is to ensure that market power is not unlawfully acquired or exercised in ways that harm consumers, competitors, or the broader economy. By preventing anti-competitive agreements, abuses of dominance, and excessive market concentration (together 'competition law enforcement'), these authorities promote the core benefits of competition: lower prices; greater consumer choice; higher quality; and innovation.¹

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¹OECD *Competitive Neutrality Toolkit: Promoting a Level Playing Field* (2023) p 7, available at <https://doi.org/10.1787/3247ba44-en>.

Competition authorities define legitimate competition by disciplining dominant actors and embedding economic activity within legal and political institutions.² Competition authorities give form and legitimacy to markets by defining the rules under which competition takes place and by institutionalising limits on both public and private economic power. By controlling concentrated private power, they help safeguard democratic values and uphold fundamental economic rights.³ In doing so, they advance not only efficiency and growth, but also pluralism, equality, and freedom.⁴ There is a broad consensus that competitive markets are essential to democratic governance, as unchecked economic power can erode political power.⁵ Accordingly, while competition law systems have been established to constrain monopolistic behaviour and promote open markets, they act as institutions that influence the allocation of economic resources and opportunities. Competition authorities are entrusted not only with correcting market failures but also with ensuring fair and inclusive participation in the economy.⁶ However, and despite the growing recognition of their broader economic, social, and democratic role, competition authorities worldwide continue to set their enforcement priorities reactively (eg by responding to leniency applications and complaints) or focus on economic efficiency. This consumer-welfare-centric approach remains the dominant rationale across many jurisdictions, defining the interpretation of competition rules, and justifying their application.⁷

This reactive nature and narrow focus on consumer welfare is increasingly at odds with growing calls for competition authorities to address broader socio-economic concerns, such as inequality, environmental degradation, or the democratic risks emerging from digitalisation and platform power. The focus of their enforcement often remains narrowly defined, guided by conventional economic growth models, and insulated within technocratic silos. Competition authorities primarily interact with businesses, courts, and peer regulators, and remain detached from the broader public and civil society they ultimately have the mandate to serve.⁸

The current regulatory field, which is shaped by geopolitics, geoeconomics, the politicisation of competition law and regulation, and growing pressure to deliver rapid and efficient results, makes the work of competition authorities particularly pressing today. In this context, the process of deciding which potential law infringements to pursue and which to disregard ('priority-setting') connects competition policy goals with the practice of enforcement. It is through the process of priority-setting that the normative goals of competition law are translated into concrete enforcement actions. By setting enforcement priorities, competition authorities operationalise abstract values into day-to-day decision-making and resource allocation.

This paper analyses how, despite its importance, the process of priority-setting has largely been treated as a technical exercise rather than a subject of normative debate or democratic deliberation. Prioritisation criteria and decisions are typically determined by independent competition authorities, enjoying a wide margin of discretion and subject to limited judicial or public oversight. Case selection is often reactive, triggered primarily by leniency applications or complaints, and remains insulated from the involvement of key stakeholders. Even when competition authorities engage in proactive and more

²C Foster and K Thelen 'Coordination rights, competition law and varieties of capitalism' (2024) 58(6) *Comparative Political Studies* 1199.

³G Amato *Antitrust and the Bounds of Power* (Oxford: Hart Publishing, 1997).

⁴KJ Cseres 'The role of independent competition authorities as quasi-courts in defending rule of law values in Europe' in P Bárd and J Krommendijk (eds) *Sustaining the Rule of Law* (Cheltenham: Edward Elgar, 2025) pp 307–327.

⁵E Deutscher 'The competition-democracy nexus resurrected? Four precursors of a competition-democracy nexus 4.0' (2025) 13(3) *Journal of Antitrust Enforcement* 1 at 1.

⁶OECD, above n 1, p 35.

⁷OECD Competition Policy Roundtable Background *Advantages and Disadvantages of Competition Welfare Standards* (2023) p 5, available at <https://doi.org/10.1787/3d174fdf-en>.

⁸F Cengiz 'Legitimacy and multi-level governance in European Union competition law: a deliberative discursive approach' (2016) 54 *Journal of Common Market Studies* 826; F Cengiz 'Bringing the citizen back into EU democracy: against the input-output model and why deliberative democracy might be the answer' (2018) 19 *European Politics & Society* 577; A Wigger and H Buch-Hansen 'EU competition regulation. A case of authoritarian neoliberalism?' in E Hartmann and PF Kjaer (eds) *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave Macmillan, 2015) p 81.

transparent prioritisation, they tend to rely on traditional economic growth indicators focused on price effects and consumer welfare.

The paper demonstrates that priority-setting often remains disconnected from broader societal challenges and unresponsive to distributional concerns. Social policy objectives, macroeconomic changes, and the differential effects of enforcement across demographics, such as gender, race, class, and income, remain typically peripheral or absent from this process. Competition authorities treat consumers as a homogeneous group of rational economic actors, whose preferences are presumed to be revealed through market transactions.⁹ This narrow framing overlooks how structural inequalities shape market access, vulnerability, and the real-life effects of enforcement.¹⁰

Consequently, the benefits of enforcement, such as market corrections or consumer savings, are unevenly distributed, often bypassing the groups most harmed by market failures and power asymmetries. Although authorities enjoy discretion in setting priorities, they remain insufficiently responsive and accountable to broader societal needs. Additionally, the paper argues that narrowly focused priority-setting decisions could weaken the legitimacy of competition policies and deepen an accountability gap, raising concerns about the democratic oversight of competition authorities.

By relying on insights from the theory of responsive regulation, social accountability of independent regulatory authorities, and deliberative and participatory governance models, the paper investigates how priority-setting can be theoretically rethought and practically restructured by enforcers to be more responsive, strategic, and socially accountable to broader societal concerns. It develops a conceptual framework and practical guidance to propose ways for competition authorities to develop priority-setting as a mechanism that connects high-level societal objectives and practical regulatory action.

Our suggested approach can enhance democratic legitimacy within technocratic governance by embedding social accountability into regulatory practice, not by politicising competition authorities, but by extending accountability beyond formal legal or political channels, through civil society engagement and transparent decision-making. Since their mandates remain economically defined, competition authorities cannot balance political values without risking accusations of politicisation or the loss of their democratic legitimacy. Therefore, stronger mechanisms for accountability and responsiveness to democratic demands should be implemented, while preserving their independent expertise.

The paper is structured as follows: [Section 1](#) examines the evolving role of competition authorities, highlighting a change from a narrow consumer welfare standard toward a broader recognition of the economic, social, and democratic implications of enforcement. It explores the conceptual and practical challenges of integrating broader considerations into the substantive analysis of competition law. [Section 2](#) turns to the practice of enforcement prioritisation, demonstrating that despite this expanded interpretative framework, competition authorities continue to adopt a reactive approach to priority-setting, one that is narrowly focused on consumer welfare and insulated from distributional and democratic concerns.

[Section 3](#) introduces a normative framework for reform, drawing on theories of responsive regulation and social accountability to propose a more responsive approach to priority-setting. It argues that embedding wider economic, social, and democratic values into prioritisation practices offers a pragmatic tool for advancing broader objectives of competition law while respecting the scope of the authorities' existing administrative discretion. [Section 4](#) develops this proposal further by outlining how enforcement agendas, substantive prioritisation criteria, impact assessments, and decision-making procedures

⁹N Olsen 'Consumer imaginaries, political visions and the ordering of modern society' in HW Micklitz (ed) *The Making of Consumer Law and Policy in Europe* (London: Bloomsbury, 2021) p 278.

¹⁰J Dixon et al 'Consumer-citizens and competition policy in the era of supermarketisation' (2020) University of Melbourne Legal Studies Research Paper No 872, available at <https://doi.org/10.2139/ssrn.3550935>; EA Posner and CR Sunstein 'Antitrust and inequality' (2022) 2 *American Journal of Law & Equality* 190 at 195. Interestingly, scholars have already observed that also in the field of criminal law, criminal enforcement and enforcement discretion do not represent the interests of vulnerable groups. See for example EM Iglesias 'Designing the institutional and legal structure of prosecutorial power in the transition to democracy' in IP Stotzky (ed) *Transition to Democracy in Latin America: the Role of the Judiciary* (Abingdon: Routledge, 2019) pp 269–283.

can become more responsive through the incorporation of broader considerations and mechanisms of social accountability. The paper ends with a brief conclusion.

1. Changing role of competition authorities: from consumer welfare to broader social considerations

Over the past two decades, many competition authorities worldwide have embraced consumer welfare as the ultimate goal and guiding standard for enforcement.¹¹ Understood in terms of economic efficiency, consumer welfare focuses on market outcomes, typically measured through price effects and their impact on purchasers of goods and services and suppliers.¹²

The consumer welfare standard embodies a particular normative vision of markets and their participants. First, it does not treat the welfare of all groups equally. By design, the standard gives priority to the welfare of consumers *within* the relevant market under investigation – typically those directly affected by the anti-competitive conduct in question. Secondly, it marginalises economically vulnerable members of society and neglects the differentiated impact of market practices on diverse consumer groups, particularly those disadvantaged by their social or economic circumstances.¹³

Competition authorities face increasing pressure to show how their enforcement supports public interests like sustainability, data protection, and fairness – raising questions about their role in complementing or constraining majoritarian politics within a contested economic and societal landscape.¹⁴ Accordingly, the consumer welfare standard is increasingly seen as inadequate for addressing the complex power dynamics and systemic risks in today's fast-moving markets, due to its narrow focus on price and output while overlooking broader social concerns.¹⁵ Digitalisation,¹⁶ alongside rising inequality¹⁷ and the urgent climate crisis,¹⁸ particularly highlights the limitations of competition policy – especially when it fails to address power imbalances, support sustainability efforts, and consider distributional impacts.

A growing body of scholarship argues that broader societal concerns and distributional effects should be an integral part of the competition analysis. These critics argue that market competition should not merely be a mechanism for optimising efficiency, but should also serve to promote a more equitable distribution of wealth and support a more inclusive and diverse marketplace.¹⁹

This approach calls for a more holistic vision of competition law, one that recognises it as a tool of social ordering, capable of affecting access, participation, and fairness in markets in ways that cannot be captured by a narrow focus on price and outputs.²⁰ From this perspective, competition law is seen as a

¹¹RA Posner *Antitrust Law* (Chicago: University of Chicago Press, 2nd edn, 2001); AD Melamad and N Petit 'The misguided assault on the consumer welfare standard in the age of platform markets' (2019) 54 *Review of Industrial Organization* 741; OECD, above n 1, p 11.

¹²OECD, above n 1, pp 12–13.

¹³Ibid.

¹⁴KJ Csere 'Non-majoritarian regulators in majoritarian systems: the case of competition authorities' (forthcoming) *European Papers*.

¹⁵OECD, above n 7.

¹⁶A Gerbrandt and P Phoa 'The power of big tech corporations as modern bigness and a vocabulary for shaping competition law as counter-power' in M Bennett et al (eds) *Wealth and Power: Philosophical Perspectives* (Abingdon: Taylor & Francis, 2022) pp 166–176.

¹⁷KJ Csere and J Broulik (eds) *Competition Law and Economic Inequality* (London: Bloomsbury Publishing, 2022).

¹⁸S Holmes 'Sustainability and competition policy in Europe: recent developments' (2024) 15 *Journal of European Competition Law & Practice* 562; J Nowag (ed) *Research Handbook on Sustainability and Competition Law* (Cheltenham: Edward Elgar, 2024).

¹⁹R Shaban and C Kaiser 'Leveraging competition law and policy to promote inclusive growth in Canada' (2023) *Smart Prosperity Institute and Canadian Anti-Monopoly Project*, available at <https://institute.smartprosperity.ca/sites/default/files/Inclusive%20Growth%20in%20Competition%20Law%20and%20Policy.pdf>; A Ayal 'The market for bigness: economic power and competition agencies' duty to curtail it' (2013) 1 *Journal of Antitrust Enforcement* 231 at 231.

²⁰Ayal, *ibid.*, at 231. Also see I Lianos 'The poverty of competition law: the short story' in D Gerard and I Lianos (eds) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge: Cambridge University Press, 2019).

tool for advancing broader societal objectives, including sustainability,²¹ social (gender,²² race²³) and economic inequality,²⁴ labour and workers' rights,²⁵ and responding to the cost of living crisis and financial instability.²⁶

Incorporating broader economic, social, and democratic concerns into the objectives of competition law reflects a wider change in how economic policies are evaluated. Since the early 1970s, concerns have emerged that macro-economic statistics, such as gross domestic product (GDP), do not provide a sufficiently detailed picture of the living conditions that ordinary people experience. There is a growing need for alternative development models that assess not only economic growth but also societal progress through improvements in overall well-being. Such an assessment requires measuring both the functioning of the economic system and also the diverse experiences and living conditions of people.²⁷ Hence, many variations of so-called beyond-GDP indicators have been developed,²⁸ moving away from narrow economic growth to inclusive and sustainable growth, encompassing a wide range of quality-of-life and well-being parameters and aiming to distribute wealth fairly across society and create opportunities for all.²⁹

Nevertheless, expanding the scope of competition law beyond the consumer welfare standard remains a matter of ongoing debate. While this paper does not seek to resolve this issue, it is important to highlight that opposition typically centres on questions of whether, and how, broader societal, economic, and democratic interests should be integrated into the *substantive assessment* of competition law, eg in the definition of anti-competitive conduct and the criteria for exemptions.

First, commentators note that competition authorities are independent, non-majoritarian institutions operating outside direct electoral control. As competition authorities assume responsibilities that go beyond the narrow protection of competition, they are expected to balance complex and often conflicting and incommensurable objectives, from economic efficiency to environmental sustainability, social inclusion, and democratic integrity.³⁰ As unelected bodies exercising public power without a

²¹S Kingston *Greening EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2011).

²²KJ Cseres 'Feminist competition law' (3 January 2024) Amsterdam Centre for European Law and Governance Research Paper No 2023-04, Amsterdam Law School Research Paper No 2023-43, available at <https://ssrn.com/abstract=4682906>; OECD, above n 1, p 35.

²³JM Newman 'Racist antitrust, antiracist antitrust' (2021) 66 Antitrust Bulletin 384; B Capers and G Day 'Race-ing antitrust' (2022) 121 Michigan Law Review 523.

²⁴Cseres and Broulik, above n 17; A Ezrachi et al 'The effects of competition law on inequality – an incidental by-product or a path for societal change?' (2023) 11 Journal of Antitrust Enforcement 51.

²⁵B Waas and C Hiefl (eds) *Collective Bargaining for Self-employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (Alphen aan den Rijn: Kluwer Law International, 2021); F Cengiz 'The conflict between market competition and worker solidarity: moving from consumer to a citizen welfare standard in competition law' (2021) 41 Legal Studies 73; S Paul et al (eds) *The Cambridge Handbook of Labor in Competition Law* (Cambridge: Cambridge University Press, 2022).

²⁶F Costa-Cabral and J Nowag 'EU competition policy report: greedflation, competition law, and the cost-of-living crisis' (2023), available at <https://portal.research.lu.se/en/publications/greedflation-competition-law-and-the-cost-of-living-crisis>.

²⁷OECD 'Measuring well-being and progress', available at <https://www.oecd.org/en/topics/measuring-well-being-and-progress.html>.

²⁸The Brundtland Report defined 'sustainable development' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs': World Commission on Environment and Development (WCED) 'Our common future (Brundtland Report)' (1987), available at <https://www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html>. Also see A Jansen et al 'A synthesis of beyond GDP metrics for wellbeing, inclusion, and sustainability: including a deep-dive into EU metrics and their role in governance' (WISE Horizons, 2023), available at <https://wisehorizons.world/cms/wp-content/uploads/2023/09/Review-of-metrics.pdf>.

²⁹According to the OECD, inclusive economic growth is defined as economic growth distributed fairly across society and creates opportunities for all: OECD 'Well-being and beyond GDP', available at <https://www.oecd.org/inclusive-growth>.

³⁰Ezrachi et al, above n 24, at 67; L Kaplow *On the Choice of Welfare Standards in Competition Law* (Harvard John M Olin Discussion Paper Series, No 693, May 2011); O Brook *Non-competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge: Cambridge University Press, 2022). Also see Lianos, above n 20.

political mandate, scholars have argued that competition authorities should refrain from making such value-laden judgements, especially those involving distributional outcomes.³¹

Secondly, given that the enforcement of the competition law prohibitions often takes place in an ex post and retrospective manner, companies must be able to self-assess their conduct. Introducing broad public policy considerations to the competition law assessment may create considerable legal uncertainty and unpredictability as to the scope of the antitrust prohibitions, and the remedies imposed.³²

Thirdly, critics argue that using competition law to pursue social or environmental objectives risks diluting its original purpose, and undermining its effectiveness and legitimacy.³³ Therefore, they suggest that competition law should focus on ensuring competitive markets and structures, rather than being redirected to serve broader policy agendas.

Finally, it is frequently argued that competition law is simply not an effective legal instrument for addressing societal challenges, which are more appropriately tackled through taxation, welfare, or labour provisions. Accepting restrictions to competition to advance other public policy objectives, it is submitted, is likely to result in anti-competitive side effects such as granting monopolistic profits to certain firms.³⁴

While these risks of incorporating broader considerations into the *substantive* competition law assessment merit careful consideration, this paper argues that they do not preclude adopting a more socially responsive approach to *priority-setting*. As elaborated in Section 3 below, integrating distributional concerns into enforcement priorities falls within competition authorities' administrative discretion, guiding the strategic allocation of limited resources without necessitating changes to the legal framework.

2. Prevailing approach to priority-setting: reactive, insulated, and consumer welfare centric

Competition authorities operate under significant constraints, with limited financial and human resources preventing them from pursuing every potential infringement. Estimates suggest that over 90% of anti-competitive conduct remains undetected, not investigated, or unresolved.³⁵ As a result, the ability to set enforcement priorities – deciding which cases to investigate and which to disregard – is both a practical necessity and a core feature of their independence.³⁶ Priority-setting serves a double function. First, it is instrumental in *preserving scarce public resources* by channelling enforcement toward the most harmful law infringements. By choosing which cases to pursue, authorities focus on issues of genuine economic and doctrinal importance, shaping competition policies and contributing to credible and effective enforcement.³⁷ Secondly, it is an essential mechanism of *norm concretisation*. Given the open-textured and broadly framed nature of many competition law prohibitions, prioritisation decisions clarify and give content to abstract legal standards. As such, the discretionary powers involved in setting priorities are an expression of technocratic, expert decision-making that fundamentally shapes the meaning and boundaries of competition law.³⁸

³¹M Bovens and T Schillemans 'Non-majoritarian institutions and representation' in R Rohrschneider and J Thomassen (eds) *The Oxford Handbook of Political Representation in Liberal Democracies* (Oxford: Oxford University Press, 2020) pp 517–518.

³²RH Bork *The Antitrust Paradox* (Keswic, VA: Bork Publishing, 2021) p 5; O Odudu *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford: Oxford University Press, 2006) pp 171–172.

³³Odudu, *ibid*, pp 172–173.

³⁴OECD 'The objectives of competition law and policy – note by the secretariat' (2003) p 4, available at [https://one.oecd.org/document/CCNM/GF/COMP\(2003\)3/En/pdf](https://one.oecd.org/document/CCNM/GF/COMP(2003)3/En/pdf).

³⁵S Davies and P Ormosi 'The impact of competition policy – what are the known unknowns?' CCP Working Paper 13-7 (2013); E Combe and C Monnier 'Fines against hard core cartels in Europe: the myth of overenforcement' (2011) 56 *Antitrust Bulletin* 235.

³⁶O Brook and KJ Cseres 'Priority setting as the blind spot of administrative law enforcement: a theoretical, conceptual, and empirical study of competition authorities in Europe' (2024) 87 *Modern Law Review* 1209 at 1226–1230.

³⁷*Ibid*, at 1211.

³⁸*Ibid*, at 1255.

This section shows that, despite its significance and increasing calls to incorporate broader policy concerns in the enforcement of competition rules, the process of priority-setting has largely been approached as a technical-administrative exercise, rather than as a matter for normative debate or democratic deliberation. In practice, prioritisation tends to be: (i) reactive in nature; (ii) disconnected from meaningful stakeholder participation; and (iii) narrowly focused on consumer welfare.

(a) Reactive priority-setting

While many competition authorities enjoy priority-setting powers, in practice a significant proportion of their enforcement activity is reactive, driven by complaints from competitors (and only occasionally from consumer organisations), leniency applications by firms seeking immunity in exchange for cartel disclosures, and whistleblowing.³⁹ The proactive initiation of ex officio investigations by competition authorities, by comparison, remains scarce.

Reactive priority-setting means that the potential impact of competition law interventions on markets, competition, and society at large is not systematically taken into account when allocating enforcement resources.⁴⁰ Reactive priority-setting has been associated with adverse distributional effects; while complaints and leniency applications are important tools for detecting otherwise hidden anti-competitive conduct, they also tend to focus the enforcement efforts on a relatively narrow range of anti-competitive behaviours, which do not necessarily represent the most serious societal harm. Empirical studies have shown that many cartel cases revealed through leniency applications were already failing or causing limited harm by the time they came under enforcement scrutiny.⁴¹ Similarly, complaints often serve to protect large competitors rather than the interests of final consumers.⁴²

In such contexts, enforcement risks functioning primarily as a means of disciplining competitors, rather than protecting consumers, workers, and underrepresented or marginalised groups, prompting questions about the alignment of enforcement priorities with broader societal goals. These concerns were highlighted, for example, by the EU's 2020 Courts of Auditors Report, warning that while the European Commission should prioritise cases with the highest potential impact on the internal market and consumers, 'no clear weighted criteria' ensures the selection of such cases.⁴³

(b) Insulated priority-setting: limited involvement of key stakeholders

The power to set priorities is a key expression of this independent, expert decision-making of competition authorities. Designed to operate independently from political influence, competition authorities were established on the premise that technocratic expertise and economic reasoning would ensure objective and efficient enforcement.⁴⁴ The importance of their independence is further reinforced by the

³⁹O Brook 'Do EU and UK antitrust "bite"?: A hard look at "soft" enforcement and negotiated penalty settlements' (2023) 68 Antitrust Bulletin 477.

⁴⁰ICN 'Agency effectiveness: competition agency practice manual' (2010) p 29, available at <https://perma.cc/N9QA-NB77>. Also see ICN 'Report on the 2009 seminar on competition agency effectiveness' (2009), available at <https://perma.cc/P3ER-4X47>; LO Blanco and AL De Pablo 'EU competition law enforcement: elements for a discussion on effectiveness and uniformity' (2012) Fordham 38th Conference of International Antitrust Law & Policy 45 at 60–61.

⁴¹A Stephan 'An empirical assessment of the European leniency notice' (2009) 5 Journal of Competition Law & Economics 537 at 559.

⁴²HW Friederiszick and FP Maier-Rigaud 'Triggering inspections ex officio: moving beyond a passive EU cartel policy' (2008) 4 Journal of Competition Law & Economics 89 at 98; WPJ Wils 'Discretion and prioritisation in public antitrust enforcement, in particular EU antitrust enforcement' (2011) 34 World Competition 378 at 379.

⁴³Court of Auditors 'Special Report No 24-2020 The Commission's EU merger control and antitrust proceedings- a need to scale up market oversight' (2020) paras 37–38.

⁴⁴C Koop and J Jordana 'Regulatory independence and the quality of regulation' in M Maggetti et al (eds) *Handbook of Regulatory Authorities* (Cheltenham: Edward Elgar, 2022); M Maggetti 'Independent regulators in the post-delegation stage' in Maggetti et al (eds) *ibid.* On the historical development of competition authorities' independence, see Brook and Cseres, above n 36, at 1210–1212.

complex technical assessments and normative decisions they must undertake, based on open-ended legal norms, without fixed or clear legal standards. Competition authorities function as quasi-judicial bodies, requiring strong independence alongside internal accountability. Unlike sectoral regulators, which typically have broader discretionary powers when interpreting and applying the rules, competition authorities are strictly bound by a narrower legal mandate and more confined procedural rules.⁴⁵ Tasked with safeguarding market actors' rights, their impartiality and legal integrity depend on institutional independence as a foundational principle.⁴⁶ Independence, understood as structural insulation from both government and politics, is widely regarded as essential to protect competition authorities from the inherently anti-competitive tendencies of populist pressures and political self-interest. In organisational terms, this model of independence has become the dominant global paradigm for structuring competition authorities over the past three decades.⁴⁷ Once competition policy is articulated through legislation and delegated to specialised bodies, its implementation is expected to rest with expert, independent authorities capable of grasping the economic intricacies of market competition and ensuring a credible commitment to free and fair competition. In the EU, the ECN+ Directive of 2019 emphasises the importance of protecting the national competition authorities of the EU Member States against external intervention or political pressure that is liable to jeopardise their independent assessment of the matters before them.⁴⁸

Despite the theoretical importance of independent competition authorities, in practice, the nature and degree of independence of each competition authority vary considerably, depending, inter alia, on the constitutional structure of each jurisdiction and the level of development of its competition law and culture.⁴⁹ In practice, de facto independence depends on a range of factors, most notably the agency's institutional status and resource endowments, the scope of its regulatory powers, and the cultural and constitutional constraints within which it operates.⁵⁰

Priority-setting is an important manifestation of the autonomy of the administrative decision-makers to choose among different enforcement paths when concretising legal norms, in pursuit of the objectives those norms prescribe. Priority-setting reflects how authorities make informed, principled, and context-sensitive decisions about where to intervene and why.⁵¹ It is a practical tool for managing limited resources, and this discretionary power is essential in regulatory contexts, where not every potential infringement can or should be pursued.⁵² Owing to their highly discretionary nature, prioritisation decisions typically involve an informal and opaque process. In many jurisdictions, competition authorities are under no legal obligation to publish, reason, or systematically evaluate their prioritisation decisions.⁵³

Yet, the delegation of power to independent expert bodies, though designed to ensure impartiality, carries its own set of risks. Independence may create remoteness, diminishing social understandings of the competition law system and raise concerns about political accountability and the legitimacy of

⁴⁵OECD 'Independent sector regulators – OECD Background Note' DAF/COMP/WP2 (2019) p 3.

⁴⁶Quasi-constitutional economic rights, such as the freedom of enterprise and consumer choice, originate from a private law tradition, particularly in Germany, where competition law was seen as protecting individual rights and economic liberties: D Gerber *Law and Competition in Twentieth Century Europe* (Oxford: Oxford University Press, 1998) p 286.

⁴⁷I Maher 'The institutional structure of competition law' in MW Dowdle et al (eds) *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (Cambridge: Cambridge University Press, 2013) p 55.

⁴⁸Directive (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 of EU competition law [2019] OJ L 11/3, Recital 17.

⁴⁹M Guidi *Competition Policy Enforcement in EU Member States: What is Independence For?* (London: Springer, 2016). Also see OECD 'Independence of competition authorities – from design to practice – background paper by the Secretariat (2016), available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/10/independence-of-competition-authorities-from-design-to-practice_c5d776dc/ea9749e1-en.pdf.

⁵⁰Maher, above n 47, p 62.

⁵¹Brook and Cseres, above n 36, at 1210–1212.

⁵²Ibid.

⁵³Ibid, at 1210–1211, 1245–1245.

decision-making.⁵⁴ The highly technical and often opaque implementation of competition law can undermine its perceived legitimacy, appearing at odds with broader societal, business, and political conceptions of the market–state relationship.

Accordingly, the strong emphasis on competition authorities' independence implicates limited accountability mechanisms, leaving little room for both internal and external controls through parliaments, oversight by other regulatory bodies or networks, and engagement with the broader public.⁵⁵ As elaborated in Section 4 below, while some competition authorities conduct occasional public consultations or roundtables when adopting, assessing, or revising their enforcement priorities, these are often ad hoc and not institutionalised. Few, if any, authorities maintain permanent citizen panels or provide structured participation avenues for engagement with civil society organisations, particularly those representing the interests of marginalised or disadvantaged groups.⁵⁶ Emphasising the independence of competition authorities often comes at the expense of public participation, limiting broader societal input into enforcement priorities that directly affect the public interest. As we further examine in Section 3 below, the risks associated with such independence and the greater scope for discretionary action may be mitigated through alternative accountability mechanisms that ensure that the authority remains credibly committed both to government policy objectives and to the genuine promotion of economic competition. Such mechanisms can confine, structure, and check the exercise of such discretion, which also aligns with the theory of responsive regulation.⁵⁷

(c) *Consumer-welfare-centric priority-setting*

Many competition authorities are not bound by a clear set of rules for selecting priority areas or specific cases. Moreover, there are no best practices or clear rules for measuring what constitutes a 'good' allocation of enforcement efforts.⁵⁸ Even where prioritisation principles exist, they tend to emphasise operational and evidentiary considerations, such as the likelihood of proving an infringement, the need for legal precedent, or the availability of investigative resources. Some jurisdictions have adopted more substantive criteria, typically focusing on the gravity or seriousness of the infringement, the impact of the conduct on competition, the functioning of the economy or market, or on consumer welfare.⁵⁹

By contrast, prioritisation is rarely informed by broader societal concerns, or the differentiated impact of enforcement on people across demographics, including gender, race, income, and social background. Competition authorities seldom examine how their interventions affect vulnerable or marginalised groups, who often bear the greatest burdens of market failures yet remain structurally underrepresented in enforcement processes. Competition law enforcement thus appears to focus only on 'the size of the (consumers') pie, not about how the pie is divided'.⁶⁰

The prevailing consumer-welfare-centric approach to competition law enforcement, which has dominated across many jurisdictions over the past three decades, frames prioritisation around the promotion of economic efficiency.⁶¹ Under this paradigm, consumer welfare, typically measured through price effects in narrowly defined markets, serves as the primary benchmark for enforcement.⁶² This reflects a particular normative vision of the market that privileges the interests of active consumers directly affected by the conduct in question, while sidelining economically inactive individuals and overlooking the differentiated impact of market practices across social groups.⁶³

⁵⁴Maher, above n 47, p 63.

⁵⁵Brook and Cseres, above n 36, at 1252–1255.

⁵⁶Cseres, above n 14.

⁵⁷Cf R Baldwin et al *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 2011) p 264; Maher, above n 47, p 63.

⁵⁸Also see Section 4 below.

⁵⁹Brook and Cseres, above n 36, at 1248–1249.

⁶⁰Broulík and Cseres 'Introduction' in Cseres and Broulík, above n 17, p 5.

⁶¹Posner above n 11; Melamed and Petit, above n 11; OECD, above n 1, p 11.

⁶²OECD, above n 1, pp 12–13.

⁶³See Section 1 above.

The consumer-welfare approach to prioritisation does not distinguish between the type of products or services subject to an investigation, ie whether competitive harm is taking place in essential product markets or those involving luxury products.⁶⁴ From a purely mathematical calculation, reducing the prices of luxury products mostly consumed by high-income consumers may produce higher welfare gains in comparison to a smaller decrease in the price of a first-necessity good.⁶⁵ Using consumer-welfare-focused prioritisation could mean, therefore, that a competition authority focuses its efforts on reducing the price of Rolex watches rather than bread.⁶⁶ This is well illustrated in the investigations of the European Commission and several of the EU Member States' competition authorities involving luxury goods.⁶⁷

Nevertheless, evidence shows that the burden of market failures, and, conversely, the benefits of competition enforcement, are not distributed evenly. Sectors that are crucial to the daily lives and well-being of marginalised and vulnerable communities⁶⁸ often remain under-enforced, although such groups suffer disproportionately from anti-competitive practices in essential sectors such as food, healthcare, education, housing, and energy.⁶⁹ Vulnerable consumer groups often face what has been termed the 'poverty premium': they pay more for basic goods and services, have fewer choices, and are more exposed to exploitative or exclusionary practices.⁷⁰ According to the 2022 Eurobarometer surveys, for example, over half of the EU citizens (54%) reported experiencing problems arising from a lack of competition – such as higher prices, less choice or lower quality. Concerns were most acute in many of the sectors that are likely to disproportionately affect vulnerable citizens and those of marginalised ethnic or social groups, including energy (27%), food retailing (20%), telecommunication and Internet access (18%) transport (18%), pharmaceuticals (15%), education and human services (eg healthcare) (12%) and financial services (10%).⁷¹

Contrary to competition law, various sector-specific regulators have developed clear and operational definitions of vulnerability to inform their enforcement and policy decisions. When acting as the consumer protection regulator, for example, the UK Competition and Markets Authority (CMA) defines consumer vulnerability in a broad sense, referring to 'any situation in which an individual may be unable to engage effectively in a market and as a result, is at a particularly high risk of getting a poor deal'.⁷² It distinguishes between 'vulnerability associated with personal characteristics' (eg physical disability, poor mental health or low incomes) and 'market-specific vulnerability', which derives from the specific context of particular markets (eg purchases that ought to be made at a stressful time, or when the value of a product involves complex estimations of risk or probability). Along these lines, many British sector regulators adjust their interventions to meet the needs of 'vulnerable citizens', defined as people who are significantly less able to protect their interests in markets, and/or significantly more likely to suffer substantial harm.⁷³ Similarly, the European Commission refers to five sets of drivers of vulnerability in

⁶⁴Costa-Cabraland Nowag above n 26, p 6.

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷See, for example, the Commission's decision of October 2025 fining Gucci, Chloé and Loewe over €157 million for anticompetitive resale price maintenance practices. See Commission's Press Release IP/25/2361 of 14 October 2025, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2361. For an overview of these cases, see F Carloni et al 'Survey – competition law enforcement in the fashion and luxury sector' (2023) 14 Journal of European Competition Law & Practice 52.

⁶⁸The concept of vulnerable and disadvantaged consumers was granted different meanings across various disciplines. See P Cartwright 'Understanding and protecting vulnerable financial consumers' (2015) 38 Journal of Consumer Policy 119; C Riefa and S Saintier 'In search of (access of justice) for vulnerable consumers' in C Riefa and S Saintier (eds) *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (Abingdon: Routledge, 2020) pp 6–8.

⁶⁹JB Baker and SC Salop 'Antitrust, competition policy, and inequality' (2015) 104 Georgetown Law Journal Online 1; Ezrachi et al, above n 24; Capers and Day, above n 23.

⁷⁰European Commission 'Consumer vulnerability across key markets in the European Union' (2016), available at <https://op.europa.eu/en/publication-detail/-/publication/79b42553-de14-11e6-ad7c-01aa75ed71a1>.

⁷¹European Commission, 'Flash eurobarometer 511: citizens' perceptions about competition policy' (October 2022) p 4, available at <https://europa.eu/eurobarometer/surveys/detail/2654>.

⁷²Ibid.

⁷³National Audit Office 'Vulnerable consumers in regulated industries' (2017) p 6, available at <https://www.nao.org.uk/reports/vulnerable-consumers-in-regulated-industries/>.

its consumer protection efforts, including personal and demographic characteristics; behavioural and characteristics (eg the degree of impulsivity or trust); market-related; access (eg access to internet search); and situational (eg finding it hard to make ends meet).⁷⁴

To conclude, the characteristics of reactive, institutionally insulated, and consumer-welfare-centric priority-setting may lead to case selection practices that either reinforce or mitigate existing social and economic inequalities,⁷⁵ even when framed as a neutral and technical process. In the absence of responsiveness to broader societal needs, competition authorities make decisions with significant distributive consequences – shaping the concentration of wealth and power, and affecting workers, users, and consumers – without the democratic safeguards of representation, transparency, or accountability.⁷⁶ These dynamics raise concerns regarding the legitimacy of competition enforcement, particularly as its expanding political influence increasingly bypasses traditional democratic mechanisms and may not reflect the preferences of political majorities.⁷⁷

3. The potential of responsive priority-setting

Thus far, academic and policy discussions have mostly focused on the interpretation and reform of the *substantive* competition law prohibitions and exceptions in line with a broader economic, social, and democratic vision of competition law.⁷⁸ While some initial suggestions were advanced for inclusive priority-setting,⁷⁹ and in particular shifting to a vulnerable consumer standard when setting enforcement priorities,⁸⁰ those studies do not engage with how the substantive prioritisation choices and the procedural and institutional aspects of prioritisation can be re-thought. This section draws on Ayres and Braithwaite's theory of responsive regulation and enforcement⁸¹ and the theory of social accountability⁸² to offer an approach to responsive priority-setting for competition law.

The theory of responsive regulation is primarily built around the relationship between regulator and regulatee, but it also broadens the perspective to a wider set of stakeholders. It expands the regulatory perspective, introducing flexibility and responsiveness to the social objectives within regulated sectors. The theory suggests that governance should be responsive both to the regulatory environment and to the conduct of the regulated when deciding whether a more or less interventionist response is appropriate.⁸³ While not offering a 'tightly prescriptive theory',⁸⁴ the notion of responsiveness has direct implications for priority-setting, as it calls on law enforcers to assess how effectively citizens or corporations are self-

⁷⁴European Commission, above n 70.

⁷⁵Cseres and Broulik, above n 17.

⁷⁶Bovens and Schillemans, above n 31.

⁷⁷F Vibert *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge University Press, 2009).

⁷⁸See Section 1 above.

⁷⁹Baker and Salop, above n 69, at 18–20; OECD, above n 27, p 26; E Santacreu-Vasut and C Pike 'Competition policy and gender' (2018) OECD Global Forum on Competition Policy and Gender 30, available at <https://doi.org/10.2139/ssrn.3487471>; Posner and Sunstein, above n 10, at 200; G Dibb and T Valletti 'Fair play: how competition policy can drive growth' Institute for Public Policy Research Paper (2025), available at https://ippr-org.files.svdcn.com/production/Downloads/Fair_play_May25.pdf?dm=1747212831.

⁸⁰Costa-Cabral and Nowag, above n 26, pp 9–10; Ezrachi et al, above n 24.

⁸¹I Ayres and J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1995).

⁸²M Righettini and S Grimaldi 'Social accountability in the regulatory policy process: the governance of telecommunications in Italy and Spain' in AC Bianculli et al (eds) *Accountability and Regulatory Governance* (London: Palgrave Macmillan, 2015); G Nesti 'Strengthening the accountability of independent regulatory agencies: From performance back to democracy' (2018) 16 Comparative European Politics 464.

⁸³J Braithwaite 'Types of responsiveness' in P Drahos *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017) p 117.

⁸⁴*Ibid*, p 129.

regulating before escalating intervention.⁸⁵ Importantly, responsiveness sees regulation not just as a matter of punishment or deterrence, but as an interactive process between regulator and society, impacting when and how to enforce the law.

Accordingly, regulators can select from a range of enforcement strategies, tailoring their approach to specific contexts. While the theory is aimed at improving regulatory effectiveness and efficiency, its deeper relevance here lies in enhancing the legitimacy of regulatory authorities, and priority-setting in particular. By consulting stakeholders, independent regulators, like competition authorities, become more transparent and accessible. While they remain unelected, such engagement improves their accountability, encouraging stakeholders to understand and assess their role in the economy.⁸⁶

One aspect of responsive regulation is that markets can be controlled and regulated, not just for economic efficiency, but to actively reduce domination and promote social outcomes. This involves using a range of regulatory tools, including state power and market-based mechanisms, to achieve outcomes beyond simple compliance, often incorporating ‘socialist responsiveness’ through the inclusion of diverse stakeholders in the regulatory process.⁸⁷

In particular, this element of responsive regulation incorporates tripartite arrangements for market governance by involving public interest groups, such as consumer organisations, as third actors alongside regulators and regulatees.⁸⁸ A responsive approach encourages competition authorities to move beyond a narrow, dyadic relationship between regulator and regulatee, and to engage a broader range of relevant stakeholders, including civil society, industry actors, and affected communities. Such an approach can enhance the legitimacy, adaptability, and accountability of regulatory decision-making by grounding it in a more inclusive and participatory process.⁸⁹ Originally developed to counter regulatory capture and corruption, *tripartism* empowers these groups to monitor firms and hold regulators accountable. They are granted access to the same information as regulators, a seat at the table, and, in some cases, the right to initiate legal action, adding an important layer of oversight that reinforces compliance and transparency.⁹⁰ Indeed, Braithwaite viewed responsive regulation not only as a theory of regulatory enforcement, but also as ‘a democratic ideal, incorporating notions of deliberative democracy and restorative justice’.⁹¹

The broad objectives and open-textured norms of competition law create space for *socialist responsiveness*, enabling market oversight to adapt to emerging societal challenges.⁹² This flexibility is reinforced by the enforcement framework, which grants competition authorities a high degree of discretion and independence in setting their enforcement priorities and applying the rules in each case. Such discretion lies at the heart of the responsive regulatory approach, allowing authorities to tailor their interventions to context and evolving circumstances.⁹³

We argue that responsive priority-setting could offer a foundational mechanism for embedding *responsiveness* throughout the enforcement process. It could enable competition authorities to tailor their enforcement efforts in ways that are both anticipatory and reflexive, responding not only reactively to past violations but also to emerging risks, structural harms, and public concerns. As such, it operationalises responsiveness at the earliest stage of enforcement by guiding where attention and resources are directed, embedding enforcement within a cycle of feedback, learning, and recalibration.

⁸⁵Ibid, p 117.

⁸⁶Bovens and Schillemans, above n 31.

⁸⁷Braithwaite, above n 83, p 127.

⁸⁸I Ayres and J Braithwaite ‘Tripartism: regulatory capture and empowerment’ (1991) 16 Law & Social Inquiry 435; M Ioannidou ‘Responsive remodelling of competition law enforcement’ (2020) 40 Oxford Journal of Legal Studies 846.

⁸⁹Ioannidou, *ibid*; W Sauter ‘Responsive competition law’ (2024) 3(4) European Law Open 1, at 4, 7, 24–25.

⁹⁰Ibid.

⁹¹J Braithwaite ‘Responsive regulation and developing economies’ (2006) 34 World Development 884.

⁹²Sauter, above n 89, at 2; S Makris ‘EU competition law as responsive law’ (2021) 23 Cambridge Yearbook of European Legal Studies 228.

⁹³Baldwin et al, above n 57, p 264.

This model is particularly relevant for competition authorities, who often operate without direct democratic accountability. Mechanisms such as stakeholder consultations, formal complaints, participation in market studies, and public hearings enable authorities to become more transparent, accessible, and socially embedded. While such stakeholders lack direct control over decision-making, their involvement strengthens *social accountability*, allowing affected groups to understand, interrogate, and evaluate regulatory choices. In this way, responsive regulation enhances not only enforcement effectiveness but also the democratic legitimacy of technocratic governance.⁹⁴ Responsive regulation can enhance democratic legitimacy within technocratic governance by embedding social accountability into regulatory practice,⁹⁵ not by politicising competition authorities, but by expanding accountability beyond formal legal or political channels, through civil society engagement and transparent decision-making.

As competition authorities' mandates remain framed in economic terms, they cannot openly balance political values without risking accusations of politicisation or erosion of democratic legitimacy. Preserving their independent expertise must therefore go hand in hand with stronger mechanisms of accountability and responsiveness to democratic demands.

Yet, given the inherent tension between accountability and outcome-oriented performance, participatory and deliberative practices may compromise efficiency and credibility by increasing political transaction costs. Consequently, marginal or purely procedural accountability is unlikely to secure genuine legitimacy.⁹⁶

We suggest that responsive priority-setting, a proactive and participatory approach that incorporates broader economic, social, and democratic concerns beyond a consumer welfare focus – offers a pragmatic way to address the challenges of expanding competition law's substantive scope (as outlined in [Section 2](#)). This approach operates within the bounds of existing administrative discretion and does not require changes to the current substantive, procedural, or institutional frameworks, while addressing time constraints and efficiency shortcomings.

First, priority-setting is an expression of administrative discretion that reflects the expertise and institutional autonomy of competition authorities. Rather than undermining independence, a transparent, principled approach based on a broader vision of competition law and strict adherence to fair and open procedures⁹⁷ can enhance accountability by clarifying the values guiding enforcement decisions, making them clearer to the public and more resistant to claims of arbitrariness. Competition law enforcement must be responsive and accountable upwards (to courts, parliaments, or governments) and downwards to broader society (consumer and civil society organisations, citizens) while not overburdening the enforcement, hence remaining independent, time-efficient and effective.⁹⁸ Such responsiveness should be 'confined, structured, and checked' by generating a set of rules and guidelines for exercising their discretion,⁹⁹ which are further elaborated in [Section 4](#) below.

Secondly, priority-setting is often operationalised through soft law instruments, such as press releases or notifications published by the competition authorities, which offer flexibility that is not available in formal-substantive legal provisions. Soft law priority-setting instruments allow competition authorities to respond adaptively to evolving societal expectations without sacrificing legal certainty in the application of the substantive competition law rules.¹⁰⁰

Thirdly, setting enforcement priorities does not require the adoption of pre-determined balancing tests. Instead, they can offer a responsive and context-specific approach to identifying when and where

⁹⁴Bovens and Schillemans, above [n 31](#), p 522.

⁹⁵Nesti, above [n 82](#), p 468.

⁹⁶M Maggetti 'Legitimacy and accountability of independent regulatory agencies: a critical review' (2010) *Living Reviews in Democracy* 2.

⁹⁷Maher, above [n 47](#), p 64.

⁹⁸Cseres, above [n 4](#).

⁹⁹Cf Baldwin, above [n 57](#), p 264.

¹⁰⁰Cf K Gelber 'Capabilities and the law' in E Chiappero-Martinetti et al (eds) *The Cambridge Handbook of the Capability Approach* (Cambridge: Cambridge University Press, 2020) p 649.

distributional concerns merit enforcement attention, while continuing to apply the existing substantive legal tests. As noted, the *ex post* and self-assessment nature of competition law enforcement necessitates a clear and predictable delineation of the role of non-competition interests, to provide legal certainty for firms evaluating the compliance of their conduct. In contrast, embedding broader economic, social, and democratic concerns into the priority-setting process does not require altering the interpretation of the prohibitions themselves, only a shift in enforcement focus. This approach preserves legal predictability while enabling a more nuanced and equitable allocation of enforcement resources.

Fourthly, incorporating broader economic, social, and democratic concerns into priority-setting can bridge the gap between supranational competition policies and socio-economic realities at the national level. While many competition authorities are bound by the same substantive provisions (eg as part of a transnational competition regime such as the EU, the Common Market for Eastern and Southern Africa, the Association of Southeast Asian Nations, or due to voluntary convergence), they retain significant discretion in determining which cases to investigate and how to allocate enforcement efforts. Such discretion allows competition authorities to tailor their priorities to reflect local needs and pressing socio-economic challenges of their national constituencies, something that cannot be easily achieved through uniform substantive standards. Importantly, these authorities operate within different varieties of capitalism, shaped by distinct political, spatial, and social ideologies regarding the relationship between markets and society.¹⁰¹

A responsive approach embeds social accountability by ensuring that enforcement strategies are responsive to the diverse economic and social conditions of each country and the lived experiences of its citizens. In the EU, for example, while all of the Member States' national competition authorities have the obligation to apply the substantive provisions of Articles 101 and 102 TFEU where a conduct may affect trade between Member States, they have the power and mandate to adopt their own priority-setting rules and practices. Such rules and practices considerably diverge in practice, both in terms of the procedure for priority-setting and the choice of cases.¹⁰²

Broader economic, social, and democratic concerns should be integrated into priority-setting frameworks because, as demonstrated above, enforcement decisions inevitably have distributional consequences, even when such objectives are not explicitly considered. Ignoring these effects does not eliminate them; it simply conceals their impact and perpetuates existing inequities. As (now former) FTC Commissioner Rebecca Kelly Slaughter aptly noted in the context of racial inequality and antitrust enforcement: '[p]retending that antitrust is neutral won't make it so ... you are necessarily picking winners and losers when you do any enforcement or fail to do any enforcement. And I'd rather that we be aware of who those winners and losers are and what effect our enforcement decisions have on them on sort of greater economic structure'.¹⁰³

Finally, while the priority-setting of competition authorities is often portrayed as a space of autonomous decision-making, in practice the agency of these authorities is considerably constrained by legal mandates, political pressures, resource limitations, and institutional frameworks. While they have discretion to interpret and enforce competition law, their mandates remain narrowly defined in economic terms, limiting the extent to which they can openly consider broader societal or political values. Attempts to balance opposing objectives, such as efficiency, consumer welfare, and social values, worker welfare, sustainability or digital democracy, must operate within these legal and procedural boundaries. Overestimating their agency risks assuming that authorities can resolve complex societal conflicts independently, when in reality they are embedded in a network of formal and informal accountability mechanisms, 'embedded independence'.

¹⁰¹Foster and Thelen, above n 2.

¹⁰²For an empirical overview, see Brook and Cseres, above n 36.

¹⁰³Interview with FTC Commissioner Rebecca Kelly Slaughter in Rosa Morales 'Can antitrust enforcement be a tool for racial equity?' (2020), available at <https://www.crowell.com/a/web/rxBPtcscfdxk5cWLNWjiQp/4Ttkbx/20210330-can-antitrust-enforcement-be-a-tool-for-racial-equity.pdf>

Politicisation becomes a concern when authorities appear to overstep or align too closely with government priorities, yet avoiding it does not absolve them from considering the broader consequences of their enforcement choices. Transparent decision-making, stakeholder engagement, and responsive mechanisms can allow authorities to reflect societal interests without compromising independence. In concrete cases, balancing conflicting objectives often requires careful proportionality analysis and public justification. Ultimately, competition authorities operate at the intersection of law, economics, and politics, constrained in their discretion but pivotal in shaping market outcomes and societal welfare.

4. Typology of responsive priority-setting

This section demonstrates how priority-setting can become more responsive, by focusing on four aspects of prioritisation: enforcement agenda; the substantive criteria for prioritisation; impact assessment of prioritisation decisions; and the procedure for setting enforcement priorities.¹⁰⁴

(a) Enforcement agenda

An enforcement agenda refers to a structured and publicly communicated set of priorities adopted by a competition authority to guide its enforcement activities over a defined period –typically annually or as part of a multi-year strategic plan. Also described in some jurisdictions as an action plan, work programme, or strategy statement, such an agenda outlines specific sectors (eg agriculture, food, healthcare) or forms of anti-competitive conduct (eg cartels or bid-rigging) that the authority intends to prioritise for intervention.¹⁰⁵

The adoption of an enforcement agenda represents a proactive and strategic approach to enforcement. Rather than relying solely on external triggers, such as complaints or leniency applications, an enforcement agenda empowers the authority to focus its limited resources on issues with the greatest potential economic and social impact. It serves as a decision-making framework for determining when to initiate ex officio investigations, how to allocate enforcement tools, and whether to proceed with or dismiss complaints.

From a governance perspective, enforcement agendas enhance transparency and accountability by publicly signalling enforcement intentions to stakeholders, including businesses, government agencies, and civil society. This can deter anti-competitive conduct in prioritised areas and encourage compliance more broadly. Moreover, by aligning enforcement choices with broader economic, social, and democratic goals, agendas can become powerful tools for integrating competition law into a jurisdiction's inclusive and sustainable development strategy.

To date, much of the discussion on using enforcement agendas to advance broader economic, social, and democratic goals has centred on developing and emerging economies, where strategic prioritisation is often framed as a way to address entrenched structural inequalities. In this context, scholars have typically advocated for the prioritisation of markets that supply basic necessities (eg agriculture, education, and healthcare), as well as sectors that directly impinge on the well-being of the poor.¹⁰⁶

¹⁰⁴In Brook and Cseres, above n 36, we identified seven aspects of the priority-setting cycle, pointing to their role and effects in the pre-decision, decision, and post-decision stages. This section focuses on the aspects that are relevant to responsive priority-setting.

¹⁰⁵Ibid, at 1241–1242. The benefits of adopting an enforcement agenda were endorsed by the OECD in 'Communication by competition authorities: objectives and tools, OECD competition policy roundtable background note' (2023) pp 15–16, available at www.oecd.org/daf/competition/communication-bycompetition-authorities-objectives-and-tools-2023.pdf.

¹⁰⁶TK Cheng *Competition Law in Developing Countries* (Oxford: Oxford University Press, 2020) p 10; A Bhattacharjee 'Who needs antitrust?: Or, is developing-country antitrust different? A historical-comparative analysis' in D Sokol et al (eds) *Competition Law and Development* (Redwood City, CA: Stanford University Press, 2013). Also see O Brook and KJ Cseres 'Enforcement priorities in developing countries and economies in transition: the priority setting paradox' in J Nowag et al (eds) *Competition Law in Developing Countries* (Cheltenham: Edward Elgar, forthcoming).

Similarly, it has been argued that the stage of economic development should inform the design of the agenda. For instance, competition authorities in emerging economies should prioritise anti-bid-rigging in public procurement, address the conduct of state-owned enterprises, and tracking the liberalisation of key sectors to foster an open market economy.¹⁰⁷

However, tailoring enforcement agendas to reflect broader economic, social, and democratic concerns is equally relevant in developed economies. In particular, the adoption of an enforcement agenda can reflect a deliberate decision by a competition authority to address both *market outcomes* and *market access*:

First, authorities may prioritise sectors in which anti-competitive practices disproportionately affect low-income consumers – including essential services, agriculture, health,¹⁰⁸ transport,¹⁰⁹ and fuel¹¹⁰ – given the significant share of household expenditure they represent. Similarly, authorities might prioritise interventions in labour markets, especially those involving vulnerable groups or marked by pronounced race- or gender-pay gaps.¹¹¹ For example, in June 2025, the European Commission announced that it had imposed a €329 million fine on Delivery Hero and Glovo, two major players in the online food delivery sector, for participating in a cartel.¹¹² In addition to the harm caused to the welfare of consumers and business partners, the Commission found that the companies had breached EU competition law by agreeing not to hire or solicit each other's employees (a 'no-poach' agreement). This marks the first time that the Commission has chosen to intervene in labour markets under competition rules. The case signalled a change in EU competition policy, recognising that antitrust enforcement can also protect workers' rights and ensure fair labour market conditions, not just consumer welfare. In the words of Executive Vice-President Ribera, 'this investigation shows that competition rules aren't just about keeping prices down. They also protect our freedom to choose, including where we want to work'.¹¹³

Secondly, an enforcement agenda can target practices that impede access to markets for under-represented firms or individuals, such as women-led businesses that were found to face difficulties in accessing finance,¹¹⁴ access to digital platforms,¹¹⁵ or anti-competitive practices that limit future market access by members of society (unequal access to education and capital).¹¹⁶

Despite their potential benefits, enforcement agendas are under-utilised by many developed jurisdictions. In the EU, for example, less than half of the Member States have adopted enforcement agendas.¹¹⁷

(b) Substantive criteria for prioritisation

Competition authorities or legislators may also incorporate broader economic, social, and democratic concerns into the substantive criteria used to evaluate whether to pursue or disregard a specific potential

¹⁰⁷H Jennings 'Prioritisation in antitrust enforcement – a finger in many pies' (2015) 11 Competition Law International 29. Also see A Capobianco 'Procompetitive industrial policy – note by BIAC', submission to the OECD Competition Committee meeting on 12–14 June 2024, available at [https://one.oecd.org/document/DAF/COMP/WD\(2024\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2024)46/en/pdf).

¹⁰⁸Posner and Sunstein, above n 10, at 200.

¹⁰⁹Santacreu-Vasut and Pike, above n 79, p 12.

¹¹⁰PL Ormosi et al 'Do the poor pay disproportionately more for increasing market concentration? A study of retail petroleum markets' (2025) 73(1) Journal of Industrial Economics 70.

¹¹¹Posner and Sunstein, above n 10, at 200.

¹¹²European Commission 'Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel' Press Release IP/25/1356 (2 June 2025), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356.

¹¹³European Commission 'STATEMENT/25/1381 Remarks by Executive Vice-President Ribera on the adoption of a cartel settlement decision against Delivery Hero and Glovo' (2 June 2025), available at https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_25_1381/STATEMENT_25_1381_EN.pdf.

¹¹⁴OECD, above n 27, p 26; B Mkatshwa et al 'Prioritising gendered public interest considerations' OCED Gender Inclusive Competition Policy (2021) p 6, available at <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/gender-inclusive-competition-policy/gender-inclusive-competition-proj-6-prioritising-gendered-public-interest-considerations.pdf>.

¹¹⁵Santacreu-Vasut and Pike, above n 79, p 12.

¹¹⁶Ibid, p 4.

¹¹⁷Brook and Cseres, above n 36, at 1241–1242.

violation of the competition rules.¹¹⁸ Unlike the enforcement agenda, substantive criteria do not pertain to a sector or practice, but rather to the assessment of case-specific circumstances.

Setting substantive criteria for the selection of cases that are sensitive to economic, social, and democratic concerns streamlines the exercise of the competition authority's discretion and could encourage directing the enforcement efforts toward infringements that disproportionately harm vulnerable consumers or hinder equitable access to markets, thereby ensuring a more impactful and socially responsive use of limited resources. It prevents both under-enforcement (by encouraging enforcement in cases of societal impact) and over-enforcement (discouraging enforcing practices having only limited impact on consumers and markets, for example, concentrating public enforcement in luxury product markets).

Moreover, the publication of clear enforcement criteria can enhance both accountability and transparency. It requires each competition authority to articulate in advance its enforcement strategy, and helps insulate the authority from allegations of arbitrary or politically motivated enforcement by demonstrating that prioritisation is grounded in principled and publicly known standards.¹¹⁹ This can also mitigate concerns about the potential dilution of competition policy objectives by signalling that broader socio-economic factors are considered within a structured and rule-based framework, rather than being introduced opportunistically or inconsistently.

While many competition law systems are guided by substantive criteria when allocating enforcement efforts – whether adopted internally by the competition authority or externally mandated through national legislation – these frameworks often overlook the distributional impact of the intervention or its alignment with broader economic, social, and democratic goals. For example, our previous research indicates that although approximately three-quarters of EU Member States employ some form of prioritisation criteria, these are typically shaped by operational considerations (such as the availability and strength of evidence) or traditional economic metrics (such as the likely effect on market competition or consumer welfare). Broader public interest considerations, such as equity, inclusion, or sustainability, are rarely integrated into these formal frameworks.¹²⁰ In parallel, competition authorities in many developing countries and economies in transition often lack a mandate to exercise meaningful discretion over enforcement priorities altogether, and therefore have no substantive prioritisation criteria.¹²¹

Nevertheless, there are some notable exceptions. The Hellenic Competition Commission (HCC) has explicitly recognised the relevance of sustainability considerations in shaping its enforcement priorities, noting in a policy statement that '[s]ustainability concerns, as these are defined by the existing regulatory framework, can thus be conceived as forming part of a broader goal of systemic resilience that should frame the consideration of competition law enforcement priorities'.¹²² The authority stressed the importance of shifting consumer preferences towards more sustainable products, while 'keep[ing] an eye for distributional implications, as these consumers may also be among the poorest in society'.¹²³

An even more detailed integration of inclusive growth considerations into substantive prioritisation criteria can be observed in the recent guidelines adopted by the UK¹²⁴ and Dutch¹²⁵ competition authorities.

¹¹⁸Ibid.

¹¹⁹Ibid; Capobianco, above n 107, pp 5–6.

¹²⁰Brook and Cseres, above n 36, at 1241–1242.

¹²¹O Brook and KJ Cseres 'Competition law enforcement at a crossroad: setting enforcement priorities in the era of digital markets' (2025) 56 *International Review of Intellectual Property & Competition Law* 687.

¹²²Hellenic Competition Commission 'Contributing to the European Green Deal', contribution to the European Commission's consultation on Competition Policy Contributing to the European Green Deal (2020), available at https://competition-policy.ec.europa.eu/about/green-gazette/conference-2021_en.

¹²³Ibid.

¹²⁴CMA 'Prioritisation principles' (2023), available at https://assets.publishing.service.gov.uk/media/653f71b780884d0013f71cf4/CMA_Prioritisation_Principles_.pdf. Also see O Brook and KJ Cseres 'The CMA's new prioritisation guidelines: towards inclusive and sustainable growth?' *Kluwer Competition Law Blog* (2023), available at <https://competitionlawblog.kluwercompetitionlaw.com/2023/11/28/the-cmas-new-prioritisation-guidelines-towards-inclusive-and-sustainable-growth/>.

¹²⁵Beleidsregel Prioritering van handavingsonderzoeken door de Autoriteit Consument en Markt 2023, available at <https://wetten.overheid.nl/BWBR0048190/2023-05-26> (ACM Prioritisation Rules).

The UK CMA's Prioritisation Guidelines of 2023 marked a notable shift from a narrow consumer welfare focus that informed the previous guidelines,¹²⁶ toward a broader conception of public interest, explicitly referencing fairness, vulnerability, and regional disparities. This 2023 framework replaces references to 'consumers' with 'people', and frames the 'impact' of intervention not solely in terms of price or efficiency but also in relation to social harm, including 'physical harm, emotional distress or online harms (such as the misuse of personal data)'. The 2023 Guideline noted that the selection of enforcement targets aims to benefit 'people who need help the most', namely, to protect 'vulnerability' taking a 'range of forms'. The assessment of the strategic significance of a case was similarly broadened to include long-term goals such as empowering disadvantaged groups and supporting inclusive, sustainable economic growth. These prioritisation principles reflect the 2019 British Government's strategic steer to the CMA, noting that '[c]onsumer harm can be substantial when markets do not work well, with people in vulnerable situation in particular at risk of losing out', and directed the CMA to 'make markets work well for vulnerable consumers'.¹²⁷ Notably, these prioritisation guidelines do not seem to be in force following the UK Government's 2025 shift towards imposing stronger duties for regulators to ensure they better prioritise helping businesses go for growth.¹²⁸ This political agenda has led not only to changes in the CMA's leadership, but also to the adoption of the Annual Plan for 2025–2026 that declares that the CMA will give 'appropriate consideration to prioritising pro-growth and pro-investment interventions; focussing on markets and harms that particularly impact UK-based consumers and businesses; enhancing business and consumer confidence; and supporting growth and international competitiveness in the Industrial Strategy's eight key sectors'.¹²⁹

The Netherlands Authority for Consumers and Markets (ACM) adopted a similarly expansive approach in its 2023 Prioritisation Policy, recognising that 'competition is an economic process that promotes the achievement of certain social goals'.¹³⁰ It declares that it will prioritise cases based on 'whether, and if so to what extent, the potential breach is detrimental to the proper functioning of markets for people and businesses, in the short and longer term'.¹³¹ The guidelines introduce a three-fold prioritisation criteria, investigating: (i) the harm of the alleged anti-competitive conduct on the proper functioning of markets and the confidence of people and firms in markets. Such assessment is not limited to the harm caused to an 'average' or 'representative' market participants, and that it may prioritise cases having a relatively large impact on vulnerable or dependent groups of people or firms; (ii) the social interest in intervention, including in addition to market governance wider public interests such as sustainability, economic resilience, quality of care, privacy and safety; and (iii) the extent to which the authority would be able to act effectively (possible remedies) and efficiently (cost-benefit analysis), considering the authority's available resources and the wish to distribute its enforcement actions evenly.¹³²

¹²⁶CMA 'Prioritisation principles' (2014), available at <https://webarchive.nationalarchives.gov.uk/ukgwa/20150402051226/https://www.gov.uk/government/publications/cma-prioritisation-principles>.

¹²⁷UK Department for Business, Energy and Industrial Strategy 'The government's strategic steer to the Competition and Markets Authority' (2019), available at <https://assets.publishing.service.gov.uk/media/5d2f3e3ce5274a14ed4871b8/cma-strategic-steer.pdf>. For each Parliament, government issues a non-binding strategic steer to the CMA, intending to support the CMA in achieving its objectives and delivering real benefits for UK consumers and the UK economy.

¹²⁸See UK Department for Business and Trade Press Release of 21 October 2025 'Growth placed at the heart of regulators' remit alongside new measures to boost scrutiny and transparency', available at <https://www.gov.uk/government/news/growth-placed-at-the-heart-of-regulators-remit-alongside-new-measures-to-boost-scrutiny-and-transparency>.

¹²⁹CMA 'Annual Plan 2025 to 2026: promoting competition and protecting consumers to drive growth, opportunity, and prosperity for the UK of 27 March 2025', available at https://assets.publishing.service.gov.uk/media/67e408209c9de963bc39b4d4/Annual_Plan_2025_to_2026.pdf. For an overview of the political shift in the UK and its impact on the CMA, see 'Where is the CMA headed: a strategic shift towards growth and investment' *Bird & Bird* (15 July 2025), available at <https://competitionlawinsights.twobirds.com/post/102krml/where-is-the-cma-headed-a-strategic-shift-towards-growth-and-investment>.

¹³⁰ACM Prioritisation Rules, above n 125, Section 1

¹³¹*Ibid*, p 5.

¹³²*Ibid*, Sections 4–5.

In addition to adopting priority-setting policies that determine which cases to pursue, some competition authorities have also issued guidelines identifying categories of competition law violations that will not be subject to enforcement. These involve an explicit decision not to intervene against certain practices that, while potentially restrictive, serve other important social or policy objectives. For instance, the European Commission's 2022 Guidelines on collective agreements by solo self-employed persons state that it 'will not intervene' against certain anti-competitive collective agreements aimed at addressing bargaining power imbalances (eg structural disadvantages in negotiating their working conditions), even if they do not qualify for exemption under Article 101 TFEU.¹³³ Similar approaches were adopted by other competition authorities to support objectives, such as employment protection, sustainability, and during the COVID-19 pandemic – access to basic goods, services, and public health.¹³⁴

(c) Impact assessment of prioritisation decisions

A third avenue through which competition authorities can engage in responsive priority-setting is by embedding broader economic, social, and democratic concerns into their ex post impact assessments, that is, the periodic evaluation of enforcement actions and prioritisation decisions after they have been implemented.¹³⁵ Such assessments play a crucial role in ensuring that the competition authority's actions not only comply with legal mandates but also deliver tangible benefits to society. As a form of public reporting and budget scrutiny, impact assessments of priority-setting also function as 'fire alarms', enabling parliaments to intervene if competition authorities deviate from their mandate. Such assessments are particularly important given the institutional independence of competition authorities, which are subject to limited external oversight and scrutiny.¹³⁶

Despite the importance of such evaluations, ex post assessment of competition law interventions remains limited, especially when it comes to the justification and impact of prioritisation choices.¹³⁷ There are no internationally recognised standards for measuring the performance of a competition authority in general, and the allocation of enforcement priorities in particular.¹³⁸ The few impact assessments of prioritisation decisions often rely on basic quantitative indicators, such as the number of interventions per year, or on microeconomic metrics like consumer savings, typically calculated by estimating the price reductions attributed to enforcement actions and multiplying them by the assumed duration of those reductions.¹³⁹ These measures reflect a traditional consumer welfare standard, focused on immediate direct (economic) benefits for consumers as a result of an intervention.¹⁴⁰ Impact assessments rarely consider benefits outside direct price effect, such as broader and longer-term effects on market access, inequality, regional disparities, or the position of vulnerable groups.¹⁴¹

Given the lack of or limited impact assessment of prioritisation decisions, there is insufficient public scrutiny and academic debate over whether competition enforcement has succeeded in delivering its purported benefits – whether in terms of price, quality, innovation, or equity. This was observed by the

¹³³Communication from the commission 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons' [2022] OJ C 374, para 32.

¹³⁴For examples and a discussion see O Brook 'Priority setting as a double-edged sword: how modernization strengthened the role of public policy' (2020) 16 Journal of Competition Law & Economics 435 at 456–460; O Odudu 'Feeding the nation in times of crisis: the relaxation of competition law in the United Kingdom' (2020) 19 Competition Law Journal 68 at 69–76.

¹³⁵Brook and Cseres, above n 36, at 1251–1252.

¹³⁶Nesti, above n 82, at 471.

¹³⁷Brook and Cseres, above n 36, at 1251–1252.

¹³⁸Court of Auditors, above n 43, para 80. Also see OECD 'Assessing the impact of competition authorities activities, background note' (2025) p 11, available at [https://one.oecd.org/document/DAF/COMP/WP2\(2025\)2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2025)2/en/pdf).

¹³⁹European Commission 'Ex-post economic evaluation of competition policy enforcement: a review of the literature' (2015) p 80, available at <https://data.europa.eu/doi/10.2763/83196>.

¹⁴⁰OECD, above n 138, p 9.

¹⁴¹Ibid, p 12.

EU Court of Auditors, criticising the European Commission for focusing ‘more on activities rather than on impact’ when explaining and demonstrating the benefits of its enforcement actions for citizens.¹⁴²

Beyond-GDP indicators, which were developed for the assessment of economic policies on inclusive and sustainable growth in the past three decades,¹⁴³ could be embedded into the methodology of competition law impact assessment. Doing so would allow authorities to move beyond narrow cost-benefit calculations and towards a multi-dimensional evaluation framework that reflects the full range of competition law’s potential contributions to inclusive development. Measuring and quantifying the allocation of enforcement priorities would help to improve transparency and accountability by explicitly communicating how the resources are spent.¹⁴⁴

Similarly, impact assessments can examine the distributional effects of enforcement interventions. For example, following the adoption of the UK’s revised Prioritisation Principles in 2023 that aimed to reduce regional disparities,¹⁴⁵ the CMA began publishing data on the number of warning and advisory letters issued to businesses, disaggregated by nation and region.¹⁴⁶ These letters are issued in response to complaints or other intelligence concerning potential breaches of competition law, in cases where the CMA has decided not to prioritise a formal investigation. If a business receives a warning or advisory letter and is subsequently found to have infringed competition law through the same or similar conduct described in the letter, the consequences can be significant, including the possibility of an increased financial penalty.

(d) Procedure for setting enforcement priorities

Beyond enforcement agendas, substantive criteria, and impact assessments, priority-setting can become more responsive by integrating mechanisms of social accountability into processes. This section examines how such accountability tools can function as external checks that enhance the responsiveness and legitimacy of enforcement choices. Drawing on theories of tripartism,¹⁴⁷ deliberative regulatory governance,¹⁴⁸ and participatory oversight,¹⁴⁹ we argue that competition authorities could shape their priority-setting practices and procedures by moving beyond their traditional technocratic role and adopting more open, responsive, and publicly engaged approaches to priority-setting.

Competition authorities’ priority-setting is subject to both internal and external controls, including parliaments,¹⁵⁰ oversight by other regulatory networks, and public engagement.¹⁵¹ Accountability operates formally, through reporting, financial audits, and judicial review; and substantively, through transparent communication and stakeholder engagement.¹⁵² However, these mechanisms are often weakened by a narrow, performance-based model of accountability, focused on output legitimacy

¹⁴²Court of Auditors, above n 43, para 91.

¹⁴³See text to n 28 above.

¹⁴⁴OECD, above n 138, pp 9–12.

¹⁴⁵See text to n 126 above.

¹⁴⁶CMA ‘Corporate report – number of letters sent by the CMA to nation or region’ (May 2025), available at <https://www.gov.uk/government/publications/warning-and-advisory-letter-maps/map-of-letters-sent-between-2018-and-2023>.

¹⁴⁷Ioannidou, above n 88.

¹⁴⁸CM Hendriks ‘Deliberative governance in the context of power’ (2009) 28 Policy & Society 173.

¹⁴⁹I Neves ‘No enforcement without representation: how participatory democracy can strengthen the Digital Markets Act’ (2024) 20 European Competition Journal 675.

¹⁵⁰The scope of competition authorities’ accountability to national parliaments varies across legal systems, and must be assessed in light of their institutional, personal, and financial independence, which differs across jurisdictions: KJ Cseres and A Outhuijse ‘Parallel enforcement and accountability: the case of EU competition law’ in M Scholten and M Luchtman (eds) *Law Enforcement by EU Authorities* (Cheltenham: Edward Elgar, 2017).

¹⁵¹Brook and Cseres, above n 36, at 1216.

¹⁵²Competition authorities can be held accountable for their enforcement choices and resource allocation through vertical accountability (to national parliaments, courts, regulated actors, and the public) and horizontal accountability (to peer networks like the European Competition Network).

(eg consumer welfare) or procedural fairness,¹⁵³ which can crowd out broader democratic responsiveness and public oversight.¹⁵⁴ The scope of competition authorities' accountability to national parliaments varies across legal systems and traditions. Accordingly, any analysis of political accountability must also consider the authority's institutional, personal, and financial independence, which differs across jurisdictions.¹⁵⁵

Yet, the broad discretionary space competition authorities have when they set priorities offers a unique opportunity to incorporate mechanisms of social accountability, which can reintroduce affected stakeholder voices into regulatory processes, particularly where traditional parliamentary or electoral accountability is limited. Social accountability involves civil society exercising control through participation, deliberation, and public scrutiny through collaborative mechanisms like public consultations, stakeholder hearings or participatory market studies that invite consumer and stakeholder input into regulatory decision-making.

Mechanisms such as public reporting and budget scrutiny primarily allow parliamentary intervention when regulators overreach their mandate, but they offer limited influence over independent regulatory authorities' policy priorities and decision-making processes. By comparison, mechanisms like formal complaint handling, participatory market studies, public consultations, citizen panels, and stakeholder hearings can inform both enforcement priorities and case decisions, thereby making them more responsive to market realities and social concerns. Although such participatory practices can increase transaction costs and potentially challenge efficiency, limited accountability risks eroding regulatory authorities' legitimacy. The following sections show how tools like complainant participation and public consultations can help align enforcement priorities more closely with the public interest.

(i) Formal complaints

Many competition authorities rely on formal complaints from affected consumers, competitors, or other third parties to detect anti-competitive practices. In some jurisdictions, authorities are obliged to investigate formal complaints, with complainants granted procedural rights such as submitting observations or accessing case files.¹⁵⁶ Formal complainants can support authorities in monitoring market functioning and reinforcing democratic oversight.¹⁵⁷ They are given the opportunity to contradict the draft decision, invoking errors, flaws, or mistakes which could ultimately lead to the illegality of the final decision.¹⁵⁸ These participation rights carry the potential to enhance the legitimacy of the procedure and the final decision-making.¹⁵⁹

However, most competition law systems restrict the effective participation of complainants. First, national administrative laws often require a 'legally relevant interest' for third-party access to procedures, with standing requirements that are frequently interpreted narrowly, thereby limiting complaint rights to directly affected parties and excluding broader public or stakeholder participation.¹⁶⁰ Secondly, many competition authorities assess complaints using a narrow consumer welfare focus, prioritising cases based on procedural efficiency and economic impact. In some jurisdictions, authorities are not required

¹⁵³Nesti, above n 82, at 468.

¹⁵⁴*Ibid.*

¹⁵⁵Cseres and Outhuijse, above n 150.

¹⁵⁶Some jurisdictions distinguish between 'formal' and 'informal' complaints, particularly with respect to their procedural status, legal effect, and the obligations imposed on the competition authority. Formal complaints are submitted in accordance with prescribed procedural rules (eg a standardised form) and require the complainant to demonstrate a legitimate interest. Such complaints generally trigger a duty on the authority to act, either by initiating proceedings or by issuing a reasoned decision rejecting the complaint.

¹⁵⁷KJ Cseres and LC de Korte 'Participation of third parties in the public enforcement of the Digital Markets Act: between democracy and technocracy' (2025) 13(3) *Journal of Antitrust Enforcement* 595.

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*

¹⁶⁰O Brook and KJ Cseres 'Policy report: priority setting in EU and national competition law enforcement' (2021) pp 35–40, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930189.

to publish or justify complaint rejections.¹⁶¹ For instance, the EU's ECN+ Directive allows national authorities to reject complaints on priority grounds alone, promoting efficiency but limiting transparency or procedural fairness.¹⁶² This reinforces a technocratic model of accountability, that privileges efficiency over public oversight and administrative transparency.

This overview shows that competition authorities often operate as 'gatekeepers', filtering complaints based on narrow prioritisation criteria.¹⁶³ While such discretion helps manage limited resources, it frequently overlooks broader, systemic harms, like structural distortions or long-term threats to market integrity, that fall outside the traditional consumer welfare framework.¹⁶⁴ A more responsive approach to complaint handling requires recognising broader harms, including diffuse or collective ones, and acknowledging the structural dimensions of market power. Moreover, it demands procedural balancing: transparent prioritisation criteria, reasoned decisions and feedback mechanisms to keep complainants informed. Even when rejecting complaints, authorities should offer clear explanations and maintain communication to build trust and demonstrate institutional responsiveness.¹⁶⁵

Another avenue towards more responsive prioritisation is to structure formal complaints more clearly by differentiating types of participation and granting special status to certain relevant categories of third parties, such as representative organisations acting in the public interest. In some EU Member States, for example, consumers and civil society organisations enjoy privileged status, as a presumption of 'relevant interest' (France, Germany, Greece), or a right to request the opening of investigations (eg Lithuania, Romania, Bulgaria, particularly concerning suppliers of agricultural products and foodstuffs).¹⁶⁶ Under UK law, certain designated consumer bodies have the right to make a 'super-complaint' where they consider that there is a feature, or combination of features of a market that appears to be significantly harming the interests of consumers. This tool seeks to encourage launching well-researched and substantial complaints on behalf of consumer groups who would not find it as easy to make such complaints individually.¹⁶⁷ Accordingly, the CMA – or, where appropriate, the relevant sectoral regulator – is obliged to respond to such a super-complaint within 90 calendar days. The Secretary of State for Trade and Industry designates the bodies based on detailed criteria.¹⁶⁸ This process acts as a filter, aiming to ensure that super complaints are launched by bodies that are motivated by the interests and detriment suffered by the group of consumers and are capable of effectively representing such interests.¹⁶⁹ This could also partly offset the disadvantages that a higher evidentiary threshold of admissibility for complaints would create for final consumers or other complainants that do not have the necessary resources and investigatory capacity to satisfactorily meet such a burden.

A more responsive approach to complaint handling serves not merely as a filter for enforcement decisions, but as a channel for public accountability. Complaints can articulate democratic concerns and reflect broader social demand. Transparent and participatory complaint processes, therefore, help

¹⁶¹ *Ibid.*, p 25.

¹⁶² 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 of EU competition law [2019] OJ L 11/3, Recital 22, Art 4.

¹⁶³ O Brook et al 'Abolishing formal complaints? Balancing technical expertise and efficiency with democratic accountability in the European Commission's decision-making' (2023) 14(8) *Journal of European Competition Law & Practice* 497 at 506–507.

¹⁶⁴ *Ibid.*

¹⁶⁵ Nesti, above n 82.

¹⁶⁶ For an overview of the EU's Member States, see Brook and Cseres, above n 160, Figure 7.

¹⁶⁷ Explanatory Memorandum – The Enterprise Act 2002 (Bodies Designated to make Super-complaints) (Amendment) Order 2009 No 2079, para. 7.10.

¹⁶⁸ Enterprise Act 2002 (c 40), s 11(1); OFT 'Super complaints: guidance for designated consumer bodies' (2003), available at <https://www.gov.uk/government/publications/what-are-super-complaints/super-complaints-guidance-for-bodies-seeking-designation-as-super-complainants>.

¹⁶⁹ UK Department for Business and Trade 'Super complaints: guidance for bodies seeking designation as super complainants' (February 2025), available at <https://www.gov.uk/government/publications/what-are-super-complaints/super-complaints-guidance-for-bodies-seeking-designation-as-super-complainants>.

authorities remain responsive to evolving societal priorities, strengthen institutional legitimacy, and support fair and inclusive markets.

(ii) *Participatory engagement*

More responsive prioritisation can also be achieved by encouraging greater public engagement in the design of the enforcement agenda, the substantive criteria, and the indicators and review of impact assessments.

Existing models of participatory engagement in competition enforcement generally, and priority-setting in particular, remain limited and ad hoc, rather than being formally institutionalised. For example, while around half of the national competition authorities of the EU Member States have adopted enforcement agendas, only 3% are obliged to report their agendas to parliament, and 7% to their government.¹⁷⁰ Moreover, just 17% of the national competition authorities adopt agendas following a public consultation. A notable example is the Netherlands ACM, which invites stakeholders to comment on its draft agenda through roundtable meetings, an interactive website, and social media platforms.¹⁷¹ A further example of a durable and institutionalised form of social accountability is found in the use of consumer panels by certain sectoral regulators in the UK. For instance, the Communications Act 2003 mandates the establishment of a consumer panel by the Office of Communications (Ofcom). This panel, comprising up to 12 members, is tasked with advising Ofcom and, where the Panel deems appropriate, other relevant persons on matters affecting small businesses, domestic consumers, and citizens within the communications sector.¹⁷² Similarly, the Legal Services Consumer Panel, established under the Legal Services Act 2007, is composed of members selected for their capacity to reflect the experiences of the diverse range of consumers of legal services. Its work is explicitly oriented towards amplifying the interests of those consumers deemed less able to articulate their own concerns, particularly individuals who may be in positions of vulnerability when engaging with legal services.¹⁷³ Participatory tools like citizen panels are especially valuable in politically sensitive or high-impact sectors, such as digital markets, health, or media, where they allow diverse voices to articulate perceived harms and priorities, deepening the legitimacy and relevance of competition interventions.

Together, these participatory practices envision competition authorities not merely as enforcers of technical rules, but as public-interest institutions responsive to democratic concerns and societal change. To enable affected stakeholders to question, evaluate, and pressure regulatory authorities, such accountability must be *institutionalised*, not based on one-off consultations or symbolic participation.¹⁷⁴

While there is an inherent tension between accountability and outcome delivery, critics warn that participatory and deliberative practices may compromise efficiency and credibility by raising political transaction costs. Yet marginal accountability and ad hoc participation are unlikely to ensure legitimacy.¹⁷⁵ When participation is constrained and legitimacy relies solely on formal procedures, the regulatory framework risks appearing weakly justified.¹⁷⁶ For independence and priority-setting to be meaningful, they must be paired with accountability mechanisms that ensure transparency, responsiveness, and alignment with the public interest. These tools create a feedback loop between regulators and the public, crucial in sectors where market failures disproportionately affect vulnerable groups.¹⁷⁷

¹⁷⁰Brook and Cseres, above n 160, pp 21–23.

¹⁷¹ACM ‘Our agendas’, available at <https://www.acm.nl/en/about-acm/mission-vision-strategy/our-agendas>.

¹⁷²Communications Consumer Panel ‘Terms of reference’ (as amended 6 February 2019), available at <https://www.communicationsconsumerpanel.org.uk/downloads/communications-consumer-panel-tor-2019.pdf>.

¹⁷³Legal Services Consumer Panel ‘Terms of reference’ (30 November 2009), available at <https://www.legalservicesconsumerpanel.org.uk/about-us/corporate-documents>.

¹⁷⁴Righettini and Grimaldi, above n 82; Nesti, above n 82.

¹⁷⁵Maggetti, above n 97, at 5.

¹⁷⁶Ibid.

¹⁷⁷Cseres, above n 14.

Conclusions

The discretion that competition authorities exercise when setting enforcement priorities carries profound implications for both markets and societies. These choices determine which sectors are scrutinised, which harms are addressed, and which interests and groups in society are protected. Accordingly, priority-setting is not a neutral or purely technocratic exercise, but a process with significant normative and institutional implications. Yet, despite growing pressure to incorporate social and democratic considerations into the substantive interpretation of competition law, enforcement priorities across jurisdictions remain predominantly focused on consumer welfare, to the exclusion of broader societal, economic, and democratic concerns.

This paper argued that current prioritisation practices are insufficiently responsive to the structural inequalities embedded in market systems. By treating consumers as a homogeneous group of rational actors, competition authorities overlook how various social and economic vulnerabilities impact individuals' participation in markets and their exposure to harm. As a result, enforcement may risk entrenching, rather than alleviating, these disparities. This disconnect not only limits the effectiveness of competition enforcement, but also undermines the legitimacy and public accountability of competition authorities.

To address these limitations, the paper proposed a reorientation of priority-setting practices, drawing on principles of responsive regulation and social accountability. Responsive enforcement requires authorities to move beyond reactive, insulated approaches towards proactive, participatory, and context-sensitive strategies that meaningfully engage with the public whom the enforcement ultimately aims to serve. The paper advocates for embedding these principles into enforcement agendas, the substantive criteria for prioritisation, impact assessments, and the broader prioritisation process.

Enhancing responsiveness and accountability in enforcement priority-setting is not merely a pragmatic means of addressing contemporary challenges within the bounds of existing administrative discretion. It is also essential to rebuilding public trust and ensuring that competition policy contributes meaningfully to a more equitable, inclusive, and democratic economic order.