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Case Prioritisation and Prosecutorial Discretion – Note by Poland

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Ori SCHWARTZ
Email : Ori.Schwartz@oecd.org

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Poland

1. Introduction

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (UOKiK), we share our observations on case prioritisation and prosecutorial discretion.

2. This contribution deals only with cases concerning anticompetitive agreements and abuse of dominance. It does not cover priority-setting in the area of merger policy.

2. General background

3. Our institutional model and legal framework for antitrust enforcement generally resembles that used by the European Commission. We are an administrative antitrust agency and our task is to enforce: (a) Article 101-102 TFEU; (b) our own national antitrust law, which generally follows the language and spirit of relevant provisions of the TFEU.

4. As an administrative agency, we generally enjoy much discretion in setting our priorities. Also, following the adoption of the ECN+ Directive, our independence and the ability to set priorities has been further safeguarded.[1]

5. However, as with every national competition authority, there are certain characteristics of our national legislation that distinguish our legal framework from that used by other authorities. For example, insofar priority-setting is concerned, our enforcement model differs much from the one used by the European Commission and some of other EU national competition authorities, because we do not issue appealable rejection decision with regard to complaints.[2]

6. As we also explain further, national legal frameworks may have a serious impact on the ability of antitrust agencies to prioritise cases.[3]

7. We return to both of these issues throughout this contribution. Our discussion below follows the outline suggested by the Secretariat, but before moving there, we believe it is useful to list a few types of prioritisation decisions (actions) that may take place. We believe prioritisation may take place with regard to at least the following areas:

1. investigating or not investigating a case (**case selection**);
2. prosecuting or not prosecuting a perpetrator (**prosecution choice**);

[1] According to Article 4(5) of the ECN+ Directive: "*National administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Articles 101 and 102 TFEU as referred to in Article 5(2) of this Directive. To the extent that national administrative competition authorities are obliged to consider formal complaints, those authorities shall have the power to reject such complaints on the grounds that they do not consider such complaints to be an enforcement priority. This is without prejudice to the power of national administrative competition authorities to reject complaints on other grounds defined by national law*". See also recital 23 of this directive.

[2] This is not to say our actions cannot be legally verified by different means, see para 32 and further.

[3] See, in particular, para. 18-21, 29, 54, 55.

3. choosing the type of reaction (**instrument choice**);
4. allocating resources after the case has been launched (**ongoing prioritisation**);
5. areas of interests (**case type prioritisation**);
6. markets and sectors under special scrutiny (**market prioritisation**).

8. ***Case selection***. Every authority receives complaints, tip-offs, and generates its own intelligence that can be used to start a case. Yet, the volume of such information is generally much larger than available resources. Also, even with generally sufficient resources, some cases may not merit close scrutiny based on a simple cost-benefit assessment ("bad investment"). Consequently, case selection becomes one of the most basic types of prioritisation: some cases lead to an investigation, some do not, even if they include some elements that have a link to "competition".

9. ***Prosecution choice***. Even if there is an infringement, an authority may decide not to prosecute the case (at all or against some of perpetrators). In the EU context, a classic case of this type of prioritisation is a decision not to prosecute distributors (retailers) that are parties to a vertical agreement, if it is deemed that prosecuting the producer (wholesaler) is "sufficient".

10. ***Instrument choice***. Priority-setting may also concern the mode of reaction chosen by an authority. A case may be started, but the outcome of the case may vary depending on priorities. For example, some cases may warrant starting a full-scale investigation (which typically ends with a fine); however, other cases may end with "softer" measures, such as warning letters. This can be seen as akin to a police officer instructing a person that something should not be done, but without any other major legal consequences (even if legally such more serious consequences could be attributed to the violator).

11. ***Ongoing prioritisation***. Once a case is started, resources are assigned to it. However, throughout the investigation, it may turn out that the case is more promising than it seemed, or conversely that the case leads to a dead-end. Depending on what happens during the case lifetime, it may become a higher or lower priority. Also, internal developments may lead to new promising cases that may require more resources which need to be pulled from older cases. In other words, authorities may prioritise and de-prioritise cases and tasks dynamically, sometimes even without any formal procedures and guidelines, but rather based on "skill" and general managerial prowess.

12. ***Case type prioritisation***. Case type prioritisation concerns certain categories of conduct. For example, most antitrust authorities prioritise strongly anti-cartel enforcement, concluding that cartels are a serious and unambiguous competition infringement. Such prioritisation may also be more dynamic and temporal. For example, over the last few years some competition authorities decided to prioritise more enforcement with regard to no-poach and wage-fixing cartels, observing that undertakings have not been in full compliance with competition law in this area. Likewise, in the EU, following the European Commission's investigations into RPMs in 2018, some national competition authorities became more active in this area.

13. ***Market prioritisation***. Certain markets or sectors may become targets of closer scrutiny. This may happen for various reasons. For example, public concerns over the terms of trade in a given sector may warrant a closer look at such a sector also from the point of view of competition law. Disregard for consumer needs or rising prices may potentially come from insufficient competition, which – in turn – might be the result of anticompetitive conduct or undesirable barriers to entry stemming from (other) legislation.

3. Links between discretion and prioritisation

14. Since in the previous part we distinguished certain kinds of prioritisation that may take place in practice, in this section we provide further observations in the context of discretion in two subsections: (i) prioritisation that concerns specific cases ("low-level prioritisation"); (ii) prioritisation in a broader and more abstract sense ("high-level prioritisation). It seems to us that discretion in these two areas is exercised in different ways; it also is subject to different safety mechanisms.

3.1. Discretion in case selection, prosecution choice, and instrument choice

3.1.1. Assessment standard

15. Prioritisation is an interesting topic because, on the one hand, it is natural and indispensable, but, on the other hand, it might not be addressed directly or regulated clearly in national legislation.

16. Also, due to the nature of competition law, many market practices may appear to have ambiguous market effects, in particular at the early stages of analysis. This means that based on limited information (e.g., included in a compliant or tip-off), one can make a reasonable conclusion that something warrants or does not warrant further scrutiny – in that case, such a conclusion does not need to be a "prioritisation" decision (or at least not entirely), but may include elements of **legal assessment** ("*most likely, this is not an infringement, so we will not intervene, because we are only expected to act if we have a reasonable suspicion of an infringement*", rather than: "*it is not our priority, so we will not intervene, because to perform better our duties, we need to do focus on something else*"). Consequently, there might be a narrow line between, on the one hand, "**pure**" prioritisation decisions and, on the other hand, enforcement decisions that arise from an exercise of discretion with regard to legal assessment. For easier reference, below we will call the former type of priority-setting "**legal-based prioritisation**" and the latter "**performance-based prioritisation**".[4]

17. Before we move to the discussion of possible checks-and-balances in the exercise of direction (Question A2 of the Call for Contributions), we believe it might be useful to reflect on the narrow line between legal-based prioritisation and performance-based prioritisation.

18. Historically, we have been much more likely to engage in legal-based prioritisation of cases rather than performance-based prioritisation. This is because for many years our applicable legal framework did not envisage clear-cut provisions mentioning the ability to "prioritise" or engage in performance-based assessments. Still, if there is no sufficient suspicion of infringement (e.g., unproven anticompetitive effects, unlikely dominant position), then there is no duty to act, which also lays the foundations for prioritisation based on legal considerations. Since such prioritisation requires an assessment of a specific case, it also did not allow general statements of intent with regard to any classes of infringements (e.g. "no bid-rigging cases below threshold XYZ will be prosecuted, because

[4] Please note that in strict sense, "performance-based prioritisation" may be in fact based on a legal rule or principle. For example, if there is a legal rule (e.g., within an act of parliament) that obligates administrative agencies to perform their duties in an efficient way, then "performance-based prioritisation" is "legal-based" in the sense that the obligation to proceed in a specific way follows directly from law. However, in this discussion we use "legal-based" in the sense of market activity giving rise to a suspicion of an infringement of (substantive) antitrust law.

they are too small, and therefore more suitable for a prosecution by a local prosecutor, not the antitrust agency"), which is perhaps closer to performance-based prioritisation.

19. To be clear, this is not to say that our legal framework precluded a more performance-based prioritisation. For example, our competition act has always specified that it regulates: "*principles of protection of the interests of undertakings and consumer, undertaken in the public interest*". Since public interest is a broad category, one could argue that in some cases engaging in an investigation is not warranted by the public interest, giving also room for performance-based prioritisation.[5] Likewise, some of our national legislation specifies that our actions should be "*swift*" and "*use possibly simplest measures to solve cases*".[6] In other words, the general expectation is to use measures that allow speedy resolution of cases. Hypothetically, a well-suited measure for a less serious potential infringement might be a warning letter, not a full-blown investigation, and surely not raiding someone's premises.[7] Still, as mentioned earlier, it was legal-based prioritisation, rather than performance-based prioritisation, that attracted more attention in our jurisdiction in the more distant past.

20. The most important change came with the ECN+ Directive which mentions explicitly that NCAs may prioritise cases. The specific provision of the directive has not been implemented by any "mirroring" provision in our national legislation, as it was concluded that the ability to prioritise already follows from national law. Still, even without a clear, mirroring provision, the directive becomes an important interpreting device for our national law, as some of the provisions of our national law that before the adoption of the directive might have been argued to be ambiguous, now can be filled with more precise meaning, giving more room for performance-based prioritisation.

21. To conclude, discretion can be exercised within legal-based prioritisation and performance-based prioritisation. Legal-based prioritisation (in the meaning adopted in this contribution) comes down to a simple question: "is there a reasonable suspicion of infringement to warrant further scrutiny" – if there is not, then the case may become "de-prioritised" (i.e., dropped). It seems to us that this kind of prioritisation more seldom becomes subject of separate prioritisation documents (guidelines), because much of it follows from the law itself and because each time it requires an individual assessment by a case-handler ("given my experience and knowledge, does this conduct give rise to a reasonable suspicion that an infringement has been committed?").

22. Conversely, performance-based prioritisation may more often become subject to written guidelines (external or internal), because it requires defining some factors that do not follow directly from the law. For example, a general principle of law may say that cases should be resolved with the "simplest measures" but this is ambiguous. However, an agency may have various ideas on how to best implement this. For example, an agency may conclude that: (a) the easiest way to solve certain less serious cases is by warning the (potential) infringer that certain conduct should be stopped, or (b) it may conclude that such cases should be automatically re-directed to another government body, which might be

[5] In fact, at some point, the case law of our Supreme Court hinted at this, or at least can be construed this way. In case III SK 40/07, the Supreme Court said that: "*the violation of public interest allows the competition authority to make a certain kind of case selection, in which enforcement actions are taken*".

[6] Article 12 of the Polish code on administrative procedure.

[7] See also para 10 and "instrument choice" there.

better-placed. Since neither of these options follows directly from the law, the agency might be willing to declare its policy beforehand in a prioritisation document.

23. However, this is not to say that performance-based prioritisation always needs to be put into written guidelines. In fact, it seems to us that most agencies engage into some kind of performance-based prioritisation with regard to at least one type of prioritisation mentioned in paragraph 7. In many cases, such prioritisation may be done "intuitively", through "common institutional knowledge", or by means of experience. For example, ongoing prioritisation (and de-prioritisation) of cases is crucial in dynamic settings – and such prioritisation often comes down to multitude of more minor managerial decisions that are supposed to keep everything afloat and on the course to the final destination.

3.1.2. Checks-and-balances

24. It is clear that prioritisation needs to have limits, and that discretion cannot become an arbitrary exercise of power.

25. A classic measure against arbitrary exercise of power and "capricious" enforcement is subjecting decisions to judicial appeals, as mentioned by the Secretariat in the Call for Contributions. This may concern, for example, the ability to appeal a complaint rejection decision.

26. In that regard, our national procedural framework diverges from the EU model and frameworks used by some of the other EU authorities. This is because complainants in our jurisdiction cannot challenge our actions with regard to not pursuing cases, at least not by means of a standard court action. Furthermore, this was a conscious decision made in 2007, based on bad experience of providing the ability of such appeals.

27. Under our pre-2007 procedural framework, certain groups of stakeholders could request us to open proceedings (investigation) in connection to possible antitrust violation.[8] In practical terms, those requests could be qualified as "complaints", in the meaning typically used in the antitrust community.

28. Our decisions not to open proceedings could be appealed to the competition court, then further to the court of appeals, and then potentially (on the points of law) to the Supreme Court. Furthermore, if proceedings (investigation) were opened, the "complainant" was party to these proceedings. Consequently, it enjoyed the same rights as the recipients of statement of objections do. This included, in particular, access to file, the right to request new evidence to be collected (e.g., to hear witnesses or request an expert opinion), and the right to appeal the final decision (e.g., no infringement decision). All of that went beyond what is typically afforded to complainants, putting us into a position of an "administrative tribunal", which – on the one hand – was expected to investigate and collect evidence, and – on the other hand – was dealing with two parties with conflicting interests, in a way similar to what courts do in litigation cases.[9]

[8] Those entities were: (a) undertakings with a legal stake in the case (i.e., legal standing); (b) municipalities (i.e., local authorities); (c) state supervision authorities (e.g., the Supreme Court of Audit); (d) consumer ombudsmen; (e) consumer associations.

[9] One of the main differences from classic court litigation was, however, that in court proceedings, parties are expected to be active and present evidence. In the model discussed above, the competition authority was becoming a "low-cost court", in which – on the one hand – there was often a dispute between the parties to the proceedings, but it was the authority ("judge") that was supposed to collect all evidence and render a decision, which – by definition – had to go against the interests of one of the parties, easily leading to further litigation (this time in an "actual" court).

29. Unsurprisingly, this model proved to be unworkable. The framework outlined above led to opportunistic and strategic complaints, often filed by undertakings pursuing their own agenda, rather than public interest. Many of cases initiated through this framework focused on vertical restraints and ill-defined abuse of dominance theories. Also, it seriously curtailed our ability to focus on most relevant cases, as we needed to litigate cases *not to open an investigation* and cases *not to find an infringement*.

30. This highly negative experience resulted in a complete legislative overhaul of our complaints system. In 2007, a new competition act was adopted, replacing the previous one. The most significant change was abandoning the procedure for requesting us to open a case and the right to obtain an appealable decision in that regard. Furthermore, since 2007, the only parties to our proceedings are the entities that receive a statement of objections.

31. Since 2007, instead of the previous complaints procedure, complaints can be filed by anyone, but without the right to appeal our response. Also, complainants do not become parties to any proceedings. A submission needs to meet certain legal requirements to be considered a (formal) complaint.[10] If it is qualified as such, we are obligated to respond in a specific timeframe and provide the complainant with a justification for the chosen course of actions. If a submission does not meet the legal requirements of a (formal) complaint, we treat it as an informal tip-off – in such cases we may, but do not have to, provide a response.

32. While it might seem that the lack of appealable decisions on rejecting complaints creates too much discretion in setting one's enforcement agenda, we do not believe that this is the case. First, our choice not to follow a complaint needs to be motivated and explained in writing, creating the first check against arbitrary judgements. Second, while complainants cannot appeal the case to a court, it is still possible for them to file a complaint on the outcome of their case. Such complaints are reviewed by our legal department (i.e., case handlers from a different department than those involved in the original case), leading to a separate legal review of how the case was handled. Also, complainants may file general complaints to the prime minister (although, the prime minister cannot instruct us to act). Finally, it is not uncommon that our actions, including our choices not to follow certain complaints, are audited by the Supreme Court of Audit.[11]

33. Furthermore, our agency uses differentiated internal procedures for discontinuing cases, depending on their stage. While there is more discretion available at the early stages of analysis, the more mature the case becomes, the more checks-and-balances apply. For example, if a complaint or tip-off led to an opening of a formal procedure (pre-SO), closing such a procedure requires inter-departmental consultation and a written report.[12] Subsequently, the decision to discontinue such a formal procedure needs to be greenlighted

[10] Those requirements are minimal and concern mostly simple obligations of discussing case facts and making a basic legal assessment. Also, such complaints cannot be anonymous.

[11] The Supreme Court of Audit is a public auditing body that reports to the Polish parliament. It audited our actions in particular during its unannounced audit in 2025, focusing, to a large extent, on whether we were justified not to follow certain cases. The audit concerned our activities in 2020-2025 and lasted for almost 6 months (from October 2024 to March 2025). The auditors reviewed almost 20,000 pages of our documentation, supplemented also with further oral explanations and statistics. The outcome of the audit was positive.

[12] The inter-departmental consultations typically involve the Chief Economist Team and the Legal Service as independent reviewers.

by a special internal committee.[13] If, in turn, a complaint or tip-off led to an opening of a formal procedure (pre-SO) and then to a statement of objections, it is impossible to discontinue the case without issuing a decision.[14]

3.2. Discretion in case type prioritisation and market prioritisation

34. As mentioned earlier, we believe that discretion works in a different way when it comes to the more "abstract" types of prioritisation, such as case type prioritisation and market prioritisation.

35. While those type of priorities may significantly impact the outcome of individual cases (in particular, when it comes to "de-prioritisation" of enforcement with regard to some types of cases), we believe there should be considerable discretion in setting them. It is hardly imaginable for there to be any legal remedies that would allow forcing an agency to change such broadly defined priorities and, for example, requiring it to focus on a certain market.

36. Those types of priorities remain at the core of what "policy-making" is about. This does not mean that such priorities should not be questioned or should not be subject to open discussion. For example, in some jurisdictions, competition authorities might be obliged to report before the parliament on their activities, and such public appearances may also serve as an occasion to ask for explanations on the course of action adopted by enforcers.[15] While this might seem like an illusory accountability measure, as the parliament members should not be in a position to force an antitrust authority to change its prioritisation policy, we believe such a measure is in fact the essence of democracy, as issues of public importance are discussed in public, ideas may clash, and an explanation of one's actions needs to be provided.[16]

37. Theoretically, the accountability for more abstract forms of prioritisation could also be ensured by subjecting a competition authority to the oversight of the broader executive (cabinet, prime minister, president). In our case, this was actually possible before the implementation of the ECN+ directive, i.e. the head of our authority did not have a fixed term and could be recalled from the position, based on the prime minister's judgement. Consequently, while the prime minister was not in a position to instruct the authority on the outcome of specific cases (this was legally precluded), he/she could replace the head of the agency based on broader policy issues or personal preference. Since 2023, this is not an option – the head of the authority is appointed by the prime minister for a fixed term of five years and there is only a closed list of circumstances which may lead to an earlier termination of the term; choices concerning priorities are not one of them.

[13] The committee operates on a permanent basis. It comprises of the Head of the Authority and directors of relevant departments (including the Chief Economist and the Head of the Legal Service).

[14] This decision cannot be appealed by the complainant (because the complainant is not a party to the proceedings and is not an addressee of this decision). However, we are always obligated to provide legal grounds for the decision and to make its full text publicly available on our website. All decisions go through inter-departmental consultations and the committee mentioned in n 13.

[15] For example, in our case, the leadership of our agency is supposed to appear annually before the parliament and report on activities.

[16] As regards the parliament members not being in a position to force the authority to change its policy, it should be recalled that at least insofar EU national competition authorities are concerned, the ECN+ directive specifically ensures that the agencies enjoy independence in that regard.

4. Prioritisation and de-prioritisation methods

4.1. Policy and procedural documents

38. Since the beginning of antitrust enforcement in our jurisdiction, we have not had a public document disclosing our prioritisation methods. However, while at the time of writing this submission we still do not provide publicly separate prioritisation guidelines, we intend to issue them. Also, the fact that we have not had separate prioritisation guidelines does not mean that our documents did not discuss priorities in one way or another.

39. For a number of years our general priorities have been communicated in (general) competition policy documents. Such policy documents were adopted in relation to a specific time period. For example, our Competition Policy for 2011-2013 specified a number of general priorities and tasks to be undertaken. One of the main priorities in that period was increasing the activity of the authority in the area of bid-rigging; other priorities included a number of actions in regulated sectors. Likewise, the earlier Competition Policy for 2008-2010 put much emphasis on the regulated sectors (stressing that antitrust enforcement in these areas is crucial in the context of liberalisation of these sectors and de-monopolisation). However, while the 2011-2013 policy mentioned bid-rigging as one of main priorities; the 2008-2010 put more emphasis on the enforcement of antitrust rules on local markets (which in practical terms meant antitrust enforcement against municipal undertakings, e.g. against utility companies owned by municipal authorities, and against local authorities themselves; the latter is possible under our national antitrust law).

40. In 2015, the policy of issuing multiannual "competition policy documents" changed. The periodically published documents were replaced with an "on-going" policy document, without an expiration date. The 2015 *Competition and Consumer Protection Policy* specified that insofar competition policy is concerned, the priority is to take actions against cartels.[17] The 2015 policy document became much more general then the previously published multi-year policies.

41. As mentioned earlier, as of today we intend to publish separate prioritisation guidelines in the area of antitrust enforcement.

4.2. Factors

42. While we do not have any public prioritisation documents, there are certain factors that we believe most of authorities take into account when they proceed with cases. This can be based on officially published documents, internal documents, or by means of practical arrangements and routine actions.

43. We believe there are at least five factors that are relevant to most competition authorities:

1. strategic considerations;
2. market considerations;
3. institutional considerations;

[17] The 2015 policy document concerned both competition policy and consumer protection policy. Our authority is a multi-purpose agency and we enforce both antitrust law and consumer protection law. In 2015, policies for both areas of our activity were merged into one document.

4. resources;
5. risks.

44. ***Strategic considerations***. Each case presents certain strategic dilemmas that go beyond the significance of the case looked at in isolation. For example, a local abuse of dominance case (e.g., by a utility company) may not warrant an action by an antitrust authority insofar its impact on the entire economy is limited, and the authority may face serious opportunity costs in pursuing it. On the other hand, pursuing a local case may set a precedent and clarify the law for other local undertakings, having a more meaningful impact on the wellbeing of citizens/consumers. Likewise, a cartel agreement that was never implemented may have little significance when looked at in isolation and short-term, but if inaction becomes seen as permissiveness or weakness of the enforcer, it may have serious strategic consequences.

45. ***Market considerations***. The impact of the case on the market may serve as an important reason to prioritise the case. The greater the harm for consumers, the stronger the reasons to take swift and decisive actions.

46. ***Institutional considerations***. With regard to some markets, problems can be solved by other, more relevant or better-placed authorities. For example, regulated sectors have their own regulators, which may be better placed than a competition authority to take "some actions". Such actions may solve a market problem by means other than the enforcement of general antitrust rules. Likewise, bid-rigging (in Europe) is often both an infringement of criminal law and (administrative) competition law. Consequently, in some cases, a local prosecutor might be better-placed to take actions than a competition authority, which is often more focused on "systemic" problems and large cases with a nation-wide impact.

47. ***Resources***. No antitrust authority has unlimited resources. Consequently, every case needs to be checked against what realistically can be done, given the resources allocated to the antitrust agency.

48. ***Risks***. Cases may present certain risks, e.g. in terms of setting-precedents. A "weak" case with blurry case facts may not be a good subject to secure an important precedent, because blurry case facts may overshadow the actual legal question at stake. Consequently, in some cases, it might be better to first start with a "strong" case, clarify the law with regard to some issue, and only then pursue more nuanced cases.

49. In this context, we believe that most authorities engage in a more complex exercise that involves both qualitative and quantitative assessments. We would expect that in most cases those assessments do not lead to any clear "scoring" of cases, but rather to an ability of putting cases into some order/hierarchy ("this one goes first, this goes second, and that one goes third").

50. This does not mean that clear-cut quantitative assessments may not play an important role. There seem to be certain good proxies that may quickly lead to de-prioritisation of a case.[18] For example, in some jurisdiction obtaining the turnover data of undertaking may be easy even without launching an official case. If those turnovers are very low, this may lead to a de-prioritisation of the entire case, due to likely limited effects of the analysed conduct. Likewise, if available data shows that the market in question is small and has a limited relevance for the entire economy, then this may warrant a lower

[18] De-prioritisation does not necessarily mean "inaction". As we explain in Section 2, we believe prioritisation may take different forms. For example, in some cases "de-prioritisation" may mean choosing a different instrument (e.g., a less time-consuming, like a warning letter), not a complete "inaction".

priority of the case. In fact, some of such easy benchmarks became part of law (for example, in the EU, block exemption regulations include market share thresholds; also, cases may be subject to the *de minimis* rule).

4.3. Changes in prioritisation of cases

51. Even despite the fact that we have not used dedicated prioritisation guidelines, over the last three decades, there have been significant changes in how we approach enforcement. This included in particular: (a) selection of prosecuted undertakings; (b) approach to local cases; (c) approach towards individual guidance.

4.3.1. Prosecutorial discretion

52. The most stark example of a change in our approach to enforcement priorities is our policy on prosecuting members of anticompetitive agreements.

53. Every agreement needs to have at least two parties. Some agreements may even have numerous parties, in particular in case of vertical agreements that apply to distribution systems. However, logically, not every party of an agreement needs to become a target of an investigation and be prosecuted.

54. In more distant past, our approach was to prosecute all parties to anticompetitive agreements, without any regard to their role in the infringement, economic viability, and their market position.[19] Consequently, we used to have cases in which we prosecuted at once over 80 and over 140 undertakings.[20] In practical terms, such cases bound much of our resources, even considering the barely administrative aspects of filing, serving documents, and providing access to file. This also had an impact on litigation, since in our procedural context, each party to administrative proceedings was becoming a party or at least an interested party to court proceedings. Furthermore, due to the size of some of undertakings in such cases, some of imposed fines were very low or even symbolic.

55. This approach significantly changed over time. Instead of prosecuting each and every party to an agreement, we decided to apply a more nuanced approach, resembling that used at the EU level. Consequently, as of today, we: (a) prosecute only the "organiser" of the agreement (i.e., in vertical cases typically the producer); (b) prosecute just selected undertakings; (c) prosecute all members of the agreement in question. The Polish Supreme Court confirmed that we may indeed decide to launch a case and issue a decision with regard to just a selected undertaking.[21] We are aware, however, that in some EU jurisdictions, this has caused more controversy.[22]

56. Our prioritisation in those types of cases is mostly based on the assessment of the role and activity of a given undertaking in the agreement. This may include a more complex quantitative and qualitative assessment of evidence.

[19] A more detailed discussion of our approach in that regard is available in: Jan Polański, 'Selective Enforcement and Multi-Party Antitrust Infringements: How to Handle "Unilateral Agreements"?' (2023) 16(27) *Yearbook of Antitrust and Regulatory Studies*, 83-110.

[20] *Tikkurila I* (Case RKT-79/2007); *Poltrade* (Case RKT-88/2008). See also n 19, p. 89 and the discussion there.

[21] For example, in Case I NSK 10/18, *Anyro*.

[22] See n 19.

57. Our assessment of this kind of prioritisation is highly positive, as it frees up much of our resources, allowing us to re-allocate those resources to other cases, including new ones. If it was not for this kind of prioritisation, we would likely start fewer cases.

4.3.2. Local cases

58. Our approach has also changed insofar local cases are concerned. As mentioned in subsection 4.1, there was a time when local cases were considered a priority in our policy documents. This trend was further strengthened by the structure of our authority.[23] The local cases mostly concerned: utilities (in particular water), funeral services, waste management, local transportation services.

59. However, over the years, we took many actions to rationalise our involvement in small local cases, rediverting available resources to larger investigations. When it comes to utilities such as water supply, this has been possible after legislative changes that set up a sectoral regulator (with cases being redirected there).[24] To reduce the number of reported violations, we also issued a guidance document concerning this market.[25] Likewise, with regard to funeral services we decided to temporarily redirect some of our resources to advocacy efforts to permanently increase compliance in this market and to reduce the number of infringement cases in the long term.[26]

60. Overall, national-scale cases became a strong priority for us, in particular against the backdrop of local cases being indicated as a priority in the past. However, this change of priorities did not necessarily amount to an abrupt "cut" of local cases, but rather came down to a more strategic change of the enforcement practice, which included advocacy efforts and other soft measures taken over a period of a few years. Still, this change is highly visible in our performance, with numerous local cases initiated in the past (mostly based on just national law) vis-à-vis more frequent national cases started currently (mostly based on EU and national law).

4.3.3. Soft enforcement measures

61. A visible trend in our priority-setting during the last decade was more frequent use of soft enforcement measures, such as guidance documents, non-binding RFIs, and warning letters.[27] In other words, some cases that have been previously dealt with through "hard"

[23] Our authority has had a partly-decentralised structure, with a number of branch offices operating throughout our jurisdiction. Those branch offices have been authorised to deal with some of antitrust cases (in practical terms, all antitrust cases except mergers – after the setting up of a dedicated M&A department within our structure, mergers have been exclusively dealt with by that department; however, in more distant past, the branch offices were also tasked to deal with mergers).

[24] See also para. 46.

[25] The guidance document was awarded in the Competition Advocacy Contest 2016-2017, organised by the ICN and the World Bank, see: https://www.worldbank.org/en/events/2016/10/24/the-2016---2017-competition-advocacy-contest.

[26] This included issuing a guidance document, which was later acknowledged by the ICN and the World Bank, see: https://www.worldbank.org/en/events/2015/10/30/the-2015---2016-competition-advocacy-contest-how-to-build-a-culture-of-competition-for-private-sector-development-and-economic-growth.

[27] Generally, RFIs in our jurisdiction (as opposed to, e.g., the European Commission) are "binding" (compulsory) RFIs, with undertakings being obligated to respond (and risking fines if they do not). However, sending such an RFI requires an official investigation. Non-binding RFIs were explicitly introduced into our law in 2015 and do not require opening a formal procedure.

measures (investigations and fines) started to be more frequently addressed by other means: general guidance (advocacy, guidance documents) and individual guidance (warning letters).[28] This trend is visible since around 2015.[29]

62. Some of examples of this kind of priority adjusting has been discussed in subsection 4.3.2 with regard to local cases. However, this does not mean that those kinds of priority considerations (and instrument choice, see Section 2) apply to local cases only. Also, it does not mean that soft measures cannot be combined with hard measures.

63. A good example of how priority-setting may impact enforcement are our actions with regard to the labour market. Labour market as such is not the main concern of antitrust, as antitrust applies to all markets and is therefore more concerned with types of infringements (e.g., cartels) rather than specific markets. Still, following a general global trend in antitrust enforcement, we have also analysed cases in which undertakings engaged in wage-fixing and no-poaching. In some of such cases, we imposed fines. However, we also decided to issue a guidance document to increase legal awareness and compliance in this area.. This mirrors our earlier experience in the water supply and funeral services markets: we decided to temporarily prioritise certain activity within our organisation (more resources allocated to an advocacy project in a specific market, which is not necessarily a priority market in the long term) to increase compliance and reduce the number of "accidental" violations that we would otherwise need to deal with in the future (and which would generate losses for workers up until the time we detect them).

64. Within the same guidance document, we also signalled to market participants that there are certain cases that we are generally not interested in (e.g., legitimate legislative lobbying, such as concerning the statutory minimum wage). This also included signalling that with regard to the assessment of agreements between solo self-employed persons, we are going to employ similar criteria of assessment as the European Commission, and that we may not treat certain agreements between such persons as a priority.[30]

5. Priority-setting at the authority level and individual case decisions

65. As mentioned in subsection 4.1, at the time of submitting this contribution, we have not published separate prioritisation guidelines. Consequently, we do not elaborate further in this section on the link between priority-setting at the authority level vs individual decisions.

[28] For individual guidance, see Eva Lachnit, *Alternative Enforcement of Competition Law* (Eleven International Publishing), 199 and further. Please note that in our case "individual guidance" in the context of priority-setting refers to "negative" feedback (warning letters, not comfort letters).

[29] This is in connection with the entry into force of the 2014 amendment to our competition act. The amendment, among other changes, introduced an explicit legal basis for both issuing soft law documents and for non-binding RFI/letters directed to individual undertakings (see also n 27). This was further coupled with the adoption of the 2015 Competition and Consumer Protection Policy (see subsection 4.1), which put emphasis on more "open" approach towards the public. All changes discussed in Section 4 can be then seen as part of a larger move towards a more flexible and swift enforcement, more conscious resource-allocation, and more cost-effective approach towards enforcement.

[30] Insofar the European Commission is concerned, see: *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* (2022/C 374/02), in particular Section 4 (Enforcement priorities of the Commission).

66. However, we believe that there are certain top-level considerations that are of relevance and which demonstrate how priorities may evolve and how they can be communicated to the public.

67. In the first place, a good measure of an authority's approach towards priorities may be annual reporting.[31] In our case, we are obliged by law to report in writing to the prime minister on our actions. The very same report also needs to be subsequently published on our website.

68. Since an annual report of this kind includes aggregated information on all undertaken actions, it also shows what was priority in the recent past. While such reporting may appear like looking in the back window, we do not believe this is without relevance. This is because agencies often do not change their priorities abruptly, ceasing all interest in specific areas precisely at the end of a reported period. Annual reporting may still, to some extent, show what might be of interest to an authority in the immediate future.

69. Also, in terms of accountability, such transparency matters and is in fact non-obvious. In fact, in our case, we have been obligated by law to provide such reports only in 2023, after over three decades of enforcement (although, in practice we had already reported annually earlier, based on our own initiative; in a way, our own practice was elevated to the level of a binding law). This experience and the non-obviousness of legal obligations to report may play a role in particular in those jurisdictions that have only recently started their enforcement practice or which overhaul their competition law systems to meet higher standards.

70. A less obvious example of how non-prioritisation documents may reflect priorities and their evolution are our fine guidelines. Fine guidelines themselves are not a prioritisation instrument, but – like priorities – they are subject to much discretion. They may also signal what is of higher priority to an authority, because they often include indications with regard to what constitutes the most serious infringements, possibly leading to the highest fines.

71. Consequently, fine guidelines may indirectly communicate priorities in the sense that it is likely that infringements that may lead to the highest fines are likely those infringements that the authority prioritises in its work. Furthermore, out of all policy documents, fine guidelines are likely one of the most frequently read by undertakings and compliance officers (it is far more likely for undertakings to be well-acquainted with antitrust fine guidelines than general competition policy).

72. Our fine guidelines evolved much over time, with the first fine guidelines adopted in 2008, then 2015, 2021, and 2024. The 2008, 2015, and 2021 fine guidelines included a division into: very serious, serious, and "other" infringements, each with their own brackets for the starting amount of fine.

73. However, the contents of these categories varied. For example, in the 2008 guidelines, "very serious" infringements included only plain cartels. In the 2015 guidelines, this was updated, with "cartel-like" mixed agreements being treated on par with classic, plain cartels. Indirectly, then, what had been earlier treated as a broad group of "vertical cases" had become two more nuanced groups, with "cartel-like" mixed agreements

[31] While announcing priorities would be "forward-looking", reporting can be considered "backward-looking".

becoming a higher priority than "pure" vertical cases. In the 2021 guidelines, this was further amended to explicitly signal that cartel facilitation would also belong to this group.[32]

74. The 2024 fine guidelines abandoned the division of infringements into categories, indicating instead which types of infringements will be considered as the most serious, but without a rigid brackets structure for the starting amounts of fines. Also, for the first time, the fine guidelines mentioned that when analysing the characteristics of the product and its buyers, the authority may consider the relevance of the product for public safety (including economic safety, i.e. resilience), environment, privacy.

75. To conclude, communicating priorities may take different forms. A natural place to discuss and outline priorities is a general competition policy document (often a multi-year plan). There are some clear advantages in setting priorities in such documents. For example, a multi-annual plan typically requires a more in-depth analysis, provides more stability and predictability (also for market participants), and more focus (a long term vision and a more distant goal).

76. However, we also see certain disadvantages associated with such plans and setting priorities therein. Over the last few years, the economic and political situation has become highly unstable, making precise, long-term priority-setting difficult. This was particularly visible in 2020 (during the COVID pandemic) and in 2022 (following the Russian invasion of Ukraine and the energy crisis in Europe). Furthermore, setting priorities in such documents might also be either counterproductive or misleading. For example, for most antitrust agencies, cartels are and will remain the top priority, irrespective of the sector in which they operate. This means that each and every year (in in every adopted document), the authority would need to declare cartels as its priority – this seems counterproductive. Still, if such a priority is not mentioned in a long-term competition policy document, this may mislead the public and to some extent even dilute one of the most important tasks of every enforcer.[33]

77. In this context, a different approach might be issuing separate prioritisation guidelines, which focus on the method of prioritisation, rather than actual conduct or markets. It seems to us that some competition authorities have indeed opted for this approach.[34] This does not mean that general policy documents cannot include some broader priorities. It is rather that in such a case the general policy document may include very general goals, while the separate guidelines may outline the principles of prioritisation. In turn, specific priorities can be adapted more dynamically.

78. Finally, it should not go unnoticed that priorities can be expressed through various other means. Policy documents such as fine guidelines may signal to the public which types of infringements are considered most serious and thus (implicitly) may constitute higher priority to an authority at a specific time. This is not to mention a wide range of tools that have been unavailable or less available in the past (e.g., social media presence).

[32] While the 2008-2015 change was more substantial (mixed agreements became "very serious"), the 2015-2021 change can be deemed more textual in the sense that facilitators belonged to this group already before. However, the change in the guidelines put more emphasis on the fact that facilitation is also an infringement, giving also more reasons for thorough consideration by compliance officers.

[33] This is because non-presence of a certain topic in a top strategic document may over time lead to a perception that "these are the other things that are actually relevant".

[34] Notably, the UK competition authority, see: https://www.gov.uk/government/publications/cma-prioritisation-principles.

6. Conclusion

79. Priority-setting is a complex task. As discussed in this contribution, priorities may influence various types of actions undertaken by competition authorities. It is important to remember that even if some case or type of cases is considered to be of a lower priority, this does not necessarily need to result in inaction. A lower case priority may warrant dealing with a case, but using a better-suited instrument, for example individual guidance by means of a warning letter instead of a full-scale investigation that leads to a fine.

80. Priorities may change over time and might be a silent but serious factor impacting the performance and track record of an authority. This is because resource allocation and case selection sooner or later becomes visible in infringement decisions and case law. If, for example, an authority attaches much weight to local cases, then unsurprisingly in a long term it may see its case law mostly concerned with issues that are characteristic to those markets. In extreme cases this may even lead to the entire system being "geared up" to best deal with a specific type of cases, since case law may slowly evolve towards dealing with such cases, ignoring a broader picture and needs of other cases.[35] In this context, it might be prudent to ensure that case selection and prosecutorial discretion is exercised in a way that ensures some level of pluralism and diversity, i.e. a more balanced portfolio of cases, rather than a monoculture.

81. What is also interesting is that priorities can be expressed in a broad range of documents, or even simply in actual actions and modes of behaviour of a competition authority. We believe what might become more relevant in the foreseeable future are various types of documents which discuss principles and general rules of picking cases, rather than more "old-school" lengthy strategic documents that pinpoint priorities and set milestones. This may provide more flexibility and manoeuvrability in the context of dynamic global changes and unexpected challenges. Against the backdrop of rapid global developments, detailed multi-year strategies may more often encounter the obstacle of cost-benefits analysis, in the sense that much effort is invested into a multiannual strategy, which then quickly becomes not fit-for-purpose.

82. This is not to say that a long term vision and strategy is not needed, but we would expect that practical considerations, including public expectations, may drive enforcers towards more flexible instruments that allow better responsiveness. In this context, general policy documents that outline prioritisation principles, coupled with more dynamic adjustments of actions on-the-go, may address – at least to some extent – the problem of transparency and accountability with regard to case prioritisation.

[35] For example, a jurisdiction that focuses much on cartel enforcement can be expected to produce evidentiary rules that take full account of the fact that cartels leave little evidence. A jurisdiction that priorities other types of infringements, failing to generate cartel cases, may experience difficulties once it returns to cartels, as the whole competition system might be accustomed to cases where evidence is more straightforward. Likewise, a competition system that focuses on the "old-economy" may try to apply the "old logic" to new dynamic markets, ignoring their different nature.