



***Non-Majoritarian Instruments and Institutions:  
Dissensus and Democracy in Europe***  
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## **Non-Majoritarian Regulators in Democratic Systems: The Case of Competition Authorities**

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ABSTRACT: Competition Authorities (CAs) form a specific type of non-majoritarian institution tasked with safeguarding competitive markets and fundamental economic freedoms by controlling excessive concentrations of economic power, which can undermine democratic processes. CAs play a vital role in aligning markets with democratic principles, and the enforcement of competition law is often cited as a safeguard of liberal democracy. However, being established as independent regulatory bodies insulated from electoral politics, capture, and short-termism, their mandate is limited to assessing economic effects and safeguarding competition. This paper examines how CAs, as independent decision-makers, can safeguard democratic institutions and the values of liberal democracy in a complex and contested economic and societal environment. It asks how CAs can counterbalance, constrain, and complement majoritarian decision-making in times of overlapping economic, geopolitical, and democratic crises, as they are increasingly expected to assume responsibilities beyond the narrow protection of competition. As their mandate remains primarily economic, competition authorities cannot openly weigh political values without risking politicization, technocratic overreach, and erosion of democratic legitimacy. Preserving independent expertise must therefore be paired with stronger accountability and responsiveness to democratic demands. This paper proposes a constructive way through responsive enforcement, drawing on theories of responsive regulation, particularly tripartism, and social accountability, to

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strengthen institutional responsiveness, accountability, and democratic legitimacy. This paper is a contribution to a Special Issue that critically analyses the role of non-majoritarian instruments and institutions with respect to three challenges that shape contemporary democracies in Europe: socio-economic inequality and discrimination, growing authoritarianism, and the pressing climate crisis.

KEYWORDS: competition authorities – technocracy – independence – accountability – responsive regulation – democracy.

## 1. Introduction

This paper examines the role of Competition Authorities (CAs) as Non-Majoritarian Institutions (NMIs) within an increasingly complex and contested economic and societal environment. It asks whether, and how, these authorities can counterbalance, constrain, and complement majoritarian decision-making.

This question resonates with the broader concerns of the Special Issue, and explores whether and how competition authorities strengthen or undermine a democratic system grounded in fundamental rights and equality.

Amid today's overlapping economic, geopolitical, and democratic crises, competition authorities are ever more expected to assume responsibilities that extend beyond the narrow protection of competition. They are called upon to balance complex and often conflicting objectives, like economic efficiency and digital fairness, consumer welfare and environmental sustainability, social inclusion, economic security or safeguarding democratic integrity.

With large-scale digitalization, new enforcement challenges emerge due to the pace and novelty of technological change, threatening core democratic values such as a diverse marketplace. Competition authorities face pressure to address rising market concentration and its entanglement with political power, which can distort public debate and undermine democratic governance, distort public discourse, undermine economic and societal resilience, and accelerate environmental degradation.<sup>1</sup>

Accordingly, competition authorities are not merely correcting market failures; they also safeguard democratic institutions and the values of liberal democracy.<sup>2</sup> By limiting market power, whether of digital gatekeepers, state-backed monopolies, or media conglomerates, they can counterbalance democratic erosion.

<sup>1</sup> A Gerbrandy and V Morozovaite, 'Corporate Power Beyond Market Power: Strengthening the Role of Competition Law' (Verfassungsblog, 2 October 2025), at [verfassungsblog.de](http://verfassungsblog.de); O 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 and Competition Law* 687; D Coyle, 'Everything Everywhere All at Once: Competition Policy and Industrial Policy Choices in an Era of Structural Change' (2024) 40 *Oxford Review of Economic Policy* 718.

<sup>2</sup> Organisation for Economic Co-operation and Development (OECD), *The Interaction Between Competition and Democracy* (OECD 2024) at [www.oecd.org](http://www.oecd.org).

As dissensus deepens around liberal democracy, the rule of law,<sup>3</sup> and its economic foundations, CAs have a vital role to play in shaping the future of markets and their alignment with democratic principles.<sup>4</sup>

In studying Non-Majoritarian Institutions (NMIs), CAs, as independent regulatory bodies, offer a particularly revealing case as they were established as independent bodies, insulated from electoral politics, capture, and short-termism. This design deliberately limited their mandate to assessing the economic effects of conduct and safeguarding competition.

Moreover, over the past three decades, CAs have operated under the influence of neoclassical economics and neoliberal policy frameworks, resulting in competition law enforcement, which is increasingly technical, narrowly framed, and insulated from public scrutiny.<sup>5</sup> By prioritizing economic efficiency and consumer welfare, enforcement agendas have narrowed, sidelining broader socio-political concerns, like inequality, sustainability or employment.<sup>6</sup> This also led CAs to function in ‘technocratic silos’, engaging mainly with courts and businesses while remaining largely disconnected from civil society, reinforcing institutional isolation and limiting democratic oversight and responsiveness.<sup>7</sup>

However, the conditions that justified the original mandate have changed. Industrial policy has re-emerged as a central instrument of economic governance, geopolitical rivalry increasingly shapes markets, and authoritarian drift threatens democratic institutions.<sup>8</sup> In an era of transatlantic political instability and the global revival of illiberal governance, the normative foundations of market regulation are under strain.<sup>9</sup>

These developments call for reassessing the role of competition authorities. Their expanding mandate heightens their normative and political significance while challenging the technocratic model that has insulated them from democratic oversight. Their narrow focus on efficiency risks marginalizing their role in broader market

<sup>3</sup> R Coman and N Brack, ‘Dissensus over Liberal Democracy: Concept-Building and Typology’ (2025) 24 *European Political Science* 417.

<sup>4</sup> E Deutscher, ‘The Competition-Democracy Nexus Resurrected? Four Precursors of a Competition-Democracy Nexus 4.0’ (2025) 13 *Journal of Antitrust Enforcement* 507.

<sup>5</sup> H Buch-Hansen and A Wigger, ‘Revisiting 50 Years of Market-Making: The Neoliberal Transformation of European Competition Policy’ (2010) 17 *Review of International Political Economy* 20; I Lianos, ‘Minding Competition in Complex Adaptive Social Systems: The Sociological Approach to Competition Law’ (SSRN, 19 May 2024) at [ssrn.com](https://ssrn.com).

<sup>6</sup> OECD, ‘The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards’ (2023) *OECD Competition Policy Roundtable Background Note*, at [www.oecd.org](https://www.oecd.org).

<sup>7</sup> H Buch-Hansen and A Wigger, ‘The Unfolding Contradictions of Neoliberal Competition Regulation and the Global Economic Crisis: A Missed Opportunity for Change?’ in H Overbeek and H van Apeldoorn, B (eds), *Neoliberalism in Crisis* (Palgrave Macmillan, London 2012) 23 ff.

<sup>8</sup> D Coyle, ‘The Relationship Between Competition Policy and Industrial Policy in an Era of Structural Change’ (2025) 60 *Intereconomics* 205-209.

<sup>9</sup> M Bernatt and KJ Cseres, ‘Forgotten Constitutional Identity of EU Competition Law’ (Kluwer Competition Law Blog, 7th January 2025), at [competitionlawblog.kluwercompetitionlaw.com](https://competitionlawblog.kluwercompetitionlaw.com).

governance, neglecting broader societal concerns, and leaving unaddressed the complex challenges posed by new technologies and global market developments, particularly when these operate beyond traditional competition law boundaries.

Whether CAs can effectively defend the values of liberal democracy, depends not only on the adoption of substantive new regulations (e.g. those addressing the challenges of digital markets), or on a more democracy-oriented vision of competition policy,<sup>10</sup> but also on their institutional structures and enforcement mechanisms. Though unelected and unrepresentative, CAs can nonetheless reinforce constitutional checks and balances by preventing the concentration of economic power and ensuring fair market competition. They can indirectly restraint the political power of special interests, act as a check on majoritarian excesses, and enforce the rule of law.

As their mandate remain defined in economic terms, they cannot openly weigh political values without risking accusations of politicization, technocratic overreach, and erosion of their democratic legitimacy. Preserving independent expertise should, therefore, be coupled with stronger accountability and responsiveness to democratic demands.

This paper proposes a constructive way forward through the concept of responsive enforcement. Drawing on theories of responsive regulation, particularly tripartism,<sup>11</sup> and social accountability,<sup>12</sup> it advocates stronger accountability mechanisms and proposes concrete mechanisms to enhance institutional responsiveness and democratic legitimacy.

By opening processes to wider stakeholder participation and recognising themselves as sites of democratic contestation, competition authorities can strengthen their legitimacy. Without deciding political questions directly, they can act as counter-majoritarian institutions, preserving the conditions of pluralism, fairness, and the rule of law in markets on which liberal democracy depends.

In doing so, they can become more responsive enforcers, complementing majoritarian politics, counterbalancing technocratic insulation, and engaging citizens not merely as *homo economicus*, but as *homo civicus*.<sup>13</sup>

Rethinking competition law enforcement in this way means finding a new balance: preserving expertise and independence, while re-embedding competition enforcement within a more democratic, socially grounded, and politically accountable framework.

In the following, Section 2 analyzes CAs as a specific type of non-majoritarian institutions, their emergence as independent regulatory authorities in the 1990s, their

<sup>10</sup> A Ezrachi and V Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop it' (2025) 13 *Journal of Antitrust Enforcement* 315.

<sup>11</sup> L Ayres and J Braithwaite, 'Tripartism: Regulatory Capture and Empowerment' (1991) 16 *Law & Social Inquiry* 435.

<sup>12</sup> M Righettini and S Grimaldi, 'Social Accountability in the Regulatory Policy Process: The Governance of Telecommunications in Italy and Spain' in AC Bianculli, X Fernández-i-Marín, J Jordana (eds), *Accountability and Regulatory Governance. Executive Politics and Governance Series* (Palgrave Macmillan 2015) 143 ff.; G Nesti, 'Strengthening the Accountability of Independent Regulatory Agencies: From Performance Back to Democracy' (2018) 16 *Comparative European Politics* 464481.

<sup>13</sup> 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 and Society* 580.

democratic deficit in the EU regulatory space and in what ways they could defend representative democracies. Section 3 investigates CAs' role in liberal democracy and analyzes their independence as a core feature of EU market governance. Section 4 shows how independence as a one-dimensional value has resulted in the administrative insulation of CAs from broader societal challenges, and Section 5 investigates how the institutional autonomy of CAs, especially the European Commission, has developed into a governance model with limited political accountability and with relevant implications for democratic oversight. Finally, Section 6 examines how CAs can maintain accountability within majoritarian political systems without undermining their independence.

## 2. CAs as NMIs

### 2.1. CAs as independent regulators

A defining feature of NMIs is that they exercise some form of public authority, without being directly accountable to either affected stakeholders or democratically elected institutions such as governments and parliaments.<sup>14</sup> Accordingly, the legitimacy of NMIs' power is not based on a majority of the votes of the electorate, either directly or indirectly. Their legitimacy is based on independent expert decision-making at arm's length of elected politicians.

As distinguished by Vibert, Independent Regulatory Authorities (IRAs) form one of the five categories of NMIs, besides service providers, risk assessors, auditors, and appeal bodies.<sup>15</sup> They are public bodies that regulate and oversee the protection of a series of public values, such as fair and free competition, privacy, non-discrimination, or consumer protection. Often, they monitor the boundaries between private activities and public concerns, and offer a solution to the increasing legal and technical complexity of policy fields. They emerged as a reaction to the fact that majoritarian elected politicians and government officials lack the technical knowledge necessary to navigate markets, society and the economy and to deliver important services for citizens.<sup>16</sup> Besides expert knowledge, IRAs provide credible commitments to investors and consumers, and long-term consistency. In this way, the broader public are assured that undertakings compete on the merit, quality of food and the environment is guaranteed or financial stability are not jeopardized by political concerns

<sup>14</sup> See C Armeni and C Eckes, 'Non-Majoritarian Instruments and Institutions: Dissensus and Democracy in Europe' (2026) 11 *European Papers* 341; M 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 University Press 2020) 512.

<sup>15</sup> F Vibert, *The Rise of Unelected: Democracy and the New Separation of Powers* (Cambridge University Press 2009).

<sup>16</sup> JL Selin, 'Political Control of Regulatory Authorities' in M Maggetti et al. (eds), *Handbook of Regulatory Authorities* (Edward Elgar Publishing 2022).

or private interests.<sup>17</sup> Independence from majoritarian politics allows expert bodies to make informed choices without short-term political pressures, enhancing overall legitimacy. Independence has been justified by better-quality decision-making and is a broadly proclaimed distinctive character of regulatory governance globally.<sup>18</sup> Their proactive, policy-oriented role and reliance on technical expertise set them apart from other NMIs, such as courts.<sup>19</sup>

Historically, the 1990s and 2000s witnessed the emergence and spread of NMIs in many countries across the EU, and outside, including independent regulatory authorities. Market-liberalizing reforms in the 1980s and 1990s – marked by privatization, deregulation, and a retreat of direct state control – were accompanied by the rise of regulatory authorities across Western Europe. These bodies were tasked with monitoring market processes from an independent, technocratic position.<sup>20</sup> It was during this neoliberal restructuring of capitalism that competition law and enforcement rose to prominence, with the global proliferation of CAs closely following these shifts.<sup>21</sup>

Being framed as an independent, apolitical and economically driven legal field, with enforcement seen as the preserve of technocratic expertise, CAs emerged as key actors in advancing neoliberal transformations, promoting market efficiency, and economic liberalization.<sup>22</sup> Designed as guardians of free markets, and shaped by neoliberal ideals that prioritized deregulation, market efficiency, and competitiveness, CAs embedded market-based approaches into the architecture of economic governance across a growing number of jurisdictions. Neoliberalism shaped not only the substance of competition policy, but also the institutional architecture of its enforcement. It encouraged the rise of non-majoritarian institutions: politically independent, expert-driven authorities positioned outside democratic control.<sup>23</sup> Modelled as the most reliable guardians of free and fair competition, their legitimacy rested on technocratic authority rather than on accountability.<sup>24</sup>

<sup>17</sup> Bovens and Schilemans (n 15).

<sup>18</sup> C Koop and J Jordana, 'Regulatory Independence and the Quality of Regulation' in M Maggetti (n 16).

<sup>19</sup> Courts resolve disputes based on legal reasoning and act only when approached, regulators actively shape and implement rules, often combining legislative, executive, and quasi-judicial functions. They are legitimized not by legal impartiality but by specialized knowledge and delegated authority, and are held accountable through oversight mechanisms rather than judicial appeal. S Voigt, 'Non-Majoritarian Institutions - A Menace to Constitutional Democracy?' (University of Hamburg, Institute of Law and Economics Working Paper Series 68-2023).

<sup>20</sup> O 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 *The Modern Law Review* 1209.

<sup>21</sup> A Wigger and H Buch-Hansen, 'EU Competition Regulation: A Case of Authoritarian Neoliberalism?' in E Hartmann, PF Kjaer (eds), *The Evolution of Intermediary Institutions in Europe* (Palgrave Macmillan 2015).

<sup>22</sup> Lianos (n 6).

<sup>23</sup> As other NMIs, CAs are not directly elected and are decoupled from traditional democratic processes of representation, scrutiny, and accountability.

<sup>24</sup> Wigger and Buch-Hansen (n 22).

## 2.2. Legitimacy and accountability of NMIs

However, like other Independent Regulatory Agencies (IRAs), CAs can be at odds with democratic principles of majoritarianism and electoral accountability. Their decisions, while meant to be impartial and based on expertise, may not directly reflect the will of the elected government or the preferences of the majority of citizens. This creates a tension between the need for technical expertise and democratic legitimacy. While their expert, knowledge-based decision-making is essential in modern economic governance, and democracies must delegate many tasks to independent bodies, these institutions are unelected and exercise public power in capitalist democracies, without direct democratic legitimacy.<sup>25</sup> They rely on *throughput* legitimacy (impartial, legal, and technically sound procedures) and *output* legitimacy (effective and efficient outcomes).<sup>26</sup>

While functional rationales for delegation highlight the ability of independent agencies to offer credible long-term commitments, improve policymaking efficiency, and manage complex technical areas more effectively than elected politicians, concerns have been raised about their democratic legitimacy.<sup>27</sup> Governance systems that rely solely on economic performance, without supporting trust-based relationships with citizens, risk losing legitimacy.<sup>28</sup>

CAs increasingly make decisions with significant distributive consequences – such as influencing wealth and power concentration, and affecting workers, users and consumers – yet they do so without the democratic safeguards of representation, scrutiny, or accountability.<sup>29</sup> Their choices about what to prioritize and how to enforce the rules can reinforce or mitigate social and economic inequalities,<sup>30</sup> despite being framed as neutral or technical. This raises concerns about their legitimacy and accountability, especially when their growing political influence bypasses traditional democratic mechanisms and are not aligned with the preferences of political majorities.<sup>31</sup> Accordingly, while independence safeguards impartiality, it can also distance NMIs from public oversight, raising questions about democratic engagement, participation and representation.

Designed to operate independently from political influence, CAs were built on the premise that technocratic expertise and economic reasoning would ensure objective and efficient enforcement.

<sup>25</sup> A Van Veen, 'Regulation without Representation? Independent Regulatory Authorities and Representative Claim-Making in the Netherlands, 1997-now' in D Sloopjes and H Kaal (eds), *New Perspectives on Power and Political Representation from Ancient History to the Present Day* (Brill 2019) 171-201.

<sup>26</sup> Bovens and Schillemans (n 15); Cengiz (n 14).

<sup>27</sup> M Thatcher and AS Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions (2011) 25 *West European Politics* 1.

<sup>28</sup> Arguably, this provides one of the explanations for the decreasing citizen trust in the EU institutions after the 2008 crisis; Cengiz (n 14).

<sup>29</sup> Bovens and Schillemans (n 15).

<sup>30</sup> J Broulik and KJ Cseres, *Competition Law and Economic Inequality* (Hart Publishing 2022).

<sup>31</sup> Vibert (n 16).

However, their formal independence has increasingly contributed to their insulation from democratic oversight. While central to advancing market-based governance, the focus on market efficiency has, over time, created tensions between their institutional independence and the growing demand to respond to societal challenges, especially in the wake of economic crises and rising industry concentration. This tension reflects a deeper crisis within liberal democracy, rooted in the long-held belief that economic liberalism would naturally sustain political liberalism.<sup>32</sup> In practice, the decoupling of market governance from democratic control has created fertile ground for illiberal forces.<sup>33</sup> Neoliberal policies of deregulation and minimal state intervention, intended to safeguard competitive markets, have failed to deliver the democratic, economic, and political goals that competition law originally sought to uphold. Instead, they have enabled market concentration, and extended market mechanisms into new social and geographic domains. In the European Union, both the substantive narrowness and institutional insulation of CAs, raised concerns about their ‘authoritarian traits’ within EU competition law, a regulatory field that has been largely shielded from democratic control and political contestation since the founding years of the European Communities.<sup>34</sup> These developments led to declining public trust, and CAs now face growing pressure to be not just independent and expert-driven, but also socially accountable and democratically responsive. This development will be discussed in Section 3 below.

### 2.3. *NMIs as guardians of representative democracy*

At the same time, NMIs can be seen as guardians of representative democracy. Despite their democratic deficit, they may align more closely with liberal and *monitory* notions of democracy, acting as checks on corruption, and abuse of power.<sup>35</sup>

As part of the institutional system of checks and balances, NMIs can help constrain majoritarian excesses and support constitutional democracy. Delegation, in this view, creates new separations of power that empower both citizens and elected representatives to oversee political authority.<sup>36</sup> CAs, as NMIs, can serve as counterweights to populist movements by safeguarding liberal economic frameworks. They

<sup>32</sup> The rise of populism across Europe can be understood, at least in part, as a political backlash against the depoliticization of economic governance and the perceived erosion of popular sovereignty through technocratic rule, W Galston, ‘Populist Challenge to Liberal Democracy’ (2018) 29 *Journal of Democracy* 5.

<sup>33</sup> B Vormann and MD Weinman, ‘From a Politics of No Alternative to a Politics of Fear, Illiberalism and Its Variants’ in B Vormann and M D Weinman (eds), *The Emergence of Illiberalism: Understanding a Global Phenomenon* (Routledge 2020) 8.

<sup>34</sup> Wigger and Buch-Hansen (n 22); F Cengiz, ‘Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach’ (2016) 54 *Journal of Common Market Studies* 826.

<sup>35</sup> Bovens, and Schillemans (n 15) 512.

<sup>36</sup> E Eriksen, *Making the Unelected Safe for Democracy. The Accountability of Expertise Making the Un-Elected Safe for Democracy* (Routledge 2021).

help lock in stable, market-oriented policies and act as buffers against political volatility and dissensus, thus reinforcing continuity in governance amidst unstable political tides. Safeguarding independent expert decision-making, addressing time-inconsistency problems, and enhancing the state's capacity to make credible commitments,<sup>37</sup> NMIs can act as independent information gatherers, offering informational checks and balances in an era gravitating towards fact-free politics and fake news.<sup>38</sup> Though unelected and unrepresentative, NMIs can play an important role in protecting democratic systems by reinforcing constitutional checks and balances through stronger accountability mechanisms.<sup>39</sup> NMIs can help curb majoritarian excesses, keep the elected powers in check, protect the rule of law, and prevent abuse of power,<sup>40</sup> through specific strategies to enhance legitimacy. As Section 6 below argues, theories of responsive regulation, in particular tripartism, and social accountability, can strengthen CAs' institutional responsiveness relying on stakeholder engagement, or more transparent communication practices.<sup>41</sup>

### 3. The role of competition authorities in liberal democracy

#### 3.1. CAs and liberal democracy

Competitive markets are frequently cited as essential to liberal democracy, not merely as tools for optimizing welfare, but as prerequisites for democratic governance.<sup>42</sup> Its connection to liberal democratic values lies, for example, in the recognition that unchecked private economic power can be just as threatening to individual freedom as unchecked political power.<sup>43</sup>

As technocratic bodies engaged in purely technical decision-making, CAs play a central role in the governance of markets and society. By preventing anti-competitive practices, like restrictive agreements, abuse of dominance, harmful mergers, and selective state aid, CAs' mandate is to protect the competitive process as a key accountability mechanism for market actors. Through preventing the concentration

<sup>37</sup> M Zürn, 'How Non-Majoritarian Institutions Make Silent Majorities Vocal: A Political Explanation of Authoritarian Populism' (2022) 20 *Perspectives on Politics* 788.

<sup>38</sup> Bovens and Schillemans (n 15).

<sup>39</sup> They refer to O'Donnell's (1998) who called for 'horizontal accountability': powerful unelected bodies designed to keep the elected powers in check, protect the rule of law, and prevent abuse of power. GA O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 *Journal of Democracy* 112.

<sup>40</sup> Bovens, and Schillemans (n 15).

<sup>41</sup> Ayres and Braithwaite (n 12); Nesti (n 13).

<sup>42</sup> KJ Cseres, 'EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding' in C Colombo, M Eliantonio and K Wright (eds), *The Evolving Governance of EU Competition Law in a Time of Disruptions: A Constitutional Perspective* (Hart Publishing 2024); OECD (n 2).

<sup>43</sup> A Katz, 'The Chicago School and the Forgotten Political Dimension of Antitrust Law' (2020) 87 *The University of Chicago Law Review* 413.

of economic power, they limit how corporate influence can be converted into political power, so controlling it helps prevent abuses that could undermine democratic processes.<sup>44</sup>

By limiting the abuse of economic power, they uphold the ‘market’s equivalent of separation of powers’,<sup>45</sup> and provide democratic oversight of both public and private economic power.<sup>46</sup> In Europe, competition law emerged as a key pillar of democratic systems aimed at constraining illegitimate power.<sup>47</sup> EU institutions have emphasized competition as a force for the ‘democratization of markets’ and as the foundation of a democratic society. Like political checks and balances, effective competition was seen as essential safeguards within the market economy.<sup>48</sup>

In liberal democracies, CAs balance the public interest in economic efficiency with the protection of individual economic freedoms. They reconcile private property rights with the public good, ensuring that economic freedom does not become a form of coercive power.<sup>49</sup> Their core function is to prevent the unlawful acquisition and abuse of market power, enabling the benefits of competition, lower prices, greater choice, and higher quality. By limiting excessive economic concentration, they safeguard economic rights that we consider ‘fundamental’ in our societies.<sup>50</sup> With the rise of digital markets, CAs are increasingly tasked with preserving a diverse marketplace, safeguarding the digital public sphere, and address democratic challenges, such as misinformation, censorship, and biased moderation that undermine informed debate and democratic governance.<sup>51</sup>

### 3.2. Mandate and powers of CAs in the EU

CAs have a particular position in the classical scheme of division of powers. While distinct from the legislative and executive branches, they are not part of the judiciary,

<sup>44</sup> Deutscher (n 5).

<sup>45</sup> MP Maduro, ‘Ensuring Market and State Accountability: The Private? Public Distinction in the EU Internal Market’ in O Andriychuk (ed), *Antitrust and the Bounds of Power – 25 Years On* (Hart Publishing 2024).

<sup>46</sup> KJ Cseres, ‘The Role of Independent Competition Authorities as Quasi-Courts in Defending Rule of Law Values in Europe’ in P Bárd and J Krommerdijk (eds), *Judicial Independence* (Edward Elgar Publishing 2025) 143 ff.

<sup>47</sup> Commission of the European Communities, Resolution on the 12th Report of the Commission of the European Communities on Competition Policy 1982, recital 5; Commission of the European Communities, Resolution on the 18th Report of the Commission of the European Communities on Competition Policy, recital 2.1.5.4.

<sup>48</sup> European Commission, XVth Report on competition policy (1985) 11.

<sup>49</sup> G Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997).

<sup>50</sup> M Guidi, ‘Explaining and Assessing Independence: National competition authorities in the EU member states’ (PhD Thesis, European University Institute 2012) 6.

<sup>51</sup> V Morozovaite, A Gerbrandy, ‘Exploring the Nexus between European Competition Law and Democratic Society: A Case of Political Microtargeting’ (2024) 17 *Yearbook of Antitrust and Regulatory Studies* 9-10.

yet their functions combine elements of lawmaking, administrative enforcement, and judicial adjudication.<sup>52</sup> Unlike sector-specific economic regulators, CAs have a broad, cross-sectoral mandate. While their mandates and powers may differ across jurisdictions, they share the role to protect the competitive process in markets, which is framed in economic (rather than political) terms. Despite differences across jurisdictions, competition authorities hold far-reaching powers to investigate companies, make binding decisions on anticompetitive conduct or mergers, and impose sanctions such as fines or remedies. They decide concrete cases by applying the law, often exercising quasi-judicial powers, such as finding infringements, ordering the cessation of conduct, or imposing fines.<sup>53</sup> They interpret legal provisions, set precedents, and issue binding decisions, while remaining embedded within the public administration.<sup>54</sup>

Given their extensive enforcement powers and their growing tasks, it is essential to examine who enforces competition law, under what mandate, and with what oversight. In the EU, the European Commission and national CAs (NCAs) share responsibility for enforcing the EU Treaty's competition rules. In 2004, Regulation 1/2003 established a system of parallel competences between the Commission, NCAs, and national courts, requiring NCAs to apply Articles 101 and 102 TFEU alongside national rules when there is 'effect on trade between Member States'.<sup>55</sup> While Regulation 1/2003 outlines the Commission's procedures and sets basic rules on NCAs' powers, it leaves their procedural rules and institutional structures to national discretion according to the principles of national procedural and institutional autonomy.<sup>56</sup> Consequently, the decentralized system operates through a composite of substantive EU law and different national procedures.<sup>57</sup>

EU competition enforcement has long reflected a hierarchical structure dominated by the European Commission. The Commission has the overall responsibility and necessary legal tools to ensure that all NCAs apply EU competition rules in a

<sup>52</sup> M Guidi, *Competition Policy Enforcement in EU Member States: What is Independence for?* (Palgrave Macmillan 2016).

<sup>53</sup> Cseres (n 47).

<sup>54</sup> K Wright, 'The "Judicial", the "Administrative" and Consistent Application After the Decentralisation of EC Antitrust Enforcement' (2009) draft paper for *European Union Studies Association Eleventh Biennial International Conference*.

<sup>55</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>56</sup> This means that the NCAs apply the same substantive EU rules, but they do so in different procedural frameworks and may impose different sanctions. These procedural differences had been addressed to some extent in Articles 11 and 12 of Regulation 1/2003 through the cooperation of the NCAs within the ECN. European Commission, Commission Staff Working Paper accompanying the Report on Regulation 1/2003, SEC (2009) 574 final, para 200; Commission Staff Working Paper, 'Enhancing Competition Enforcement by the Member States' Competition Authorities: Institutional and Procedural Issues' COM (2014)453, para 43.

<sup>57</sup> Case C-33/76 *Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para 5.

uniform way. This makes the Commission the key enforcer of EU competition rules. Despite the 2004 decentralisation reforms, this centralisation persisted, and have even deepened.<sup>58</sup> By the 1990s, competition law had become a ‘common core’ across Member States, driven by market integration, EU constitutionalisation, and strong supranational enforcement.<sup>59</sup>

The Europeanisation<sup>60</sup> of competition law, especially in candidate countries, was marked by the adoption of national competition laws and the establishment of NCAs. This process institutionalised a neoliberal model through top-down pressure from the Commission, EU courts, and expert networks.<sup>61</sup>

The supremacy of EU law led most national competition regimes to align closely with both the substantive EU prohibitions and the Commission’s procedural and institutional framework. This process was reinforced by financial conditionality, bilateral cooperation, and the institutional framework of the European Competition Network (ECN). Since 2009, the Commission has advanced procedural harmonisation, but this deepening integration has also highlighted that EU competition policy remains largely insulated from political oversight.<sup>62</sup> Operating as a non-majoritarian instrument, it is removed from national democratic politics and anchored in technocratic expertise and transnational cooperation. While this depoliticised mode of governance enhances coherence and credibility, it also raises questions of legitimacy and democratic responsiveness.

### 3.3. The relevance of independent CAs in the EU

CAs operate as quasi-judicial bodies, requiring a higher degree of independence and stronger internal accountability mechanisms. While sectoral regulators often exercise discretion within broad policy goals, CAs are strictly bound by legal mandates, underscoring the need for impartial, legally grounded enforcement.<sup>63</sup> Tasked with protecting market actors’ quasi-constitutional rights, CAs independence is a foundational requirement.<sup>64</sup> This is not only essential for safeguarding undistorted competition but also for ensuring effective legal protection, as enshrined in Article 19(1) of

<sup>58</sup> Guidi (n 53).

<sup>59</sup> M Drahos, *Convergence of Competition Laws and Policies in the European Community: Germany, Austria and Netherlands* (Kluwer 2002).

<sup>60</sup> Europeanisation is understood as ‘the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance’ in I Bache and A Jordan, ‘Europeanization and Domestic Change’ in I Bache and A Jordan (eds), *The Europeanization of British Politics* (Palgrave Macmillan 2006) 30.

<sup>61</sup> F van Waarden and M Drahos, ‘Courts and (Epistemic) Communities in the Convergence of Competition Policies’ (2002) 9 *Journal of European Public Policy* 928.

<sup>62</sup> Cengiz (n 35) 586.

<sup>63</sup> OECD, Independent Sector Regulators, (2019) OECD Background Note, DAF/COMP/WP2(2019)3.

<sup>64</sup> Quasi-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

the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights (CFR).<sup>65</sup> The importance of independence was underlined by the General Court in *Sped-Pro*, which addressed whether Poland's CA met rule of law standards. The Court held that NCAs, like national courts, must be independent to effectively enforce EU competition law and uphold complainants' rights under Article 19(1) TFEU.<sup>66</sup>

NCAs' independence has traditionally been justified by the technical complexity of regulated markets and the need for expertise.<sup>67</sup> This independence is rooted in their legal and functional separation from market parties and political influence, ensuring decisions are made without political interference.<sup>68</sup> Today, this independence is further reinforced by the complex technical assessments and normative decisions they make, based on open-ended legal norms, without fixed or clear legal standards.

In the EU's decentralized system, NCAs' administrative capacity and institutional design are crucial for effective enforcement. However, challenges regarding what constitutes independent, and effective enforcement, such as detecting infringements, setting priorities, allocating resources, and imposing penalties, remain unresolved.

Article 35 of Regulation 1/2003 required each Member State to designate a competition authority, administrative or judicial, to enforce Articles 101 and 102 TFEU, provided it ensured effective compliance. However, EU law offered limited guidance, leaving further procedural and institutional aspects of enforcement to national jurisdictions.<sup>69</sup>

protecting individual rights and economic liberties. D Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press 1998) 286.

<sup>65</sup> Charter of Fundamental Rights of the European Union [2000].

<sup>66</sup> Case T-791/19 *Sped Pro v Commission*, EU:T:2022:67, para 91. The General Court confirmed that the fundamental right to a fair trial before an independent tribunal under Art 47 of the Charter, 'is also of particular importance for the effective application of Articles 101 and 102 TFEU' and that Member States are obliged, 'under the second paragraph of Article 19(1) TEU, to provide the remedies necessary to ensure respect for individuals' right to effective judicial protection in the fields covered by EU law, including the field of competition law'.

<sup>67</sup> I Maher, 'Functional and Normative Delegation to Non-majoritarian Institutions: The Case of the European Competition Network' (2009) 7 *Comparative European Politics* 414, 419.

<sup>68</sup> Koop and Jordana (n 24); M Maggetti, 'Independent Regulators in the Post-delegation Stage' in M Maggetti, F Di Mascio, and A Natalini (eds), *Handbook of Regulatory Authorities* (Edward Elgar Publishing 2022) 227 ff.

<sup>69</sup> Their competences were set out in Arts 5 and 6 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 1–25; KJ Cseres, 'Integrate or Separate – Institutional Design for the Enforcement of Competition Law and Consumer Law' (Amsterdam Centre for European Law and Governance Research Paper No. 2013-01), at papers.ssrn.com.

While EU law has emphasized the independence of national regulators in other sectors like energy and telecommunications,<sup>70</sup> Regulation 1/2003 did not specify requirements for NCAs' formal independence.<sup>71</sup> Although NCAs are integral to most political systems, their powers and structures vary across Europe, due to national administrative traditions and constitutional frameworks. Some NCAs are fully independent, while others operate under ministry supervision. These differences reflect varying levels of economic coordination and contrasting theoretical perspectives on administrative governance.<sup>72</sup>

### 3.4. ECN+ Directive: focus on independence

To address these disparities and ensure more consistent enforcement across the EU, the ECN+ Directive<sup>73</sup> aimed to strengthen NCA enforcement by ensuring their independence, adequate resources, and effective powers, addressing concerns that weak authorities could allow anti-competitive practices to persist and harm consumers. The Directive set minimum standards for investigative, decision-making, and enforcement powers, with safeguards for independence from market and political actors in Article 4.<sup>74</sup>

Though, the Directive did not engage with the broader constitutional context of competition law enforcement. While specific analysis concerning NCAs' accountability remains limited, research underscores that *de facto* independence depends on the strength of a country's rule of law.<sup>75</sup> This is important to understand how CAs build institutional capacity and autonomy to address both private and state-led anti-

<sup>70</sup> Already in Art 6 of Directive 88/301 on competition in the markets in telecommunications terminal equipment the Commission introduced an obligation on the MS to entrust the regulation of terminal equipment to a body independent from market parties active in the provision of telecoms services or equipment. This requirement of independence has also been implemented in the second liberalization package in the energy and telecoms sector. C-202/88 *France v Commission* EU:C:1991:120, paras 51-52; Case C-18/88 *RTT v GB-Inno-BM*, EU:C:1991:474, paras 25-26; Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* EU:C:2008:143.

<sup>71</sup> Case C-53/03 *Syfait* EU:C:2005:333, paras 31-36. Empirical studies, highlight significant variation across Member States in the institutional, personal, and financial independence of CAs from governments. Guidi analyses how an NCA's *de iure* independence reflects its *de facto* independence. M Guidi, 'Delegation and Varieties of Capitalism: Explaining the Independence of National Competition Agencies in the European Union' (2014) 12 *Comparative European Politics* 343.

<sup>72</sup> Brook and Cseres (n 21).

<sup>73</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

<sup>74</sup> KJ Cseres, 'The Implementation of the ECN+ Directive in Hungary and Lessons Beyond' (2019) 12 *Yearbook of Antitrust and Regulatory Studies* 20, 55-90.

<sup>75</sup> U Aydin, and T Bütthe, 'Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (2016) 79 *Law and Contemporary Problems* 1.

competitive practices. What they require is *embedded autonomy*,<sup>76</sup> not absolute independence, which enables them to act effectively while remaining politically and judicially accountable.<sup>77</sup> The degree of independence that is given to an NCA is ultimately a *political choice*, reflecting a jurisdiction's commitment to a particular economic policy.<sup>78</sup> National variations in enforcement powers and institutional structures stem from differences in administrative law systems, constitutional orders, as well as local varieties of regulatory capitalism.<sup>79</sup>

#### 4. From independence to insulation: the EU's technocratic competition governance

In the EU, Regulation 1/2003 has been seen as consolidating the neoliberal turn in competition law by reinforcing a narrow, efficiency-driven focus embedded in neo-classical economics. It adopted the 'more economic approach', with price effects as the primary benchmark for enforcement, thereby sidelining broader concerns such as employment, environmental protection, and long-term structural transformation.<sup>80</sup> The rise of the 'competition state' as a global governance concept, alongside the EU's Lisbon and Europe 2020 Agendas, focused on growth and competitiveness, provided the political backdrop for these reforms.<sup>81</sup>

EU competition law has come to be seen as a separate expert domain,<sup>82</sup> disconnected from broader societal concerns, and increasingly isolated and separate from broader public debate. Their exclusive reliance on technical economic expertise has been criticized for reducing citizen engagement and raising questions about the democratic legitimacy of the enforcement system as a whole.<sup>83</sup>

<sup>76</sup> P Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press 1992).

<sup>77</sup> Independence requirements relate to independent exercise of regulatory powers. EU law recognizes that democratic control mechanisms should be in place, like reporting obligations, appointment procedures of NCAs' board members, guaranteeing authorities' political accountability. S Lavrijssen, 'Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator' (2022) 16 *Carbon & Climate Law Review* 1, 25-40.

<sup>78</sup> G Monti, 'Independence, Interdependence, and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' in D Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016).

<sup>79</sup> I Guardiancich and M Guidi, 'Formal Independence of Regulatory Agencies and Varieties of Capitalism: A Case of Institutional Complementarity?' (2016) 10 *Regulation & Governance* 211. The varieties of capitalism literature has been instrumental in highlighting how national modes of market coordination influence the autonomy and role of regulators such as CAs.

<sup>80</sup> Buch-Hansen and Wigger (n 22).

<sup>81</sup> Competition commissioners increasingly relied on Lisbon terminology to justify their actions, and the growing prominence of economics in competition law led to the creation of a Chief Competition Economist position within the Commission to oversee economic reasoning. Cengiz (n 14) 833.

<sup>82</sup> Coyle (n 2) 720.

<sup>83</sup> Cengiz (n 14) 833.

Scholars have argued that this neoliberal turn in competition law and CAs' institutional design reflects "authoritarian traits", aligning with the concept of *authoritarian neoliberalism*, a system in which neoliberal policies are enforced through increasingly centralised and undemocratic governance.<sup>84</sup>

In the EU, Buch-Hansen and Wigger trace the authoritarian character of EU competition law to developments in the 1990s, which were further entrenched by the 2004 modernisation and the adoption of Regulation 1/2003.<sup>85</sup> Their analysis highlights the European Commission as a central actor in competition law, an unelected, democratically unaccountable institution that merges executive, judicial, and legislative functions. With limited oversight from the Council and European Parliament, the Commission used its autonomy to promote a neoliberal enforcement model, which influences the structure and practices of national CAs across the EU.<sup>86</sup>

At the national level, many EU member states have mirrored this model, granting their competition authorities strong investigatory and sanctioning powers and distancing them from political accountability, and concerns of the general public. Neoliberalization was particularly successful and enduring in Central and Eastern Europe. Shaped by rapid restructuring and the top-down transplantation of EU law during accession, it left legacies that did not vanish after membership, instead provided the institutional and political soil in which authoritarian neoliberal trajectories later took root.<sup>87</sup>

This neoliberal enforcement approach was institutionalized through the Europeanisation of competition enforcement. Due to their integration in global and European networks like the ECN, NCAs have adopted similar norms and models. The transatlantic epistemic community of competition law and economics further reinforced this process.<sup>88</sup> Following the 2004 modernisation, the European Commission actively promoted convergence among NCAs toward its own model, one marked by broad discretionary powers in setting priorities and limited external oversight.<sup>89</sup> Through a series of recommendations, policy papers, the creation of the ECN, and the adoption of the ECN+ Directive the European Commission has actively promoted

<sup>84</sup> E Gallo, 'Three Varieties of Authoritarian Neoliberalism: Rule by the Experts, the People, the Leader' (2021) 26 *Competition & Change* 554.

<sup>85</sup> Under the decentralized enforcement framework introduced by Regulation 1/2003, the Commission retains broad supervisory powers that allows it to intervene in proceedings before national authorities and which in fact enables it to act as 'primus inter pares', Art 11(6).

<sup>86</sup> Cengiz (n 35) 586.

<sup>87</sup> MA Orenstein and H Appel, 'Why did Neoliberalism Triumph and Endure in the Post-Communist World?' (2016) 48 *Comparative Politics* 313.

<sup>88</sup> Cengiz (n 35) 586; Maher (n 68).

<sup>89</sup> Brook and Cseres (n 21).

its technocratic, efficiency-oriented enforcement model, helping to embed the neo-liberal logic of EU competition law more deeply across member states.<sup>90</sup>

Today CAs now face a very different landscape. They are increasingly tasked with addressing harms from extreme economic concentration, rising inequalities, and political polarization. As open markets face growing contestation and international cooperation weakens, many governments are re-evaluating the liberal market model. Embracing economic nationalism and state-centric governance, they often retreat from the traditional legal checks and balances that underpin liberal economic law.<sup>91</sup>

In practice, this means a greater willingness to intervene in markets for strategic or political purposes, the politicization of regulatory institutions, and a weakening of independent oversight mechanisms. The normative foundations of competition law and economic governance, deep-rooted in neutrality, transparency, and the rule of law, are being challenged by governance models that prioritize national interest, industrial policy, or regime stability over fair competition and legal accountability.<sup>92</sup>

## 5. Democratic accountability: navigating the role of competition authorities in democratic systems

The above context shows that *de iure* independence, while essential, is insufficient on its own to guarantee legitimacy. High levels of formal independence can lead to an ‘accountability deficit’ as democratic oversight by parliaments, governments, and citizens diminishes.<sup>93</sup> This is particularly problematic with regard to CAs who operate in *technocratic silos*, engaging primarily with businesses, courts, and other regulators, rather than the broader public. This limits the influence of civil society and public scrutiny, further entrenching the accountability gap. As explained above since 2004 the harmonized enforcement framework has prioritized effectiveness and independence in enforcement, while paying less attention to accountability mechanisms. For example, accountability is only briefly mentioned in recital 22 and Article 4 of the ECN+ Directive.<sup>94</sup>

Still, NCAs are 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

<sup>90</sup> European Commission, ‘Commission Staff Working Paper accompanying the Report on Regulation 1/2003’ SEC (2009) 574 final. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market Art 5(1). ECN, ‘Recommendation on the Power to Set Priorities’ (2013), at [competition-policy.ec.europa.eu](http://competition-policy.ec.europa.eu).

<sup>91</sup> Doyle (n 2).

<sup>92</sup> Gallo (n 85).

<sup>93</sup> Guidi (n 53); Brook and Cseres (n 21).

<sup>94</sup> It emphasizes that NCAs must act impartially, ‘*subject to proportionate accountability requirements* [emphasis added]’ while maintaining close cooperation within the European Competition Network.

ECN).<sup>95</sup> NCAs are accountable to national parliaments, but the scope of this accountability varies across legal systems and traditions. Accountability operates formally, through reporting, financial audits, and judicial review; and substantively, through transparent communication and meaningful stakeholder engagement. Any analysis of political accountability must also consider the authority's institutional, personal, and financial independence, which differs across Member States.<sup>96</sup>

However, it has been argued that in multilevel regulatory environments, like competition law, mechanisms designed to enhance accountability are often weakened by a neutral conception of accountability, one centred on performance metrics or procedural fairness.<sup>97</sup> In other words, performance-based accountability (output legitimacy), like safeguarding consumer welfare tends to crowd out democratic accountability (input and throughput legitimacy).

*Ex post* accountability mechanisms, such as public reporting and budget scrutiny at the national level often represent fire alarm mechanisms that allow parliaments to monitor regulators' behaviour and to prevent their deviation from the political mandate, but overall remain weak.<sup>98</sup> For example, Malinauskaite has shown, that CEE countries rely mainly on state audits and annual reports to their parliaments, and are subject to judicial review.<sup>99</sup> A study in 2008 showed similar patterns for a broader set of jurisdictions.<sup>100</sup>

In addition to political accountability, judicial review is an important safeguard of accountability. However, it cannot substitute for political accountability. Courts typically assess whether an agency has acted within the boundaries of legality and procedural correctness, not whether the agency's decisions are substantively aligned with democratic values or public interest goals. Effective oversight would require mechanisms that reconnect Cas to democratic institutions and publics, not just legal norms and economic outputs as is often the case in competition law litigation cases.<sup>101</sup>

As a complement to judicial review, for example, formal complaints by third parties enhance transparency and accountability in administrative decision-making. Complainants act as crucial 'watchdogs', supporting authorities in monitoring mar-

<sup>95</sup> S Overman et al, 'Accountability and Regulatory Authorities' in M Maggetti, F Di Mascio and A Natalini (eds), *Handbook of Regulatory Authorities* (Edward Elgar Publishing 2022) 258, 261.

<sup>96</sup> KJ Cseres and A Outhuijse, 'Parallel Enforcement and Accountability: The Case of EU Competition Law' in M Scholten and M Luchtman, *Law Enforcement by EU Authorities* (Edward Elgar Publishing 2017).

<sup>97</sup> Nesti (n 13) 466.

<sup>98</sup> *Ibid* 471.

<sup>99</sup> J Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer International Publishing 2020) 164-166.

<sup>100</sup> UNCTAD, *Independence and Accountability of Competition Authorities* (UNCTAD Secretariat 2008) 10-11.

<sup>101</sup> Nesti (n 13) 475-477.

ket functioning and reinforcing democratic oversight. Third parties are given the opportunity to contradict the possible decision of CAs, invoking errors, flaws, or mistakes which could ultimately lead to the illegality of the final decision.<sup>102</sup> As such, it enhances the legitimacy of the procedure and the final decision-making.<sup>103</sup> However, CAs often act as ‘gatekeepers’ having substantial margin of discretion in deciding whether a complaint is a priority.<sup>104</sup> Most national administrative laws define a ‘legally relevant interest’ that validates access of third parties to the procedure.<sup>105</sup> They assess formal complaints through narrow legal and economic filters and prioritize cases based on internal criteria focused on procedural efficiency and consumer welfare.<sup>106</sup> This approach reinforces a technocratic model of accountability, where complaints are handled within a framework that favours procedural efficiency as being essential for addressing complex problems and for managing high-pace technological changes in markets, but neglects the considerations of transparency and accountability for public administration. The ECN+ Directive reflects this in further harmonising national procedures, especially NCAs’ ability to reject low-priority complaints, by encouraging efficient resource allocation and swift decision-making without addressing transparency or procedural fairness.

Similarly, accountability through networks, like interactions within the ECN, while expected to form peer review, cooperation and exchange of good practices and enhance procedural forms of accountability, they often emphasize coordination and mutual learning rather than transparency or control.<sup>107</sup> While these networks may enhance efficiency and coherence, they lack clear lines of responsibility, making democratic oversight diffuse and indirect. Therefore, democratic oversight through networks is questioned because they lack visibility and they are uncoupled and remote from democratic institutions.<sup>108</sup>

Finally, public consultations and hearings with relevant stakeholders are often symbolic, with limited impact due to partial inclusivity and a tendency to favour well-organized interest groups.<sup>109</sup> This can lead to a form of ‘managed’ participation, where the consultation process serves more as a procedural formality than a genuine

<sup>102</sup> KJ Cseres and LC de Korte, ‘Participation of Third Parties in the Public Enforcement of the Digital Markets Act: Between Democracy and Technocracy’ (2025) 13 *Journal of Antitrust Enforcement* 595.

<sup>103</sup> Ibid.

<sup>104</sup> O Brook et al., ‘Abolishing Formal Complaints? Balancing Technical Expertise and Efficiency with Democratic Accountability in the European Commission’s Decision-Making’ (2023) 14 *Journal of European Competition Law & Practice* 497.

<sup>105</sup> Brook and Cseres (n 21).

<sup>106</sup> Ibid.

<sup>107</sup> FP Vantaggiato, H Kassim and K Wright, ‘Internal Network Structures as Opportunity Structures: Control and Effectiveness in the European Competition Network’ (2020) 28 *Journal of European Public Policy* 571.

<sup>108</sup> Y Papadopoulos, ‘Accountability and Multi-Level Governance: More Accountability, Less Democracy?’ (2010) 33 *West European Politics* 1030.

<sup>109</sup> Nesti (n 13) 472.

avenue for diverse public input. by well-organized interest groups, limiting the diversity of voices and perspectives represented.<sup>110</sup>

This overview shows that evaluating NCAs solely on their capacity to deliver ‘efficient’ outcomes risks weakening their democratic embeddedness, as accountability becomes narrowly technocratic and diluted. This ‘accountability pitfall’ highlights the need to reframe legitimacy not just in terms of outcomes, but through a normative lens that reasserts democratic values within regulatory governance.<sup>111</sup>

To address this, accountability mechanisms could compensate for the lack of direct democratic oversight, not by limiting independence, but by ensuring it is exercised responsibly and in accordance with constitutional principles and public trust.<sup>112</sup>

## 6. Rethinking competition law enforcement: toward democratic responsiveness

For rethinking competition law enforcement from an accountability perspective, I build on the model of responsive regulation and enforcement,<sup>113</sup> and the theory of social accountability.<sup>114</sup>

The theory of responsive regulation is primarily built around the relationship between regulator and regulatee, but it also broadens the perspective to wider set of stakeholders. It expands the regulatory perspective introducing flexibility and responsiveness to the social motivations within regulated sectors. Regulators can choose from various enforcement strategies, adapting their approach based on context and behaviour. While the theory aims to improve effectiveness and efficiency, its relevance here lies in its potential to enhance the legitimacy of regulatory authorities. By consulting stakeholders, independent regulators, like CAs become more transparent, and accessible. While they remain unelected, such engagement fosters their accountability, encouraging stakeholders to understand and assess their role in the economy.<sup>115</sup>

In particular, responsive regulation incorporates tripartite arrangements with the involvement of public interest groups, such as consumer organisations, as a third actor.<sup>116</sup> Tripartism was introduced to counter regulatory capture and corruption by

<sup>110</sup> Righettini and Grimaldi (n 13).

<sup>111</sup> Cengiz (n 35).

<sup>112</sup> Nesti (n 13) 477.

<sup>113</sup> Ayres and Braithwaite (n 12).

<sup>114</sup> Righettini and Grimaldi (n 13).

<sup>115</sup> Bovens and Schillemans (n 15).

<sup>116</sup> Ayres and Braithwaite (n 12); M Ioannidou, ‘“Responsive” Remodelling of Competition Law Enforcement’ (2020) 40 *Oxford Journal of Legal Studies* 846.

empowering public interest groups to monitor firms and hold regulators accountable.<sup>117</sup> This is particularly relevant for independent regulators, like CAs, who often lack traditional democratic accountability. Through stakeholder consultations, complaints, public consultations, or participation in market studies, CAs can become more transparent, accessible, and socially embedded. While stakeholders do not have direct public control such engagement promotes social accountability, enabling affected groups to understand, question, and assess regulatory decisions. In this way, responsive regulation offers not only more effective enforcement, but also a path to democratic legitimacy within technocratic governance.<sup>118</sup>

It is this perspective where the theory of social accountability offers a way to reintroduce citizen and stakeholder voice into the regulatory process, especially where traditional parliamentary or electoral accountability is limited. Social accountability is a form of control exercised by civil society through participation, deliberation, and public scrutiny in collaborative spaces such as public consultations, rather than through elections or hierarchical mechanisms. It enables affected stakeholders, such as consumers or citizens to question, evaluate, and pressure regulatory authorities. However, such accountability must be institutionalized to be effective; it cannot rely on one-off consultations or symbolic participation as described above. In this light, responsive regulation becomes more than a tool for flexible enforcement, it can serve as a platform for democratic legitimacy in technocratic governance, by embedding social accountability into regulatory practice.<sup>119</sup>

The idea is not to politicize CAs, but to broaden the scope of accountability beyond formal legal or political channels, for instance through civil society engagement, and transparent justifications of decisions. While there is an inherent tension between accountability and outcome delivery, and participatory and deliberative practices can compromise efficiency and credibility by raising political transaction costs, marginal accountability is unlikely to ensure legitimacy.<sup>120</sup> When participation is reduced and legitimacy rests solely on procedures, the regulatory order risks being perceived as weakly legitimized, a dilemma inherent in all procedural accountability frameworks.<sup>121</sup>

Currently the models of participatory engagement in competition enforcement remain *ad hoc* rather than formally institutionalized. For example, the UK's Competition and Markets Authority (CMA) regularly holds public consultations concerning merger reviews and market investigations, giving stakeholders, including businesses, con-

<sup>117</sup> These groups are given access to the same information as regulators, a seat at the table, and in some cases the ability to sue or prosecute, adding a crucial layer of oversight that reinforces compliance; Ioannidou (n 117).

<sup>118</sup> Bovens and Schillemans (n 15).

<sup>119</sup> Nesti (n 13) 471-475.

<sup>120</sup> M Maggetti, 'Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review' (2010) *Living Reviews in Democracy* 2.

<sup>121</sup> Maggetti (n 121) 5.

sumer organizations, and the public, an opportunity to express their views on the proposed actions. In the *Sky/21st Century Fox* merger, the CMA conducted an extensive public consultation to judge the potential effects of the merger on competition and public interest. This allowed consumer groups and other stakeholders to voice concerns about media diversity and potential impacts on consumer choice.<sup>122</sup> Similarly, the Netherlands' Authority for Consumers and Markets (ACM) organized public consultations on draft guidelines related to sustainability and competition law inviting civil society organizations, businesses, academics and citizens to offer feedback and influence the shaping of competition rules, particularly in relation to sustainability.<sup>123</sup>

However, to genuinely anchor democratic values in enforcement governance, such mechanisms should move beyond symbolic or occasional use and become durable, institutionalized forms of social accountability. For example, in 2013 the CMA established the Consumer Panel to provide expert guidance on strengthening consumer outcomes. This panel was composed of diverse experts and played a key role in influencing CMA decisions, particularly in sensitive market sectors such as funeral services.<sup>124</sup> The Consumer Panel was restructured in 2020. Another example can be a tighter structuring of formal complaints by differentiating between types of participation and by granting special status to certain relevant categories of third parties, who are sufficiently representative organizations acting in the public interest.<sup>125</sup> Moreover, a super-complaint tool like in the UK can offer a fast-track system, ordering the NCA to investigate and publish within a tight time-limit complaints launched by consumer bodies designated by political actors, in the UK the Secretary of State for Trade and Industry by order.<sup>126</sup> This tool seeks to encourage launching well-researched and substantial complaints on behalf of groups of consumers who would not find it as easy to make such complaints individually.<sup>127</sup> The process of designation acts as a filter. It aims 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 to effectively represent such interest.<sup>128</sup> This could also partly offset the

<sup>122</sup> Competition Market Authority, '21st Century Fox / Sky merger inquiry' (21 April 2017) at [www.gov.uk](http://www.gov.uk).

<sup>123</sup> Autoriteit Consument Markt, Second draft version: Guidelines on Sustainability Agreements – Opportunities within competition law (2021) at [www.acm.nl](http://www.acm.nl).

<sup>124</sup> Competition Market Authority, 'Funerals Market Study' (1 June 2018), at [www.gov.uk](http://www.gov.uk).

<sup>125</sup> Brook et al (n 105) 506-7. While concerns exist about whether third parties (e.g., business users) are sufficiently representative or unbiased, these can be addressed through stricter designation criteria. For example by consulting privacy and security experts to assess potential bias in their feedback.

<sup>126</sup> UK Enterprise Act, Section 11(1); OFT, Super complaints: guidance for designated consumer bodies (2003).

<sup>127</sup> Explanatory Memorandum, *The Enterprise Act 2002* (Bodies Designated to make Super-complaints) (Amendment) Order 2009 2009 No. 2079, para 7(10).

<sup>128</sup> UK Department for Business and Trade, 'Super Complaints: Guidance for Bodies Seeking Designation as Super Complainants' (February 2025) at [www.gov.uk](http://www.gov.uk).

disadvantages that a higher evidentiary threshold of admissibility for formal 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.

## 7. Conclusions

Markets and competition are not neutral or given; they are social constructs, embedded in specific contexts and continually reproduced through legal and regulatory frameworks. The current reorientation of competition policy, from a narrow, efficiency-based tool toward a strategic, green, and geopolitical instrument, is occurring at a time when the political and economic foundations of liberalism are in retreat in many parts of the EU. This challenging social, political and economic environment where CAs operate, and reflect, mediate, and respond to the political and economic realities that underpin them.

Such realities differ from the 1990s, when CAs emerged as non-majoritarian institutions closely tied to the spread of neoliberal governance policies. Designed to operate independently from elected officials, CAs rely on technical expertise and economic analysis to enforce competition rules. Their independence is seen as a safeguard against political interference, particularly in liberalized markets. However, over time, this insulation has produced a legitimacy gap: CAs have often come to be viewed as isolated technocratic actors, distant from public concerns and shielded from democratic oversight. This raises a fundamental question: can independent CAs genuinely complement majoritarian decision-making in democratic societies?

To answer this question, this paper aimed to move beyond a binary understanding of independence and accountability. The goal was to analyse how competition enforcement could be embedded more firmly within democratic norms—through participatory mechanisms that reconnect regulators with the publics they affect. Responsive regulation and social accountability offer tools for doing so: not by diminishing expertise, but by contextualizing it within broader societal values. In this way, CAs could retain their independence while becoming more attuned to democratic expectations, thus complementing, rather than displacing, majoritarian decision-making.

