Competition agency participation in private litigation—a roadmap

Okeoghene Odudu[*]

1. Introduction

During the hearing of *Gormsen v Meta* Justice Smith remarked that the CMA's right to participate in private litigation is "terrain that is largely uncharted".[1] Competition authorities typically participate in private proceedings in one of two ways. First, at the request of the court, the authority may provide documents, information, and opinions.[2] In this situation the questions are whether and why a court solicits participation from the agency.[3] Second, unsolicited by the court, the agency may submit observations. In this situation, and the focus of this contribution, the questions concern what the agency seeks to achieve when it submits observations of its own volition.

The purpose of this contribution is to consider the reasons why public authorities participate in private litigation. Building on some ideas expressed in a 2003 paper given by Kovacic, the starting point of this analysis is a distinction between the public's interest in competition law enforcement and the private interests at stake in any particular dispute.[4] Public agencies intervene to prevent distortions to the public value of competition law that may be caused by those in pursuit of a private interest. This contribution's aim is twofold. First, to identify the conditions under which participation in private proceedings is an effective tool in a public enforcers' armoury. Second, to highlight how the use of participation has and can evolve. Section 2 identifies four risks posed by private litigation to an effective competition law regime. Section 3 explores how competition

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[*] Professor of Competition Law, Faculty of Law, University of Cambridge. This paper builds on remarks delivered at an event celebrating the 20th Anniversary of the Competition Appeal Tribunal held on 4th May 2023, at Downing College, Cambridge.

[1] Transcript of the oral hearing held on 1 February 2023, p.28

[2] See the comments of Mr Robin Knowles CBE, QC (Sitting as a Deputy High Court Judge) in Software Cellular Network Limited v T-Mobile (UK) Limited [2007] EWHC 1790 (Ch), para. 60-62.

[3] One reason is to ensure a uniform approach across a number of jurisdictions, so that Article 15 (1) can be seen as analogous to Article 267 TFEU. The Commission's observations under Article 15(1) are expected to be the same nature as those it submits to the Court under Article 267 TFEU. As the observations are submitted without hearing the parties or the member states they can appear much more quickly. The aim is to make them within four months (compared to the 2 years wait for an Article 267 preliminary ruling). The observations, unlike an Article 267 preliminary ruling, are of course non-binding. See Luis Ortiz Blanco Eu Competition Procedure (Fourth edition. Oxford University Press, 2021), para 2.24, note 131.

[4] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 .

agencies can manage those risks by participating in private proceedings. Section 4 then considers the features that make participation an effective strategy for the public authority. Section 5 concludes the paper by noting how the exercise of a public agency's right to participate in private litigation has evolved.

2. The risks of private enforcement

Competition law expresses its' commands through a series of broad statutes and statements that are made concrete through enforcement practice and judicial application.[5] As the law is over-inclusive, competition agencies limit their enforcement activities to cases in which competition law operates in the public interest.[6] This exercise of discretion plays:

> "an important role in determining how the [antitrust laws] will be applied to specific behavior. Statutes and judicial decisions (formal legal rules) define the outer boundaries of the agencies' operations, but the agencies often develop policies or principles that lack the force of law (norms) to decide how to execute their prosecutorial discretion."[7]

Commenting on the law in the Unites States, former Assistant Attorney General for Antitrust, Donald Turner, expressed the view that:

> "it is a proper approach of government enforcement agencies not to bring cases solely on the basis that they would be upheld because of past precedents, but on the basis that they should be upheld because they rest on interpretations of antitrust law that reflect a clearly sound economic analysis of the competitive pros and cons of the conduct in

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[5] See Crane, Daniel A. "Antitrust Antitextualism." Notre Dame L. Rev. 96, no. 3 (2021): 1205-1256

[6] On how the public interest is determined see Kovacic 'The Modern Evolution of US Competition Policy Enforcement Norms' 71 Antitrust LJ (2004), 377-478, 395-400, 413-414. State Attorneys General are also able to enforce the antitrust rules. However, for various reasons, they operate more like private than public enforcers: McChesney 'Talking `Bout My Antitrust Generation: Competition for and in the Field of Competition Law' 52 Emory LJ (2003), 1401-1438, 1424-1431.

[7] Kovacic 'The Modern Evolution of US Competition Policy Enforcement Norms' 71 Antitrust LJ (2004), 377-478, 395. On the rationale for discretionary non-enforcement generally see Landes and Posner 'The Private Enforcement of Law' 4 Journal of Legal Studies (1975), 1-46, 38-41. On the way enforcement discretion shapes the substantive law see Or Brook, Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy, *Journal of Competition Law & Economics*, Volume 16, Issue 4, December 2020, Pages 435–487, https://doi.org/10.1093/joclec/nhaa014. On the inapplicability of discretionary non-enforcement in spheres subject to private enforcement, see Landes and Posner 'The Private Enforcement of Law' 4 Journal of Legal Studies (1975), 1-46, 39-41.

question."[8]

When the enforcement of competition law is carried out predominantly by public enforcement agencies the exercise of prosecutorial discretion determines which actions of which parties it is in the general interest to challenge (even though more could be challenged within rules drafted to be over-inclusive).[9] More recently, encouraged by changes made in the Consumer Rights Act 2015, private litigants have come to the fore. The collective proceedings regime facilitates stand-alone collective actions for damages before a specialist tribunal on an opt-out basis and the enhanced ability to recover substantial damages provides an incentive for private parties to litigate. Private litigants assess the likelihood of success and the rewards available if they are able to succeed, and therefore focus on the highest value claims rather than those with greatest legal merit or having the greatest public interest.[10] The enforcement landscape then begins to look very different than if determined by the public agencies enforcement priorities such that the operation of competition law in the public interest may be put at risk.[11]

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8 Turner 'The Virtues and Problems of Antitrust Law' 35 Antitrust Bull (1990), 297-310, 297-298. Also Kovacic 'The Modern Evolution of US Competition Policy Enforcement Norms' 71 Antitrust LJ (2004), 377-478, 460-464. (discussing how the new economics of vertical relationships caused the DOJ to use its discretion to bring cases that would have been successful under the prevailing law).

9 Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Spa; Antonio Cannito v Fondiaria Sai Assicurazioni Spa; Nicolò Tricarico; and Pasqualina Murgolo v Assitalia Assicurazioni Spa* [2006] ECR-I 6619, AG Opinion [30] (on discretion of public enforcement agency to determine the types of case it will prosecute); Case T-219/99 *British Airways PLC v Commission of the European Communities* [2003] ECR II-5917, [59]-[60], [65], and [68], Case T-24/90 *Automec II* [1992] ECR II-2223. Article 4(1) and 9(1) of Regulation 17. First Regulation Implementing Articles 81 and 82 of the Treaty [1962] OJ Special Edition 204/62 , Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Spa; Antonio Cannito v Fondiaria Sai Assicurazioni Spa; Nicolò Tricarico; and Pasqualina Murgolo v Assitalia Assicurazioni Spa* [2006] ECR-I 6619, AG Opinion [29] .

10 Breit and Elzinga 'Private Antitrust Enforcement: The New Learning' 28 J Law Econ (1985), 405-443, 414..

11 DOUGLAS H GINSBURG, Comparing Antitrust Enforcement in the United States and Europe, 1 Journal of Competition Law and Economics 427-439, 439 (2005); KENNETH G ELZINGA & WILLIAM BREIT, The Antitrust Penalties: A Study in Law and Economics (Yale University Press. 1976); STEPHEN CALKINS, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065-1161,1090, 1094-1098 (1986); and WOUTER P J WILS, Should Private Antitrust Enforcement Be Encouraged in Europe?, 26 W Comp 473-488, 482-483 (2003). William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 .

At least four risks can be identified. The first risk is that the competition authority is not in control of the development of doctrine and policy.[12] Kovacic observes that:

> "private rights of action magnify the role of the courts in implementing the law. In a world of multiple potential prosecutors, public and private, the courts become the chief vehicle for defining the law's content. The rulings of adjudicatory tribunals, not the administrative choices of public competition authorities, assume greater importance in shaping competition policy."[13]

This risk has two dimensions. The first dimension concerns the agency. As competition law proceeds and develops in the absence of the agency, the agency's power—its prestige—even its relevance, can be called into question and the agency necessarily becomes less authoritative. The second dimension concerns the entity to whom power and authority transfers. The entity now tasked with ensuring that competition law is enforced (courts and tribunals) must weigh the arguments of private litigants but also ensure that the law functions for the benefit of the economy (and society) as a whole. Stated bluntly, the risk is that the relevant courts or tribunals are not up to the job.

A second risk is that private enforcement in a particular case, or in a particular way, might not be in the public interest (and this risk might be heightened when the claim is brought on behalf of, rather than by, the affected individuals).[14] Kovacic notes that:

> "the delegation of enforcement functions to private parties yields a serious perceived mismatch between social objectives and private enforcement behaviour, the mismatch may generate distortions in the development of policy and doctrine that discourage the prosecution of sound cases."[15]

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[12] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 . 176-177.

[13] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 , 173

[14] Sir Marcus Smith alludes to this risk when he suggests that particular attention be paid to collective proceedings, noting particularly that "these claims are driven by class representatives, funders and claimant-sided legal firms." See "Remarks on Private Enforcement of Competition Law" Informa Connect conference, Brussels 7 Feb 2023 https://www.catribunal.org.uk/sites/cat/files/2023-02/2023_PRIVATE%20ENFORCEMENT%20OF%20COMPETITION%20LAW%202023.pdf

[15] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 , 170

There is some nuance to this second risk. That the private interest diverges from the public interest is not itself the problem—courts and tribunals can and do take action to prevent or deter the overzealous pursuit of private interests in a phenomenon Calkins terms equilibrating.[16] Allocating the burden of proof; imposing a demanding standard of proof; and, removing presumptions and procedural devices that assist in the satisfaction of that burden are all intended to filter meritorious from unmeritorious claims.[17] The risk is that these techniques to deter private action harmful to the wider good also make it more difficult for a public agencies to enforce competition law in the public interest. Kovacic clearly expressed the concern that courts might make "adjustments in evidentiary tests or substantive standards to correct for perceived infirmities in private rights of action" that are "of general applicability" and so "encumber public prosecutors as much as private litigants."[18]

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16 Calkins 'Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System' 74 Geo LJ (1986), 1065-1161, 1104-1127. The court may adopt "analytical approaches and conceptual perspectives that [view] intervention sceptically." William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 . 176

17 On the various equilibrating techniques see Calkins 'Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System' 74 Geo LJ (1986), 1065-1161, 1104-1127.; McChesney 'Talking 'Bout My Antitrust Generation' 27 Regulation (2004), 48-55, 49-50.; and McChesney 'Talking `Bout My Antitrust Generation: Competition for and in the Field of Competition Law' 52 Emory LJ (2003), 1401-1438, 1408-1411.. The equilibrating tendency has been recognized in the EC context in Wesseling *The Modernisation of EC Antitrust Law* Hart, 2000), 4, 19, 28 though *contra* Bright 'EU Competition Policy: Rules, Objectives and Deregulation' 16 OJLS (1996), 535-560, 544-545.. Factors relevant to the determination of merit are (a) academic opinion, and (b) opinion of public enforcement agencies: **On (a)**: Illinois Tool Works Inc. et al. v. Independent Ink, Inc. 547 U.S. 28, 43, note 4 (2006). Also Leegin Creative Leather Products, Inc. v. PSKS, Inc., dba Kay's Kloset ... Kay's Shoes 127 S.Ct. 2705, 2721 (2007), Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Co., 127 S.Ct. 1069, 1075-1076 (2007) (citing Kirkwood, Buyer Power and Exclusionary Conduct, 72 Antitrust L.J. 625 (2005); Blair & Harrison, Antitrust Policy and Monopsony, 76 Cornell L.Rev. 297 (1991); Piraino, A Proposed Antitrust Approach to Buyers' Competitive Conduct, 56 Hastings L.J. 1121 (2005); Hovenkamp, The Law of Exclusionary Pricing, 2 Competition Policy Int'l, No. 1, pp. 21 (Spring 2006); Noll, "Buyer Power" and Economic Policy, 72 Antitrust L.J. 589 (2005) and Salop, Anticompetitive Overbuying by Power Buyers, 72 Antitrust L.J. 669 (2005)). **On (b)**: Illinois Tool Works Inc. et al. v. Independent Ink, Inc. 547 U.S. 28, 45 (2006) citing U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property*, Sec. 2.2 (April 6, 1995) available from http://www.usdoj.gov/atr/public/guidelines/0558.pdf. Also Leegin Creative Leather Products, Inc. v. PSKS, Inc., dba Kay's Kloset ... Kay's Shoes 127 S.Ct. 2705, 2721 (2007). It is noted that the academic and agency position is "not binding on the Court.": Illinois Tool Works Inc. et al. v. Independent Ink, Inc. 547 U.S. 28, 45 (2006).

18 William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 . 175

A third risk is that the way the parties frame the arguments might ignore broader public policy issues –which are not of interest to the parties. Actions that intersect with privacy rights or sustainability issues may be cases where this risk is present.

A fourth risk is that, left to the untrained, the law will become incoherent or be applied inconsistently. Competition law is thought of as a particularly intricate area of the law, made more complex by the economic evidence often required to apply the law correctly. Courts may struggle to get to grips with the economic context in which the rules are to be applied and the understanding of how markets operate may change, requiring the law to be applied differently to reflect this. Further, the courts may simply reach different conclusions on the facts than a competition agency in similar circumstances.

3. Mitigating the risks of private litigation

Whilst private litigation enables an increased *quantity* of enforcement, the risk that some types of litigation are harmful to the general good means that the *quality* of enforcement must be monitored. Kovacic suggests that a competition agency can manage, reduce, or counter the risk of harmful private litigation by spending time "preparing *amicus curiae* submissions in private cases".[19] An examination of the way public agencies have intervened in private litigation does indicate that the power is used to counter at the risks that private litigation poses to the effective functioning of a competition law regime. Specifically, as outline below, public agencies have intervened in private litigation in order to develop policy; to ensure that the ability to publicly enforce the competition rules is not impaired; to highlight important interests that might otherwise be overlooked; and to ensure that the law and policy do not become incoherent.[20]

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[19] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 177.

[20] Article 15(3) of the Regulation 1/2003 enables the European Commission and national competition authorities to submit observations in proceedings before national courts. The power is mirrored in rule 50 of the Tribunal Rules, which enables the Competition and Markets Authority to submit observations in proceedings before the Competition Appeal Tribunal. The Commission Staff Working Paper on the Report on the functioning of Regulation 1/2003 SEC(2009) 574 final para.290 reported that: "Stakeholders have called on the Commission to have greater recourse to this instrument and it should be reflected upon how this practice should further develop." Also Commission, "Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003" COM (2009) 0206 final., [40]. An account of the Commission's use of this power is provided in Athanasios Kalliris and Richard Pike "The role of the European Commission as an intervener in the private enforcement of competition law" Global Competition Litigation Review 2018, 11(4), 138-144. The right to submit observations was addressed

3.1. Participation to develop competition policy

Competition policy is shaped through enforcement, and as private parties bring cases that advance new theories, the risk is that public agencies "lose some of the control they now enjoy over the development of doctrine and policy."[21] The US DoJ and the European Commission have therefore intervened in private litigation—not to weigh on the outcome of the dispute between the parties—but in order to shape policy.[22] Indeed, the European Commission describes its role under Article 15(3) as "to intervene in cases that have important policy implications for the application of Articles [101] and [102 TFEU]."[23]

Three broad policy concerns are apparent. First, agencies have intervened when the reach of competition law has been in dispute, particularly as determined by exemptions and

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in C-429/07 Inspecteur Van de Belastingdienst v X BV [2009] I-04833 and Case C-439/08, Reference for a preliminary ruling from the Hof van Beroep te Brussel lodged on 6 October 2008 – VZW Vlaamse Federatie van Vereniging van Brood-en Banketbakkers, Ijsbereiders en Chocoladebewerkers 'VEBIC', the other parties being Raad voor de Mededinging and the Minister van Economie, OJ C 313 of 06.12.2008, p. 19. It is also open to a court to invite observations: see National Grid v ABB [2011] EWHC 1717 (Ch). See also Civil Procedure Rules, Practice Direction – competition law – claims relating to the application of Articles [101] and [102 TFEU] and Chapters I and II of part I of the Competition Act 1998, para. [4] available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw_pd . The European Commission has also submitted observations in arbitration proceedings (on the matter of state aid, which has a separate by identically worded legal basis to Article 15(3). See http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_en.pdf issued under Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9 further amending and replacing Council Regulation (EC) No.659/1999 of March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L 083/1.

[21] William E Kovacic 'Private Participation in the Enforcement of Public Competition Laws' in Mads Tønnesson Andenæs, Michael Hutchings, and Philip Marsden (eds) Current Competition Law British Institute of International and Comparative Law, 2004) 167-179 . 176-177. Barry E Hawk and James D Veltrop 'Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community' in Piet Jan Slot and Alison Mcdonnell (eds) Procedure and Enforcement in Ec and Us Competition Law Sweet & Maxwell, 1993) 21-31, 27 write that privation action "forestalls the gatekeeping function that might be performed by an enforcement agency." And Wayne D Collins and Steven C Sunshine 'Is Private Enforcement Effective Antitrust Policy?' in Piet Jan Slot and Alison Mcdonnell (eds) Procedure and Enforcement in Ec and Us Competition Law Sweet & Maxwell, 1993) 50-60, 50.

[22] https://www.justice.gov/atr/statements-interest and See Karen Hoffman Lent and Kenneth Schwartz "Antitrust Division Increasingly Weighs In as Amicus Curia" New York Law Journal (February 8, 2019) Volume 261 (No. 28) available at https://www.skadden.com/-/media/files/publications/2019/02/antitrustdivisionincreasinglyweighsinasamicuscuria.pdf and Brannon and Ginsburg 'Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007' 3 (Autumn) Competition Policy International (2007), 3-23, 17-20. (describing the role of public agencies as amicus)

[23] Commission, "Staff working paper accompanying the Communication from the Commission to the European Parliament and Council" SEC (2009) 574 final. [290]. Also Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Arts 81 and 82 EC ("Notice on co-operation with national courts") [2004] OJ C101/54, [32]

exclusions. Special attention has been paid to the scope of antitrust, the current view being that a narrow approach to exemptions and immunities should be taken.[24] For example, in *William Morris Endeavor Entertainment* the DoJ submitted a brief to argue that the application of the labor exemption cannot be determined in the absence of a full factual enquiry.[25] Similarly, the European Commission issued observations setting out its view on the scope of exemptions in *Pierre Fabre Dermo-Cosmétique*.[26]

Secondly, competition agencies have submitted observations to articulate standards of assessment when business practices are being challenged for the first time. The purpose of the intervention has not been to insert the agency's view of the merits of the practice, but to advise on how the practice is best assessed. For example, the DoJ submitted briefs to explain that while no-poach agreements among competitors are to be assessed under the *per se* approach, unless they are ancillary to a separate legitimate transaction or collaboration[27], no-poach agreements between firms in a vertical relationship, such as franchisor and franchisee, are to be assessed under a rule of reason.[28] Similarly, in *Pierre Fabre Dermo-Cosmétique*, the European Commission has issued observations setting out its view that a general prohibition of online sales in a selective

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[24] See Makan Delrahim, Remarks at Antitrust Division's First Competition and Deregulation Roundtable, https://www.justice.gov/opa/speech/assistant-attorney-general-makan- delrahim-delivers-remarks-antitrust-division-s-first

[25] William Morris Endeavor Entertainment, LLC, et al. v. Writers Guild of America, West, Inc., et al. November 26, 2019 Statement of Interest of the United States. See also U.S. Chamber of Commerce and Rasier LLC., v. City of Seattle, et al. November 3, 2017 Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal (arguing state action doctrine does not apply to the dispute conduct); SmileDirectClub, LLC v. Tanja D. Battle, et al. January 25, 2021 En Banc Brief For The United States And The Federal Trade Commission As Amici Curiae Supporting Plaintiff-Appellee (arguing state action doctrine does not apply to the dispute conduct); Oscar Insurance Company of Florida v. Blue Cross and Blue Shield of Florida, Inc., et al. April 24, 2019. Statement of Interest of the United States (arguing the McCarran-Ferguson insurance exemption does not apply).

[26] See observations submitted to the Appeal Court (France), Paris in Pierre Fabre Dermo-Cosmétique on 11/06/2009 available at : https://competition-policy.ec.europa.eu/system/files/2021-02/amicus_2009_pierre_fabre_fr.pdf . See also observations submitted to the Supreme Court (Germany) in Economic succession in cartel fines on 07/04/2014 available at: https://competition-policy.ec.europa.eu/system/files/2021-02/cartel_fines_amicus_curiae_observation_en.pdf (on the extent to which undertakings related by succession are liable for an infringement of competition law).

[27] (In re: Railway Industry Employee No-Poach Antitrust Litigation. February 8, 2019. Statement of Interest of the United States and Danielle Seaman v. Duke University, et al. March 7, 2019. Statement of Interest of the United States of America)

[28] (Ashlie Harris v. CJ Starr LLC, et al. March 8, 2019. Corrected Statement of Interest of the United States of America ; Joseph Stigar v. Dough Dough, Inc., et al. March 8, 2019. Corrected Statement of Interest of the United States of America ; and Myrriah Richmond and Raymond Rogers v. Bergey Pullman Inc., et al. March 8, 2019. Corrected Statement of Interest of the United States of America)

distribution agreement should be assessed as a restriction of competition by object and not within the framework of a block exemption regulation.[29]

Finally, competition agencies have participated in private litigation to argue for remedial action believed to be most effective. As an example, in *Steves v JELD-WEN* the DoJ submitted a brief arguing in favour of structural relief, such as divestiture, over a behavioural remedy on the grounds that the former requires less ongoing enforcement.[30] Similarly, the European Commission has submitted observations on the effectiveness of remedies, for example arguing that effectiveness would be undermined if competition law sanctions could be deducted from profit for the purposes of tax. [31]

3.2. Participation to preserve public enforcement

Private litigation is driven ultimately by the amount the claimant might recover. Cases that advance a narrow private interest may do so at the expense of the wider public interest.[32] In such situations the competition agency should submit observations to ensure the enforcement of competition law in the general interest remains paramount. The classic example of such an intervention is the European Commission's observations on the use of documents arising from public enforcement in subsequent private litigation.[33] Observations were also submitted to national courts in EU member states and to courts in the US in an attempt to protect documents produced as part of public enforcement in the EU being disclosable in private proceedings in the US, and thus undermining the effectiveness of the EU public enforcement regime.[34]

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[29] See observations submitted to the Appeal Court (France), Paris in Pierre Fabre Dermo-Cosmétique on 11/06/2009 available at : https://competition-policy.ec.europa.eu/system/files/2021-02/amicus_2009_pierre_fabre_fr.pdf

[30] in Steves v. JELD-WEN. June 6, 2018. Statement of Interest of the United States of America Regarding Equitable Relief .

[31] Observations in X B.V. case to the Supreme Court (Netherlands) on 16/12/2010. See also C-429/07 Inspecteur Van de Belastingdienst v X BV [2009] I-04833.

[32] Wayne D Collins and Steven C Sunshine 'Is Private Enforcement Effective Antitrust Policy?' in Piet Jan Slot and Alison Mcdonnell (eds) Procedure and Enforcement in Ec and Us Competition Law Sweet & Maxwell, 1993) 50-60, 53.

[33] Euribor (available at http://ec.europa.eu/competition/court/2017_euribor1.pdf) ; Visa and Mastercard MIFs (available at http://ec.europa.eu/competition/court/visa_mastercard_commission_observation2_en.pdf) and and National Grid (available at http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf).

[34] See Commission, "Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003" COM (2009) 0206 final., [44] ; Commission, "Staff working paper accompanying the Communication from the Commission

3.3. Participation to highlight a public interest

As parties to private proceedings frame the arguments and courts resolve only the arguments the parties bring to light, an identified risk is that broader public policy issues are not of interest to the parties and therefore not raised before the court. Following a 2009 report, in 2016, JUSTICE published a guide to *Third Party Interventions in the UK* in which it considers intervention to be appropriate if a case "raises one or more issues of public importance; and (ii) there is a risk that this public interest may not be sufficiently well-addressed by the submissions of the parties alone."[35] A number of actions before the UK competition appeal tribunal raise novel claims and concerns that move beyond those traditional considered in competition law adjudication. It may bell be that the agency will intervene in order to argue that such consideration are (or are not) relevant in a competition law dispute. But will the agency also offer powerful intervention on how such concerns are to be quantified (and will it do so based on its own previous experience of assessing such issues?)

3.4. Participation to promote coherence

Applying competition law before the ordinary courts risks the law becoming incoherent. Hawk and Veltrop write of "flawed but also inconsistent results" flowing from courts comprised of generalist judges.[36] The European Commission describes its interventions under Article 15(3) as occurring when "there was an imminent threat to the coherent application of the EC competition

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to the European Parliament and Council" SEC (2009) 574 final. [302]-[311]; United States District Court of the District of Columbia, In Re. Vitamins Antitrust Litigation—Misc. No.99-197 (in which observations were not persuasive) ; United States District Court of Northern District of California, In Re: Methionine Antitrust Litigation Case No.C-99-3941 CRB MDL No.1311 and In Re: Rubber Chemicals Antitrust Litigation Case No.C04-1648 MJJ (BZ) (in which observations were persuasive).

[35] Third Party Interventions in the UK, para. 4.1. This is recognised in Competition Appeal Tribunal Guide to Proceedings (2015), [4.92], and [5.92]-[5.93]. See also http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/To-Assist-the-Court-26-October-2009.pdf and https://files.justice.org.uk/wp-content/uploads/2016/06/06170721/To-Assist-the-Court-Web.pdf

[36] Barry E Hawk and James D Veltrop 'Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community' in Piet Jan Slot and Alison Mcdonnell (eds) Procedure and Enforcement in Ec and Us Competition Law Sweet & Maxwell, 1993) 21-31, 27.

rules."[37] Incoherence might arise is two ways. First the outcome may become detached from the way the law is intended to be applied. Second, the law may evolve in a way that is detached from its underlying rationale.

3.4.1. The intended application of the law

Competition authorities may participate in private litigation with the aim of guiding the court as to how the law might be applied in the particular context as public agencies have an obvious interest and a degree of expertise in areas of law they administer.[38] Both the DoJ and the European Commission are specialist bodies advising generalist judges, assumed to be untrained in competition law (and its underlying economics). For this reason, in the US, it is thought, "When the DOJ comes in and says, `Here's how you should interpret the law,' that's powerful".[39] Similarly, "the relative importance of the EC Commission provides for some optimism about the prospects for guidance and consistency."[40]

The position of the competition agency in the UK differs from that of other countries in that the Competition Appeal Tribunal is very much regarded as a specialist court. The CMA therefore needs to think carefully about what it might add—and the Tribunal needs also to think about the

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[37] Commission, "Staff working paper accompanying the Communication from the Commission to the European Parliament and Council" SEC (2009) 574 final. [283] and Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (November 2019) Module 4, para. 39. On coherency or consistency see Richard Pike and Samuel Milucky "Achieving consistency between the Commission's decisions and follow-on or parallel damages actions before national courts" Global Competition Litigation Review 2020, 13(4), 155-163

[38] Third Party Interventions in the UK, para.1.14

[39] Dan Papscun, Justice Looks to Sway Private Antitrust Law With More Briefs, Bloomberg Law, August 4, 2022 : https://news.bloomberglaw.com/antitrust/doj-gains-early-sway-in-private-antitrust-law-with-more-briefs. Rebecca Haw Allensworth, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 Texas Law Review. 1247 (2011) Available at: https://scholarship.law.vanderbilt.edu/faculty-publications/918. The position advocated by DoJ or FTC intervention is not always accepted and it has sometimes been noted that the agency's intervention is "unhelpful." See Oscar Insurance Co. of Florida v. Blue Cross and Blue Shield of Florida Inc. 413 F. Supp. 3d 1198, 1199 n. 1 (M.D. Fla. 2019): https://storage.courtlistener.com/recap/gov.uscourts.flmd.357052/gov.uscourts.flmd.357052.113.0.pdf . Also NextEra Energy Capital Holdings Inc. v. Deann T. Walker No. 19-626 (W.D. Tex.)

[40] Barry E Hawk and James D Veltrop 'Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community' in Piet Jan Slot and Alison Mcdonnell (eds) Procedure and Enforcement in Ec and Us Competition Law Sweet & Maxwell, 1993) 21-31, 28.

extent to which it should rely on the Authority's observations.[41] In a situation when neither the Authority or the Tribunal have prior experience—who should take the lead?

3.4.2. Realignment with the underlying rationale

Competition agencies can submit observations in private litigation in order to align the substantive law with a changing underlying rationale. An example of this might be the DoJ actions in relation to the antitrust implications of intellectual property rights. The established position appeared to be that there was great risk of holders of standard-essential patents violating their obligations to license on FRAND terms, and that such behaviour was an antitrust violation. The DoJ submitted observations in a number of cases to argue that the obligation to deal on FRAND terms is not an antitrust concern, most notably in *Federal Trade Commission v. Qualcomm*, where the DoJ argued against the FTC continuing to follow the established position.[42]

3.4.3. Parallel Proceedings

A risk of incoherence arises if public and private proceedings run in parallel. With slightly different facts before them, or by taking slightly different approaches to the economic and legal arguments involved, or simply because there is a margin or appreciation in the assessment of the issues, the court and competition authority might properly arrive at different conclusions on substantive issues. At present, in the UK private litigation has commenced at the same time that public enforcement against the same parties and in relation to the same conduct is being pursued in[43] *Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd* (CMA:10 June 2022/Dr

[41] Luis Ortiz Blanco Eu Competition Procedure (Fourth edition. Oxford University Press, 2021), para 2.47 notes that, while not binding problems "may arise in connection with the considerable weight that the Commission's or NCA's observations inevitably have for a national judge".

[42] Federal Trade Commission v. Qualcomm Incorporated. May 2, 2019. Statement of Interest of the United States ; Federal Trade Commission v. Qualcomm Incorporated. July 16, 2019. United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal and Federal Trade Commission v. Qualcomm, Incorporated. August 30, 2019. Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur

[43] See the 'Register of cases in which the CMA has intervened' at https://www.gov.uk/government/publications/competition-law-court-proceedings-serving-documents-on-the-cma/service-of-documents-on-the-cma-in-court-proceedings-relating-to-competition-law#register-of-cases-in-which-the-cma-has-intervened

Rachel Kent:29 July 2021)[44]; *Elizabeth Helen Coll vs Alphabet Inc. and others* (CMA:3 March 2021/Coll 11 May 2021)[45] and Epic Games v Google.[46] How is the risk of inconsistent outcomes to be avoided? One approach is to stay private (national) proceedings while the public (supra-national) proceedings take place. What drives this *Masterfoods* solution is conflict between national and supra-national proceedings.[47] Similarly, as regards **public proceedings** within the EU, Article 11(6) of Regulation 1/2003 gives the Commission the right to take over. The Commission says that it would use such power "to counter a serious risk of incoherence by itself initiating proceedings in the same case, thereby relieving the NCA of its competence to deal with this case."[48] When there is no issue of supra-national norms then it is not all together clear why public enforcement should take precedence over private proceedings. Though there are ongoing claims in a number of jurisdictions that follow on from the Commission's finding of infringement in *Google Search (Shopping)*, no observations seem to have been submitted.[49] So whilst the High Court stayed private proceedings when the same matter was also subject to investigation by a national competition authority in *Synstar v ICL (Sorbus)*, it is not clear that this is due to public enforcement taking precedence or because supra-national norms are in play.[50] If public enforcement does not take precedence then participation may simply be a method of coordination. By intervening the

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[44] Case no. 1403/7/7/21: Dr Rachael Kent v Apple Inc. and Apple Distribution International Ltd. https://www.gov.uk/cma-cases/investigation-into-apple-appstore
https://www.catribunal.org.uk/cases/14037721-dr-rachael-kent
https://www.appstoreclaims.co.uk/

[45] Case no. 1408/7/7/21: Elizabeth Helen Coll v Alphabet Inc. and Others. https://www.catribunal.org.uk/cases/14087721-elizabeth-helen-coll
https://www.gov.uk/cma-cases/investigation-into-suspected-anti-competitive-conduct-by-google

[46] Case no. 1378/5/7/20: Epic Games, Inc. and Others v Alphabet Inc., Google LLC and Others.

[47] Case C-344/98.

[48] COMMISSION STAFF WORKING DOCUMENT "Ten Years of Antitrust Enforcement under Regulation 1/2003" {COM(2014) 453} {SWD(2014) 231} , [242]

[49] Google Search (Shopping) (Case AT.39740) Commission Decision [2016] not yet reported in the Official Journal but available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (Accessed 21 October 2020), appealed in Case T-612/17 Google and Alphabet v Commission, ECLI:EU:T:2021:763, which is under appeal in Google and Alphabet v Commission (Google Shopping) Case C-48/22 P. For private claims following on see Infederation Ltd v Google Inc [2013] EWHC 2295 ; Infederation Ltd v Google Inc [2015] EWHC 3705; Infederation Ltd v Google LLC [2020] EWHC 657;"European shopping sites sue Google for abuse of position" (Financial Times, 2019) www.ft.com/content/88f26f10-5d3a-11e9-939a-341f5ada9d40 ; "Google sued over abuse of search power, opening path for more claims" (Wall Street Journal, 2019) www.wsj.com/articles/suit-could-raise-googles-liabilities-in-price-comparison-case-11555056397 ; and "Heureka Group, Heureka is suing Google for an abuse of dominance that harms online shoppers and merchants alike", press release (30 June 2020) www.politico.eu/wp-content/uploads/2020/07/Heureka-press-release.pdf

[50] *Synstar Computer Services (UK) v ICL (Sorbus)* [2001] UKCLR 85

agency is able to (i) be informed about the progress of the proceedings; (ii) to access to materials that are the subject of those proceedings; (iii) make submissions where appropriate.[51] A clear risk for the agency is that the court rejects its understanding of the law, which might not only damage the agency's reputation but also a future line of work it had intended to pursue. Blanco however describes Article 15(3) intervention as a tool to be used when the Commission has not and is not going to take a decision on a matter.[52]

4. Effective Intervention

The function of public agency participation in private litigation is to ensure that private litigation does not harm the public interest. Given the purposes for which it occurs, its seems that the effectiveness of the observations is a function of when the intervention occurs; whether the observations are published; and on the neutrality of the intervention (though of course the observations point in favour of a particular party).

4.1. Timing of intervention

The Commission reports that most of its interventions have been made before courts of last instance or before appeal courts, with there being very few made in proceedings heard by first instance courts.[53]In Kerse and Khan it is thought:

> "likely to be rare for the Commission to intervene in proceedings at first instance; an "imminent threat to the coherent application" of the competition rules is unlikely to manifest itself at first instance, the Commission's concern being to ensure that an error is not enshrined in national practice through a judgment of an appeal court. This approach limits the number of cases in which the Commission finds it necessary to intervene."[54]

[51] Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Arts 81 and 82 EC ("Notice on co-operation with national courts") [2004] OJ C101/54, [33]

[52] Luis Ortiz Blanco, ed. European Community Competition Procedure (Second Edition Oxford University Press, 2006), para. 2.19

[53] COMMISSION STAFF WORKING DOCUMENT "Ten Years of Antitrust Enforcement under Regulation 1/2003" {COM(2014) 453} {SWD(2014) 231} , [248]. Also See also Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (November 2019) Module 4, para. 39.

[54] Kerse and Khan 6. Ed para 5-129.

Historically the DoJ also has intervened in cases at the Supreme Court, or when invited by appeals court judges.[55] More recently the DoJ has filed an increased number of statements of interest and amicus briefs at the district court level. What this points to is a change in the function of intervention. Intervention in private proceedings is far less resource intensive that the public agency itself bring proceedings. At a time of limited funding and limited human capital it may be that an effective way to communicate an agency's view is to participate in proceedings that are privately resourced.

4.2. Publication

The Commission reports stakeholders finding its observations useful as a source of guidance in other proceedings before other national courts.[56] Observations thus have the potential to influence behaviour even in the absence of the court's ruling. However, to achieve this function its publication and wide dissemination is essential. Information on Commission intervention before national courts is to be summarised in the Commission's annual Report on Competition Policy and the interventions themselves published on its website.[57] The DoJ/FTC also publish their Statements of Interest and amicus briefs.

A question arises as the status or value of observations in a case that the private litigants then decide to settle. A response would be that publication of the observation ensures they have an enduring value as guidance on the agency's viewpoint. Given that they are published, and in

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[55] A common assertion is that matters involving Intellectual Property rights fall outside the scope of antitrust regulation. Although consistently rejected by the apex courts, lower courts periodically accept the claim (see, as an example, *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 344 F.3d 1294 (11th Cir. 2003)). Intervention occurs by the agency to give a correct account of the law.

[56] Commission, "Staff working paper accompanying the Communication from the Commission to the European Parliament and Council" SEC (2009) 574 final., [286].

[57] Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Arts 81 and 82 EC [2004] OJ C101/54, [20] and See also Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (November 2019) Module 4, para. 36. It is possible that the content of a Commission intervention is also publicly available under the European Union's access-to-documents regime, though if there is bespoke legal or economic analyses specific to the case it may be that its accessibility is governed by national rules on access to expert reports. See Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 and Joined Cases C-174 and 189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1 at [125].

These observations (with summary's and background) can be found here. Kerse and Khan [5-131] consider there to be no obligation to publish observations and that it is for the national court to determine whether publication is permissible.

many ways intended to be treated as a form of guidance, a question arises as to whether they create legitimate expectations and so bind the agency, regardless how they are received and treated by the court.

4.3. **Neutrality**

The European Commission's observations are intended to assist the court rather than a particular party to the dispute, the Commission making it clear:

> "it has "no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court."[58]

Gutmann v First MTR South Western Trains Limited certainly suggests that the public agency's participation in private proceedings is more welcome when it proceeds in a "neutral" manner.[59] How far can neutrality be maintained? Writing of the US, in Jan 2020, the Financial Times reported that:

> "The spike in briefings has reshaped how antitrust lawyers represent corporate clients. Increasingly, persuading the justice department to weigh in on your side is a part of antitrust litigation strategy, according to defence lawyers. "This is the sort of thing you want to put on your front burner, whereas it was an afterthought before," said one."[60]

Though the Commission is "committed to remaining neutral and objective in its assistance"[61], it is noted that:

> "Whatever the intervener's intent, it is very likely that its submissions will give more support to one party than the other, and, for that reason, lawyers for one of the main parties may be keen to discuss strategy with interveners and co-ordinate legal submissions."

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[58] Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Arts 81 and 82 EC ("Notice on co-operation with national courts") [2004] OJ C101/54, [19]

[59] Gutmann v First MTR South Western Trains Limited and Ors [2023] CAT 23 at [35]. Though note that the different position of the CMA may require it to be treated differently that other public agencies or bodies are in Gutmann at [36].

[60] Kadhim Shubber, Trump Administration Steps Up Push to Sway Antitrust Cases, Financial Times, Jan. 20, 2020: https://www.ft.com/content/1fad936e-38a3-11ea-a6d3-9a26f8c3cba4#

[61] Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Arts 81 and 82 EC ("Notice on co-operation with national courts") [2004] OJ C101/54, [19]

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5. Conclusion

All decisions, including whether (and how) to intervene in private proccedings, are to be taken in accordance with the agency's prioritisation principles.[63] For the CMA this requires consideration of the (i) impact on consumer welfare and any additional economic impact of efficiency, productivity and the wider economy; (ii) strategic significance (i.e. whether it is in line with the CMA's strategy and other objectives, and whether the CMA is best placed to act); (iii) risks (of an unsuccessful outcome); and (iv) resources. One of the lessons from other agencies is that it is unusual for a high impact intervention of strategic significance does not occur at first instance, with intervention occurring primarily at the appeal stage. This is because the strategic concern is with the developing jurisprudence rather than the outcome of the particular case. This suggests that there should be relatively little use of the Rule 50 right of intervention. The caveat of course is that the US approach has evolved, so that rather than strategic intervention, *amicus* briefs have been used as a competition advocacy tool. The effectiveness of intervention for this new purpose is however untested.

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[62] Kadhim Shubber, Trump Administration Steps Up Push to Sway Antitrust Cases, Financial Times, Jan. 20, 2020: https://www.ft.com/content/1fad936e-38a3-11ea-a6d3-9a26f8c3cba4#

[63] 'Prioritisation principles for the CMA', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885956/prioritisation_principles_accessible_v.pdf (accessed 27 April 2023).

6. Annex—Table of English Language Interventions

Case			Economic Sector	date	Stand alone v follow on?	101 or 102
Flynn Pharma Limited & Pfizer v/ the Competition and Markets Authority (CMA)	UK	Court of Appeal	pharmaceuticals	Commission observation: 14/06/2019 en National Court judgment: 10/03/2020 en		
Visa and MasterCard MIFs: Court of Appeal interchange hearing [2018] EWCA 1536 (Civ).	UK	Court of Appeal	Financial services	06/04/2018, 21/02/2018		
EURIBOR	UK	High Court	Financial services	27/01/2017		
Morgan Advanced Materials v Deutsche Bahn	UK	Supreme Court	Manufacturing	18/02/2014		
National Grid Electricity Transmission plc v ABB Ltd [2012] EWHC 869 (ch), [2012] All ER (D) 92 (Apr).	UK	High Court	Electrical and electronic engineering	03/11/2011		
Beef Industry Development Society Ltd (BIDS)	Ireland	High Court	Food and drink industry	30/03/2010		
Hasselblad v Orbinson [1985] QB 475			commission intervention under RSC – Order 59, r8			
EWS v E.ON [2007] EWHC 599 (Comm)				ORR/2007		
Crehan [2006] UKHL 38						

7. Annex--DoJ speeches and public statements

· Jonathan Kanter, *Remarks at Howard Law School*, Jan. 12, 2023 (link)

· Jonathan Kanter, *Respecting the Antitrust Laws and Reflecting Market Realities*, Sept. 13, 2022 (link)

· Federalist Society, *An Interview with Makan Delrahim*, March 22, 2021 (link)

· Makan Delrahim, *Broke. . . but Not No More: Opening Remarks--Innovation Policy and the Role of Standards, IP, and Antitrust*, September 10, 2020 (link)

· Antitrust Division, *The Antitrust Division's Competition Advocacy*, Spring 2019 (link)

· Makan Delrahim, Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, October 3, 2018 (link)

· Antitrust Division, *Oyez Oyez! The Antitrust Division Expands Its Appellate and Amicus Program*, Spring 2018 (link)

https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf

https://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf