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The "Objective Friends" of the CJEU. The Role and Practice of the *Amicus Curiae* in the Procedural Law of the European Union

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Abstract: The figure of *amicus curiae* in the law of the European Union does not allow and has not even foreseen up to now the participation of a subject/subjects outside of a dispute, but with their own legal interest to participate as *amicus curiae*. The Court of Justice of the European Union does not allow the possibility of participation in a figure that only allows the intervention of subjects other than states and institutions, which are pre-established by Article 40 of the Statute. According to the procedural rules of the Union, the observation of a series of elements testify that such a figure is also obvious but often necessary on some disputes such as those relating to technical matters, such as competition and the environment. The practice up to now has shown that the intervention is used by associations that carry general and legal interests allowing the performance of the function of *amicus curiae* in a rigorous manner within the limits of this figure. This work, based on a more jurisprudential practice, tries to reconstruct such institute in a comparative way also through other supranational courts, thus regulating the insertions of the *amicus curiae* to the judges of Kirchenberg.

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1. Introduction

When we talk about *amicus curiae*[1] we mean a third party and/or subjects who, not being a party to a dispute, voluntarily choose to participate in a process with the final objective of helping the judging body. This is not a third party intervener from a technical point of view. It is, therefore, a figure whose objective is to defend his own right/interest suffered from a prejudice and, consequently, the outcome of the pending dispute between the parties is also very important for him.[2] In the supranational jurisdiction, the figures of the *amicus curiae*, as bearers of interests that are widespread and coincident with the parties but also independent from a transformation, are confused.[3] In the international process and generally in international law, such presence of bodies, institutions belong to the management of a process, that participate in interests of a material nature, which respect the individual dispute.

The practice of submitting *amicus curiae* briefs is well established in common law jurisdictions. It has become common practice within international cooperation organisations and in arbitral tribunals in matters of investment arbitration. This figure is also largely used in competition cases in the US and more recently in the European Union. In fact, this figure, was progressively introduced in EU Competition Law on an initiative of the same EU institution. Also the European Commission emerges as the most frequent *amicus* filer in front of US Courts, followed by Canada and Japan. A fundamental difference with the US courts is that the EU ones still exercise a very strong scrutiny on the usefulness of such a figure, while the EU Members States or EU institutions can always intervene if they wish, considering that the EU Treaties grant them directly this benefit.

1 Olga Gerlich, "More than a Friend? The European Commission's *amicus curiae* Participation in Investor-State Arbitration," in *International Economic Law: Contemporary Issues*, eds. G. Adinolfi et al. (Berlin: Springer, 2017), 253–69; Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (Baden-Baden: Hart/Nomos, 2018), 707–18.

2 Luigi Crema, "The Common Law (And Not Roman) Origins of Amicus Curiae in International Law-Debunking a Fake News Item," *Global Jurist* 20, no. 1 (2020): 3 et seq.

3 Michael K. Lowman, "The Litigating Amicus Curiae. When Does the Party Begin After the Friends Leave?," *American University Law Review* 41, no. 4 (1992): 1243 et seq.

As regards the Court of Justice of the European Union (CJEU), we have not seen the possibility of participation of subjects in the role of *amicus curiae*. The CJEU has shown a certain distrust, closure to restrictive rules of intervention for subjects other than states and institutions according to Article 40 of the Statute.[4] In particular, the rules for intervention that are provided by Article 40 of the statute are also applied to the judgments before the CJEU as well as to the tribunal according to Article 53, para. 1 of the Statute.[5]

The rule in letter a) already affirms that states and institutions intervene in disputes before the CJEU, thus, demonstrating their interest in acting. Paragraph 2 of Article 40 of the statute also states that: "[…] it is up to the bodies and agencies of the Union and to any other person if they can demonstrate that they have an interest in the resolution of the dispute submitted to the Court […]." It is clear that for other subjects that are not part of states and institutions the intervention is subject to a precise interest that is qualified through jurisprudence and as it establishes:

> […] direct and current to the resolution of the dispute […] natural or legal persons cannot intervene in cases between Member States, between institutions of the Union, or between Member States on the one hand and institutions of the Union on the other […].

These are interests that aid, from a procedural point of view, the dispute, the categories of non-privileged appellants, thus, precluding a dispute that has a constitutional character between subjects that bring interests of a public nature.

This observation does not result from preliminary reflections of the *amicus curiae* of the law of the Union but from elements and procedural rules of the Union and not only, which show a theoretical influence of this figure.[6] Practice has shown that the intervention used by associations

4 Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2023).

5 Ibid.

6 According to O. De Shutter: "[…] nostalgie d'un statut de l'amicus curiae que les textes ne reconnaissent pas comme tel, mais qu'une certaine conception d'intervention devant le juge de l'Union européenne permet de développer à la faveur des incertitudes qui entourent celle-ci […]" ("Le tiers à l'instance devant la Cour de justice de l'Union européenne,"

representing widespread interests allows the performance of an *amicus curiae* function within certain limits of such a figure. The elements are various to outline the opportunities for the inclusion of the amicus curiae in the CJEU.

2. *Amicus Curiae* at Supranational Level

The EC acts as amicus curiae also at supranational jurisdictions, thus providing the interpretation of Union law. The EC's intervention at the European Court of Human Rights (ECtHR) is immediately noticeable. In particular, Article 36, para. 2 ECHR allows the participation of third parties as *amicus curiae* when speaking of intervention. It is, thus, stated that:

> […] proper administration of justice, the President of the Court may invite any High Contracting Party who is not a party to the proceedings or any interested person other than the applicant to submit written observations or to take part in hearings […].

Referring to the interest of justice and the need for the President's authorization, it is clear that this type of intervention is not linked to the position of the parties in the proceedings. Thus, the ECtHR as an *amicus curiae* figure has recognized since the seventies in a precise manner as well as according to Article 36, para. 1 ECHR in the intervention of the state to support the applicant and to clarify his position.[7] For the Commissioner for Human Rights of the Council of Europe the role as *amicus curiae* is submitted under the guise and scrutiny of the President himself.

The need to introduce, include the non-appellant third party to a dispute before the ECtHR, asserts its interest in being heard as a right/opportunity that has been taken into account in the intervention of the Court.[8] This is a topic that, however, has not been considered among the guidelines on the intervention of cases originating from disputes between private

in *Le tiers à l'instance devant les juridictions internationales*, eds. Hélène Ruiz-Fabri and Jean-Marc Sorel [Paris: Pèdone, 2005], 88 et seq.).

7 Laura Van den Eynde, "Amicus Curiae: European Court of Human Rights (ECtHR)," Max Planck Encyclopedias of International Law, 2019.

8 Krzysztof Wojtyczek, "Procedural Justice and the Proceedings Before the European Court of Human Rights: Who Should Have the Right to Be Heard?," in *Fair Trial: Regional and International Perspectives*, eds. Robert Spano et al. (Cambridge: Intersentia, 2021), 742 et seq.

individuals, as well as through practice directions. Third party intervention under Article 36, para. 2 of the convention or under Article 3, second sentence of protocol no. 161 of March 13, 2023[9] has been taken into consideration by the ECtHR. The intervention of third parties as support to judges with an impartial manner and with an objective based on elements of law, in fact inherent to a dispute, to a controversy to be resolved, has been put in the foreground. The ECtHR has highlighted and maintained a normative dictate by reinvigorating the decision, that the intervention *amicus curiae*, is compliant and determined to the needs of a correct administration of justice thus regulating the public interest and identifying the "third party" to participate in the trial to contribute to the determination of the relative outcome. Of course, the discretion of the President of the ECtHR in the manifestation with a precise and clear way to the role of the *amicus curiae*, is very important. A negative determined path is noted by the ECtHR. This means, that the intervention of *amicus curiae* as a subject perhaps involves an injury and puts secondary the guarantee of the integrity of the adversarial process and in fact to the incision of the legal sphere of an absent third party.[10]

According to the author's opinion, the lack of a third party as *amicus curiae*, i.e. not appearing and not taking a position at any time in a case before the Strasbourg judges, perhaps leads to a damage to one's own interests and to the reopening of a trial before the national authorities.[11] Thus, a certain type of distortion of the public interest is noted and correct administration[12] remains weakened in the face of a risk that makes an appeal to the ECtHR a simple means of appeal and nothing else from a procedural

9 Justine Batura, "The Objective Friends of the Court. New Insights Into the Role of Third Parties Before the European Court of Human Rights," EJIL:Talk!, April 19, 2023, accessed March 5, 2025, https://www.ejiltalk.org/the-objective-friends-of-the-court-new-insights-into-the-role-of-third-parties-before-the-european-court-of-human-rights/.

10 Nicole Bürli, *Third-Party Interventions Before the European Court of Human Rights. Amicus Curiae, Member State and Third Party Interventions* (Cambridge: Cambridge University Press, 2017), 178 et seq.

11 Wojtyczek, "Procedural Justice," 742 et seq.

12 Batura, "The Objective Friends of the Court."

point of view. They also remain without satisfactory human rights, which first of all must be protected and safeguarded.[13]

The subjective right of an *amicus curiae* may also have repercussions on the principle of subsidiarity, recalling and carefully rereading the preamble of the ECHR and the amendment of protocol no. 15 of June 24, 2013. The functioning of a European jurisdictional system does not diminish the work of internal judges but highlights before the ECtHR the qualification of judgments, limiting thus the evaluation of compatibility of conducts, which are attributed to the contracting states with fundamental rights established by the ECHR, by the related protocols, etc. which by all means make the work of the Strasbourg judges more functional and the values that are part of the procedural mechanism more reliable, according to Article 36, para. 2 ECHR. This means that the public interest, the correct administration of justice, the amicus curiae in the figure of non-appellant can be heard. This situation, also, respects the rights and values of a fair trial, the right to be heard, the greater protection of a procedural right, but also a general consensus that respects the need and protection of an individual interest, which ensures and protects the correct administration of justice.

Thus, the participation of the EC in ECtHR proceedings uses such a figure. Especially, for questions concerning the interpretation of Union law. The EU in the role of defendant, due to lack of jurisdiction *ratione personae* of the ECtHR whenever EU law is discussed in a dispute, remains between the applicant and the Member States. Thus, the entry of the EC into the proceedings allows the ECtHR to acquire useful elements for the interpretation of Union law.

3. Indicative Figures of the *Amicus Curiae* in the European Process

In a revealing, indicative and symptomatic way, the European Commission (EC) can appear at a trial through a preliminary reference.[14] Already

[13] ECtHR Judgement of 28 August 2023, Case I.S. v. Greece, application no. 19165/20, hudoc.int; ECtHR Judgement of 8 June 2022, Case Y.Y. v. Russia, application no. 43229/18, hudoc.int; ECtHR Judgement of 8 June 2022, Case Omorefe v. Spain, application no. 69339/16, hudoc.int; ECtHR Judgement of 10 September 2019, Case Strand Lobben and others v. Norway, application no. 37283713, hudoc.int.

[14] Clelia Lacchi, *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection* (Bruxelles: Larcier, 2020); Filipe Galvão Teles Sanches Afonso, "The

Article 23(2) of the Statute already provides for the right for the EC to present the relevant observations to the preliminary proceedings, that are part of and based on Articles 96 and 97 of the rules of procedure of the General Court.

The power of intervention has the interest and legality in a system that with a role that resembles *amicus curiae* can appear in a dispute at the CJEU. It is confirmed that the role of guarantee in a system of legality, which participates as *amicus curiae* in an autonomous manner, allows the EC to initiate an infringement procedure against an interested state through a preliminary reference,[15] as well as demonstrate the compatibility of a national rule with the law of the Union. This is a jurisdictional voluntarism, which the EC presents and acts within the framework of a normative initiative. Thus, the intervention through preliminary references and the infringement procedures initiate the confirmation of a presence of interest in an institution that the intervention of the EC as *amicus curiae* intervenes in its own interest carrying out direct appeals. The EC also intervenes in appeals for annulment that are adopted on a proposal that supports its legitimacy.[16]

Associations, non-governmental organizations that are bearers of various interests in the context of the Union through the lobbying scale, at the European Parliament, for example, interest the observations as *amicus curiae* at the CJEU. *Amicus curiae* also goes against the consent of subjects of participation in various training processes denying access to the CJEU and the relative interpretative validity of the application of such acts. Introducing the figure of *amicus curiae* allows the expansion of the transparency of a continuous dialogue with civil society at the CJEU. Therefore, it does not contribute to the strengthening and legitimacy as an institution.

The CJEU notes useful elements of the *amicus curiae*, which involve important and often excessive work in this regard. It immediately recalls the exceptional work of the ECtHR and the jurisdictions of this

European Commission as Amicus Curiae of Arbitral Tribunals: Is It a Legitimate Relationship?," *Revista de Arbitragem e Mediação* 16, no. 60 (2019): 237–57.

15 Lacchi, *Preliminary References*.

16 CJEU Judgement of 12 October 2022, Corneli v. BCE, Case T-502/19, ECLI:EU:T:2022:627; CJEU Judgement of 14 July 2022, Repubblica Italiana e Comune di Milano v. European Parliament and Council, Case C-106/19 and C-232/19, ECLI:EU:C:2022:568.

figure, which positively insert and recall many times the role of constitutional courts and the continuous dialogue with civil society through *amicus curiae*.

As *amicus curiae* we can also characterize the intervention of the Advocate General.[17] This is an intervention based on the French model of Commissaire du Gouvernement, which allows the CJEU, in an independent manner, to decide on questions relating to the subject matter of the case that are not binding on acts and/or previous practice. This is a solution that typically represents the element of *amicus curiae*. The elements so contrary and assimilative, as well as the possibility of presenting conclusions in a rigorous manner, put the statutory rules to a decision of the CJEU. We note Article 20, the last number of the statute which states in this regard: "(...) the case does not raise new questions of law, the Court may decide, after hearing the Advocate General, that the case be judged without conclusions of the Advocate General (...)." There are also powers of the figure of the *amicus curiae* who seek to deprive the parties of questions during a hearing.[18] In this way, functions of an organizational nature are carried out within a trial, also expressing opinions relating to the referral of a case to the plenary chamber according to Article 16 of the Statute. Also, the review of a judgment of the court is based on Article 62 of the Statute.[19] As regards the review of judgments admitted, through preliminary reference from the court, according to Article 256, para. 3 TFEU, are transferred to the CJEU, as well as in the phase of reform of the statute. The reform, proposed by the CJEU and after request from the European

17 Dobrochna Bach-Golecka, "Amicus Curiae or Primus Inter Pares? The Advocate General and the EU Institutional Framework," *Studia Iuridica* 54, (2012): 8 et seq.

18 Cyril Ritter, "A New Look at the Role and Impact of Advocates-General-Collectively and Individually," *Columbia Journal of European Law* 12, no. 3 (2006): 752 et seq.

19 Article 62 of the statute states that: "[…] cases referred to in Article 256, paragraphs 2 and 3, of the Treaty on the Functioning of the European Union, the First Advocate General, where he considers that there is a serious risk of the unity or coherence of Union law, may propose to the Court of Justice that the decision of the General Court be reviewed […]". In reality the review for judgments given by the General Court on appeals after decisions by specialized courts based on Article 256, para. 2 TFEU puts in second place the dissolution of the Civil Service Tribunal organized and in operation since September 1, 2016 after the reform of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L341, 24 December 2015), 14–7.

Parliament and of Council, according to ex Article 281, para. 2 TFEU of December 4, 2022, has taken into account the transfer of matters to a common system relating to value added, excise duties, code, customs, greenhouse gas emissions, etc.

From a theoretical point of view, the *amicus curiae* represents a figure of an expert who, according to ex Article 20, para. 4 of the statute, has characteristics of a comparable nature to a technical consultant foreseen and inspired in civil and criminal cases by the procedural systems of Member States of the Union. Thus, participation in a trial with an exclusive manner after the invitation of judges of the Union is foreseen and based on the scope of investigative means.

Within this context, we recall the European Data Protection Supervisor, which according to Regulation EC no. 45/2001, and in particular in Article 47, para. 1, letter i), was provided for the possibility of intervention in cases pending before the CJEU.[20] This is a rule that maintains, according to the subsequent Regulation EU no. 2018/1725[21] and in particular through Article 58, para. 4, the possibility of a public intervention. An independent intervention that respects the parties in an effective manner as a figure of participation, that is as an *amicus curiae* and not so much a technical intervention. Thus, the practice allows the guarantor to intervene in a discussion, detecting the protection of data entrusted to a large section at the CJEU. As well as a figure in the infringement procedures that have as their object national legislation within this scope.[22] This type of

[20] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L8, 12 January 2001), 1–22.

[21] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance.), PE/31/2018/REV/1 (OJ L295, 21 November 2018), 39–98.

[22] CJEU Judgement of 30 May 2006, Parliament v. Council, Case C-317/04 and C-318/04, ECLI:EU:C:2006:346, I-02457; CJEU Judgment of 9 March 2010, Commission v. Germany, Case C-518/07, ECLI:EU:C:2010:125, I-01885; CJEU Judgment of 16 October 2012, Commission v. Austria, Case C-614/10, ECLI:EU:C:2012:631; CJEU Judgment of 8 April 2014, Commission v. Hungary, Case C-288/12, ECLI:EU:C:2014:237; CJEU Judgment of 16 July 2015, ClientEarth and Pesticide Action Network Europe (PAN Europe) v. EFSA,

intervention is the subject of Article 40 of the Statute. Also, the guarantor intervenes in the conclusions of the parties within certain limits. Therefore, the CJEU clarifies as inadmissible the intervention of the guarantor within the scope of a preliminary reference since it is not a party to a national judgment according to Article 23 of the Statute, thus rejecting the rule of the regulation which also provides for the possibility that constitutes a sufficiently legal basis.[23]

4. The Figure of *Amicus Curiae* as Use of an Institution of Intervention by "Candidates"

It is taken into consideration ex Article 40 of the Statute as an absent notion that examines guidelines relating to the intervention of the third party. It is at the moment that the European judge adapts the institution as a consensus of the process of organizations that brings coherent interests considered as *amicus curiae*.

The case law regarding the intervention of representative associations is oriented towards the protection of general interests of their members. These are orientations that focus on the main issues concerning the intervention of associations in a case that represents companies operating in the sector concerned for objectives that fall within the protection of the interests of their members. Thus, the principle under examination is based on the functioning of the related consolidated sector even if the issuing of the sentence significantly affects the interests of its members.[24]

Associations directly seek a solution to the interests of their members. Associations that protect the environment have put the CJEU to specify the requirement for a direct interest for the solution of disputes related to the action that coincides with the sector of the programs of protection

Case C-615/13 P, ECLI:EU:C:2015:489; CJEU Judgment of 16 February 2024, Coillte Cuideachta Ghníomhaíochta Ainmnithe v. Commissioner for Environmental Information, Case C-129/24, not yet discussed. See also in argument: Jirí Zemànek, "Case C-518/07, European Commission v. Federal Republic of Germany, Judgment of the Court of Justice (Grand Chamber) of 9 March 2010," *Common Market Law Review* 49, no. 5 (2012): 1755–68.

23 CJEU Judgment of 12 September 2007, Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07, ECLI:EU:C:2007:507, I-09831.

24 CJEU Judgment of 21 October 2014, Bayer CropScience AG v. European Commission, Case T-429/13, ECLI:EU:T:2014:920, para. 22.

of the studies to the interested sector. The practice in analysis has as its objective the adoption of measures often contested.[25]

The use of *amicus curiae* to an intervention contributes to the consensus of the participation of subjects, who bring requirements related to the litigation but with various criticisms. Associations represent general interests, but their members cannot bypass rules governing interventions.[26] Non-governmental organizations, such as ClientEarth and Greenpeace International, were not accepted for interventions in litigation concerning state aid and especially in the coal-fired electricity sector. The Spanish regime failed to show a direct interest in the resolution of the case and allowed the intervention of Greenpeace in Spain as a demonstration of impact on a field of action in its territory.[27]

Non-governmental organizations and associations are excluded from the possibility of intervening in disputes of a constitutional nature, and disputes in states, between institutions and between states and institutions lead to contributions that the subjects, who are bearers of general interests, are useful. Thus, infringement procedures and the reporting of the EC for the work of a non-governmental organization, are noted.[28] The use of the *amicus curiae* as an intervention does not demonstrate the opportunity to introduce a permanent figure to the European process thus allowing the intervention of subjects who are bearers of general interests.

5. The Role of the European Commission as *Amicus Curiae* Before National Courts

The EC intervenes in national proceedings in various ways. According to Regulation EC No. 1/2003 and Article 15(3) and (4):

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25 CJEU Judgment of 6 November 2012, Castelnou Energia v. Commission, Case T-57/11, ECLI:EU:T:2012:580, para. 10; CJEU Judgment of 7 February 2019, Bayer CropScience AG v. Commission, Case C-499/18 P, ECLI:EU:C:2019:107, para. 6.

26 Mathias Forteau, "General Principles of International Procedural Law," Max Planck Encyclopedias of International Procedural Law, 2018, para. 36.

27 CJEU Judgment of 6 November 2012, Castelnou Energia v. Commission, Case T-57/11, paras. 16–27; CJEU Judgment of 7 July 2004, Região autónoma dos Açores v. Council, Case T-37/04, ECLI:EU:T:2004:215, II-00103.

28 Mariolina Eliantonio, "The Role of NGOs in Environmental Implementation Conflicts: 'Stuck in the Middle' Between Infringement Proceedings and Preliminary Rulings?," *Journal of European Integration* 40, no. 6 (2018): 754 et seq.

> […] where necessary for the uniform application of Article 81 (now Art. 101) or Article 82 (now Art. 102) of the Treaty, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States […] competent court, it may also submit oral observations […] competent court of the Member State to transmit or ensure that documents necessary for the assessment of the case are transmitted to them (...).[29]

In this spirit of cooperation between the EC and national jurisdictions, the application of Articles 81 and 82 TEU (now Articles 101 and 102 TFEU) also entails other relevant roles.[30] The role of the EC, as *amicus curiae*, is a qualification of a support tool for the national jurisdictions, which thus takes the form of the transmission of information, presentation of opinions and the intervention of national judgments. The related communication in para. 18 also refers to the national jurisdictions, requests any kind of support from the EC, as well as the power to act *ex officio*. It is highlighted that the EC plays a role of public interest, which also maintains as neutral the respect of the parties and the national jurisdictions that also bind the expected observations. The related intervention in national judgments as *amicus curiae* in the strict sense and especially from the EC, which has the right to present written observations, has allowed the national authorities and especially those dealing with competition to provide in a necessary way the authorization to national judges.

The objectives of these observations provide useful elements for the application of Articles 101 and 102. The CJEU interprets broadly disputes relating to the tax sector and of the EC for infringement of competition rules.[31] This is an objective that has to do with para. 32 of the communication which states: "[…] the Commission will limit itself to an economic and legal analysis of the facts on which the case pending before the national

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29 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 (Text with EEA relevance) (OJ L1, 4 January 2003), 1–25.

30 Communication from the Commission on cooperation between the Commission and the courts of the Member States of the EU for the purposes of applying Articles 81 and 82 of the EC Treaty (OJEU C101, 27 April 2004), 54 et seq.

31 CJEU Judgment of 11 June 2009, Inspecteur van de Belastingdienst v. X BV, Case C-429/07, ECLI:EU:C:2009:359, I-04833.

jurisdiction is based (...)." And it is also the same Regulation EC no. 1/2003 that includes, from the procedural point of view, to Member States the relative task of determining the procedural applicability that allows the submission of observations by the EC itself according to para. 35. This refers to rules that *amicus curiae* are part of the national procedures that are adopted *ad hoc*. The EC as *amicus curiae* before national judgments, and especially in the area of state aid, plays an important role. Note Article 29, para. 2 of Regulation EU 2015/1589 which states:

> (...) for the purposes of the consistent application of Article 107(1) or Article 108 TFEU, the Commission may, on its own initiative, submit written observations to the courts of the Member States responsible for the application of the state aid rules (...) subject to the authorisation of the court in question, it may also submit oral observations (...).

It is affirmed and noted the power of the EC, which intervenes in national judgments and the public interest, that conceives with the same way the Regulation EC no. 1/2003 and with a necessary way the relative authorization of the national judge for oral observations. Unlike the regulation the peculiarities in the matter allows the EC, which informs the Member State that has interest, the intention to do so and to present observations in a formal and precise way.[32]

These are statements and positions that are also provided for in Regulation EU 2022/2065 of the European Parliament and of the Council,[33] which specifically in Article 82, para. 2 states that:

> […] for the purposes of the consistent application of this Regulation, the Commission may, on its own initiative, submit written observations to the competent judicial authority […] authorization of the judicial authority in question, the Commission may also make oral observations […].

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32 CJEU Judgment of 13 December 2024, Kargins v. Commission, Case T-110/23, ECLI:EU:T:2024:805.

33 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), PE/30/2022/REV/1 (OJ L277, 27 October 2022), 1–102.

Thus, the EC as *amicus curiae* appears before national courts and then intervenes at the CJEU and within the scope of preliminary references. In this regard, we note the Bpost case in the competition sector, where the EC as *amicus curiae* before the judgment of the Court of Appeal of Brussels argued that the interpretation of the principle of *ne bis in idem* and the conditions of application intervene in the judgment of referral to the same CJEU.[34]

6. The Role of the European Commission as *Amicus Curiae* in International Arbitrations

As we saw from the previous paragraphs, the EC intervenes with a double, we can say, right. The right that derives from the participation in the national judgment, that the *amicus curiae* resembles a third party intervener according to Belgian law. And the right for the EC, that comes from Article 23 of the Statute. For the other parties, the assimilation of the *amicus curiae* to the third party intervener decreases the participation in the preliminary phase at the CJEU, which thus admits the parties that are in dispute. Parties such as states, EC, the institution, organ, body that contests an act. The hypotheses are thus not read to the recognition of a use of the faculty that the EC intervenes as *amicus curiae* in national judgments.

When speaking of international arbitrations and in relation to the EU, we mean Article 26 of the Energy Charter Treaty,[35] which the EC has asked to file observations as *amicus curiae* even in the absence of a provision in the treaty.[36] The EC has intervened as *amicus curiae* at the ICSID courts and in disputes between Member States and companies, thus offering interpretation in rules relating to state aid[37] to UNCITRAL arbitrations, which have started from bilateral agreements to support treaties that are not

34 CJEU Judgment of 22 March 2022, Bpost SA, Case C-117/20, ECLI:EU:C:2022:202.

35 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L69, 9 March 1998), 1–116.

36 CJEU Order of 1 March 2021, Republiken Italien v. Athena Investments A/S and Others, Case C-155/21, ECLI:EU:C:2021:1032.

37 CJEU Order of 12 March 2019, Romatsa and others, Case C-333/19, ECLI:EU:C:2019:749.

compatible with the rules of the TFEU.[38] The practice, in the sector, has shown that the EC acts in a specific interest, that reflects the adoption of other decisions that resemble a real intervener and an *amicus curiae*.

7. Concluding Remarks

What we immediately understood from the previous paragraphs is that the figure of *amicus curiae* in the law of the Union does not present itself in an "institutional" way or as a third party intervener but plays an important role for the disputes from various places on the matter. Above all it assumes an important and precise role before the CJEU.

The introduction of this figure allows the CJEU to acquire data and information useful for the decision in a case. The environmental associations that are now many and the appropriate bodies considered in a particular way authorize acts of the EC and draw up reports of the non-governmental organizations relating to the environment and the protection of human rights. This is information that is useful for the European procedural system given that it rarely follows appeals to means of inquiry, preliminary references and on technical questions.[39] The participation in the written phase, the associations and the non-governmental organizations for the CJEU allows to acquire elements that are useful for the decision. The judgments from the CJEU according to Article 267 TFEU take into consideration in a precise way the individual legal system and thus produce the relative effects for the Member States that are certainly used to allow an open debate, for the subject under investigation, for the coming years.

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38 See the conclusions of the Advocate General Wathelet: CJEU Judgment of 19 September 2017, Slowakische Republik v. Achmea BV, Case C-284/16, ECLI:EU:C:2017:699, para. 3; see also in argument: Ellen Alden and Ali Sahin, "Towards a 'New' Law of Sustainable Foreign Investments Between International and European Union Law. Foreign Investments and Sustainability Through a New Global Perspective," *American Yearbook of International Law (AYIL)*, no. 3 (2024): 2–118.

39 See the conclusions of the Advocate General Bobek: "(...) the limits on the active legitimacy of private individuals have the consequence that particularly technical questions, where a broad investigation would be necessary, are examined in the context of preliminary references to the Court of Justice rather than to the General Court […]." (Opinion of 16 July 2020, Région de Bruxelles-Capitale v. European Commission, Case C-352/19 P, ECLI:EU:C:2020:588, paras. 142–5).

The possibility of participation in the process allows the resolution of contradictions to a system, that derives as a third party intervener, to the *amicus curiae* of associations. An intervention that leads to general interests as described in para. 3, which refers to the discriminations of the position of different entities that cannot exceed what is referred to in Article 40 of the Statute. It does not allow the participation of judgments of a constitutional nature that will be useful for further analysis.

The figure of *amicus curiae* allows the overcoming of issues that arise from a coordination with national judgments. Thus, the participation of *amicus curiae* in national judgments and within the scope of preliminary reference allows it to be the referral judgment at the CJEU, that is, the qualification of a party in the seat according to national procedural rules, excluding also to a procedural system of the Union the status that is not recognized.[40]

A coherent system allows the EC to participate as *amicus curiae* in different cases for supranational judgments and does not open the possibility at the jurisdiction of the Union. The relative opening of the *amicus curiae* at a process of the Union is a reality in continuous increase by organizations that bring widespread interests for the participation in a process before the judge of the Union and filing, consequently, the legal papers. Therefore, *amicus curiae* brief, for example, the association of Eurogroup for animals before the case Centraal Israëlitisch Consistorie van België and others of the CJEU, as well as the protection of animals during ritual slaughter, were ignored by the rules of procedure at the court.[41] However, a foundation that

[40] "[…] the qualification of party pursuant to art. 23 St. to five entities, namely the Union des associations européennes de football (UEFA), British Sky Broadcasting Ltd, Setanta Sports Sàrl, Group Canal Plus SA and The Motion Picture Association, considering that they had intervened in the national proceedings only after the preliminary ruling issued by the High Court of Justice: therefore, despite having become parties to the national proceedings as a result of the decision of the referring court […]" (CJEU Order of 16 December 2009, Football Association Premier League Ltd, Case C403/08 to C429/08, ECLI:EU:C:2009:789, I-09083).

[41] "[…] liberty to submit this Amicus Curiae brief to your attention in a spirit of constructive collaboration […] are well aware that – under the current Court's Statute and Rules of Procedure – this brief won't formally be admissible to the proceedings, we hope that it could inform your deliberation, given the nature *erga omnes* of your forthcoming preliminary judgment in such an important, consequential case […]" (CJEU Judgment of 17 December 2020, Centraal Israëlitisch Consistorie van België and Others, Case C-336/19, ECLI:EU:C:2020:1031, para. 22).

collects useful causes for the quality intervention of the *amicus curiae* has sent a brief that has conveyed to the CJEU some of its reasons.

It was also the CJEU that submitted a request to the European Parliament and the Council, under Article 281, para. 2 TFEU, to amend its statute and transfer the preliminary jurisdiction of certain matters to the Court. Among them are the common system of value added tax, excise duties, the Customs Code, the tariff classification for goods of the Combined Nomenclature, compensation and assistance to passengers, the system of greenhouse gas emission quotas. A necessary and concrete reform, precise and obvious for the introduction of *amicus curiae* at the Court of the Union, is welcomed. This can contribute also useful elements for the decision of the Tribunal to a new functioning role in matters that are rather and above all technical.

It is necessary that the CJEU should open the doors to the *amicus curiae* starting from the relative filing of written observations and trying to put and make the role of the judges more transparent from all points of view to a dispute, bringing in such a way forward the general interests of the European process. In sum, the advantages of democracy and the transparency of a process seem to overcome indications that seem to be in conflict with each other.

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