

The Role of the European Commission as an Intervener in the Private Enforcement of Competition Law

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Introduction

This article considers the power of the European Commission to act as an intervener in private actions by submitting amicus curiae¹ observations to courts of the Member States pursuant to art.15(3) of Regulation (EC) No.1/2003.² The first part of the article analyses the legal basis, the scope and the details of the procedure, followed by a succinct overview of the most significant competition law cases where the European Commission has made observations. The second part focuses on the extension of the scope of the amicus curiae observations to State aid and arbitration proceedings and discusses the Commission's amicus curiae briefs to the courts of the US.

Part A

The Commission as Amicus Curiae

Legal Basis

Article 4(3) TEU³ introduces the notion of “sincere cooperation” in the Treaty of Lisbon.⁴ The rule, which corresponds to the former art.10 EC and has been interpreted as applying the concept of loyalty⁵ to the legal framework of the EU, is worded as follows:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives”.

This general principle of sincere cooperation, as enshrined in primary EU legislation, is of paramount importance to the establishment of an effective cooperation mechanism in the field of competition law. In this respect, and for the purpose of ensuring the coherent application of the competition rules in the Member States, a cooperation mechanism between the Commission, the national competition authorities and the courts of the Member States was set up in Ch.IV of Regulation (EC) No.1/2003.

Articles 11 to 14 of the pertinent Chapter (Ch.IV) of the Regulation provide for various forms of cooperation between the European Commission and the national competition authorities, whilst art.15 of the Regulation, entitled “Cooperation with national courts”, establishes a system for the mutual exchange of information between the Commission and the courts of the Member States. Importantly, it also foresees the possibility of intervention by the Commission and the competition authorities of the Member States in proceedings pending before the national courts.

Article 15 of Regulation (EC) No.1/2003, referring to the most frequent types of assistance between the European Commission and the courts of the Member States, stipulates in its third paragraph⁶ that:

“Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty.⁷ With the permission of the court in question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit

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¹ Latin for “friend of the court”.

² Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L001/1.

³ Consolidated version of the Treaty on European Union [2008] OJ C115/13.

⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

⁵ M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014), p.10.

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R0001> [Accessed 15 October 2018].

⁷ With effect from 1 December 2009, arts 81 and 82 of the EC Treaty have become arts 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this article, references to arts 81 and 82 of the EC Treaty should be understood as references to arts 101 and 102, respectively, of the TFEU when and where appropriate.

written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

For the purpose of the preparation of the observations only, the competition authorities of the Member States and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case⁸.

The first subparagraph of art.15(3) indicates two distinct types of intervention with separate fields of application: (i) intervention by the national competition authorities before the national courts of their Member State on issues relating to the application of arts 101 TFEU or 102 TFEU; and (ii) intervention by the European Commission before the national courts of Member States where the coherent application of arts 101 TFEU or 102 TFEU so requires. The Regulation distinguishes between written observations, which may be submitted by the competition authorities and the European Commission on their own initiative, and oral observations which can only be submitted with the permission of the national court.⁸

Scope

Commission Notice (2004/C 101/04),⁹ aiming to address the cooperation between the Commission and the courts of the EU Member States when the latter apply arts 101 TFEU and 102 TFEU, explains the rationale behind the Commission's *amicus curiae* observations. In art.32 thereof, it is underlined that "the Commission will only submit observations when the coherent application of articles 81 or 82 so requires". It is also noted that any observations submitted by the European Commission should be limited to an economic and legal analysis of the facts underlying the case pending before the national court. It follows from the foregoing that the option for the European Commission, acting *sua sponte*, to present written observations to the courts of the Member States is subject to the sole condition that it is deemed to be necessary for the coherent application of arts 101 TFEU or 102 TFEU.

This principle was reinforced by the European Court of Justice (ECJ), when it was requested to give a preliminary ruling in *Inspecteur Van de Belastingdienst v X BV*.¹⁰ The question brought before the ECJ concerned the power of the European Commission to submit, on its own initiative, written observations to a national court in proceedings relating to the deductibility from taxable profits of the amount of a fine imposed by the Commission for infringement of the then arts 81 EC or 82 EC. In supporting the ability of the Commission to make observations, the ECJ concluded that

"the effectiveness of the penalties imposed by the national or Community competition authorities on the basis of Article 83(2)(a) EC is a condition for the coherent application of Articles 81 EC and 82 EC".

The ECJ observed that

"a literal interpretation of the first subparagraph of Article 15(3) of Regulation (EC) No 1/2003 leads to the conclusion that the option for the Commission, acting on its own initiative, to submit written observations to courts of the Member States is subject to the sole condition that the coherent application of Articles 81 EC or 82 EC so requires. That condition may be fulfilled even if the proceedings concerned do not pertain to issues relating to the application of Article 81 or 82 of the Treaty".

These observations of the ECJ have been interpreted as giving the European Commission a broad scope to submit, on its own initiative, observations in private actions. The "coherent application" of arts 101 TFEU and 102 TFEU is interpreted widely, permitting the European Commission to intervene not only in proceedings related to the *per se* application of arts 101 TFEU and 102 TFEU, but in all cases where doubts over the consistent and systematic application of these articles may arise, irrespective of the subject matter of the case in concern.

Details of the procedure

An initial distinction should be drawn between the power of the European Commission to submit written observations, on its own initiative, and its ability to make oral observations,¹¹ which is always subject to approval by the national court in question. The former option reflects an established and uncontested right of the European Commission, whereas in the latter situation it is at the court's discretion to either accept or dismiss the proposed intervention.

Article 17 of the Commission Notice (2004/C 101/04), describing the forms of assistance between the European Commission and the national courts in the application of EC competition rules, states that, in the absence of Community procedural rules,

"Member States must adopt the appropriate procedural rules to allow both the national courts and the Commission to make full use of the possibilities the regulation offers".

⁸ According to art.15(4) of the Regulation, this is without prejudice to any wider powers to make observations before courts that may be conferred on national competition authorities under domestic laws.

⁹ Commission notice on the cooperation between the Commission and the courts of the EU Member States in the application of arts 81 and 82 EC [2004] OJ C101/54.

¹⁰ *Inspecteur Van de Belastingdienst v X BV* (C-429/07) [2009] I-04833.

¹¹ Article 15(1) of the Council Regulation (EC) No.1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] OJ L001/1.

Where a Member State has not yet established the relevant procedural framework, then it is the national court which must determine the applicable procedural rules for the submission of observations in the case pending before it.¹²

National procedural rules must respect the general principles of Community Law,¹³ namely the principles of “effectiveness” and “equivalence”, and the relevant provisions should safeguard the fundamental rights of the parties involved in the case. In this vein, the applicable rules shall not make the submission of the amicus curiae observations excessively difficult or practically impossible¹⁴ nor more difficult than the submission of observations in court proceedings where equivalent national law is applied.¹⁵

In accordance with art.15(3) of Regulation (EC) No.1/2003, and exclusively for the purpose of enabling the European Commission to submit useful observations,¹⁶ the national courts may be asked by the Commission to transmit a copy of all the documents that are essential for the assessment of the case. The European Commission may only use these documents for preparing its observations, bound by the general prohibition of art.28(2) of the Regulation which prevents the disclosure of the acquired information and imposes the obligation of professional secrecy.

In fulfilling its duty to assist and cooperate with the national courts, the Commission is obliged to remain neutral and objective. In alignment with the principle of “sincere cooperation”, the European Commission must not serve any private interests of the parties involved in the case and must inform immediately the national court if contacted by any of them.¹⁷ The obligation of the European Commission to respect the independence of the court reflects the purely advisory nature of its observations, which do not bind the national court in its final judgment. Evidently, this constitutes a fundamental structural difference between the amicus curiae mechanism and the procedure applicable following a

request for a preliminary ruling, under art.267 TFEU, where the national court seeks a binding ruling from the ECJ.¹⁸

Overview of the Commission’s observations to national courts

In 2009, the European Commission published a Report on the functioning of Regulation (EC) No.1/2003.¹⁹ The Report was accompanied by a staff working paper²⁰ including details on the use of the amicus curiae tool by the Commission. The working paper revealed that whilst some national competition authorities had made notable use of their power to submit amicus curiae observations to their national courts, the Commission had only decided to intervene on two occasions during the reporting period.

The European Commission’s first use of its new powers was to make amicus curiae observations to the Cour d’appel de Paris in 2006,²¹ in a case brought by Garage Gremau against DaimlerChrysler France (the *Garage Gremau* case).²² The intervention of the European Commission was directed at providing legal certainty over the interpretation of the concept of quantitative selective distribution in the “Motor Vehicle Block Exemption Regulation”.²³

The Commission clarified that quantitative selective distribution systems do not have to fulfil the same requirements as those applicable for qualitative selective distribution systems as otherwise the two types of selective distribution systems would be conflated. In this respect, it concluded that it is not necessary to assess the objectivity of the selection criteria other than those for determining the number of distributors.²⁴ The Commission further observed that the Block Exemption Regulation did not prohibit the possibility of a supplier allowing a new distributor a transitional period to come into conformity with the requirements of the selective distribution system. It was noted that to hold otherwise would foreclose competitive newcomers. The observations of the Commission led to a subsequent judgment of the Court of Cassation in 2005,²⁵ consistent

¹² Article 34 of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹³ Article 10 of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹⁴ Article 35 para.(b) of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹⁵ Article 35 para.(c) of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹⁶ Article 33 of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹⁷ Article 19 of the Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.

¹⁸ The Court of Justice decision has the force of res judicata, binding not only the court on whose initiative the reference for a preliminary ruling was made, but equally all the national courts of the Member States.

¹⁹ Commission, “Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003” COM (2009) 0206 final.

²⁰ Commission, “Staff working paper accompanying the Communication from the Commission to the European Parliament and Council” SEC (2009) 574 final.

²¹ http://ec.europa.eu/competition/court/amicus_curiae_2006_gremeau_fr.pdf [Accessed 15 October 2018].

²² Available at http://ec.europa.eu/competition/antitrust/national_courts/court_2007_20_fr.pdf [Accessed 15 October 2018].

²³ Commission Regulation (EC) No.1400/2002 of 31 July 2002 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector [2002] OJ L 203/30.

²⁴ Commission, “Staff working paper accompanying the Communication from the Commission to the European Parliament and Council” SEC (2009) 574 final p.82.

²⁵ Available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007049939> [Accessed 15 October 2018].

with the views expressed in the amicus submission. Following an appeal, the Paris Court of Appeal confirmed the deferred decision in 2014²⁶ and two years later the Court of Cassation delivered a final ruling in line with the previous decisions.²⁷

The staff working paper in 2009 indicates that stakeholders found this intervention useful in the context of similar proceedings in other Member States but also records that stakeholders had called on the Commission to have greater recourse to its art.15(3) powers. The Commission appears to have taken this on board. Whilst it took the Commission two and a half years to make its first intervention after the Regulation took effect,²⁸ and it only made that one intervention in the first five years, it

became a lot more active in its use of the mechanism over the following five years. The figures do suggest, though, that its use of the power has, again, tailed-off a bit in the last few years.

According to the amicus curiae database of the Directorate General for Competition of the European Commission,²⁹ the EC has intervened in 17 private litigation cases, in a wide range of sectors, including inter alia transport, financial services, agriculture, electrical and electronic engineering and manufacturing. The amicus curiae observations have been submitted in the courts of nine Member States.³⁰ In two cases, the EC has decided to submit more than one set of observations.³¹

List of Commission amicus curiae observations³²

Case	Country	Court	Sector	Date of submission
<i>Visa and MasterCard MIFs</i>	United Kingdom	Court of Appeal	Financial services	06/04/2018, 21/02/2018
<i>EURIBOR</i>	United Kingdom	High Court	Financial services	27/01/2017
<i>Competition law in the agricultural sector</i>	France	Court of Cassation	Agriculture	27/02/2015
<i>Economic succession in cartel fines</i>	Germany	Supreme Court	—	07/04/2014
<i>Morgan Advanced Materials v Deutsche Bahn</i>	United Kingdom	Supreme Court	Manufacturing	18/02/2014
<i>Spanish decennial insurance</i>	Spain	Supreme Court	Financial Services	05/05/2014, 05/03/2014, 19/02/2014, 24/01/2014, 04/12/2013, 04/12/2013
<i>French MIF</i>	France	Court of Cassation	Financial Services	17/02/2015, 29/10/2012
<i>Tessenderlo Chemie v Belgische Staat</i>	Belgium	Constitutional Court	Agriculture	08/03/2012
<i>E.-P. v Slovak NCA</i>	Slovakia	Supreme Court	—	24/01/2012
<i>National Grid</i>	United Kingdom	High Court	Electrical and electronic engineering	03/11/2011
<i>Orange Caraïbe</i>	France	Court of Cassation	Electrical and electronic engineering	13/10/2011
<i>Bundeswettbewerbbehörde v undertakings active in the transport sector</i>	Austria	Supreme Court	Transport	12/09/2011
<i>X B.V. case</i>	Netherlands	Supreme Court	Construction	16/12/2010
<i>Železničná spoločnosť Cargo Slovakia, a.s</i>	Slovakia	Supreme Court	Transport	25/06/2010
<i>Beef Industry Development Society Ltd (BIDS)</i>	Ireland	High Court	Food and drink industry	30/03/2010
<i>X B.V. case</i>	Netherlands	Appeal Court	Construction	24/09/2009
<i>Pierre Fabre Dermo-Cosmétique</i>	France	Appeal Court	Cosmetics	11/06/2009
<i>Garage Grémeau</i>	France	Appeal Court	Automotive industry	02/11/2006

²⁶ Available at <https://www.doctrine.fr/d/CA/Paris/2014/RC47C12F5F7BED1249B2B> [Accessed 15 October 2018].

²⁷ Available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000033112070> [Accessed 15 October 2018].

²⁸ Pursuant to art.45, the Regulation applied from 1 May 2004.

²⁹ http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html [Accessed 15 October 2018].

³⁰ The European Commission has intervened in proceedings pending before the courts of the following Member States: Austria, Belgium, France, Germany, Ireland, the Netherlands, Slovakia, Spain and the UK.

³¹ Six in *Spanish decennial insurance* and two in *Visa and MasterCard MIFs*.

³² For the preparation of this table and the article analysis, the names of the cases have followed the corresponding citation in the Commission's official database.

The interventions made by the European Commission in ensuring the coherent application of arts 101 TFEU or 102 TFEU have addressed a plethora of competition law concerns. In five cases, the amicus curiae observations have tackled issues pertaining to the concept of restriction of competition by object (art.101(1)) and provided clarification regarding the existence of elements which could allow for an exemption either under art.101(3) or pursuant to a Block Exemption Regulation,³³ whereas in four cases the European Commission has considered cartel-related matters.³⁴

In more recent cases, particularly, a lot of the interventions have been made in private antitrust litigation where victims have sought damages for violation of competition law. In those cases, observations have centred around issues such as the disclosure and use of documents arising from investigations by competition authorities and leniency statements in private litigation³⁵ and the starting point of the limitation period for follow-on damages actions based on a Commission decision.³⁶ Other observations have addressed the “notion of appreciable effect on trade” between Member States,³⁷ the parallel application of EU and national competition law³⁸ and the concept of “economic continuity” under EU competition rules.³⁹ Finally, in its most recent intervention in *Visa and MasterCard MIFs* (another private antitrust damages action), the European Commission submitted two sets of amicus curiae observations by which it reiterated the EU decisional practice and case law⁴⁰ with respect to the application of art.101 TFEU to multilateral interchange fees and addressed certain issues concerning art.101(3) TFEU.⁴¹

The non-binding nature of the amicus curiae observations has not prevented the national courts of the Member States from adopting the position of the European Commission. In the vast majority of the cases listed above, the final judgment of the court in question was fully aligned with the opinion expressed by the Commission. On three occasions, namely in *Competition*

law in the agricultural sector, *Bundeswettbewerbshörde v undertakings active in the transport sector* and *Pierre Fabre Dermo-Cosmétique*, the intervention on behalf of the European Commission gave rise to a subsequent request for a preliminary ruling to the ECJ. It seems that the authority the European Commission carries in its interpretation of EU competition law is given a lot of weight by national courts, persuading them to either follow the Commission or seek a binding determination by the ECJ.⁴²

Part B

The extension of the scope of the amicus curiae observations to State aid and arbitration proceedings

As stated on the webpage of the European Commission dedicated to the cooperation with national courts in the field of State aid,⁴³

“since 2013, the Commission has the possibility to submit, on its own initiative, *amicus curiae* observations to the national courts under Article 29, par. 2 of the Procedural Regulation”.

Article 29(2) of Regulation 2015/1589,⁴⁴ constituting the legal basis for the commission’s observations, stipulates the following:

“Where the coherent application of Article 107(1) or Article 108 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.

The Commission shall inform the Member State concerned of its intention to submit observations before formally doing so.

³³ In *Spanish decennial insurance* the European Commission gave guidance over the interpretation of the Insurance Block Exemption Regulation whilst in *Pierre Fabre Dermo-Cosmétique* it explained that a general prohibition of online sales to end users, imposed by the supplier on all distributors belonging to its selective distribution network, constitutes a hardcore restriction of competition and cannot benefit from an exemption from the application of art.101 TFEU on the basis of the Block Exemption Regulation. Such a hardcore restriction could only benefit, under exceptional circumstances, from an individual exemption under art.101(3) TFEU.

³⁴ In *economic succession in cartel fines* in Germany, the European Commission analysed the “notion of undertaking” and the “principle of effectiveness”; in *Tessenderlo Chemie v Belgische Staat* it cast light on the principles of “effectiveness” and “loyal cooperation”; in *Bundeswettbewerbshörde v undertakings active in the transport sector* it provided clarity in respect of the principle of effective enforcement of EU law and in the *X.B.V.* case it defined the principles of “effectiveness” and “loyal cooperation” in the context of tax deductibility of cartel fines.

³⁵ In *Euribor*, available at http://ec.europa.eu/competition/court/2017_euribor1.pdf [Accessed 15 October 2018], http://ec.europa.eu/competition/court/visa_mastercard_commission_observation2_en.pdf [Accessed 15 October 2018] and *National Grid*, available at http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf [Accessed 15 October 2018].

³⁶ In *Morgan Advanced Materials v Deutsche Bahn* [2014] UKSC 24, available at: http://ec.europa.eu/competition/court/amicus_curiae_morgan_crucible_observations_en.pdf [Accessed 15 October 2018].

³⁷ In *Orange Caraibe*, available at http://ec.europa.eu/competition/court/amicus_curiae_2011_orange_caraibe_en.pdf [Accessed 15 October 2018].

³⁸ In *E.-P. v Slovak NCA*, available at http://ec.europa.eu/competition/court/amicus_curiae_epslovak_sk.pdf [Accessed 15 October 2018].

³⁹ In *Železničná spoločnosť Cargo Slovakia, a.s.*, available at http://ec.europa.eu/competition/court/amicus_2010_cargo_slovakia_sk.pdf [Accessed 15 October 2018].

⁴⁰ See the database of the European Commission for *Visa MIF and MasterCard I*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39398 [Accessed 15 October 2018] and http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_34579 [Accessed 15 October 2018].

⁴¹ The two sets of observations are available at http://ec.europa.eu/competition/court/visa_mastercard_commission_observation1_en.pdf [Accessed 15 October 2018] and http://ec.europa.eu/competition/court/visa_mastercard_commission_observation2_en.pdf [Accessed 15 October 2018].

⁴² It should be noted that the list of formal amicus submissions on the Commission’s website may not provide a comprehensive record of all the interventions the Commission has made in national court proceedings, as the authors know of at least one occasion where the Commission wrote to a national court that is not included in the database yet, at least. An Mlex story on 28 August about DAF being denied permission to appeal a disclosure ruling on the “trucks cartel” mentions that the Commission wrote to the High Court in July to express concerns about the disclosure application.

⁴³ http://ec.europa.eu/competition/court/state_aid_requests.html [Accessed 15 October 2018].

⁴⁴ 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.

For the exclusive purpose of preparing its observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court, necessary for the Commission's assessment of the matter".

This relatively new power of the European Commission, first introduced five years ago, extends the scope of the amicus curiae mechanism to State aid cases, in an attempt to cover the entire spectrum of competition law. The construction of the relevant provisions is almost identical to this of the corresponding art.15(3) of Regulation (EC) No.1/2003, for the submission of amicus curiae observations in antitrust proceedings. The distinction between the *sua sponte* submission of written observations and oral observations, which are subject to the court's approval, remains in place, with the only additional requirement being the duty of the Commission to notify the Member State concerned prior to its intervention. This requirement is explained by the necessity for an advanced level of cooperation between the European Commission and the Member States, which is inherent to the nature of the State aid proceedings.

Regardless of the form of the assistance, the Commission must act in accordance with its long-standing obligation to defend the public interest.⁴⁵ Recital 38 of the State aid Procedural Regulation states that any amicus curiae observations are submitted without prejudice to the possibility of a reference pursuant to art.267 TFEU and emphasises the non-binding nature of the intervention. Moreover, it clarifies that interventions should be limited to cases that are important for the coherent application of arts 107(1) or 108 TFEU. It is noted that the interests of transparency and legal certainty require the publication of any submission made by the EC, but the rules on professional secrecy require the protection of all confidential information and personal data included therein.⁴⁶

The Commission has not made extensive use of its power to intervene in State aid matters. According to the information provided in its dedicated database,⁴⁷ the European Commission has only decided to intervene in six cases over the reporting period, on issues pertaining to tourism, the food and drink industry, maritime affairs and the aeronautical sector.⁴⁸

List of Commission State aid amicus curiae observations

Case	Country	Court	Sector	Date of submission
<i>Magic Mountain Kletterhallen</i>	Germany	Higher Administrative Court of Berlin	Tourism	05/12/2017
<i>Micula</i>	Sweden	Nacka District Court	Food and drink industry	26/10/2017
<i>Hellenic shipyards</i>	n/a	International Court of Arbitration of the International Chamber of Commerce	Maritime industry	27/02/2015
	Greece	Administrative Court of Athens	Maritime industry	04/06/2016 (four observations)
<i>French airport cases</i>	France	Administrative Court of Appeals of Bordeaux	Aeronautic industry	25/11/2015
<i>SNCM</i>	France	Administrative Court of Appeals of Marseille	Maritime industry	05/08/2014
<i>Micula</i>	Romania	Secției a III-a Civilă a Tribunalului București	Food and drink industry	26/05/2014
		Tribunalul București		07/05/2014

As illustrated above, whilst most of the interventions have been made at the administrative courts of the Member States, in *Hellenic shipyards* the European Commission submitted amicus curiae observations before the ICC's International Court of Arbitration.⁴⁹ This intervention is significant as it extended the scope of art.29(2) of Council Regulation (EU) 2015/1589 to arbitration proceedings. In its analysis of the legal basis for submitting observations, the legal service of the European Commission⁵⁰ stated that: "Article 29(2) of

Regulation 2015/1589 is applied by analogy in cases of commercial arbitration that may interact with the application of State aid rules". The legal service further stressed that:

"In accordance with Article 36(2) of Regulation 2015/1589, that regulation is binding in its entirety and directly applicable in all Member States. Therefore, the direct effect of the aforementioned

⁴⁵ Recital 37 of the Council Regulation (EU) 2015/1589.

⁴⁶ Recital 39 of the Council Regulation (EU) 2015/1589.

⁴⁷ http://ec.europa.eu/competition/court/amicus_curiae_interventions.html [Accessed 15 October 2018].

⁴⁸ See the table below for an overview of the amicus curiae observations submitted by the European Commission pursuant to art.29(2) of Council Regulation (EU) 2015/1589. For consistency purposes, the names of the cases mentioned therein as well as in the article analysis, have followed the wording of the official database of the European Commission.

⁴⁹ Available at http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_en.pdf [Accessed 15 October 2018].

⁵⁰ Represented by Messrs Antonios Bouchagiar and Tim Maxian Rusche.

Article 29(2) enables the Commission to submit its written observations in the matter before your Arbitral Tribunal”.

Hence, the European Commission, at least, considers that its power to submit observations where the coherent application of art.107(1) or art.108 TFEU so requires, should be interpreted broadly, to also include the possibility for the Commission to intervene in arbitration proceedings that may interact with the application of state aid rules. The same logic would seem to apply in the case of arbitration proceedings dealing with arts 101 and 102 issues. As such, we may yet see the Commission applying art.15(3) of Regulation 2003/1 by analogy in arbitration proceedings as well.

The Commission’s amicus curiae briefs before the courts of the US

The European Commission has submitted amicus curiae briefs to courts in the US as well as to Member State courts but its reasons for doing so are quite different. The amicus curiae briefs it has submitted in the US have been directed at safeguarding the effectiveness of public antitrust enforcement when there is a risk that broad US discovery requirements⁵¹ may undermine the Commission’s ongoing investigative processes.

Such amicus briefs were lodged in the *Vitamins Case*⁵² and the *Methionine litigation*.⁵³ In the first case, the dispute concerned the disclosure of the defendants’ submissions under the Commission’s leniency program, during an ongoing investigation. Despite the submission of observations by the European Commission, the defendant did not contest the production of its corporate statements and the court ordered their discovery.⁵⁴ In the *Methionine litigation*, where again the plaintiff requested access to documents submitted to the Commission under its leniency program, the Northern District Court of California aligned with the position of the European Commission, to dismiss the motion for discovery.

In parallel with this power of the European Commission to submit amicus curiae briefs, the Directorate General for Competition has also over the years sent letters to litigants in the US, aiming to discourage them from seeking the discovery of information gathered under its Leniency Programme.⁵⁵ In the *Rubber Chemicals litigation*⁵⁶ for instance, where the plaintiff requested discovery of the documents

provided by the defendant to the Commission as part of its Leniency Programme, the latter presented a letter from the Commission expressing its opposition to discovery. The court, in denying the discovery, adopted the Commission’s position. These interventions before the courts of the US, either in the form of amicus curiae briefs or letters sent to the plaintiffs, have effectively contributed in the Commission’s defence against the discoverability of information that has been prepared for the purpose of its own investigation.

Similar concerns, regarding the discoverability of documents and information provided under a national leniency programme arose in Europe after the *Pfleiderer* judgment.⁵⁷ Following a referral from the Bonn Local Court, questioning whether EU law, and in particular arts 11 and 12 of Regulation (EC) No.1/2003 on the implementation of the rules on competition laid down in arts 101 and 102 TFEU preclude communication of this type of documents, the Court of Justice found that, in the absence of Union law common rules on the right of access to documents voluntarily submitted to a national competition authority under a leniency program, this material may be communicated in order to prepare a civil action for damages, under conditions which must be determined by the courts of the Member States.⁵⁸ The issue, which prompted one of the Commission’s amicus curiae observations in the *National Grid* case, has now been dealt with expressly in the EU Damages Directive,⁵⁹ blocking disclosure of leniency statements in Europe.

Conclusion

This article set out to explain the role of the European Commission in intervening in private actions. The power of the European Commission to submit amicus curiae observations in competition law cases pending before the courts of the Member States has assisted in clarifying basic principles of EU competition law, ensuring the coherent application of arts 101 and 102 TFEU and providing legal certainty with respect to competition matters. The extension of the power to intervene to State aid and arbitration proceedings has further increased the scope for the Commission to act, albeit used to only a limited extent to date.

Despite the non-binding nature of the observations, the national courts have often adhered to the opinions expressed by the Commission and adopted its position in their final decisions. The European Commission has made

⁵¹ Discovery in the US is exceptionally broad. According to r.26(b)(1) of the Federal Rules of Civil Procedure: “parties may obtain discovery regarding any non-privileged matter that is relevant to any part’s claim or defence-including the existence, . . . nature, custody . . . and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter”.

⁵² United States District Court of the District of Columbia, *In Re. Vitamins Antitrust Litigation*—Misc. No.99-197.

⁵³ United States District Court of Northern District of California, *In Re: Methionine Antitrust Litigation* Case No.C-99-3941 CRB MDL No.1311.

⁵⁴ The District Court of Columbia affirmed the position of the Special Master who had previously concluded that “concerns raised by the EC and Australia were outweighed by the United States’ interests in open discovery and enforcement of its antitrust laws”.

⁵⁵ The rules of the Commission’s leniency programme are set out in the “Commission Notice on Immunity from fines and reduction of fines in cartel cases” [2006] OJ C 298/11.

⁵⁶ *In Re: Rubber Chemicals Antitrust Litigation* Case No.C04-1648 MJJ (BZ).

⁵⁷ *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62009CJ0360> [Accessed 15 October 2018].

⁵⁸ See also http://ec.europa.eu/dgs/legal_service/arrets/09c360_en.pdf [Accessed 15 October 2018].

⁵⁹ Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

significant use of this instrument over the past years and it will be interesting to see how this practice will further develop.