OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 5 March 2009 [1]

I — Introduction

1. This is the first time the Court has been asked to examine the condition or conditions governing the lodging by the Commission of the European Communities of written observations before the courts of the Member States under Article 15(3) of 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. [2]

2. That question, posed in a reference for a preliminary ruling made by the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) (Netherlands), is raised in the particular context of a tax dispute concerning the partial deductibility of a fine imposed by a Commission decision.

1 — Original language: French.
2 — OJ 2003 L 1, p. 1.

II — The legal context

A — *The Community rules*

3. Article 15 of Regulation No 1/2003, entitled 'Cooperation with national courts', provides as follows:

'1. In proceedings for the application of Article 81 [EC] or Article 82 [EC], courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules.

2. Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 [EC] or Article 82 [EC]. Such copy shall be forwarded without delay after the full written judgment is notified to the parties.

3. 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 [EC] or Article 82 [EC]. 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 [EC] or Article 82 [EC] so requires, the Commission, acting on its own initiative, may submit 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 their 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 case.

…'

4. Recital 21 in the preamble to Regulation No 1/2003 states:

'Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. This is relevant for all courts of the Member States that apply Articles 81 [EC] and 82 [EC], whether applying these rules in lawsuits between private parties, acting as public enforcers or as review courts. In particular, national courts should be able to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States should also be able to submit written or oral observations to courts called upon to apply Article 81 [EC] or Article 82 [EC]. These observations should be submitted within the framework of national procedural rules and practices including those safeguarding the rights of the parties. Steps should therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.'

B — *The national legislation*

5. Article 89h of the Mededingingswet (Netherlands Law on competition) of 22 May 1997,

as amended by the Law of 30 June 2004 (the 'Mededingingswet'), provides:

'1. The Administrative Board [of the Nederlandse Mededingingsautoriteit (Netherlands competition authority, the "NMa")] or the Commission of the European Communities may, when not acting as a party, submit written observations in the appeal proceedings before the Administrative Court, pursuant to the first subparagraph of Article 15(3) of Regulation No 1/2003, if the Board [of the NMa] or the Commission of the European Communities has expressed its wish to do so. The court may set a time-limit for this. With the permission of the court, they may also submit oral observations during the hearing.

2. Following an application, pursuant to the second subparagraph of Article 15(3) of Regulation No 1/2003, the court shall provide the Board [of the NMa] and the Commission of the European Communities with all documents referred to in the aforementioned provision. The parties may give their opinions on the documents to be issued within a time-limit to be determined by the court.

3. The parties may respond to observations submitted by the Board [of the NMa] or the Commission of the European Communities within a time-limit to be determined by the court. The court may provide the parties with an opportunity to respond to each other's observations.'

6. The explanatory memorandum to the Law of 30 June 2004 amending the Mededingingswet states that the written or oral observations lodged by the Commission have the status of an opinion and the purpose of promoting the coherent application of the competition rules. To that end, the Commission and the national competition authorities must comply with the Netherlands rules of procedure. In proceedings between two parties, the court is passive. Moreover, the court is not bound by the Commission's opinion. The court's independence is not therefore called into question. The Commission and the national competition authorities must respect the rights of the parties and ensure that confidential business information remains confidential. Finally, in accordance with Article 15(1) of Regulation No 1/2003, the national court is empowered to ask the Commission to transmit to it information in its possession or its opinion.

7. Article 3.14 of the Wet Inkomstenbelasting 2001 (Law on income tax 2001) provides:

‘1. When assessing profits, the charges and costs relating to the following headings shall not be deductible:

…

c. fines imposed by a Netherlands court and sums paid to the State to avoid judicial proceedings in the Netherlands or to fulfil a condition linked to a decision on remission of a penalty, fines imposed by an institution of the European Union and fines and increases imposed pursuant to the Algemene wet inzake rijksbelastingen (General Law on national taxation), the Douanewet (Law on customs), the Coördinatiewet Sociale Verzekering (Law on the coordination of social insurance), the Wet administratiefrechtelijke handhaving verkeersvoorschriften (Law on the administrative enforcement of traffic regulations) and the Mededingingswet (Law on competition);...’

III — The facts of the dispute in the main proceedings and the question referred

8. By decision of 27 November 2002, the Commission established that BPB plc, Gebrüder Knauf Westdeutsche Gipswerke KG, Lafarge SA and Gyproc Benelux NV had infringed Article 81(1) EC by participating in a set of agreements and concerted practices in the plasterboard business between 1992 and 1998. [3] By the same decision, the Commission also imposed a fine on each of those companies. The fines were paid provisionally or secured by a bank guarantee.

9. The fines imposed by the Commission were confirmed by the Court of First Instance of the European Communities in its judgments of 8 July 2008. [4]

10. Before the judgments of the Court of First Instance confirming the amount of those fines were delivered, one of the four abovementioned companies, called X KG by the

3 — Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard) (OJ 2005 L 166, p. 8).

4 — Case T-50/03 *Saint-Gobain Gyproc Belgium* v *Commission*; Case T-52/03 *Knauf Gips* v *Commission*; Case T-53/03 *BPB* v *Commission* [2008] ECR II-1333; and Case T-54/03 *Lafarge* v *Commission*. It should be noted that the judgments in *Knauf Gips* v *Commission* and *Lafarge* v *Commission* are both the subject of appeals, currently pending, before the Court which have been registered as Cases C-407/08 P and C-413/08 P respectively.

referring court, passed on part of the fine to one of its subsidiaries established in the Netherlands, X BV ('X').

11. On 13 March 2004, an assessment to corporation tax was made on X by the Netherlands tax authority in respect of the financial year 2002. By letter of 8 April 2004, the company lodged an objection to the assessment with the Inspecteur van de Belastingsdienst/P/kantoor P, which was dismissed by decision of 11 March 2005.

12. On 19 April 2005, X brought the case before the Arrondissementsrechtbank Haarlem (District Court, Haarlem), which has jurisdiction over tax matters. The parties to the case were in dispute over the question whether the fine imposed by the Commission, which was passed on to X, is a fine within the meaning of Article 3.14(1)(c) of the Wet Inkomstenbelasting 2001, which prohibits the deduction of fines imposed by the Community institutions from the assessment of a company's profits.

13. By judgment of 22 May 2006, the Arrondissementsrechtbank Haarlem held that the fine was partially deductible in so far as its object was to deprive the offending party of the enrichment obtained by the infringement.

14. The Netherlands tax authority brought an appeal against that judgment before the Gerechtshof te Amsterdam by notice of 30 June 2006.

15. By letter dated 15 March 2007, the Commission, having been informed by the press and through the NMa of the judgment given by the Arrondissementsrechtbank Haarlem and of the proceedings pending, notified the Gerechtshof te Amsterdam that it wished to intervene as *amicus curiae* pursuant to Article 15(3) of Regulation No 1/2003. The Commission also requested that a time-limit be set for that purpose and that any documents necessary for the assessment of the case be transmitted to it.

16. At a hearing on 22 August 2007 before the Gerechtshof te Amsterdam, the parties to the main proceedings and the Commission were asked to express their views on the question whether the Commission was competent under Article 15(3) of Regulation No 1/2003 to submit, on its own initiative, written observations in the main proceedings.

17. Considering that the interpretation of Article 15(3) of Regulation No 1/2003 was open to reasonable doubt, the Gerechtshof te Amsterdam decided to stay proceedings and

refer the following question to the Court for a preliminary ruling:

'Is the Commission competent, under Article 15(3) of Regulation No 1/2003, to submit, on its own initiative, written observations in proceedings relating to the deductibility from the (taxable) profit realised by the party concerned in 2002 of a fine for infringement of Community competition law, which was imposed by the Commission on X KG and (partially) passed on to the party concerned?'

IV — The procedure before the Court

18. In accordance with Article 23 of the Statute of the Court, written observations were lodged by X, the Netherlands Government and the Commission. They and the Italian Government also presented oral argument at the hearing which was held on 18 December 2008.

V — Analysis

19. Under the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003, the Commission, acting on its own initiative, may submit written observations to courts of the Member States '[w]here the coherent application of Article 81 [EC] or Article 82 [EC] so requires'.

20. The phrase cited above is interpreted differently by the parties which have lodged observations before the Court.

21. Essentially, according to X and the Netherlands Government, the phrase contained in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 is to be interpreted strictly and has the purpose of ensuring the coherent interpretation of Articles 81 EC and 82 EC and assisting the national courts in applying those provisions. The Commission's intervention as *amicus curiae* is thus limited to the strict context of the application of Articles 81 EC and 82 EC by the national courts. That approach, they contend, is consistent with the wording, purpose and history of Article 15 of Regulation No 1/2003 and the texts interpreting that regulation, such as the Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 EC and 82 EC. [5] Moreover, in the opinion of the Netherlands Government, the Commission may not avail itself of the procedure provided for in Article 15(3) of

5 — OJ 2004 C 101, p. 54.

Regulation No 1/2003 for the wider purpose of ensuring the effective application of Articles 81 EC and 82 EC. Finally, the Netherlands Government submits that the coherent application of Articles 81 EC and 82 EC cannot be adversely affected in a case where the national court is not asked to interpret or apply either of those articles. Consequently, the above considerations, taken as a whole, preclude the possibility for the Commission of submitting observations in a dispute under national tax law, such as that pending before the referring court, on the basis of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003.

22. For its part, the Commission, supported, essentially, by the Italian Government, submits that it is necessary to give a broad interpretation to the scope of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003, and in particular the phrase 'coherent application of Article 81 [EC] or 82 [EC]', which sets the framework for the submission of its written observations before a national court. According to the Commission, it is wrong to take the view that the submission of written observations under the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 is subject to the supplementary condition that the national proceedings must relate to the application of Article 81 EC or Article 82 EC. Rather, it is sufficient that the dispute is capable of jeopardising the coherent application of the Community competition rules. Moreover, the provisions of recital 21 in the preamble to Regulation No 1/2003 and of the Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 EC and 82 EC are merely indicative and cannot restrict a broad interpretation of the third sentence of the first subparagraph of Article 15(3) of that regulation. In the light of those considerations and in so far as it has broad discretion to examine whether a case requires that written observations be submitted to a national court, the Commission contends that it is empowered to submit observations and has a legitimate interest in doing so in the context of the tax dispute in the main proceedings. Because they sanction anti-competitive conduct, fines are linked to the application of Articles 81 EC and 82 EC, as indicated by Article 83(2)(a) EC. The possibility of deducting from tax even part of the fines imposed by a Commission decision would bring with it the risk of substantially restricting their deterrent effect and would undermine the objectives of the EC Treaty, in particular the application of the Community competition rules. Finally, the Commission points out, on the one hand, that the national court is not bound by the written observations which it submits and, on the other hand, that it does not acquire the status of intervener in the main proceedings under Article 15(3) of Regulation No 1/2003.

23. Summarised more succinctly, the issues raised by the present reference for a preliminary ruling boil down to the following question: does the scope of the condition laid down in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 cover a situation in which, by submitting written observations to a national appeal court, the Commission wishes to ensure the coherent application of the effects of one of its own decisions implementing Article 81 EC, where the Commission considers that such coherent application could be jeopardised by that court if it were to confirm the interpretation and solution adopted by the court of first instance.

24. First of all, it should be noted that the Commission has accepted before the Court that the situation at issue in the present case falls within the category of 'atypical cases' in which it may be obliged to use the procedural competences conferred on it by the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003. It is common ground that the 'typical cases' covered by that provision are those in which the national court is asked to apply Articles 81 EC and/or 82 EC to a given situation and/or applies them to a specific case.

25. That said, I cannot concur with the restrictive interpretation of Article 15(3) of Regulation No 1/2003 put forward by X and the Netherlands Government.

26. First, their claim that the Commission is empowered to activate the procedure in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 only in cases where there is a risk that the coherent interpretation of Articles 81 EC or 82 EC will be adversely affected by a decision of a court in a Member State must be dismissed. It need only be pointed out that the wording of that provision refers to the 'coherent application' of those articles and not exclusively to their interpretation.

27. Next, the argument put forward by the Netherlands Government that the Commission may not avail itself of the right to submit written observations under the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 in a dispute relating to the application of national law since there is no risk that national law will adversely affect the coherent application of Article 81 EC or Article 82 EC, but only, at the very most, the effective application of the latter, is also unconvincing.

28. Since 'coherence' is a term which by its nature has multiple meanings, the phrase contained in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 is perfectly capable of referring both to situations in which a national court may adversely affect the internal coherence of Article 81 EC or Article 82 EC, that is to say, essentially, the coherent application of the conditions laid down by those provisions, and to situations where the national court may adversely affect their external coherence, that is to say the fact that those provisions retain a logical and intelligible place within the more general framework of the system of Community competition rules or of the Treaty. [6]

6 — Although legal theoreticians are not agreed on a definition of coherence, they generally consider it, notionally, to refer essentially to elements of a legal system which, taken together, make sense (see in particular in this regard, MacCormick, N., 'Coherence in Legal Justification' in Peczenik, A. (ed.), *Theory of Legal Science*, Reidel, 1984, p. 235). They also, as a rule, distinguish between local systemic coherence and global systemic coherence, the former referring to a situation in which only certain areas of a legal system are coherently interlinked, the latter referring to the logical and intelligible interaction of all areas of the system: see, on this point, Amaya Navarro, A., *An Inquiry into the Nature of Coherence and its Role in Legal Argument*, Doctoral Thesis, European University Institute, Florence, 2006, in particular pp. 35 to 37, and Bertea, S., 'Looking for Coherence within the European Community', *European Law Journal*, No 2, 2005, p. 157.

29. If it is considered that the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 refers to coherence in the latter sense, it is not inconceivable, as I shall examine in the comments that follow, that a national court seised of a dispute under national law may none the less adversely affect the coherent application of Article 81 EC or Article 82 EC.

30. In that respect, it is already apparent, in my view, that a national judgment which grants the possibility of deducting from tax all or part of a fine imposed by a Commission decision under Article 81 EC is capable of adversely affecting the coherent application of such a decision in the Member States in which the undertakings concerned are established.

31. It is true that, in those circumstances, it might be objected that the submission of written observations by the Commission under the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 would relate to a case concerned more with ensuring the uniform application of a decision under Article 81 EC than with the coherent application of that provision.

32. However, it seems to me that to draw the abovementioned inferences directly from the latter interpretation of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003, as proposed in point 28 above, would be to err on the side of excessive formalism.

33. First, although coherence is different from uniformity, in that there may be degrees of the former but not, in principle, of the latter, it is important to note that the latter term is also used in certain language versions of Regulation No 1/2003 instead and in place of the term 'coherence' or the phrase 'coherent application' used in the other language versions of that act. Thus the phrase 'uniform application' is used in the Danish ('ensartede anvendelse'), Italian ('applicazione uniforme') and Swedish ('enhetliga tillämpningen') versions of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003, while the word 'uniform' is also used in the German ('einheitliche'), Danish and Swedish versions of the relevant recitals in the preamble to that regulation.

34. Next, the concept of coherence or, more precisely, the phrase 'coherent application' appears to be sufficiently flexible for situations in which a national court would or might jeopardise the uniform, or even effective,

application of Article 81 EC or Article 82 EC to be included within the scope of the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003. [7] Such an approach seems particularly appropriate given that the objectives of Regulation No 1/2003 are to ensure the effective and uniform application of Articles 81 EC and 82 EC; [8] in the context of that application, the Commission, in the light of the task of supervision conferred on it by Community law, [9] performs a predominant function.

35. Finally, as the interpretation of Article 81 EC is part and parcel of the provision itself, I find it difficult to conceive of the Commission's not being able to avail itself of the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 on the ground, if such is the case, that that institution seeks to safeguard only the coherent application of a decision which itself applies and interprets Article 81 EC. In this regard, it is to my mind impossible to exclude from the scope of the reference made to Articles 81 EC and 82 EC in Article 15(3) of Regulation No 1/2003 not only the interpretation given to those provisions by the Court but also the decision-making practice of the Commission founded on those same provisions, unless, of course, that practice is considered illegal by the Community courts.

36. It is true that this might still be countered with the argument that the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 seeks only to maintain the coherent application of Article 81 EC or Article 82 EC and not that of other provisions of Community law such as Article 83 EC, on the basis of which the Commission was, in particular, given the competence to impose fines on undertakings which have infringed the prohibition laid down in Article 81(1) EC.

37. However, such an objection would tend to overlook the 'finalist' character of the fines, as highlighted by Article 83(2)(a) EC, the purpose of which is 'to ensure compliance with the prohibitions laid down in Article 81(1) [EC] and in Article 82 [EC]' and which therefore constitute one of the

7 — Without wishing to embark on a discussion of the substance of the main proceedings or to adopt a position on the issues raised there, the links between coherent application and effective application of Articles 81 EC and 82 EC in the particular context of the deductibility of fines appear to have been addressed, at least implicitly, in Case T-10/89 *Hoechst* v *Commission* [1992] ECR II-629, paragraphs 368 and 369, in which the Court of First Instance held that, in fixing the amount of the fine which it had imposed for infringement of the prohibition in Article 81(1) EC, the Commission could not proceed on the assumption that the fine would be charged on the taxable profits, because 'the result [of that assumption] would be that the fine was paid in part by the State to which the undertaking pays tax,' thereby reducing the taxable income of the undertaking. By pointing up the fact that the Commission 'could not proceed on such a basis', it seems to me that the Court of First Instance sought to emphasise that such a situation would not be coherent with the rules on the liability of undertakings which adopt conduct contrary to the prohibition laid down in Article 81(1) EC and would render ineffective that prohibition and the deterrent nature of the fines imposed for its enforcement.

8 — See, in particular, recitals 1 and 34 in the preamble to Regulation No 1/2003.

9 — Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 22.

means given to the Commission to permit it to carry out the task of supervision conferred on it by Community law. [10]

38. In those circumstances, it would be specious to say the least to argue that, despite the intrinsic link between the fines and the application of Articles 81 EC and 82 EC, a dispute under national law which raises a question relating to the nature of the fines imposed by a Commission decision adopted to ensure compliance with the prohibition in Article 81(1) EC is not automatically capable of affecting the coherent application of Article 81 EC.

39. This brings me to the principal objection raised by the Netherlands Government and X to the effect that the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 was designed to be activated only where a national court is asked to apply Article 81 EC or Article 82 EC.

40. That line of argument, I concede, is not entirely without foundation, since the mechanism introduced by the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 is undoubtedly intended *essentially* to be activated where the national courts are asked to rule on the application of Article 81 EC and/or Article 82 EC.

41. It thus seems clear that the transition from a highly centralised application of Articles 81 EC and 82 EC, as was the case under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty, [11] to an arrangement providing for the decentralised implementation of the Community competition rules, as established by Regulation No 1/2003, requires the establishment of mechanisms to ensure the 'effective', 'efficient', 'uniform' and/or 'coherent' application of the provisions of Articles 81 EC and 82 EC, in accordance with the various terms used by Regulation No 1/2003. [12] It is also true that these mechanisms include those relating to cooperation between the courts of the Member States, on the one hand, and the Commission and the national competition authorities on the other, as laid down in Article 15 of Regulation No 1/2003.

10 — *Musique Diffusion française and Others* v *Commission*, paragraph 105, and *Britannia Alloys & Chemicals* v *Commission*, paragraph 22.

11 — OJ, English Special Edition 1959-1962, p. 87. Regulation last amended by Council Regulation (EC) No 1216/1999 of 10 June 1999 (OJ 1999 L 148, p. 5).

12 — In the French language version of Regulation No 1/2003, the term 'effectif[ve]' is used in recitals 5 and 8 and, adverbially, in Article 35(1) of that regulation; the term 'efficace' is used in recitals 6 and 34; the term 'uniforme' is used in recital 22 and in the title of Article 16 of Regulation No 1/2003; the term 'cohérent(e)' is used in recitals 14, 17, 19 and 21 and in Article 15(3) of Regulation No 1/2003. As I underlined in point 33 of this Opinion, these differences are not necessarily relevant in all the language versions of Regulation No 1/2003.

42. However, I consider that the specific cooperation mechanism referred to in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 cannot be made subject to the prior condition that the dispute pending before the national court must relate to the application of Article 81 EC or Article 82 EC but may comfortably cover a situation where, although seised of a dispute under national law, the national court gives a ruling, in the context of that dispute, on the meaning or scope of a matter or term of Community law, such as a fine imposed by the Commission, which is intrinsically linked to the application of Articles 81 EC and/or 82 EC.

43. First of all, it is important to recall that the wording of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 refers solely to the 'coherent application' of Articles 81 EC and 82 EC. Thus, unlike Article 15(1) of that regulation, which is aimed at requests for information and opinions made by the national courts to the Commission where the former are ruling '[i]n proceedings for the application of Article 81 [EC] or Article 82 [EC]', and Article 15(2) of the same regulation, which relates to the transmission to the Commission of judgments given by the national courts 'deciding on the application of Article 81 [EC] or Article 82 [EC]', the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 does not make the submission of written observations by the Commission subject to the existence of a dispute pending before a national court which requires the latter to rule on the application of Article 81 EC or Article 82 EC.

44. Next, although it is true that recital 21 in the preamble to Regulation No 1/2003 states that '[the Commission] *should*... be able to submit written... observations to courts *called upon to apply Article 81[EC] or Article 82 [EC]*', [13] that statement does not of itself limit the possibility granted to the Commission of submitting observations in other circumstances provided that the condition contained in the actual wording of the third sentence of the first subparagraph of Article 15(3) of that regulation is fulfilled.

45. Moreover, it will be noted that the phrase from recital 21 in the preamble to Regulation No 1/2003 which I have just reproduced in part in the preceding point reflects only imprecisely the wording of Article 15(3) of that regulation. On the one hand, it is important to note that that phrase treats the written and oral observations submitted by the Commission to the national courts in exactly the same way, while the fourth sentence of the first subparagraph of

13 — My italics.

Article 15(3) of Regulation No 1/2003 makes the latter subject to prior permission from the national court. On the other hand, it also places on an equal footing observations submitted by the Commission and those submitted by the national competition authorities, whereas, as the Netherlands Government also concedes, the condition applicable to the former ('[w]here the coherent application of Article 81 [EC] or Article 82 [EC] so requires') differs, at least in its wording, from that relating to the latter, which may submit written observations on their own initiative to the courts of their respective Member State 'on issues relating to the application of Article 81 [EC] or Article 82 [EC]'.

46. That sentence in recital 21 cannot therefore serve to support a conclusion as rigid as that proposed by the Netherlands Government as regards the interpretation of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003.

47. Similarly, while there is certainly a link between the transmission to the Commission of any written and complete judgment given by the national courts 'deciding on the application of Article 81 [EC] or Article 82 [EC]' in accordance with Article 15(2) of Regulation No 1/2003 and the option given to that institution of submitting written observations to the courts of the Member States pursuant to the third sentence of the first subparagraph of Article 15(3) of that regulation, that link cannot be converted into a prior condition for the submission of such observations.

48. If that were to be the case, the Commission could never submit written observations to national courts ruling at first instance or in cases where there has been a failure to fulfil the obligation contained in Article 15(2) of Regulation No 1/2003, but where the Commission has become aware, by other means, of a judgment which it considers may jeopardise the coherent application of Article 81 EC or Article 82 EC, thus requiring that it submit written observations, including where those courts are ruling on the application of Articles 81 EC and/or 82 EC.

49. I conclude from this, therefore, that the submission of written observations by the Commission to the courts of the Member States cannot be made subject to a supplementary or implicit condition to the effect that an assessment made by a national court which is capable of adversely affecting the coherent application of Article 81 EC or Article 82 EC must be carried out within the framework of a dispute in which that court is asked to apply those articles.

50. In its observations, the Netherlands Government suggested that such an approach would create legal uncertainty in so far as the possibility for the Commission of submitting observations to the national courts pursuant to the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 would become unlimited.

51. That criticism is unconvincing. The limits on the use of the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 are those laid down by the condition contained in that paragraph. In short, as I have already stressed in this Opinion, it seems to me that, irrespective of the nature of the dispute at issue, it is assessments made by a national court in relation to the application of Articles 81 EC and 82 EC which are capable of jeopardising the coherent application of those articles that are decisive for the purposes of the Commission's being able to activate the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003.

52. That, to my mind, is precisely the situation in the case at issue, on account of which the Commission wished to submit written observations to the referring court.

53. It follows from the documents before the Court that, in setting aside the application of Article 3.14(1)(c) of the Wet Inkomstenbelasting 2001, the Arrondissementsrechtbank Haarlem, before which the tax dispute was brought at first instance, held that the fines imposed by a Commission decision under Article 81 EC were essentially in the nature of 'enrichment deprivation', and that they were therefore, at least in part, tax-deductible.

54. Such an assessment of the nature of the fines imposed by the Commission indisputably relates to a matter which falls within the scope of Community law and which is intrinsically linked to the application of Articles 81 EC and/or 82 EC. In other words, even though the dispute pending before the Arrondissementsrechtbank Haarlem concerned tax, the assessments made by that court clearly related to a question which is intrinsically linked to the application of Articles 81 EC and/or 82 EC.

55. As is clear from paragraph 2.3 of the order for reference and the observations submitted to the Court by the Commission, it is precisely that assessment, which relates to the nature of the fines imposed by a Commission decision under Article 81 EC, which the latter regards as jeopardising the coherent application of

that article, particularly in the light of the Court's case-law to the effect that fines imposed in that context have the purpose of suppressing illegal activities and preventing their reoccurrence. [14] Moreover, on the basis of that case-law, the Commission claims that 'enrichment deprivation' is clearly not the primary objective of the fines which it imposes on undertakings which have infringed the Community competition rules. [15]

56. It was therefore following the assessment made by the Arrondissementsrechtbank Haarlem as to the nature of the fines imposed by the Commission that the latter, informed by the press and the NMa of the proceedings pending before the referring court, took the view that the coherent application of Article 81 EC required that it submit to that court written observations concerning the abovementioned assessment set out in the judgment of the Arrondissementsrechtbank Haarlem.

57. Accordingly, in taking the view in this case that it has the right to submit written observations pursuant to the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003, the Commission does not, in my view, exceed the condition laid down in that article.

58. Contrary to the submissions advanced by X and the Netherlands Government, such a solution does not, to my mind, distort the nature of the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 or encroach upon the procedural autonomy of the Member States.

59. As regards the first point, I note that X alleges that the Commission, although it does not have the status of party to the main proceedings, has its own interest in that dispute being resolved in such a way as to preclude the deductibility from tax of the fines which it imposes for infringement of Community competition law, in which regard it exceeds the powers conferred upon it within the framework of its role as '*amicus curiae*' under Article 15(3) of Regulation No 1/2003.

14 — See Cases 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173; C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 37; and *Britannia Alloys & Chemicals* v *Commission*, paragraph 22.

15 — Without adopting a definitive position on this question, I would point out that the Commission's argument appears to be supported by the findings in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 292 to 294, to the effect that the profit which the undertakings were able to derive from their anti-competitive practices is, at least implicitly, one of the factors to be considered in *assessing the gravity of the infringement* and taking that factor into account is designed to ensure that the fine is deterrent.

60. In addition to the fact that Regulation No 1/2003 does not use the term *'amicus curiae'* let alone define its function, [16] there are two principal reasons why I must dismiss that line of argument.

61. First, as I have already noted at several points in this Opinion, the only condition which the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 attaches to the activation by the Commission of its right to submit written observations to the courts of the Member States is that the coherent application of Article 81 EC or Article 82 EC must be jeopardised. That provision does not therefore rule out the possibility that, in addition to compliance with that binding condition, the Commission may have an interest, immediate or otherwise, and/or clearly expressed or not, in a particular form of order in the dispute in which it wishes to submit written observations. Moreover, because of the special task of supervising Community law, in particular the competition rules, with which the Commission is charged, it will be extremely difficult, if not impossible, to make a distinction in practice between what constitutes a Community public interest and what constitutes a more individual interest on the part of the Commission, assuming that such an interest exists. In the case at issue, for example, it is quite apparent to me that there is a general interest in a finding to the effect that a Commission decision which imposes fines on undertakings which have infringed the prohibition in Article 81(1) EC must be applied in a coherent, uniform and effective manner throughout the Community.

62. In reality, it would in my view be pointless to attempt to define the scope of the mechanism provided for in the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 in terms of the interests, immediate and avowed or otherwise, allegedly pursued by the Commission, *even though* the only condition laid down in that provision has actually been fulfilled.

63. Second, sight should not be lost of the fact that the written observations submitted by the Commission pursuant to the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003 are not binding on the national court before which those observations are lodged, as is explicitly pointed out, moreover, in the explanatory memorandum to the Law of 30 June 2004 amending the Mededingingswet, applicable in this case, that the Commission does not have the status of party to the main proceedings and is not treated as such, as indeed X itself conceded at

16 — In practice, such a function is difficult to define, particularly in relation to that of intervention: see De Schutter O., 'Le tiers à l'instance devant la Cour de justice de l'Union européenne', in Ruiz Fabri H. and Sorel J.-M., *Le tiers à l'instance*, Pedone, Paris, 2005.

the hearing,[17] and that the submission of those observations does not in particular affect the recognised procedural rights of the parties to the main proceedings.[18]

64. Therefore, it does not by any means appear to be the case that, by lodging written observations before the referring court, the Commission exceeded the limits imposed on its right to submit such observations as laid down in Article 15(3) of Regulation No 1/2003, or failed to observe the detailed procedural rules laid down by that provision and by the national rules of procedure.

65. That procedural observation leads me to consider and to dismiss the second criticism, set out in point 58 of this Opinion and put forward by the Netherlands Government, concerning encroachment on the procedural autonomy of the Member States. To my comments in the preceding point I need only add that such encroachment cannot exist where, as in this case, the Commission's action falls within the scope of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003.

66. Finally, and in so far as the point is relevant, the approach suggested in this Opinion relates only to the possibility for the Commission of submitting written observations to the referring court. This is of course without prejudice to the freedom of the latter, under Article 234 EC, to seek a ruling from the Court on the substantive question whether Community law precludes a Member State, including its national courts, from granting a taxpayer the possibility of deducting from its taxable profit a fine imposed by a Commission decision adopted under Article 81 EC.[19]

67. In the light of all the above considerations, I take the view that a situation, such as that in the main proceedings, in which the Commission wishes to submit written observations to a national court seised of a dispute concerning the deductibility from tax of a fine imposed by a Commission decision adopted under Article 81 EC falls within the scope of the third sentence of the first subparagraph of Article 15(3) of Regulation No 1/2003.

17 — In this regard, it should be noted that the second subparagraph of Article 15(3) of Regulation No 1/2003 authorises the Commission to request any documents necessary for the assessment of the case solely for the purpose of the preparation of its observations.

18 — See, in this connection, recital 21 in the preamble to Regulation No 1/2003 and, as regards the main proceedings, Article 89h(3) of the Mededingingswet.

19 — In this context, it should be noted that the Netherlands Government agrees with the Commission that the Wet Inkomstenbelasting 2001 precludes the deductibility from tax of fines imposed by the Commission for infringement of the prohibition laid down in Article 81(1) EC.

VI — Conclusion

68. In the light of the foregoing, I propose that the Court's reply to the question referred for a preliminary ruling by the Gerechtshof te Amsterdam should be as follows:

'A situation, such as that in the main proceedings, in which the Commission of the European Communities wishes to submit written observations to a national court seised of a dispute concerning the deductibility from tax of a fine imposed by a Commission decision adopted under Article 81 EC falls within the scope of the third sentence of the first subparagraph of Article 15(3) of Regulation (EC) No 1/2003.'