JUDGMENT OF THE COURT (Sixth Chamber)

27 November 2003 *

In Case C-185/00,

Commission of the European Communities, represented by E. Traversa and I. Koskinen, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

Kingdom of Sweden, represented by I. Simfors and A. Kruse, acting as Agents,

intervener,

v

Republic of Finland, represented by T. Pynnä and E. Bygglin, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish.

APPLICATION for a declaration that, by maintaining in force the laws and regulations on the use of gas oil as a motor fuel, as they are applied in practice, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) and Article 5(1) of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19),

THE COURT (Sixth Chamber),

composed of: V. Skouris (Rapporteur), acting for President of the 6th Chamber, C. Gulmann, J.-P. Puissochet, F. Macken and N. Colneric, Judges,

Advocate General: L.A. Geelhoed,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 17 May 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by maintaining in force the laws and regulations on the use of gas oil as a motor fuel, as they are applied in practice, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12 and Article 5(1) of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils (OJ 1992 L 316, p. 19).

Legal background

Community legislation

2 According to the third recital in the preamble to Directive 92/82, 'Member States must apply minimum rates of excise duty on [mineral oils] by 1 January 1993 if the internal market is to be achieved by that date';

3 Article 5(1) and (2) of Directive 92/82 provides:

'1. As from 1 January 1993, the minimum rate of excise duty on gas oil used as propellant shall be fixed at ECU 245 per 1 000 litres...

2. As from 1 January 1993, the minimum rate of excise duty on gas oil used for the purposes set out in Article 8, paragraph 3, of Directive 92/81/EEC shall be fixed at ECU 18 per 1 000 litres.'

4 Article 2(2) and (3) of Directive 92/81 provides:

'2. Mineral oils other than those for which a level of duty is specified in the rates [in] Directive 92/82/EEC shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. The rate of duty to be charged shall be fixed, according to use, at the rate for the equivalent heating fuel or motor fuel.

3. In addition to the taxable products listed in paragraph 1, any product intended for use, offered for sale or used as motor fuel, or as an additive or extender in motor fuels, shall be taxed as motor fuel...'

5 The sixth recital of the preamble to Directive 92/81 states that 'it is appropriate to permit Member States to apply on an optional basis certain... exemptions or reduced rates within their own territory where this does not give rise to distortions of competition'.

6 Under Article 8 of Directive 92/81:

'1. In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels

...

2. Without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used under fiscal control:

...

(f) exclusively in agricultural and in horticultural works, and in forestry and inland fisheries;

...

3. Member States may also, in the case of all or some of the following industrial and commercial uses, apply a reduced rate of taxation on gas oil and/or LPG and/or methane and/or kerosene used under fiscal control, provided that the rate charged is not less than the minimum rate set in Directive 92/82/EEC on the approximation of the rates of excise duty on mineral oils:

...

(b) in respect of plant and machinery used in construction, civil engineering and public works;

...'

7 Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) which lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, is applicable, under Article 3(1), thereof to mineral oils.

8 Under Article 6(1) of that directive, the excise duty referred to is to become chargeable at the time of release for consumption of the products subject to excise duties, except where such products have already been released for consumption in one Member State and are held for commercial purposes in another Member State. In such cases the excise duty is to be levied, in accordance with Article 7(1) of that directive, in the Member State in which those products are held.

9 Article 8 of Directive 92/12 provides:

'As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.'

10 Under Article 9(1) and (3) of Directive 92/12:

'1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

...

3. Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf. Atypical transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.'

The national legislation

11 The excise duties applicable to gas oil sold on the Finnish market, namely to diesel and domestic fuel oil, are laid down by Law 1472/1994 on the excise duty applicable to combustible liquids, as last amended by Law 509/1998 ('Law 1472/1994'). According to Paragraph 2 of that law, diesel oil is defined as gas oil supplied for use as motor fuel in diesel engines ('diesel'). Domestic fuel oil is defined as gas oil supplied for use in heating and identifiable when placed on the market by way of an orange colorant visible to the naked eye ('domestic fuel oil' or 'less heavily taxed gas oil').

12 According to Law 1472/1994 the excise duty charged on diesel and domestic fuel oil comprises a basic tax and a supplementary tax, the amount of which is calculated according to the volume of heating oil. From the beginning of 1999 the excise duty on diesel was to be EUR 325 per 1 000 litres and that on domestic oil EUR 64 per 1 000 litres. If gas oil is used as a motor fuel it is taxed at the rate of excise duty applicable to diesel.

13 Law 722/1966 on motor vehicle tax ('Law 722/1966') introduces a surcharge, which is also levied annually, by analogy with the annual tax proper imposed on diesel vehicles.

14 Under Paragraphs 14 to 22 of Law 722/1966, all vehicles registered in Finland or used in Finland without being registered there, and which contain in their fuel tank domestic fuel oil instead of diesel, are liable to that surcharge. Under Paragraph 16 of Law 722/1966, the amount of the surcharge is calculated by multiplying by 20 the amount of the motor vehicle tax applicable to the vehicle in question.

15 Under Paragraphs 17 and 17a of Law 722/1966 tractors and machinery used for public works, except tractors in so far as they are used for agriculture and forestry or closely related activities, and machinery for public works, in so far as they are not used for activities other than those related to their normal use and performed at the workplace or building site, for the transport of their own fuel and lubricants or for their movement from one building site to another, are liable to the surcharge. Where agricultural tractors are none the less used to transport goods, the use of diesel oil is compulsory.

16 Under Paragraph 25 of Law 722/1966, compliance with the provisions laid down by that law is monitored by the police and customs authorities, which, according to Paragraph 28 of that law, have the right to carry out the necessary checks in fuel storage facilities and on motor vehicles, to determine the quality of the fuel used in the vehicles. That provision also authorises the police and customs authorities to stop vehicles in order to carry out such checks. If domestic fuel oil is found in the fuel tank the authorities must, in accordance with Paragraph 27 of that law, take the vehicle out of circulation until the relevant penalties have been enforced.

17 Law No 337/1993 on the fuel levy, as last amended by Law 234/1998 ('Law 337/1993'), provides for collection of a fuel levy corresponding to the number of days during which a vehicle, registered in Finland or abroad, has used domestic fuel oil, for a maximum period of 60 consecutive days, and for at least 10 days where the date of entry of the vehicle cannot be determined. The amount per day of the levy is FIM 1 000 for cars, FIM 1 500 per day for vans, FIM 2 000 for coaches and FIM 3 000 for lorries.

18 Furthermore, the illegal use of domestic fuel oil, that is to say, without prior notification to the competent authority in accordance with the detailed rules in Paragraph 3 of that law, entails the tripling of the fuel levy.

19 Paragraph 8 of Law 337/1993 sets out the detailed rules for monitoring by the police and customs authorities. Paragraph 11 of Law 337/1993 prohibits the removal from Finland of a vehicle registered abroad and subject to a fuel levy for the use of domestic fuel oil instead of diesel oil

The pre-litigation procedure

20 By letters of 16 July 1996 and 3 April 1997, the Commission requested that the Finnish Permanent Representative to the European Union provide information on the taxation of mineral oil in Finland, stating in the second letter that the matter concerned the application of Directives 92/81 and 92/82 in particular.

21 The Finnish Permanent Representative replied to those requests by letters of 3 October 1996 and 5 June 1997.

22 On 3 December 1997 the Commission sent the Finnish Government a letter of formal notice, in which it concluded that the possibility of using less heavily taxed gas oil as motor fuel could not be regarded as consistent with Community rules.

23 The Finnish Government replied by letter of 26 January 1998, in which it stated that its legislation was consistent with Community law.

24 By letter dated 4 May 1998, the Finnish Permanent Representative sent to the Commission Law 234/1998 which came into force on 1 May 1998 and amended Law 337/1993.

25 By letter of 6 August 1998, the Commission sent the Finnish Government a reasoned opinion in which it reiterated the arguments set out in the letter of formal notice, adding that the amendment to Law 337/1993 had no bearing on the possibility of using domestic heating oil as motor fuel.

26 In its response of 22 September 1998 the Finnish Government maintained its position.

27 It is against that background that the Commission decided to bring the present action.

28 By order of the President of the Court of Justice of 15 January 2001, the Kingdom of Sweden was granted leave to intervene in the present case in support of the form of order sought by the Commission.

Arguments of the parties

Preliminary observation

29 It must be observed at the outset that the Finnish Government has raised objections of inadmissibility against both the Commission's action and the

Swedish Government's application to intervene and has thus put forward its pleas in law on the substance in the alternative. Given that those objections go to the substance of the parties' arguments, the Court will set them out after considering the substance of the case.

Substance

30 The Commission complains essentially that the Republic of Finland has not made the necessary amendments to its legislation on the use of gas oil as motor fuel, which was in force at the time of its accession to the European Union, so as to render it consistent with the system laid down by the provisions of Article 5 of Directive 92/82 and Article 8 of Directive 92/81.

31 First, the Commission submits that, although, in Law 1472/1994, the Finnish legislation imposes a rate of excise duty on gas oil used as motor fuel which is higher than the minimum rate set in Article 5(1) of Directive 92/82, that legislation cannot, however, be regarded as being consistent with that provision, since it does not guarantee in all circumstances that the gas oil is in fact taxed at the rate laid down in it.

32 The Commission explains that, although it is true that Article 5 of Directive 92/82 does not require Member States to include in their legislation a formal ban on the use of less heavily taxed gas oil as motor fuel, it is none the less clear from that provision that the relevant national rules must, in practice, prohibit such use.

33 According to the Commission, the Finnish system does not achieve that objective, in so far as it permits the use of less heavily taxed gas oil as motor fuel subject to prior notification and payment of a surcharge, under Law 722/1966 and/or a fuel levy under Law 337/1993. The Commission concludes that, in practice, such use must be prohibited.

34 Second, the Commission argues that the Republic of Finland has failed to implement adequate and effective checks on the distribution of gas oil and its use for the purposes mentioned in Article 8(2) and (3) of Directive 92/81, provisions which seek to ensure that gas oil is put only to the uses for which it is taxed.

35 In that regard, the Commission observes that in Finland service stations may sell less heavily taxed gas oil without any fiscal control, while the annual number of road checks carried out on final consumers is insufficient in relation to the number of vehicles with diesel engines. Furthermore, the Commission argues that it does not have any information showing that an adequate fiscal control is guaranteed in respect of the use of domestic fuel oil in the sectors referred to in Article 8(2)(f) and (3) of Directive 92/81, such as agriculture, forestry and public works.

36 The Commission adds that it is precisely because of the lack of checks carried out in Finland that the Swedish legislature considered the adoption of a law to ensure that the ban on the use of Swedish domestic fuel oil as motor fuel also applies to domestic fuel oil from Finland. It explains that as customs inspections on the border between Sweden and Finland are almost impossible, in view of the length of the border and the small number of customs posts, Finnish domestic fuel oil is easily imported into Sweden by groups of traffickers without being subject to excise duty, and sold for use as motor fuel.

37 The Finnish Government contends that the system set up by the Finnish legislation is based on the obligation imposed on owners or users of motor vehicles to give prior notification to the tax authorities of their intention to use domestic fuel oil as motor fuel. Thus, in the absence of prior notification the amount of the surcharge may even be tripled, while the amount of the fuel levy is, in such cases, always multiplied by three.

38 The surcharge and the fuel levy are, therefore, neither payments giving entitlement to use domestic fuel oil as motor fuel nor taxes imposed on transport, nor excise duties, but fiscal penalties with a deterrent effect, introduced in order to prevent abuse.

39 In support of the argument that giving prior notification and making early payment of the surcharge and fuel levy is possible only in theory and is never financially viable, the Finnish Government further argues that in the last 10 years that option has never once been used, and in practice those two fiscal penalties have been imposed only where breaches have been recorded during checks.

40 The Finnish Government submits that Article 5 of Directive 92/82 does not in any way entail an obligation to include in national law a formal prohibition on the use of less heavily taxed gas oil as motor fuel, but only an obligation to ensure that it is not used as such. Taking the view that the Member States have a discretion as to the means of implementing the objective laid down by that article, the Finnish Government argues that the system of fiscal penalties put in place by Finnish law is the most appropriate means to prevent such use.

41 The Finnish Government adds that the imposition of a formal ban would entail the replacement of the fiscal penalty system by criminal penalties, which would be less effective as a means of achieving the objective pursued by Article 5 of the Directive.

42 In particular, it argues, first, that the level of a criminal penalty would have to be brought into line, for the sake of consistency, with the general level of other penalties laid down by the criminal justice system. That would lead, in practice, to the imposition of penalties that are considerably lighter than the existing fiscal penalties. Furthermore, the fiscal penalties in force could not be added to a criminal penalty because, according to the principles of Finnish law, an activity prohibited by criminal law cannot be subject to tax.

43 Second, the Finnish Government argues that having recourse to criminal law would make it more difficult to apply the penalties in terms of the standard of proof required. It points out that the mere discovery by the police or customs authorities that a fuel tank contains domestic fuel oil coloured red, regardless of the amount, is sufficient for the application of fiscal penalties. Accordingly, no other evidence, for example, of the driver's intention, is necessary, while it would be in criminal law.

44 As regards the complaint alleging the absence of adequate checks on the distribution and use of less heavily taxed gas oil, the Finnish Government observes, first of all, that the Community legislation does not contain any provisions on the detailed rules for implementing the fiscal control for which it provides. More particularly, it does not require Member States either to subject the sale or distribution of domestic fuel oil to specific checks or to provide for penalties to be levied on retail sales.

45 The Finnish Government takes the view that the only obligation which arises is to guarantee that the final consumer does not use less heavily taxed gas oil as motor fuel, and that it is for the Member States to assess the specific circumstances prevailing in their territory in order to select the means to achieve that objective. The Finnish Government submits that it has put in place checks to achieve that objective under the arrangements most appropriate to the circumstances prevailing in Finland.

46 In that regard the Finnish Government draws attention to that fact that the use of domestic fuel oil for heating is substantially more widespread in Finland than in the other Member States. In fact, the total quantity of gas oil used for heating is significantly higher than the quantity of diesel used as motor fuel in road vehicles. The Finnish Government adds that the fuel storage tanks in private houses and apartment blocks can contain 1 500 to 3 000 litres of domestic fuel oil and must, in general, be refilled at least twice a year. Generally, domestic fuel oil is delivered by petrol tankers, but the great distances and extreme climatic conditions of the thinly populated northern part of the country makes the availability of domestic fuel oil at service stations essential. Only 4% of the total amount of domestic fuel oil is sold by such service stations.

47 The Finnish Government submits that the vulnerability of the distribution infrastructure, already thinly spread in those regions, the long period during which heating is required, and the large number of households requiring a permanent supply of domestic fuel oil does not permit the implementation of a system under which domestic fuel oil may only be distributed under the supervision of the authorities. It states that the country does not have the resources to operate such a system, and that further restrictions on the distribution infrastructure could lead to difficulties over the supply of domestic heating oil which could have, in the worst scenario, fatal consequences.

48 In addition, the needs of farmers and the excessive costs inherent in supply exclusively by petrol tankers also justify the possibility of purchasing domestic fuel oil in small quantities at service stations.

49 As regards fiscal control, the Finnish Government points out that domestic fuel oil is stored in tens of thousands of fuel storage tanks in private houses, farms and forest farms, and that it is relatively easy to extract some of that oil to put in the fuel tanks of vehicles without there being any way of preventing such breaches by checks at distribution or retail sale level. The Finnish Government states that that is why, in order to prevent its use in motor vehicles, Finnish law provides for a system of sufficiently effective penalties, coupled with checks at the level of the final consumer, and that, therefore, it is unreasonable to implement supervisory measures in the spheres in which the use of domestic fuel oil is authorised, as in agriculture and forestry.

50 Moreover, the Finnish Government takes the view that the fiscal control system established in its territory is accurately targeted, effective and adequate, in so far as it achieves the objective pursued by the provisions of Article 8 of Directive 92/81, which is to ensure that less heavily taxed gas oil is not in fact used in road traffic.

51 Pointing out that each year approximately 3 500 to 4 500 vehicles are subject to such checks, the Finnish Government states by way of example that in 1999 3 923, checks were carried out, and that in 141 cases laboratory samples were taken, of which 125 were positive which, in the Finnish Government's opinion, is a very small number, given that the total consumption of domestic fuel oil in the country is very high.

52 As to the Commission's allegations concerning smuggling in Sweden, the Finnish Government submits that those allegations do not prove in any way that the Republic of Finland does not comply with the provisions of the relevant directives. In that connection, it points out that Swedish purchasers are also obliged to give prior notification and pay the surcharge, and that if a Swedish motorist refills his fuel tank in Finland with less heavily taxed gas oil, without giving prior notification to the authorities and does not pay the surcharge, the gas oil is not legally purchased. The Finnish Government submits, therefore, that the imposition by Finnish law of a formal ban would not prevent smuggling and states that, in any event, the present case is not concerned with measures to prevent smuggling.

53 As regards the Finnish Government's argument that any criminal penalties laid down by law would be less severe than the fiscal penalties, the Commission draws particular attention to the fact that the possibility of using administrative sanctions to prevent improper use of domestic fuel oil as motor fuel has not been explored. Citing by way of example the administrative penalties laid down by Finnish law for the overloading of a vehicle or those imposed on warehouse-keepers when they fail to undertake the identification procedures for domestic fuel oil, it argues that the Finnish legislature could also have used that option to penalise the use of domestic fuel oil as motor fuel.

54 As regards the failure to fulfil obligations arising from Article 8(2) and (3) of Directive 92/81, the Commission submits that its contention that in Finland there are no systematic checks for motor vehicles and that the checks carried out by the police are infrequent, is confirmed by the statistics provided by the Finnish Government. The Commission points out that, in its defence, the Finnish Government stated that 3 500 to 4 500 vehicles are currently checked each year, while in its reply to the letter of formal notice it had stated that the figure for annual checks was more than 5 000. Pointing out that, according to the statistics recorded in 1988, a total of 755 377 diesel vehicles and tractors were registered in Finland, the Commission argues that, given the increase in the number of vehicles

that run on diesel and the fact that vehicles registered abroad have also probably been checked, the figure of 3 923 checks declared by the Finnish Government in 1999 must be regarded as very low.

55 The Commission submits that, in any event, fiscal control, even if it were perfect, would not prevent the Finnish law in force from being contrary to Community provisions and permitting by the payment of taxes, however high they may be, the widespread use of domestic fuel oil as motor fuel.

56 In its statement in intervention the Swedish Government argues, first, that the system in Finland which makes possible the use, legal or illegal, of domestic fuel oil in vehicles with diesel engines, is in breach of Article 5(1) of Directive 92/82, which lays down a minimum amount of excise duty. In the case of unlawful use, excise duty which is too low, namely that which applies to domestic fuel oil, is charged. In the case of lawful use on the basis of prior notification the taxes imposed, namely the surcharge and the fuel levy are not excise duties, since they are not levied in accordance with the quantity of domestic fuel oil used but according to the duration of use.

57 Second, the Swedish Government submits that, even assuming that the Finnish system prevents the use of domestic fuel oil as motor fuel in Finland, the lack of any statutory prohibition on such use is in itself an infringement of Community law, since it prevents the implementation of effective checking of cross-border traffic and, therefore, the full implementation in Sweden of the Community system of excise duties on mineral oils.

58 In that regard, it explains that the transposition in Sweden of Directives 92/81 and 92/82 takes the form of a general ban on the use of domestic fuel oil as motor fuel and heavy administrative penalties. It states further that given the volume required for heating, it has never been considered necessary in Sweden to maintain a system whereby individuals must themselves transport domestic fuel oil between the service station and their home. The lack of demand explains why domestic fuel oil is not sold in service stations, and that in spite of the fact that such sale is not prohibited, and that climatic conditions and population are substantially the same in the north of Sweden and the north of Finland.

59 Although Swedish law provides for an effective system of checking in order to prevent Swedish domestic fuel oil, marked green, being used as motor fuel, the Finnish system is the source of cross border commerce between Finland and Sweden of Finnish domestic fuel oil, marked red, which took off after the accession of those two States to the European Union and reached such proportions that it threatened the very existence of legal trade in petrol products in the north of Sweden.

60 The Swedish Government explains that, in 1996, in order to combat that smuggling, the prohibition on the use of Swedish domestic fuel oil as motor fuel was extended to Finnish domestic fuel oil, which led to an immediate fall in the import of the latter to Sweden.

61 However having regard, first, to the provisions of Article 8 and 9(3) of Directive 92/12 and second, to the fact that it is not compatible with Community law for a Member State to unilaterally introduce into its domestic law measures to compensate the fact that another Member State has failed to fulfil its obligations under Community law, in 1997 the Swedish legislature lifted the unilateral prohibition on the use of Finnish domestic fuel oil as motor fuel.

62 According to the Swedish Government, under the scheme introduced by Directive 92/12 that, as regards mineral oils acquired by individuals for their own use and transported by them, excise duties are levied by the Member State where those products are acquired. That means that the Kingdom of Sweden cannot impose excise duties or impose penalties on a Swede who has legally refilled the fuel tank of his motor vehicle or a petrol can with Finnish domestic fuel oil.

63 According to the Swedish legislation currently in force, it is therefore possible to have Finnish domestic fuel oil, marked red, in the fuel tank of a motor vehicle or in a fuel reserve canister up to a maximum of 10 litres, as long as the domestic fuel oil was put in by the party concerned for his own use.

64 Subsequently, smuggling into Sweden of domestic fuel oil from Finland, for which no tax is levied in Sweden has increased significantly. The Swedish Government argues that when the authorities find during a check that the fuel tank of a vehicle contains Finnish domestic fuel oil it is impossible for them to disprove a statement that the fuel tank was refilled in Finland. That would not be the case if the Republic of Finland also applied a statutory prohibition on the use of domestic fuel oil as motor fuel.

65 The Swedish Government therefore concludes that, even if Directives 92/81 and 92/82 do not expressly lay down a prohibition on the use of less heavily taxed gas oil as motor fuel for motor vehicles, it follows from the purpose and the very logic of the system that they establish, that such a statutory prohibition is a requirement for the functioning of the internal market. It submits, therefore, that even if the Finnish system works in Finland, Finland has failed to fulfil its obligations under Community law because that system creates distortion of competition in the internal market, a distortion which Sweden cannot counteract unilaterally.

66 The Finnish Government replies, as a preliminary point, that the situations in the two countries are not comparable, because in Sweden unlike in Finland, domestic fuel oil is not used in agriculture and forestry.

67 Furthermore, the Finnish Government states that its national law does not prevent effective checks on the use of domestic fuel oil in other Member States. It explains that in the case where a Swedish motorist falsely claims that the Finnish red domestic fuel oil that he is using was put in the fuel tank of the vehicle or in the reserve fuel canister in Finland when, in fact, it was fraudulently imported into Sweden and only on Swedish territory put in the fuel tank, that motorist provides sufficient evidence to justify the application of penalties provided for by Finnish law. To that end it is sufficient for the Swedish authorities to record their complaints and send the relevant information to the Finnish authorities.

68 The Finnish Government adds that, therefore, in the case of a passenger car, if there is no notification and the date of entry of the vehicle cannot be determined, the fuel levy is an amount which considerably exceeds the comparable penalties in force in Sweden. The Finnish Government further argues that the traffic checks do not cover only vehicles registered in Finland. It points out that about 120 Swedish motorists were subject to checks between 1998 and 2002 and the effectiveness and the deterrent effect of the system implemented in Finland increased as a result of the fact that a vehicle registered abroad for which the fuel levy is applicable cannot be exported before payment of the levy.

69 The Commission points out in that regard that, as there is no fiscal control in Finland on distribution, drivers of vehicles registered abroad are able to fill up with domestic fuel oil in a service station which is not authorised to require the presentation of proof of payment of the fuel levy. Then, in Sweden there is no statutory provision for requiring such proof, which has no equivalent in Swedish law.

70 The Commission further submits that the customs administration of the customs district division for northern Finland, which employs a total of 223 staff, does not seem to be in a position to undertake adequate checks in a district which covers more than 150 000 square kilometres. Furthermore, in northern Finland the number of police officers per square kilometre is lower than in the rest of the country. The Commission therefore takes the view that the authorities responsible for controlling the borders do not have enough staff to carry out checks on foreign vehicles before they leave Finnish territory.

Admissibility

71 As regards the Commission's arguments alleging, on one hand the lack of fiscal control of the use of domestic fuel oil in the sectors referred to in Article 8(2) and (3) of Directive 92/81, such as agriculture, forestry and public works, and on the other hand, the measures provided for by the Swedish legislature, the Finnish Government argues that they are matters raised by the Commission for the first time in the application and that, therefore, it has not had the opportunity to express its views on those matters during the pre-litigation proceedings. Pointing out that according to settled case-law the proceedings must be based on the grounds set out in the pre-litigation proceedings, it submits that they must be declared inadmissible.

72 In that regard, the Commission states, inter alia, that, in its application, it considered it useful to point out by way of information, that the inadequacy of the checks carried out in Finland results in widespread tax fraud in Sweden in relation to the use of Finnish domestic fuel oil, which has made it necessary to adopt legislative measures, but that, in doing so, it did not seek a new form of order or raise a new plea in law.

73 Furthermore, the Finnish Government's principal plea is that the arguments in the Swedish Government's statement in intervention are inadmissible, on the ground that they do not satisfy the conditions laid down by the fourth paragraph of Article 37 of the EC Statute of the Court of Justice and Article 93(5) of the Rules of Procedure of the Court of Justice.

74 More particularly, it observes, first, that the Commission in no way maintains that the Finnish legislation does not guarantee compliance with the minimum level of excise duty laid down by Directive 92/81 as regards gas oil used as motor fuel. That claim by the Swedish Government is not therefore intended to support the form of order sought by the Commission but is a fresh and separate claim.

75 Second, the Finnish Government submits that the Commission expressly acknowledged that its explanations concerning relations between Sweden and Finland are neither a submission nor a new plea in law, but simply a finding made by way of information. Relying on the case-law of the Court, according to which the intervener may put forward arguments which are different from those of the party it supports, provided that they are intended to support the forms of order sought by that party, the Finnish Government argues that the Swedish Government, as an intervener, cannot properly put forward submissions or arguments based on the consequences of the Finnish system for the Kingdom of Sweden.

76 By contrast, the Commission submits that Kingdom of Sweden's submissions are admissible.

77 In particular, it agrees with the Swedish Government's argument that the surcharge and fuel levy are not excise duties and points out that it had already indicated that view to the Finnish Government in the letter of formal notice.

78 Moreover, it argues that the evidence put forward first by itself and then by the Swedish Government concerning the trafficking between Finland and Sweden must be regarded as proof of the consequences which the Finnish system results in beyond Finland's borders.

Findings of the Court

Admissibility

The pleas of inadmissibility relating to the Commission's application

79 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10).

80 Accordingly, the letter of formal notice from the Commission to the Member State and then the reasoned opinion issued by it delimit the subject-matter of the dispute, so that it cannot thereafter be extended. Consequently, the reasoned opinion and the application must be based on the same complaints (see, in particular, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55, and Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18).

81 However, that requirement cannot be stretched so far as to mean that in every case the statement of the complaints set out in the letter of formal notice, the wording of the reasoned opinion and the forms of order sought in the action must be exactly the same, if the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see *Commission* v *Germany* cited above, paragraph 56, and *Commission* v *Spain*, paragraph 19).

82 It must be held that in this case the Commission has not amended the subject-matter of the dispute by changing the grounds of the alleged failure to fulfil obligations.

83 Both during the pre-litigation procedure and in the application the Commission clearly stated its complaint that the Republic of Finland has failed to fulfil its obligations arising, first, from Article 5(1) of Directive 92/82, in so far as Finnish law does not guarantee that correct excise duties are applied to gas oils according to their use, and second, from Article 8(2) and (3) of Directive 92/81, in so far as Finnish law does not provide for adequate fiscal control on the application of exemptions or reduced rates of excise duty on the use of mineral oils in accordance with the latter provision.

84 Admittedly, the Commission mentioned the consequences for the Swedish market in mineral oils of the Republic of Finland's alleged failure to fulfil its obligations for the first time is its application. However, that fact, which is intended to demonstrate the inadequacy of the monitoring system put in place by Finnish law does not alter either the definition or the basis of the alleged failure to fulfil obligations.

85 Similarly, the arguments put forward by the Commission for the first time in its application concerning the lack of fiscal control of the use of domestic fuel oil in certain sectors of agriculture, forestry and public works has not led to the

extension or alteration of the subject-matter of the alleged failure because the obligation to introduce such control in those sectors is expressly provided for by Article 8(2) and (3) of Directive 92/81.

86 It follows that during the pre-litigation procedure, the Commission defined in sufficiently clear terms the subject-matter of the dispute by setting out the obligations arising from Directives 92/81 and 92/82, with which the Republic of Finland has not complied.

87 Therefore, it must be held that the fact that in the application the Commission set out in detail the complaints it had already made in a more general way in the letter of formal notice and the reasoned opinion has no effect on the scope of the proceedings.

88 It follows that the pleas of inadmissibility raised by the Finnish Government in respect of the Commission's action must be rejected.

The pleas of inadmissibility relating to the application to intervene of the Swedish Government

89 As to the first plea of inadmissibility raised in that regard by the Finnish Government, as set out in paragraph 74 of the present judgment, it suffices to point out that the Commission's first complaint alleges that the application of the

minimum rate of excise duty on gas oil used as motor fuel as required by Article 5(1) of Directive 92/82 is not guaranteed by the Finnish legislation.

90 It appears, therefore, that the arguments expounded in that regard by the Swedish Government, as set out in paragraph 56 of the present judgment, are specifically intended to support the first complaint set out by the Commission.

91 As regards the second plea of inadmissibility, as set out in paragraph 75 of the present judgment, it must be recalled that the fourth paragraph of Article 37 of the EC Statute of the Court of Justice does not prevent an intervener from using arguments different from those used by the party it is supporting, provided the intervener seeks to support the forms of order sought by that party (see, in particular, Case C-150/94 P *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36, and Case C-200/92 P *ICI* v *Commission* [1999] ECR I-4399, paragraph 31).

92 It must be held that the arguments put forward by the Swedish Government, as described in paragraphs 57 to 65 of the present judgment, to demonstrate that the inadequacy of the fiscal monitoring system prevents the effective application of the Swedish legislation implementing the relevant Community provisions, are intended to contribute to the success of the Commission's application by shedding further light on the dispute. Those arguments specifically concern the deficiencies in fiscal control alleged by the Commission to be the source of the failure to fulfil obligations alleged against the Republic of Finland.

93 It follows that the pleas of inadmissibility raised against the Swedish Government's application to intervene must also be rejected.

Substance

94 The Finnish system relating to the use of gas oil as motor fuel, as laid down in Laws 722/1966, 337/1993 and 1472/1994 and as applied in practice, is based on two main elements. First, the owners or users of motor vehicles are obliged to give prior notice to the tax authorities of their intention to use domestic fuel oil as motor fuel and to pay a surcharge and/or fuel levy. Second, the authorities are to ensure by means of road checks that those conditions are complied with, and the breaches recorded are to be penalised by fiscal charges imposed automatically, and at a sufficiently high level to have a deterrent effect.

95 As is clear from paragraphs 38, 56 and 77 of the present judgment, it is common ground that the surcharge and the fuel levy which is chargeable subject to prior notification are not excise duties. It appears, therefore, that Finnish law, in so far as it allows the use of less heavily taxed gas oil as motor fuel, cannot be regarded as complying with Article 5(1) of Directive 92/82, which requires that the gas oil used as motor fuel be taxed at the minimum rate of excise duty provided for in that article, and the fact that that option is, according to the Finnish Government's submissions, purely theoretical, is without relevance in that regard.

96 In order to ascertain whether the Finnish system achieves the objectives pursued by Community law, in so far as, according to the Finnish Government, it prevents in practice the use of less heavily taxed gas oil as motor fuel, it is essential to define the scope of the obligations which arise for Member States from the provisions of Article 5(1) of Directive 92/82, in conjunction with those of Article 8(2) and (3) of Directive 92/81.

97 In that regard, it must be observed that although Article 5(1) of Directive 92/82 imposes on Member States the obligation to guarantee that mineral oils used as motor fuel are taxed at the minimum rate of excise duty set down by that provision, Article 8(2) and (3) of Directive 92/81 sets out certain sectors in which the use of mineral oils as motor fuel may be subject to exemptions or a reduced rate of excise duty, provided that they are subject to fiscal control.

98 According to the sixth recital of the preamble to Directive 92/81 Member States must ensure that the application of exemptions or rate reductions does not give rise to distortions of competition. For that purpose they must put in place fiscal control aiming, as it is clear from Article 8(1) of that directive, to prevent evasion, avoidance or abuse.

99 Therefore, it is clear from the provisions of Article 5(1) of Directive 92/82, in conjunction with those of Article 8(2) and (3) of Directive 92/81, that the exercise of effective fiscal control is a necessary requirement for the correct application of the different rates of excise duty to which mineral oils are subject depending on their use.

100 More specifically, it follows that, in order to ensure the effectiveness of the scheme of excise duties introduced by those provisions concerning mineral oils used as motor fuel, the Member States are obliged to put in place in their domestic law mechanisms to prevent in practice the use as motor fuel of mineral oils intended for other purposes and therefore, subject, under the provisions of Article 5(2) of Directive 92/82 and Article 8(2) and (3) of Directive 92/81, to a rate of excise duty less than the minimum rate set in Article 5(1) of Directive 92/82.

101 Therefore, it is essential to check whether the rules for the enforcement of the mechanism adopted by Finnish law meet the requirements of effectiveness deriving from the Community scheme of excise duties applicable to mineral oils, as set out in paragraphs 97 to 100 of the present judgment.

102 The lack of restrictions or controls at the level of distribution of domestic fuel oil, which is sold without restrictions in service stations, inevitably gives rise to a situation which *de facto* fosters fraudulent conduct. Accordingly it is in the light of that situation that the effectiveness of the mechanism introduced by Finnish law to prevent abuse must be ascertained.

103 It is clear from the statistics produced to the Court, as set out in paragraphs 51 and 54 of the present judgment, that the checks carried out for that purpose by the police and customs authorities at the final consumer stage are not an adequate means of combating the high risk of abuse constituted by the inclusion of service stations in the distribution chain for domestic fuel oil. According to the information provided by way of example by the Finnish Government, in 1999 the authorities carried out 3 923 checks in total on the 755 377 diesel vehicles and tractors registered in Finland, to which must be added diesel vehicles registered abroad which circulate in Finland and that, again according to the Finnish Government, the road checks carried in the whole of Finnish territory are 3 000 to 5 000 each year.

104 The inadequacy of the monitoring system set up by Finnish law is, however, confirmed by the scale of fiscal fraud described by the Swedish Government, without being contradicted by the Finnish Government, and which arises from the smuggling into Sweden of domestic fuel oil from Finland.

105 That view is not called into question by the Finnish Government's argument that the introduction of checks or other restrictive measures on the sale and distribution of domestic fuel oil would make no sense, since it is still possible to extract domestic fuel oil from fuel storage tanks in apartment blocks, and that there is the same risk with supplies intended for agriculture, forestry and public works. It is significant, in this regard, that the Finnish Government itself has not put forward any argument to show that that possibility could be the source of the breaches recorded in the course of the road checks carried out in Finland, or that it has any connection with the failings of the Finnish system to which the Commission points.

106 Furthermore, it is not disputed that domestic fuel oil used as motor fuel in agriculture, forestry and public works is generally delivered to the door or the farms, that is to say not to service stations.

107 Finally, as regards the Finnish Government's arguments alleging that the introduction into Finnish law of a formal prohibition on use of domestic oil as motor fuel together with criminal penalties would not stop that usage more effectively than the current regime, it is sufficient to point out that that objective can be achieved in various ways which do not necessarily require criminal penalties. As the Commission argued, without being contradicted by the Finnish

Government, such a prohibition coupled with administrative sanctions would not encounter insurmountable problems.

108 It must therefore be held that examination of the detailed rules for applying the mechanism of fiscal control put in place by Finnish law reveals that that mechanism does not allow the objective pursued by the provisions of Article 5(1) of Directive 92/82, read in conjunction with those of Article 8(2) and (3) of Directive 92/81, to be attained, since it cannot effectively prevent mineral oils intended for other purposes and therefore less heavily taxed from being used as motor fuel or guarantee that gas oil used as motor fuel is in fact taxed at the minimum rate of excise duty laid down by those provisions.

109 In the light of all the foregoing considerations, it must be held that by maintaining in force the laws and regulations on the use of gas oil as a fuel, as they are applied in practice, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Council Directive 92/81 and Article 5(1) of Directive 92/82.

Costs

110 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs, the Republic of Finland, which has been unsuccessful, must be ordered to pay the costs. The Kingdom of Sweden which intervened in support of the forms of order put forward by the Commission is to bear its own costs, in accordance with Article 69(4) of those rules.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that by maintaining in force the laws and regulations on the use of gas oil as a fuel, as they are applied in practice, the Republic of Finland has failed to fulfil its obligations under Article 8(2) and (3) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, and Article 5(1) of Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils;**

2. **Orders the Republic of Finland to pay the costs;**

3. **Orders the Kingdom of Sweden to bear its own costs.**

Skouris Gulmann Puissochet

Macken Colneric

Delivered in open court in Luxembourg on 27 November 2003.

R. Grass V. Skouris

Registrar President