OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 5 December 2002 [1]

I — Introduction

1. In this case the Commission asks the Court to rule that, by maintaining in force its laws and regulations on the use of gas oil as a motor fuel, 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 [2] 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. [3]

1 — Original language: Dutch.
2 — OJ 1992 L 316, p. 12.
3 — OJ 1992 L 315, p. 19.

II — Legislative background

A — *Community law*

2. 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.'

3. Article 2(2) and (3) of Directive 92/81/EEC reads as follows:

'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.....'

4. Article 8 of Directive 92/81 reads as follows:

'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:

(a) for stationary motors;

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

(c) for vehicles intended for use off the public roadway or which have not been granted authorisation for use mainly on the public highway.'

5. Article 3(1) of 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, [4] which lays down the arrangements for products subject to excise duties and other indirect taxes levied directly or indirectly on the consumption of such products, states that the directive applies to mineral oils. Pursuant to Article 6(1) of this directive, excise duty becomes chargeable at the time of release for consumption. Pursuant to Article 7, however, where products subject to excise duty and already released for consumption in one Member State are held for commercial purposes in another Member State, the excise duty is levied in the Member State in which those products are held.

6. Article 8 of Directive 92/12 states:

'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.'

7. Article 9(1) and (3) of Directive 92/12 provides:

'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 pro-

4 — OJ 1992 L 76, p. 1.

ducts 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.'

B — *National law*

8. In Finland the excise duties applicable to gas oil are governed by Law 1472/1994 of 29 December 1994 on excise duty on combustible liquids, as subsequently amended by Law 509/1998 (hereinafter 'Law 1472/1994'). Pursuant to Paragraph 2 of this law, diesel oil is defined as gas oil which is supplied for use as a motor fuel in diesel engines. Domestic fuel oil means gas oil which has been supplied with the intention that it be used for heating purposes and made recognisable in compliance with the provisions of Paragraph 7 of the law and with Decree 1547/1995 based thereon.

9. Pursuant to Law 1472/1994, the excise duty on diesel oil and domestic fuel oil consists of a basic tax and a supplementary tax. The two taxes total EUR 325 per 1 000 litres in the case of diesel oil and EUR 64 per 1 000 litres in the case of domestic fuel oil. If gas oil is used as motor fuel, it is taxed at the excise duty rate applicable to diesel oil.

10. Paragraphs 14 to 22 of Law 722/1966 on motor vehicle tax specifies that a surcharge is payable in respect of all vehicles used in Finland, whether or not registered there, whose fuel tank has been filled with domestic fuel oil instead of diesel oil. Pursuant to Paragraph 16 of this law, the amount of the surcharge is calculated by multiplying the amount of motor vehicle tax applicable to the vehicle concerned by 20.

11. Pursuant to Paragraphs 17 and 17a of this law tractors and machinery used for public works are similarly subject to the surcharge. An exception to this general rule applies to tractors used in agriculture or forestry or activities closely associated therewith and machines for public works provided that 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. Where agricultural tractors or machines for public works are none the less used to transport merchandise, the use of diesel oil is compulsory.

12. Pursuant to Paragraph 25 of Law 722/1966, compliance with these provisions is monitored by the police and customs authorities. Under Paragraph 28, these authorities have the power to make the necessary checks in fuel storage facilities and on motor vehicles to determine the quantity of fuel used in the vehicles. This provision also permits them to stop vehicles in order to carry out such checks. If a tank is found to contain domestic fuel oil, they are required by Paragraph 27 of the law to take the vehicle out of circulation until the relevant penalties have been imposed.

13. Law 337/1993 on the fuel levy, last amended by Law 234/1998 to bring tourists' motor vehicles within its scope, provides for a fuel levy for each day during which a vehicle has used domestic fuel oil, up to a maximum of 60 consecutive days. The levy amounts to FIM 1 000 (EUR 168.19) per day for cars, FIM 2 000 (EUR 336.38) per day for vans and FIM 3 000 (EUR 504.56) per day for lorries. The levy is tripled unless the competent Finnish authorities are given prior notification of the use of domestic fuel oil in accordance with the provisions of Paragraph 3. The fuel levy is chargeable for the number of days on which the vehicle is used in Finland until the day on which the use of domestic fuel oil is detected. If the date of entry cannot be determined, a levy is chargeable for a minimum of 10 days. In addition, the illegal use of domestic fuel oil, that is its use without the Finnish authorities receiving prior notification, gives rise to an investigation and possibly prosecution for tax evasion. A court may in such circumstances sentence the offender to pay an amount in compensation equivalent to the difference between the applicable taxes on the different types of gas oil.

14. Paragraph 8 of Law 337/1993 sets out, by analogy with the provisions of Paragraph 28 of Law 722/1966, the monitoring powers of the police and customs authorities. Paragraph 11 of Law 337/1993 prohibits the removal from Finland of a vehicle registered abroad in respect of which a fuel levy is payable for the use of domestic fuel oil instead of diesel oil.

III — Procedure

15. By letters of 16 July 1996 and 3 April 1997 to Finland's Permanent Representative to the European Union the Commission requested information on the taxation of mineral oils in Finland. In the second

letter it was explained that the question particularly concerned the application of Directive 92/81 and Directive 92/82. The Finnish authorities responded to these questions by letters of 3 October 1996 and 5 June 1997.

16. On 3 December 1997 the Commission declared the Republic of Finland to be in default. Finland responded to this by letters of 26 January and 4 May 1998. In the second of these letters the Finnish Permanent Representative refers to the amendment of Law 337/1993. The Commission then issued a reasoned opinion on 6 August 1998, reiterating the arguments set out in its letter of formal notice and stating that the amendments to Law 337/1993 had no bearing on the possibility of domestic fuel oil being used as motor fuel. The Finnish Government responded to the reasoned opinion by letter of 22 September 1998, reaffirming its previous contention that the Finnish legislation is consistent with the Community legislation concerned.

17. As the Commission did not share the Finnish Government's view, it brought the action at issue before the Court on 17 May 2000 against the Republic of Finland for failure to fulfil its obligations. The Kingdom of Sweden intervened in this procedure in support of the form of order sought by the Commission. The Commission and the Finnish and Swedish Governments explained their positions at the Court's hearing of 26 September 2002.

IV — Pleas in law and main arguments

18. In essence, the Commission's objection is that, on acceding to the European Union, Finland did not introduce a prohibition on the use of domestic fuel oil as motor fuel, but left the system hitherto in force in Finland intact, albeit with a number of adjustments. According to the Commission, Article 5 of Directive 92/82 precludes the possibility of permitting, on payment of a surcharge and/or a fuel levy, the use of heating oil, on which a lower excise duty is payable, as motor fuel in vehicles equipped with diesel engines. Such additional levies could not be regarded as excise duties. In its reply the Commission points out that, while in theory it may be maintained that, strictly speaking, a statutory prohibition is not needed to enforce the provisions of Article 5(1) of Directive 92/82, in practice this prohibition is indeed necessary. The situation might be different if Finland could guarantee that, whatever the circumstances, fuel oil used as motor fuel would be taxed at a rate of at least EUR 245 per 1 000 litres. According to the Commission, this is not, however, the case.

19. The Commission also points out that under Article 8(2) and (3) of Directive 92/81 a reduced rate of excise duty may be applied provided that fiscal control is exercised. The Commission notes, however, that domestic fuel oil is freely available, especially in the thinly populated areas of Finland, where service stations can sell it without any kind of fiscal control. According to the Commission, there is thus no control over the distribu-

tion of domestic fuel oil, while at the level of the final consumer the number of checks on traffic as compared to the number of vehicles equipped with diesel engines is too small to be regarded as adequate and effective. [5] From this the Commission concludes that the Republic of Finland has not fulfilled its obligations under Article 8 of Directive 92/81.

20. It adds that the exemptions defined in Paragraph 17(2)(a) and Paragraph 17a of the Finnish Law on motor vehicle tax permit the use of domestic fuel oil for agricultural and forestry activities and for machinery used in public works. It does not, however, see what form the fiscal control takes in this respect.

21. Nor is the Commission convinced that a system of penalties governed by fiscal law is the only effective option for Finland, as Finland claimed in the pre-litigation phase.

22. The Commission also refers to the problems that have arisen with respect to the payment of VAT and to the problems which the Finnish legislation poses for Sweden.

23. The Swedish Government too believes that the Finnish legal system has its shortcomings. It argues that this system permits domestic fuel oil to be used in vehicles equipped with a diesel engine, whether illegally or legally. In the former case, the excise duty paid — that applicable to domestic fuel oil — was certainly too low. In the latter case, where the use of domestic fuel oil was legal because prior notification had been given, the special surcharge amounting to 20 times the motor vehicle tax chargeable annually and/or the fiscal penalty for each day on which domestic fuel oil was used in a motor vehicle were not excise duties. They were related, after all, not to the quantity of diesel oil used but to specific periods of time. The Finnish legislation therefore disregarded Article 5(1) of Directive 92/82, which prescribed a specific minimum excise duty.

24. The Swedish Government then maintains that the absence of a statutory prohibition on the use of domestic fuel oil as motor fuel is in itself an infringement of Community law. Even though in practice the Finnish system resulted in no one in Finland using domestic fuel oil as motor fuel, the absence of a statutory prohibition created an enforcement problem in cross-frontier traffic and therefore had competition-distorting effects elsewhere in the internal market. It points out that in Sweden the use as motor fuel of light fuel

5 — According to the information in the file, there are 2 328 990 vehicles in Finland, including 434 534 cars with diesel engines, 327 792 tractors and 320 843 diesel tractors. Between 3 500 and 5 000 checks are made annually.

oil, which is taxed at a lower rate of excise duty, is prohibited. Pursuant to Article 8 of Directive 92/12, however, the excise duty payable on products acquired by private individuals for their own use and transported by them must be charged in the Member State in which they are acquired. This means that Sweden could not charge excise duty if a Swedish private individual acquired domestic fuel oil legally in Finland. The Swedish Government explains that in 1996 it extended the prohibition to include domestic fuel oil acquired in Finland. However, as this was inconsistent with Article 8 and Article 9(3) of Directive 92/12, it had withdrawn this unilateral prohibition. Since then organised illegal trade in Finnish domestic fuel oil had again risen very sharply. Under the applicable Swedish legislation Finnish domestic fuel oil, marked red, might be carried in the fuel tank or in a reserve tank with a maximum capacity of 10 litres, provided that this fuel had been imported by the individual concerned in person for private purposes. It was difficult, however, to prove that an individual had not taken on the fuel himself in Finland. This would not be the case if the use of domestic fuel oil as motor fuel was also prohibited by law in Finland.

25. The Finnish Government argues that Directive 92/82 does not require the Member States to include a prohibition of the use of domestic fuel oil as motor fuel in their national legislation. The directive prescribed only the application of the correct rate of excise duty. The Finnish Government states that its legislation does not, broadly speaking, permit the use of domestic fuel oil as motor fuel. Such use was fiscally 'penalised' with a surcharge pursuant to Law 722/1966 and/or a fuel levy pursuant to Law 337/1993.

26. These additional levies could not be regarded as a payment that permitted domestic fuel oil instead of diesel oil to be used as motor fuel. They were in the nature of a fiscal penalty designed to prevent abuse. Given the amount of these fines, it did not make economic sense to use domestic fuel oil instead of diesel oil as motor fuel in road transport. An ordinary passenger car would have to travel some 5 000 km a day and a lorry some 3 000 km a day to recoup the additional financial burden. Domestic fuel oil was therefore rarely, if ever, used as motor fuel instead of diesel oil in Finland, according to the Finnish Government. In this context it also points out that mere detection by the police or customs authorities of domestic fuel oil — marked red — in a fuel tank, however small the quantity, was enough for the fiscal penalties to be imposed.

27. In response to the Commission's contention that Finland has omitted, contrary to Article 8 of Directive 92/81, to provide for fiscal control at the distribution stage, the Finnish Government comments that the Community legislation does not contain detailed provisions concerning fiscal control procedures. It did not reveal precisely what this control must entail, nor that the sale or distribution of domestic fuel oil

must be subject in some way to special control by an authority or that the penalties must be related to retail sales. The Finnish Government points out that, of the 2.7 million tonnes of domestic fuel oil used in Finland each year, 80% is used to heat dwellings and other buildings. The other 20% was consumed in agriculture and forestry and in the performance of public works. According to the Finnish Government, the great distances and extreme climatic conditions, especially in the thinly populated northern part of the country, made the availability of domestic fuel oil at service stations essential. It argues that — further — restrictions on the already widespread distribution infrastructure might cause supply problems. This could have fatal consequences in the winter period, when temperatures sometimes fell extremely low in the sparsely populated north of the country. The aim was that the final consumer should not use the less heavily taxed domestic fuel oil as motor fuel. The Finnish legal system was geared to this. It was on this too that the checks focused, and the Finnish Government believed they were adequate.

V — Assessment

A — *Admissibility*

28. The Finnish Government has remarked that the arguments which the Commission derives from the existence of illicit trade in domestic fuel oil between Finland and Sweden, the alleged absence of effective fiscal control over the fuel used in tractors and the loss of VAT revenue were not mentioned by the Commission in the pre-litigation phase and must therefore be disregarded on the ground that they are inadmissible.

29. According to settled case-law, the subject-matter of the proceedings brought before the Court is delimited by the reasoned opinion, inasmuch as the application must be founded on the grounds and pleas already put forward in that opinion.[6] In this instance Finland is accused of not fulfilling, or not adequately fulfilling, its obligations under Article 5(1) of Directive 92/82 and Article 8(2) and (3) of Directive 92/81, in that the Finnish legislation does not ensure that the rate of excise duty applied to gas oil is appropriate to the manner in which it is consumed and not enough is done to ensure that adequate fiscal control is exercised over the use of domestic fuel oil in 'exempted' sectors.

30. It is clear from the reasoned opinion that the Commission's objections explicitly concern — among other things — the inadequacy of the fiscal control referred to in Article 8 of Directive 92/81. According to Article 8(2) and (3), this control should also extend to the use of domestic fuel oil in agriculture and forestry and in

6 — See, for example, the judgment in Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 28, and the case-law referred to therein.

the performance of public works. I deduce from this that, where the Commission has objected in the pre-litigation phase to what it regards as inadequate fiscal control over the consumption of domestic fuel oil in general, it may include fiscal control over consumption in specific sectors in these objections in the litigation procedure.

31. In my view, however, the situation is different in the case of the arguments which the Commission has advanced in connection with the consequences which the Finnish system is alleged to have for the VAT base. In its application the Commission contends that, where the application of the Finnish system results in excise duty not being levied on domestic fuel oil used in motor vehicles in accordance with Community law, the VAT own resources base is eroded. Pursuant to the Sixth VAT Directive, after all, the surcharge on motor vehicle tax and the special fuel levy did not form part of the VAT base as defined in the directive. However, the Commission neither adduced nor observed anything about this during the pre-litigation procedure that preceded this action. In its reply the Commission states that this objection does not form part of the procedure. From the Finnish Government's defence it is, moreover, clear that this aspect has already been mentioned in another context. From this it follows, in my view, that the arguments advanced by the Commission concerning the VAT base must be disregarded in this procedure.

32. The same is true, to my mind, of what the Commission has had to say about the illicit trade in domestic fuel oil between Sweden and Finland. Once again, nothing about this is to be found either in the letter of formal notice or in the reasoned opinion. In its reply the Commission itself indicated that this was a reference to actual consequences and not a — new — plea in law or claim.

33. The arguments with which the Finnish Government contests the admissibility of the Swedish Government's intervention are not, in my view, conclusive.

34. To summarise, the Swedish Government has submitted (1) that Finland has not complied properly with the Community provisions on the minimum excise duty on gas oil used as motor fuel and (2) that the absence of an explicit prohibition of the use of domestic fuel oil in 'ordinary' road transport makes it difficult to ensure the effective enforcement elsewhere of legislation which is meant to implement Community provisions. The latter shortcoming constituted in itself an infringement of Community law.

35. The Finnish Government's first argument is contrived and objectively incorrect. It is advanced in an attempt to demonstrate that the Swedish reference to Finland's failure to comply properly with the Community legislation is inconsistent with the Commission's view.

36. Indeed, as the Finnish Government argues, the Commission stated in its application that the Finnish excise duty on gas oil used as motor fuel is higher than the minimum excise duty prescribed by Article 5 of Directive 92/82, but the Commission links to this statement its principal objection to the Finnish system, that not enough had been done to ensure that the product subject to the lower excise duty was used for its intended purpose as domestic fuel oil. The Commission and the Swedish Government thus largely agree in their views on the Finnish system.

37. The second argument similarly misses the mark. Although the Swedish Government submits that the absence of a statutory prohibition in the Finnish system hampers the enforcement of the legislation on excise duties elsewhere in the internal market and that this in itself constitutes an infringement, the Swedish Government did not formulate this statement as a new plea in law that departs from the Commission's submissions. The Swedish Government's intention here is to illustrate the consequences of the Finnish system.

38. According to case-law, Article 37(4) of the EC Statute of the Court of Justice does not prevent an intervener from using arguments other than those used by the party it supports, provided the intervener seeks to support that party's submissions.[7] This is obviously true of the Swedish Government's argument concerning the consequences of the Finnish system for cross-frontier trade.

B — *Substance*

39. The main question in this procedure is whether the Finnish legal system is consistent with the requirements arising from Article 5 of Directive 92/82 and Article 8(2) and (3) of Directive 92/81.

40. Article 5(1) of Directive 92/82 requires that the minimum rate of excise duty on gas oil used as motor fuel be fixed at EUR 245 per 1 000 litres. This places the Member States under an obligation to ensure that gas oil actually used as motor fuel is taxed at least at this rate of excise duty.

41. The situation is, however, complicated by the fact that gas oil can be used for purposes other than as motor fuel in road transport, such as heating, industrial applications (power-generating units), shipping, agriculture, forestry and civil engineering. In respect of such other applications the

7 — See, for example, the judgment in Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 36, and the case-law referred to therein.

system defined in Directives 92/81 and 92/82 provides for exemptions or — sometimes substantially — lower minimum excise duties on gas oil than where it is used as motor fuel.

42. The significant differences in excise duties, which are reflected in the cost price of gas oil at the final consumer stage, make the excise duties on motor fuel — the most heavily taxed — highly susceptible to avoidance and evasion. To preclude this, Article 8(1), (2) and (3) of Directive 92/81 requires that the use of gas oil on which excise duty is not chargeable, or chargeable at a reduced rate, for the purposes described in those provisions takes place under fiscal control in order to prevent 'any evasion, avoidance or abuse'.

43. Proper fiscal control of the use of gas oil on which excise duty is charged at a lower rate therefore forms part of the obligations to achieve a given result arising from Article 5(1) of Directive 92/82, which require that the minimum rate of excise duty on gas oil used as motor fuel be fixed at EUR 245 per 1 000 litres.

44. The considerable differences in the prices of heavily taxed gas oil used as motor fuel and less heavily taxed gas oil used for other purposes have resulted in the rapidly growing consumption of gas oil as motor fuel being highly susceptible to abuse. An important criterion for the discharge of the obligation to achieve a given result referred to above is therefore whether the national legislation concerned, as implemented and enforced, is able to prevent the use as motor fuel of gas oil which is not intended for that purpose.

45. The dispute between the Commission and Finland should be appraised in this light: does the Finnish legal system, as implemented and enforced, adequately prevent the use as motor fuel of gas oil intended for other purposes, principally as domestic fuel oil? To determine this, the operation of the Finnish system should be examined in its entirety. I therefore consider the answer to the question whether or not this legislation includes a formal prohibition and/or excludes certain parts of the distribution chain — service stations — to be in itself less important.

46. What the Finnish system has in common with the excise duty systems of other Member States is that gas oil intended for use as motor fuel and gas oil intended for other purposes are made identifiable by the addition of a red dye to gas oil intended for heating and other special purposes. The presence of this 'domestic fuel oil', even in highly diluted form, in the fuel containers of motor vehicles can easily be detected when a check is made, as even the Commission admits.

47. The consumption of red domestic fuel oil for inadmissible purposes is not explicitly prohibited by the Finnish system or associated with penalties under criminal or administrative law, but it is subject to the range of specific fiscal charges described in points 8 to 14 above. What is prohibited is not consumption as such, but consumption without prior notification.

48. It follows from this system that the consequence of the use of domestic fuel oil as motor fuel in motor vehicles registered in Finland is that the owner or holder of the vehicle concerned is charged a road tax 20 times the applicable annual rate (Law 722/1966) and a fuel levy for each day on which a vehicle has used domestic fuel oil as motor fuel (up to a maximum of 60 days). This special fuel levy is tripled if the use of domestic fuel oil as motor fuel is not notified in time (Law 337/1993).

49. Only Law 337/1993 is applicable to vehicles not registered in Finland — both lorries and now passenger vehicles — that consume domestic fuel oil. It is clear from the history of this law that it was created to prevent the avoidance of the normal excise duty on motor fuel by foreign lorries. The special rate of Finnish road tax could not, after all, be applied to these vehicles. Its scope was subsequently expanded on two occasions, initially to include vehicles registered in Finland with a view to avoiding discrimination and then to include foreign passenger cars (tourist traffic).

50. As the Finnish Government has stated, without being contradicted by the Commission, the combined system of the special road tax and fuel levies briefly described here is economically prohibitive for consumers. It therefore serves not, as the Swedish Government seems to suggest, to enable the less heavily taxed domestic fuel oil to be consumed in road transport, but to prevent this.

51. The penalising nature of those fiscal levies is clear from the provision which states that unnotified use of domestic fuel oil as motor fuel automatically results in a tripling of the special fuel levy which is already prohibitive in itself.

52. If only for economic reasons, it cannot in fairness be assumed that the holder of a motor vehicle will opt for the 'legal' use of domestic fuel oil as motor fuel. It therefore seems obvious that, where domestic fuel oil is detected in motor vehicles, it will always be a case of consumption without prior notification. This has the extremely serious consequence of a fiscal penalty that may amount to EUR 504 (for passenger cars) or EUR 1 512 (for lorries) for each day on which domestic fuel oil is consumed 'illegally'. The provision of Law 337/1993

which states that, if the number of days of 'illegal' consumption cannot be determined with certainty, a minimum of 10 days is assumed further emphasises the punitive nature of this special levy.

53. The result required by the directive — that a minimum excise duty actually be levied on gas oil used as motor fuel at the rate of EUR 245 per 1 000 litres referred to in Article 5(1) of Directive 92/82 — is therefore achieved in principle by the Finnish legal system, provided that it is appropriately implemented and enforced.

54. The arguments advanced by the Commission and the Swedish Government in opposition to this view — that the system does not include a prohibitive clause and might in certain circumstances permit the use of domestic fuel oil as motor fuel without the minimum excise duty of EUR 245 per 1 000 litres being charged — do not convince me.

55. As I have said in point 40 above, Article 5(1) of Directive 92/82 read in conjunction with Article 8 of Directive 92/81 does not require, implicitly or explicitly, the application of a prohibitive clause in the implementation of these provisions. All that matters is the outcome, the actual charging of the minimum excise duty on gas oil used as motor fuel. The Finnish legal system, which provides for a system of prohibitive fiscal penalties, is in principle at least as effective as any other system based on a formal prohibition.

56. I would add in this context that even an implementing system based on administrative or penal prohibitions does not in itself preclude fraudulent behaviour. The level of the penalties, the intensity of the checks and the diligence with which action is taken when offences are detected partly determine the effectiveness of such systems. It is the level of the fiscal penalties in the Finnish system and the fact that they are chargeable by law when the inadmissible use of domestic fuel oil as motor fuel is detected that result in the system combining effectiveness and deterrence.

57. The Swedish Government derives a further argument from Article 3 of Directive 95/60.[8] It takes the view that this provision codifies the prohibitions arising from Article 5 of Directive 92/82. I would point out in this context that any obligations arising from Directive 95/60 are not

8 — Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene (OJ 1995 L 291, p. 46). Article 3 specifies that Member States are to take the necessary steps to ensure that improper use of the marked products is avoided and, in particular, that the mineral oils in question cannot be used for combustion in the engine of a road-going motor vehicle or kept in its fuel tank unless such use is permitted in specific cases determined by the competent authorities of the Member States. Member States are to provide that the use of the mineral oils in question in the cases mentioned in the first subparagraph is to be considered as an offence under the national law of the Member State concerned. Each Member State is to take the measures required to give full effect to all the provisions of this directive and is, in particular, to determine the penalties to be imposed in the event of failure to comply with the said measures; such penalties are to be commensurate with their purpose and have adequate deterrent effect.

at issue in this procedure. I do not, moreover, deduce from the provision concerned that the Finnish legislation is inconsistent with it, since the system of special fiscal levies provided for therein adequately penalises the use of marked, red, gas oil in contravention of Directive 92/82.

58. The problems referred to by the Swedish Government in connection with cross-frontier traffic using marked, red, gas oil are, strictly speaking, again not at issue in this action, as the Commission itself has already acknowledged in its reply. I would add, unnecessarily perhaps, that in principle these problems can easily be solved through administrative cooperation between the Finnish and Swedish authorities. After all, a Swedish motorist driving around in Sweden on marked Finnish domestic fuel oil has either paid the Finnish special fuel levy, which must be evident from the notification he has given, or he has wrongfully failed to pay this levy. In the latter case he is required to pay this very high fiscal levy or penalty. Given the prohibitive nature of this penalty, the consumption of marked Finnish domestic fuel oil can therefore be adequately controlled by the Swedish authorities in cooperation with the Finnish authorities.

59. The second argument advanced by the Commission and the Swedish Government, that the Finnish system results in its being possible for domestic fuel oil to be used 'legally' as motor fuel without the tax due having been paid, is based, as I have already remarked, on an — overly — formalistic reading of the relevant Finnish legislation. From its substance and tenor that legislation seeks to achieve precisely the opposite.

60. In view of the above, the Commission has not, in my opinion, succeeded in showing that the Finnish legal system has implemented Community law in contravention of Article 5(1) of Directive 92/82.

61. This statement means that I do not need to consider the separate arguments derived from national law which the Finnish Government has advanced for retaining the existing regime of fiscal and administrative penalties.

62. Full compliance with the Community legislation of relevance here is not determined solely by reference to the national legal system for its implementation. It is the way in which this system, which is in itself compatible with Community law, is applied and enforced that determines whether Finland has fulfilled its obligations under Article 5(1) of Directive 92/82 and Article 8 of Directive 92/81.

63. The Commission accuses the Finnish Government of failing to introduce the fiscal control required by Article 8(2) and (3) of Directive 92/81, especially at the level of distribution. In its view, the fact that domestic fuel oil is freely available at service stations encourages abuse. It also believes that the checks made on motor vehicles by the Finnish authorities are — too — few in number.

64. In response to the first accusation the Finnish Government has said that Article 8 of Directive 92/81 does not specify what the fiscal control must comprise. As fiscal control over the widespread distribution system in Finland is difficult and ineffective, the Finnish Government has chosen to concentrate it on the final consumer level. It points out that fiscal control at distribution level cannot be effective because it is very easy to extract domestic fuel oil from the storage tanks that supply heating boilers. The same risk applies in the case of stocks held for use in agriculture and forestry and the performance of public works.

65. As Directive 92/81 does not elaborate on the term 'fiscal control' in Article 8(2) and (3), by stating, for example, that it should be explicitly understood to include the distribution stage, the obligation to exercise control should be interpreted as meaning that the Member States are required to exercise effective fiscal control. Seen from this angle, the Finnish Government's argument that fiscal control to prevent the use of domestic fuel oil as motor fuel is most effective at the final consumer stage seems conclusive. The Commission's statement also fails to advance any arguments that demonstrate convincingly why fiscal control at the distribution stage should be a necessary complement to fiscal control at the final consumer stage. I therefore find that the Commission has not succeeded in presenting an adequate substantive basis for this accusation.

66. Nor does the basis for the Commission's second accusation seem convincing. The Finnish Government has advanced strong arguments in support of the availability of domestic heating oil at service stations in the thinly populated far north of the country, where weather conditions can be extreme. The vulnerability of the distribution infrastructure in that area is such that it must be possible for final consumers, when necessary, to meet their domestic fuel oil needs at service stations. From the information submitted by the Finnish Government, which the Commission has not contradicted, it is clear that this is a supplementary supply channel. Only 4% of all domestic fuel oil is sold through service stations.

67. The arguments which the Commission has advanced against Finland in this respect are imprecise. On the one hand, the Commission generally reveals its objection to the distribution of domestic fuel oil through service stations; on the other hand, it makes no more than a few marginal comments in opposition to what it sees as the inadequate control exercised by the Finnish authorities.

68. In the light of the statement of reasons submitted by the Finnish Government, I do not consider the general objections to the inclusion of service stations in the domestic fuel oil distribution chain to be decisive. I would point out, in passing, that service stations are also included in this distribution chain elsewhere in the Community, in Austria, for example. It is true that the presence of service stations as a link in the distribution chain entails certain risks of abuse, which require specific fiscal control. It is here that the Commission should have demonstrated that the specific control exercised by the Finnish authorities is inadequate. For this, however, its general objections to Finnish fiscal control, which will be considered below, are not specific enough.

69. The Commission's third accusation concerns the general level of control at the final consumer stage in Finland. It considers a control frequency of 3 000 to 5 000 cases per annum to be too low.

70. Here again, the Commission's objective arguments lack the necessary accuracy. Statements on the adequacy or inadequacy of the level of control cannot be based solely on the number of checks made each year. In addition, it must at least be shown that the results of these checks indicate extensive illegal use of domestic fuel oil as motor fuel. The information submitted by the Finnish Government would appear to show that the Commission has not succeeded in this respect.

71. This uncontested information reveals, among other things, that 3 943 checks were made in 1999. In 141 cases there was reason to take a sample. Of the samples taken, 125 were positive. As it is reasonable to assume that these fiscal checks were not made arbitrarily, but were concentrated on sectors and environments where there was an increased risk of abuse, these figures do not indicate extensive illegal use of domestic fuel oil in road transport. This seems to be confirmed by the findings of a general check made on road transport in eight Member States on 22 September 1999. In this action fiscal offences were detected in the case of 283 vehicles checked. Of these vehicles, three were identified in Finland, two being agricultural tractors carrying merchandise on the public highway.

72. In opposition to this the Commission has not presented any facts or data which might show that fiscal control in Finland is so inadequate qualitatively and quantitatively that the result which Article 5(1)

of Directive 92/82 is intended to have, the payment of a minimum excise duty of EUR 245 per 1 000 litres on gas oil used as motor fuel, is not ensured.

73. I therefore conclude that the Commission has not succeeded with its pleas in law and arguments and that its action should therefore be dismissed.

74. Pursuant to Article 69(2) and the first subparagraph of Article 69(4) of the Court's Rules of Procedure, the Commission should be ordered to pay the costs of the procedure and the Kingdom of Sweden should bear its own costs.

VI — Conclusion

75. In the light of the foregoing, I propose that the Court should:

(1) dismiss the Commission's action against the Republic of Finland for failure to fulfil obligations.

(2) order the Commission to bear the costs of the procedure.

(3) order the Kingdom of Sweden to bear its own costs.