JUDGMENT OF THE COURT (Grand Chamber)

8 April 2008 *

In Case C-167/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 April 2005,

Commission of the European Communities, represented by L. Ström van Lier, K. Gross, K. Simonsson and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Sweden, represented by K. Wistrand, acting as Agent,

defendant,

* Language of the case: Swedish.

supported by:

Republic of Latvia, represented by E. Balode-Buraka and E. Broks, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts and L. Bay Larsen, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, P. Kūris (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 8 May 2007,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that the Kingdom of Sweden has failed to fulfil its obligations under the second paragraph of Article 90 EC, by imposing internal taxes of such a nature as to afford indirect protection to beer, which is mainly produced in Sweden, as compared with wine, which is mainly imported from other Member States.

Legal context

Law 1994:1564 on excise duty on alcohol

2 The Swedish legislation concerning the excise duty applicable to alcoholic beverages, the subject of the present action, is contained in Law 1994:1564 on excise duty on alcohol (lagen (1994:1564) om alkoholskatt) of 15 December 1994 (SFS 1994 No 1564), as amended by Law 2001:822 ('the lagen om alkoholskatt').

3 Paragraph 2 of the lagen om alkoholskatt states as follows:

'Excise duty shall be payable on beer under [Combined Nomenclature] Heading 2203 if its alcoholic strength exceeds 0.5% vol.

Excise duty must also be paid on products containing a mixture of beer and non-alcoholic beverages under [CN] Heading 2206 if the alcoholic strength of the mixture exceeds 0.5% vol.

Excise duty per litre is payable at the rate of [SEK] 1.47 per percentage of alcohol by volume.

Beers with a maximum alcoholic strength of 2.8% are exempt.'

4 Article 3 of that law is worded as follows:

'Excise duty shall be payable on wine under [CN] Headings 2204 and 2205 if the alcoholic strength is the result exclusively of fermentation and

1. if the alcoholic strength exceeds 1.2% vol. but is lower than or equal to 15%, or

2. if the alcoholic strength exceeds 15% vol. but is lower than or equal to 18%, and if the wine is produced without additives.

Excise duty shall be payable per litre:

on beverages with an alcoholic strength higher than 2.25% vol. but lower than or equal to 4.5% vol., at a rate of [SEK] 7.58;

on beverages with an alcoholic strength higher than 4.5% vol. but lower than or equal to 7% vol., at a rate of [SEK] 11.20;

on beverages with an alcoholic strength higher than 7% vol. but lower than or equal to 8.5% vol., at a rate of [SEK] 15.41;

on beverages with an alcoholic strength higher than 8.5% vol. but lower than or equal to 15% vol., at a rate of [SEK] 22.08; and

on beverages with an alcoholic strength higher than 15% vol. but lower than or equal to 18% vol., at a rate of [SEK] 45.17.

Wines with a maximum alcoholic strength of 2.25% vol. are exempt.'

The pre-litigation procedure

5 Following complaints received regarding the Swedish rules governing excise duty on wine, allegedly discriminatory by comparison with those applicable to beer, the Commission examined the legislation in question and reached the conclusion that, contrary to the second paragraph of Article 90 EC, the Kingdom of Sweden was imposing internal taxes of such a nature as to afford indirect protection to beer, which is mainly produced in Sweden, to the detriment of wine, which is mainly imported from other Member States.

6 After giving the Kingdom of Sweden formal notice, by letters notified on 28 February 2000 and 1 July 2002, to submit its observations, the Commission issued a reasoned opinion and an additional reasoned opinion dated, respectively, 19 June 2001 and 7 July 2004.

7 Since the Commission did not consider the legislative amendments introduced after 19 June 2001 by Laws 2001:517 and 2001:822 to be satisfactory and since the Kingdom of Sweden took the view that it was not required to accept the argument set out by the Commission in the additional reasoned opinion, the Commission decided to bring the present action.

8 By order of the President of the Court of 16 September 2005, the Republic of Latvia was granted leave to intervene in support of the form of order sought by the Kingdom of Sweden

The action

Preliminary observations

9 The Commission and the Kingdom of Sweden agree that, in Sweden:

— beer is mainly a domestic product and wine is mainly an imported product;

— the most commonly consumed wines, which are generally the lighter wines, share a sufficient number of characteristics with beer to constitute, for the consumer, a substitute for it, so that such wines may be considered to be in competition with beer for the purposes of the second paragraph of Article 90 EC;

— the taxation of beer and wine is traditionally linked to the alcohol content of those beverages, that is to say, it is in proportion to their alcoholic strength by volume;

— there is a difference in the taxation by volume of beer and wine; and

— taxation can influence consumer behaviour.

10 Nevertheless, the Kingdom of Sweden qualifies the statements set out in the second and fifth indents above, asserting that beer and wine are only partly in competition and that taxation is only one of the factors likely to influence consumer behaviour.

11 The Commission and the Kingdom of Sweden also agree that when the latter acceded to the European Union on 1 January 1995, the rate of duty applied, on the basis of alcoholic strength by volume, to strong beer — defined by Law 1994:1738 on alcohol (alkohollagen (1994:1738)) of 16 December 1994 (SFS 1994:1738) as beer of an alcoholic strength in excess of 3.5% vol. — and the rate of duty applied, on the basis of alcoholic strength, to wine of 11% vol. were almost identical.

12 With effect from 1 January 1997, excise duty on beer was reduced by approximately 40%.

13 With regard to that reduction, the Kingdom of Sweden states that its Government had found in 1996 that, because of the difference between Sweden and Denmark in terms of the taxation of beer, the cross-border trade in beer between those two Member States had reached such proportions that it was necessary to reduce the level at which beer was taxed in Sweden.

14 The Kingdom of Sweden states further that no cross-border trade in wine has grown up in parallel to that cross-border trade in beer, despite the fact that the wine is taxed much more heavily in Sweden than in Denmark. Accordingly, in the view of the Kingdom of Sweden, there is no need to adjust the excise duty on wine, just as there was no reason to revise the rates of taxation applied to wine when the decision was taken to reduce the excise duty on beer. However, the Kingdom of Sweden adds

that, following pressure brought to bear by the Commission, excise duty on wine was reduced by 18.8% with effect from 1 December 2001 pursuant to Law 2001:822, thereby restoring the former correspondence between the taxation level for strong beer and that for wine. Thus, the tax treatment of wine and the tax treatment of beer are now equivalent.

15 In Sweden, the retail selling of wine, strong beer and spirits is a monopoly, responsibility for which has been entrusted to a company wholly owned by the Swedish State, Systembolaget AB ('Systembolaget'). According to the explanations provided by the Kingdom of Sweden, which have not been contradicted by the Commission, that monopoly system is Sweden's main policy instrument in its campaign against alcoholism, being designed to channel the retail selling of alcoholic beverages so as to make sure that the age of consumers is checked and that the sales prohibitions in force are complied with, while ensuring that the products concerned are accessible.

Arguments of the parties

16 The Commission submits that Swedish beer, the product which dominates sales of alcohol on the Swedish market, is subject to lower excise duty than the competing category of wine. In its view, that difference in taxation influences consumer choice, in that the structure and characteristics of the tax arrangements in question reinforce the preference, claimed to be traditional, of Swedish consumers for beer. Such a situation is unfavourable to wine, which is mainly imported from other Member States, and consequently has a protective effect, prohibited under the second paragraph of Article 90 EC, in favour of beer, which is mainly produced in Sweden.

17 On analysing the thrust of the relevant Swedish tax provisions, the Commission submits that, despite a reduction in excise duty on wine with effect from 1 December

2001 pursuant to Law 2001:822, not only does wine remain subject to higher excise duty than beer but in addition it is taxed progressively according to its alcoholic strength by volume, in accordance with the excise duty scales set out in the second subparagraph of Paragraph 3 of the alkohollagen. Thus, the Commission points out, on a wine with an alcoholic strength of 12.5% vol. — which the Commission regards as normal — the excise duty applicable is SEK 1.77 per percentage of alcohol by volume, which differs by approximately 20% from the excise duty on beer (SEK 1.47 per percentage point of alcohol by volume).

18 The Commission points out that the final price also includes value added tax ('VAT') at 25%, arguing that since the VAT is calculated on the basis of the price inclusive of excise duty and wine is subject to higher excise duty than beer, the result of applying VAT is to widen the existing disparity, thus reinforcing the protective effect of the tax arrangements at issue.

19 It follows that wine is taxed more heavily than beer and that tax accounts for a higher proportion of the price of bestselling wines (those with an alcoholic strength of between 8.5 vol. and 15% vol. and a final selling price ranging between SEK 49 and SEK 70; 'the intermediate category') than of the price of beer.

20 As regards competition between beer and wine, the Commission takes the view that, in Sweden, there is competition between strong beer, the product which dominates sales on the Swedish market, and wines in the intermediate category. It points out that wine must be bought at Systembolaget sales outlets, as must strong beer, whereas beer with an alcoholic strength lower than 3.5% vol. is available in food shops. Strong beer and wine are therefore in competition at the same sales outlets. According to the

Commission, the fact that the consumer is obliged to go to Systembolaget in order to buy strong beer and wine suggests that the two products are interchangeable and, accordingly, in competition with each other. The Commission goes on to point out that wine and beer are available only in specially licensed restaurants and catering establishments where, in consequence, the two beverages may also be in competition.

21 The Commission makes a comparison of the effect on beer and wine of the tax arrangements at issue, in terms of price, alcohol content and volume, in order to argue that, whatever method of comparison is used, the tax imposed on wine is clearly higher than that on beer. In that context, the Commission points out that the effect of the taxation is most marked in the case of wines with a final selling price in the range between SEK 41 and SEK 70, that is to say, the wines which account for by far the greater part of retail sales of the product (78.7% in 2003).

22 As regards the assessment, in the light of the second paragraph of Article 90 EC, of the protective nature of the tax arrangements at issue, the Commission maintains that it is essential not only to establish that those arrangements afford protection but also to show the effect of that protection on the consumer, who may be induced directly or indirectly, actually or potentially, to choose a domestic product which, but for that protection, is equivalent to an imported product and, accordingly, in competition with it.

23 The Commission takes the view that the tax arrangements at issue in the present action have the same purpose as those referred to in paragraph 27 of the judgment in Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265, which, according to the Court, had the effect of subjecting wine imported from other Member States to additional taxation so as to afford protection to domestic beer production, inasmuch as beer production constituted the most relevant reference criterion from the point of view of competition. The Commission, referring to the judgment in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, paragraph 14, maintains that

those arrangements crystallise consumer habits by reinforcing the advantage of beer (the domestic product) and subjecting to discrimination the marketing possibilities of wine, the product from other Member States.

24 The Commission submits that the Kingdom of Sweden uses taxation in this way to influence consumer behaviour with regard not only to choice of product but also to choice between competing products. In its view, it is clear from the statistics published by Systembolaget that, before the 40% reduction in the excise duty on beer and the slight concomitant increase in the tax on wine on 1 January 1997, the sales volumes of beer and wine were relatively similar and that, following those amendments, sales of wine dropped by 3.7%, whilst sales of beer rose by 8.9%. After the reduction — described as 'slight' — in the excise duty on wine, which was implemented with effect from 1 December 2001, sales of wine increased by 11%, which is the highest increase seen between 1995 and 2004. However, the same statistics also show that, alongside that increase in wine sales, sales of beer increased by a much higher percentage. The Commission adds that that data must be examined in the knowledge that the Kingdom of Sweden uses taxation as an instrument to reinforce a pattern in the consumption of the products concerned.

25 In that context, the Commission submits that the change in the respective sales volumes of the two beverages originates in and is explained by the difference in tax treatment instituted between them in 1997, which was clearly intended to afford protection to domestic beer production. That protective effect persists today. The Commission points out that, although the excise duty applied to wine has also been reduced, that reduction was not on a par with the reduction of the excise duty on beer, and excise duty on wine nevertheless remains significantly higher than excise duty on beer, so that the tax arrangements at issue continue to have the effect of promoting beer over wine.

26 In conclusion, the Commission maintains that, although the Kingdom of Sweden need not tax beer and wine at a particular rate, it must fix the excise duty on those competing products in such a way that domestic products are not favoured at any level whatsoever. In that regard, the Commission stated at the hearing that, in its view, a fresh reduction in the level of taxation of wine — of the same amplitude as that implemented from 1 December 2001 — is necessary.

27 The Kingdom of Sweden disputes that it has failed to fulfil its obligations under the second paragraph of Article 90 EC. The disputed tax rules for beer and wine — which are not materially identical — have neither the aim nor the effect of indirectly protecting beer sales from competition from wine.

28 The Kingdom of Sweden takes the view that an assessment of the taxation arrangements at issue in the light of the second paragraph of Article 90 EC must be based on a comparison between, on the one hand, the most widely sold strong beers and, on the other, the most widely sold and least expensive wines with an alcoholic strength of approximately 11% vol.

29 According to the Kingdom of Sweden, the essential question is whether or not the taxation imposed on those competing products is such as to have the effect, on the market in question, of reducing the potential consumption of imported products to the advantage of domestic products.

30 The effects of the national tax rules should be assessed in two stages. First, it is necessary to compare prices in the light of the influence that they exert on consumer

choice as between beer and wine and, secondly, to study the statistics on the sales patterns reflecting the choice between those products.

31 As regards the comparison of the selling prices of the competing beer and wine, the Kingdom of Sweden maintains that it is not a simple matter to choose the basis for calculation appropriate to such a comparison and it is not easy to know what price comparison gives the truest picture of their relationship in terms of competition.

32 Since, in an action for failure to fulfil obligations, the Commission is required to demonstrate that the alleged failure to fulfil obligations is real, the Kingdom of Sweden does not consider it necessary to explain all the possible ways in which the final selling price of the products in question could be compared. It considers it sufficient to base its arguments in the present case, as in the case which gave rise to the judgment in Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, on the results of a comparison between the selling price of a litre of beer and the selling price of a litre of wine. In Case 356/85, that comparison also shows that the essential difference between the respective selling prices of beer and wine cannot be disregarded, irrespective of the difference in the taxation of those products.

33 The Kingdom of Sweden takes the view that a comparison between the selling price of a litre of the most widely sold strong beer and the selling price of a litre of the most widely sold and least expensive wine, with an alcoholic strength of approximately 11% vol., shows that the difference in the tax imposed on those products is not such that it could be regarded as influencing consumer behaviour. That wine, even if taxed in exactly the same way as the strong beer which is compared with it, is twice as expensive as the beer. A relevant comparison of prices cannot therefore support the conclusion that the Swedish tax rules at issue are such as to affect consumer choice by favouring trade in beer, the domestic product, to the detriment of trade in wine, the imported product.

34 The Kingdom of Sweden, supported by the Republic of Latvia, thus contends that the Commission fails to show, through the price comparisons which it makes, that the difference in price between beers and wines of similar quality is so slight that the difference in the taxation of those two products is likely to influence consumer behaviour.

35 Further, the Kingdom of Sweden contends that the statistics relied on by the Commission to reflect trends in the consumption of beer and wine give no indication regarding the protective effect that the Swedish tax rules are claimed to have on trade in beer. In that regard, the Kingdom of Sweden maintains that a comprehensive examination of the statistics of the Systembolaget, the Skatteverket (Swedish authority responsible for direct and indirect taxation) and the Svenska Bryggareföreningen (Swedish Federation of beer, cider, soda-water and water producers) gives a more accurate picture of the situation. It states that, more or less consistently since 1996, the volume of sales of strong beer has exceeded the volume of sales of wine by approximately 100 000 000 litres per year.

36 The Kingdom of Sweden shares the Commission's view that the sales statistics show that the consumer is, in absolute terms, sensitive to taxation, since it affects the price of the product to which it is applied. At the same time, the Kingdom of Sweden takes the view that pricing is an important instrument for achieving the objectives of its campaign against alcoholism. However, the fact that the consumer reacts to a reduction in prices by engaging in higher consumption does not show that, by the same token, he changes his behaviour when it comes to choosing between different categories of alcoholic beverage. On the contrary, sensitivity to price makes it unlikely that a downwards adjustment in the price of wine — as a result of wine and strong beer being made subject to identical levels of taxation — could entail an increase in the consumption of wine to the detriment of beer consumption, since, if wine costs twice as much as strong beer despite a reduction in the taxes imposed on it, a consumer who is sensitive to price will not turn to wine.

37 For its part, the Republic of Latvia maintains that it is essential to investigate the cross-elasticity of demand between wine and beer. In its opinion, demand for those products is relatively non-elastic, since demand is not price-sensitive. It infers from this that the price of beer and the price of wine are not determining factors in relation to consumer choice.

38 The Kingdom of Sweden considers, moreover, that the Commission's view of the manner in which excise duty influences consumer choice between beer and wine is too simplistic. Since those two products are not wholly interchangeable, factors other than taxation can influence consumer choice.

39 The Kingdom of Sweden, supported by the Republic of Latvia, further contends that the submissions made by the Commission with regard to trends in consumption habits vis-à-vis wine and beer are not sufficient to show for certain that there is a link between the changes in consumption and the fact that wine is subject to a level of taxation which is marginally higher than that imposed on beer. The Commission has thus failed to establish that the Swedish taxation system has, on the facts, a protective effect for trade in beer.

Findings of the Court

40 As a preliminary point, it should be recalled that, in accordance with established case-law, Article 95 of the Treaty (now, after amendment, Article 90 EC), as a whole,

has the aim of ensuring free movement of goods between the Member States in normal conditions of competition through the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States and the complete neutrality of internal taxation as regards competition between domestic products and imported products (*Commission* v *Belgium*, paragraph 6).

41 In that context, the second paragraph of Article 90 EC is intended to prevent any form of indirect fiscal protectionism affecting imported products which, although not similar, within the meaning of the first paragraph of Article 90 EC, to domestic products, nevertheless compete with some of them, even if only partially, indirectly or potentially (*Commission* v *Belgium*, paragraph 7, and Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 38).

42 Consequently, for the purposes of examining the compatibility with the second paragraph of Article 90 EC of the taxation arrangements criticised by the Commission, it is appropriate first to determine the extent to which beer and wine may be regarded as competing products in the light of that provision.

43 It is clear from the case-law that wine and beer are, to a certain extent, capable of meeting identical needs, which means that a certain measure of mutual substitutability must be acknowledged. Nevertheless, the Court has pointed out that, in view of the significant differences in quality — and, accordingly, in price — between wines, the decisive competitive relationship between wine and beer, a popular and widely consumed beverage, must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and least expensive varieties, and it is therefore on that basis that tax comparisons must be made (*Commission* v *Belgium*, paragraph 10 and the case-law cited).

44 Those considerations are also valid in the context of the present case, since the evidence submitted to the Court discloses no special feature of the Swedish market which could justify a different assessment. Consequently, it must be found that, in the present case, only wines in the intermediate category, which only Systembolaget can sell on a retail basis, share a sufficient number of characteristics with strong beer — with an alcoholic strength equal to or higher than 3.5% vol. and also available for retail sale only through Systembolaget — to be regarded as being in competition with strong beer for the purposes of the second paragraph of Article 90 EC.

45 Secondly, it is appropriate to compare the taxation arrangements for the products at issue in order to determine whether there is any difference in the tax treatment applied to them and, if so, the extent of that difference.

46 The Commission and the Kingdom of Sweden disagree as to the relevance of the application, in the present case, of the methods of comparison used in *Commission* v *United Kingdom* and *Commission* v *Belgium* in order to assess the taxation relationship between beer and wine.

47 The Court considers that the most relevant comparison in the present case is between the excise duty applied to wine and the excise duty applied to beer, the rate of duty being determined in each case according to the alcoholic strength by volume of the beverage.

48 It should be noted, as the Advocate General points out in point 54 of his Opinion, that alcoholic strength is the most pertinent criterion of assessment in the present

case, since it is used by Sweden as the tax base for determining excise duty. In addition, it is an objective criterion which reflects the characteristics of the products in question.

49 Under Paragraph 2 of the lagen om alkoholskatt, excise duty on beer is fixed, whereas, under Paragraph 3 of that law, excise duty on wine is progressive, varying according to the categories specified in the latter provision. It is common ground, moreover, that for both products the rate of VAT is 25% of the selling price, inclusive of excise duty.

50 Thus, it emerges from a comparison of the levels of taxation in relation to alcoholic strength that a wine with an alcoholic strength of 12.5% vol., which is in competition with strong beer, is subject to taxation per percentage of alcohol by volume which exceeds by approximately 20% per litre the taxation on strong beer (SEK 1.77 as against SEK 1.47), and that that difference increases to 36% in the case of a wine with an alcoholic strength of 11% vol. (SEK 2 as against SEK 1.47) and to 50% in the case of a wine with an alcoholic strength of 10% vol. (SEK 2.208 as against SEK 1.47).

51 Wine which is in competition with strong beer is therefore subject to higher taxation than strong beer.

52 Thirdly, it is appropriate to determine whether the higher taxation of wine as compared with strong beer is such as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products (see *Commission* v *Belgium*, paragraph 15, and *Roders and Others*, paragraph 39).

53 In that respect, account must be taken of the difference between the selling prices of the products in question and the impact of that difference on the consumer's choice, as well as to changes in the consumption of those products (*Roders and Others*, paragraph 39).

54 To arrive at that assessment, a method of comparison finally accepted by both parties, based on a litre of beer and a litre of wine, must be used, since the Commission has failed to establish the relevance to the present case of any other method.

55 In that regard, it must be held that, in the light of the information provided by the Commission and the Kingdom of Sweden, the relationship between the final selling price, inclusive of all taxes, of a litre of strong beer and that of a litre of wine in competition with it is in the order of 1 : 2.

56 As is apparent from the information provided to the Court, even supposing that excise duty as applicable per litre of strong beer — that is to say, SEK 1.47 per percentage point of alcohol by volume — were to be applied to the wine in competition with strong beer (such as a wine with an alcoholic strength of 12.5% vol.), the reduction in the final selling price, inclusive of all taxes, of a litre of that wine would be SEK 4.63 (EUR 0.5) or 6.65%. Despite that reduction, the relationship between the final selling price, inclusive of all taxes, of a litre of strong beer and that of a litre of wine in competition with strong beer would remain in the order of 1 : 2. Expressed in more precise terms, the relationship between the final selling prices would be 1 : 2.1 instead of 1 : 2.3.

57 The comparison of the relationship between the selling prices of a litre of strong beer and a litre of wine in competition with strong beer thus makes it clear that the

difference in price between those two products is virtually the same before taxation as after taxation. In those circumstances, even though the difference between the respective selling prices of beer and competing wines is narrower than that found by the Court in *Commission* v *Belgium*, it must be pointed out that the difference in selling price found in the present case is nevertheless such that the difference in the tax treatment of those two products is not liable to influence consumer behaviour in the sector concerned.

58 It follows from all the foregoing that the Commission has not shown that, in the present case, the difference between the price of strong beer, with an alcoholic strength equal to or higher than 3.5% vol., and the price of wine in the intermediate category, in competition with that beer, is so slight that the difference in the excise duty applicable to those products in Sweden is likely to influence consumer behaviour. In view of the finding in paragraph 56 of the present judgment, concerning the relationship of final selling prices, the application of the tax arrangements at issue does not appear to have the effect of affording indirect protection to Swedish beer, within the meaning of the second paragraph of Article 90 EC, simply because under those arrangements wine, which is mainly imported from other Member States, is taxed more heavily than beer, which is mainly a domestic product.

59 In any event, it must be held that the statistical information submitted by the Commission regarding sales of the products in question shows, at most, a certain sensitivity on the part of consumers to variations in the price of those products over a short period, but not long-term changes in consumer habits in favour of beer and to the detriment of wine.

60 Admittedly, the Court pointed out, in paragraph 10 of the judgment of 27 February 1980 in *Commission* v *United Kingdom*, that it is impossible to require, in each case,

for the purposes of applying the second paragraph of Article 90 EC, that the protective effect of internal tax arrangements be shown statistically, but that it is sufficient for it to be shown that a given tax mechanism is likely, in view of its inherent characteristics, to bring about such an effect.

61 However, in the present case, in the light of the foregoing, the view must be taken that the Commission has not shown to the required legal standard that the legislation at issue is likely to bring about such a protective effect.

62 It follows that the present action must be dismissed as unfounded.

Costs

63 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 Kingdom of Sweden has applied for costs and the Commission has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

64 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. It is therefore appropriate to rule that the Republic of Latvia must bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders the Republic of Latvia to bear its own costs.**

[Signatures]