

JUDGMENT OF THE COURT

23 September 2003 *

In Case C-30/01,

Commission of the European Communities, represented by R.B. Wainwright,
acting as Agent, with an address for service in Luxembourg,

applicant,

supported by

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an
address for service in Luxembourg,

intervener,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, and D. Wyatt QC, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that by failing, in respect of Gibraltar, to adopt the laws, regulations or administrative provisions necessary to comply with

- Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions in relation to the classification, packaging and labelling of dangerous substances (OJ 1967 L 196, p. 1), as amended by Commission Directive 97/69/EC of 5 December 1997 (OJ 1997 L 343, p. 19);

- Council Directive 87/18/EEC of 18 December 1986 on the harmonisation of laws, regulations and administrative practice relating to the application of good laboratory practice and the verification of their application for tests on chemical substances (OJ 1987 L 15, p. 29);

- Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels (OJ 1993 L 74, p. 81), as amended by Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 (OJ 1998 L 350, p. 58);

- Council Directive 79/113/EEC of 19 December 1978 on the approximation of the laws of the Member States relating to the determination of the noise emission of construction plant and equipment (OJ 1979 L 33, p. 15), as amended by Commission Directive 85/405/EEC of 11 July 1985 (OJ 1985 L 233, p. 9);

- Council Directive 84/533/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of compressors (OJ 1984 L 300, p. 123), as amended by Commission Directive 85/406/EEC of 11 July 1985 (OJ 1985 L 233, p. 11);

- Council Directive 84/534/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of tower cranes (OJ 1984 L 300, p. 130), as amended by Council Directive 87/405/EEC of 25 June 1987 (OJ 1987 L 220, p. 60);

- Council Directive 84/535/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of welding generators (OJ 1984 L 300, p. 142), as amended by Commission Directive 85/407/EEC of 11 July 1985 (OJ 1985 L 233, p. 16);

- Council Directive 84/536/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of power generators (OJ 1984 L 300, p. 149), as amended by Commission Directive 85/408/EEC of 11 July 1985 (OJ 1985 L 233, p. 18);

- Council Directive 84/537/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of powered hand-held concrete breakers and picks (OJ 1984 L 300, p. 156), as amended by Commission Directive 85/409/EEC of 11 July 1985 (OJ 1985 L 233, p. 20);

- Council Directive 84/538/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of lawnmowers (OJ 1984 L 300, p. 171), as amended by Council Directive 88/181/EEC of 22 March 1988 (OJ 1988 L 81, p. 71);

- Council Directive 86/594/EEC of 1 December 1986 on airborne noise emitted by household appliances (OJ 1986 L 344, p. 24);

- Council Directive 86/662/EEC of 22 December 1986 on the limitation of noise emitted by hydraulic excavators, rope-operated excavators, dozers, loaders and excavator-loaders (OJ 1986 L 384, p. 1), as amended by Directive 95/27/EC of the European Parliament and of the Council of 29 June 1995 (OJ 1995 L 168, p. 14);

- European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) and

- Commission Directive 97/35/EC of 18 June 1997 adapting to technical progress for the second time Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms (OJ 1997 L 169, p. 72),

or, in any event, by failing to inform the Commission of the adoption of such provisions, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under those directives,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric (Rapporteur), S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 January 2003,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 24 January 2001, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing, in respect of Gibraltar, to adopt the laws, regulations or administrative provisions necessary to comply with:
 - Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions in relation to the classification, packaging and labelling of dangerous substances (OJ 1967 L 196, p. 1), as amended by Commission Directive 97/69/EC of 5 December 1997 (OJ 1997 L 343, p. 19);
 - Council Directive 87/18/EEC of 18 December 1986 on the harmonisation of laws, regulations and administrative practice relating to the application of good laboratory practice and the verification of their application for tests on chemical substances (OJ 1987 L 15, p. 29);
 - Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels (OJ 1993 L 74, p. 81), as amended by Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 (OJ 1998 L 350, p. 58);

- Council Directive 79/113/EEC of 19 December 1978 on the approximation of the laws of the Member States relating to the determination of the noise emission of construction plant and equipment (OJ 1979 L 33, p. 15), as amended by Commission Directive 85/405/EEC of 11 July 1985 (OJ 1985 L 233, p. 9);

- Council Directive 84/533/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of compressors (OJ 1984 L 300, p. 123), as amended by Commission Directive 85/406/EEC of 11 July 1985 (OJ 1985 L 233, p. 11);

- Council Directive 84/534/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of tower cranes (OJ 1984 L 300, p. 130), as amended by Council Directive 87/405/EEC of 25 June 1987 (OJ 1987 L 220, p. 60);

- Council Directive 84/535/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of welding generators (OJ 1984 L 300, p. 142), as amended by Commission Directive 85/407/EEC of 11 July 1985 (OJ 1985 L 233, p. 16);

- Council Directive 84/536/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of power generators (OJ 1984 L 300, p. 149), as amended by Commission Directive 85/408/EEC of 11 July 1985 (OJ 1985 L 233, p. 18);

- Council Directive 84/537/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of powered hand-held concrete breakers and picks (OJ 1984 L 300, p. 156), as amended by Commission Directive 85/409/EEC of 11 July 1985 (OJ 1985 L 233, p. 20);

- Council Directive 84/538/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of lawnmowers (OJ 1984 L 300, p. 171), as amended by Council Directive 88/181/EEC of 22 March 1988 (OJ 1988 L 81, p. 71);

- Council Directive 86/594/EEC of 1 December 1986 on airborne noise emitted by household appliances (OJ 1986 L 344, p. 24);

- Council Directive 86/662/EEC of 22 December 1986 on the limitation of noise emitted by hydraulic excavators, rope-operated excavators, dozers, loaders and excavator-loaders (OJ 1986 L 384, p. 1), as amended by Directive 95/27/EC of the European Parliament and of the Council of 29 June 1995 (OJ 1995 L 168, p. 14);

- European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) and

- Commission Directive 97/35/EC of 18 June 1997 adapting to technical progress for the second time Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms (OJ 1997 L 169, p. 72),

or, in any event, by failing to inform the Commission of the adoption of such provisions, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under those directives.

- 2 By order of the President of the Court of 22 June 2001, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the Commission.

Legal background

Community legislation of a general nature

- 3 Articles 2 EC and 3(1) EC provide:

‘Article 2

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;

(b) a common commercial policy;

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

...'

4 Article 14(2) EC provides:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

5 Part Three of the EC Treaty contains a Title I headed ‘Free movement of goods’. That title opens with the general provisions of Articles 23 EC and 24 EC and contains two chapters on ‘The customs union’ (Articles 25 EC to 27 EC) and the ‘Prohibition of quantitative restrictions between Member States’ (Articles 28 EC to 31 EC).

6 Under Article 23 EC:

‘1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 25 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.’

7 Article 24 EC provides:

‘Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.’

8 Article 25 EC, to which Article 23(2) EC refers, prohibits customs duties on imports and exports and charges having equivalent effect between Member States.

9 Articles 94 EC and 95(1) EC are worded as follows:

‘Article 94

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Article 95

By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’

10 Under Article 299(4) EC:

‘The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.’

The provisions of the Act of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland concerning Gibraltar

11 The act concerning the conditions of accession for the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14, ‘the UK Act of Accession’) provides in its Articles 28, 29 and 30:

‘Article 28

Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise.

Article 29

The acts listed in Annex I to this Act shall be adapted as specified in that Annex.

Article 30

The adaptations to the acts listed in Annex II to this Act made necessary by accession shall be drawn up in conformity with the guidelines set out in that Annex and in accordance with the procedure and under the conditions laid down in Article 153.’

- ¹² Annex I, Section I (Customs legislation), point 4, to the UK Act of Accession provides:

‘Council Regulation (EEC) No 1496/68 of 27 September 1968 [on the definition of the customs territory of the Community] OJ L 238/1, 28 September 1968

Article 1 is replaced by the following:

“The customs territory of the Community shall comprise the following territories:

— ...

— The territory of the United Kingdom of Great Britain and Northern Ireland and of the Channel Islands and the Isle of Man.”

- ¹³ Regulation No 1496/68 was repealed by Council Regulation (EEC) No 2151/84 of 23 July 1984 on the customs territory of the Community (OJ 1984 L 197, p. 1), which was, in turn, repealed by Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). Article 3 of that regulation defines the customs territory of the Community and contains an identical provision to that cited in the previous paragraph of this judgment.
- ¹⁴ Annex I, Section VIII (Commercial policy) to the UK Act of Accession replaced the list of countries in Annex II to Council Regulation (EEC) No 1025/70 of 25 May 1970 establishing common rules for imports from third countries (OJ, English Special Edition 1970(II), p. 309), as amended by Council Regulations (EEC) Nos 1984/70 of 29 September 1970 (OJ, English Special Edition 1970(II), p. 66), 724/71 of 30 March 1971 (OJ, English Special Edition 1971(I), p. 202), 1080/71 of 25 May 1971 (OJ, English Special Edition 1971(I), p. 287), 1429/71 of 2 July 1971 (OJ, English Special Edition 1971(II), p. 469) and 2384/71 of 8 November 1971 (OJ, English Special Edition 1971(III), p. 901) (‘Regulation No 1025/70’) by a new list excluding Gibraltar.

- 15 Annex II, Section VI (Commercial policy) to the UK Act of Accession provides as follows with regard to Regulation No 1025/70:

‘The problem created by the deletion of the reference to Gibraltar in Annex II is to be solved in such a way as to ensure that Gibraltar is in the same position with regard to the Community’s import liberalisation system as it was before accession.’

The provisions of the Act of Accession of the Kingdom of Spain and the Portuguese Republic

- 16 Article 25 of the act concerning the conditions of accession of the Kingdom of Spain and the Republic of Portugal and the adjustments to the Treaties of 12 June 1985 (OJ 1985 L 302, p. 23, hereinafter ‘the Act of Accession of Spain and Portugal’) provides:

‘1. The Treaties and the acts of the institutions of the European Communities shall apply to the Canary Islands and to Ceuta and Melilla, subject to the derogations referred to in paragraphs 2 and 3 and to the other provisions of this Act.

2. The conditions under which the provisions of the EEC and ECSC Treaties concerning the free movement of goods, and the acts of the institutions of the Community concerning customs legislation and commercial policy, shall apply to the Canary Islands and to Ceuta and Melilla are set out in Protocol [No] 2.

3. Without prejudice to the specific provisions of Article 155, the acts of the institutions of the European Communities concerning the common agricultural policy and the common fisheries policy shall not apply to the Canary Islands and to Ceuta and Melilla.

...’

- 17 Protocol No 2 concerning the Canary Islands and Ceuta and Melilla, which is annexed to the Act of Accession of Spain and Portugal (‘Protocol No 2’), provides:

‘Article 1

1. Products originating in the Canary Islands or in Ceuta and Melilla and products coming from third countries imported into the Canary Islands or into Ceuta and Melilla under the arrangements which are applicable there to them shall not be deemed, when released for free circulation in the customs territory of the Community, to be goods fulfilling the conditions of Articles 9 and 10 of the EEC Treaty, nor goods in free circulation under the ECSC Treaty.

2. The customs territory of the Community shall not include the Canary Islands and Ceuta and Melilla.

3. Except where otherwise provided for in this Protocol, the acts of the institutions of the Community regarding customs legislation for foreign trade

shall apply under the same conditions to trade between the customs territory of the Community, on the one hand, and the Canary Islands and Ceuta and Melilla, on the other.

4. Except where otherwise provided for in this Protocol, the acts of the institutions of the Community regarding the common commercial policy, be they autonomous or enacted by agreement, directly linked to the import or export of goods, shall be applicable to the Canary Islands or to Ceuta and Melilla.

5. Except where otherwise provided for in the Act of Accession, including this Protocol, the Community shall apply in its trade with the Canary Islands and with Ceuta and Melilla, for products falling within Annex II of the EEC Treaty, the general arrangements which it applies in its foreign trade.

Article 2

1. Subject to Articles 3 and 4 of this Protocol, products originating in the Canary islands and in Ceuta and Melilla, shall, when released for free circulation in the customs territory of the Community, qualify for exemption from customs duties under the conditions defined in paragraphs 2 and 3.

...

Article 6

1. On import into the Canary Islands or into Ceuta and Melilla, products originating in the customs territory of the Community shall qualify for exemption from the customs duties and charges having equivalent effect under the conditions defined in paragraphs 2 and 3.

...’

The directives at issue

- ¹⁸ This case concerns the Council directives adopted under Article 100 of the EC Treaty (now Article 94 EC) or Article 100a of the EC Treaty (now, after amendment, Article 95 EC) and the Commission directives enacted under the executive power granted to it by a basic directive based on those articles (‘the directives at issue’). Those directives cover various subjects: chemical substances, fuel standards, noise emissions, packaging waste and genetically modified organisms. None of the directives at issue contains an express provision excluding Gibraltar from its scope.

Pre-litigation procedure

- ¹⁹ As it considered that the United Kingdom had not implemented the directives at issue in respect of Gibraltar, the Commission initiated the infringement procedure under Article 226 EC. Having given the United Kingdom formal notice that it

should submit its observations, the Commission issued a reasoned opinion on 28 July 2000 calling on that Member State to take the measures necessary to comply with it within two months of its notification.

20 The United Kingdom contended that, as the directives at issue were intended to remove barriers to trade in goods on the internal market, it was not necessary to implement them in Gibraltar.

21 Against that background, the Commission decided to bring this action.

The proceedings

Arguments of the parties

22 The Commission, supported by the Kingdom of Spain, argues, on the basis of the fact that Gibraltar is a Crown Colony for whose external relations the United Kingdom is responsible, that the Treaty provisions apply to that territory pursuant to Article 299(4) EC. It argues, as does the Spanish Government, that an exception to the rule that Community law applies to Gibraltar can be provided for only by way of an express exclusion or derogation from that rule.

23 The Commission recalls that, under the UK Act of Accession, certain Treaty provisions do not apply to Gibraltar. Those derogations, laid down in Articles 28,

29 and 30 of that Act, do not cover the legislation adopted by the Communities under Articles 94 EC or 95 EC on the approximation of laws.

24 According to the Commission, supported by the Kingdom of Spain, the UK Act of Accession provides for the following derogations only:

- Acts concerning agricultural products and acts of harmonisation of legislation concerning turnover taxes are not applicable to Gibraltar by virtue of Article 28 of that Act of Accession in so far as that Act constitutes an adjustment to the Treaties;

- Gibraltar is excluded from the customs territory provision under Regulation No 1496/68 by virtue of Article 29 of and Annex I, Section I, point 4, to the Act of Accession;

- The commercial policy provisions under Regulation No 1025/70 are not applicable to Gibraltar by virtue of Article 30 of and Annex II, Section VI to the Act of Accession, which is listed as an adaptation to acts adopted by the institutions.

25 The Commission also points out that the directives at issue do not contain derogations as regards their applicability to Gibraltar.

- 26 According to general principles, exceptions to Community law must be interpreted strictly. As a rule, the exclusion of a territory from the scope of Community law is effected by means of an express exclusion included either in the Treaty or in secondary legislation.
- 27 If the United Kingdom intended to rule out the application of instruments adopted under Articles 94 EC or 95 EC, the UK Act of Accession should have made express provision for that.
- 28 The Commission, supported by the Kingdom of Spain, also argues that using the legal basis as the sole criterion to determine whether a directive must be implemented in Gibraltar is not always logical in terms of environmental protection.
- 29 It points out *inter alia* that if the distinction made by the United Kingdom were upheld by the Court, most of the legislation on waste would apply to Gibraltar, while the specific legislation on packaging waste, set out in Directive 94/62, and on used batteries, set out in Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38), would not apply to it as those two directives are based on Article 100a of the Treaty.
- 30 According to the Spanish Government, the fact that the legislation on the common customs territory does not apply to Gibraltar cannot entail that the principle of the free movement of goods is inapplicable to it. That government argues that inclusion within that territory is only a small part of the principle of the free movement of goods, which includes, as well as a common customs tariff (Article 26 EC), the prohibition of customs duties on imports and exports

between Member States (Articles 23(1) EC and 25 EC) and the prohibition, between those States, of quantitative restrictions on imports and exports and all measures having equivalent effect (Articles 28 EC and 29 EC).

- 31 Thus it is entirely possible for a part of the territory of the Community to be excluded from the common customs territory and yet be subject in its trade exchanges with the rest of the Community to the prohibition of customs duties and charges having equivalent effect and quantitative restrictions on imports and exports and measures having equivalent effect.
- 32 The Spanish Government mentions, by way of example, the Spanish territories of Ceuta and Melilla. It points out that, in accordance with Article 25 of the Act of Accession of Spain and Portugal, the Treaties apply to those territories subject to the exceptions contained in that Act. It points out that Article 1 of Protocol No 2 provides that Ceuta and Melilla are not included within the customs territory of the Community. However, while goods from non-member countries brought into those territories and subsequently imported into the customs territory of the Community are subject to the general arrangements for foreign trade (Article 1(5) of Protocol No 2), there is, in respect of goods originating in those territories and brought into the customs territory of the Community and goods originating in the customs territory of the Community and brought into those territories, complete exemption from customs duties and charges having equivalent effect (Articles 2(1) and 6(1) of Protocol No 2).
- 33 Furthermore, the Spanish Government argues that the objective of the regime established by Articles 14 EC, 94 EC and 95 EC is the approximation of the laws of the Member States for the establishment and functioning of the internal market and that it has a much broader aim and scope than simply the free movement of goods, as it deals also with the free movement of persons, services and capital. If the United Kingdom's interpretation equating the internal market with the free

movement of goods were upheld, it would be mistakenly concluded that Gibraltar is excluded from the internal market and that, consequently, not only the provisions on free movement of goods but also the rules on free movement of persons, services and capital do not apply to it.

34 The United Kingdom Government contends that the provisions of the Treaty on the free movement of goods do not apply to Gibraltar and that, therefore, the same is true of directives based on Articles 94 EC or 95 EC which are intended to remove barriers to trade in goods between the Member States.

35 According to that government, the exclusion of Gibraltar from the customs territory of the Community entails the inapplicability of the Treaty provisions on the free movement of goods (Articles 28 EC to 30 EC). That necessarily implies that harmonisation measures legally dependent on those provisions are also inapplicable to Gibraltar. Accordingly, it is not necessary to provide specifically in the directives at issue for the exclusion of Gibraltar.

36 However, the United Kingdom Government accepts that the other directives on the internal market, which are not excluded by specific provisions concerning Gibraltar, and in particular those concerning the removal of barriers to the freedom to provide services, are applicable to it.

37 More specifically, the United Kingdom Government outlines various arguments which, it contends, preclude the application of the directives at issue to Gibraltar.

- 38 At the time of the negotiations over the provisions of the UK Act of Accession concerning Gibraltar, the maintenance of that possession's status as a free port and, consequently, its exclusion from the common market in goods, both as regards the Treaty provisions on the free movement of goods and in the light of those governing the common commercial policy, were not considered controversial. The maintenance of Gibraltar's status was considered, in that respect, as a technical question rather than a divisive policy issue in those negotiations. The technical solution adopted was a series of derogations from the *acquis communautaire* as regards the application of the Treaty provisions and secondary legislation on the operation of the common market in goods.
- 39 Although Gibraltar was no longer to have the status of third country as a result of the accession of the United Kingdom to the EEC Treaty, which from then on applied to Gibraltar subject to the special provisions of the UK Act of Accession, its position remained comparable to that of a third country in respect of trade in goods both with Member States and with third countries.
- 40 At the time of those negotiations, Annex II to Regulation No 1025/70 contained a list of third countries and territories to which that regulation applied. Gibraltar was on that list. The UK Act of Accession deleted Gibraltar from that list, thus confirming that its status was no longer that of a third country or territory (Annex I, Section VIII (Commercial policy) to that Act).
- 41 According to the United Kingdom Government, as Gibraltar no longer enjoyed the status of third country, exports from it to the Member States no longer qualified for access under the Community's import liberalisation system. The draughtsmen of the accession instruments were aware that this could place Gibraltar in a worse position as regards exports of goods to the Member States after the accession of the United Kingdom than it had been in before. That is why

Annex II, Section VI (Commercial policy) to the UK Act of Accession includes a guideline which states that 'the problem created by the deletion of the reference to Gibraltar in Annex II is to be solved in such a way as to ensure that Gibraltar is in the same position with regard to the Community's import liberalisation system as it was before accession'.

- 42 It is clear from those provisions that, although Gibraltar is no longer included on the list of third countries in Annex II to Regulation No 1025/70, its position as regards access to the markets of the Member States remains the same as it was before accession.
- 43 The United Kingdom Government recalls that Article 24 EC provides that products coming from a third country are to be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State. Since Articles 28 EC and 30 EC on the removal of quantitative restrictions and measures having equivalent effect apply to goods from third countries, on which duty has been paid, and such duties are payable under the common external tariff where those goods enter the customs territory of the Community, the scope of those articles, like that of the Treaty provisions concerning the abolition of customs duties and charges having equivalent effect, is limited to that territory.
- 44 That government points out, by way of example, that the application to Gibraltar of a directive adopted under Article 94 EC or 95 EC, on the packaging and labelling of products, could hinder the importation into Gibraltar of goods from third countries and undermine the liberty of Gibraltar as a free port to import goods from third countries on terms and conditions to be determined by the authorities of Gibraltar.

- 45 The United Kingdom Government accepts that acts of the institutions under Article 94 EC or 95 EC to remove hindrances to trade in goods may also pursue other objectives, for example, the protection of consumers, public health or the environment. However, it submits that, in the case of measures properly adopted under one or the other of those articles, such other objectives are harmonised to the extent necessary to remove hindrances to the free movement of goods, and it is the latter aim which justifies recourse to those articles as a legal basis for the measures in question.
- 46 As regards the arguments concerning the legal position of Ceuta and Melilla, the United Kingdom Government submits that the exclusion of Ceuta and Melilla from the common customs territory does have the effect of excluding the application of the Treaty provisions on the free movement of goods and that Protocol No 2 applies special provisions, in lieu of those provisions, to trade in goods between Ceuta and Melilla and Member States, and those provisions derive their force and effect from Protocol No 2 itself.

Findings of the Court

- 47 Under Article 299(4) EC, the Treaty applies to Gibraltar as it is a Crown Colony for whose external relations the United Kingdom is responsible. However, under the UK Act of Accession, certain Treaty provisions do not apply to Gibraltar. The territory is *inter alia* excluded from the customs territory of the Community, as defined in Article 1 of Regulation No 1496/68 and Article 29 of that Act and in Annex I, Section I, point 4, thereto.

- 48 In order to assess the merits of the Commission's action, it must be considered whether the directives at issue, which are intended to remove barriers to trade in goods between the Member States and which are based on Articles 94 EC or 95 EC, are applicable to Gibraltar.
- 49 According to Article 23(1) EC, the Community is to be based upon a customs union which is to cover all trade in goods and which is to involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
- 50 Under Article 23(2) EC, the measures laid down for the liberalisation of intra-Community trade apply in the same way both to products originating in Member States and to products coming from third countries which are in free circulation in the Community (see Case 41/76 *Donckerwolcke and Schou* [1976] ECR 1921, paragraph 15).
- 51 The customs union incorporates a common customs tariff intended to bring about equalisation of the charges borne at the external frontiers of the Community by products imported from non-member countries, in order to ensure that trade with such countries is not diverted and that the free movement of products between Member States and the conditions of competition between economic agents are not distorted (see Case C-125/94 *Aprile* [1995] ECR I-2919, paragraph 32).
- 52 The Treaty sought to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect in order to ensure the free movement of goods (Joined Cases 2/69 and 3/69 *Brachfeld and Chougol* [1969] ECR 211, paragraph 12).

- 53 The customs union necessarily implies that the free movement of goods should be ensured between Member States (Case 266/81 *SIOT* [1983] ECR 731, paragraph 16) and, in more general terms, within the customs union (see Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957, paragraph 29).
- 54 It is clear from Article 23 EC that, as regards free circulation of goods within the Community, products entitled to ‘free circulation’ are definitively and wholly assimilated to products originating in Member States. The result of this assimilation is that the provisions of Article 28 EC concerning the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products (see *Donckerwolcke and Schou*, cited above, paragraphs 17 and 18).
- 55 However, products originating in Gibraltar are not products originating in the Community.
- 56 According to Annex II, Section VI to the UK Act of Accession it was agreed that it would be ensured ‘that Gibraltar is in the same position with regard to the Community’s import liberalisation system as it was before accession’. That provision would not have been necessary if goods originating in Gibraltar had to be considered as originating in the Community and if, as a result, the Community rules on free movement had to be applied to them.
- 57 Similarly, goods imported into Gibraltar are not considered to be in free circulation in a Member State within the meaning of Article 24 EC because they are not subject to the customs duties of the common customs tariff.

- 58 Under Title I of the third part of the Treaty, concerning free movement of goods, Article 23(2) EC provides that Article 25, which prohibits customs duties and charges having equivalent effect, and the whole of Chapter 2 of that title, which concerns the prohibition on quantitative restrictions between Member States, apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States. As products originating in Gibraltar fall within neither of those categories, they are not covered by the Treaty rules on free movement of goods and, in particular, those prohibiting quantitative restrictions between Member States.
- 59 It is clear from all the foregoing that the exclusion of Gibraltar from the customs territory of the Community implies that neither the Treaty rules on free movement of goods nor the rules of secondary Community legislation intended, as regards free circulation of goods, to ensure approximation of the laws, regulations and administrative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it.
- 60 That interpretation is not called into question by the rules applicable to Ceuta and Melilla, which contain an express provision that goods originating in those territories are exempt from customs duties following their release into free circulation in the customs territory of the Community. Rather, those rules confirm the soundness of that interpretation, to the effect that exclusion from the customs territory of the Community entails the inapplicability of the Treaty provisions and secondary legislation on trade in goods, unless otherwise expressly provided.
- 61 Nor can that interpretation be called into question by the Commission's submission that it is paradoxical that, while most of the rules of Community law on the environment are applicable to Gibraltar, that is not the case where such provisions are contained in directives based on Articles 94 EC and 95 EC.

- 62 It is not disputed that the principal objective of the directives at issue is to remove barriers to trade in goods between Member States. They are therefore inextricably tied to the free movement of goods from which Gibraltar is excluded for the reasons set out in paragraph 58 of this judgment.
- 63 Of course, failure to apply the directives at issue to Gibraltar may endanger the consistency of other Community policies, such as environmental protection, where the objectives of those policies are pursued as an ancillary aim by those directives. However, that fact cannot lead to the extension of the territorial scope of those directives beyond the limits imposed by the Treaty and by the UK Act of Accession.
- 64 Accordingly, the Commission's action must be considered unfounded.

Costs

- 65 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 United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of those Rules, the Kingdom of Spain, which intervened in these proceedings, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;
2. Orders the Commission of the European Communities to pay the costs;
3. Orders the Kingdom of Spain to bear its own costs.

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Gulmann	Edward
La Pergola	Jann	Skouris
Macken	Colneric	von Bahr
Cunha Rodrigues		

Delivered in open court in Luxembourg on 23 September 2003.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President

