



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 September 2017¹

Case C-267/16

**Albert Buhagiar,
Wayne Piri,
Stephanie Piri,
Arthur Taylor,
Henry Bonifacio,
Colin Tomlinson,
Darren Sheriff,**

v

The Hon. Gilbert Licudi QC MP Minister for Justice

(Request for a preliminary ruling from the Supreme Court of Gibraltar (United Kingdom))

(Reference for a preliminary ruling — Jurisdiction — **Concept of ‘court or tribunal of a Member State’** — Gibraltar — Article 29 of the Act concerning the Conditions of Accession of the United Kingdom — Customs union — Directive on control of the acquisition and possession of weapons — Directive 91/477 — Interpretation of the provisions concerning hunters and marksmen — European firearms pass — Free movement of goods — Freedom to provide services — Freedom of movement of persons)

I. Introduction

1. In the present case the Supreme Court of Gibraltar has referred questions to the Court for a preliminary ruling on whether Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons,² as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008³ (‘Directive 91/477’), applies to the territory of Gibraltar.

2. More specifically, in view of the special status of Gibraltar, which does not form part of the Union customs territory, the referring court asks whether, even though Directive 91/477 seems to fall within the scope of EU legislation on trade in goods and does not therefore have to be applied to Gibraltar, certain provisions of that directive, which relate to the European firearms pass (‘the pass’) issued to hunters and sports target shooters who are in possession of their weapons for the purposes of making a journey between different Member States, might nevertheless be applicable to Gibraltar.

3. As I will explain in this Opinion, I do not consider this to be the case.

¹ Original language: French.

² OJ 1991 L 256, p. 51.

³ OJ 2008 L 179, p. 5.

II. Legislative framework

4. Under Article 355 TFEU:

‘In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

...

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

...’

5. Article 28 of the Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the Adjustments to the Treaties⁴ (‘the 1972 Act of Accession’) provides:

‘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.’

6. Under Article 29 of the 1972 Act of Accession, in conjunction with point 4 of Section I of Annex I thereto, Gibraltar does not form part of the Community customs territory.

7. According to the third to seventh recitals of Directive 91/477:

‘... in its white paper “Completing the internal market” the Commission stated that the abolition of controls on the safety of objects transported and on persons entails, among other things, the approximation of weapons legislation;

... abolition of controls on the possession of weapons at intra-Community frontiers necessitates the adoption of effective rules enabling controls to be carried out within Member States on the acquisition and possession of firearms and on their transfer to another Member State ...;

... the mutual confidence in the field of the protection of the safety of persons which these rules will generate between Member States will be the greater if they are underpinned by partially harmonised legislation; ... it would therefore be useful to determine category of firearms whose acquisition and possession by private persons are to be prohibited, or subject to authorisation, or subject to declaration;

... passing from one Member State to another while in possession of a weapon should, in principle, be prohibited; ... a derogation therefrom is acceptable only if a procedure is adopted that enables Member States to be notified that a firearm is to be brought into their territory;

... however, more flexible rules should be adopted in respect of hunting and target shooting in order to avoid impeding the free movement of persons more than is necessary’.

⁴ OJ 1972 L 73, p. 14.

8. Under Article 1(1) of Directive 91/477:

‘For the purposes of this Directive, “firearm” shall mean any portable barrelled weapon that expels, is designed to expel or may be converted to expel a shot, bullet or projectile by the action of a combustible propellant, unless it is excluded for one of the reasons listed in Part III of Annex I. Firearms are classified in part II of Annex I.

...’

9. Article 1(4) of Directive 91/477 reads as follows:

‘A ... pass shall be issued on request by the authorities of a Member State to a person lawfully entering into possession of and using a firearm. It shall be valid for a maximum period of five years, which may be extended, and shall contain the information set out in Annex II. It shall be non-transferable and shall record the firearm or firearms possessed and used by the holder of the pass. It must always be in the possession of the person using the firearm and any change in the possession or characteristics of the firearm as well as the loss or theft thereof, shall be indicated on the pass.’

10. Article 3 of Directive 91/477 provides:

‘Member States may adopt in their legislation provisions which are more stringent than those provided for in this Directive, subject to the rights conferred on residents of the Member States by Article 12(2).’

11. Article 8(3) of Directive 91/477 provides:

‘3. If a Member State prohibits or makes subject to authorisation the acquisition and possession within its territory of a firearm classified in category B, C or D, it shall so inform the other Member States, which shall expressly include a statement to that effect on any ... pass they issue for such a firearm, pursuant to Article 12(2).’

12. Article 11(1) of Directive 91/477 states:

‘1. Firearms may, without prejudice to Article 12, be transferred from one Member State to another only in accordance with the procedure laid down in the following paragraphs. These provisions shall also apply to transfers of firearms following a mail order sale.’

13. Article 12(1) and (2) of Directive 91/477 read as follows:

‘1. If the procedure provided for in Article 11 is not employed, the possession of a firearm during a journey through two or more Member States shall not be permitted unless the person concerned has obtained the authorisation of each of those Member States.

Member States may grant such authorisation for one or more journeys for a maximum period of one year, subject to renewal. Such authorisations shall be entered on the ... pass, which the traveller must produce whenever so required by the authorities of the Member States.

2. Notwithstanding paragraph 1, hunters, in respect of categories C and D, and marksmen, in respect of category B, C and D, may, without prior authorisation, be in possession of one or more firearms during a journey through two or more Member States with a view to engaging in their activities, provided that they are in possession of a ... pass listing such firearm or firearms and provided that they are able to substantiate the reasons for their journey, in particular by producing an invitation or other proof of their hunting or target shooting activities in the Member State of destination.

Member States may not make acceptance of a... pass conditional upon the payment of any fee or charge.

However, this derogation shall not apply to journeys to a Member State which prohibits the acquisition and possession of the firearm in question or which, pursuant to Article 8(3), makes it subject to authorisation; in that case, an express statement to that effect shall be entered on the ... pass.

...'

14. Annex I to Directive 91/477 includes the definition of firearms, which are then categorised as follows: Category A — Prohibited firearms, Category B — Firearms subject to authorisation, Category C — Firearms subject to declaration, and Category D — Other firearms.

15. Annex II specifies the sections which the pass must include. That annex includes, in paragraph (f), the following statements:

'The right to travel to another Member State with one or more of the firearms in categories B, C or D mentioned in this pass shall be subject to one or more prior corresponding authorisations from the Member State visited. This or these authorisations may be recorded on the pass.

The prior authorisation referred to above is not in principle necessary in order to travel with a firearm in categories C or D with a view to engaging in hunting or with a firearm in categories B, C or D for the purpose of taking part in target shooting, on condition that the traveller is in possession of the firearms pass and can establish the reason for the journey.

Where a Member State has informed the other Member States, in accordance with Article 8(3), that the possession of certain firearms in categories B, C or D is prohibited or subject to authorisation, one of the following statements shall be added:

"A journey to ... (State(s) concerned) with the firearm ... (identification) shall be prohibited."

"A journey to ... (State(s) concerned) with the firearm ... (identification) shall be subject to authorisation."

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

16. The applicants in the main proceedings are all members of the Gibraltar Target Shooting Association. On 19 May 2015 Albert Buhagiar, President of the Association, wrote to the defendant, the Minister for Justice of Gibraltar ('the Minister for Justice'), requesting that he issue passes to each of the individual applicants in the main proceedings.

17. On 2 June 2015, the Minister for Justice replied stating that, in view of the position of both the European Commission and the United Kingdom Government that Directive 91/477 did not apply to Gibraltar, the Gibraltar Government had decided not to undertake its transposition. As a result, the Minister for Justice was not able to issue to the applicants in the main proceedings the passes for which they had applied. Following that refusal, the applicants in the main proceedings brought the matter before the referring court.

18. The referring court states that EU law is fully applicable to Gibraltar under Article 355(3) TFEU, except in respect of the exceptions provided for in Articles 28 to 30 of the 1972 Act of Accession. Article 29 of that Act, in conjunction with point 4 of Section I of Annex I thereto, provides that Gibraltar does not form part of the common customs territory of the Union.

19. According to the referring court, the Court clarified the effect of that exclusion in its judgment of 23 September 2003, *Commission v United Kingdom* (C-30/01, EU:C:2003:489, paragraph 59), in which it held that the application of directives which had Articles 114 and 115 TFEU as their legal basis and which had the free movement of goods as their principal objective is excluded in the territory of Gibraltar.

20. Nevertheless, according to the referring court, the applicants in the main proceedings raise novel arguments.

21. First, they assert that, in view of the purpose of the derogations laid down by the 1972 Act of Accession and in the light of the principle that exceptions must be interpreted strictly, acts of EU law on the free movement of goods that do not undermine the purpose of the derogations laid down by the 1972 Act of Accession should apply to Gibraltar. According to the applicants in the main proceedings, that should be the case with the provisions of Directive 91/477 concerning the pass, which are intended to benefit hunters and sports target shooters. The pass is granted for the exclusive purpose of travelling to and from Member States in order to participate in sporting events, without involving any commercial transaction in respect of the goods in question.

22. Second, the applicants in the main proceedings maintain that the provisions concerning the pass come under the freedom to provide services. As such, they are applicable to Gibraltar and must therefore be transposed in that territory. Non-transposition creates discrimination within the meaning of Article 56 TFEU against Gibraltar-resident hunters and sports target shooters, who have to incur extra expenditure and administrative delays when travelling within the EU with their firearms to take part in hunting or shooting events and competitions. Those firearms do not constitute goods in the context of trade, but sporting equipment necessary for their activity.

23. Last, and in the alternative, the applicants in the main proceedings challenge the validity of Directive 91/477. They claim that the provisions of Directive 91/477 concerning the pass relate to the free movement of persons. This is confirmed by the seventh recital of the directive. Consequently, that directive was adopted on the wrong legal basis. The directive is based on Article 100a of the Treaty establishing the European Economic Community (subsequently the first paragraph of Article 95 EC and now Article 114 TFEU), when Article 100a(2) of the EEC Treaty excludes the possibility of adopting measures on the free movement of persons.

24. In those circumstances, the referring court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) If the ... provisions [of Directive 91/477 concerning the pass] concern only the free movement of goods, can they nonetheless apply to Gibraltar on the basis that they do not involve a trade or commercial transaction and are therefore outside the scope of the derogations granted to Gibraltar under the 1972 Act of Accession?
- (2) Are the provisions of ... Directive [91/477] concerning the [pass], as regards hunters and sports target shooters, applicable to Gibraltar on the ground that they concern the free movement of services?
- (3) Are the provisions of ... Directive [91/477] concerning the [pass], as regards hunters and sports target shooters, invalid on the ground that they concern the free movement of persons and have therefore been adopted under the wrong legal basis?’

25. The applicants in the main proceedings, the Minister for Justice, the United Kingdom Government, the European Parliament, the Council of the European Union and the European Commission submitted written observations on these questions. These interested parties also presented oral argument at the hearing on 16 May 2017.

IV. The Court's jurisdiction

26. This is the first time that the Court has been requested to give a preliminary ruling by the Supreme Court of Gibraltar. Despite Gibraltar's special status in EU law, neither the referring court nor the interested parties have called into question the status of the Supreme Court of Gibraltar as a court or tribunal within the meaning of Article 267 TFEU.

27. I concur with that position.

28. First of all, it is not disputed that the provisions of the Treaties apply to Gibraltar under Article 355(3) TFEU in so far as the United Kingdom is responsible for the external relations of that European territory.

29. It must be pointed out in this regard that, according to Article 1(3) of the 1972 Act of Accession, the provisions concerning the powers and jurisdiction of the institutions of the Communities are to apply in respect of that Treaty. Accordingly, the jurisdiction in preliminary ruling proceedings conferred on the Court by Article 267 TFEU extends to the 1972 Act of Accession.⁵

30. Second, the Court has recognised judicial bodies of other European territories governed by the various paragraphs of Article 355 TFEU as having the status of a court or tribunal within the meaning of Article 267 TFEU. For example, with regard to the Channel Islands and the Isle of Man, in respect of which Article 355(5)(c) TFEU provides that the Treaties apply to them only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the 1972 Act of Accession, the Court acknowledged that courts and tribunals established in those territories are empowered to refer questions to it in order to ensure the uniform application of EU law, as it is applicable in those territories.⁶ This approach was confirmed implicitly in a reference for a preliminary ruling made by a court from the Åland Islands; as we know, the application of EU law in that territory of the Republic of Finland is governed under Article 355(4) TFEU.⁷

31. In the present case, the referring court wishes to know to what extent Directive 91/477 might apply to the territory of Gibraltar, having regard to Gibraltar's status.

32. It is clear that this issue concerns the uniform application of EU law within the meaning of the case-law cited in point 30 of this Opinion. I therefore consider that the Supreme Court of Gibraltar must be regarded as a court or tribunal empowered to refer questions to the Court pursuant to Article 267 TFEU.

V. The questions referred for a preliminary ruling

33. Article 355(3) TFEU extends the applicability of the provisions of EU law to the territory of Gibraltar, subject to the exclusions expressly provided for in the 1972 Act of Accession.

34. Those exclusions apply to the provisions of EU law on the free movement of goods⁸ but not to those relating to the freedom to provide services⁹ or the free movement of persons.

⁵ See, by analogy, judgment of 3 July 1991, *Barr and Montrose Holdings* (C-355/89, EU:C:1991:287, paragraph 8).

⁶ Judgments of 3 July 1991, *Barr and Montrose Holdings* (C-355/89, EU:C:1991:287, paragraphs 9 and 10); of 16 July 1998, *Pereira Roque* (C-171/96, EU:C:1998:368); and of 8 November 2005, *Jersey Produce Marketing Organisation* (C-293/02, EU:C:2005:664). See also Opinion of Advocate General La Pergola in *Pereira Roque* (C-171/96, EU:C:1997:425, point 24).

⁷ Judgment of 13 November 2003, *Lindman* (C-42/02, EU:C:2003:613).

⁸ See judgment of 23 September 2003, *Commission v United Kingdom* (C-30/01, EU:C:2003:489, paragraph 59).

⁹ Judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15, EU:C:2017:449, paragraphs 30 and 39).

35. As is clear from the reasoning in the order for reference and the wording of the questions referred for a preliminary ruling, the national court has no doubt that Directive 91/477 falls within the scope of the free movement of goods, at least mainly, which should mean a priori that it is not applicable in the territory of Gibraltar under Article 29 of the 1972 Act of Accession.

36. I fully accept the premiss of the referring court's reasoning, that Directive 91/477 is among the provisions of EU law concerning the free movement of goods.

37. That interpretation follows from the findings made by the Court in the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143). The Court concluded, in the light of the objectives pursued and the general scheme and context of Directive 91/477, that that measure introduced effective rules to harmonise some of the administrative requirements relating to *the acquisition of firearms, their possession and their cross-border transport*.¹⁰ It is therefore an instrument relating to the control and movement of firearms, in so far as firearms fall within the category of goods.

38. That does not, however, answer the questions referred by the national court.

39. The referring court seeks, in essence, to ascertain *to what extent* Article 12(2) of the directive, which deals with the procedure relating to the possession of firearms during journeys between two or more Member States made by hunters or sports target shooters in possession of the pass, could nevertheless be isolated, separable from the general character of Directive 91/477 as an instrument connected with the free movement of goods, and could, therefore, be applicable in the territory of Gibraltar. In this regard, the referring court envisages three distinct situations.

40. The first relates to the question whether Article 12(2) of Directive 91/477 could be an exception to the exclusion provided for in Article 29 of the 1972 Act of Accession on the ground that Article 29 is to be interpreted strictly and that only measures involving commercial transactions or trade do not apply to Gibraltar. This situation is based on the assumption that the procedure governed by Article 12(2) of Directive 91/477 does not involve such commercial transactions or trade.

41. The second and third situations — which correspond to the second and third questions respectively — are secondary alternatives. On the one hand, the referring court seeks to ascertain whether Article 12(2) of Directive 91/477 could fall within the scope of the freedom to provide services and, as a result, be applicable to the territory of Gibraltar. On the other, whilst it formulates its question from the perspective of the validity of Directive 91/477, the referring court asks, in essence, whether Article 12(2) of Directive 91/477 falls within the scope of free movement of persons, and, if so, what the consequences of that would be.

42. I do not find any of these situations convincing.

43. In order to answer the three questions asked by the referring court, I consider it necessary, first of all, to examine the nature of the provisions of Directive 91/477 concerning the pass, in particular Article 12(2). That examination will enable the second and third questions to be answered in so far as Article 12(2) of Directive 91/477 pursues a twofold aim, the main aim relating to the movement of goods. Second, it will be necessary to answer the first question, which seeks to ascertain, in the light of a strict interpretation of Article 29 of the 1972 Act of Accession, whether the free movement of goods has a limited scope in relation to Gibraltar. I will state at this juncture that, in my view, this situation must be ruled out. Last, in case the Court does not agree with my view and considers that Article 12(2) of Directive 91/477 pursues a twofold aim (free movement of goods and free movement of persons), without one aim taking precedence over the other, I will make a few remarks in the alternative regarding the inferences to be drawn from such an approach in the main proceedings.

¹⁰ Judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143, paragraphs 43 and 47).

A. The nature of Article 12(2) of Directive 91/477 and the free movement of services or persons

44. The applicants in the main proceedings claim, in essence, that Article 12(2) of Directive 91/477 pursues an objective independent of the objective of the free movement of goods. First, the one and only purpose of that article is to facilitate journeys by hunters and sports target shooters in possession of their firearms in order to allow them to provide and receive services within the European Union. Second, and in the alternative, Article 12(2) of Directive 91/477 seeks, according to the applicants, to facilitate the movement of hunters and sports target shooters through the European Union with their firearms. In support of their arguments, the applicants in the main proceedings invoke the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143).

45. I note that Article 12 of Directive 91/477 lays down a procedure relating to the movement of firearms in the possession of an individual during a journey between two or more Member States.

46. Under Article 12(1) of Directive 91/477, the person concerned must have obtained the prior authorisation of those Member States, which is entered on the pass defined in Article 1(4) of that directive.

47. Notwithstanding that procedure, Article 12(2) of Directive 91/477 grants hunters and sports target shooters the right to travel within the European Union without prior authorisation with the categories of firearms mentioned in that article, provided that they possess a pass listing such firearm or firearms and provided that they are able to substantiate the reasons for their journey.

48. When asked about the scope of the provisions of Directive 91/477 concerning the pass in respect of hunters and sports target shooters, the Court acknowledged, in the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143), that those provisions do pursue an aim of facilitating the cross-border movement of hunters and sports target shooters in possession of their weapons, although that aim does not take precedence over the main objective of the directive relating to the acquisition, possession and movement of weapons.

49. Whilst it is true that paragraphs 53 and 57 of the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143) state, respectively, that Directive 91/477 expressly confers a right on hunters and sports target shooters and that ‘the purpose of the introduction of the ... pass [was] to facilitate the free movement of hunters and [sports target shooters] in possession of their weapons from one Member State to another to the extent strictly necessary to achieve that objective’, paragraph 52 states that ‘Article 1(4) of Directive 91/477, read in conjunction with Article 12(2) thereof, *is intended mainly to facilitate the transport of weapons* used for hunting or sporting purposes’.¹¹

50. This argument is supported by the seventh recital of Directive 91/477 and by the general scheme of the directive. First, the seventh recital states that more flexible rules adopted in respect of hunting and target shooting must not impede the free movement of persons more than is necessary. Second, it should be noted that Article 12(2) of Directive 91/477 is part of Chapter 3 of the directive, entitled ‘Formalities for the *movement of weapons* within the Community’.¹² In addition, the movement of hunters and sports target shooters, even those holding a pass, may be limited under Article 8(3) of Directive 91/477 where a Member State prohibits the acquisition and possession within its territory of a firearm classified in the categories mentioned in that article. Such a prohibition is not based on a personal criterion relating to the individual characteristics of the persons concerned, but on a substantive criterion, namely the category of weapons at issue.

¹¹ My italics.

¹² My italics.

51. The analysis conducted by the Court in the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143) therefore contradicts one of the arguments put forward by the applicants in the main proceedings, claiming that the centre of gravity test for an act of EU secondary legislation is limited to disputes having concurrent legal bases.

52. It is true that this test is regularly used in determining the appropriate legal basis for an act of EU secondary legislation. Under that test, the choice of the legal basis for a Union measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure. If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant aim or component. With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases.¹³

53. However, the case-law shows that such a test is also, essentially, used by the Court where it is necessary, for example, to determine the freedom(s) of movement guaranteed by EU law in the light of which national legislation relating to more than one of those freedoms must be examined¹⁴ or to classify a certain complex supply in the field of value added tax as a 'supply of goods' or a 'supply of services'.¹⁵ It is thus a general test. Where that test relates to an act of EU secondary legislation, it makes it possible to identify the aim(s) of that act, in particular with a view to interpreting its provisions and, where necessary, to determining the appropriate legal basis or bases for the act.

54. Well before the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143), the test was applied in the judgment of 23 September 2003, *Commission v United Kingdom* (C-30/01, EU:C:2003:489) in relation to the alleged failure to transpose a number of directives in the territory of Gibraltar, in which the legal basis of those acts was not called into question, showing that the centre of gravity test is not exclusively used in finding the appropriate legal basis for an act of EU secondary legislation.

55. Furthermore, in the judgment of 23 September 2003, *Commission v United Kingdom* (C-30/01, EU:C:2003:489), the Court ruled that the principal objective of those directives was to remove barriers to trade in goods between Member States and was therefore covered by the exclusion of the application of the free movement of goods to the territory of Gibraltar under Article 29 of the 1972 Act of Accession. Although those directives also pursue objectives of environmental protection, those objectives were held to be simply ancillary (which was insufficient for those directives to be permitted to apply to the territory of Gibraltar). The Court thus did not accept that the United Kingdom had failed to fulfil its obligations, as claimed by the Commission.

56. Comparable reasoning can legitimately be put forward in the present case, as has rightly been suggested by both the United Kingdom Government and the three institutions which submitted observations to the Court. With regard to Article 12(2) of Directive 91/477, and in accordance with the assessment made in points 48 to 50 of this Opinion, the aim relating to the free movement of persons remains ancillary to the main or predominant aim of that article relating to the movement of firearms.

¹³ See, inter alia, judgment of 19 July 2012, *Parliament v Council* (C-130/10, EU:C:2012:472, paragraphs 42 to 45).

¹⁴ See, for example, with regard to the relationship between the free movement of goods and the freedom to provide services, judgments of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraph 43), and of 16 December 2010, *Josemans* (C-137/09, EU:C:2010:774, paragraph 50). See also, in the same vein, with regard to the relationship between the freedom of establishment and the freedom to provide services, inter alia, judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 36 and the case-law cited).

¹⁵ See, inter alia, judgment of 29 March 2007, *Aktiebolaget NN* (C-111/05, EU:C:2007:195, paragraphs 27 and 28 and the case-law cited).

57. On the basis of that assessment, it is now possible to answer the second and third questions referred.

58. First, contrary to the claim made by the applicants in the main proceedings regarding the freedom to provide services, I find that no provision of Directive 91/477 is intended to regulate or organise the provision and enjoyment of services offered by shooting facilities or hunting reserves, as is implicit from the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143). Although the provision of such services can obviously be facilitated by the possibility made available to hunters and sports target shooters of travelling with their firearms, this is merely an incidental consequence of the adoption of Article 12(2) of Directive 91/477.

59. Furthermore, the pass constitutes a travel document, but certainly not an authorisation to engage in shooting or a hunting licence.¹⁶ A fortiori, it does not replace the authorisations to engage in such activities issued by sports shooting facilities or owners of hunting reserves. Therefore, no analogy can be drawn between the issue of the pass and the grant by a natural or legal person of rights to fish in waters, in the case which gave rise to the judgment of 21 October 1999, *Jägerskiöld* (C-97/98, EU:C:1999:515, paragraph 36), on which the applicants in the main proceedings rely, wrongly in my view.

60. The second question referred by the national court should therefore, in my view, be answered to the effect that Directive 91/477 does not concern the freedom to provide services.

61. As regards the third question referred, it can be stated, based on the foregoing analysis, that in so far as the main objective of Directive 91/477, including Article 12(2) thereof, falls within the scope of the free movement of goods, that act could, in accordance with the case-law cited in point 52 of this Opinion, be legitimately based on Article 100a(1) of the EEC Treaty (now Article 114(1) TFEU), since Directive 91/477 is a measure to harmonise provisions laid down by administrative action in Member States relating to the acquisition, possession and cross-border movement of firearms, which has as its object the establishment and functioning of the internal market.

62. As the main aim of Directive 91/477, including Article 12(2), is the movement of firearms, it must now therefore be examined whether, as is claimed by the applicants in the main proceedings, the scope of the free movement of goods is affected by the need for a strict interpretation of Article 29 of the 1972 Act of Accession.

B. Strict interpretation of Article 29 of the 1972 Act of Accession and its impact on the scope of the free movement of goods in relation to Gibraltar

63. The applicants in the main proceedings maintain that Article 29 of the 1972 Act of Accession must be interpreted strictly.

64. That argument is consistent with the Court's interpretation of that article in its judgment of 21 July 2005, *Commission v United Kingdom* (C-349/03, EU:C:2005:488). The Court ruled that while, under Article 29 of the 1972 Act of Accession, Gibraltar does not form part of the Community customs territory, that exception must be interpreted strictly.¹⁷ For that reason, in that judgment, the Court held that an act of secondary law in respect of mutual assistance by the competent authorities in the

¹⁶ See, to that effect, judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143, paragraph 51).

¹⁷ Judgment of 21 July 2005, *Commission v United Kingdom* (C-349/03, EU:C:2005:488, paragraph 51).

field of excise duties was applicable in the territory of Gibraltar, even though the provisions 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 products¹⁸ concerning the harmonisation of the substantive laws on excise duties do not apply to Gibraltar.¹⁹

65. I am prepared to accept that it is necessary to interpret an exception to the application of EU law to the territory of Gibraltar strictly. Nevertheless, the extent of the Community customs territory is not affected by such strict interpretation.

66. In other words, this always means that, as the Court has held, the exception in Article 29 of the 1972 Act of Accession, that is, ‘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 [114 and 115 TFEU] are applicable to it’.²⁰

67. This is not therefore inconsistent with the judgment of 21 July 2005, *Commission v United Kingdom* (C-349/03, EU:C:2005:488, paragraphs 52 and 53), since in that case the Court only dealt with the applicability to the territory of Gibraltar of an act of secondary law *which did not seek to approximate the Member States’ substantive laws on excise duties*.

68. In the present case, however, it is undeniable that the object of Directive 91/477 is to harmonise some of the administrative requirements relating to the acquisition of weapons, their possession and their cross-border transport in accordance with Article 100a(1) of the EEC Treaty (now Article 114(1) TFEU), as the Court held in the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143, paragraph 47).

69. Contrary to the claim made by the applicants in the main proceedings, the strict interpretation of Article 29 of the 1972 Act of Accession does not imply that the free movement of goods should be given a narrower interpretation in relation to Gibraltar than follows from the provisions of the FEU Treaty.

70. In particular, I cannot see how such a freedom could be reduced to commercial transactions or trade so that Article 12(2) of Directive 91/477 could apply to Gibraltar.

71. Even if we were to accept the argument presented by the applicants in the main proceedings that the journey of a hunter or sports target shooter with his firearm does not involve commercial transactions or trade, the fact remains that this situation still falls within the scope of the free movement of goods. Thus, in the judgment of 3 December 2015, *Pfotenhilfe-Ungarn* (C-301/14, EU:C:2015:793, paragraphs 46 and 47), the Court stated that the customs union covers all trade in goods and that the provisions of the FEU Treaty on free movement of goods apply irrespective of whether the goods concerned are being transported across national frontiers for the purposes of sale or resale, or rather *for personal use or consumption*.

72. That is why the firearms covered by Directive 91/477 all fall within the scope of the free movement of goods, irrespective of whether their transfer within the EU takes place, for example, in the context of a mail order sale or a journey by a hunter or a sports target shooter.

¹⁸ OJ 1992 L 76, p. 1.

¹⁹ Judgment of 21 July 2005, *Commission v United Kingdom* (C-349/03, EU:C:2005:488, paragraphs 52 and 53).

²⁰ Judgment of 23 September 2003, *Commission v United Kingdom* (C-30/01, EU:C:2003:489, paragraph 59).

73. To contemplate a different legal regime in EU law depending on whether goods are sold or are for personal use would create insurmountable practical difficulties. The same goods would either fall within the scope of the free movement of goods or not according to their use, whether commercial or personal, that is, based on a subjective criterion which would have to be determined on a case-by-case basis.

74. In the light of the foregoing analysis, the strict interpretation of Article 29 of the 1972 Act of Accession does not mean that the free movement of goods is limited to goods which are the object of commercial transactions or trade. Consequently, all the provisions of Directive 91/477 fall within the scope of that freedom and, in accordance with Article 29 of the 1972 Act of Accession, none of those provisions apply to the territory of Gibraltar.

C. Remarks in the alternative concerning the answer to the third question

75. In the event that the Court were not to concur with the above analysis and were to consider that Article 12(2) of Directive 91/477 pursues an aim of free movement of goods and of persons inseparably, without the former taking precedence over the latter, it would clearly follow that the directive would be invalid. Directive 91/477 would then have an insufficient legal basis, since Article 100a(2) of the EEC Treaty provides that paragraph 1 of that article does not apply to provisions concerning the free movement of persons.

76. In that case, the question of the possible detachable or separable character of the provisions of Directive 91/477 concerning the pass with reference to its other provisions does not arise. Even though the parties in the main proceedings devoted some of their observations to this subject, this argument is practical and subsidiary in relation to compliance with the judgment to be delivered. There are two possibilities: either, as I have demonstrated above, Directive 91/477 pursues one main objective (movement of goods) and one ancillary objective (movement of persons), in which case it has the correct legal basis and is not therefore applicable to Gibraltar, or Directive 91/477 pursues two objectives of equivalent rank, in which case the legal basis is insufficient, Directive 91/477 is thus invalid and it is for the competent authorities of Gibraltar to draw the necessary inferences from the judgment to be delivered, transposing only the provisions of the directive which are necessary for the implementation of the pass.²¹

77. Until such transposing measures are adopted, however, the additional question arises — which is not itself referred by the national court — as to whether hunters and sports target shooters from Gibraltar, and the applicants in the main proceedings in particular, could rely directly on Article 12(2) of Directive 91/477 and claim the passes requested from the Minister for Justice.

78. I note in this regard that, according to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly.²²

79. As I have already stated, Article 12(2) of Directive 91/477 grants hunters and sports target shooters the right to travel within the EU without prior authorisation with the categories of firearms mentioned in that article, provided that they are in possession of a pass, defined in Article 1(4) of that directive, listing such firearm or firearms and they are able to substantiate the reasons for their journey.

²¹ For the record, and in so far as is relevant, while the Minister for Justice considers that it would be impossible to split the provisions of Directive 91/477 without calling into question the coherence of that act as a whole and that a partial transposition of the act would not therefore be practicable, the applicants in the main proceedings take the view that, in order to make the pass operational, it would be possible to transpose Article 1(1) and (4), Articles 2, 4a, 5, and 12 and Annexes I and II of Directive 91/477 autonomously.

²² See, inter alia, judgment of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraph 13 and the case-law cited).

80. In the judgment of 4 September 2014, *Zeman* (C-543/12, EU:C:2014:2143, paragraphs 52 to 54), the Court inferred from Articles 1(4) and Article 12(2) of Directive 91/477 that the Member States *are required* to issue hunters and sports target shooters a pass since, if that were not granted, those categories of persons would not be able to exercise the right expressly conferred on them by that directive, Article 3 of that directive providing that this right may not be impaired by the adoption by the Member States of national provisions which are more stringent.

81. Therefore, so far as its subject matter is concerned, Article 12(2) of Directive 91/477 appears to be sufficiently precise and unconditional, within the meaning of the case-law cited in point 78 of this Opinion, to permit the applicants in the main proceedings to rely on it directly against the Minister for Justice.²³

82. That said, as I have already stated, these remarks would be relevant only if Directive 91/477 were applicable to Gibraltar, which is not the case. In my opinion, for the reasons I have set out above.

II. Conclusions

83. In the light of all the foregoing, I propose that the Court answer the questions referred by the Supreme Court of Gibraltar (United Kingdom) as follows:

- (1) Article 12(2) of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons, as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, concerns mainly the movement of goods, and there is no need to make any distinction according to whether or not the firearms are the object of commercial transactions or trade, with the result that none of the provisions of that directive apply to the territory of Gibraltar.
- (2) None of the provisions of Directive 91/477 concern the freedom to provide services.
- (3) In so far as Directive 91/477 harmonises some of the administrative requirements relating to the acquisition of weapons, their possession and their cross-border transport, it is correctly based on Article 100a(1) of the Treaty establishing the European Economic Community (subsequently Article 95(1) EC, and now Article 114 TFEU).

²³ Moreover, the information to be entered on the pass is set out in Annex II and a uniform specimen pass is annexed to the Commission Recommendation of 25 February 1993 on the European firearms pass (OJ 1993 L 93, p. 39).