OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 10 March 2005 [1]

I — Introduction

1. On 8 August 2003 the Commission of the European Communities brought an action before the Court of Justice under Article 226 EC in which it seeks a declaration that, by failing to implement in full Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation, [2] as amended, ('Directive 77/799' or, simply, 'the Directive') [3] in the territory of Gibraltar, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EC Treaty.

1 — Original language: Italian.

2 — OJ 1977 L 336, p. 15.

3 — Directive 77/799 was amended, in so far as is here relevant, by Council Directive 79/1070/EEC of 6 December 1979 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1979 L 331, p. 8) ('Directive 79/1070') and by Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) ('Directive 92/12').

II — Legal framework

A — *The relevant provisions of the Treaty*

2. For the purposes of the present case, it is first of all necessary to have regard to the Treaty articles which, together or separately as the case may be, constitute the legal basis of the relevant directives, that is to say, Articles 99 and 100 of the EEC Treaty (now, after amendment, Articles 93 EC and 94 EC respectively).

3. The first of those articles (included in the Chapter on 'Tax Provisions') provided, in the version in force at the time when the directives in question were adopted, that '[t]he Commission shall consider how the legislation of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation ... can be harmonised in the interest of the common market.

The Commission shall submit proposals to the Council, which shall act unanimously ... .'[4]

4. For its part, Article 100 (included in the Chapter on 'Approximation of Laws') provided that '[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market ...'.[5]

5. Finally, it seems to me appropriate also to mention Article 100a, or rather the provision which most recently replaced it, namely Article 95 EC, the interpretation of which, although not directly relevant to the present case, may provide useful information, as will be seen in what follows. Article 95(1) EC provides that the Council, in this case not unanimously but by way of the co-decision procedure, is to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market'. Article 95(2) EC, however, provides that 'Paragraph 1 shall not apply to fiscal provisions'.

B — *Directive 77/799*

6. Inasmuch as 'practices of tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of conditions of competition',[6] the Council adopted Directive 77/799 on the basis of Article 100 of the EEC Treaty. Directive 77/799 seeks to strengthen 'collaboration between tax administrations within the Community'[7] by requiring Member States to 'exchange information concerning particular cases' and to 'make the necessary enquiries to obtain such information'.[8]

7. In particular, Article 1(1) of Directive 77/799, as originally worded, provided that '[i]n accordance with the provisions of this Directive, the competent authorities of the

4 — At present, by contrast, Article 93 EC provides as follows: '[t]he Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market ...'.

5 — The present Article 94 EC has identical wording but also imposes an obligation of prior consultation of the European Parliament and the Economic and Social Committee.

6 — First recital in the preamble.

7 — Fourth recital in the preamble.

8 — Fifth recital in the preamble.

Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital'.

8. Directive 79/1070, based on Articles 99 and 100 of the EEC Treaty, subsequently amended that provision by including within its scope information relating to value added tax ('VAT'). [9] A further extension to cover excise duties on mineral oils, alcohol and alcoholic beverages and manufactured tobacco was effected by means of Directive 92/12, which was based on Article 99 of the EEC Treaty. [10]

9. Finally, I should point out that the Member States were required to transpose Directive 77/799, in its original version, by no later than 1 January 1979. The amendments just referred to were to be introduced by no later than 1 January 1981 and 1 January 1993 respectively.

C — *Provisions relating to Gibraltar*

10. In order to determine whether and how Directive 77/799 was to be transposed in Gibraltar, it is first of all appropriate to outline the extent to which Community law applies to that territory.

11. Ceded by the King of Spain to the British Crown under Article X of the Treaty of Utrecht of 1713, Gibraltar has, since 1830, had the status of a Crown Colony (British Overseas Territory). As you will be aware, the City is governed by the Gibraltar Constitution Order 1969, which defines it in its preamble as 'part of her Majesty's dominions'. While there has been a significant transfer of powers of self-governance to democratically elected local institutions within Gibraltar, the Crown retains powers in matters of foreign affairs, defence and public security.

12. Article 299 EC determines the territorial scope of the Treaty. Article 299(4) EC provides that '[t]he provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible'. It follows that Gibraltar is in principle subject to Community law.

13. In view, however, of the special status of Gibraltar, provision is made for derogations from that principle. I am obviously referring to Article 28 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, which forms part of the Documents concerning the Accession to

9 — Article 1(2)(a) of Directive 79/1070 (see footnote 3).

10 — Article 30(2)(a) of Directive 92/12 (see footnote 3).

the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland ('the 1972 Act of Accession' or 'the Act of Accession'). [11]

14. Article 28 of the Act of Accession, as you will know, provides as follows:

'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'. [12]

15. Furthermore, pursuant to Articles 29 and 30 of the Act of Accession, in conjunction with Annexes I and II thereto, Gibraltar does not form part of the Community customs territory and is for that reason treated as a non-member country for purposes of the importation and exportation of goods.

11 — OJ, English Special Edition of 27 March 1972, p. 14.

12 — Emphasis added.

III — Facts and procedure

16. On 7 April 1997, as it had not received any notification from the United Kingdom with regard to the application of Directive 77/799 to the territory of Gibraltar, the Commission sent to the United Kingdom Government a letter of formal notice requesting information in that regard.

17. By letters of 6 June 1997 and 7 October 1997, the United Kingdom stated that it had adopted the measures necessary to ensure that, with effect from 1 October 1997, Directive 77/799 would apply to Gibraltar as regards direct taxation. It submitted, however, that no such obligation existed in regard to VAT and excise duties inasmuch as these are indirect taxes.

18. In response to that reply, the Commission sent an additional letter of formal notice dated 18 July 2001 in which it stated that, on the contrary, Directive 77/799 had to be applied to Gibraltar also in relation to VAT and excise duties.

19. The United Kingdom challenged that view by letter of 13 November 2001, in which it argued that the Directive did not apply to Gibraltar in so far as it involved 'provisions

for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation' within the terms of Article 93 EC, these being provisions which, under Article 28 of the Act of Accession, specifically did not apply to Gibraltar.

20. As it took the view, however, that Directive 77/799 did not effect any harmonisation of national tax legislation, the Commission maintained its position and accordingly sent a reasoned opinion on 26 June 2002 in which it gave the United Kingdom a period of two months within which to adopt the requisite measures.

21. After requesting, by letter of 15 August 2002, an extension of two months to that period, the United Kingdom on 13 September 2000 submitted its reply, in which it essentially rejected the arguments put forward above.

22. As it remained unconvinced by those arguments, the Commission brought the present action.

23. By order of the President of 4 December 2003, the Court granted leave to the Kingdom of Spain ('Spain') to intervene in the present case in support of the form of order sought by the Commission, in accordance with Article 93(1) of the Rules of Procedure.

24. As none of the parties applied to make oral submissions, the Court decided, pursuant to Article 44a of the Rules of Procedure, to proceed to judgment without any oral part.

IV — Legal analysis

25. As already stated, the Commission takes issue with the United Kingdom on the ground that it has applied Directive 77/799 to Gibraltar only in regard to direct taxes, whereas it ought to have applied it also in regard to VAT and excise duties.

26. The Commission accepts that, under Article 28 of the Act of Accession, Gibraltar is excluded from application of the 'acts on the harmonisation of legislation of Member States concerning turnover taxes' and is also prepared to acknowledge, for the purposes of the present case, that the Community rules on the harmonisation of excise duties do not concern Gibraltar, which does not form part of the customs territory of the Community.

27. According to the Commission, however, the fact remains that the Directive does not bring about any harmonisation of laws on

turnover tax and excise duties. By contrast, in accordance with the objectives outlined in the recitals in its preamble, it seeks only to secure cooperation between Member States in combating tax evasion and tax avoidance, and for that purpose confines itself therefore to providing for the introduction of a system for the exchange of information between the competent authorities of the Member States.

28. That, the Commission continues, is confirmed by the fact that the system for the exchange of information was originally introduced only for direct taxation, which has not been harmonised at Community level. Directives 79/1070 and 92/12 were limited to extending the scope of that cooperation to VAT and to excise duties respectively, but did not alter the objective of that system and therefore did not affect the substantive tax laws of the Member States. Indeed, even after such amendments, Directive 77/799 did not have any influence on rates, basis of assessment or the other elements making up national tax systems, or on the systems for collection of the taxes and duties in question.

29. Further, the Commission continues, harmonisation of the laws of the Member States on VAT and excise duties constitutes a very distinct objective and one which is easily distinguishable from that of the fight against tax evasion and avoidance by way of cooperation between the competent national authorities. Consequently, the derogation which Gibraltar enjoys with regard to the Community rules designed to pursue the first objective cannot also apply in regard to the rules concerning the second objective.

30. Even if, the Commission adds, VAT and excise duties do not concern Gibraltar, the information provided by its tax authorities could be extremely useful for the correct determination of those taxes in other parts of the Community. Moreover, in the vast majority of cases the information would be flowing in one direction only, that is to say, from Gibraltar to the other regions of the Community in which the taxes and duties in question apply. Consequently, even if cooperation were to bring about any degree of harmonisation, that would be so only among those to whom that information is addressed, and thus not in Gibraltar.

31. The Commission concludes by stating that, 'at the limit', the application to Gibraltar of the system for the exchange of information could be justified on the basis of the duty to cooperate laid down in Article 10 EC.

32. In addition to developing arguments similar to those set out by the Commission, the Kingdom of Spain, which has intervened in this case, stresses in particular that, in interpreting the derogations provided for Gibraltar, it is necessary to bear in mind the fact that the status of that territory was

defined at a moment in history at which the economic systems of the Member States were subject to a level of integration lower than that which exists at present. Spain goes on to point out that, in contrast to the United Kingdom, it has transposed Directive 77/799 in full even in those of its territories to which the indirect taxes in question do not apply.

33. The United Kingdom replies to that criticism with arguments which are, in my view, more convincing, as I hope to demonstrate in the following analysis.

34. As a preliminary matter, I believe that it is necessary to set aside those arguments which are either non-legal in character or do not directly concern the specific matter under examination.

35. For the first aspect, I must point out that this issue touches on the applicability to the territory of Gibraltar of the Community rules on VAT and excise duties. This must therefore be examined, as the United Kingdom has correctly pointed out, within its specific terms and thus by defining the scope of the derogations provided for by the Act of Accession, without that appraisal being in any way influenced by the utility which Member States might derive from the application to Gibraltar of the system for the exchange of information introduced by the Directive.

36. On the other hand, I must express serious doubts as to the relevance, for present purposes, of Article 10 EC, even though it was mentioned by the Commission. So far as is material for present purposes, that provision states that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks'.

37. I fail to see how such a provision can play any role in the present case. Only one of two alternatives is possible: either the system for the exchange of information which the Directive in issue intended for indirect taxes is not covered by the derogations authorised for Gibraltar, with the result that, pursuant to Article 249 EC, read in conjunction with Article 299(4) EC, the United Kingdom is under an obligation to transpose the Directive in full within that territory, without there being any need to seek additional support from Article 10 EC; or, in the alternative, that system comes within the scope of those derogations, with the result that the conditions governing the application of Article 10 EC likewise do not obtain.

38. The first question to be addressed in order to resolve the present case is therefore precisely that of determining whether Directive 77/799, in so far as it relates to VAT, is also binding on Gibraltar or whether it falls to be included among 'the acts on the harmonisation of legislation of Member

States concerning turnover taxes', which, pursuant to Article 28 of the Act of Accession, do not apply to that territory.

39. It seems to me that a number of arguments militate in favour of the second alternative.

40. First, it must be pointed out that Directive 77/799 was based on the original Article 100 of the EEC Treaty (see point 4 above), which allowed for the adoption of 'directives for the *approximation* of such [national] provisions ... as directly affect the establishment or functioning of the common market'. [13] When it subsequently decided to extend to VAT the system for the exchange of information originally provided by Directive 77/799 only in respect of direct taxation, the Community legislature based the relevant measure (specifically, Directive 79/1070) on Article 99 of the EEC Treaty, which at the time provided that '[t]he Commission shall consider how the legislation of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation ... can be *harmonised* ...' and was to submit proposals to the Council for that purpose. [14]

41. The choice of such legal bases constitutes, in my view, a significant indication that the exchange of information for both direct and indirect taxation is a form of harmonisation or approximation of the relevant national legislation.

42. On the other hand, I have to point out, as the United Kingdom has also done, that the exchange of information does not constitute an end in itself but is rather an instrument designed to increase the efficiency of the national tax systems and consequently their capacity to collect taxes to the extent to which they are in fact outstanding.

43. This seems to me also to be confirmed by the sixth recital in the preamble to Directive 77/799, which states that 'the Member States should exchange ... any information which appears relevant for the *correct assessment* of taxes on income and on capital', and by the third recital in the preamble to Directive 79/1070, which provides that cooperation should be extended to cover indirect taxes 'in order to ensure that these are *correctly assessed and collected*'. [15]

44. Whether it relates to direct taxes, the constituent elements of which are not the subject of Community legislation, or to VAT, the constituent elements of which have, by

13 — Emphasis added.

14 — Emphasis added.

15 — Emphasis added.

contrast, been harmonised, [16] the introduction of a system for the exchange of information does none the less seem to me to represent an element of harmonisation inasmuch as it tends to render uniform, in order to make them more efficient, the rules governing the assessment and collection of taxes, whether direct or indirect.

45. On the other hand, the fact that measures which do not impact on the constituent elements of a tax can also be the subject of harmonisation measures seems to me to have been confirmed by a recent judgment of the Court in proceedings between the Commission and the Council. [17]

46. At issue in that case was the choice of the legal basis underlying Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties ('Directive 2001/44'). [18]

16 — See Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

17 — Judgment of 29 April 2004 in Case C-338/01 [2004] ECR I-4829.

18 — OJ 2001 L 175, p. 17.

47. The Commission took the view in that case that the Council had erred in basing Directive 2001/44 on Articles 93 EC and 94 EC, as the correct legal basis, in the Commission's opinion, was Article 95 EC (see points 3 to 5 above).

48. As has been stated previously, both Article 93 EC and Article 94 EC authorise the Council to adopt, on a unanimous basis, measures for the harmonisation of national provisions (the first with reference to 'legislation concerning turnover taxes, excise duties and other forms of indirect taxation'; the second with reference to 'such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market'). Article 95 EC, by contrast, introduces, in paragraph 1, the co-decision procedure for the adoption of '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'. Article 95(2) EC, however, provides that 'Paragraph 1 shall not apply to fiscal provisions ...'.

49. In Case C-338/01, the Commission specifically argued, in order to circumvent that derogation, that Directive 2001/44 did not relate to 'fiscal provisions' inasmuch as, in its view, that notion refers solely to the substantive provisions determining taxable persons, taxable events, basis of taxation, rates and exemptions, together with the

detailed rules for the assessment and enforcement of tax claims. Those matters, however, according to the Commission, were not affected by Directive 2001/44, which for that reason did not involve any harmonisation or approximation of the substantive tax laws of the Member States.

50. The Court, in its judgment in that case, rejected the Commission's line of argument and ruled that the Council had acted correctly in choosing Articles 93 EC and 94 EC as the legal basis for Directive 2001/44.

51. In view of the fact that there is nothing in the Treaty to indicate how the concept of 'fiscal provisions' is to be construed, the Court pointed out that, 'by reason of their general character, those words cover not only all areas of taxation, without drawing any distinction between the types of duties or taxes concerned, but also all aspects of taxation, whether material rules or procedural rules'. [19]

52. In addition, the Court further specified that 'the detailed arrangements for the collection of taxes of whatever kind cannot be disassociated from the system of taxation or imposition of which they form part', [20] concluding from this that 'the words "fiscal provisions" contained in Article 95(2) EC must be interpreted as covering not only the provisions determining taxable persons, taxable transactions, the basis of imposition, and rates of and exemptions from direct and indirect taxes, but also those relating to arrangements for the collection of such taxes'. [21]

53. It must therefore be inferred from this that a system of cooperation designed to facilitate the recovery of tax debts which have arisen in another Member State can feature among the harmonisation measures of the aforementioned laws specifically referred to in Article 95(2) EC. Clearly, the same must also hold true, with regard to the facts of the present case, for the system governing the exchange of VAT information envisaged by Directive 77/799.

54. For yet further confirmation of this conclusion, finally, I must also cite Council Regulation (EC) No 1798/2003 of 7 October 2003 on administrative cooperation in the field of value added tax and repealing Regulation (EEC) No 218/92. [22] The third recital in the preamble to that regulation states that *'tax harmonisation measures taken to complete the internal market should*

19 — *Commission* v *Council*, cited above, paragraph 63.

20 — *Ibidem*, paragraph 66.

21 — *Ibidem*, paragraph 67.

22 — OJ 2003 L 264, p. 1.

... include the establishment of a common system for the exchange of information between the Member States whereby the Member States' administrative authorities are to assist each other and cooperate with the Commission in order to ensure the proper application of VAT on supplies of goods and services ...'. [23]

55. As the exchange of information thus also represents a form of harmonisation/approximation of the relevant national laws, it seems to me that the United Kingdom is right to invoke in this case the derogation provided under Article 28 of the Act of Accession (see points 13 and 14 above), once it is clear that the case relates to 'acts on the harmonisation of legislation of Member States concerning turnover taxes'.

56. With regard to the fact that this plea in law was not invoked by the United Kingdom in relation to the exchange of information on direct taxation, it strikes me that there is an all too evident explanation for this. The derogation under Article 28 of the Act of Accession does not extend to direct taxation and there is therefore no legal basis on which Article 28 can be relied on in that regard.

23 — Emphasis added.

57. In the light of the foregoing, I therefore take the view that the derogation under Article 28 of the Act of Accession allows the United Kingdom, so far as VAT is concerned, to refrain from applying to the territory of Gibraltar the system for the exchange of information provided for by Directive 77/799.

58. With that matter having been resolved, it remains to be determined whether the same conclusion may be arrived at in regard to the exchange of information concerning excise duties.

59. In this regard, it is appropriate to go along with the view, which has been accepted by the Commission itself at least for the purposes of the present case, that the harmonised rules on excise duties do not apply to Gibraltar in so far as it does not form part of the Community customs territory.

60. The Court has in fact ruled 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 adminis-

trative provisions of the Member States pursuant to Articles 94 EC and 95 EC are applicable to it'. [24]

61. It seems to me that the same considerations must, as the United Kingdom submits, hold true for the Community rules based on Article 93 EC (or on Article 99 of the EEC Treaty which preceded it) which seek to harmonise national laws 'concerning ... excise duties' in order to avoid divergent rules in the Member States which might constitute barriers to the free movement of goods.

62. This is precisely the case with regard to Directive 92/12, which, as is clear from the first and fourth recitals in its preamble, was adopted in order to render 'chargeability of excise duties ... identical in all the Member States' in such a way as to ensure 'the establishment and functioning of the internal market', which require 'the free movement of goods, including those subject to excise duties'.

63. For the purpose of achieving this harmonisation, Directive 92/12, inter alia, broadened the scope of application of the system for the exchange of information provided for by Directive 77/799 by extending it to excise duties.

64. On the other hand, I find that, in the same way as has been seen in the foregoing with regard to VAT, in the case of excise duties also there is no basis for the distinction which the Commission seeks to draw between, on the one hand, measures which harmonise the constituent elements of such indirect taxes — and which therefore do not apply to Gibraltar — and, on the other, measures which are limited to providing a system of cooperation between the tax authorities of the Member States — and which, it is submitted, are therefore applicable in Gibraltar as being 'non-harmonising'.

65. In this regard also we may apply, mutatis mutandis, reasoning similar to that applied above in connection with VAT (see point 40 et seq. above) and thus uphold an interpretation of the concept of 'harmonisation of legislation concerning ... excise duties' which includes measures relating to the system for the exchange of information.

66. I can thus conclude on the basis of the foregoing that the United Kingdom was not under an obligation to apply within the territory of Gibraltar the system for the

24 — Judgment in Case C-30/01 *Commission* v *United Kingdom* [2003] ECR I-9481, paragraph 59.

exchange of information provided for by Directive 77/799 even in regard to excise duties.

67. In the light of the foregoing, I accordingly propose that the action brought by the Commission be dismissed.

V — Costs

68. In the light of Article 69(2) of the Rules of Procedure, and in view of the outcome reached to the effect that the action should be dismissed, I submit that the Commission should be ordered to pay the costs incurred by the United Kingdom. Spain, on the other hand, should bear its own costs, in accordance with Article 69(4) of the Rules of Procedure.

VI — Conclusion

69. On the basis of the findings set out above, I propose that the Court should rule as follows:

'(1) The action is dismissed.

(2) The Commission shall pay the costs.

(3) The Kingdom of Spain shall bear its own costs.'