JUDGMENT OF THE COURT (Grand Chamber)

21 July 2005 *

In Case C-349/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 7 August 2003,

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

applicant,

supported by:

Kingdom of Spain, represented by N. Díaz Abad, 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 K. Manji and R. Caudwell, acting as Agents, and D. Wyatt QC, with an address for service in Luxembourg,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, R. Schintgen, N. Colneric (Rapporteur), S. von Bahr, J.N. Cunha Rodrigues, G. Arestis, M. Ilešič, J. Malenovský and J. Klučka, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks from the Court a declaration that, by failing to implement in the territory of Gibraltar 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 (OJ 1977 L 336, p. 15), as amended by Council Directive 79/1070/EEC of 6 December 1979 (OJ 1979 L 331, p. 8) 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 77/799 as amended'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EC Treaty.

2 By order of the President of the Court of 4 December 2003, the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Commission.

3 The United Kingdom contends that the Commission's application should be dismissed and that the Commission should be ordered to pay the costs.

Relevant provisions

The partial exclusion of the territory of Gibraltar from the scope of Community law

4 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 Treaties (OJ, English Special Edition of 27 March 1972, p. 14) ('the 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.'

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

Directive 77/799 and its amendments

6 Directive 77/799, in its original version, concerned mutual assistance by the competent authorities of the Member States in the field of direct taxation. It was adopted on the basis of Article 100 of the EEC Treaty (which became, after amendment, Article 100 of the EC Treaty, now Article 94 EC).

7 Directive 79/1070 widened the scope of Directive 77/799 by extending it to value added tax ('VAT'). It was adopted on the basis of Article 99 of the EEC Treaty (amended by the Single European Act, which became, after amendment, Article 99 of the EC Treaty, now Article 93 EC) and Article 100 of the EEC Treaty.

8 According to the first recital in the preamble to Directive 79/1070, 'the practice of tax evasion and tax avoidance leads to budget losses and to violations of the principle of fair taxation and jeopardises healthy competition ... this therefore affects adversely the smooth running of the common market'.

9 The second recital in the preamble to that directive states:

'... in order to combat this practice more effectively, cooperation between tax administrations within the Community should be strengthened in accordance with common principles and rules'.

10 As set out in the third recital in the preamble to that directive:

'... mutual assistance [by the competent authorities of the Member States] should be extended to cover indirect taxes in order to ensure that these are correctly assessed and collected'.

11 The fourth recital in the preamble to Directive 79/1070 states:

'... as a matter of particular urgency, mutual assistance must be extended to cover value added tax, both because it is a general tax on consumption and because it plays an important part in the Community's own resources system'.

12 Article 2 of Directive 79/1070 provides that the Member States are to bring into force the laws, regulations or administrative provisions necessary to comply with that directive by 1 January 1981.

13 Directive 92/12 again widened the scope of Directive 77/799 by extending it to excise duties on mineral oils, alcohol and alcoholic beverages and manufactured tobacco. Directive 92/12 was based on Article 99 of the EEC Treaty as amended by the Single European Act.

14 In the words of the first recital in the preamble to Directive 92/12:

'... the establishment and functioning of the internal market require the free movement of goods, including those subject to excise duties'.

15 The fourth recital in the preamble to that directive states that, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States.

16 Article 1(1) of Directive 77/799 as amended provides:

'In accordance with this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital and any information relating to the assessment of the following indirect taxes:

— value added tax,

— excise duty on mineral oils,

— excise duty on alcohol and alcoholic beverages,

— excise duty on manufactured tobacco.'

17 Article 8(1) of that directive provides:

'This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.'

18 Under Article 31(1) of Directive 92/12, the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive on 1 January 1993.

Pre-litigation procedure

19 Since the Commission took the view that the United Kingdom had not informed it of the measures adopted to ensure the transposition into national law of Directive 77/799 as amended, with regard to the territory of Gibraltar, it initiated infringement proceedings under Article 226 EC and gave the United Kingdom an opportunity to submit its observations. The United Kingdom authorities then notified the

Commission of the measures they had taken concerning direct taxation by Ordinance No 26 of 1997 to amend the income tax ordinance (Income Tax (Amendment) (No 2) Ordinance 1997), which came into force on 1 October 1997. The United Kingdom took the view, however, that since Gibraltar is not subject to the common system of VAT or to the harmonised rules on excise duties, the provisions of Directive 77/799 as amended on those levies do not apply to that territory. Following a supplementary letter of formal notice, on 27 June 2002 the Commission sent a reasoned opinion inviting the United Kingdom to take the measures necessary to comply with it within two months of its notification. Since the Commission took the view that the observations submitted by the United Kingdom Government further to that opinion showed that the failure to fulfil obligations alleged in the reasoned opinion was continuing, it decided to bring this action.

The action

Arguments of the parties

20 The Commission accepts that, pursuant to Article 28 of the Act of Accession, the territory of Gibraltar is excluded from the scope of the rules on the harmonisation of turnover taxes and it is prepared, for the purposes of these proceedings, to assume that the provisions of Community law on the harmonisation of excise duties likewise do not apply to Gibraltar.

21 However, it submits that Directive 77/799 as amended, concerning mutual assistance by the competent authorities of the Member States in the fields of VAT and excise duties, is among the provisions of Community law applicable to Gibraltar.

22 That directive establishes a mechanism for the exchange of information between the tax authorities of the Member States to enable them better to enforce national legislation. Its objective is solely to facilitate the exchange of information necessary for the assessment and collection of taxes in accordance with the tax system of each Member State, thus countering tax evasion, avoiding distortions of capital movements and safeguarding healthy competition. The amendments to Directive 77/799 by Directives 79/1070 and 92/12 do not affect the tax law as such of the Member States. The directive is not a measure harmonising legislation on VAT or excise duties.

23 Information from the Gibraltar tax authorities may be useful or even essential for the correct assessment of VAT or excise duties in other parts of the European Community even though those taxes are not applied in Gibraltar.

24 Ultimately, it could be argued that Article 10 EC requires the extension to Gibraltar of the mutual information system.

25 Given that Directive 92/12 concerns almost exclusively the harmonisation of substantive laws on excise duties, it is necessarily based on Article 99 of the EEC Treaty. The mere fact that a provision appears in a measure concerned mainly with substantive harmonisation does not imbue it with the character of a harmonising provision. As regards Directive 79/1070, it should have been based on Article 100 of the EEC Treaty. The legal basis relied on to extend the scope of Directive 77/799 to VAT and then excise duties cannot in any event determine the treatment of mutual assistance measures for the purposes of Article 28 of the Act of Accession.

26 The Spanish Government submits that, although the exclusion of certain territories from the harmonisation of indirect taxation was something desired and accepted by the Community, for various reasons, the Community did not intend those territories to become refuges for evasion to the detriment of the other Member States, through one Member State refusing to provide another with information relating to one of those territories. Such a situation would probably preclude substantive harmonisation in the other territories which are indeed subject to harmonisation.

27 The economic reality of Gibraltar has been transformed, including its influence on various aspects of the operation of the internal market. The Kingdom of Spain, as a party which has suffered particular damage as a result of the non-implementation, has sufficient evidence to show that the non-application to Gibraltar of Directive 77/799 as amended is damaging to the Member States. That argument, taken to its logical conclusion, means that there is a duty of cooperation between the Member States which derives from Article 10 EC.

28 There have been developments in the understanding of, and the importance to be given to, mutual cooperation between tax administrations through the exchange of information for the purpose of combating tax evasion and tax avoidance more effectively. It has become possible to make a distinction depending on whether a cooperation measure relates to a tax harmonisation objective or relates simply to a measure which does not have that dimension and confines itself to laying down rules for cooperation between the Member States.

29 Although there are territories in Spain in which VAT does not apply or which do not form part of the customs union, the Kingdom of Spain does not consider that

Directive 77/799 as amended by Directive 79/1070 or Directive 92/12 should not apply in those territories.

30 In conclusion, the Spanish Government considers that the fact that certain territories are excluded from the scope of application of VAT and harmonised excise duties does not entail their automatic exclusion from the scope of Directive 77/799 as amended. That directive is intended to be of general geographical application.

31 The United Kingdom Government challenges the merits of the action. The extensions of the scheme of Directive 77/799 to VAT by Directive 79/1070, on the one hand, and to excise duties by Directive 92/12, on the other, are not applicable to Gibraltar.

32 To the extent that Directive 77/799 as amended relates to mutual assistance on VAT, it comprises 'harmonisation of legislation of Member States concerning turnover taxes' within the meaning of Article 28 of the Act of Accession and, consequently, does not apply to Gibraltar. The words of that provision should be given their natural meaning.

33 To the extent that that directive relates to mutual assistance on excise duties, it likewise does not apply to Gibraltar. This follows from Gibraltar's exclusion from the Community customs territory and the fact that the provisions of the EC Treaty which aim to secure the free movement of goods in the internal market have no application to Gibraltar. The first recital in the preamble to Directive 92/12 and a number of other recitals show that the purpose of that directive is to ensure the free movement of goods.

34 It is impossible to distinguish the objectives of mutual assistance in the assessment and collection of VAT and excise duties from the objectives of harmonisation of the provisions relating to VAT and customs duties themselves. The assessment and collection of VAT and customs duties, with which the mutual assistance provided for by that directive is closely concerned, are inextricably linked to the underlying taxes and duties which are to be assessed and collected. The efficiency with which a tax system is administered is an important factor in determining the effective rate of tax and is, in practical terms, inseparable from the revenue-raising power of the Member States.

35 The extensions of the scope of Directive 77/799 by Directives 79/1070 and 92/12 were adopted on the basis of Article 99 of the EEC Treaty, relating to the harmonisation of legislation concerning indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market. The legal bases used in order to extend the mutual assistance arrangements to VAT and excise duties cannot be determinative of the matters at issue in these proceedings, but are the background to the present dispute and should be taken into account.

36 The United Kingdom Government notes that, in paragraph 67 of Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, the Court held 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. Analogous considerations apply to the present case.

37 The United Kingdom's approach is consistent with that adopted in recent Community tax legislation, which treats measures of cooperation on VAT as tax harmonisation measures (see the third recital in the preamble to 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 (OJ 2003 L 264, p.1)).

38 Reliance on Article 10 EC as the basis of the argument, in order to avoid a conclusion which would otherwise be drawn from Article 28 of the Act of Accession, is not consistent with either the letter or the spirit of Article 10 EC.

39 The Kingdom of Spain's contentions as to the legal position of the Spanish territories in question are not relevant to the matters at issue in the present proceedings.

Findings of the Court

Preliminary remark

40 In the light of the pre-litigation procedure and the reasoning in the application, this action must be understood as relating to the non-implementation of Directive 77/799 as amended only as regards VAT and excise duties.

Mutual assistance by the competent authorities in the field of VAT

41 Under Article 299(4) EC, the Treaty is to apply to Gibraltar since it is a Crown colony for whose external relations the United Kingdom is responsible. However, under the Act of Accession, certain Treaty provisions do not apply to Gibraltar (see Case C-30/01 *Commission* v *United Kingdom* [2003] ECR I-9481, paragraph 47). Those exceptions were introduced on account of the special legal position of that territory and, in particular, its status as a free port.

42 Under Article 28 of the Act of Accession, the acts of the institutions of the Community on the harmonisation of legislation of Member States concerning turnover taxes are not to apply to Gibraltar, unless the Council of the European Union, acting unanimously on a proposal from the Commission, provides otherwise.

43 As an exception to the application of Community law in the territory of the Community, that provision must be given an interpretation which limits its scope to that which is strictly necessary to safeguard the interests which it allows Gibraltar to protect. It must also be read in the light of the second sentence of the first paragraph of Article 10 EC, pursuant to which the Member States are required to facilitate the achievement of the Community's tasks (see, to that effect, Joined Cases 194/85 and 241/85 *Commission* v *Greece* [1988] ECR 1037, paragraph 20).

44 Therefore, provisions which merely require cooperation between the Member States, leaving each of them to use their own methods of enquiry and communication of information, cannot be regarded as 'acts on the harmonisation of legislation of Member States concerning turnover taxes' within the meaning of Article 28 of the Act of Accession.

45 However, Directive 77/799 as amended does not go further, as is apparent in particular from Article 8(1) thereof, which refers to the limits to exchange of information arising from the laws or administrative practices of the Member State concerned.

46 It must therefore be concluded that Directive 77/799 as amended, in so far as it concerns VAT, is not one of the 'acts on the harmonisation of legislation of Member States concerning turnover taxes' within the meaning of Article 28 of the Act of Accession.

47 That finding is not inconsistent with that made by the Court in its judgment in *Commission* v *Council*, cited above, which provides an interpretation of 'fiscal provisions' within the meaning of Article 95(2) EC, and not of 'acts on ... harmonisation' within the meaning of Article 28 of the Act of Accession.

48 Furthermore, it is true that the third recital in the preamble to Regulation No 1798/2003, relied on by the United Kingdom Government, states that 'the tax harmonisation measures taken to complete the internal market should therefore 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, intra-Community acquisition of goods and importation of goods'.

49 However, a provision of primary law such as Article 28 of the Act of Accession cannot be interpreted in the light of a recital in a measure of secondary legislation. In addition, the abovementioned third recital is part of the statement of reasons for a regulation adopted by the Community legislature on the basis of Article 93 EC which, in particular, is not a derogating measure, unlike Article 28 of the Act of Accession. That recital is not therefore capable of calling into question the Court's finding in paragraph 46 of this judgment.

50 It follows from all the foregoing that Directive 77/799 as amended, in so far as it concerns VAT, does apply to Gibraltar.

Mutual assistance by the competent authorities in the field of excise duties

51 In this regard, it must be noted that, under Article 29 of the Act of Accession in conjunction with Annex I, Section I, point 4, thereto, Gibraltar does not form part of

the Community customs territory. Like Article 28 of the Act of Accession, that exception must be interpreted strictly.

52 For the purposes of this case, it is not necessary to determine whether Gibraltar's exclusion from the Community customs territory means that the provisions of Directive 92/12 on the harmonisation of the substantive laws on excise duties do not apply to Gibraltar.

53 Even assuming that those provisions do not apply in that territory, that exclusion does not mean, in any event, that Gibraltar falls outside the requirement of mutual assistance by the competent authorities of the Member States provided for by Directive 77/799 as amended in the field of excise duties. The fact that the Gibraltar authorities are subject to that requirement has no bearing on any non-application to that territory of provisions requiring harmonisation of those duties as such.

54 Accordingly, Directive 77/799 as amended, in so far as it concerns excise duties, does apply to Gibraltar.

55 In the light of all the foregoing, the Commission's action must be considered to be well founded.

56 It must therefore be held that, by failing to implement in the territory of Gibraltar, in the fields of VAT and excise duties, Directive 77/799 as amended, the United Kingdom has failed to fulfil its obligations under the EC Treaty.

Costs

57 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 Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain, as intervener, is to bear its own costs.

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

1. **Declares that, by failing to implement in the territory of Gibraltar, in the fields of value added tax and excise duties, 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, as amended by Council Directive 79/1070/EEC of 6 December 1979 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, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the EC Treaty;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**

3. **Orders the Kingdom of Spain to bear its own costs.**

[Signatures]