OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 16 January 2003 [1]

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1 — Original language: Italian.

I — Introduction

1. In these proceedings the Commission of the European Communities claims that the United Kingdom has not implemented a series of directives adopted on the basis of Articles 94 and 95 EC.

2. In particular, it is alleged that the United Kingdom has not adopted, in respect of that territory, the laws, regulations or administrative provisions necessary to comply with Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances ('Directive 67/548'),[2] as subsequently amended several times, Council Directive 87/18/EEC of 18 December 1986 on the harmonisation of laws, regulations and administrative provisions relating to the application of the principles of good laboratory practice and the verification of their applications for tests on chemical substances ('Directive 87/18'),[3] Council Directive 93/12/EEC of 23 March 1993 relating to the sulphur content of certain liquid fuels ('Directive 93/12'),[4] and subsequent amendments, Council Directive 79/113/EEC of 19 December 1978 on the approximation of the laws of the Member States relating to the determination of the noise emission of construction plant and equipment ('Directive 79/113'),[5] and subsequent amendments, Council Directive 84/533/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of compressors ('Directive 84/533'),[6] and subsequent amendments, Council Directive 84/534/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of tower cranes ('Directive 84/534'),[7] and subsequent amendments, Council Directive 84/535/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of welding generators ('Directive 84/535'),[8] and subsequent amendments, Council Directive 84/536/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of power generators ('Directive 84/536'),[9] Council Directive 84/537/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of powered hand-held concrete-breakers and picks ('Directive 84/537'),[10] and subsequent amendments, Council Directive 84/538/EEC of 17 September 1984 on the approximation of the laws of the Member States relating to the permissible sound power level of lawnmowers ('Directive 84/538'),[11] and subsequent amendments, Council Directive 86/594/EEC of 1 December 1986 on airborne noise emitted by household

2 — OJ, English Special Edition, Series I, 1967 p. 234.
3 — OJ 1987 L 15, p. 29.
4 — OJ 1993 L 74, p. 81.
5 — OJ 1979 L 33, p. 15.
6 — OJ 1984 L 300, p. 123.
7 — Ibid., p. 130.
8 — Ibid., p. 142.
9 — Ibid., p. 149.
10 — Ibid., p. 156.
11 — Ibid., p. 171.

appliances ('Directive 86/594'), [12] Council Directive 86/662/EEC of 22 December 1986 on the limitation of noise emitted by hydraulic excavators, rope-operated excavators, dozers, loaders and excavator-loaders ('Directive 86/662'), [13] and subsequent amendments, European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste ('Directive 94/62'), [14] and Commission Directive 97/35/EC of 18 June 1997 adapting to technical progress for the second time Council Directive 90/220/EEC on the deliberate release into the environment of genetically modified organisms ('Directive 97/35'). [15]

II — Legislative framework

A — *General Community provisions*

(a) Free movement of goods and the internal market

3. Pursuant to Article 3 EC, the activities of the Community are to include, as we know, the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, (subparagraph (a)), a common commercial policy, (subparagraph (b)), and 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital' (subparagraph (c)).

4. Article 14(2) EC reiterates and clarifies the content of Article 3(c) EC, providing:

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

5. Title I of Part Three of the Treaty, which covers the free movement of goods, opens with the general provisions of Articles 23 and 24 EC, which provide:

'Article 23

1. The Community shall be based upon a customs union which shall cover all trade

12 — OJ 1986 L 344, p. 24.
13 — OJ 1986 L 384, p. 1.
14 — OJ 1994 L 365, p. 10.
15 — OJ 1997 L 169, p. 72.

in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

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

Article 24

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

6. Further, Article 25 EC, which is referred to in Article 23(2), prohibits customs duties on imports and exports between Member States and charges having equivalent effect.

Chapter 2 of Title I (Articles 28 to 31), also referred to in Article 23(2), then deals with the prohibition of quantitative restrictions between Member States.

7. Finally, Articles 94 and 95 EC are of relevance in this connection; they provide as follows:

'Article 94

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

Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the

measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

...'

(b) The territorial scope of the Treaty

8. Article 299 EC defines the territorial scope of the EC Treaty, and, so far as relevant here, provides in paragraph 4:

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

B — *The provisions of secondary legislation concerning the customs union*

9. Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Community Customs Code' or simply 'the Code') [16] defines its own subject-matter, providing in Article 1 that:

'Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them. The Code shall apply, without prejudice to special rules laid down in other fields

— to trade between the Community and third countries,

— to goods covered by the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community or the Treaty establishing the European Atomic Energy Community.'

10. Article 3 of the Code defines the 'customs territory of the Community' confirming what had been laid down by earlier Community acts, and, in particular, by Regulation (EEC) No 1496/68 of the Council of 27 September 1968 on the

16 — OJ 1992 L 302, p. 1.

definition of the customs territory of the Community ('Regulation No 1496/68'),[17] as amended following the various enlargements of the Community. That territory comprises, in principle, all the customs territories of the individual Member States: it thus excludes those territories which, although constituting an integral part of a Member State, are not considered part of its customs territory,[18] while it includes those which are deemed to be the customs territory of a Member State, although not part of that State.[19]

11. In particular, as a consequence of the 1972 enlargement, so far as relevant here, Article 3 provides:

'1. The customs territory of the Community shall comprise:

...

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

...'.

12. It follows that the entire territory of the United Kingdom, together with the above Crown possessions even though they are not part of the United Kingdom, is included in the customs territory of that State. Gibraltar, however, is not included.

13. Article 4 of the Code then defines the term 'Community goods' for the purposes of the application of the Community customs rules, providing:

'For the purposes of this Code, the following definitions shall apply:

...

17 — OJ 1968 L 238, p. 1, a regulation subsequently repealed by Council Regulation (EEC) No 2151/84 of 23 July 1984 on the customs territory of the Community, OJ 1984 L 197, p. 1, repealed in turn by Council Regulation No 2913/92, cited above, which established a Community Customs Code. See also below, point 18.

18 — For example, apart from Gibraltar, the Italian and German territories which form part of Swiss customs territory.

19 — In particular, the territory of the Principality of Monaco, which is part of French customs territory and, previously, the territory of the Republic of San Marino, in that it was part of Italian customs territory until the entry into force, on 1 December 1992, of the Interim Agreement on trade and customs union between the European Economic Community and the Republic of San Marino of 27 November 1992, OJ 1992 L 359, p. 14.

(7) "Community goods" means goods:

— wholly obtained or produced in the customs territory of the Community under the conditions referred to in Article 23 and not incorporating goods imported from countries or territories not forming part of the customs territory of the Community,

— imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation,

— obtained or produced in the customs territory of the Community, either from goods referred to in the second indent alone or from goods referred to in first and second indents.

(8) "Non-Community goods" means goods other than those referred to in subparagraph 7.'

14. Article 79 of the Code provides:

'Release for free circulation shall confer on non-Community goods the customs status of Community goods.

It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due.'

C — *Provisions concerning Gibraltar*

(a) Introduction

15. Ceded by the King of Spain to the Crown of Great Britain by Article X of the Treaty of Utrecht of 1713, since 1830 Gibraltar has enjoyed the status of Crown Colony (British Overseas Territory). The City is governed, as we know, by the Gibraltar Constitution Order 1969, which defines it in its preamble as 'part of Her Majesty's dominions'. Following a substantial transfer of powers of self-government to local democratically elected institutions of the colony, the Crown retains its powers in respect of external relations, defence and public security.

(b) The 1972 Act of Accession

16. In view of this special status of Gibraltar, Article 28 of the Act concerning the accession to 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') [20] provided:

'Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty [21] 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.'

17. In its turn, Article 29 of the Act of Accession provides:

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

18. It is of particular interest for present purposes that the first section of the list in Annex I concerns customs legislation and that this was amended as described above (point 11) to adapt the definition of the Community customs territory in Regulation No 1496/68 following the accession of the United Kingdom to the Community. Gibraltar, as I said, is excluded from that territory.

19. Also of interest for present purposes is the fact that the 1972 Act of Accession removed the reference to the United Kingdom and its dependent territories, including Gibraltar, from the list of territories belonging to third countries subject to the rules on liberalisation of imports of goods laid down by Regulation (EEC) No 1025/70 of the Council of 25 May 1970 establishing common rules for imports from third countries ('Regulation No 1025/70'). [22] To that end, Annex I to the 1972 Act of Accession provided for the amendment of the list contained in Annex II to that regulation.

20. As regards that amendment to Regulation No 1025/70, Annex II to the 1972 Act of Accession provides:

'The problem created by the deletion of the reference to Gibraltar in Annex II is to be

20 — OJ 1972 L 73, p. 1.

21 — Namely, agricultural products.

22 — OJ 1970 L 124, p. 6, a regulation subsequently repealed by Regulation (EEC) No 1439/74 of the Council of 4 June 1974 on common rules for imports, OJ 1974 L 159, p. 1.

solved in such a way as to ensure that Gibraltar is in the same position with regard to the Community's import liberalisation system as it was before accession.'

(c) Common commercial policy measures applicable to Gibraltar

21. Simply in order to understand better Gibraltar's position in the scheme of the Treaty it is appropriate also to examine here the rules on trade in goods with third countries, which, before the root and branch liberalisation resulting from the entry into force for the Community of the WTO agreements, were laid down by Council Regulation (EEC) No 288/82 of 5 February 1982 on common rules for imports ('Regulation No 288/82'). [23]

22. Under its Article 1(1), Regulation No 288/82 applies 'to imports of products covered by the Treaty originating in third countries'.

23. Under Article 1(2):

'Importation into the Community of the products referred to in paragraph 1 shall be free, and therefore not subject to any quantitative restriction, without prejudice to

...

— quantitative restrictions for the products listed in Annex I and maintained in the Member States indicated opposite these products in that Annex.'

24. Annex I to that regulation, then listed a series of quantitative restrictions, relating to certain products described there, which individual Member States were authorised to retain in force as against all third countries, or as against one or more such countries. That Annex thereby made provision, in particular, for France and Italy to maintain in force quantitative restrictions in respect of products from the territory of Gibraltar.

25. Again, in order to shed light on Gibraltar's position *vis-à-vis* the common

23 — OJ 1994 L 35, p. 1, a regulation subsequently repealed by Council Regulation (EC) No 518/94 of 7 March 1994 on common rules for imports and repealing Regulation (EEC) No 288/82, OJ 1994 L 67, p. 77, in turn repealed by Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94, OJ 1994 L 349, p. 53.

commercial policy, it must, finally, be observed that Gibraltar is included in the list of third countries which are beneficiaries of the generalised tariff preferences scheme which the Community applies to developing countries. Gibraltar is included in Annex I of Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 ('Regulation No 2501/2001').[24] Under Article 2 of that Regulation, Gibraltar is thus covered by the generalised tariff preferences scheme detailed in Article 7 thereof. Accordingly, substantial tariff reductions with reference to the most favoured nation duty rate of the common customs tariff are guaranteed on imports of products originating in Gibraltar.

D — *The Directives at issue*

26. The many directives implementation of which is at issue here are very varied in content and, in many cases, very technical, but their content is not of direct relevance here. In these proceedings it is sufficient to highlight the features they have in common for present purposes, that is to say the fact that they were all adopted on the basis of Articles 94 and 95 EC[25] and all are intended to foster free movement of goods through the harmonisation of the national rules relating to goods which at the same time are connected with environmental policies.

III — Facts and procedure

27. By letter of formal notice of 3 July 1997 and subsequent reasoned opinion of 28 July 2000 the Commission claimed that the United Kingdom had not implemented, in respect of Gibraltar, a number of harmonisation directives based on Articles 94 and 95 EC, namely the directives listed above in point 2.

28. The United Kingdom, for its part, contended that it was right not to implement them, since the territory of Gibraltar was outside the customs territory of the Community and must therefore be considered excluded from the scope of the Treaty provisions on free movement of goods and from the related provisions of secondary legislation, such as the directives at issue.

29. As it was not satisfied with the answers given, the Commission brought this action, by application lodged on 25 January 2001.

24 — OJ 2001 L 346, p. 1.

25 — Some of the directives are in fact secondary directives, adopted by the Commission in execution of an executive power conferred on them by a principal directive, based, in turn on Article 94 EC or Article 95 EC.

30. By order of 22 June 2001 the Court granted the Kingdom of Spain leave to intervene in these proceedings in support of the forms of order sought by the Commission, pursuant to Article 93(1) of the Rules of Procedure.

IV — Arguments of the parties and assessment

A — *Introduction*

31. As is clear from the above description of the relevant rules, Gibraltar is subject to a special regime. It is not part of the Community customs territory and is therefore excluded from all the Community customs rules and that is also true, as the provisions set out above show, of agricultural products, given that acts of secondary legislation concerning such products do not apply to Gibraltar.

32. It follows, as is, moreover, expressly confirmed by the above provisions of secondary legislation (see Regulations No 288/82 and 2501/2001), that goods imported into the Community from Gibraltar are subject to the rules on extra-Community imports; just as (although the question, as we shall see, is open to controversy) goods from Gibraltar should be deemed to come from third countries. Finally, the legislation on harmonisation of VAT does not apply to Gibraltar.

33. Otherwise, the Treaty is, as a matter of principle, applicable to Gibraltar, pursuant to Article 299(4) EC; in particular the general principles of the Community legal order (beginning with the prohibition on discrimination on the ground of nationality), and free movement of persons, services and capital and the other Community policies listed in Article 3 EC are fully applicable.

34. For a long time this regime does not appear to have given rise to particular problems, not even after the accession of Spain to the Community. The ancient dispute with the United Kingdom flared up only in some sectors; [26] however, at least as far as is known, no specific difficulties have arisen in connection with the implementation of the Treaty and secondary

26 — I would point out, in particular, that border checks carried out by the Spanish authorities gave rise to parliamentary questions and individual complaints to the Commission; just as the question of joint use of the airport on the isthmus, agreed by the parties and never implemented because of the difficulties which subsequently arose, led to the exclusion of Gibraltar from the liberalisation of the skies regime. See Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States (OJ 1990 L 217, p. 8, in particular Article 1(3)).

legislation to Gibraltar over many years. The Commission itself appears to have paid scant attention to the question, so much so that even in 1996, when asked to explain to the European Parliament the state of implementation of Community directives in Gibraltar, it stated that it was not in a position to give an immediate reply. [27] In order to be in a position to do so, it spent several months and concerned itself essentially with the directives on freedom to provide services, freedom of establishment and free movement of capital. [28] However, the issue of the applicability of the directives based on Articles 94 and 95 EC to Gibraltar was not raised with any particular urgency on that occasion. [29]

B — *The terms of the question*

35. Thus, the issue has been raised clearly and precisely only in these proceedings and must be addressed in all its aspects. In particular, it seems to me that, above all, the following problems must be resolved in turn.

36. First of all, it must be established whether the exclusion of Gibraltar from the Community customs territory also entails its exclusion from the scope of the Treaty provisions which are intended to guarantee free movement of goods.

37. Second, it must be determined whether the possible inapplicability of the provisions on free movement of goods entails, in turn, that the directives based on Articles 94 and 95 EC intended to complete the internal market and aimed, in particular, at the elimination of obstacles to the free movement of goods are not applicable to Gibraltar.

38. If it does, it must then be considered whether those directives will be inapplicable even where, although their principal objective is the elimination of obstacles to the free movement of goods, they also pursue goals unrelated to the internal market (in this case, environmental policy goals).

27 — When asked to 'report on what progress has been made in the application by the United Kingdom of Community directives in the territory of Gibraltar' (Written Question No. 3558/96 by L. de Esteban Martin of 12 December 1996), in its initial answer given on 15 January 1997, President Santer replied that: 'The Commission is collecting the information it needs to answer the question. It will communicate its findings as soon as possible', see OJ 1997 C 83, p. 133.

28 — Supplementary answer given by Mr Santer on behalf of the Commission on 1 July 1997 (OJ 1997 C 45, p. 3), further to its first answer, cited in the previous footnote. In it the Commission reported on the failure to implement some directives concerning specifically the financial services sector, and recognition of training and qualifications in the medical and liberal professions, pointing out that infringement proceedings had been initiated in that connection.

29 — Supplementary answer, cited above: 'Directives based on Article 100a of the EC Treaty that also have an environmental impact are, in the Commission's view, applicable to Gibraltar, and discussions are currently under way with the United Kingdom authorities on this matter'.

C — *Arguments of the parties*

39. The Commission, supported by the Spanish Government, starts from the premiss that, by virtue of its status as a Crown colony of the United Kingdom, Gibraltar is undoubtedly a European territory for whose external relations a Member State is responsible. Under Article 299(4) EC, therefore, the Treaty and secondary legislation apply in full to Gibraltar, subject to the exclusions and derogations expressly provided for.

40. Such derogations, the Commission argues further, include significant areas of Community legislation listed in the 1972 Act of Accession. In particular, the provisions on agricultural products and VAT harmonisation measures are not applicable, just as Gibraltar is excluded from the customs territory and from the commercial policy provisions of Regulation No 1025/70.

41. The Commission goes on to argue that, as such provisions represent an exception to the general principle that Community legislation is fully applicable, they must be interpreted narrowly, in accordance with the well-known principle, often upheld by the Court, that derogations from fundamental freedoms must be interpreted strictly. [30]

42. In the present case, those provisions relate to a fundamental freedom, namely that relating to movement of goods. In the light of the above principle of interpretation, it must therefore be considered whether they remain confined to their specific subject area or whether they encompass the applicability (or rather, the inapplicability) of the entire legislation on free movement of goods (Article 28 EC et seq.). However, in fact the Commission does not address the question from that angle, but from the angle of the applicability of the harmonisation directives adopted by the Community institutions on the basis of Articles 94 and 95 EC for the purpose of completing the internal market.

43. In that connection the applicant submits that the derogations relating to the application of the Treaty to Gibraltar do not include any concerning those directives, nor do those at issue in these proceedings, for their part, provide for any specific territorial limitation. It must therefore be concluded, according to the Commission, that both the above Treaty articles and the directives at issue must apply to the territory of the British colony.

30 — The Commission, in fact, directly quotes only one decision, concerning Article 30 EC, namely Case 113/80 *Commission v Ireland* [1981] ECR 1625.

44. On the other hand, the Commission points out, to argue otherwise would have unreasonable consequences in terms of environmental protection. The directives adopted on the basis of the powers specifically provided for by Title XIX of the Treaty, on the environment, would, if that argument were accepted, be applicable to Gibraltar while those adopted on the basis of Articles 94 and 95 EC would not be, even though they are also intended (although not principally and exclusively) to protect the environment.

45. The Kingdom of Spain, for its part, submits that the regime of free movement of goods is fully applicable to Gibraltar. As the basis of its position, that government, too, points out that free movement of goods constitutes a fundamental principle of the common market [31] and that derogations from such freedom must therefore be interpreted narrowly. If that is so, it must then be acknowledged that the exclusion of Gibraltar from the customs territory of the Community entails only the inapplicability of the common customs tariff to the foreign trade of the British colony, with the result that goods from third countries imported into Gibraltar are exempt from customs duties. However, in trade between Gibraltar and the rest of the Community the prohibition on customs duties will continue to apply as will the prohibition of quantitative restrictions and measures having equivalent effect.

46. In support of that interpretation the Spanish Government points to the regime in force for Ceuta and Melilla under the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties. [32] Those two North African cities are also excluded from the customs territory of the Community pursuant to Article 1 of Protocol No 2 concerning the Canary Islands and Ceuta and Melilla, annexed to the 1985 Act of Accession; [33] despite that, products originating in Ceuta and Melilla enjoy full exemption from duties and taxes having equivalent effect on entry into the Community customs territory and vice versa (Articles 2 and 6 of that Protocol). It must therefore be concluded, according to that government, that exclusion from the Community customs territory entails solely the non-application of the common customs tariff duty to products imported from third countries, with any effect on free movement of goods within the Community being ruled out.

47. As regards, then, the applicability to Gibraltar of Articles 94 and 95 EC, the Spanish Government, as well as putting forward arguments similar to those of the Commission, adds, in particular, that the

31 — See in particular Case 37/83 *Rewe* [1984] ECR 1229 and Case C-41/93 *France* v *Commission* [1994] ECR I-1829.

32 — OJ 1985 L 302, p. 27 ('the 1985 Act of Accession').

33 — OJ 1985 L 302, p. 400 ('Protocol No 2 concerning the Canaries, Ceuta and Melilla').

powers conferred on the Commission by such provisions serve to complete the internal market *overall*. Indeed, it would not be possible to achieve the completion of a single market without internal borders, without aiming to eliminate obstacles to *all* freedoms of movement of factors of production. If, therefore, it had to be considered that the territory of Gibraltar is entirely excluded from freedom of movement for goods, it would have to be concluded that the British colony is excluded from *all* the internal market, because not only that freedom but all the others would not be applicable.

48. For its part, the United Kingdom Government first points out, in general terms, that the provisions of the Act of Accession relating to Gibraltar, considered as a whole, are intended to retain for the British colony the same complete autonomy in the management of its own commercial policy as it enjoyed before the accession of the United Kingdom to the Community. That objective was never at issue during the negotiations and in order to achieve it the exclusion of Gibraltar from the Community customs territory and from the scope of the common commercial policy was enshrined in the Act (see Article 29 and Annex I, Section 1, point 4, of the 1972 Act of Accession).

49. As a result of that exclusion, that government goes on to argue, the provisions of the Treaty on the establishment of the customs union (Article 23 EC et seq.) do not apply to the colony and the goods which enter it cannot be considered to be in free circulation in the Community within the meaning of Article 24 EC, given the independence of its commercial policy. However, if that is the case, the provisions of Article 28 EC et seq. on the prohibition of quantitative restrictions and measures having equivalent effect on trade in goods cannot be applicable to trade between Gibraltar and the rest of the Community either; this is because of the express provision in Article 23(2) EC which restricts the application of such prohibitions to goods in free circulation. Moreover, as is consistent with and complementary to such a regime, Article 28 of the 1972 Act of Accession provides that the rules on the common agricultural policy and the common commercial policy in the agricultural sector do not apply to Gibraltar, thus establishing the exclusion of the British colony from the free movement of goods regime in that sector.

50. Of course, the United Kingdom is not unaware of the principle of the narrow interpretation to be given to derogations from the application of the Treaty provisions, but denies that that principle is relevant in the present case. If, as we have seen, the provisions of the 1972 Act of Accession as regards Gibraltar entail the non-application to that territory of all the Treaty provisions on free movement of goods, it follows necessarily, on the basis of considerations of logic and justice, that the provisions of secondary legislation intended to secure that freedom are not applicable either.

51. As regards, in particular, the powers provided for by Articles 94 and 95 EC, the United Kingdom points out that they are aimed at the removal of obstacles, within the Community, to the movement of goods, services, persons and capital. It follows that measures based on those rules and intended to eliminate obstacles to the movement of goods can be applicable only to those parts of the Community territory within which the Treaty has provided that goods are to circulate freely. That, as we have seen, is not the case for Gibraltar, and there is thus no justification for the application of such measures to trade between Gibraltar and the rest of the Community.

52. If we accept the Commission's point of view, the defendant government argues, we achieve the paradoxical effect of divesting of all meaning the status which the Act of Accession aims to secure for Gibraltar, that is to say, that of a territory with an independent commercial policy as regards goods. The application of the directives adopted on the basis of Articles 94 and 95 EC relating to goods could prevent Gibraltar from importing goods from third countries which do not meet the requirements imposed by those directives.

53. Finally, the United Kingdom Government rejects the Commission's argument that the directives which are the subject of this judgment should be applicable to Gibraltar, since they pursue environmental objectives in addition to internal market objectives. In that connection, it points out that the case-law of the Court has made clear, on the one hand, that internal market objectives are a necessary and sufficient condition for the valid adoption of harmonising legislation on the basis of Article 95 EC and, on the other hand, that such objectives must be considered to prevail even where the directive pursues, in addition to such objectives, goals relating to the protection of health or of the environment. [34] So, a harmonisation measure based on Article 95 EC which concerns free movement of goods can never be applicable to Gibraltar, even where it pursues ancillary objectives of environmental protection.

D — *Assessment*

54. Turning now to my appraisal of the arguments set out above, I will follow the same order as that followed so far. Thus, I will assess first of all whether the exclusion of Gibraltar from the Community customs territory also entails its exclusion from the scope of the Treaty rules intended to guarantee free movement of goods, and will go on to address the issue of the applicability of directives adopted on the basis of Articles 94 and 95 EC and intended

34 — See, in particular, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraphs 84 to 88.

to remove obstacles to the movement of goods. Finally, if such applicability is excluded, we must then ask whether the same conclusion must be reached as regards those directives which, while having as their main aim the elimination of obstacles to free movement of goods, also pursue goals unrelated to the internal market (in the present case, environmental policy goals).

(a) The regime for trade in goods between Gibraltar and the rest of the Community

55. In this connection, I would observe first of all that there does not appear to be any genuine dispute between the applicant and the defendant government. The argument of the United Kingdom that the Community rules on free movement of goods do not apply to Gibraltar has never really been challenged by the Commission. On the contrary, it in fact argued along the same lines in its answer to questions by Parliament, explaining that Gibraltar operates independently its own commercial policy in relations with the rest of the Community, and is treated as a third country for the purposes of measures under the common commercial policy. [35] On that point, therefore, the dispute is primarily between Spain and the United Kingdom.

56. Against that background, and turning now to the substance of the question, I would first point out that, under the Treaty, the prohibition on customs duties and equivalent charges, and quantitative restrictions and equivalent measures, applies to products from Member States and to those from third countries released for free circulation in the Member States. Thus, in order to establish whether trade

35 — See the answer by Mr De Clercq to Written Questions Nos 1823/84, 1824/84 and 1825/84, in OJ 1985 C 341, p. 1. On that occasion, in answer to a question whether, inter alia, 'as a result of Spain's proposed entry to the Community... the right to such wholesale sales would not be limited by requiring Spanish exporters to obtain a licence on the grounds that Gibraltar's needs are adequately met by existing suppliers within Gibraltar' the Commission stated: 'On the basis of the 1972 Act of Accession, and in particular the exclusion of Gibraltar from the Community's customs territory, the provisions of the EEC Treaty concerning the free movement of *goods within the Community do not apply to Gibraltar and the territory is treated as a "third country" for the purposes of measures under the common agricultural policy directly involving the import or export of goods*' (emphasis added), going on to state that 'the arrangements which Gibraltar will apply to imports of goods from Spain and other Member States form part of its own commercial policy... The Commission would also point out that, apart from the derogations resulting from the 1972 Act of Accession, the provisions of the EEC Treaty and the related secondary legislation apply to Gibraltar, pursuant to Article 227(4) of the EEC Treaty. These provisions, concerning *inter alia* freedom to provide services and the right of establishment, will therefore apply to the enlarged Community from accession'. Subsequently, in 1989, the answer given by Mr Bangemann on behalf of the Commission to a question on 'Harassment at the border between Gibraltar and Spain' (OJ 1989 C 262, p. 10), confirmed that position, stating that 'Gibraltar is part of the territory covered by the Treaties establishing the Community but not part of its customs territory. *The rules of the Treaty concerning the free movement of goods do not therefore apply to trade between Gibraltar and Spain, while goods coming from that territory are subject to the common system governing imports into the Community.* The facilities provided by the Community rules with regard to intra-Community trade in goods therefore do not apply to cross-frontier traffic between Gibraltar and Spain' (emphasis added).

between Gibraltar and the rest of the Community comes within the rules on free movement it must be determined, on the one hand, whether goods produced in Gibraltar must be considered to originate in a Member State and, on the other hand, whether those imported into Gibraltar can be considered released for free circulation in a Member State within the meaning of Articles 23 and 24 EC.

57. To begin with the last point, I would point out that, under Article 24 EC, products coming from a third country are considered to be in free circulation in a Member State if, in that State, the import formalities have been complied with, commercial policy measures applied and any customs duties legally due charged (see Article 79 of the Community Customs Code) bearing in mind that such duties are laid down by the common customs tariff (Article 23(1) EC; Article 20(1) of the Community Customs Code).

58. So, it is not disputed that, as Gibraltar is outside the Community customs territory, goods which enter it from a third country are not subject to the duty fixed by the common customs tariff but to that which the local authorities may have set independently. Moreover, because of Gibraltar's exclusion from the customs union, goods entering it are not subject to any of the measures under the common commercial policy. It follows that goods imported into Gibraltar are not in free circulation in a Member State within the meaning of Article 24 EC.

59. Then, as regards the question whether goods from Gibraltar can be considered to originate in a Member State within the meaning of Article 23(2) EC, it is clear to me that the answer must be in the negative, given that only goods produced in the customs territory of a Member State, and thus in the customs territory of the Community, can 'originate' in a Member State.

60. Indeed, as I pointed out above (see point 10), that territory comprises, as is entirely consistent with the objective of Article 23 EC, the customs territory of the individual Member States, although it may be different from the scope of their territorial sovereignty (Article 3 of the Community Customs Code). Further, pursuant to Article 4 of that Code, '"Community goods" means goods *wholly obtained or produced in the customs territory of the Community*' and goods '*imported from countries or territories not forming part of the customs territory of the Community which have been released for free circulation*'.[36]

36 — Emphasis added.

61. If that is the case, goods originating in Gibraltar obviously cannot therefore be considered 'Community goods', insofar as they are not produced in the customs territory of the Community; they could possibly become such after being released for free circulation in Community territory.

62. For the rest, the fact that Gibraltar must be considered as a third country for the purposes of the Community provisions on movement of goods is confirmed by the provisions specifically laid down by the common commercial policy. In fact, on the one hand, before the Marrakesh Agreements revitalised globally the prohibition on quantitative restrictions and required the amendment of the relevant provisions of the Community commercial policy, the common rules for imports laid down by Regulation No 288/82 expressly contemplated the possibility of subjecting products from the territory of Gibraltar to quantitative restrictions on entry into Community customs territory (Article 1(2) and Annex I: see above, points 23 and 24). On the other hand, Gibraltar is included in the generalised tariff preferences scheme set up by Regulation No 2501/2001, and goods from the colony are thus considered to be goods from a third country and allowed into the Community under the preferential tariff conditions laid down by that regulation (Article 2 and Annex I).

63. I must concur, moreover, with the defendant government when it points out that the subjection of goods from Gibraltar to the rules applicable to trade in goods with third countries is obviously the premiss on which the provisions of the 1972 Act of Accession relating to the British colony are based. In particular, it must be borne in mind that, having formally removed the United Kingdom and its dependent territories, including Gibraltar, from the list of third countries whose products are admitted into the Community under the rules on the liberalisation of imports laid down by Regulation No 1025/70 (Annex I, Section 1, point 4, of the Act of Accession: see above, point 19), Annex II of that Act expressly provides that goods from Gibraltar must none the less benefit, on importation into the Community customs territory, from liberalisation rules similar to those covering goods from the third countries to which that regulation applies (see above, point 20). Now, it seems to me that, as the United Kingdom has pointed out, such a caveat would not be necessary at all if goods from Gibraltar were considered to be Community goods and the Community rules on free movement thus applied to them.

64. Nor do the objections raised by the Spanish Government to such a conclusion seem to me to be persuasive, based as they are on an alleged analogy between the rules applicable to the British colony and those laid down for the Spanish territories, Ceuta and Melilla. It is true that the two Spanish cities are excluded from the Community customs territory, while goods originating there none the less have access to the rest of the Community without being subject to

common customs tariff duties. However, it must be said that, pursuant to Article 1 of the Protocol,[37] goods from Ceuta and Melilla are not considered to be 'in free circulation' in the Community customs territory for the purposes of Articles 23 and 24 EC, and, therefore, the regime of free movement applicable to goods originating in those Spanish territories does not derive from the implementation of the Treaty. Rather, it results from the creation, by Articles 2(1)[38] and 6(1),[39] of Protocol No 2 on the Canaries, Ceuta and Melilla, of a free trade area comprising the customs territory of the Community, on the one hand, and the customs territory of the two Spanish enclaves, on the other. In my view, it follows, that, far from undermining the above interpretation of the regime applicable to Gibraltar, the regime in force for Ceuta and Melilla confirms its accuracy: the exclusion from the Community customs territory entails the inapplicability of the Treaty provisions on trade in goods, save as otherwise expressly provided.

65. I think I am therefore entitled to conclude on that point that no free movement of goods regime applies between Gibraltar and the rest of the territory of the Community, or, to put it the other way round, the Community rules in Title I of Part three of the Treaty on free movement of goods do not apply.

37 — In the terms of which,
'1. Products originating in the Canary Islands or in Ceuta and Melilla and products coming from third countries imported into the Canary Islands or into Ceuta and Melilla under the arrangements which are applicable there to them shall not be deemed, when released for free circulation in the customs territory of the Community, to be goods fulfilling the conditions of Articles 9 and 10 of the EEC Treaty, nor goods in free circulation under the ECSC Treaty.
2. The customs territory of the Community shall not include the Canary Islands and Ceuta and Melilla.
3. Except where otherwise provided for in this Protocol, the acts of the institutions of the Community regarding customs legislation for foreign trade shall apply under the same conditions to trade between the customs territory of the Community, on the one hand, and the Canary Islands and Ceuta and Melilla, on the other.
4. Except where otherwise provided for in this Protocol, the acts of the institutions of the Community regarding the common commercial policy, be they autonomous or enacted by agreement, directly linked to the import or export of goods, shall not be applicable to the Canary Islands or to Ceuta and Melilla.
5. Except where otherwise provided for in the Act of Accession, including this Protocol, the Community shall apply in its trade with the Canary Islands and with Ceuta and Melilla, for products falling within Annex II to the EEC Treaty, the general arrangements which it applies in its foreign trade.'

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

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

(b) The applicability to Gibraltar of the directives on the internal market

66. As I have already indicated, however, the real crux of the dispute between the Commission and the United Kingdom concerns the measures adopted pursuant to Articles 94 and 95 EC and their applicability to Gibraltar.

67. According to the United Kingdom, as we have seen, such applicability must be excluded where the measures in question are intended to facilitate freedom of movement of goods, that is to say, a freedom which is not extended to Gibraltar.

68. According to the Commission, however, that conclusion goes too far and conflicts with the principle which requires a narrow interpretation of derogations from general principles. Moreover, as the Spanish Government, for its part, observes, the unity of the concept of the internal market implies the indivisibility of the freedoms provided for by the Treaty, with the consequence that where one of those is not applicable, the others cannot be either.

69. That objection is obviously rooted in the idea that it is not the sole function of harmonisation measures relating, from time to time, to goods, persons, services or capital to promote one or the other of those freedoms, but they have to be assessed overall, in the sense that they are part of a single complex plan relating to the completion and the operation of the single market. Consequently we should speak not so much of harmonisation measures intended individually to eliminate obstacles to free movement of goods, persons, services or capital, but of measures intended, each and every one, to achieve that single objective.

70. However, that objection, though interesting, does not convince me, at least not in this context. It seems to me that, while it is certainly true that the concept of the internal market is a single concept which encompasses all the freedoms in question, that does not mean that it is something other than those freedoms, still less does it mean that they merge their specific characteristics in that concept so as to become indistinguishable from one another.

71. Moreover, that hypothesis is inconsistent with the clear legislative position, that is to say, the fact that different provisions of the Treaty govern the establishment of the various freedoms. But in reality that difference in the legislation is merely a reflection of the conceptual and systemic autonomy of the individual freedoms, the achievement of which rests with very different instruments, arrangements, times and conditions.

72. Without wishing to dwell on this point, I would merely observe that the lie is given to that objection by the texts on precisely the points at issue in this case. While it is true that an internal market encompassing all four of the above freedoms of movement is the objective pursued by the Community in general terms, it is not necessarily true that it is pursued for the *whole* Community. There are in fact territories of the Community which are expressly excluded from one freedom or the other, without the applicability of the others being in any way

called into question. Consider the case of the Channel Islands or the Isle of Man, to name two possessions of the British Crown or, after the accession of Finland, the case of the Åland islands: the provisions relating to free movement of goods, but not those relating to free movement of persons and services, apply to those territories, as is clear from Articles 1 and 2 of Protocol No 3 on the Channel Islands and the Isle of Man, [40] and from Article 1 of Protocol No 2 on the Åland islands. [41]

73. Thus, it does not strike me as strange or odd that the Treaty ith a specific status, such as that of Gibraltar, for an equally specific regime, under which the freedoms of movement are tied in with the general regime in different ways. In the present case, that regime pursues the objective of merging the market in Gibraltar and the rest of the Community market in an area without internal borders as regards the movement of services, persons and capital, leaving out the movement of goods for the reasons already stated.

74. If that is so, it follows necessarily that the directives pursuant to Articles 94 and 95 EC intended to harmonise national provisions on free movement of goods, which therefore seek chiefly to achieve that freedom, cannot apply in Gibraltar as they would otherwise breach the regime expressly laid down for that territory, that is to say the regime which excludes Gibraltar from the free movement of goods.

75. We could try to imagine what would happen if we opted for the alternative solution, and we can do this by taking as an example the first of the directives which the Commission complains has not been implemented in Gibraltar, that is to say Directive 67/548 on the classification, packaging and labelling of dangerous substances. As we know, that directive provides that dangerous substances may be marketed only if the labelling on the packaging and the classification of the

40 — Protocol No 3 on the Channel Islands and the Isle of Man OJ 1972 L 73, 27 March 1972, p. 164.
Article 1(1): 'The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom.'
Article 2: 'The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services.'

41 — Protocol No 2 on the Åland islands to the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, OJ 1994 C 241, 29 August 1994, p. 352.
Article 1: 'The provisions of the EC Treaty shall not preclude the application of the existing provisions in force on 1 January 1994 on the Åland islands on:
— restrictions, on a non-discriminatory basis, on the right of natural persons who do not enjoy hembygdsraett/kotiseutuoikeus (regional citizenship) in Åland, and for legal persons, to acquire and hold real property on the Åland islands without permission by the competent authorities of the Åland islands;
— restrictions, on a non-discriminatory basis, on the right of establishment and the right to provide services by natural persons who do not enjoy hembygdsraett/kotiseutuoikeus (regional citizenship) in Åland, or by legal persons without permission by the competent authorities of the Åland islands.'

substance comply with the harmonised requirements, and the name of the substance, its origin, the symbols and indications relating to its dangerous nature and the attendant risks *inter alia* are specified in accordance with the detailed provisions of the directive. If those rules were held also to cover Gibraltar, they would make it impossible to import, for marketing in the territory, goods originating in a third country which do not meet the requirements of the directive without prior reconditioning of those goods following their correct classification in accordance with the harmonised technical rules. This would obviously be inconsistent with the status conferred on Gibraltar and in particular the special regime laid down by the Act of Accession to guarantee the autonomy in commercial policy which it enjoyed before the accession of the United Kingdom to the Community.

76. Another example can be drawn from the directives on noise emission of construction plant and equipment, which are the subject, *inter alia*, of this case (I refer to the framework Directive 79/113 and implementing Directives such as Directive 84/533, or Directive 84/534, or indeed Directives 84/535, 84/536, 84/537, etc.). If such directives had to be applied in Gibraltar too, this would in practice prevent the importation into the territory to meet the needs of the local construction industry of compressors, generators or pneumatic drills and other similar equipment which is noisy but good value originating in, for example, neighbouring Morocco. Such equipment could not be marketed on the territory of Gibraltar unless steps had first been taken to reduce its noise emissions and to obtain Community certification from a competent body. Thus, in such cases too, there would be a breach of the special regime laid down for Gibraltar.

77. It thus seems to me that I can conclude that the exclusion of this territory from free movement of goods necessarily implies that directives based on Articles 94 and 95 EC intended to harmonise national provisions on movement of goods are not applicable to Gibraltar either.

78. That conclusion seems to be inescapable as regards directives aimed principally at the establishment of the freedoms relating to such movement. We might also ask — even if the issue does not arise in the present case — whether the same conclusion is called for as regards directives based on Articles 94 and 95 EC which primarily and chiefly pursue the establishment of the other freedoms of movement (all of which, as I have said, apply to Gibraltar), which also tend, albeit only incidentally, to promote free movement of goods.

79. It is not easy to give a definite answer to this question. However, it seems to me that in such circumstances the harmonisation measure in question should be considered applicable to the territory of Gibraltar as well, not only because of the indirect and ancillary character of the effects the relevant directive has on the movement of goods, but chiefly on the basis of the principle of the narrow interpretation of derogations from the uniform application of Community law. It would be difficult for that principle to operate in the circumstances considered earlier because in such cases one cannot speak of a derogation as such, given that the exclusion of Gibraltar is the *direct* consequence of the regime established by the Act of Accession. However, in the case now under consideration, that consequence is not only not imposed by the Act of Accession, but is, rather, excluded by it.

(c) The applicability of the directives which also pursue other aims

80. However, I repeat, that is not the issue in this case. As I have said, the issue here is those directives which, while exclusively concerning movement of goods, at the same time also pursue other, albeit ancillary, goals (here, relating to environmental protection).

81. As I have pointed out, the Commission claims that such directives must be considered applicable to Gibraltar, partly for the general reasons considered above but primarily because there would otherwise be unreasonable discrimination in the territorial application of directives pursuing environmental protection objectives, according to whether they were based on Articles 94 and 95 EC or directly on the relevant legal bases established for those sectors (Article 174 EC et seq). Such discrimination, the Commission objects, would lead to partial application to Gibraltar of environmental protection measures, which would be bound to adversely affect the consistency of Community policy in that area.

82. For my part, while I understand the concerns of the Commission, I find the opposing argument put forward by the United Kingdom more convincing. It seems to me in fact that the 'unreasonable' consequences which the Commission rightly highlights are primarily the result of Community legislative practices, which were more or less necessary for a certain time and thus more or less justified, but which cannot have any bearing for present purposes.

83. As is well known, as the Community did not in the past have a specific legislative power to lay down rules on environmental matters it had to rely on alternative legal bases, including, in particular, Article 100 of the Treaty (now Article 94 EC). From 1987, with the entry into force of the Single

European Act, the situation changed and the Community was given a specific power to adopt measures on environmental matters. The same thing happened, as as we know, in other sectors (consumer protection, health etc.), giving rise to an understandable but uncertain practice as regards the relation between the objective of an act and its legal basis.

84. The Court has also developed clear case-law on the subject perhaps primarily to address the abuses and ambiguities to which that practice may have given rise. In particular, for present purposes, it has consistently held that 'the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure.' [42] If, therefore, 'examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component'. [43]

85. In the present case, that obviously means that a directive which is chiefly intended to eliminate obstacles to the creation of the internal market, that is to say a directive which 'genuinely [has] as its object the improvement of the conditions for the establishment and functioning of the internal market', [44] cannot but be based only on Article 94 or on Article 95 EC and exclusively on them, and that any other incidental aims which may be pursued by the measure are of no relevance.

86. In this case the directives at issue are all based, either themselves or the act of which they are an implementing measure (see above, footnote 25), on Article 94 or Article 95 EC, and are intended chiefly, if not exclusively, to foster the free movement of goods. For that reason, as I have endeavoured to demonstrate above, those directives must have the same territorial

42 — See Opinion 2/00 of 6 December 2001, Protocol of Cartagena [2001] ECR I-9713, paragraph 22, and judgments in Case C-268/94 *Portugal* v *Council* [1996] ECR I-6177, paragraph 22, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43, and Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 58.

43 — See Case C-36/98, cited above, paragraph 59, and Opinion 2/00, cited above, paragraph 23, Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraphs 19 and 21, Case C-42/97 *Parliament* v *Council* [1999] ECR I-869, paragraphs 39 and 40.

44 — Case C-376/98 *Germany* v *Parliament* [2000] ECR I-8419, paragraph 84.

scope as that freedom; the fact that they incidentally pursue objectives relating to environmental protection does not alter their classification and, for present purposes, cannot lead to an extension of their territorial scope beyond the limits set by the Treaties and the 1972 Act of Accession.

87. This is not to deny, of course, that failure to apply such directives to Gibraltar could jeopardise the consistency of Community policies in the sectors which are incidentally the subject of those directives. However, to prevent the effect feared by the Commission and ensure the consistency of Community policy we cannot call into question the regime established for Gibraltar, particularly as the Community always has the option, where the relevant conditions are met, of exercising the powers conferred on it in the specific sectors (for the environment, as we know, by Article 174 EC et seq.), and, if necessary, adopting appropriate measures applicable (also) to Gibraltar.

(d) Concluding considerations

88. For the reasons I have set out above it therefore seems to me that we must accept that neither the rules of the Treaty establishing a regime of free movement of goods, nor the harmonisation measures based on Article 94 or Article 95 EC, are applicable to Gibraltar, where they are intended chiefly to ensure the free movement of goods, irrespective of the other objectives which those measures incidentally pursue.

89. In the present case, as the United Kingdom essentially contends, without being contradicted by the Commission or the Spanish Government, all the directives whose implementation is at issue exclusively concern the harmonisation of national provisions relating to goods and are thus not aimed at the establishment of any other freedom of the internal market.

90. Consequently, for the reasons just given, I take the view that the Commission's application must be dismissed in its entirety.

V — Costs

91. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the United Kingdom has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

92. Under Article 69(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain is therefore to bear its own costs.

VI — Conclusion

93. In the light of the foregoing considerations I therefore propose that the Court should:

(1) dismiss the Commission's application;

(2) order the Commission to pay the costs;

(3) order the Kingdom of Spain to bear its own costs.