



Press and Information

Court of Justice of the European Union

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Judgment in Case C-400/08
Commission v Spain

A Member State may not make the opening of a large retail establishment conditional upon economic considerations such as its impact on the existing retail trade, or the market share of the undertaking concerned

Such considerations cannot justify a restriction on the freedom of establishment

Taking the view that freedom of establishment precludes the legislation governing the conditions for setting up large retail establishments in the Autonomous Community of Catalonia¹, the European Commission decided to bring the present action against Spain for failure to fulfil obligations.

Any opening of a large retail establishment on the territory of the Autonomous Community of Catalonia is subject to a prior authorisation system, under which the localities available for new establishments and their sales areas are restricted. Furthermore, a licence for new establishments is issued only where it is found that there will be no impact on existing small traders.

In its judgment, delivered today, the Court finds that **the contested legislation, taken as a whole, constitutes a restriction on the freedom of establishment**. That legislation has the effect of hindering or rendering less attractive the exercise by economic operators from other Member States of their activities on the territory of the Autonomous Community of Catalonia and thus of affecting their establishment in the Spanish market.

The Court points out that restrictions on freedom of establishment, such as that at issue, may nevertheless be justified on the basis of overriding reasons in the public interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. Such overriding reasons include environmental protection, town and country planning and consumer protection. On the other hand, purely economic objectives cannot constitute an overriding reason in the public interest. That said, the Court examines whether some of the provisions of that legislation may be justified.

The restrictions on the location and size of large retail establishments

The Court declares that the Kingdom of Spain has failed to fulfil its obligations as regards the principle of freedom of establishment by adopting and/or by maintaining in force the Catalan provisions which: (1) prohibit the opening of large retail establishments outside consolidated urban areas of a limited number of municipalities²; (2) restrict the setting up of new hypermarkets to districts where the existing commercial supply is not regarded as excessive³; and (3) provide that such new hypermarkets are not to account for more than 9% of estimated expenses for staple supplies and 7% of estimated expenses for non-staple supplies.

¹ Although some of those conditions are laid down in a national law, others are laid down in Catalan regional legislation.

² Large retail establishments may be set up only in consolidated urban areas of municipalities which are administrative centres or which have a population of over 25 000 inhabitants or seasonal tourist visitors who may be regarded as such.

³ For 2009, the commercial supply was regarded as excessive in 37 of the 41 districts of the Autonomous Community of Catalonia.

Although restrictions relating to the location and size of large retail establishments appear to be methods suitable for achieving the objectives relating to town and country planning and environmental protection, relied on by Spain, the Court nevertheless finds that Spain has not produced sufficient evidence to explain the reasons for which the restrictions at issue are necessary to achieve the objectives pursued. Accordingly, given that lack of explanation and the significant impact of the restrictions in question on the possibility of opening large retail establishments on the territory of Catalonia, the Court considers that the specific restrictions relating to the location and size of large retail establishments are not justified.

The conditions for obtaining the licence necessary for opening a large retail establishment

On that point, the **national** legislation requires the public authorities to take account of the existence of retail facilities in the area concerned and the impact of a new establishment on the commercial structure of that area. Similarly, the **Catalan** legislation requires the public authorities to draw up, as part of the licensing procedure, a report on the applicant's market share.

Thus, by means of those two requirements, the issue of a licence is conditional upon compliance with certain ceilings regarding market share and impact on existing retail trade, above which large retail establishments cannot be opened. Since those considerations are purely economic, the Court considers that they cannot constitute an overriding reason in the public interest and thus justify a restriction on the freedom of establishment. Consequently, as regards the conditions for obtaining the licence necessary for opening a large retail establishment, **the Court concludes that the principle of freedom of establishment precludes the national and Catalan provisions which require compliance with ceilings regarding the market share of the applicant undertaking and the impact of a new establishment on existing retail trade.**

Lastly, in the course of the licensing procedure, it is compulsory under the legislation to consult with the Retail Facilities Committee, which is responsible for drawing up a report, account being taken, inter alia, of town and country planning and environmental protection. In that regard, the Court considers that **the principle of freedom of establishment precludes the Catalan legislation governing the composition of the Retail Facilities Committee, in so far as that legislation ensures that the interests of the existing retail trade are represented, but makes no provision for the representation of associations active in the field of environmental protection, or interest groups working towards consumer protection.**

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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