JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

12 December 2006 *

In Case T-95/03,

Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid, established in Madrid (Spain),

Federación Catalana de Estaciones de Servicio, established in Barcelona (Spain),

represented by J. Jiménez Laiglesia, M. Delgado Echevarría and R. Ortega Bueno, lawyers,

applicants,

v

Commission of the European Communities, represented by J. Buendía Sierra, acting as Agent, and J. Rivas Andrés and J. Gutiérrez Gisbert, lawyers,

defendant,

* Language of the case: Spanish.

supported by

Kingdom of Spain, represented initially by E. Braquehais Conesa, and subsequently by M. Muñoz Pérez, acting as Agents,

and

Asociación Nacional de Grandes Empresas de Distribución (ANGED), established in Madrid, represented by J. Pérez-Bustamante Köster and J. Passás Ogallar, lawyers,

interveners,

APPLICATION for annulment of Commission Decision C(2002) 4355 final of 13 November 2002 concerning Spanish legislation on the opening of service stations by hypermarkets,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 October 2005,

gives the following

Judgment

Background to the dispute

1. *Spanish legislation*

1 Article 47(2) of the Spanish Constitution provides that 'the community shall have a share in the benefits accruing from the town-planning policies of public bodies'.

2 Articles 3, 7, 8, 14 and 18 of Ley 6/1998 sobre Régimen del Suelo y Valoraciones (Law on land and development; the 'LRSV') provide:

'*Article 3*

The share of the community in the benefits accruing from the town-planning policies of public bodies shall be governed by the conditions laid down in this law and other applicable laws.

...

Article 7

For the purposes of this law, land shall be classified as urban land, land on which urban development is permissible and land on which urban development is not permissible, or in accordance with equivalent classifications regulated by town-planning law.

Article 8

For the purposes of this law, the following shall be regarded as urban land:

(a) land which has already been developed in that it consists of, at least, road access, a water supply, water drainage and an electricity supply, or because it is consolidated by construction in the manner and with the characteristics required by town-planning law;

(b) land which has been developed in implementation of an urban development plan and in compliance with its requirements.

...

Article 14

1. Owners of urban land consolidated by urban development must complete, at their own expense, the urban development necessary to make such land suitable for

construction — if it is not already — and carry out such construction within the time-limit prescribed if the land is situated in a zone for which the urban development plan provides for such an obligation, and in accordance with that plan.

2. Owners of non-consolidated urban land shall be subject to the following obligations:

...

(c) they must transfer a plot corresponding to 10% of the profit made on the relevant zone to the competent authority free of charge; that percentage, which is the maximum, may be reduced by town-planning law; similarly, that law may reduce the competent authority's share of the urban development fees in respect of that land.

...

Article 18

The development of land classified as land on which urban development is permissible shall entail the following obligations for its owners:

...

(4) they must transfer a plot corresponding to 10% of the profit made on the relevant sector or zone to the competent authority free of charge; that percentage, which is the maximum, may be reduced by town-planning law; similarly, that law may reduce the competent authority's share of the urban development fees in respect of that land.

...'

3 The first transitional provision ('the TP 1') of Real Decreto-Ley 6/2000, de Medidas Urgentes de Intensificación de la Competencia en Mercados de Bienes y Servicios (Royal Decree-Law on emergency measures to promote competition in the markets for goods and services; 'the Decree-Law') provides:

'[Hypermarkets] in operation at the time of entry into force of the [Decree-Law], and which, for that purpose, have been granted municipal authorisation to open, may be fitted, in accordance with Article 3 of the [Decree-Law], with installations for supplying petroleum products which meet the following requirements:

(a) The space occupied by the installations and the equipment essential for the provision [of the goods at issue] is not to be included in the calculation of the area for building or the area of occupation.

(b) Where the authority fails to reply, the municipal authorisation required for the construction of installations and for their operation is deemed to be granted, if that authority fails to serve an express decision within 45 days of the date on which the application was brought.

(c) The commercial establishment is, in any event, required to build the infrastructure for connecting the installations for the supply of petroleum products to the general external systems and to bear the costs thereof, in conformity with the requirements and the conditions laid down in the [urban development] plan.'

4 Article 19(1) of Ley 16/1989 de Defensa de la Competencia (Law on the protection of competition) provides that 'the provisions of this article are without prejudice to Articles 87 to 89 [EC] ... and Council Regulation (EC) No 659/1999 of 22 March [1999 laying down detailed rules for the application of Article 88 EC (OJ 1999 L 83, p. 1)]'.

2. *Decree-Law and the TP 1*

5 On 23 June 2000 the Spanish Government adopted the Decree-Law with the objective of promoting competition in the Spanish markets for goods and services, in particular in the market for the retail supply of petroleum products. The Decree-Law, which contained the TP 1, was not notified in advance to the Commission under Article 88(3) EC.

3. *Procedure before the Commission*

6 On 20 July 2000 the Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid (Association of Service Station Operators of the Autonomous Community of Madrid), the Federación Catalana de Estaciones de Servicio (Catalonian Federation of Service Stations) and the Confederación Española

de Estaciones de Servicio (Spanish Confederation of Service Stations) lodged a complaint with the Commission under Article 20 of Regulation No 659/1999. The complainants alleged that the adoption of the TP 1 led to the granting of State aid in terms of Article 87(1) EC in favour of hypermarket owners and requested the Commission to order the suspension of that aid and initiate the formal investigation procedure in accordance with Article 4(4) of Regulation No 659/1999.

7 The complainants sent additional information and arguments to the Commission on several occasions during 2000 and 2001. Telephone conversations and meetings between the complainants' legal representatives and Commission officials also took place during that period.

8 On 28 December 2000 the Commission invited the Kingdom of Spain to state its views on the subject-matter of the complaint and to provide it with additional information. The Kingdom of Spain sent its reply by letter of 13 February 2001.

9 By letter of 8 February 2002, the Commission informed the complainants that, having carried out a preliminary assessment on the basis of the available information, it found that the TP 1 was not financed by public resources and that, consequently, there were not sufficient reasons for continuing the investigation.

10 By letter of 8 March 2002, the complainants made further observations. On 18 September 2002 the complainants requested the Commission, on the basis of Article 232 EC, to adopt a decision in accordance with Article 13 of Regulation No 659/1999.

4. *Contested decision*

11 On 13 November 2002 the Commission adopted Decision C(2002) 4355 final finding that there was no State aid ('the contested decision').

12 As regards paragraph (a) of the TP 1, the Commission considers, first, that that provision constitutes a change in the characteristics of the land as laid down in the general urban development plan, since it enables hypermarkets, which have exhausted the maximum area for building set out in that plan, to construct a service station without having to destroy a pre-existing construction. Thus, the beneficiaries of the TP 1 no longer have to negotiate with the municipalities in order to be able to change the characteristics of the land on which they plan to build the service station. The Commission considers, on the basis of Articles 8 and 14 of the LRSV, that, since hypermarkets are situated on consolidated urban land, their owners are not under any obligation under Spanish law to transfer to the local authorities a share of the benefits accruing from the possibility of additional construction. Therefore, the TP 1 does not exempt hypermarket owners from an obligation to transfer benefits to the State. That position is supported by judgment No 54/2002 of the Tribunal Constitucional (Spanish Constitutional Court) ('judgment 54/2002'), according to which national law precludes any obligation on the part of owners of consolidated urban land to transfer benefits accruing from the extension of the right to build.

13 Second, the Commission considers that paragraph (a) of the TP 1 does not change the intended use of the land on which hypermarkets are built, as set out in the relevant municipal plan. According to the Commission, that provision refers only to the area for building and to the maximum area which may be occupied. Therefore, if the intended use of the land precludes the building of a service station, its owner is required to apply for an amendment in accordance with the administrative procedure provided for.

14 In addition, the Commission takes the view that paragraph (b) of the TP 1 merely reduces the period within which the authorities are deemed to have failed to reply and does not derogate from the obligation of a holder of planning permission to pay the fees attached to its grant.

15 Finally, the Commission asserts that hypermarket owners are required to obtain the authorisation necessary for the construction and operation of installations for the retail supply of petroleum products and that those installations must respect the technical standards in force. The Commission infers from that that, in that respect, hypermarket owners do not receive more favourable treatment than the other operators in the sector.

16 In conclusion, the Commission considers, on the basis of Article 14 of the LRSV and its interpretation by the Tribunal Constitucional, that the Spanish legislation precludes the imposition on owners of consolidated urban land, such as hypermarket owners covered by the TP 1, of any obligation to transfer a share of the benefits. The Commission infers from that that the TP 1 does not lead to any loss of public resources or a waiver of the collection of such resources and, therefore, that it is a State decision of a regulatory nature which does not entail any direct or indirect transfer of State resources. For that reason, it concludes that the TP 1 does not constitute State aid for the purposes of Article 87 EC.

Procedure and forms of order sought by the parties

17 By application lodged at the Registry of the Court of First Instance on 8 March 2003, the Asociación de Empresarios de Estaciones de Servicio de la Comunidad Autónoma de Madrid and the Federación Catalana de Estaciones de Servicio brought the present action.

18 On 19 June 2003 the Kingdom of Spain sought leave to intervene in support of the defendant. By order of 22 September 2003, the President of the Second Chamber, Extended Composition, granted that leave. The Kingdom of Spain lodged its statement in intervention on 5 December 2003. The other parties waived their right to submit observations in that regard.

19 By document lodged at the Registry of the Court of First Instance on 4 September 2003, the applicants waived their right to submit a reply.

20 On 11 March 2004 the Asociación Nacional de Grandes Empresas de Distribución (ANGED, National Association of Large Distributors) sought leave to intervene in support of the defendant. The defendant and the applicants submitted their observations on that application on 25 and 31 March 2004 respectively. Since the application for leave to intervene was made after the expiry of the six weeks prescribed in Article 115(1) of the Rules of Procedure of the Court of First Instance, the President of the Second Chamber, Extended Composition, invited ANGED, by order of 17 May 2004, to submit its observations at the hearing pursuant to Article 116(6) of the Rules of Procedure.

21 By letter of 13 June 2005, the Court requested the applicants, the Commission and the Kingdom of Spain to send it a document and to answer certain questions. Replies were subsequently sent by the parties within the time-limit prescribed.

22 On 5 October 2005 the Commission sent the Court two judgments of the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid) of May and July 2005, which, in its view, were relevant to the outcome of the dispute. The Commission pointed out that those judgments had been brought to its attention at the end of September 2005.

23 On 14 October 2005 the applicants submitted their observations on the judgments of the Tribunal Superior de Justicia de Madrid, which were put forward by the Commission. The applicants attached to their observations, first, extracts from the administrative file concerning one of the judgments of the Tribunal Superior de Justicia de Madrid and, second, a series of town-planning agreements concluded between individuals and Spanish local authorities.

24 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 18 October 2005.

25 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— rule on the admissibility of the action;

— dismiss the action as unfounded;

— order the applicants to pay the costs.

27 The Kingdom of Spain and ANGED claim that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Admissibility

1. *The admissibility of certain annexes to the applicants' observations of 14 October 2005*

28 The applicants attached to their observations of 14 October 2005 concerning the judgments of the Tribunal Superior de Justicia de Madrid put forward by the Commission a series of extracts from official bulletins of the Spanish autonomous communities dated 9 May 2003, 17 February 2004, 28 March and 1 July 2005, concerning certain town-planning agreements concluded between individuals and local authorities.

29 First, contrary to the applicants' claims, those documents do not relate to the judgments of the Tribunal Superior de Justicia de Madrid put forward by the Commission and thus cannot be regarded as a reaction to the submission of those judgments by the Commission.

30 Second, in their application and also in their complaint before the Commission, the applicants relied on the existence of town-planning agreements, such as those concerned in the extracts submitted. Therefore, the applicants cannot claim that, by sending those extracts to the Court, they are responding to a new argument raised by the Commission in its observations of 5 October 2005.

31 Third, the applicants do not give any reasons why they were not in a position to send the extracts concerned at an earlier date.

32 In the light of the above, the extracts from the official bulletins of the Spanish autonomous communities attached to the applicants' observations of 14 October 2005 must be removed from the file, in accordance with Article 48(1) of the Rules of Procedure, because of the delay in their submission.

2. *Admissibility of the action*

Arguments of the parties

33 Without raising a plea of inadmissibility by a separate document, the Commission contends that the action is inadmissible.

34 Referring to case-law, the Commission considers that the action brought by the applicants, which are associations of undertakings, could be admissible only in two situations: (1) if the members of the applicants were also able to bring individual actions, and (2) if the contested decision affected the applicants' negotiating position. According to the Commission, the action brought by the applicants does not satisfy either of those requirements.

35 The Commission is of the view, first, that the members of the applicants are not directly and individually concerned by the contested decision. The contested decision affects the competitive position of the members of the applicants only indirectly and potentially. Therefore, the members of the applicants do not have standing to bring an action for annulment against the contested decision. Second, the Commission considers that neither the applicants' negotiating position nor their role as important interlocutors has been affected by the contested decision. At the hearing, the Commission added that the applicants had not submitted any precise data regarding the significant impact of the TP 1 on the position of their members.

36 In response to the argument concerning the absence of national legal remedies, the Commission points out that the mechanism laid down in Article 19 of the Ley de Defensa de la Competencia, the effectiveness of which is called into question by the applicants, concerns only the application of national provisions concerning State aid. According to the Commission, the applicants could have relied on the direct effect of Article 88(3) EC before the Spanish courts by alleging the existence of unlawful aid. Therefore, the applicants are not denied effective judicial protection.

37 The Kingdom of Spain endorses the arguments of the Commission. It points out that the Confederación Española de Estaciones de Servicio, which is a national association, has not taken part in the present action although it did take part in the administrative procedure before the Commission, which confirms the applicants'

lack of standing. At the hearing, the Kingdom of Spain stated, first, that the applicants have effective national remedies at their disposal and, second, that the present case could not give rise to the application of the case-law set out in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 since, in the present case, the applicants are not alleging infringement of their procedural rights.

38 The applicants consider that their application is admissible. They take the view, first, that they have standing since their rights are directly affected by the contested decision. Since the Kingdom of Spain did not notify the TP 1, the Commission carried out its investigation on the basis of their complaint. In addition, the applicants remained in constant contact with the Commission officials investigating the case, they submitted their observations to the Commission and provided guidance to the Commission in its assessment of the TP 1. The applicants also claim that the Commission's letter of 8 February 2002 containing the Commission's initial position (see paragraph 9 above) was addressed exclusively to them and that the contested decision, in which they were mentioned at several points, was sent to them after having been sent to the Kingdom of Spain. Finally, in the past, the applicants have been involved in proceedings before the Commission defending the professional interests of their members, in accordance with their statutes.

39 Second, the applicants submit that the contested decision is of concern to their members, which are direct competitors of the beneficiaries of the TP 1. The application of the TP 1 causes serious harm to the owners of service stations which have already been built or are in the process of being built in the zones of influence of hypermarkets. The fact that the beneficiaries of the TP 1 are not required to transfer benefits to the State in order to open a service station amounts, in their view, to a competitive advantage over other operators.

40 Finally, the applicants submit that there are no channels in Spain for making a complaint about the granting of State aid. The only channel which exists, namely the mechanism laid down in Article 19 of the Ley de Defensa de la Competencia, is devoid of any effectiveness in practice since it does not enable individuals to make a complaint about aid which has been granted or to participate in proceedings as interveners. In addition, the Tribunal de Defensa de la Competencia (Court for the Defence of Competition) has the discretionary power to adopt a decision on aid and to issue a report, which is not, however, binding on the Spanish Government in so far as it concerns the amendment or withdrawal of contested measures.

Findings of the Court

41 According to case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; *Cook* v *Commission*, paragraph 20; *Matra* v *Commission*, paragraph 14; and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

42 Similarly, an association responsible for protecting the collective interests of undertakings is as a matter of principle entitled to bring an action for annulment of a final decision of the Commission on State aid only where the undertakings in question are also entitled to do so individually, or where it is able to rely on a particular interest in acting, especially because its negotiating position is affected by

the measure which it seeks to have annulled (Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 23).

43 It is therefore for the Court to ascertain, first, whether the members of the applicants, or at least some of them, may be considered to be individually concerned by the contested decision in the present case.

44 It should be recalled, in that regard, that, under the procedure for monitoring State aid laid down in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the investigation stage envisaged by Article 88(2) EC. It is only under the latter, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34).

45 Where, without initiating the formal investigation procedure laid down under Article 88(2) EC, the Commission finds, by a decision taken on the basis of Article 88(3) EC, that an aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided under Article 88(2) EC may secure compliance with them only if they are able to challenge that decision based on Article 88(3) EC before the Community judicature (*Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; *Commission* v *Sytraval and Brink's France*, paragraph 40; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35).

46 For those reasons, the Community judicature will declare to be admissible an action for the annulment of a decision based on Article 88(3) EC, brought by a person who is concerned within the meaning of Article 88(2) EC, where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35; see also, to that effect, *Cook* v *Commission*, paragraphs 23 to 26, and *Matra* v *Commission*, paragraphs 17 to 20).

47 The parties concerned, within the meaning of Article 88(2) EC, who are thus entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (*Commission* v *Sytraval and Brink's France*, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36).

48 By contrast, if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. It must then demonstrate that it has a particular status within the meaning of the *Plaumann* v *Commission* case-law. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37).

49 By this action, the applicants call into question the merits of the contested decision. Accordingly, it is necessary to consider whether they have explained, by reference to

relevant criteria, why the TP 1 is likely to have a significant effect on the position of one or more of its members on the Spanish market for the retail supply of petroleum products.

50 Contrary to the Commission's contentions, the information provided by the applicants at the hearing concerning the particular position of a number of their members cannot be considered to be out of time by virtue of Article 48(1) of the Rules of Procedure. That information forms part of the continuing discussion between the parties (see, to that effect, Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731, paragraphs 67 and 70), since it does no more than supplement, in response to the Commission's arguments relating to inadmissibility, the arguments put forward in the application that the TP 1 has a negative effect on the competitive position of undertakings operating service stations, such as the members of the applicants. In any event, as the conditions governing the admissibility of an action may be examined at any time by the Community judicature of its own motion, there is nothing to prevent the Court from taking additional information provided at the hearing into consideration.

51 As regards the members of the applicants, they represent, according to their written response to the questions posed by the Court, the correctness of which has not been challenged, more than a quarter of all service stations in Spain and, in particular, 85% of the service stations of the Autonomous Community of Madrid and 70% of those in Catalonia.

52 As the Kingdom of Spain has pointed out, the purpose of the TP 1 was to facilitate the entry of hypermarkets into the Spanish market for the retail supply of petroleum products in order to promote competition in that market. However, such an increase is likely substantially to alter the competitive situation on the market to the disadvantage of certain other service station operators.

53 Furthermore, it is apparent from the information submitted by the Commission to the Court that the number of service stations forming part of hypermarkets rose from 80 to 157 between 2001 and 2003. Although, as pointed out by the Commission at the hearing, that figure represents only a small percentage of the total number of service stations in Spain, which was in the region of 8 600, the fact nevertheless remains that the considerable increase in the number of service stations opened in hypermarkets does not correspond to the growth in the total number of service stations, which experienced only a slight increase in the region of 1% during that period. In accordance with the information provided by the Kingdom of Spain at the hearing, that disproportionate growth in the number of service stations forming part of hypermarkets is a result, at least in part, of the effects of the TP 1.

54 Finally, at the hearing, the applicants cited, without being challenged by the other parties, the case of several service stations operated by their members which have suffered a significant drop in their sales leading, in certain cases, to the closing-down of their businesses as a result of the opening of a service station by a neighbouring hypermarket. The applicants also pointed out that the number of petroleum products sold by service stations forming part of hypermarkets has increased considerably.

55 In the light of the above, it has been established that the State measure in dispute was likely substantially to affect the competitive situation of certain members of the applicants which, therefore, have standing to bring an action against the contested decision.

56 On those grounds, the action must be found to be admissible without it being necessary for the Court to rule on the standing of the applicant associations, which, allegedly, results from the fact that the contested decision affected their negotiating position, or on the alleged lack of available legal remedies under Spanish law.

Substance

1. *The first plea, alleging a manifestly incorrect assessment of the Spanish legislation*

The first part, alleging a manifestly incorrect assessment of the obligation to transfer benefits

Arguments of the parties

57 The applicants maintain that, in finding in the contested decision that the TP 1 does not exempt hypermarket owners from the obligation to transfer to the State, the Commission failed to take into consideration the general obligation to transfer benefits accruing from town-planning policies, laid down in the Spanish Constitution, national law, the laws of the autonomous communities and administrative practice. Hypermarket owners are exempted from that obligation by the TP 1 and are therefore able to access the market for the retail supply of petroleum products without having to pay the charges to which other economic operators are subject.

58 According to the applicants, by reason of the obligation to transfer, owners of all types of land, including consolidated urban land, are required to transfer, to the local authorities, a share of the benefits accruing from their land as a result of town-planning policies adopted by those authorities, regardless of the exact nature of those policies. That obligation is laid down in Article 47(2) of the Spanish Constitution which is not implemented only by the obligations to transfer laid down

in Article 14 of the LRSV, which is the only article investigated in the contested decision and concerns only the compulsory transfer of a share of the land in the context of urban development.

59 In that regard, the applicants object to the Commission's interpretation of judgment 54/2002 in the 34th recital in the preamble to the contested decision in which it stated that, as a result of that judgment, national law precludes any obligation to transfer benefits in respect of consolidated urban land, thereby denying the existence of the general obligation to transfer. They submit, first, that that judgment was not intended to define the scope of Article 14 of the LRSV and, second, that it concerns only the obligation to transfer land, which is laid down in that same article. Therefore, that judgment did not concern the more general obligation to transfer as relied on by the applicants.

60 The applicants go on to point out that the Spanish Constitution lays down a right for the State to require transfers of benefits and, ultimately, an obligation to require them. The applicants explain that Article 47(2) of the Spanish Constitution imposes an ineluctable obligation on the State which must be implemented by legislation, judicial practice and the acts of public bodies. They point out that the non-enforcement of that obligation in a given case could amount to preferential treatment, which would be discriminatory, and could thus be regarded as unlawful.

61 In support of their argument, the applicants cite legislative measures of the autonomous communities which, in their view, reflect that general obligation and, at the same time, specify the detailed rules for its enforcement, in particular by stipulating the different forms which transfers of benefits may take.

62 In addition, the applicants state that, in Spain, there is a general administrative practice for concluding town-planning agreements between individuals and local authorities. Such an agreement, which is administrative in nature and the conclusion

and arrangement of which are defined by the laws of the autonomous communities, is concluded where an individual seeks to obtain a particular town-planning measure from the local authorities in the form of an amendment to the plan in force. In return for the agreement of the local authority concerned to adopt the measure sought, the contractual partner undertakes to provide a service, of a financial or some other nature, to the local authority, corresponding to a share of the benefits accruing from the measure in question.

63 The applicants add that the lack of rules laying down the specific form and the amount of the obligation to transfer of the owner of the land concerned in each case cannot be interpreted as evidence that such an obligation does not exist. The lack of rules is due to the heterogeneous nature of the town-planning measures which may give rise to such an obligation, and to the fact that legislation cannot provide for all possible cases. Therefore, the local authorities determine and negotiate the detailed rules and the corresponding amounts on a case-by-case basis, which are then laid down in a town-planning agreement concluded with the individual concerned. The applicants point out that, as a result of the existence of the TP 1, hypermarket owners wishing to open a service station are no longer subject to the process of negotiating the conditions of a town-planning measure with local authorities, concluding a town-planning agreement and, finally, transferring benefits to the authorities in the manner laid down in the agreement.

64 The lawfulness and the validity of town-planning agreements and the general obligation to transfer which they contain have been confirmed on several occasions by the Spanish courts. The fact that that practice is current is also demonstrated by the existence of standard models of town-planning agreements and extensive legal literature on the subject.

65 The Tribunal de Defensa de la Competencia has also recognised that administrative practice as a means of negotiating an amendment to a development plan by the authorities. Finally, the existence of that practice and its harmful effects have also been noted by Spanish company directors.

66 In addition, the applicants submit that the mere existence of the TP 1 is proof of the existence of the alleged general obligation to transfer. In their view, if no charges were involved in the extension of the right to build, the contested measure would be devoid of all purpose. They add that, in so far as the legislation provides for the obligation on the part of the authorities to compensate individuals if a town-planning measure causes them harm, a concomitant right, requiring individuals to hand over part of the benefits accruing from the town-planning measure, must also exist.

67 The applicants conclude by pointing out that, if the interpretation of judgment 54/2002 defended by the Commission were correct, the tax on the increase in value of urban land would be unlawful in respect of owners of consolidated urban land. However, that is not the case.

68 The Commission disputes the existence of an obligation to transfer benefits accruing from town-planning, such as that alleged by the applicants, which applies to owners of consolidated urban land, and therefore hypermarket owners. It points out that such an obligation is neither provided for under current Spanish legislation nor imposed by a law of an autonomous community or by administrative practice.

69 The Kingdom of Spain denies the existence of forms of participation of the State in benefits other than that laid down in Article 14 of the LRSV. It argues that the practice of town-planning agreements is neither generalised nor compulsory since it falls within the freedom to act granted to local authorities by the Spanish legal system. Therefore, according to the Kingdom of Spain, that practice cannot be relied on to justify the non-participation of the State in benefits.

Findings of the Court

70 It is necessary to examine the argument relied on by the applicants that the general obligation to transfer benefits accruing from town-planning, which applies to owners of all types of land, is, first, laid down in Article 47(2) of the Spanish Constitution, in national law and in the laws of the autonomous communities and, second, results from an administrative practice of concluding town-planning agreements.

— The existence of legislation laying down an obligation to transfer benefits

71 First, Article 47(2) of the Spanish Constitution, according to which 'the community shall have a share in the benefits accruing from the town-planning policies of public bodies', is formulated generally and abstractly. It thus appears that, as submitted by the Commission and the Kingdom of Spain, that provision must be implemented by legislation. In the light of the documents before the Court, it must be concluded that that implementation is effected by the LRSV. Article 3 of the LRSV mirrors the wording of the constitutional provision stating that '[t]he share of the community in the benefits accruing from the town-planning policies of public bodies shall be governed by the conditions laid down in this law and other applicable laws'.

72 Thus, Article 3 of the LRSV provides that obligations to transfer benefits are governed by the provisions of that law or, where relevant, by another national law. Since the applicants have not put forward any other national laws which lay down obligations to transfer benefits, only the relevant provisions of the LRSV need to be examined.

73 Articles 14 and 18 of the LRSV concern the obligations of owners of different types of land. The obligations to transfer benefits are laid down in Article 14(2)(c) and Article 18. Those obligations apply, respectively, to owners of non-consolidated urban land and to owners of land on which urban development is permissible. In contrast, no obligation to transfer benefits is laid down in Article 14(1) which sets out the obligations of owners of consolidated urban land. Since it is not contested in this case that hypermarkets are situated on consolidated urban land, it must be found that the LRSV does not impose any obligation on the owners of that type of land to transfer benefits.

74 Second, it follows from the analysis of Article 3 of the LRSV, made in paragraph 72 above, that the autonomous communities may not lay down additional obligations to transfer benefits applicable to owners of consolidated urban land. That finding is supported by judgment 54/2002, according to which the exclusion made in Article 14(1) of the LRSV of all compulsory transfers of benefits accruing from town-planning in respect of consolidated urban land may not be amended in any way by the autonomous communities. In any event, the examination of the legislation of the autonomous communities submitted by the applicants does not indicate the existence of obligations to transfer benefits accruing from town-planning imposed on owners of consolidated urban land. It thus appears that the purpose of the legislation is to provide detailed rules for implementing the obligations laid down in the LRSV rather than to impose an additional obligation to transfer benefits which is applicable to all types of land.

75 It follows that the applicants have not established the existence, in the Spanish legislation, of a general obligation to transfer benefits accruing from town-planning which applies to owners of consolidated urban land such as hypermarket owners.

76 In that regard, the applicants' argument that the lack of rules laying down the specific rules for and the amount of the obligation to transfer cannot be interpreted

as evidence that the alleged general obligation to transfer does not exist. As pointed out above, not only did the legislature fail to lay down any specific rules for the implementation of the obligation or fixing the amount thereof, but it also failed to lay down the obligation itself. In addition, judgment 54/2002 suggests that the legislature did so intentionally. The Tribunal Constitucional pointed out that the State had broad discretion as regards the share of the community in the benefits accruing from town-planning and that, in the exercise of that discretion, it could legitimately make that share applicable to certain types of land only.

77 Similarly, the applicants' argument regarding the various ways in which a landowner may provide consideration for the transfer of benefits cannot be upheld. Although it is true that the relevant articles of the LRSV provide that the obligation is to take place in the form of a transfer of a plot of land, the fact nevertheless remains that certain pieces of legislation of the autonomous communities cited by the applicants provide for the possibility of replacing the transfer of a plot of land with another form of consideration. In addition, it has been found in paragraph 74 above that additional obligations to transfer benefits cannot be laid down by the autonomous communities. Therefore, it appears that the different forms of consideration are merely expressions of the obligations to transfer laid down in the LRSV and, therefore, that fact is not capable of establishing the existence of a general obligation to transfer as alleged by the applicants.

78 The argument that the legislation provides for the obligation for the authorities to compensate individuals if a town-planning measure causes them harm must also be rejected. The inevitable result of that is not that the State has a right, or even an obligation, to require individuals to hand over a share of the benefits accruing from a town-planning measure. It should be recalled in that regard that, as pointed out in paragraph 76 above, it is apparent from judgment 54/2002 that the Spanish State may legitimately decide not to take a share of the benefits relating to a certain type of land, and, consequently, not to provide for an obligation to transfer in respect of that land.

79 Finally, the applicants' argument concerning the tax on the increase in value of urban land must also be rejected. It is not contested that the TP 1 has not exempted hypermarket owners from payment of such tax in any way. Similarly, that tax is not charged specifically on benefits accruing from town-planning, but on any increase in value of urban land irrespective of its cause. Therefore, it does not appear that that tax may be analysed as a transfer of benefits accruing from town-planning. Finally, the general conditions for the levying of that tax are laid down in national legislation, in the present case Ley 39/1988, Reguladora de las Haciendas Locales (Law on the regulation of local finances). Consequently, even if that tax were to be analysed from the point of view of a transfer of benefits accruing from town-planning, its levying would not be incompatible with the provisions of the LRSV and their interpretation by judgment 54/2002, set out in paragraphs 72 and 74 above, which do not rule out that additional obligations may be laid down by national law.

— The existence of an administrative practice authorising the State to require the transfer of benefits

80 As regards the administrative practice alleged by the applicants, it is apparent from the documents in the case and the parties' written submissions that the local authorities have the opportunity to make amendments to plans by means of town-planning agreements concluded with individuals. However, the Tribunal Constitucional's interpretation of the relevant provisions of the LRSV, set out in paragraph 74 above, suggests that, where such an agreement concerns consolidated urban land, local authorities cannot require any consideration from individuals.

81 In any event, the information submitted by the applicants does not make it possible to establish the existence of a general administrative practice by which local authorities systematically amend the relevant plan in favour of the owner of consolidated urban land in consideration for the transfer of a share of the benefits accruing from the amendment.

82 First, the legislation of the autonomous communities put forward by the applicants merely lays down, in a general manner, the detailed rules for the conclusion and implementation of all sorts of town-planning agreements. The mere fact that that legal framework exists does not imply that it is used in a general manner by local authorities, or even that it is used for requiring the transfer of benefits accruing from town-planning from owners of consolidated urban land. In that regard, it is clear that the legislation cited by the applicants does not provide that the local authorities are bound to conclude town-planning agreements, or even that those agreements must provide for consideration from individuals.

83 Second, the same observations apply to the legal literature and the standard models of town-planning agreements. The legal literature put forward generally confirms that the local authorities have the opportunity to conclude town-planning agreements to amend the plan in force and the standard models show the form which those agreements may take. This does not however make it possible to check to what extent the discretionary power granted to local authorities is used or how it is applied.

84 Third, as regards the examples of town-planning agreements and the case-law of the Spanish courts attached to the application, it must be pointed out that a significant part of that information is based on national legislation which predates the LRSV. Therefore, as such, it cannot be relied on to challenge the reasoning of the contested decision, which is based primarily on the LRSV and on its interpretation by the Tribunal Constitucional. In addition, the agreements and the judgments put forward generally concern types of land other than consolidated urban land, or they do not make it possible to determine the type of land concerned. Thus, they are not capable of establishing the existence of an administrative practice concerning consolidated urban land.

85 Fourth and finally, the reports of the Tribunal de Defensa de la Competencia and the observations of the company directors relate to general problems connected with the Spanish town-planning system currently in force and its application by the local

authorities. However, the parts of those documents cited by the applicants, first, focus on the urban development process rather than amendments to the conditions of use of land which is already developed and, second, do not illustrate the problems connected with the conclusion of town-planning agreements in a sufficiently detailed manner.

86 It follows that the applicants have not established to the requisite legal standard the existence of a general administrative practice whereby local authorities require, by means of a town-planning agreement, a transfer from owners of consolidated urban land, such as hypermarket owners, of town-planning benefits resulting from an amendment to the conditions of use of that land.

87 In conclusion, the purpose of the TP 1 is to facilitate the entry of hypermarkets into the market for the retail supply of petroleum products by removing certain restrictions in relation to town-planning and by simplifying the administrative procedures linked to the construction of a service station. However, the applicants have not established that, by means of those measures, hypermarket owners were exempted from any obligation whatsoever to make a transfer to the State, either as laid down in the relevant Spanish legislation or as resulting from a general administrative practice of the local authorities. Therefore, the Commission did not commit a manifest error in considering that the TP 1 did not entail a direct or indirect transfer of public resources and that, consequently, it could not be regarded as State aid. The first part of the first plea must therefore be rejected.

The second part, alleging a manifest error of assessment of the change in the intended use of the land

Arguments of the parties

88 The applicants submit that, contrary to the Commission's assertion in recital 37 to the contested decision, the TP 1 changes the intended use of the land. They claim in

that regard that, under the TP 1, hypermarket owners are in a position to build a service station on land formerly classed as a green area or a car park. Therefore, the intended use of the land in question is changed. They add that that fact is established by the judgments of the Tribunal Superior de Justicia de Madrid, submitted by the Commission on 5 October 2005. Those judgments confirm that service stations may be added to hypermarkets irrespective of the intended use of the land concerned and without payment of consideration to the State.

89 The Commission disputes the applicants' submission. In its view, since the intended use of the land is not mentioned in the TP 1, it cannot be changed by it. In addition, that question is not relevant in the present case since the obligation laid down in Article 14 of the LRSV does not apply to consolidated urban land in any event.

90 The Commission, supported by the interveners, adds that its argument that the TP 1 does not affect the intended use of the land is supported by the judgments of the Tribunal Superior de Justicia de Madrid, which it submitted on 5 October 2005. It explains in that regard that, according to those judgments, the TP 1 does not constitute a reclassification of the intended use of the land concerned and, for that reason, it neither changes nor contravenes development plans.

Findings of the Court

91 The question whether the TP 1 changes the intended use of the land could be relevant only if it were established that, in the case of such a change, hypermarket owners would be required to transfer a share of the benefits resulting from that change for the relevant land. However, as pointed out in paragraph 87 above, the applicants have not established the existence of any obligation to transfer whatsoever which is applicable to hypermarket owners. Therefore, the TP 1 is not

likely to exempt hypermarket owners from an obligation to make a transfer to the State and, thus, regardless of the change in the intended use of the land which it may possibly provide for, it does not involve a direct or indirect transfer of public resources.

92 Consequently, the second part must be rejected as irrelevant. Since both parts of the first plea have been ruled out, the first plea must be rejected in its entirety.

2. *The second plea, alleging misinterpretation and misapplication of the constituent elements of the concept of State aid*

Arguments of the parties

93 First, the applicants claim that, in recital 49 to the contested decision, the Commission wrongly considers that, for an indirect transfer of State resources, consisting of the latter's failure to collect revenue, to be found, the obligation to transfer concerned must be laid down in a law. They claim in that regard that neither the EC Treaty nor the case-law of the Court in the field establishes that an indirect transfer of public resources may result only from the State's forgoing the collection of revenue due by reason of legislation. On the contrary, the Court, and the Commission in its current practice, recognises that such an indirect transfer may also arise in other situations, such as where the State fails to recover a debt due under a contract, or as is the case here, the waiver of an obligation which is established in consistent and legitimate administrative practice.

94 Second, the applicants assert that, in the present case, in contrast to Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, the costs arising for the State from the granting of a benefit are not purely ancillary to the measure, since the objective of that measure is substantially different. On the contrary, the TP 1 specifically pursues the objective of relieving hypermarkets of the obligations which they have to bear under applicable Spanish law.

95 Finally, the applicants submit that the decisive factor for determining that there is State aid is the granting of a benefit by the State. For that reason, the requirement of a direct or indirect transfer of public resources is made conditional on that essential criterion. The applicants infer from that that measures which could amount to aid need to be investigated in relation to their effects on competition. Therefore, such measures should fall within the ambit of Article 87(1) EC as soon as they give rise to a distortion of competition. The question of an active or passive disbursement by the State, which is laid down in a law, is thus irrelevant in the present case.

96 The Commission considers that the applicants are basing their arguments on an incorrect reading of recital 49 to the contested decision. It does not follow from that recital, read in its context, that the indirect transfer of State resources for the purposes of Article 87(1) EC is conditional on the existence of an obligation to levy laid down by national legislation, or that such a transfer may be based only on an administrative tax levying practice. That recital merely points out that, in the present case, the Spanish State cannot be required to collect a sum of money or property to which it is not entitled.

97 The Kingdom of Spain submits that the TP 1 does not favour certain undertakings, does not affect trade between Member States and, ultimately, serves only to promote competition in the market for the retail supply of petroleum products.

Findings of the Court

98 As regards the first complaint, the exact wording of recital 49 to the contested decision should first be recalled: 'the State may forgo the collection of resources only if legislation imposes an obligation to pay them'.

99 It must be said, next, that, on a literary interpretation, that wording seems to work in favour of the applicants' point of view. Nevertheless, the background to the contested decision precludes such an interpretation.

100 Besides the wording of recital 49, nothing in the contested decision suggests that the Commission denied the relevance of an administrative practice to the investigation of the existence of an indirect transfer of State resources.

101 Similarly, reasons are given for the Commission's refusal to take into account the administrative practice alleged by the applicants in recital 52 to the contested decision, according to which 'the Commission cannot consider there to be a loss of resources or a failure to collect them because Spanish law currently in force ([the LRSV]) expressly prohibits taxation of transfers of benefits from consolidated urban land'. Accordingly, in the Commission's view, 'hypermarket owners ... cannot be made liable to pay an amount in respect of benefits from land'. Therefore, the Commission did not base its decision on the fact that administrative practices are, a priori, irrelevant in relation to the question whether there is an indirect transfer of State resources, but on the fact that an administrative practice, such as that cited by the applicants, is contrary to the applicable national law.

102 Therefore, in the light of the reasons stated for the contested decision as a whole, it does not appear that the Commission based its decision not to raise an objection to the TP 1 on the argument that, for an indirect transfer of State resources, consisting of the latter's failure to collect revenue, to be found, the obligation to transfer concerned must be laid down in a law. The first complaint is thus not founded.

103 Next, the Commission's conclusion as regards the absence of a direct or indirect transfer of State resources is not based on the purely ancillary nature of costs arising for the State from the adoption of the TP 1. Therefore, the second of the applicants' complaints, disputing that nature, is inoperative.

104 Finally, as regards the third complaint, concerning the alleged secondary role of the existence of a direct or indirect transfer of resources in the assessment of State aid, it is sufficient to point out that, according to settled case-law, only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 87(1) EC (*Sloman Neptun*, paragraph 19; *Viscido and Others*, paragraph 13; and *PreussenElektra*, paragraph 58). Therefore, a State measure which does not involve a direct or indirect transfer of State resources cannot be regarded as State aid for the purposes of Article 87(1) EC, even if it satisfies the other conditions laid down in that provision (see, to that effect, *Viscido and Others*, paragraphs 14 to 16).

105 Since none of the applicants' complaints can be upheld, the second plea must be rejected.

3. *The third plea, alleging infringement of the duty to state reasons*

106 The applicants point out that the Commission was required to give the reasons why the matters of fact and law submitted in their complaint were not sufficient to demonstrate the existence of State aid. They claim that the Commission fails to respond to the questions which they raised, bases its decision on incomplete arguments, makes unfounded and unsubstantiated statements, misconstrues the national case-law and relies on incoherent arguments which are flawed. They add that the only clear reason given in the contested decision, namely the fact that Article 14 of the LRSV is not applicable to hypermarket owners covered by the TP 1, is misconceived. They infer from that that sufficient reasons are not given for the contested decision.

107 In that connection, it must be borne in mind that the duty to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35). It follows that the applicants' complaints relating to the merits of the contested decision, which have also already been examined in the context of the first and second pleas in this action, are not relevant in the context of the present plea.

108 Next, in accordance with settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirement to state reasons must be appraised by reference to the circumstances of each case. The question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. As regards, more particularly, a Commission decision in which it is found that the State aid objected to by a complainant does not exist, the Commission must

provide the complainant with an adequate explanation of the reasons why the factual and legal material relied on in the complaint has failed to demonstrate the existence of State aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance (see *Commission* v *Sytraval and Brink's France*, paragraphs 63 and 64, and the case-law cited).

109 It is in the light of those rules that the merits of the present plea need to be assessed.

110 The contested decision finds that there is no State aid on the ground that one of the conditions laid down in Article 87(1) EC is not met. According to the Commission, the TP 1 does not entail a direct or indirect transfer of public resources since, contrary to the applicants' contentions, it does not exempt hypermarket owners from any obligation to transfer benefits to the State (recitals 43 to 53 to the contested decision).

111 As regards the limits on the area for building and the area of occupation, laid down in paragraph (a) of the TP 1, the Commission relied on the following grounds, laid down in recitals 30 to 35 and 50 to 52 to the contested decision, in coming to the conclusion that that provision does not exempt hypermarket owners from any obligation whatsoever to transfer benefits to the State:

— the obligations to transfer benefits laid down in the LRSV do not apply to hypermarkets, which are all situated on consolidated urban land;

— the Spanish national legislation does not lay down any other obligations to transfer benefits, which are applicable to hypermarket owners in the case of a derogation such as that laid down in paragraph (a) of the TP 1;

— therefore, irrespective of the fact that the TP 1 exists, hypermarket owners are not under any obligation to transfer benefits to the State;

— in the absence of an amendment to the applicable national legislation, the imposition of such an obligation on hypermarket owners would also be unconstitutional.

112 In response to the complainants' other complaints, the contested decision states that the TP 1 does not change the intended use of the land, that the reduction of the period during which the authorities are deemed to have failed to reply does not exempt hypermarket owners from payment of administrative fees and that those owners are required to obtain all the authorisation necessary for the opening and running of a service station (recitals 36 to 42 to the contested decision).

113 That statement enables interested parties to understand the justification for the contested decision inasmuch as it sets out, both clearly and unequivocally, the reasoning which led the Commission to find that the condition of the direct or indirect transfer of public resources was not met and, therefore, to decide not to raise any objections. In that regard, in the light of the structure of the application, the applicants appear to have been in a position to understand the reasons given in that decision. By their first plea, they dispute the various arguments set out in

paragraph 111 above and the affirmation that the TP 1 does not change the intended use of the land. Their second plea is brought against the general assessment of the TP 1 in the light of Community law undertaken by the Commission in the contested decision, summarised in paragraph 110 above.

114 Similarly, the reasons given for the contested decision enable the Court to review its legality. It follows that sufficient reasons were given for the contested decision and, consequently, the third plea in law must be rejected.

4. *The fourth plea, alleging infringement of the principle of sound administration, of Article 88(2) EC and of Article 4(4) of Regulation No 659/1999*

Arguments of the parties

115 The applicants submit, first, that the Commission infringed the principle of sound administration since it failed to conduct a diligent and impartial investigation of their complaint.

116 They argue, in that regard, that the Commission conducted a long investigation which caused harm to both themselves and their members. During the investigation, which lasted almost two and a half years, the TP 1 was in full effect, enabling hypermarkets to open numerous service stations. The applicants recall, in that context, that, according to Community case-law, the Commission cannot extend the preliminary phase of the investigation beyond a period of time which enables it to form an initial opinion on the classification of the measures in dispute and their compatibility with the common market. According to them, in the present case, the detailed investigation of the question by the Commission does not justify the period

of more than 27 months which they needed. In particular, the applicants raise the question of the period of nine months which passed between the letter of 8 February 2002, containing the Commission's initial position, and the date of the contested decision of 13 November 2002.

117 Second, the applicants consider that the Commission acted unmethodically and that, in the majority of cases, it expressed differing views without justification. In their view, the Commission did not respond to the documents submitted by the applicants concerning the questions raising doubts either.

118 Third, the applicants claim that, by refusing to initiate the formal investigation procedure even though there were serious doubts as to the compatibility of the TP 1 with the common market, the Commission infringed Article 88(2) EC and Article 4(4) of Regulation No 659/1999.

119 They consider in that regard that, in the present case, an initial investigation did not enable the Commission to overcome all the difficulties concerning the classification of the TP 1 as State aid. Besides the alleged excessive duration of the initial investigation, the existence of difficulties is illustrated by the fact that the Commission changed its mind significantly several times. Throughout the investigation, the Commission asserted that the TP 1 constituted aid and then acknowledged that it was a measure having equivalent effect to State aid. It expressed reservations only as regards the question as to whether there was a direct or indirect transfer of State resources. Finally, prior to the contested decision, the Commission never made any reference to Article 14 of the LRSV even though it was aware of that provision.

120 The Commission considers that it conducted a diligent and impartial investigation of the complaint and that the applicants have not put forward any evidence which

might contradict that conclusion. It adds, first, that the applicants have not shown in what way they were prejudiced or what harm they suffered as a result of the investigation and, second, that the TP 1 may legitimately have its desired effect since it does not present the constituent elements of State aid. The Commission also submits that the duration of the investigation is due less to the doubts which it had than to the amount of study, analysis and attention which it devoted to each of the claims and to the additional information submitted by the applicants.

Findings of the Court

The duration of the investigation

121 According to case-law, where the disputed State measures were not notified by the Member State concerned, the Commission is not required to carry out an initial investigation of those measures within a specified period. However, where interested third parties submit complaints to the Commission relating to State measures which have not been notified the Commission is bound, in the context of the preliminary stage laid down in Article 88(3) EC, to conduct a diligent and impartial examination of the complaints in the interests of sound administration of the fundamental rules of the EC Treaty relating to State aid. It follows, in particular, that where the Commission has initiated a preliminary investigation into State measures in relation to which there has been a complaint, it cannot prolong that investigation indefinitely. The purpose of that examination is simply to allow the Commission to form an initial opinion on the classification of the measures submitted for its assessment and their compatibility with the common market (see Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraphs 103, 105 and 107, and the case-law cited).

122 Whether or not the duration of an initial investigation procedure is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission, the complexity of the case and its importance for the various parties involved (Case T-95/96 *Telecinco* v *Commission* [1998] ECR II-3407, paragraph 75).

123 In the present case, it should be pointed out that, in their complaint and in their subsequent observations, the complainants presented the Commission with a certain number of allegations concerning the different aspects of the TP 1, supported by legal analyses, references to legislation and to Spanish case-law and numerous documents. In that context, the Commission rightly points out that it was required to investigate all the matters of fact and law brought to its attention by the complainants.

124 However, those circumstances do not justify the duration of the initial investigation conducted by the Commission, which lasted for almost 28 months.

125 First, although it is true that the complainants submitted a relatively large amount of information, the total amount was not so vast as to explain the amount of time needed to carry out the investigation. It should be added, in that regard, that the observations submitted by the complainants after the complaint had been made sought primarily to develop, clarify or illustrate certain questions discussed in the context of the administrative procedure, rather than to make new claims in relation to the TP 1. Therefore, the fact that those observations were submitted after the initial complaint does not explain the considerable extension of the initial investigation.

126 As regards the period of time which passed between the letter of 8 February 2002, containing the Commission's initial position, and the final decision of 13 November

2002, although the applicants sent the Commission 20 pages of observations, on 8 March 2002, together with several annexes in response to its initial position, the fact remains that those observations represented a summary of all the important information which the complainants had submitted throughout the administrative procedure. Consequently, the need for the Commission to conduct a diligent investigation of that information does not justify the period of time taken of more than nine months.

127 Second, in relation to the procedural steps taken by the Commission, it should be pointed out that, besides the meetings and telephone conversations with the complainants' representatives, the Commission made only one request for information from the Kingdom of Spain, in December 2000. The Kingdom of Spain responded to the invitation in February 2001 by way of summary observations based exclusively on the interpretation of the applicable Spanish legislation. Consequently, the steps taken by the Commission do not justify the duration of the investigation either.

128 Third, there is nothing to suggest that the present case is so complex as to require an initial investigation of more than two years. In so far as its conclusion that there was no direct or indirect transfer of public resources is based essentially on the examination of the applicable Spanish legislation, it does not appear that the Commission was required to enquire extensively into the facts or to take other measures requiring a significant amount of time. Similarly, the relatively short length of the letter containing the initial position and of the contested decision seem to rebut the argument that the present case may be categorised as particularly complex.

129 It follows that, by carrying out an initial examination of the complaint for almost 28 months, the Commission did not adopt the contested decision within a reasonable period and, consequently, failed to comply with its duty to conduct a diligent examination.

130 However, although the need to conduct administrative procedures within a reasonable period is a general principle of Community law, applicable in the context of an investigation procedure of State aid, and compliance with which is enforced by the Community judicature, the mere adoption of a decision after the expiry of such a period is not in itself sufficient to render unlawful a decision taken by the Commission at the conclusion of an initial examination conducted under Article 88(3) EC (see, to that effect, the order of the President of the Court of First Instance in Case T-378/02 R *Technische Glaswerke Ilmenau* v *Commission* [2003] ECR II-2921, paragraph 65, and the case-law cited).

131 In that context, the applicants put forward two allegedly exceptional circumstances. First, they point out that the application of the TP 1 throughout the duration of the examination caused harm to both themselves and their members. Second, the excessive period of the initial examination conducted by the Commission indicates that the Commission was faced with serious difficulties, justifying the initiation of the formal investigation procedure in accordance with Article 88(2) EC.

132 The argument concerning the harm suffered by the applicants and their members is not relevant in the context of the present case, which concerns exclusively the annulment of the contested decision and, therefore, only the review of its legality. The relevance of the Commission's exceeding a reasonable period in the context of any duty it had to initiate a formal investigation procedure will be assessed in the context of the relevant complaint, examined below.

The failure to initiate the formal investigation procedure

133 As pointed out in paragraph 44 above, in the context of Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on whether

the measure concerned amounts to State aid and on the partial or complete conformity of the aid in question with the common market, must be distinguished from the formal investigation stage envisaged by Article 88(2) EC. It is only under the latter provision, which is designed to enable the Commission to be fully informed about all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

134 It is apparent from Article 4(4) of Regulation No 659/1999 and the case-law that the Commission is required to open the procedure provided for in Article 88(2) EC if an initial examination does not enable it to overcome all the difficulties raised by the question whether the State measure under scrutiny constitutes aid for the purposes of Article 87(1) EC, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue would in any event be compatible with the common market, even if it were aid (Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 166).

135 The fact that the time spent considerably exceeds the time usually required for a preliminary examination under Article 88(3) EC may, with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 88(2) EC (*SIC* v *Commission*, paragraph 102).

136 As pointed out in paragraphs 121 to 129 above, the time spent considerably exceeded the time usually required for a preliminary examination under Article 88(3) EC. It must be observed however that, other than the fact that the Commission exceeded the reasonable period, no other factors have been established in the present case.

137 As regards the doubts which the Commission had as to whether the measure at issue constitutes aid, it appears, first, that the argument that the Commission maintained throughout the investigation that the TP 1 constituted aid is unfounded inasmuch as it is contradicted by facts in the case and by the chronology of the administrative procedure submitted by the applicants in their application.

138 Second, although it is true that the Commission stated, in the letter of 8 February 2002 containing its initial position, that 'the provisions of the TP 1 could be regarded as measures having equivalent effect to State aid', it is also true that it followed that sentence up by pointing out that 'they are not [however] financed by State resources and, consequently, are not subject to the ... prohibition [laid down in Article 87(1) EC]'. Thus, the position expressed in the letter of 8 February 2002 corresponds to that expressed in the contested decision, the validity of which was examined in the context of the first and second pleas. Consequently, the wording of the letter of 8 February 2002 does not enable it to be established that the Commission was faced with serious difficulties during the initial examination.

139 Third, as regards the alleged changes of position of the Commission, the fact that that institution expresses doubts, on the basis of the information at its disposal, as to whether a State measure constitutes State aid, and no longer expresses such doubts after receiving supplementary information from the complainants, does not lead to the conclusion that the Commission encountered serious difficulties. Although it has no discretion in relation to the decision to initiate the formal investigation procedure, where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of sound administration, the Commission may, amongst other things, engage in talks with the complainants in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (see, to that effect, Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 45). That power presupposes that the

Commission may bring its position in line with the results of the talks it engaged in, without that alignment having to be interpreted, a priori, as establishing the existence of serious difficulties.

140 Fourth and finally, although the applicants accuse the Commission of not having referred explicitly, before adoption of the contested decision, to Article 14 of the LRSV, they have not established the relevance of that fact in the context of the examination of whether serious difficulties exist or not. In so far as the Commission is not under an obligation to conduct an exchange of views and arguments with the complainants (*Commission* v *Sytraval and Brink's France*, paragraphs 58 and 59), it is not required to indicate to them the legal basis on which it intends to base its decision. Consequently, the mere absence of such an indication does not imply that the Commission encountered difficulties.

141 In addition, in the letter of 8 February 2002, the Commission states that 'the information at the Commission's disposal shows that there is no legal obligation requiring payment of ... compensation by the [hypermarket owner seeking to alter the conditions of use of the land on which that hypermarket is situated]'. That wording implies that the Commission relied on an examination of the relevant Spanish legislation, of which the LRSV represents an essential part. It thus appears that, even if the Commission did not expressly point out to the applicants that its analysis was based on the LRSV, it nevertheless took that text into account even before adopting the contested decision.

142 In the light of the above, it must be found that, even if the duration of the administrative procedure considerably exceeded the time usually required for a preliminary examination under Article 88(3) EC, it has not been established to the requisite legal standard that the Commission was faced with serious difficulties justifying the initiation of the formal investigation procedure under Article 88(2) EC.

Other errors in the examination carried out by the Commission

143 Finally, in so far as they claim that the Commission acted unmethodically, expressed differing views without justification and did not respond to the documents submitted by the complainants concerning the questions raising doubts, the applicants merely made summary claims which were not substantiated by more detailed information or any evidence. Those claims must therefore be rejected as unfounded.

144 Since none of the complaints put forward in the context of the fourth plea can be upheld, that plea must be rejected.

5. *The request to produce evidence*

145 The applicants request the Commission to produce its administrative file, including the response from the Kingdom of Spain to the Commission's request for information and the claims made by the Kingdom of Spain or third parties at a later stage.

146 In that regard, it should be pointed out that the Commission attached to its defence the response from the Kingdom of Spain to the request for information. In so far as the Court was able to examine all of the applicants' pleas on the basis of the information available in the file, there is no need to request the Commission to produce additional information. The applicants' request to produce evidence must therefore be rejected.

147 It follows from all of the foregoing that the application must be dismissed in its entirety.

Costs

148 Article 87(3) of the Rules of Procedure provides that, where the circumstances are exceptional, the Court of First Instance may order that costs be shared or that the parties bear their own costs. In the present case, it must be found that, although the applicants have failed on their head of claim seeking annulment of the contested decision, the examination conducted by the Court has nevertheless revealed that the Commission infringed its obligation to conduct a diligent examination of the complaints which were submitted to it. Accordingly, it is appropriate to order the applicants to bear three quarters of their own costs, three quarters of those incurred by the Commission and all of the costs incurred by ANGED. The Commission is to bear one quarter of its own costs and a quarter of those incurred by the applicants.

149 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. Therefore, the Kingdom of Spain is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. **Orders the applicants to bear three quarters of their own costs, three quarters of those incurred by the Commission and all of the costs incurred by the Asociación Nacional de Grandes Empresas de Distribución;**

3. **Orders the Commission to bear a quarter of its own costs and a quarter of those incurred by the applicants;**

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

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 12 December 2006.

E. Coulon J. Pirrung

Registrar President

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