

The Court of Justice of the European Union Holds that Certain Conditions for the Opening of Large Retail Establishments Provided for by National and Regional Legislation Restrict Freedom of Establishment

Introduction

On 24 March, the Court of Justice of the European Union (Court) ruled on the action brought by the European Commission (Commission) against the Kingdom of Spain, which asked the Court to declare that Spain had failed to fulfil its obligations under Article 43 of the Treaty on European Community (EC) (now Article 49 of the Treaty on the Functioning of the European Union (TFEU)) by imposing restrictions on the establishment of large retail establishments in Catalonia (Case C-400/08).

These restrictions are connected to the licensing system (including conditions thereto) that operators must undergo in order to obtain a retail licence that allows them to open their retail establishments in Catalonia and were envisaged by both national (The Retail Trade Act 7/1996 of 15 December) and Catalan law (The Retail Facilities Act 18/2005 of 27 December; Decree 378/2006 of 10 October, implementing Act 18/2005 and Decree 379/2006 of 10 October, approving the Territorial Sectoral Retail Facilities).

The Commission's action arose following a complaint filed by several companies operating in the retail sector, primarily through hypermarkets, who approached the European institution after they were unable to obtain licences to open large retail establishments in Catalonia.

The Court partially upheld the Commission's action by ruling that certain provisions of the national and regional legislation are contrary to Article 43 EC.

Analysis

In its judgement of 24 March 2011, the Court held that the contested legislation establishes a system of prior authorization, which:

- restricts both the area available for the establishment of new retail spaces in Catalonia and the size thereof;
- subjects the granting of the corresponding retail licence to certain restrictions relating to the retail structure of the area and applicant's level of market penetration; and
- establishes the need to consult with a committee which includes representatives from existing local retail.

Therefore, the Court ruled that the contested legislation contains restrictions on the freedom of establishment enshrined in Article 43 EC because it hinders or renders less attractive the exercise by economic operators from other Member

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States of their activities in the Autonomous Community of Catalonia.

Nevertheless, the Court considered the possibility that the identified restrictions could be justified on the basis of overriding reasons in the public interest such as environmental protection, town and country planning or consumer protections. However, the Court recalled that purely economic objectives cannot constitute an overriding reason in the public interest. Also, the justification for each of the restrictions must meet a test of appropriateness and proportionality. This means that they must be suitable for achieving the goal pursued and not go beyond what is necessary to achieve it.

And so, in relation to the aforementioned restrictions, the Court considered the following.

1. *Restrictions on the location and size of large retail establishments*

The Court established that the contested legislation contains restrictions that limit the opening of large retail establishments outside certain geographic areas of certain municipalities (so-called consolidated urban areas), which preclude the opening of new hypermarkets in 37 of the 41 districts in Catalonia and subject the opening of hypermarkets in the 4 remaining districts to harsh conditions. Specifically, in the remaining four districts, only hypermarkets accounting for no more than 9% of staple and 7% of non-staple goods can be authorized and there are on the maximum area available.

According to the Court, the restrictions on the location and size of large retail establishments can be justified on grounds of town and country planning and environmental protection, and at first glance, they appear to be appropriate to achieve those objectives.

However, the Court found that the Kingdom of Spain did not substantiate the appropriateness and proportionality of the restrictions contained in the legislation in question in relation to the legitimate aims on which it relied because it did not state why the restrictions at issue are necessary for the objectives pursued. Based on this and given that such limitations significantly affect the possibility of opening large retail establishments in Catalonia, the Court, following Advocate General Sharpston's considerations, upheld the Commission's complaint on this point and indicated that the analysed restrictions are not justified and violate Article 43 EC.

2. *Limits relating to the applicant's market share and the retail structure of the area for the granting of a retail licence*

The contested legislation established certain thresholds above which the opening of large retail establishments would not be authorised. On the one hand, national law provided restrictions regarding the effects of a new establishment on the retail structure of the area. On the other hand, Catalan law set restrictions related to the degree of the applicant's market penetration – basically, its market share.

The Kingdom of Spain claimed that such restrictions, by ensuring more effective competition in terms of price, quality and range of choice, are based on consumer protection.

Nevertheless, the Court held that such restrictions, by referring to the impact on the existing retail market structure, pursue purely economic objectives outside of consumer protection, and therefore, can never be justified. Thus, the restrictions violate the freedom of establishment.

3. *Consultation with the Retail Facilities Committee*

Finally, the Court noted that although the requirement to consult with the Retail Facilities Committee may be appropriate to achieve the objectives of town and country planning, environmental protection and consumer protection, the system in question is not justified since the composition of the Retail Facilities Committee is unsuitable to achieve these objectives because the only sectoral interests represented in that committee is that of existing local trade and not those for the protection of the interests put forward. Therefore, such a system restricts freedom of establishment

Conclusion

The Courts judgement of 24 March 2011 allows us to draw the following conclusions (inter alia):

- A system of prior authorization for the opening of large retail establishment may be considered appropriate and necessary to protect the objectives of environmental protection and town and country planning and, therefore, be compatible with the freedom of establishment.

- Restrictions on the size and location of large retail establishments can be justified on grounds of town and country planning and environmental protection. Such restrictions are legitimate provided that they are appropriate and do not go beyond what is necessary to achieve those objectives.
- Authorisation systems which restrict the opening of large retail establishments based purely on economic objectives such as those related to impact on existing retail, market structure and applicant's market share are incompatible with the freedom of establishment

At this point, it is necessary to analyse the significance of the Court's ruling concerning the national and regional legislation in force because during the procedures before the Court the provisions of the contested legislation (both of the nation and region) were repealed within the process of implementing Directive 2006/123/CE of the European Parliament and the Council of 12 December 2006 on services in the internal market (Services Directive) in Spain.

Indeed, at the national level, the disputed articles of Act 7/1996 were amended by Act 2010 of 1 March. At the regional level, Act 18/2005, Decree 378/2006 and Decree 379/2006 were repealed by Decree-Act 1/2009 of 22 December, although provisions of Decree 378/2006 remain in force insofar as they do not conflict with provisions Decree-Act 1/2009 (pending a new implementation regulation).

And so, in light of the national and Catalan laws currently in force, we can say the following about the three types of restrictions that the Court ruled violate the freedom of establishment:

- In relation to the restrictions covered by purely economic objectives that the Court stated violate Article 43 EC (the assessment of degree of penetration and impact of the new opening on existing businesses), they have been expressly prohibited by both national law (new wording of Article 6 of Law 7/1996) and regional law (Fifth Temporary Provision of Decree-Act 1/2009).
- Also, the need to consult the Retail Facilities Committee has also been eliminated.
- However, there are still restrictions on the locations of large retail establishments under Catalan law. Indeed, Article 9.3 of Decree-Act 1/2009 generally prevents medium and large retail establishments from being opened outside consolidated urban areas. In exceptional circumstances, these establishments could be opened outside the consolidated urban area as long as they meet a series of strict conditions which have to be fulfilled cumulatively. These conditions must be detailed by an implementing regulation that has not yet been approved. Given their similarity to some of the restrictions enshrined in the previous legislation and declared to go against Article 43 CE by the Court, in light of the judgement analysed, those restrictions on the locations of large retail establishments constitute an obstacle to freedom of establishment. Their compatibility with the TFEU will depend on whether they comply with the test of proportionality.

Finally, we must not forget that other regional laws also contain restrictions on the location and size of retail establishments similar to those provided for under Catalan law and that could be affected by Court's analysis in its judgement of 24 March 2011.

For instance, the Andalusian Trade Act (Law 1/1996 of January 10, Internal Trade in Andalusia), which was amended in December 2009 and May 2010, contains provisions concerning the delimitation of areas suitable for locating large retail spaces. In fact, the Andalusian law, as originally drafted, gave rise to infringement proceedings initiated by the Commission against Spain, which remains open (Case number 2008/4067). The present judgement can be expected to have a significant impact on the evolution of those proceedings.

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