JUDGMENT OF THE COURT (Second Chamber)

24 March 2011 *

In Case C-400/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 September 2008,

European Commission, represented by E. Traversa and R. Vidal Puig, acting as Agents, and by C. Fernández Vicién and A. Pereda Miquel, abogados, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

supported by:

Kingdom of Denmark, represented by J. Bering Liisberg and R. Holdgaard, acting as Agents,

intervener,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: E. Sharpston,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2010,

after hearing the Opinion of the Advocate General at the sitting on 7 October 2010,

gives the following

Judgment

1 By its application, the Commission of the European Communities claims that the Court should declare that the Kingdom of Spain has failed to fulfil its obligations under Article 43 EC, by imposing restrictions on the establishment of shopping centres in Catalonia, deriving from Law 7/1996 on retail commerce (Ley 7/1996, de ordenación del comercio minorista) of 15 January 1996 (BOE No 15, 17 January 1996, p. 1243; 'Law 7/1996') and the legislation of the Autonomous Community of Catalonia on the same subject, that is to say, Law 18/2005 on trading establishments (Ley 18/2005 de equipamientos comerciales) of 27 December 2005 (DOGC No 4543, 3 January 2006, p. 72; 'Law 18/2005'), Decree 378/2006, implementing Law 18/2005 (Decreto 378/2006 por el que se desarolla la Ley 18/2005), of 10 October 2006 (DOGC No 4740, 16 October 2006, p. 42591; 'Decree 378/2006'), and Decree 379/2006 approving the new sectoral territorial plan for trading establishments (Decreto 379/2006 por el que se aprueba el Plan territorial sectorial de equipamientos comerciales) of 10 October 2006 (DOGC No 4740, 16 October 2006, p. 42600; 'Decree 379/2006').

I — National legal context

A — *Law 7/1996*

2 Article 2 of Law 7/1996 provides:

'Retail establishments

1. Retail establishments are permanent premises or facilities intended for regular retail activities, whether on a continuous basis or on specific days or for specific periods.

2. Included in the definition in paragraph 1 are kiosks and, generally, installations of all types intended for the use specified in that definition, provided that they are buildings for the purposes of Article 334 of the Civil Code.

3. The Autonomous Communities shall lay down conditions for granting the status of large retail establishment. In any event, for the purposes of licences and the provisions of the commercial legislation, retail establishments intended for retail activities for all types of goods with a public display and sales area exceeding 2 500m^2 shall be regarded as large retail establishments.'

3 Article 6 of that Law provides:

‘Opening of large establishments

1. The opening of a large retail establishment shall be conditional upon the holding of a specific commercial licence, issued by the relevant Autonomous Community, which may also require an administrative licence in other cases linked to retail activity.

2. For the purposes of deciding upon the grant or refusal of the licence referred to in paragraph 1, account shall be taken of the adequacy of existing retail facilities in the local area concerned and the impact which the new establishment might have on the commercial structure of that area.

In any event, a report by the Tribunal de Defensa de la Competencia [(Competition Court)] shall be required, although its findings shall not be binding.

3. An area shall be regarded as having adequate facilities if the existing population or, if appropriate, the medium-term forecast population enjoys a level of supply which, in terms of quality, variety, service, price and opening hours, meets both the requirements of the current situation and developing trends in modern retail trade.

4. The impact on the existing commercial structure shall be assessed, account being taken of the improvement which the opening of a large establishment represents in terms of free competition in the area and of the negative effects possibly entailed for existing small traders.

5. The competent Autonomous Communities may set up local Retail Facilities Committees to report on the opening of large establishments, in accordance with any rules which those Communities may lay down.'

4 The final provision of Law 7/1996 specifies the constitutional status of the various provisions of that Law. It specifies that paragraphs 1 and 2 of Article 6 were enacted pursuant to the State's exclusive competence under Article 149(1)(13) of the Constitution. Paragraphs 3, 4 and 5 of Article 6 fall within the residual category of provisions which 'may be applicable in the absence of specific legislation enacted by the Autonomous Communities'.

B — *Law 18/2005*

5 Paragraphs 1 and 2 of Article 3 of Law 18/2005 define, for the Autonomous Community of Catalonia, 'large' and 'medium-sized' retail establishments by reference to the population of the municipality in which they are situated. As the Advocate General

states in point 11 of her Opinion, the definitions may be summarised in the following table:

Population of municipality	Large establishments (sales area of X m^2 or more)	Medium-sized establishments (sales area of X m^2 or more)
Over 240 000	2 500 m^2	1 000 m^2
25 001 to 240 000	2 000 m^2	800 m^2
10 001 to 25 000	1 300 m^2	600 m^2
Up to 10 000	800 m^2	500 m^2

6 Article 3(3) of that Law specifies that the sales area limitations under the local sectoral retail facilities plan ('PTSEC') are to apply to medium-sized food sector establishments and to all establishments with a sales area covering 1 000m^2 or more, selling home electrical or electronic goods, sports or personal equipment, or leisure or cultural items, regardless of their categorisation pursuant to Article 3(1) and (2).

7 Under Article 4(1) of Law 18/2005, large retail establishments may be opened only in consolidated urban areas of municipalities which are either the administrative centre of a district or which have a population of more than 25 000 inhabitants or seasonal tourist visitors who may be regarded as such.

8 Under Article 4(2) of Law 18/2005, the same restriction is to apply, except in exceptional cases, as regards establishments with a sales area covering 1 000m^2 or more, if they are given over essentially to the sale of home electrical or electronic goods, sports items and accessories, personal equipment, or leisure or cultural items.

9 Under Article 4(3), the term 'consolidated urban area' is to cover areas where, in accordance with the local development plan in force, the majority of the population lives; areas of continuous apartment housing; and retail outlets integrated into residential areas.

10 Article 4(8) lists the exceptions from the prohibitions described in paragraphs 7 and 8 above. Those exceptions cover, inter alia:

— establishments selling automobiles or other vehicles, machinery, building materials or do-it-yourself supplies, and garden centres;

— sales areas in high-speed train stations and some airports and ports for passenger traffic;

— shops in some border municipalities; and

— factory outlets.

11 Article 6(1) of Law 18/2005 provides that a municipal retail licence is to be necessary in the following cases:

‘(a) to open a medium-sized retail establishment;

(b) to enlarge a retail establishment the sales area of which corresponds, either before or after enlargement, to that laid down for medium-sized establishments;

(c) to change the activity of medium-sized retail establishments;

(d) to transfer a retail establishment the sales area of which corresponds, either before or after transfer, to that laid down for medium-sized establishments. In that case, the licence shall not come into effect until the actual closure of the original establishment before the new establishment is opened.’

12 Under Article 6(4), the absence of a decision by the administration before expiry of the period prescribed for the issue of the municipal retail licence is to be deemed to signify refusal of the licence.

13 Under Article 7(1) of Law 18/2005, a licence issued by the Generalitat de Catalunya (Government of Catalonia) is to be necessary in the following cases:

‘(a) to open a large retail establishment;

(b) to enlarge a retail establishment the sales area of which exceeds, either before or after enlargement, the limits fixed in Article 3(1) and (4);

(c) to change the activity of large retail establishments;

(d) to transfer a retail establishment the sales area of which exceeds, either before or after transfer, the limits fixed in Article 3(1) and (4). In that case, the licence shall not come into effect until the actual closure of the original establishment before the new establishment is opened.

(e) to dispose of large establishments, except where the conditions laid down in paragraph 3 of this article are met.'

14 Article 7(8) states:

'During the procedure for the issuing of a retail licence by the Generalitat, the applicant must provide a report drawn up by the council of the municipality on whose territory the applicant wishes to open, enlarge or transfer a large establishment or to change its activity. The report must be approved by the full municipal council and must state reasons, regard being had to the assessment criteria set out in Article 10; if it is unfavourable, that report shall be binding. If, three months after the request for the report from the council has been filed, no report has been drawn up by the council, the report shall be deemed to be unfavourable.'

15 Under Article 7(10), the absence of a decision before expiry of the six-month period allowed for the issuing of a retail licence by the Generalitat is to be deemed to signify refusal of the licence.

16 Under Article 8 of Law 18/2005:

'1. For announcements of the opening of retail establishments in Catalonia and the procedure for issue of a retail licence for medium-sized and large retail establishments governed by the present Law, a report assessing the share of the relevant market enjoyed [by the undertaking or group concerned], drawn up by the department responsible for trade, shall be required.

2. Small and medium-sized undertakings shall be exempt from the requirement to obtain a report on the market share, in accordance with the criteria set out in the first additional provision.

3. For the purposes of this Law, market share shall mean the size of the market share held by an undertaking or group of undertakings in its relevant market.

4. If it is unfavourable, the report on market share shall be binding in terms of refusal of the licence applied for and announcements of the opening of establishments referred to in paragraph 1.

5. In order to measure the market share, the department responsible for trade, in agreement with the department and bodies of the Generalitat responsible for competition, shall define the concepts of relevant market, market share and catchment area, which must be set out in the rules for the implementation of the present Law. In defining those concepts, account shall be taken, inter alia, of the products and services competing on the same market, the turnover of the sectors and the surface area of the existing establishments.

6. The relevant criteria, the procedure to be followed and the body authorised to issue the report on the market share shall be laid down by regulation. In establishing those criteria, an appraisal shall be made, inter alia, of the indicators in the White Paper referred to in Article 9. The regulation must also set the conditions in accordance with which the department responsible for trade is to make public, by means of the public register, the decisions granting or refusing licences or the reports submitted.'

17 Article 10 of Law 18/2005 lists the aspects to be assessed when the Generalitat or municipal authority decides on an application for a retail licence: conformity with the PTSEC; compliance with town planning rules; conditions to ensure the safety of the project and the integration of the establishment in the urban environment; the mobility generated by the project and, in particular, its effects on the road network and on the use of public and private transport; the number of parking places available, measured by ratios laid down by regulation in each case; the location of the establishment within the consolidated urban area and compliance with any municipal plan for retail services; the 'right of consumers to a broad and varied supply in terms of product quality, quantity, price and characteristics'; and the applicant undertaking's relevant market share.

18 Article 11 of Law 18/2005 sets up an advisory committee of the type referred to in Article 6(5) of Law 7/1996 – the Comisión de Equipamientos Comerciales (Retail Facilities Committee) – to report, in particular, on issues relating to the decision whether a licence is to be granted by the Generalitat and planning matters relating to the designation of areas where retail establishments may be opened, including drawing up proposals for amending the PTSEC.

19 Article 12 of Law 18/2005 provides for fees to be charged for processing applications for licences and for market share reports. It also authorises municipalities to charge fees for processing applications for municipal licences and providing municipal reports to the Generalitat concerning applications for a licence from the latter.

C — *Decree 378/2006*

20 Article 3 of Decree 378/2006 defines hypermarkets as self-service outlets with a sales area of at least 2 500m^2 selling a wide range of staple and non-staple goods, and with a large parking area.

21 Article 14 of that decree lays down the procedure for applying for a retail licence from the Generalitat. It lists a number of documents to be produced, including, under Article 14.1(b), a market survey analysing the viability of the project in the light of existing supply and potential demand within the catchment area, the market share attracted and the impact on current supply.

22 Article 26(1) of that decree governs the composition of the Retail Facilities Committee set up under Article 11 of Law 18/2005, that is to say, seven members representing departments of the Generalitat; six members representing the municipalities; seven members representing the trade sector; two experts chosen by the Generalitat's department of trade; and a secretary appointed by the chairman of that committee.

23 Under Article 27 of that decree, the Retail Facilities Committee is to be consulted on the matters referred to in Article 11 of Law 18/2005 and also on the delimitation of consolidated urban areas of municipalities.

24 Article 28(2) of Decree 378/2006 provides that, for large retailers, the market share report referred to in Article 8 of Law 18/2005 must cover all outlets trading under their name, whether under the direct or the indirect control of those undertakings.

25 Under Article 31(4) of that decree, a maximum market share is to be determined annually for each retail sector, both for the whole of Catalonia and for subordinate areas. The Commission states – without being contradicted on that point by the Kingdom of Spain – that that provision has not yet been applied, so that the maximum market share of the group to which a retailer belongs is that laid down in the previous legislation, that is to say, 25 % of the sales area in Catalonia, or 35 % of the sales area within the catchment area of the proposed establishment.

26 Under Article 33(2) of that decree, the market share report must be negative if that maximum share is exceeded. Article 33(5) lays down a maximum period of six months

within which the report must be issued, failing which the report is to be deemed to be favourable. Article 33(7) provides that the report is to be valid for six months.

D — *Decree 379/2006*

27 The PTSEC is laid down in the Annex to Decree 379/2006. Article 7 of the Annex to Decree 379/2006 provides that large retail establishments, together with medium-sized retail establishments in the food sector and all establishments with a sales area covering 1 000 m^2 or more, given over essentially to the sale of home electrical or electronic goods, sports items and accessories, personal equipment, or leisure or cultural items, are to be subject to the sales area limitations laid down, for each district and each municipality, in the PTSEC.

28 Article 10(2) of the Annex to that decree states, inter alia:

'In districts where excess supply is forecast for 2009, there is to be no hypermarket development.

In other districts, development is to take the form of hypermarkets, provided that they do not account for more than 9 % of estimated expenses for staple supplies for that district in 2009 and 7 % of estimated expenses for non-staple supplies.'

29 Annex 1 to the Annex to Decree 379/2006 defines in particular the maximum areas for which retail licences could be granted in the period from 2006 to 2009 for supermarkets, hypermarkets, specialist establishments and shopping centres and department stores in each territorial unit.

II — The pre-litigation procedure

30 Following examination of a complaint from a number of large retail undertakings, the Commission questioned the compatibility with Article 43 EC of the rules governing the conditions for opening large retail establishments on the territory of the Autonomous Community of Catalonia. On 9 July 2004, the Commission sent a letter of formal notice on that subject to the Kingdom of Spain.

31 In its reply of 13 October 2004, the Kingdom of Spain contended that the Commission's criticisms were not justified.

32 On 27 December 2005, Law 18/2005 was adopted. According to the Commission, not only did that Law fail to eliminate all the points of incompatibility with Article 43 EC, it placed new restrictions on freedom of establishment in the field of activity concerned. On 4 July 2006, the Commission sent the Kingdom of Spain a supplementary letter of formal notice. In its reply of 6 October 2006, the Kingdom of Spain denied that the legislation in question was restrictive, unjustified or disproportionate.

33 Dissatisfied with that reply, the Commission issued a reasoned opinion on 23 December 2007, calling on the Kingdom of Spain to amend its legislation within two

months of receipt of that opinion so as to bring the alleged infringement to an end. In its reply of 3 January 2008, the Kingdom of Spain stated that it intended to amend the legislation at issue, but that the amendments would be made in the course of implementing Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36). As no measures had been adopted by the expiry of the period prescribed, the Commission brought the present action.

34 By order of the President of the Court of 21 January 2009, the Kingdom of Denmark was granted leave to intervene in the present case in support of the forms of order sought by the Kingdom of Spain.

III — The action

A — *Admissibility*

35 As a preliminary point, it should be noted that the Court may of its own motion examine whether the conditions laid down in Article 226 EC for bringing an action for failure to fulfil obligations are satisfied (see Case C-487/08 *Commission* v *Spain* [2010] ECR I-4843, paragraph 70 and the case-law cited).

36 It should also be borne in mind that, under Article 38(1)(c) of the Rules of Procedure of the Court of Justice and the case-law relating to that provision, the application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law on which the application is based and that that statement must be

sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a claim (see Case C-211/08 *Commission* v *Spain* [2010] ECR I-5267, paragraph 32 and the case-law cited).

37 As it is, it must be held that, in its application, the Commission claims that the Court should declare that the Kingdom of Spain has failed to fulfil its obligations under Article 43 EC by imposing restrictions on the establishment of shopping centres, deriving from four laws and decrees, the texts of which – as submitted to the Court – comprise over 200 pages, and that that application is not free of inexactitudes.

38 In paragraph 46 of its reply, however, the Commission has provided a list of specific restrictions which, when read together with the references to the application, facilitates identification of the specific restrictions which, according to the Commission, arise as a result of that part of the contested legislation which was adopted by the Autonomous Community of Catalonia, that is to say, Law 18/2005 and Decrees 378/2006 and 379/2006.

39 That list covers:

(1) the prohibition on setting up large retail establishments outside consolidated urban areas of a limited number of municipalities (Article 4(1) of Law 18/2005);

(2) the sales area limitations for each district and municipality (Article 7 of Decree 379/2006, together with Annex 1 thereto); specifically, the Commission submits that:

(a) the limitation is particularly severe for hypermarkets – no new hypermarkets can be authorised in 37 of 41 districts (PTSEC, Annex 1.2 to the Annex to Decree 379/2006);

(b) in the remaining four districts, only hypermarkets accounting for no more than 9 % of staple and 7 % of non-staple goods can be authorised (Article 10(2) of the Annex to Decree 379/2006);

(c) in those four districts, only 23 667m^2 are available in six municipalities (Annex 1.2 of the Annex to Decree 379/2006);

(3) the need for a market share report which is binding if unfavourable and which must be unfavourable if the market share exceeds a certain value (Article 8 of Law 18/2005 and Article 31(4) and 33(2) of Decree 378/2006);

(4) the lack of clear definition of the criteria applied (Article 10 of Law 18/2005);

(5) certain procedural aspects:

(a) the 'negative silence' rule (Articles 6 and 7 of Law 18/2005);

(b) the need to obtain the opinion of an advisory committee comprising licence applicants' competitors (Article 11 of Law 18/2005 and Article 26 of Decree 378/2006);

(c) the charging of fees which are unrelated to the cost of the procedure (Article 12 of Law 18/2005); and

(d) the excessive length of the procedure (Article 33 of Decree 378/2006, concerning time-limits for the issuing and validity of the market share report).

40 At the hearing, the Commission confirmed that the provisions referred to in that list constitute all the aspects of the legislation adopted by the Autonomous Community of Catalonia which are in dispute.

41 In addition to those provisions, it emerges also from the application that the Commission disputes the compatibility with European Union ('EU') law of Article 6 of Law 7/1996.

42 Paragraphs 1 to 4 of Article 6 of Law 7/1996 provide that a licence must be held in order to open large retail establishments and set out the criteria applicable to the grant of that licence. Specifically, Article 6(2) lays down the essential criteria in that regard and requires the Competition Court to be consulted. In addition, Article 6(5) provides that the Autonomous Communities may set up committees to draw up reports on the opening of large retail establishments.

43 The Kingdom of Spain argues that it follows from the final provision of Law 7/1996 that paragraphs 3, 4 and 5 of Article 6 thereof are applicable in the absence of specific legislation adopted by the Autonomous Communities. However, the Autonomous Community of Catalonia has adopted such specific legislation. Consequently, at the time when the present application was lodged, paragraphs 3, 4 and 5 of Article 6 of Law 7/1996 were not applicable in Catalonia and should therefore fall outside the scope of the present action.

44 The Commission submits that its application must cover paragraphs 3, 4 and 5 of Article 6 of Law 7/1996, since they define the essential criteria for the grant of the licences referred to in Article 6(2), which forms part of the basic legislation binding throughout Spanish territory. Paragraphs 3, 4 and 5 of Article 6 of Law 7/1996 apply in a supplementary manner in the Autonomous Community of Catalonia in order to give effect to Article 6(2). Even if those paragraphs 3, 4 and 5 are not currently applicable in Catalonia, the Commission takes the view that those provisions are nevertheless in breach of EU law in so far as they may become applicable if the legislation currently in force is repealed or amended.

45 In that regard, as has been pointed out in paragraph 36 above, the Commission is required to state in the body of the application initiating proceedings the essential points of fact and of law on which the action is based.

46 As it is, it must be held that, to the extent that the present action relates to paragraphs 3, 4 and 5 of Article 6 of Law 7/1996, the application does not achieve the required level of precision. It is not sufficiently clear from the application, or from the reply, in what way those provisions constitute the failure to fulfil obligations alleged by the Commission.

47 Consequently, the action is inadmissible in so far as it concerns paragraphs 3, 4 and 5 of Article 6 of Law 7/1996.

48 On the other hand, as regards Article 6(1) and (2) of Law 7/1996, referred to in paragraph 39 above, and the contested provisions adopted by the Autonomous Community of Catalonia, the Court considers that, despite the lack of precision in the application, it has sufficient information before it to understand the scope of the infringement of EU law imputed to the Kingdom of Spain and thus to determine whether it has failed to fulfil its obligations, as alleged by the Commission.

49 Furthermore, on examination of the defence, it is clear that the Kingdom of Spain actually understood that the Commission is imputing to it restriction of the freedom of establishment by means of the contested legislation and that the Commission criticises that legislation for affecting large retail establishments and not medium-sized retail establishments, thus placing economic operators from other Member States at a disadvantage, and because it is unjustified. In those circumstances, the Kingdom of Spain was in a position properly to deploy its defence.

50 Consequently, the present action is admissible in so far as it concerns Article 6(1) and (2) of Law 7/1996 and the provisions, referred to in paragraph 39 above, of Law 18/2005 and Decrees 378/2006 and 379/2006, three acts which emanate from the Autonomous Community of Catalonia (collectively, 'the contested legislation').

B — *Substance*

51 The action brought by the Commission comprises, in essence, three complaints relating to the incompatibility with Article 43 EC of: (i) the restrictions on the location and size of large retail establishments; (ii) the conditions for obtaining the specific retail licence required to set up such establishments; and (iii) certain aspects of the procedure for the grant of that licence.

52 The first complaint, which relates to the restrictions on the location and size of large retail establishments, concerns the prohibition, laid down in Article 4(1) of Law 18/2005, on setting up such establishments outside consolidated urban areas of a limited number of municipalities and the sales area limitations for each district and municipality, under Article 7 of the Annex to Decree 379/2006 read in conjunction with Annex 1 thereto. As regards the sales area limitations for each district and municipality, the Commission argues that the limitation is particularly severe in the case of hypermarkets. It follows from the PTSEC that no new hypermarkets may be authorised in 37 of the 41 districts. Pursuant to Article 10(2) of the Annex to Decree 379/2006, in the remaining four districts, only hypermarkets accounting for no more than 9% of staple and 7% of non-staple goods can be authorised. Lastly, it follows

from the PTSEC that, in those four districts, only 23 667m^2 are available for hypermarkets in six municipalities.

53 The second complaint, which relates to the conditions for obtaining a specific retail licence, is composed of six parts, respectively concerning: (i) the need to obtain a specific retail licence before opening large retail establishments, as provided for in Article 6(1) of Law 7/1996; (ii) the taking into account, under the licensing procedure, of the existence of retail facilities in the area concerned and the effects of setting up a new establishment on the retail structure of that area, as provided for in the first subparagraph of Article 6(2) of Law 7/1996; (iii) the requirement, under the licensing procedure, of a market share report which is binding if unfavourable and which must be unfavourable if the market share exceeds a certain value, as provided for in Article 8 of Law 18/2005 and Articles 31(4) and 33(2) of Decree 378/2006; (iv) the required consultation with the Competition Court, as provided for in the second subparagraph of Article 6(2) of Law 7/1996; (v) the obligation to obtain the opinion of the Retail Facilities Committee, whose members include potential competitors of the applicant, as provided for in Article 11 of Law 18/2005 and Article 26 of Decree 378/2006; and (vi) the lack of a clear definition of the criteria applicable under Article 10 of Law 18/2005.

54 Lastly, the third complaint, which relates to certain aspects of the procedure for the issue of retail licences, is composed of three parts, respectively concerning: (i) the 'negative silence' rule laid down in Articles 6 and 7 of Law 18/2005; (ii) the charging of fees which are unrelated to the cost of the procedure, as provided for in Article 12 of Law 18/2005; and (iii) the excessive length of the procedure, which arises as a result of Article 33(5) and (7) of Decree 378/2006, concerning the time-limits for the issuing and validity of the market share report.

1. Arguments of the parties

55 The Commission submits that the contested legislation constitutes a restriction of the freedom of establishment guaranteed in Article 43 EC, since it affects the possibility of setting up large retail establishments in the territory of the Autonomous Community of Catalonia. That legislation gives rise to indirect discrimination by favouring the setting up of medium-sized retail establishments rather than large retail establishments. Most economic operators wishing to set up medium-sized retail establishments are of Spanish nationality, whereas those wishing to set up large retail establishments are more usually from other Member States. In addition, the contested legislation cannot be justified on one of the grounds set out in Article 46(1) EC. The Commission submits in the alternative that the justifications put forward by the Kingdom of Spain cannot in any event be accepted.

56 The Kingdom of Spain disputes the alleged failure to fulfil obligations. It accepts that the contested legislation entails certain restrictions on the freedom of establishment, but argues that these do not entail discrimination – even indirectly – based on nationality. According to the Kingdom of Spain, that legislation is justified on grounds of public interest and, specifically, for consumer protection, protection of the environment and proper regional planning. It is appropriate for ensuring the achievement of the objectives pursued and goes no further than is necessary for that purpose.

57 The Kingdom of Denmark contends that legislation such as that at issue should not, if it is not discriminatory, be regarded as constituting, contrary to EU law, a restriction on freedom of establishment, since it does not directly affect market access for foreign operators. The Kingdom of Spain concurs with that argument.

2. Findings of the Court

(a) The existence of restrictions on the freedom of establishment

58 It should be borne in mind that, in accordance with settled case-law, in proceedings for failure to fulfil obligations under Article 226 EC, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the factual information needed to enable the Court to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on any presumption (see, to that effect, inter alia, Case 290/87 *Commission* v *Netherlands* [1989] ECR 3083, paragraphs 11 and 12, and Case C-241/08 *Commission* v *France* [2010] ECR I-1697, paragraph 22).

59 If the Commission's allegation that the contested legislation has indirectly discriminatory effects as regards operators from Member States other than the Kingdom of Spain is to be regarded as sound, the Commission must first show that large retail establishments are treated differently from other retail establishments and that that difference constitutes a disadvantage for large retail establishments. Secondly, the Commission must show that that difference in treatment works to the advantage of Spanish operators, because Spanish operators favour small and medium-sized establishments while operators from other Member States prefer large retail establishments.

60 In order to do so, the Commission has submitted a series of figures. As the Advocate General noted in point 58 of her Opinion, those figures – although to some extent consistent with the assertion that Spanish operators prefer medium-sized retail

establishments and operators from other Member States prefer large retail establishments – are not complete. The information provided to the Court does not enable it to determine with certainty either the number of establishments concerned or the breakdown between Spanish and non-Spanish control of a significant part of the establishments falling within the category of large establishments, in accordance with Article 3(1) of Law 18/2005. Nor has the Court been provided with a breakdown showing the respective shareholdings of the economic operators concerned in the various categories of establishment.

61 At the hearing, the Commission stated that the causal relationship which, in its view, underlies the statistical correlation is to be found in the fact that foreign operators prefer to open larger establishments in order to achieve the economies of scale necessary to optimise their chances of penetrating a new territory. However, as the Advocate General pointed out in point 59 of her Opinion, that explanation relates to entry into a new market at a distance from the home base, rather than to the nationality of the operator.

62 It must therefore be held that the Commission has not adduced conclusive evidence capable of establishing that the figures which it has provided in support of its argument actually confirm that its argument is sound. Nor has the Commission put forward other factors to show that the contested legislation indirectly discriminates against operators from other Member States as compared with Spanish operators.

63 However, it is settled law that Article 43 EC precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU citizens of the freedom of establishment that is guaranteed by the Treaty (see, inter alia, Case C-299/02

Commission v *Netherlands* [2004] ECR I-9761, paragraph 15, and Case C-140/03 *Commission* v *Greece* [2005] ECR I-3177, paragraph 27).

64 In that context, it should be borne in mind that the concept of 'restriction' for the purposes of Article 43 EC covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade (see, to that effect, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 64; and, by analogy, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 37).

65 National legislation which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation falls within that category, since it is capable of hindering the exercise by that undertaking of freedom of establishment, by preventing it from freely pursuing its activities through a fixed place of business (see Joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629, paragraph 54).

66 In the present case, it should be noted that the contested legislation, taken as a whole, establishes a system under which prior authorisation, in the form of a licence, is necessary for the opening of any large retail establishment on the territory of the Autonomous Community of Catalonia.

67 First, that legislation restricts the localities available for new establishments and imposes limits on the sales areas for which such a licence can be obtained.

68 Secondly, the legislation provides for the licensing of new establishments only in so far as there will be no effect on existing small traders.

69 Thirdly, for the issue of licences, it lays down a number of procedural rules which are likely to have an appreciable negative effect on the number of licence applications made and/or granted.

70 Consequently, the contested legislation, taken as a whole, has the effect of hindering or of rendering less attractive the exercise by economic operators from other Member States of their activities on the territory of the Autonomous Community of Catalonia through a permanent establishment and thus of affecting their establishment in the Spanish market.

71 Moreover, the Kingdom of Spain accepts that that legislation entails certain restrictions on the freedom of establishment.

72 Accordingly, it must be held that the contested legislation, taken as a whole, constitutes a restriction on the freedom of establishment for the purposes of Article 43 EC.

(b) The justifications for restrictions on the freedom of establishment

73 It is settled law that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for

securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 44; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 25; and *Blanco Pérez and Chao Gómez*, paragraph 61).

74 Such overriding reasons recognised by the Court include: environmental protection (see, inter alia, Case C-384/08 *Attanasio Group* [2010] ECR I-2911, paragraph 50 and the case-law cited); town and country planning (see, by analogy, Case C-567/07 *Woningstichting Sint Servatius* [2009] ECR I-9021, paragraph 29 and the case-law cited); and consumer protection (see, inter alia, Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083, paragraph 27 and the case-law cited). On the other hand, purely economic objectives cannot constitute an overriding reason in the public interest (see, to that effect, inter alia, Case C-96/08 *CIBA* [2010] ECR I-2911, paragraph 48 and the case-law cited).

75 In that regard, it should be recalled that, although it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on freedom of movement to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, to that effect, Case C-110/05 *Commission* v *Italy*, paragraph 66).

76 Consequently, it is necessary to determine whether the contested legislation – taken not as a whole, but in relation to each of the specific restrictions alleged by the Commission – is justified by overriding reasons in the public interest, such as those relied on by the Kingdom of Spain and referred to in paragraph 56 above.

(i) The first complaint, relating to the restrictions on the location and size of large retail establishments

77 In the context of its first complaint, the Commission refers to the restrictions on the location and size of large retail establishments which follow from the prohibition on setting up such establishments outside the consolidated urban areas of a limited number of municipalities, as provided for in Article 4(1) of Law 18/2005, and the restriction on the sales areas for each district and municipality, as provided for in Articles 7 and 10(2) of the Annex to Decree 379/2006 and Annex 1.2 thereto.

78 The Kingdom of Spain contends that the provisions referred to are appropriate for achieving the objectives relating to town and country planning and environmental protection which they pursue. By confining the location of large retail establishments to population centres, where the demand is greatest, and by limiting the size of establishments in less populous areas, the contested legislation seeks to avoid polluting car journeys, to counter urban decay, to preserve an environmentally integrated urban model, to avoid new road building and to ensure access by public transport.

79 The Commission argues to the contrary that the restrictions at issue are not appropriate for ensuring the achievement of the objectives pursued.

80 In that regard, it should be noted that – contrary to the assertions made by the Commission – restrictions relating to the location and size of large retail establishments appear to be methods suitable for achieving the objectives relating to town and country planning and environmental protection, relied on by the Kingdom of Spain.

81 However, under Article 10(2) of the Annex to Decree 379/2006, there was to be no increase in commercial supply in the form of hypermarkets in the districts where such supply was deemed excessive for 2009. Next, it follows from Annex 1.2 to the Annex to that decree that that commercial supply was regarded as excessive for that year in 37 of the 41 districts of the Autonomous Community of Catalonia. In the remaining four districts, in accordance with Article 10(2) of the decree, an increase in the commercial supply could be made in the form of hypermarkets only in so far as that form of business accounted for no more than 9 % of estimated staple supplies in the district in 2009 and 7 % of estimated non-staple supplies. Lastly, under Annex 1.2, the maximum area available for hypermarkets in those four districts was limited to 23 667m2, divided between six municipalities.

82 It must be held that, taken as a whole, those specific restrictions laid down in the contested legislation significantly affect the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia.

83 In such circumstances, the reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State, and by precise evidence enabling its arguments to be substantiated (see Case C-161/07 *Commission* v *Austria* [2008] ECR I-10671, paragraph 36 and the case-law cited).

84 As it is, it should be noted that the Kingdom of Spain has not produced sufficient evidence to explain the reasons for which the restrictions at issue are necessary to achieve the objectives pursued.

85 Given that lack of explanation and the significant impact of the restrictions in question on the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia, it must be held that the restrictions on the freedom of establishment laid down in that regard are not justified.

86 It follows that the first complaint must be upheld.

(ii) The second complaint, concerning the requirement to obtain a specific retail licence to open large retail establishments, and the related conditions

— The first three parts

87 By the first three parts of the second complaint, the Commission challenges the lawfulness of: (i) Article 6(1) of Law 7/1996, requiring a specific retail licence to be obtained prior to the setting up of large retail establishments; (ii) the first subparagraph of Article 6(2) of Law 7/1996, requiring account to be taken, for the purpose of granting such a licence, of the existence of retail facilities in the area in question and of the effects of the setting up of a new establishment on the commercial structure of that area; and (iii) Article 8 of Law 18/2005 and Articles 31(4) and 33(2) of Decree 278/2006, requiring a market share report which is binding if unfavourable and which must be unfavourable if the market share exceeds a certain value.

88 The Kingdom of Spain contends that the disputed provisions pursue, in general, objectives of environmental protection, town and country planning and consumer protection, by seeking, as regards that last objective, to ensure more effective competition in terms of price, quality and choice.

89 The Commission, however, maintains that those provisions pursue purely economic objectives in that they seek to protect small local traders.

90 First, as regards the first part of this complaint, concerning the requirement under Article 6(1) of Law 7/1996 to obtain a licence before opening a large retail establishment, it should be noted that the Commission has not stated – either in its application, or in its reply or at the hearing – how that requirement, of itself, pursues purely economic objectives.

91 The Kingdom of Spain has stated that, with regard to the setting up of large retail establishments, the achievement of the objectives relating to town and country planning and environmental protection, as described in paragraph 78 above, depend on a procedure for prior authorisation. In its view, the damage which would be caused if those objectives were not achieved could not be repaired after the event, that is to say, once the establishment had been opened.

92 In that regard, as the Advocate General stated in point 91 of her Opinion, the introduction of preventative and therefore prior measures must, in the present context, be regarded as appropriate means of achieving the objective of environmental protection. Adoption of measures *a posteriori*, if the setting up of a retail establishment already built should prove to have a negative impact on environmental protection, appears

a less effective and more costly alternative to the system of prior authorisation. The same reasoning applies as regards the objective of town and country planning.

93 Nor has the Commission stated to what extent, of itself, the requirement to obtain a licence before opening a large retail establishment goes beyond what is necessary to attain those objectives.

94 The first part of the second complaint must therefore be rejected.

95 On the other hand, it should be noted that the obligation under the first subparagraph of Article 6(2) of Law 7/1996 – referred to in the second part of this complaint – to take account, for the purposes of granting such a licence, of the existence of retail facilities in the area concerned and the impact of a new establishment on the commercial structure of that area concerns the impact on existing traders and the market structure, not consumer protection.

96 The same is true of the obligation – referred to in the third part of the present complaint – in the context of the procedure for the grant of that licence, to obtain a market share report which is to be binding if unfavourable and which must be unfavourable if the market share exceeds a certain value, as provided for in Article 8 of Law 18/2005 read in conjunction with Articles 31(4) and 33(2) of Decree 378/2006.

97 In that regard, it should be noted that those provisions require the application of ceilings as regards the market share and the impact on existing retail trade, above which it is impossible to open large retail establishments and/or medium-sized retail establishments.

98 Being purely economic, such considerations cannot, pursuant to the case-law referred to in paragraph 74 above, constitute an overriding reason in the public interest.

99 In consequence, the second and third parts of the second complaint must be upheld.

— The fourth part

100 In the context of this part, the Commission challenges the compatibility with Article 43 EC of the second subparagraph of Article 6(2) of Law 7/1996, which requires the Competition Court to be consulted.

101 In general, the Kingdom of Spain contends that the provisions relating to the obtaining of a specific retail licence, including that requiring the Competition Court to be consulted, are intended to attain objectives relating to town and country planning, environmental protection and consumer protection; that they are appropriate to achieve those objectives; and that they do not go beyond what is necessary to achieve them.

102 The Commission has not stated any reasons for its claim that the justifications put forward by the Kingdom of Spain cannot be accepted.

103 In the absence of specific evidence with regard to the present part, and given that – as the Advocate General observed in point 96 of her Opinion – an obligation to consult a body with responsibility for examining questions of competition, which issues a non-binding report, appears appropriate for ensuring that the objectives relied on by the Kingdom of Spain are achieved without going beyond what is necessary to achieve them, it is appropriate to reject the fourth part of the second complaint.

— The fifth part

104 The fifth part of the second complaint concerns the requirement, under Article 11 of Law 18/2005 and Article 26 of Decree 378/2006, to consult the Retail Facilities Committee.

105 In that regard, the Commission does not appear to be criticising the existence of that committee or the obligation to consult it as such, but rather the fact that the committee is composed of potential competitors of the economic operator wishing to set up a new large establishment in Catalonia.

106 As with the other parts of the present complaint, the Kingdom of Spain contends that those provisions are intended to attain objectives relating to town and country planning, environmental protection and consumer protection; that they are appropriate to achieve those objectives; and that they do not go beyond what is necessary to achieve them.

107 Article 11 of Law 18/2005 provides that the Retail Facilities Committee is to report, not only on issues relating to the decision whether a licence is to be granted by the Generalitat, but also on planning matters relating to the designation of areas where retail establishments may be opened, including the drawing up of proposals for amending the PTSEC and on the delimitation of 'consolidated urban areas of municipalities'.

108 The establishment of such a committee, with responsibility for drawing up a report before any decision on the issuing or refusal of a licence is taken, account being taken in particular of aspects of town and country planning and environmental protection, is appropriate for ensuring achievement of the objectives pursued in that regard by that provision.

109 Furthermore, as the Advocate General stated in point 102 of her Opinion, the existence of the committee and its functions do not go beyond what is necessary to achieve those objectives of town and country planning and environmental protection.

110 On the other hand, Article 26(1) of Decree 378/2006, under which that committee is to be composed of seven members representing departments of the Generalitat, six members representing the municipalities, seven members representing the trade sector, two experts chosen by the Generalitat's department of trade and a secretary, does not appear appropriate for ensuring that the objectives pursued are attained.

111 It should be noted that the only sectoral interest represented in that committee is that of the existing local trade. A body composed in that manner, with no representation of environmental or consumer interests, but with representation of potential

competitors of the applicant for a licence, cannot constitute an appropriate instrument for pursuing objectives relating to town and country planning, environmental protection or consumer protection.

112 Thus, the existence of the Retail Facilities Committee set up under Article 11 of Law 18/2005 and its functions as specified in that provision can be justified. On the other hand, its composition, as provided for in Article 26 of Decree 378/2006, is not appropriate for ensuring achievement of the objectives pursued by means of the establishment of that committee.

113 It follows that the fifth part of the second complaint must be upheld as regards the composition of that committee, as provided for in Article 26 of Decree 378/2006.

— The sixth part

114 By the sixth part of the second complaint, the Commission disputes the compatibility with EU law of Article 10 of Law 18/2005.

115 The Commission submits in that regard that certain criteria on the basis of which the Generalitat or the municipal authorities must rule on applications for retail licences lack precision. It refers, in particular, to 'conditions which ensure the safety of the project and the integration of the establishment in the urban environment', the 'mobility generated by the project' and the 'right of consumers to a broad and varied supply in terms of product quality, quantity, price and characteristics'. In the

Commission's view, such criteria make it impossible for applicants to evaluate accurately their chances of obtaining a licence and confer too broad a discretion on the licensing authorities.

116 The Kingdom of Spain accepts that the criterion of the 'right of consumers to a broad and varied supply in terms of product quality, quantity, price and characteristics' may be regarded as insufficiently precise, but argues that that is not true of the other two disputed criteria. The Kingdom of Spain contends that, in any event, the criteria are not rendered inappropriate for the achievement of the aims of environmental and consumer protection simply because they lack precise definition. It argues that the EU legislature makes use of the same technique, indicating criteria to be applied without specifying thresholds from which it can be accurately determined in advance whether an application will be approved or not.

117 In that regard, it should be borne in mind that the Commission does not dispute the nature of the criteria in question, but merely their lack of precision. If it is accepted that integration into the urban environment, the effect on road and transport use and the range of choice available to consumers are legitimate criteria when deciding whether a retail establishment should be authorised, it must be noted that – as the Advocate General points out in point 116 of her Opinion – it is difficult to specify precise thresholds in advance without introducing a degree of rigidity likely to be even more restrictive of freedom of establishment.

118 Since the criteria set out in Article 10 of Law 18/2005 are not so imprecise as to render them inappropriate for the purposes of the objectives relating to town and country planning, environmental protection and consumer protection, on which the Kingdom of Spain relies, or disproportionate in relation to those objectives, the sixth part of the second complaint must be rejected.

(iii) The third complaint, relating to certain aspects of the retail licensing procedure

— The first part

119 By the first part of the third complaint, the Commission criticises the 'negative silence' rule laid down in Articles 6 and 7 of Law 18/2005.

120 The Kingdom of Spain contends that that system constitutes a guarantee for any party which has submitted to the competent authority an application for a retail licence, necessary for the opening, enlargement or transfer of medium-sized and large retail establishments under those provisions. That mechanism enables that party to act, if the administration fails to do so, by applying to the courts where no decision has been taken on expiry of the maximum period of time allowed for the administration to decide on the licence application.

121 The Commission argues that that mechanism is disproportionate and that the same objective could be attained by a 'positive silence' system.

122 It is true that a system under which a licence application is regarded as successful – not as having been refused – if no decision rejecting it is taken within the specified period could appear less restrictive. Moreover, as the Advocate General noted in point 120 of her Opinion, such a system is provided for in Article 33(5) of Decree 379/2006 as regards the issue of the market share report.

123 However, as was pointed out in paragraph 75 above, although it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on freedom of movement to demonstrate that its legislation is appropriate and necessary to attain the legitimate objective pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.

124 In that regard, Member States cannot be denied the possibility of pursuing objectives such as environmental protection, town and country planning and consumer protection through the introduction of rules which are easily managed and supervised by the competent authorities (see, by analogy, Case C-137/09 *Josemans* [2010] ECR I-13019, paragraph 82).

125 The negative silence system, provided for in the context of a retail licensing procedure the objectives of which are environmental protection, town and country planning and consumer protection and the role of which is to ensure legal certainty in the event that the authority responsible for ruling on that application does not take an express decision within the period allowed, by providing that that failure to act constitutes an implied decision rejecting the application, thus enabling the party which made that application to apply to the courts, is a system which the competent authorities can easily manage and supervise. What is more, the Kingdom of Spain has explained that, where no decision is taken in the context of its system, the administration is required to adopt a reasoned act terminating the procedure.

126 It follows that the first part of the third complaint must be rejected.

— The second part

127 In the context of the second part of the third complaint, the Commission submits that the fees provided for in Article 12 of Law 18/2005 for processing licence applications and for the market share report represent, for the economic operators concerned, charges which have a deterrent effect as regards establishment on the territory of Catalonia. According to the Commission, since the fees charged are unrelated to the cost of the procedure, they are disproportionate.

128 The Kingdom of Spain contends that the fees in question are set at a certain amount per square metre of the planned sales area. The amount was originally calculated by dividing the processing costs incurred in 1994 and 1995 by the number of square metres concerned during those years, and has since been updated in line with inflation. That allows operators to calculate the amount of the fees with certainty in advance. The Kingdom of Spain adds that the fees are levied by instalments, so that an applicant withdrawing a project will not have to pay the full fees, and that the fees amount, on average, to approximately 0.1 % of the total cost of the project.

129 In that regard, it should be noted that that method of calculating the fees due reflects overall costs reasonably accurately and is likely to deviate little from actual costs in individual cases. In addition, that method of calculation, corresponding to an amount per square metre, has the advantage of allowing the cost of the procedure to be estimated beforehand in complete transparency.

130 The second part of the third complaint must therefore be rejected.

— The third part

131 Since, in accordance with paragraph 99 above, the third part of the second complaint must be upheld, the Court having found that there is no justification for the obligation, laid down in Article 8 of Law 18/2005 and Articles 31(4) and 33(2) of Decree 378/2006, to obtain a market share report, there is no need to rule on the reasonableness or otherwise of the time allowed for the issuing and validity of the market share report, which the Commission challenges by the third part of the third complaint.

Costs

132 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared, or that the parties bear their own costs, where each party succeeds on some and fails on other heads. Since both parties have succeeded on some and failed on other heads, they should each be ordered to bear their own costs.

133 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Denmark, which has intervened in the present proceedings, must bear its own costs.

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

1. Declares that the Kingdom of Spain has failed to fulfil its obligations under Article 43 EC by adopting and/or by maintaining in force the following provisions:

— **Article 4(1) of Law 18/2005 on trading establishments (Ley 18/2005 de equipamientos comerciales) of 27 December 2005, in so far as it prohibits the opening of large retail establishments outside consolidated urban areas of a limited number of municipalities;**

— **Articles 7 and 10(2) of the Annex to Decree 379/2006 approving the new sectoral territorial plan for trading establishments (Decreto 379/2006 por el que se aprueba el Plan territorial sectorial de equipamientos comerciales) of 10 October 2006, and Annex 1 thereto, in so far as those provisions restrict the opening of new hypermarkets to a limited number of districts and provide that such new hypermarkets are not to account for more than 9 % of estimated expenses for staple supplies and 7 % of estimated expenses for non-staple supplies;**

— **the first subparagraph of Article 6(2) of Law 7/1996 on retail commerce (Ley 7/1996, de ordenación del comercio minorista) of 15 January 1996, Article 8 of Law 18/2005 on trading establishments of 27 December 2005 and Articles 31(4) and 33(2) of Decree 378/2006, implementing Law 18/2005 (Decreto 378/2006 por el que se desarolla la Ley 18/2005), of 10 October 2006, in so far as those provisions require the application of ceilings as regards market share and the impact on existing retail trade,**

above which it is impossible to open new large retail establishments and/or new medium-sized retail establishments; and

— **Article 26 of Decree 378/2006 implementing Law 18/2005 of 10 October 2006, in so far as in specifying the composition of the Comisión de Equipamientos Comerciales (Retail Facilities Committee) it ensures that existing retail trade is represented and fails to ensure that associations active in the field of environmental protection, or interest groups working towards consumer protection, are represented;**

2. **Declares that there is no need to adjudicate on the action in so far as it concerns the compatibility with Article 43 EC of Article 33(5) and (7) of Decree 378/2006, implementing Law 18/2005, of 10 October 2006;**

3. **Dismisses the action as to the remainder;**

4. **Orders the European Commission, the Kingdom of Spain and the Kingdom of Denmark to bear their own costs.**

[Signatures]