

The Supreme Court recently allowed a cassation appeal filed by a company against the Administration of the Autonomous Community of the Basque Country for considering that the Sectorial Territorial Plan for Public Creation of Land for Economic Activities and Commercial Facilities (the "Territorial Plan") was against the law.

The appellant declared that the Territorial Plan established a restriction on the surface area of shopping malls which contravened Directive 2006/123/EC of the European Parliament and the Council, of 12 December 2006 (the "Directive"), regarding services in the internal market, as well as Law 17/2009 of 23 November transposing the directive, on the free access to service activities and their exercise (Law 17/2009).

In this context, the Supreme Court decided to analyse the ruling discussed, the Territorial Plan, its limitations and its adaptation to the Directive and Law 17/2009.

In light of the foregoing, and in accordance with what is set forth in the Directive and in Law 17/2009, the restrictions on the establishment of commercial facilities must be sufficiently grounded on the regulations set forth in this regime, and must in any event respect the conditions of non-discrimination, necessity and proportionality.

Thus, although restrictions could indeed be admitted on the establishment of shopping malls for reasons of general interest (such as the protection of the environment or urban planning), these restrictions are limited.

In this regard, the Supreme Court analysed the reasons leading to the establishment of the territorial limitation in the Territorial Plan, which are largely to:

- encourage greater business competition
- incentivise the implementation of small commercial facilities

Following this analysis, the Supreme Court considered that these are reasons of an economic nature and not of general interest, and would be prohibited both by the Directive and by Law 17/2009 for not having observed the principles of non-discrimination, necessity and proportionality. In addition, the Court stated that, in any event, limitations of this kind should be regulated by a law and not administrative regulation. _

For all the above reasons, the Supreme Court agreed, in its Ruling of 3 September 2015, to declare invalid the determinations of the Territorial Plan that set restrictions on the maximum surface area used for commercial facilities in the Basque Country.