Legal study on Retail Establishment through the 28 Member States: Restrictions and Freedom of Establishment

Final report

Volume I

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Executive summary

1. On the basis of an extensive description of the regulatory systems applicable to the establishment of retail outlets through the 28 EU Member States (Chapter 2 and Appendix 2), we have made a comparative legal analysis examining the nature and scope of the regulatory requirements and their compliance with the Services Directive (Chapter 3). Based on the findings of the legal analysis we have performed an economic impact assessment in order to analyse the economic effects of the regulatory framework and the restrictions it entails (Chapter 4).

2. The comparison of the regulatory framework shows important differences between the 28 Member States, even though the headlines of the systems are often quite similar.

3. The legal analysis has revealed the existence of numerous requirements and regulations adopted specifically for the establishment of retail outlets. The retail specific requirements adopted by the Member States range from a retail specific authorisation to the requirement of one or more impact assessments, to additional steps in the authorisation procedure or to the involvement of other authorities - whether for advisory purposes or at the level of decision-making.

4. Most of the Member States require some sort of authorisation or permit allowing the establishment of a retail outlet, in particular if the outlet exceeds a certain size threshold. Sometimes the regulation requires a specific retail authorisation, or sometimes a planning permit. In some jurisdictions both a retail specific authorisation and a planning permit are required.

5. Compliance with planning regulations, or the plans (such as zoning plans) that have been developed under such regulations, is required in every jurisdiction, in particular if the establishment is realised through the construction of a new building. As such planning regulations or plans may amount to restrictions to retail establishment. The systems to ensure or verify such compliance or to provide derogations to plans vary considerably. In some Member States this is checked through the authorisation process for a planning permit. In other Member States this is included in the application procedure for a building permit or the adoption of a derogation to the plan or the adoption of a plan. Some Member States require, in addition, a use permit to be granted before the retailer is allowed to open the outlet to the public.

6. Some Member States have integrated two or more permits into one single permit (all-in-one permit or integrated permit). Sometimes this is combined with a one-stop-shop system, which allows the entire process to be managed and coordinated by one single authority.

7. Most Member States require, at least for the establishment of large or complex retail outlets such as shopping centres or hypermarkets, the performance of an environmental impact assessment, the results of which are taken into account in the procedure for one of the compulsory authorisations or permits. In addition, some Member States require an environmental permit.

8. Before a decision granting or refusing authorisation or permission is made, the application procedures throughout the Member States require several preliminary steps to be taken. However, the nature and number of preliminary requirements vary to a considerable extent.
9. Most Member State’s regulatory framework requires some sort of market or other studies to be conducted and/or impact assessments to be performed at some stage during the decision-making process for such authorisation or permission. The nature and the number of studies or assessments to be performed vary to a considerable extent.

10. Nearly all Member States make a distinction between large and small retail outlets in their regulatory framework. Most of the Member States that require a specific retail authorisation or specific impact assessments do so only for relatively large retail outlets.

11. The Services Directive does not per se prohibit the application of authorisation schemes, but makes such schemes subjects to a number of conditions: certain requirements are prohibited, other requirements are subject to evaluation and must pass a non-discrimination test, a necessity test and a proportionality test.

12. Some Member States impose requirements that could potentially qualify as a prohibited requirement under Article 14 of the Services Directive, either because they could potentially qualify as an economic need test, or because they could potentially allow the involvement, be it directly or indirectly, of competitors in the authorisation process. The potential character of the qualification should be stressed, because to a certain extent the qualification is based on interpretation and therefore subject to debate. At the end of the day, it is up to the CJEU, taking into account all relevant circumstances, to decide upon this qualification.

13. Many Member States impose requirements that may qualify as restrictions to the freedom of establishment which are subject to evaluation under Article 15 of the Services Directive, but are not as such prohibited: e.g. the requirement of a minimum number of employees, territorial restrictions and/or quantitative restrictions. Those requirements are not prohibited provided they can be justified, i.e. if they are non-discriminatory, serve an overriding reason of public interest, and do so in a manner which is not disproportionate. Some of the restrictions seem difficult to justify in this respect, because they amount to a ban on certain types of retail outlets or on outlets exceeding a certain size. Some restrictions may be seen as disproportionate because they include authorisation schemes with complex, lengthy and costly authorisation procedures, lack of transparency and/or discretionary decisions.

14. Our analysis shows that various overriding reasons of public interest are invoked, even though most Member States invoke more or less the same or similar reasons. Most of these relate to urban planning (city/town planning, protection of city centres, protection of the urban environment) and protection of the environment. The protection of the Member State’s or the city’s cultural, historical or artistic heritage also often serves as justification. Further motives presented by the Member States are: (public) health and safety, protection of consumers or of workers.

15. The application of urban planning regulations to retail establishment and urban planning objectives as reasons of public interest justifying restrictions to the freedom of retail establishment indicate that many Member States pay considerable attention to the pursuit of certain objectives of general interest. In particular, some Member States seek to protect their city centres, with the aim of strengthening the urbanity of the cities, safeguarding the viability of the cities by limiting traffic, or avoiding that (smaller) retail outlets move out of the city centre causing vacant shops and deserted city centres. In other words, they strive to develop, create or maintain attractive city centres.
16. With respect to regulatory requirements that must be evaluated under the proportionality test there seem to be quite some (potential) issues:

- Procedures are often very complex and, in particular for larger retail outlets, require several preliminary steps to be taken (such as oral hearing, on-site inspection, comments from the public at large, consultation of other authorities and/or of third parties), as well as market studies and/or impact assessments to be performed;

- If several authorisations and/or permits are required, as is the case in many jurisdictions, often several procedures have to be followed, with consecutive applications having to be made with various authorities. Some Member States have introduced some simplification through the all-in-one or integrated permit. Instead of having to apply for several permits, all requirements are integrated into one single permit (even though the content may vary). In some Member States, the establishment process is facilitated, in addition, through a one-stop-shop system with one single authority deciding on all required authorisations;

- Procedures are also, partly as a result of their complexity, quite lengthy and costly. In several cases the time frame as provided in the legal framework is not complied with, and failure to respond in due time is not adequately sanctioned (i.e. by considering the authorisation granted);

- Sometimes the requirements go as far as to impose some sort of ban on the establishment of (certain) retail outlets, or types of retail outlets;

- Sometimes territorial restrictions are applied which go as far as to limit the number of retail outlets in relation to the population size or density, to limit the retail outlet’s size in certain areas (e.g. city centres), to exclude (certain or all) retail outlets from certain areas (or to allow them only in certain areas), to impose a minimum geographical distance between providers or to limit the assortment of goods sold at the retail outlet.

- Many Member States have adopted planning rules aiming to protect the vitality and viability of their city centres. Some Member States protect their city centres by keeping certain store formats (e.g. shopping centres, malls, hypermarkets, ...) away from such centres, whereas other Member States apply a city centre first- rule which implies that for every establishment priority should be given to a city centre location, or a location as close to the city centre as possible.

- Sometimes the authority deciding on the application has discretionary powers, which makes the outcome rather unpredictable, or can lead to additional conditions being imposed on the applicant;

- Sometimes there is a lack of transparency as regards the procedure and its requirements, and/or as regards the decisions adopted, and the criteria applied, by the authorities, which adds up to the unpredictable nature of the outcome, and makes it difficult to understand the reasons justifying the decision, and/or to appeal the decision;

- Sometimes there is no possibility to appeal the decision, nor to apply for judicial review;

- Regulations tend to be rather complex, and complexity often increases because the regulation is adopted at various levels (federal or national
and regional, and even municipal or local), which means the rules, and their application, may vary significantly from region to region, or even from municipality to municipality.

17. As a result, it cannot be excluded that in some Member States the procedures impose requirements that are to be considered as disproportionate, i.e. requirements that go beyond what is necessary in order to attain the objective(s) pursued. As a result, they may have a dissuasive effect and may unduly complicate and delay the establishment of (certain) retail outlets.

18. In these matters, we have observed significant differences between the Member States as regards the nature, number and scope of requirements imposed on retailers wishing to establish a (relatively large) retail outlet.

19. Our legal analysis shows that, as a rule and despite the significant differences, the regulatory framework in the Member States regarding the establishment of retail outlets tends to be (very) complex. Moreover, the application procedure(s) to be followed in order to have a decision on the authorisation(s), permit(s) and licence(s) required in order to be allowed to establish a retail outlet is (are) usually quite burdensome. In addition, the regulations often provide for a series of specific requirements, developed specifically for the establishment of retail outlets.

20. In addition to the legal analysis we have performed an economic impact assessment of the retail establishment regulations. This impact assessment breaks down into three parts.

21. The first part consists in a review of existing empirical evidence on the economic impacts of retail establishment regulations. It provides a theoretical framework for the analysis of retail establishment regulations.

22. The second part seeks to provide quantitative evidence on the effects of retail establishment regulations. To do so it examines the correlation between economic outcomes and features of the retail establishment regulations.

23. The regulatory features scrutinized in this part include:

- **Complexity of the legal framework (Theme 1).** To capture the complexity of the legal framework we have used the number of permits required for establishment. The permits considered here include planning, building, use and environmental permits and retail specific authorisations.

- **Burden of the decision-making process (Theme 2).** Three variables have been defined to capture the burden of the decision-making process:
  - *Number of entities to be contacted.* This represents the maximum number of entities contacted in the decision-making process.
  - *Number of impact assessments.* This variable includes all types of impact assessments and studies a retailer must perform for retail establishment.
  - *Third parties.* This variable is the sum of the steps where competitors may potentially be involved. These steps include (i) oral hearings, (ii) on-site inspection (iii) public comments (iv) consultation of third parties (v) binding opinion of third parties. They are presented in Figure 10.

- **Specific requirements (Theme 3).** Retail establishment is subject to quite different requirements depending on the store size. The restrictiveness of these requirements varies from the requirement to perform additional impact assessments to a complete ban. To capture
these regulatory aspects a score has been built that takes into account the restrictiveness of the requirements and also the store size threshold to which these requirements apply. A regulation that bans stores of a size larger than 1,000 m² is considered to be more restrictive than a regulation that bans stores of a size exceeding 10,000 m².

24. The effects of the above features on the following economic outcomes have been considered:

- **Market dynamics.** Two measures of industry dynamics were constructed: (1) the percentage of change in square metres (m²) of sales floor space between 2014 and 2009 and (2) the percentage of change in number of stores between 2014 and 2009. In addition, to be derived at country level for all stores, both values were computed for large and small store formats, also at country level. Large store formats are defined here as retail outlets selling groceries with a sales floor space above 400 m². It includes hypermarkets and supermarkets (usually chained), and excludes, hypermarkets, discounters, convenience stores and independent grocery stores. On the contrary small store formats correspond here to the aggregation of those channels that are usually non-chained and are, therefore, owned by families and/or run on an individual basis (categorised by Euromonitor as traditional grocery retailers, including independent small grocers, food/drink/tobacco specialists and other grocery retailers). The information on market dynamics is provided by Euromonitor.

- **Market structure.** To measure concentration two indicators were used: (1) The consolidated market share of the 5 top retailers for each country in 2013 provided by Euromonitor (the higher the market share, the more concentrated the market) and (2) gross margin, in order to explore possible links between retail establishment regulation and market structure (gross margins as a proxy for the level of competition). The most straightforward way to measure competition would be to focus on prices. However, the heterogeneity of goods and services traded in the retail sector in different countries makes it hard to interpret cross-country comparisons of retail price indexes. We used a method of measuring competition based on the size of gross margins instead. Data on the gross operating surplus were used and scaled by the total value added. These data are available from Eurostat. The resulting variable, gross operating surplus to value added, captures the size of the mark-ups firms are able to charge.

25. The findings from the analysis suggest:

- The existence of a link between the evolution of the retail market in terms of store creation and store surface and some regulatory aspects. In particular the restrictiveness of specific requirements, the number of entities to be contacted in the retail establishment process and the number of impact assessments to be undertaken appear to be negatively correlated with the rate of store creation and retail surface growth.

- Large and small store formats are not affected by the regulatory aspects of retail establishment in the same way. While the dynamics of large store formats (mainly supermarkets) are most affected by the restrictiveness of the specific requirements, small store formats are most affected by the number of entities to be contacted for the
authorisation process. The latter findings could be explained by economies of scales for store chains in the treatment of administrative tasks.

- A link between the retail market structure and retail establishment regulation. The correlation analysis does not reveal a direct link between the regulatory aspects and the degree of concentration of the retail market. However, it shows that the most concentrated markets are the ones with the lowest levels of store creation. Since store creation is affected by regulatory aspects, this suggests an indirect link between concentration and regulatory aspects.

26. In our analysis, we did not find sufficient statistical evidence of a significant relationship between the other regulatory aspects (such as the requirements to provide economic data and the involvement of competitors) and the market dynamics. However, these results might stem from methodological limitations due to difficulties with comparing provisions and practices across countries.)

27. The last part of the impact assessment has a complementary role. It summarizes the findings from interviews with stakeholders, which should be viewed as informative.

28. The analysis of the replies made by the interviewed stakeholders indicates that the burden of the authorisation process and compliance costs of the overall process distort competition in favour of the incumbents. This echoes our findings of the economic analysis related to the impact of the retail establishment regulation restriction on competition. Burdensome requirements and an uncertain authorisation process limit entry and provide a competitive edge to incumbents.

29. The analysis of the replies made by the interviewed stakeholders indicates that the burden of the authorisation process and compliance costs of the overall process distort competition in favour of the incumbents. This echoes our findings of the economic analysis related to the link between the retail establishment regulation restriction and competition. Higher margins and higher market concentration could be observed for countries with more burdensome requirements where also the entry rate of new retail companies is lower.

The stakeholder interviews also indicate that there is a need for regulation of retail establishments.

30. The regulatory framework regarding the establishment of retail outlets (Theme 1), in particular those exceeding a certain threshold in the relevant Member State, tends to be (very) complex and causes a number of restrictions:

- Numerous permits required for establishment;
- The obligation to go through cumulative procedures. Cumulative procedures are burdensome for retailers wishing to enter a market. This may distort competition in favour of incumbent retailers;
- Regulations specific to the outlet’s location (city centre/ outside city centre).
- Rigid planning regulations which may prevent entry. This may favour investments in small stores;
- The protection of city centres deterring the entry of large retailers. This may also distort competition in favour of small stores;
- A lack of (sufficiently clear) regulatory framework making the authorisation process uncertain and leaving authorities with discretionary powers.

- Our analysis allows us to present a number of good practices that would be helpful in solving the issues and impacts identified:
  - Introduce an all-in-one permit (one integrated permit) combined with a reduction of the number of permits required;
  - Simplify procedures e.g. by reducing the number of permits required (see above), eliminating the requirement of certain impact assessments, (market) studies or reports, simplifying the test(s) the application must pass in order for the authorisation or permit to be granted or reducing time limits for action by authorities or comments by the public;
  - Guarantee consistency – a coherent structure, e.g. by clearly defining the powers of each level of authority, or by avoiding or limiting important differences between regions or municipalities, for example by issuing (binding) guidelines;
  - Avoid a complete ban on retail establishment outside of city centres, because of the scarcity or limitation of available space in city centres;
  - Make sure that regulations protecting city centres do not exclude new entrants or new, innovative retail concepts.

31. The authorisation process (Theme 2), tends to be (very) burdensome:
   - The involvement of third parties in preliminary steps before planning is often time consuming and may involve competitors;
   - Lack of consistency between (requirements set by) entities involved in the process cause uncertainty and extend the length of the overall process;
   - The authorisation process is often too long and costly.

32. Our analysis allows us to present a number of good practices that would be helpful in solving the issues and impacts identified:
   - Outline permission or permission in principle (two-step approach) allowing the retailer in a first stage to apply for permission in principle upon the presentation of the general outlines of the retail project;
   - One-stop-shop (one authority) centralising the procedures and allowing the retailer to deal with no more than one authority, no matter how many other authorities, bodies or stakeholders may be involved in the procedure;
   - Presumption of a successful outcome if no decision is made within the statutory term ("positive" administrative silence or tacit approval) - and as a second-best or alternative, in particular for environmental permits: a presumption of a negative outcome if no decision is made within the statutory term ("negative" administrative silence or tacit refusal);
   - Use of internet, electronic formats, online applications and webpages e.g. to allow electronic filing of the application, online tracking of the file status, online databases providing useful information, publication of decisions (grant/refusal) and their reasons;
   - Tailored procedures based on the size of the retail outlet, the type of retail development or the retail outlet’s location.
33. In many Member States the regulatory framework imposes important retail specific requirements which are specifically designed for and applicable to the establishment of retail outlets, in particular those exceeding a certain size threshold (Theme 3). A number of restrictions result from those specific requirements:

- Retail outlets above certain size thresholds often have to meet additional requirements, for example obtain additional permits, perform additional assessments or studies or provide economic data;
- A ban may be imposed on f) retail outlets above certain size thresholds (even though sometimes a derogation from the ban can be granted);

Certain retail outlets may be prohibited from establishing in certain areas or zones, or, on the contrary, obliged to establish in certain areas or zones (e.g. city centres, city outskirts, supply zones, etc.), depending for example on their size, store format or the assortment of goods sold.

Among the specific requirements imposed some may raise concerns on their compatibility with the Services Directive.

34. Our analysis allows us to present a number of good practices that would be helpful in solving the issues and impacts identified:

- Exemption from any (specific) authorisation, or mere notification requirement allowing for an immediate start, at least for relatively small outlets. Supervision a posteriori instead of supervision upfront (a priori) is less burdensome for the retailer;
- Economic data should only be requested to the extent necessary for the public policy objectives pursued and should only be used for those objective;
- Avoid a complete ban on the establishment of (large) retail outlets.

35. Member States that apply these good practices are likely to reduce or limit restrictions on the establishment of retail outlets. Member States that do not apply these practices (yet) should be encouraged to incorporate them into their regulations or practice.

36. Taking into account the results of our legal and economic analysis, the issues and good practices identified through our Study and the conclusions drawn from our analysis, we propose some recommendations to be contemplated for potential future action by the European Commission:

- Promote adoption of good practices, in particular a combination of many good practices;
- Prepare a check-list and an analysis tree for the Member States’ federal, regional and local authorities in order to assess their regulations (self-assessment);
- Reporting by the Member States to the European Commission;
- Draft model legislation and guidelines;
- Commission action before the CJEU.
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Glossary

Our legal study uses several concepts in accordance with their definition in the Services Directive, in particular concepts defined by article 4 of the Services Directive:

**Authorisation scheme**
Any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof (or concerning the establishment of a retail outlet).

Authorisation may be granted not only by a formal decision but also by an implicit decision arising e.g. from the failure of the competent authority to respond or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

**Competent authority**
Any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof.

**Establishment**
The actual pursuit of an economic activity, as referred to in Article 43 of the Treaty [Article 49 TFEU], by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out.

**Overriding reasons relating to the public interest**
Reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.

**Provider**
Any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty [Article 54 TFEU] and established in a Member State, who offers or provides a service.

**Requirement**
Any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the
social partners shall not as such be seen as requirements within the meaning of this Directive.

**Service**

Any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty [Article 57 TFEU].
# Abbreviations used

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>ASL</td>
<td>Local sanitary agencies (Italy)</td>
</tr>
<tr>
<td>Bersani Decrees</td>
<td>Bersani Decree I (Decree n° 114/1998) and Bersani Decree II (Decree n° 223/2006) (Italy)</td>
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<tr>
<td>BCMS</td>
<td>Building Control Management System (Ireland)</td>
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<tr>
<td>BWRO</td>
<td>Brussels Wetboek van Ruimtelijke Ordening (Belgium)</td>
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<tr>
<td>CCDR</td>
<td>Comissão de Coordenação e Desenvolvimento Regional (Regional Development and Coordination Committee) (Portugal)</td>
</tr>
<tr>
<td>CCSMS</td>
<td>Chamber of craft and small business of Slovenia (Slovenia)</td>
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<tr>
<td>CDAC</td>
<td>Departmental Commission for Commercial Development (France)</td>
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<tr>
<td>CNAC</td>
<td>Commission Nationale d’Aménagement Commerciale (France)</td>
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<tr>
<td>CoBAT</td>
<td>Code Bruxellois de l’aménagement du territoire (Brussels Code on Spatial Planning) (Belgium)</td>
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<tr>
<td>CoDT</td>
<td>Code du Développement Territorial (Code on the Territorial Development) (Belgium)</td>
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<tr>
<td>COMAC</td>
<td>Comissão de Autorização Comercial (Portugal)</td>
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<tr>
<td>CPC</td>
<td>Commission for Protection of Competition (Cyprus)</td>
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<tr>
<td>DGAE</td>
<td>Direção Geral das Actividades Económicas (Portugal)</td>
</tr>
<tr>
<td>DL</td>
<td>Decree Law (Decreto-Ley) (Spain)</td>
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<tr>
<td>DNO</td>
<td>Development Notification Order (Malta)</td>
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<tr>
<td>DOE</td>
<td>Department of the Environment (UK - Northern Ireland)</td>
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<td>DPAR</td>
<td>Development Planning Application report (Malta)</td>
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<td>DPEA</td>
<td>Directorate for Planning and Environmental Appeals (UK - Scotland)</td>
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<tr>
<td>DPO</td>
<td>Distributie-planologisch onderzoek (the Netherlands)</td>
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<td>DRD</td>
<td>Department for Regional Development (UK - Northern Ireland)</td>
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<tr>
<td>EC</td>
<td>Exemption certificate</td>
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<td>EDP</td>
<td>Environment Protection Directorate (Malta)</td>
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<tr>
<td>e.g. (exempli gratia)</td>
<td>For example</td>
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<tr>
<td>EIA</td>
<td>Environmental impact assessment</td>
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<td>EIA directive</td>
<td>EU directive 2011/92/EU</td>
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<td>EIS</td>
<td>Environmental Impact Statement (Ireland)</td>
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<tr>
<td>ELY Centre</td>
<td>The regional Centre for Economic Development, Transport and the Environment (Finland)</td>
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<tr>
<td>Et seq. (et sequentes)</td>
<td>And following</td>
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<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>---------</td>
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<tr>
<td>FBO</td>
<td>Food Business Operators</td>
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<td>FCCA</td>
<td>Finnish Competition and Consumer Authority (Finland)</td>
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<tr>
<td>GDO</td>
<td>General Development Order (Northern Ireland)</td>
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<tr>
<td>GEMI</td>
<td>General Commercial Registry (Greece)</td>
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<tr>
<td>i.a. (inter alia)</td>
<td>Among others</td>
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<tr>
<td>i.e. (id est)</td>
<td>That is</td>
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<tr>
<td>ICD</td>
<td>Interministerial Committee for Distribution (Interministerieel Comité voor de Distributie) (Belgium)</td>
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<tr>
<td>TTA</td>
<td>Traffic and Transport Assessment (Ireland)</td>
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<tr>
<td>LPA</td>
<td>Local Planning Authorities (UK - England)</td>
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<tr>
<td>LDP</td>
<td>Local Development Plans (UK - Scotland)</td>
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<tr>
<td>MEPA</td>
<td>Malta Environment and Planning Authority (Malta)</td>
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<tr>
<td>MFSA</td>
<td>Malta Financial Services Authority (Malta)</td>
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<tr>
<td>MTR</td>
<td>Minimum technical requirements (Croatia)</td>
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<tr>
<td>NGO</td>
<td>Non-profit Governmental Organisation (Slovenia)</td>
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<tr>
<td>NIEA</td>
<td>Northern Ireland Environment Agency (UK - Northern Ireland)</td>
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<tr>
<td>NCCD</td>
<td>National Construction Control Directorate (Bulgaria)</td>
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<tr>
<td>NPF</td>
<td>National Planning Framework (UK - Scotland)</td>
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<tr>
<td>NPF 3</td>
<td>National Planning Framework 3 (UK - Scotland)</td>
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<tr>
<td>NPPF</td>
<td>National Planning Policy Framework (UK - England and Wales)</td>
</tr>
<tr>
<td>NSECD</td>
<td>National Socio-Economic Committee for Distribution (Belgium)</td>
</tr>
<tr>
<td>NSS</td>
<td>National Spatial Strategy (Ireland)</td>
</tr>
<tr>
<td>PAC</td>
<td>Planning Appeals Commission</td>
</tr>
<tr>
<td>PD</td>
<td>Planning Directorate (Malta)</td>
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<tr>
<td>PPS</td>
<td>Planning Policy Statement (UK - Northern Ireland)</td>
</tr>
<tr>
<td>PRG</td>
<td>General Urban Plan (Italy)</td>
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<tr>
<td>RDS</td>
<td>Regional Development Strategy (UK - Northern Ireland)</td>
</tr>
<tr>
<td>RDFS</td>
<td>Regional Directorate of Food Safety (Bulgaria)</td>
</tr>
<tr>
<td>RIA</td>
<td>Retail Impact Assessment (UK - Northern Ireland)</td>
</tr>
<tr>
<td>RIEW</td>
<td>Regional Inspectorate of Environment and Waters (Bulgaria)</td>
</tr>
<tr>
<td>RO</td>
<td>Responsible of the Office (Italy)</td>
</tr>
<tr>
<td>RP</td>
<td>Responsible of the Procedure (Italy)</td>
</tr>
<tr>
<td>RPA</td>
<td>Review of Public Administration (Ireland)</td>
</tr>
<tr>
<td>SAC</td>
<td>Special Areas of Conservation</td>
</tr>
<tr>
<td>SARO</td>
<td>Strategische Adviesraad voor Ruimtelijke Ordening (Strategic Council for Spatial Planning) (Belgium)</td>
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Legal Study on Retail Establishment through the 28 Member States: Restrictions and Freedom of Establishment

SCIA
Segnalazione Certificata di Inizio Attività (Report on Certified Commercial Activity) (Italy)

SCOT
Scheme for coherent territorial development (France)

SDP
Strategic Development Plans (UK - Scotland)

SEA
Slovenian Environment Agency (Slovenia)

SEPA
Scottish Environmental Protection Agency (UK – Scotland)

SERV
Sociaal-Economische Raad van Vlaanderen (Social-Economic Council of Flanders) (Belgium)

Services Directive

SME
Small and medium sized enterprises

SDP
Strategic Planning Division

SDZ
Strategic Development Zone (Ireland)

SPA
Special Protection Area

SPG
Supplementary Planning Guidance

SPP
Scottish Planning Policy (UK - Scotland)

SPPS
Strategic Planning Policy Statements

SUAP
Sportello Unico per le attività produttive (Integrated Office for Commercial Activities) (Italy)

TAR
Local administrative court (Italy)

TIA
Traffic Impact Assessment (Ireland)

TPC
French Town planning code (France)

TTA
Traffic and Transport Assessment (Ireland)

UCO
Use Classes Order (UK - Northern Ireland)

VEM
Single point of entry

VCRO
Vlaamse Code voor Ruimtelijke Ordening (Flemish Decree on Spatial Planning) (Belgium)

VIA
Specific environmental impact assessment in the Veneto Region (Italy)

VLACORO
Vlaamse Commissie Ruimtelijke Ordening (Belgium)

ZLR
Zero Licensing Regime (Portugal)
1. Introduction

1.1 Background and objectives

1. The purpose of this study is to describe the different national systems regulating retail establishments across the EU and to undertake a comparative assessment of these systems in light of their compatibility with EU internal market rules, in particular with the freedom of establishment and the Services Directive.

2. The rules regulating retail establishments vary considerably across the European Union, as well as at regional and even strictly local level, both in form and content. Regulatory schemes can focus on a specific authorisation required for retail outlets or can be found in "planning authorisations" and in the drafting of planning documents. These two systems can also coexist. Even if not directly discriminatory, retail establishment rules can lead to restrictions significantly affecting the possibility to open retail establishments and therefore, limiting the freedom of establishment; they can also hinder the development of specific business models. They are often considered as barriers to entry. However, these restrictions could in some cases be justified with regard to the overriding reasons of general interest they pursue, provided they are necessary and proportionate.

3. Over the last 10 years, the European Commission has received an increasing number of complaints related to the specific issue of retail establishment. Complainants, and more generally retailers, complain about the restrictive conditions for opening, transforming or extending retail outlets. In parallel, Member States are concerned about the large retail developments in the city outskirts, as these could influence the development of city centres, have a negative impact on the environment (due to the traffic they generate) and transform the city outskirts and have negative effects in general on the quality of city-life.

4. Concerns about the negative impact that such developments could have on the concentration, accessibility and affordability of the products have also been expressed.

5. In parallel, while retailers continue to develop new business models, consumers’ needs and their shopping patterns are changing, notably with the increasing use of e-commerce.

6. The evolution of consumers’ needs has been highlighted inter alia in the 2009 Staff Working Document “Competition in the food supply chain”:\(^1\)

7. “European consumers are increasingly shifting from the traditional “one-stop-shop” approach for their weekly grocery shopping and now visit more than 3 shops on average for their food purchases (modern trade supermarkets, discounters or alternative distribution channels). This seems to suggest that there is increasingly intense competition between different retail formats. The rise in single person households, the growing number of working women and changes in traditional family structures, coupled with a “back-to-town” phenomenon amounting to the re-population of urban centres has led consumer preference towards convenience proximity stores (e.g. in Belgium, Proxy Delhaize). Rather than rolling out more supermarkets in an already saturated market, retailers have recently started developing new formats aimed at the general public and also at various consumer niches. These niche markets include bio/organic shops, stores aimed at providing proximity services or responding to the demand from low income households.

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focused on cheap ready-made meals, etc. Analysts believe that such trends will be confirmed in coming years and lead to more fragmentation of consumer experiences in retailing. Experience of National Competition Authorities confirms this emerging trend, though with regional differences. However, this is not always synonymous of increased competition since a large number of such stores are owned or franchised by the same large groups."

8. As retail trade is constantly developing, the measures used by the Member States should be efficient and proportional to the objectives pursued. In practice, if certain requirements for establishment are justified, others aim at restricting competition or protect incumbents.

9. The 2012 ECN\(^2\) report on the activities of national competition authorities (NCAs) in the food sector provides an overview of the work NCAs have carried out over the last decade in antitrust cases and sector enquiries in the area of food. This report, as well as some reports from national competition authorities, has pointed to restrictions arising from the retail establishment regulation.\(^3\)

10. In view of the complexity of the issue, some authorities have also issued guidelines while others have published studies.\(^4\)

11. The OECD has also pointed to problems which could arise in this context. More specifically, the OECD report of 2008 ("Land Use restrictions as Barriers to Entry")\(^6\) examines the barriers to retail establishment. The OECD also addresses questions to the Member States with regard to authorisation schemes for large retail premises (within product market regulation indicators in the retail sector). However, these questions will not provide sufficient information to cover the issues raised in this field.

12. The European Central Bank Paper of 2011\(^8\) underlined that "although some regulation is required to ensure the smooth functioning of markets, too much of it can generate numerous obstacles that hinder competition and overly favour incumbents. (...) Planning rules, in particular, are often found to play an important role in creating barriers to entry or expansion and therefore constraining competition (...)."

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\(^2\) ECN Subgroup Food, "ECN Activities in the Food Sector - Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector", May 2012.

\(^3\) Germany "Strengthening Competition in Retailing and Services", The Nineteenth Biennial Report 2010/2011 of the Monopolies Commission, Chapter VI, [http://www.monopolkommission.de/aktuell_hg19.html](http://www.monopolkommission.de/aktuell_hg19.html);


\(^8\) "Land Use Restrictions as Barriers to Entry", OECD, 2008, [http://www.oecd.org/regreform/sectors/41763060.pdf](http://www.oecd.org/regreform/sectors/41763060.pdf) and see also, "Land Use Restrictions as Barriers to Entry", OECD, 2010, [http://dx.doi.org/10.1787/clip-10-5kmjgl6ngq4](http://dx.doi.org/10.1787/clip-10-5kmjgl6ngq4)

13. In the Retail Market Monitoring Report (RMMR)\(^9\) and its accompanying Staff Working Document\(^10\), the Commission pointed out the lack of efficiency and diversity across commercial planning rules, together with the malfunctioning of the commercial property market, as having an adverse impact on the location retailers choose to establish shops and on their accessibility for consumers.

14. Adopted in a follow-up of this RMMR, the European Parliament’s report\(^11\) of July 2011 calls for a more efficient and fairer retail market in Europe and recommends the opening up of market access for business and consumers, in full respect of the subsidiarity principle. The report also “calls on the Commission, in cooperation with the Member States, to draw up a survey of the impact and possible consequences of the creation of hypermarkets or shopping malls with regard to the employment market, SMEs and consumers.”

15. In early 2012, the Commission organised a series of workshops to confirm the need for a global retail action plan. During these workshops, participants recognised the importance of retail establishment. The Commission underlined the need for a balanced approach, taking into account all the interests, while preserving the freedom of establishment.

16. In its Communication setting up a European Retail Action Plan, adopted on 31 January 2013, the Commission included specific actions related to retail establishment.\(^12\)

1.2 Legal background related to the freedom of establishment

17. Article 49 of the Treaty on the Functioning of the European Union (TFEU) aims at protecting the freedom of establishment. It is a ‘fundamental principle of EU law’, which has given rise to a large set of case-law. Through its judgments the Court of Justice of the European Union (CJEU) has played an important role in defining the freedom of establishment, as well as its limits. The concept of establishment within the meaning of article 49 TFEU (former article 43 TEC) involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period. National legislations governing the establishment of retail outlets fall within the scope of article 49 TFEU.

18. The freedom of establishment is not only governed by article 49 TFEU, but also by the Services Directive in particular articles 9 to 15 (Chapter III). To a large extent, these provisions result from the codification of the CJEU’s case-law regarding the establishment of service providers.

19. The adoption of the Services Directive (and its subsequent implementation by the Member States by 28 December 2009) has been an important step in improving the functioning of the Single Market for services. It is a significant document laying down detailed rules that require(d) all Member States to revise their national, regional and local requirements and obligations with respect to the establishment of service providers. The Directive considerably facilitates the freedom of establishment throughout the EU by promoting the creation by service providers of companies and branches in their home country as well as in other Member States,

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\(^9\) Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Retail market monitoring report “Towards more efficient and fairer retail services in the internal market for 2020” SEC(2010)807.


\(^12\)Communication from the Commission (...) setting up a European Retail Action Plan (“ERAP”), 31 January 2013, COM/2013/036 final.
by giving consumers easier access to services and by prohibiting a number of requirements that are discriminatory or particularly restrictive.

20. The Services Directive prohibits “the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority – this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons related to the public interest”13.

21. Whether or not there is an economic need for the services, whether or not there is a market demand for the services to be supplied, should be for the service provider (the retailer) to assess and decide. Such assessment or decision should not be made by the Member State or any of its authorities.

22. However, the Services Directive does not interfere with the Member States’ planning system, provided the planning requirements do not pursue economic aims but serve overriding public interest reasons and are adequate and proportionate to these overriding reasons in the public interest.

1.3 CJEU Case law clarifying freedom of establishment provisions

23. The CJEU has developed a large case-law related to this freedom, clarifying the scope of this provision.

24. The CJEU has taken a position regarding restrictions to establishment condemning purely economic criteria (e.g. case law Ypourgos Ergasias14…), protection of small shops15 but also recognising, in the field of pharmacies, restrictions aiming to ensure a correct supply of medicines to the population and recognising a margin of discretion to the Member States in this field.16

25. As confirmed by the CJEU in its judgment of 24 March 201117, national legislation governing the conditions for setting up large retail establishments falls within the scope of Article 49 TFEU. In this context, the CJEU considered that “(...) 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”. On the other hand, the CJEU has clearly pointed out that purely economic considerations cannot constitute overriding reasons relating to the public interest.

26. In the specific circumstances of the case, the CJEU considered the specific restrictions laid down in the contested legislation, taken as a whole, to significantly affect the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia.

27. In such circumstances, according to the CJEU, the reasons which may be invoked by a Member State in order to justify 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”. However, the CJEU did not provide guidance on all aspects of such an analysis. In this context, the

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14 CJEU, Judgment of 5 June 1997, case C-398/95, Ypourgos Ergasias; CJEU, Judgment of 15 April 2010, case C- 96/08, CIBA.
15 CJEU, Judgment of 3 June 1992, case C-360/89, Commission v Italy.
16 CJEU, Judgment of 1st June 2010, joined cases C-570/07 and C-571/07, Blanco Perez and Chao Gomez (ruling).
17 CJEU, Judgment of 24 March 2012, case C-400/08, Commission v./Spain.
different interests should be taken into account by the Commission in its assessment.

1.4 Overview of the most relevant provisions of the Services Directive

28. The establishment of retail outlets is often subject to one or more authorisation schemes, permits or license requirements. Such authorisation schemes permits and license requirements are subject to the Services Directive of which the relevant provisions are described below.

1.4.1 Regulation of national authorisation schemes

29. In line with the case-law of the European Court of Justice, the Services Directive does not prohibit the application of national authorisation schemes, permits and any other requirements for retail establishment in the EU Member States. However, the Member States cannot make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

- The criteria of non-discrimination, necessity and proportionality are respected. These criteria, listed in article 9 of the Services Directive, are the following:
  - The authorisation scheme does not discriminate against the provider in question;
  - The need for an authorisation scheme is justified by an overriding reason relating to the public interest;
  - The objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

- The applicants have a free choice as to how they want to be present in the territory.

30. According to article 10.4 of the Services Directive, an authorisation shall enable the service provider to have access to the service activity, or to exercise that activity, throughout the national territory, unless a limitation thereof is justified by an overriding reason relating to the public interest.

31. According to article 10 of the Services Directive, authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. These criteria are listed in article 10.2 of the Services Directive:

- Non-discriminatory;
- Justified by an overriding reason relating to the public interest;
- Proportionate to that public interest objective;
- Clear and unambiguous;
- Objective; The requirements do not duplicate requirements that the applicant has already satisfied in another country (article 10.3 of the Services Directive). The procedures involved are clear and transparent and safeguard the principles of objectivity and impartiality;
- Made public in advance. The requirements do not duplicate requirements that the applicant has already satisfied in another country (article 10.3 of the Services Directive). The procedures involved are clear and transparent and safeguard the principles of objectivity and impartiality. According to article 13 of the Services Directive, the
authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially. The procedures and formalities may not have a dissuasive effect and may not unduly complicate or delay the provision of the service;

- Transparent and accessible.

1.4.2 Costs and timing of the procedure supporting national authorisation schemes

32. The procedures involved are reasonable in terms of costs and time for the applicants. Any costs which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures (article 13.2 of the Services Directive).

33. With regard to timing, the authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time, with due motivation and notification to the applicant. If the authorities fail to respond within the time period set or extended, the authorisation shall be deemed to have been granted (article 13.3 and 13.4 of the Services Directive).

34. With regard to the length of the procedure, article 10.5 of the Services Directive also prescribes that the authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

35. The decisions are explained, have an unlimited duration and are subject to judicial review:

- With regard to the duration of the granted authorisation, according to article 11 of the Services Directive, permits, licences and authorisations should in principle be granted for an unlimited period.

- According to article 10.6 of the Services Directive, once a decision has been rendered and except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

1.4.3 Prohibited requirements of the Services Directive

1.4.3.1 Economic need tests

36. The Services Directive also identifies certain prohibited requirements which may affect access to or exercise of a service activity (article 14 of the Services Directive). Pursuant to this provision, Member States are not allowed to impose discriminatory measures or requirements based directly or indirectly on nationality (for individuals) or on the location of the registered office (for companies) nor prohibit service providers from having an establishment in more than one Member State or requiring service providers to choose between a principle or secondary establishment (in particular an obligation on the provider to have its principle establishment in their territory).

37. Furthermore, article 14.5 of the Services Directive prohibits the case-by-case application of an “economic need test”, making the granting of authorisation...
subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority. This prohibition does not apply to planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.

1.4.3.2 Involvement of competitors

38. Another important prohibition for the Member States is to prohibit the involvement directly or indirectly of (including within consultative bodies) competing operators in the granting of authorisations (Article 14.6 of the Services Directive). It is however acceptable to consult or involve professional bodies and associations or organisations acting as the competent authority, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or to consult the public at large.

1.4.4 Requirements to be evaluated

39. Beside the prohibited requirements, article 15 of the Services Directive contains requirements to be evaluated by the Member States. These requirements will often restrict the freedom of establishment but can be justified if they are non-discriminatory in nature and serve an overriding reason of public interest in a proportionate manner. These include quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of minimum geographical distance between providers or an obligation on a provider to take a specific legal form, as well as requirements which relate to the shareholding of a company. In principle, requirements which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity need to be evaluated. Also requirements fixing a minimum number of employees should be assessed, as well as a ban on having more than one establishment in the territory of the same State or an obligation on the provider to supply other specific services jointly with the services he intends to render.

1.5 Previous findings

40. The 3 year period for the Member States to implement the Services Directive ended on 28 December 2009.

41. The report on implementation of the Services Directive, published in June 2012 shows that, even though many Member States have adapted their legislation in order to be compliant with the Services Directive’s provisions, some barriers to retail establishment remain widespread among the EU Member States.

42. In this context, both the implementation report of the Services Directive adopted in June 2012, as well as the Annual Economic Growth Survey which points out restrictions existing in the field of retail, should also be taken into account.

43. An earlier study has shown that retail trade used to be one of the most regulated sectors, but that the implementation of the Services Directive has resulted in a respectable number of restrictions being either abolished or partially reduced.\(^\text{18}\)

44. In addition, when assessing/analysing the measures adopted by the Member States, account should also be taken of various EU initiatives or instruments impacting retail establishments, which can sometimes have similar objectives to\

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1.6 Content and objectives of the study

45. The main objective of the study is to provide an overview of the regulatory framework on retail establishment in the Member States and to identify best practices related to retail establishment.

46. In order to achieve this objective, first of all, the study develops an overview of the regulatory framework applicable when a retail business – be it a retail shop, outlet, distribution centre, smaller convenience store, supermarket or hypermarket (excl. pharmacies) - wishes to open a retail establishment in any of the EU Member States.

47. The results of this analysis are summarised in the second section of the study and further details on each Member States regulation are provided in the Annex.

48. The third section of the study analyses retail establishment regulations in light of the Services Directive from a legal perspective.

49. A fourth section seeks to provide evidence on the economic impacts of some features of the retail establishment regulations, especially their impact on the market dynamics and market structure.

50. The last section summarises the findings and provides a set of best practices.

1.7 Scope of the Services Directive

51. The scope of the study is aligned with the Services Directive. The Directive covers both situations where a service provider seeks to establish in another Member State and those where the service provider seeks to establish in its own Member State.

52. In particular the study addresses the following themes:

- **Theme 1 - the legal framework.** Retail establishment is governed by differing regulations which impose various requirements. This theme covers all these regulations. Furthermore the legal framework may depend on the outlet's location, because certain regulations are limited to specific regions or locations or because regulations are adopted at various levels (national, regional, local). Planning regulations aiming to protect city centres are an example of such regulations. All these aspects will be covered by the study.

- **Theme 2 - the authorisation process.** It encompasses the different steps necessary to obtain a retail authorisation. The steps considered include the preliminary steps before an application procedure and the authorisation schemes (conditions and procedures). It also includes requirements to perform certain impact assessments (e.g. an environmental impact assessment or a retail impact assessment) or studies (e.g. a market study).

- **Theme 3 - specific requirements.** These requirements include specific authorisations requested depending on the size of the retailers wishing to establish in Member States.

\textsuperscript{19} \url{http://ec.europa.eu/regional_policy/archive/themes/urban/leipzig_charter.pdf}

1.8 General approach and information collection

1.8.1 General approach

<table>
<thead>
<tr>
<th>Information sources</th>
<th>Analysis</th>
<th>Best practices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Survey of a network of country expert</td>
<td>Descriptive analysis</td>
<td>Legal framework</td>
</tr>
<tr>
<td>Case studies</td>
<td>Legal analysis</td>
<td>Decision process</td>
</tr>
<tr>
<td>Interviews with stakeholders</td>
<td>Impact analysis</td>
<td>Specific requirements</td>
</tr>
<tr>
<td>Data used to assess the economic impacts</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

53. As illustrated above our approach articulates itself in four main tasks:

- **Descriptive analysis of the regulatory framework.** This analysis seeks to characterise and provide statistics on the legal framework, the authorisation process and specific requirements. It identifies potential restrictions for retail establishments.

- **Legal analysis of the regulatory framework.** Here a legal analysis of the regulatory framework in light of the Services Directive highlights potential infringements of the directive. In a sense this analysis seeks to assess the legal basis of national authorisations and procedures for retail establishment.

- **Impact analysis.** Having established potential restrictions, we seek to provide evidence of their economic impact on the structure and the dynamics of the retail markets.
- **Identification of best practices.** Finally, for each of the themes treated in the study a set of best practices is proposed. These best practices draw from the descriptive, legal and impact analysis.

### 1.8.2 Data collection

54. Below we present the various sources of information supporting the study’s findings.

#### 1.8.2.1 Survey of a network of country experts

55. To gather data on retail establishment regulations a survey of a network of legal experts was undertaken. All of the experts surveyed are lawyers or legal professionals practicing in the legal profession and have substantial relevant practical experience.

56. A questionnaire was developed to survey this network. It aims at gaining insights into the existing and proposed legislation in the broadest sense as well as its application in day-to-day practice, by the authorities and/or its enforcement by the courts. It deals i.a. with the scope of the regulation, the requirements related to the establishment of retail outlets and the reasons of general interest claimed as justification of the requirements. It also tackles the authorisation process and the criteria applied.

57. In addition, briefing materials have been elaborated, in order to provide a comprehensive package of guidelines and common definitions. These guidelines aim to ensure the quality and consistency of data collection as well as assist the national experts in consolidating the output of their research.

58. The questionnaire has been completed by the local experts for each of the 28 EU Member States.

59. Moreover, we have communicated with the network of law practitioners to complete the information provided when necessary.

60. Based on the completed questionnaires, country data sheets have been drafted. These data sheets have been submitted to the Member States for validation. This report is based on the Member States’ and EU regulations, official guidance thereon and case law published until 30 September 2014. Comments received from the Member States pursuant to the EU Commission (DG Markt) Workshop dated 3 December 2014 were taken into account and integrated in the report to the fullest extent possible.

61. This survey provides a descriptive overview of the regulation, and of the authorisation process and criteria.

#### 1.8.2.2 Case studies

62. Two case studies were identified for the purpose of this study in each of the 10 Member States selected by the Commission, i.e. Denmark, Germany, Italy, the Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

63. The aim of the case studies is to provide illustrative examples of issues related to retail establishments. Selection of the case studies has been organised around the following main activities:

- Identification of “typical” establishment situations for the retail business and of the “objects” (e.g. SMEs, larger retailers, specific authorities, etc.) that were to be involved in the case studies. This has involved approval of the selected case studies by the Commission and has been based on what was suggested by stakeholders and key experts.

- More specifically, the set of criteria used for selecting the case studies is the following: (i) Geographic localisation (involvement of national or
federal authorities as well as local authorities); (ii) Type of activity; (iii) Size of enterprise (SMEs and larger retailers).

The full case studies are presented in Appendix 4 (volume II). In the core text of the report (this volume I), we have only included summaries of the relevant cases in the relevant sections.

1.8.2.3 Interviews with stakeholders

64. Stakeholder interviews were held in the form of individual interviews both by telephone and face-to-face. Interviews allowed us to gain deeper insight into the stakeholders’ views on specific issues and are of particular value when addressing complex or contentious issues.

65. The interviews were conducted in a selected set of countries. To collect structured and homogeneous information an interview script was drafted. The interview script is composed of a common set of questions to be answered by all types of respondents and specific questions to be answered only by a certain type of respondents.

1.8.2.4 Data used to assess the economic impacts

66. In order to measure the impact of entry regulations, data on economic variables thought to be affected by the tightness of entry restrictions was gathered.

67. A series of outcome variables were constructed based on publicly available Eurostat data coming from two different databases.

68. The National Accounts data compiled on a yearly basis by Eurostat based on information transmitted by the Member States in accordance with the ESA95 or ESA2010 transmission programme was exploited. From the National Account data information on 2 main variables was collected: the total number of people employed and the total gross value added. This information is obtained for each country both for the overall economy and for the retail sector (“Retail trade, except motor vehicles and motorcycles”; NACE G.47). The most recent complete year available in the National Accounts data is 2011, to the exception of Latvia for which 2010 data is used. This information has been integrated with data from the Eurostat Structural Business Statistics database. This database gathers information on total employment and gross value added.

69. Euromonitor data was also used. This data provides information on the number of stores and square meters for various store formats. This data covers the years between 2009 and 2014.

1.8.2.5 Online survey

70. Further, an online survey was also conducted. A questionnaire was provided to 107 retailers and 548 other stakeholders. However, the response rate was 43.9% for the retailers and only 12.2% for the other stakeholders. As a result, a total of 114 questionnaires were completed online (47 retailers + 67 other stakeholders). We did not consider this sufficient to be able to use this information.

1.9 Legal analysis

71. The legal analysis examines the Member States’ regulations, and their application in light of the provisions of the Services Directive. Three points are reviewed:
   - Compliance of authorisation schemes with the Services Directive;
   - Whether the legal framework includes requirements that are prohibited under article 14 of the Services Directive (economic need tests and the involvement of competitors);
72. In this respect any regulation which makes the granting of authorisation subject to an assessment of the activity’s economic effects, requires careful scrutiny. To a certain extent it could be argued that there is (or should be) a presumption against such regulations, unless the Member State provides sufficient evidence to sustain the view that the requirements effectively serve overriding public interest reasons (mainly related to urban/territory planning and protection of the environment) and are proportionate and adequate to achieve these objectives.

1.10 Impact assessment

73. Figure 1 summarises the approach followed to identify the economic effects of retail establishment regulations.

Figure 1: General approach

74. First, a desk research was performed in order to identify the most likely impacts regarding entry restrictions. The findings of this desk research are presented in the theoretical analysis. Then the economic analysis investigates possible correlations between certain aspects of retail establishments’ regulations and defined economic
variables, such as market dynamics and market structure (concentration/competition).

75. This analysis is completed with a qualitative analysis of interviews with stakeholders. To gather different perspectives, various categories of stakeholders have been contacted and have replied to the questions, expressing their views on the retail establishment regulations. The answers to these questions allow us to gain insights into the likely impacts of the retail establishment regulations and challenges that retailers face. This qualitative analysis completes the economic analysis performed to provide a comprehensive overview of the main issues regarding retail establishment.

1.10.1 Theoretical analysis

76. The desk research of academic literature, market reports and other relevant documents in the theoretical analysis provides an overview of the most likely impacts of entry barriers to the retail establishment, including the role played by market forces as well as the potential impact on consumer welfare and the environment. The list of documents reviewed is described in the table below.

77. These likely impacts have been characterised based on the findings of previous studies in terms of foreseen impacts on various economic aggregates such as output, employment, innovation. Most of the studies surveyed provide results from economic models; some studies also assess the environmental impact or other aspects of interest for a comprehensive characterisation of the impacts.

78. No additional modelling was carried out to support the materials presented in the theoretical analysis.

Table 1: List of documents supporting the theoretical analysis

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Source</th>
<th>Date</th>
<th>Country</th>
<th>Impact of entry regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schivardi and Viviano</td>
<td>Entry barriers in retail trade</td>
<td>The Economic Journal</td>
<td>2010</td>
<td>Italy</td>
<td>Productivity, innovation, job creation, consumption prices</td>
</tr>
<tr>
<td>Maican and Orth</td>
<td>Entry regulations: Product differentiation and determinants of market structure</td>
<td>Research Institute of Industrial Economics (IFN) – Working paper</td>
<td>2013</td>
<td>Sweden</td>
<td>Competition</td>
</tr>
<tr>
<td>Maican and Orth</td>
<td>A dynamic analysis of Regulation and productivity in retail trade</td>
<td>IFN Working Paper Nº 9 3 9</td>
<td>2012</td>
<td>Sweden</td>
<td>Productivity</td>
</tr>
<tr>
<td>Griffith and Harmgat</td>
<td>Supermarkets and planning regulation</td>
<td>Centre for Economic Policy Research - Discussion paper series Nº67 1 3</td>
<td>2008</td>
<td>UK</td>
<td>Competition, consumption prices</td>
</tr>
</tbody>
</table>
1.10.2 Economic analysis

79. In this analysis, we seek to identify relationships between features of retail establishment regulations and the dynamic and concentration of retail markets. These relationships are identified through a statistical analysis of the correlation between these features and economic outcomes such as entry rate and gross margin.

1.11 Identification of good practices

80. In this part our analysis has focused on the results: are the objectives pursued by the Member States’ regulators achieved, and to what extent? What measures allow
them to be (best) achieved, while guaranteeing compliance with the Services Directive? What measures allow achievement of the objectives with no or limited side-effects, without creating barriers to retail establishment?

81. In other words, we have aimed to evaluate the various regulations and systems and identify the most efficient ways of achieving the regulatory objectives, provided these objectives are acceptable, even if they create a certain degree of barrier to retail establishment, because they serve an overriding general interest, and are, therefore, in compliance with the Services Directive.

82. Consequently, the analysis has resulted in the identification of good practices, and in recommendations.

83. Based on the various components of our analysis, we have singled out good practices and bad practices.

84. A set of good practices was identified for each theme.

1.12 Interpretation of findings and caveats

85. In this paragraph we make some comments regarding the interpretation and understanding of our findings, and express some caveats.

1.12.1 Potential character

86. Our analysis shows that in some Member States there are still certain rules or practices that may, potentially, qualify as prohibited requirements. Other regulations or practices, even if they do not impose any prohibited requirements, have at least potentially a restrictive effect. The analysis should be read with a good sense of relativism and nuance.

87. Firstly, the potential character of the qualification should be stressed, because to a certain extent the qualification is based on interpretation and therefore subject to debate. At the end of the day, it is up to the CJEU, taking into account all relevant circumstances, to decide whether or not a certain restriction complies with the Services Directive.

1.12.2 Concrete application

88. Secondly, if in a Member State’s regulation we identify a potentially prohibited requirement, it does not necessarily mean that this Member State restricts freedom of establishment for all retail outlets in general, or for the larger part of them. On the other hand, if a Member State is known for having, in general, an open approach to retail establishment, that does not exclude a finding of the potential presence of a prohibited requirement applicable to a limited category of retail outlets.

89. Similarly, with respect to other restrictions, which are not as such prohibited, they may have a larger or a more limited scope.

90. In most jurisdictions a distinction is made between requirements applicable to large retail outlets (exceeding a certain size) and smaller outlets. Typically, smaller outlets are either exempt from the requirements, or subject to less complex and less demanding regulations.

91. Depending on the number of smaller outlets that are established as compared to the number of large outlets, the restrictions may turn out to have a considerable impact only on a very limited number of retail outlets (the large ones). As a result, the retail market may seem quite open to many (or most) retail outlets or types or formats of retail outlets, and access to the market in general may be fairly easy, even though the regulation is considered to be quite restrictive with respect to (a) certain type(s) of outlets (in particular the large retail outlets).
Nevertheless, whether or not a Member State’s regulation is in compliance with the Services Directive, does not depend on the number of (types of) retail outlets concerned. Even if the retail market in general may seem quite open, this does not exclude the possibility that certain requirements applicable to the establishment of certain retail outlets can be seen as an infringement of the Services Directive.

1.12.3 Regional and local differences

In several Member States the regulatory powers have been granted to regional or even to municipal authorities. As a result, the regulations and requirements may vary significantly from one region to another, or from one municipality to another.

National authorities are responsible for the transposition of the Services Directive even if the regulatory powers for retail establishment are decentralised.

1.12.4 New building versus existing building

The analysis shows important differences between the situation of a retailer wishing to establish in a new building or to make significant changes to an existing building, and that of a retailer deciding to establish in an existing building without (substantially) changing it.

More permits are, for obvious reasons, required in the first situation. Compliance with planning regulations is also more likely to be required when a new construction is made or an existing one is undergoing important refurbishment.

1.12.5 Brick-and-mortar retail versus e-commerce (and m-commerce) versus multi-channel retail

Both e-commerce and m-commerce have developed rapidly and have acquired a substantial market share in retail. Retailers using these channels do not have the same needs as traditional retailers. They do not need brick-and-mortar shops where they can display their goods and attract customers; their goods are presented on a website, which is accessible online from computers and tablets, as well as through mobile devices (smartphones and the like). In essence, what they need -other than technology- is logistics:

- For home delivery: the retailer’s own trucks or courier/delivery services (mail/post or any other courier) to ship the goods ordered by the online customer and deliver them at the customer’s address;

- For collection: warehouses or pick-up points for goods to be picked up by the customers. These pick-up points can be the retailer’s own special pick-up points or its own shops, or can be the post office or any other shop or collection point.

From a retail establishment point of view this development may provide a competitive advantage to e-commerce or m-commerce retailers as compared to traditional brick-and-mortar retailers, in particular if the e-commerce and m-commerce retailers are not covered by the scope of the retail establishment regulations. Our analysis includes regulation including or imposing requirements for the establishment of such warehouses or pick-up points. To date, the number of Member States that have adopted such regulation remains rather limited.

1.12.6 Robustness of the economic analysis

The cross-country nature of the analysis requires caution when interpreting the results. The cross-sectional variability in any given economic outcome will be influenced by many country specifics and possibly by time-varying factors which we cannot control. Therefore, any correlation between regulatory aspects and economic outcomes must be seen as suggestive. Moreover, this approach leaves us with at most 28 observations which limits the precision with which we will be
able to measure our correlations. For the time being, the analysis should be interpreted as illustrative of the main trends in the data, without definitive statistical significance.

100. The correlation was assumed to be significant for p-values below 10%. This threshold is a standard convention in statistical analysis. The p-value indicates the probability that the correlation is not significant. Furthermore the regulatory aspects considered are factual observations of existing regulatory provisions. The actual application of these regulations may be different, even though we have endeavoured to examine how the regulations are actually applied in day-to-day practice. In practice some of the statutory requirements may not be considered. This will reduce the restrictiveness of the regulation but our measure of the level of restrictiveness across EU countries as well as the correlation analysis will be unable to capture this effect.

As a rule we have based our economic analysis on the strictest regulations. If one jurisdiction has several regions and the regions have quite different regulations - for example different requirements (authorisation versus notification) or different thresholds (maximum floor space, or floor space triggering special requirements) - our classification takes into account the rules of the strictest region, even if certain regions may have a very liberal regime. After all, the strictest regulation has an impact on the possibilities for a retailer to establish an outlet in that jurisdiction.

Last but not least, in the correlation analysis we only take into account quantifiable aspects of the regulations. Aspects such as the degree of coherency between local or regional regulations and authorities and national or federal regulations and authorities are very hard to measure. More qualitative discussions should complete the indicators in order to have a comprehensive overview of the restrictions to retail establishments.

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21 We have made very few exceptions to this rule, for small islands (for example in Greece) because they are not representative.

22 See for example in Spain or Italy.
2. Descriptive analysis of the regulatory framework

101. The objective of this section is to characterise the Member States’ regulatory framework. This section is mostly descriptive. Relying on statistics and findings from case studies, it seeks to characterise main trends in regulating retail establishments with respect to:

- The legal framework. Here an overview is provided on the number and variety of authorisation schemes. The variety of authorisation schemes reflects the number of regulations governing retail establishment and thus the complexity of the legal framework. The existence of location specific regulations is also discussed. These variations in regulations make the legal framework more complex and, by doing so, may prevent retail establishment.

- Characteristics of the authorisation process. The authorisation process includes preliminary steps to be undertaken before a decision is made, such as an oral hearing or a market impact assessment to be performed. In reviewing the authorisation process we also examine the entities involved, such as advisory bodies, or other authorities.

- Requirements specific to retail establishment, for example requirements depending on the retail outlet’s size. Nearly all Member States make a distinction between large and small retail outlets in their regulatory framework. We conclude this overview by comparing the restrictive nature of these requirements.

2.1 Descriptive analysis of the legal framework – Theme 1

102. Here we first present the requirements associated with various regulations. We then analyse location specific regulations.

2.1.1 Overview of authorisation schemes governing retail establishment

103. In all Member States the establishment of retail outlets is subject to the granting of one or more authorisations, licences or permits. In a considerable number of Member States this includes a retail specific authorisation (see below: Theme 3, Specific requirements). Other permits that may be required are: planning permits, building permits, use permits, environmental permits. In many Member States several authorisations or permits are (or can be) required.

104. Figure 2 presents the number of permits required, ranging from 1 to 5, as spread over the Member States (in %). One can see that in general, a large number of permits is required. More than 50% of the EU Member States require at least 3 permits for the establishment of retail outlets.

105. Depending on the regulatory provisions adopted by the Member States, it is likely that for the establishment of a retail outlet that requires the construction of a new building or a considerable refurbishment of an existing building, several permits are needed.

106. Compliance with planning regulations can either be integrated in the procedure for a building permit, or be checked as part of a separate procedure for a planning permit. In some Member States the retailer must apply for a planning permit and a

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23 In other words: as the number of authorisations and permits required, and the requirements made in the process of granting such authorisations or permits, increase, the legal framework is considered as more complex.
building permit, and sometimes even for a use permit. As a result, for these retail outlets, a combination of several permits is, at least potentially, required.

107. In addition to the above permits, an environmental permit is often also required for a retail establishment.

108. Finally a considerable number of EU Member States requires an authorisation that is specific to retail establishment. These requirements are in general depending on the outlet’s size and will be analysed further later in this section (see below: Theme 3, Specific requirements).

**Figure 2: Number of permit(s) required**

![Diagram showing number of permits required]

2.1.2 **Cumulative procedures can be very complex and burdensome**

109. In most Member States, the establishment of a retail outlet requires several authorisations or permits. As a result of this, a retailer must comply with several procedures and deal with several different authorities to obtain all authorisations and permits required. This adds to the complexity of the regulatory framework. It can be quite burdensome and form a barrier to the establishment of retail outlets. Table 2 below provides illustrative cases of the restrictions caused by cumulative procedures.
Table 2: Cumulative procedures

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>Retail establishment requires both a building permit and a use permit. However an environmental impact assessment may also be required, which lengthens the process considerably.</td>
</tr>
<tr>
<td>Croatia</td>
<td>The main difficulty is confirming the ownership of the land on which a retailer wishes to establish a retail outlet, because the land registry books are not well kept. The proper registration of land ownership may take a long time. The retailer may only apply for the relevant permits once the ownership of land has been confirmed.</td>
</tr>
<tr>
<td>France</td>
<td>In cases where both a commercial development authorisation and a building permit are required, 2 separate procedures should be followed and the commercial development authorisation has to be obtained prior to the issuance of the building permit. The simplification of the procedure is one of the reasons for the recent amendments of the newly adopted Loi du 18 juin 2014 relative à l’artisanat, au commerce et aux très petites entreprises, which provides that in cases where a building permit and a commercial development authorisation are required, the latter will automatically be included in the building permit.</td>
</tr>
<tr>
<td>Hungary</td>
<td>The establishment of a retail establishment may involve several procedures to be followed, especially for large retail outlets, which must apply for an exemption on the “Plaza Ban”. In order to establish a retail outlet, a retailer might require a planning permit, a building permit, a use permit, an exemption on the “Plaza Ban”, an operating licence for a specific range of products, a Trade licence, an environmental permit and an environmental impact assessment.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Regulation regarding other authorisations is included in the territorial planning procedure. This means that prior to filing for a construction permit, all planning regulation must be complied with and a confirmation by the Environment Protection Agency must be obtained when an environmental impact assessment was required.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Interviews with retailers show that the fact that a business needs to be registered at several places may form a barrier, which could be simplified by centralising all registrations at one place.</td>
</tr>
<tr>
<td>Italy</td>
<td>When applying for the establishment of a medium/large outlet, a specific building permit/urban planning variation is almost always necessary in order to comply with the requirements set by the municipalities. This usually results in delaying the completion of the procedure significantly. Further, the authorisation, relocation and expansion of a mall are subject to a preliminary authorisation granted by the SUAP. This authorisation is a necessary prerequisite for the granting of the authorisations for the establishment of the individual outlets. Small outlets may be established once the relevant authorisation has been granted by the SUAP.</td>
</tr>
<tr>
<td>Poland</td>
<td>A final and valid environmental decision is a prerequisite for applying for all other permits such as construction permits and integrated permits.</td>
</tr>
<tr>
<td>UK (England &amp; Wales)</td>
<td>Foreign investors find the planning system alien because of the need to comply with both planning permissions and building regulations.</td>
</tr>
</tbody>
</table>

2.1.3 All-in-one permit is a good practice to reduce the number of requirements

110. Some Member States have introduced some simplification through an all-in-one or integrated permit. Instead of having to apply for several permits, all requirements are integrated into one single permit.

111. This concept exists with variable content: the all-in-one permit can integrate planning, building and use permits. It can additionally integrate the specific retail authorisation and/or the environmental permit.

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24 Austria, Finland, France (as a consequence of recent reform), Malta, the Netherlands. A similar simplification has been adopted in Belgium and Spain, as a consequence of legislative reforms in 2014. However, these reforms have not been taken into account as at the time of our report they were not effective (Belgium) or had not been implemented by the regions (Spain).
Figure 3: Overview of the permits that are required in the different Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Planning permit</th>
<th>Building permit</th>
<th>Use Permit</th>
<th>All in one permit</th>
<th>Environmental permit</th>
<th>Special retail authorisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td></td>
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<td></td>
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<td></td>
<td></td>
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<tr>
<td>Sweden</td>
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112. Figure 3 above gives an overview of the permits that are required in the different Member States. In the above, all-in-one permits include building permits in which testing of compliance with planning requirements is included. Indeed in some Member States the planning permit or approval is integrated in the building permit.
113. Figure 4 below presents an overview of the Member States for which planning requirements are embedded in the building permit. One can clearly see that jurisdictions which implement an all-in-one permit tend to require much fewer permits than countries that do not, since several permits are included in the all-in-one permit.

**Figure 4: Planning permit (incl. planning requirements in building permit).**

Note: in Malta the building permit is included in the planning permit.
2.1.4 Location specific regulations

114. Location specific regulations include planning regulations and regulations specific to city centres.

2.1.4.1 Rigid planning regulation can prevent entry

115. Planning regulation has, in all Member States, a considerable impact on the establishment of retail outlets. This is true, in particular, for retail establishments that require the construction of a new building, or important refurbishment of an existing building. It can also be the case, depending on the regulatory provisions of the Member States, for retailers wishing to establish their outlet in an existing building, either because a new permit is required, or because the establishment leads to a shift in the activities, or because the contemplated activity does not correspond with the plans.

116. In all Member States, the establishment must be in compliance with the planning regulation or the plans (zoning plans and the like) that have been developed under such regulation.

117. However, the systems to ensure or verify such compliance vary considerably. Some jurisdictions require a formal permit to be granted, and a formal procedure to be followed. Sometimes complex assessments must be performed in order to verify and confirm that the projected retail outlet complies with the plans and regulations. In other jurisdictions compliance with the planning requirements is examined in the framework of an application for a building permit.

118. In some Member States an establishment (retail or other) cannot be allowed in areas for which no plan (zoning plan, local plan, or similar) has been adopted. As a result, an applicant wishing to establish a retail outlet in the relevant zone has to apply (and wait) for a zoning plan to be adopted. During this period no retailer can enter the market. Other jurisdictions require a planning permit if the area is not covered by the existing zoning plans.
Some Member States provide for a system allowing certain exemptions or a departure from the existing plans. In many jurisdictions the only solution consists in the adoption of amendments to the plans or regulations by the relevant authority (authorities) upon completion of a formal procedure. Other jurisdictions require a planning permit if the area is not covered by the existing zoning plans. As illustrated in Table 3 below, the rigidity of the regulatory framework can form a barrier to retail establishment.

**Table 3: Rigidity of the regulatory framework**

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
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<tbody>
<tr>
<td>Germany, Italy</td>
<td>Amendments to existing plans might take years and as such form a barrier to the establishment of a retail outlet.</td>
</tr>
<tr>
<td>Germany</td>
<td>Especially with respect to large-scale retail outlets, the regulatory framework can be identified as the most relevant barrier to retail establishment, since it restricts the permissibility of (large-scale) retail outlets significantly. As indicated supra under the paragraph Territorial Restrictions, the establishment of large-scale retail outlets is only permissible in areas designated by special local land-use plans. If such land-use plans do not already exist, the applicant does not have any claim against the responsible city or community to establish the required land-use plan. Furthermore, even if the city or community is prepared to establish the required plan, it may be prevented from doing so by the applicable regional plan which generally aims to concentrate large-scale retail outlets in larger cities or communities and in the respective local centres, but generally excludes those retail outlets in rural areas.</td>
</tr>
<tr>
<td>Italy</td>
<td>The supremacy of the general urban planning interests over the commercial interests often becomes an entry-barrier. Since the municipalities are the authorities entitled to determine the urban planning (in accordance with the guidelines provided by the Regions), it is not unusual that retailers are obliged to wait several years before obtaining the amendments required to establish their commercial activity.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The lack of appeal possibilities causes barriers to retail establishment, while in Slovakia some legal requirements cause an administrative burden. The decision on whether an environmental impact assessment and the outcome of the environmental impact assessment are not appealable. As the final decision is based on the outcome of the environmental impact assessment, this can potentially be a barrier to retail establishment.</td>
</tr>
</tbody>
</table>
SLOVAKIA

Case study 1\(^{26}\) (establishment of supermarkets in 2 middle-sized towns)

In the case study 1 for Slovakia, a developer company commissioned by a supermarket chain decided in 2007 to construct supermarkets in 2 middle-sized towns (population of 10,000 and 25,000, respectively). In both cases, the supermarket was part of a bigger commercial zone, where some other chains (electronic, food) also placed their outlets. The permits were granted and the supermarkets have been constructed and are in operation. Both supermarkets were constructed as a one-storey building of about 5,000 m\(^2\).

The case demonstrates that:

- The most relevant criteria for the approval of these supermarkets were those listed in the Building Act and taken into account in the issuance of the planning and building permits. The “affected authorities” applied other national-level legislation, in their respective sector (i.e., environmental, fire protection, heritage protection, etc.). Finally, the building authority also applied the local spatial plan, which was approved by the city council of the respective town;

- Despite the fact that the criterion provided for by § 37 (1) (2) of the Building Act “necessity of the planned measure in the respective territory and its consequences” may cause a certain legal uncertainty due to the rather wide-ranging wording, this criterion is not applied in the day-to-day practice as any kind of necessity test;

- Similarly to other cases in Slovakia, it is not fully clear whether the building authority (as well as the affected authorities) indeed followed the criteria listed in § 61 Building Act, or in the respective laws applicable to the particular sector. In particular, the reasoning does not contain any assessment of the “technical level of the construction, in particular the use of appropriate construction elements, alternative energy systems and automatic driving and monitoring systems”. There is no weighting by the authority of the technologies, which are proposed to be used in the construction by the applicant, against the state-of-the-art in the respective professional area. In addition, no specific section has been identified in the building permit, where the building authority would “scrutinise the impacts of the future operations on the public interest”. On the whole, the building permits do not seem to be particularly easy-to-read, because the various requirements are not assessed, weighed and provided in a comprehensive manner, but rather listed in a row. This could make it difficult for the retailer to assess, whether the building permit was indeed issued in accordance with the relevant rules.

- From the text of planning permits in both cases it is clear that some of the binding opinions were obtained by the applicant from the affected authorities some time before the application to the building authority was made.

2.1.4.2 Protection of city centres affects large retailers

122. Many Member States have adopted regulations aiming to protect city centres (see Appendix 6.H.). This is confirmed by the analysis of the case studies conducted for...

the 10 selected Member States: in 8 of the 10 selected Member States, measures have been adopted with the aim of protecting the city centres. The aim typically is to strengthen the urbanity or viability or vitality of the cities, to prevent detrimental effects of the establishment on the planned urban development, to limit car traffic, to avoid that retail outlets move out of the city centres leaving empty shops and a deserted city centre. In the end, the aim is to develop, create and/or maintain attractive city centres.

123. These measures, which often qualify as territorial restrictions, are either implemented in the regulatory framework or follow from administrative measures.

124. There is a significant difference between the jurisdictions analysed. Some of the Member States that have adopted such measures use them to encourage the establishment of retail outlets, even large outlets, in the city centres. The “city centre first” principle of the regulations in the UK, for example, requires any retailer wishing to establish a retail outlet to show that there is no possibility to establish the outlet in the city centre, or closer to the city centre.

125. Other Member States, however, encourage large retailers to establish outlets in the city outskirts. The measures are in these cases only applicable to large retail outlets, including, among others, shopping centres and hypermarkets. The measures are often motivated, in addition to the abovementioned reasons, by the aim to protect areas of historical interest.

126. In any event in those Member States that have adopted city centre protective measures, their impact on the establishment of retail outlets (and certainly the establishment of large retail outlets) is high.

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27 Denmark, Germany, Italy, The Netherlands, Slovenia, Spain, Sweden and the UK (England & Wales, Northern Ireland and Scotland).
28 For further developments on territorial restrictions, see paragraph 3.2.3. below.
29 Denmark, Germany, Italy, Slovenia and the UK.
30 Germany, Italy, Sweden, The Netherlands and the UK.
31 Denmark, Germany and the UK (England & Wales, Northern Ireland and Scotland).
32 Italy, Slovenia and Sweden.
Germany

Case study 1\(^ {33}\) (large-scale supermarket outside the city centre)

This case study illustrates the procedure to open a large-scale retail outlet in Rhine-Main-Area in December 2013. Concretely, it deals with the problems that developers/investors of large-scale retail outlets may face when they intend to realise a project in an area that is not covered by a binding land-use plan which expressly allows such large-scale retail outlets. In this case additional problems are caused by the fact that the different political parties within the municipal council - which is responsible for the enactment of the land-use plan - do not agree with the establishment of the retail outlet and use the discussion about the project for their own political campaigns.

Particularly, this case demonstrates:

- The way in which opposing political interests within the municipal council can directly affect the realisation of a large-scale retail outlet;
- That the permissibility of large-scale retail outlets does not only depend on legal prerequisites and restrictions but also on political decisions as retailers do not have any legal claims against the municipality to establish a land-use plan due to the fact that it is the municipalities’ own responsibility;
- That the planning law requirements for large-scale retail outlets cannot be legally enforced by the developer/investor who rather depends on the willingness and goodwill of the municipality in order to realise his project;
- That the permissibility of a building project can depend on the allocation of the majority votes in the municipal council, which are naturally subject to changes, which means that the permissibility of a building project may finally depend on the outcome of council elections which also means that the voters sometimes – like in this case – may have the chance to influence the decision for or against the building project.

2.1.5 Additional issues resulting from the (lack of) regulatory framework

2.1.5.1 Lack of regulatory framework - discretionary powers of the authorities

127. As illustrated in Table 4 below, in the majority of Member States, the regulatory framework leaves room for discretionary decisions by the competent authorities.

128. Consequently, in some Member States, the decision-making procedure will be different based on which authority is competent. This makes it difficult for an applicant to know the correct procedure. In addition, an applicant may face different procedures and different requirements for two applications in the same Member State. As a result, this may form a barrier to retail establishment.

129. In some Member States the large discretion results in the outcomes of the procedures being unforeseeable/unpredictable to the applicants. This could form a significant barrier to retail establishment in the Member States concerned.

\(^ {33}\) See Appendix 4. A. 2. Germany – case study 1, p. 862.
### Table 4: Lack of regulatory framework - discretionary powers of the authorities

<table>
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<tr>
<th>Countries</th>
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<tr>
<td>Austria</td>
<td>There is no Federal legislation on spatial planning, building permits and environmental permits. As a result discretionary powers of the competent persons and authorities are considered to be a barrier to retail establishment. The complexity of the procedure to obtain a planning permit can largely depend on the competent person at the local authority.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Country experts have expressed the view that sometimes the discretionary decisions of authorities may seem to be unreasonable and not in compliance with the objective of the particular legal provision that enables the discretion. However, such phenomenon is eventually corrected by appeal or administrative or court review of such decision.</td>
</tr>
<tr>
<td>Denmark</td>
<td>As a result of the discretionary powers of the municipalities, the procedures to adopt local plans may vary significantly between municipalities, which makes it complex for a retailer to know the correct procedure.</td>
</tr>
<tr>
<td>Greece</td>
<td>The criteria set out by law, which must be applied by the competent authorities deciding on retail outlet licences, are quite vague and they have not been interpreted or explained in case-law. As a result, competent authorities have a wide discretion when considering whether or not to grant a retail outlet licence, and such discretion has led to rather subjective judgments.</td>
</tr>
<tr>
<td>Ireland</td>
<td>The trade effluent licence is granted by the local authority at its discretion under the conditions it deems appropriate. It is also possible to grant a licence subject to conditions which are binding. This makes the result of the procedure very unforeseeable.</td>
</tr>
<tr>
<td>Italy</td>
<td>The freedom to conduct business enjoys constitutional protection and can in theory not be refused other than for reasons relating to the public interest. However, since the urban planning reasons are considered reasons of general interests, the local authorities have a great discretion when assessing an application to establish a retail outlet. Molise Regional Law for instance authorises the municipalities to deny the authorisation to establish retail outlets larger than 5,000 m² without being obliged to provide the applicant with specific reasons. Liguria Regional Law entitles the municipalities to identify areas of historic interest and subject the establishment of medium and large retail outlets in these areas to limitations.</td>
</tr>
<tr>
<td>the Netherlands</td>
<td>Stakeholders are of the opinion that more criteria apply than actually is permitted. For example, major chains seem to have a lot of influence, so they seem to lobby in order to get a permit. The real estate market in The Netherlands seems to be an &quot;old-boys-network&quot;. Important connections can be very helpful.</td>
</tr>
<tr>
<td>Poland</td>
<td>The Spatial Planning Act does not provide for enough determinants. Therefore the decision to initiate or not to initiate the procedure for the amendment of a local plan is rather discretionary and cannot be challenged. Further, the environmental impact assessment for undertakings which are likely to have a significant impact on the environment is only a part of the procedure when the competent authority deems it necessary to issue the authorisation. As a result, the local governors are the competent authorities.</td>
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<tr>
<td>Portugal</td>
<td>Municipal Master Plans are established upon the sole discretion of each municipality within the scope of its constitutional powers. Therefore there is no consistency nor predictability, which may constitute a barrier to retail establishment.</td>
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<tr>
<td>Romania</td>
<td>The speed of the procedures largely depends on the different authorities involved. Further, case studies show that public authorities sometimes apply legal provisions in an abusive manner. The case study shows that the public authorities may have different views on a single matter regulated by specific legislation and that the process is not clear for the applicant.</td>
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<tr>
<td>Slovakia</td>
<td>Day-to-day practice shows that besides the regulatory framework, also &quot;social&quot; criteria (benefit for the surroundings, increase of employment rate, necessity) are taken into account by the authorities. This leads to a certain level of legal uncertainty.</td>
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Sweden
Municipalities may require a trade assessment. Such trade assessments, which are costly, take competition issues into account. Further, the procedure to obtain a planning permit, allows the municipalities a considerable amount of discretionary power and discontinuations of these procedures are non-appealable.

Further, the study shows that the procedure of land assignment is highly discretionary and that the relationship with local politicians is important to be granted a land assignment.

UK (England & Wales),
Local authorities have the discretionary power to draft local developments which can impose restrictions on certain kinds of retail outlets. As a result, local plans often tend to restrict retail establishment and are failing to take into account the current market pressure.

130. Below is illustrated the case of Denmark:

DENMARK
Case study 1\textsuperscript{34} (establishing a supermarket in the Municipality of Hørsholm)
Planning – discretionary power

Case study 1 for Denmark illustrates the situation of the rejection by the municipality of an application to expand a retail outlet in the city of Hørsholm, without giving any reasons (except informal justification).

This case study illustrates that even though at first sight it seems that there are very little discretionary powers for the local authorities, as it is clear that local plans and regulations must always be in conformity with the regulations that are set at a higher level (national planning, regional development planning, municipal planning and local planning), in practice local authorities have discretionary powers regarding various aspects of the procedure (including the possibility to require a retail trade analysis in order to assess if there is a market (consumer base) for more retail outlets in the area).

As a result of the above, procedures may vary significantly between municipalities, despite the fact that municipal councils are bound by the general prohibition against discriminatory practice and non-objective decisions, making it basically a political issue for the municipal council.

\textsuperscript{34} See Appendix 4. A. 1. Denmark – case study 1, p. 858.
131. Below is illustrated the case of Italy:

**ITALY**

**Case study 1** (T.A.R. Lombardia: Decision 2974/2012)

**Analysis of a decision T.A.R. – discretionary power of municipalities**

Case study 1 for Italy analyses the decision adopted by the T.A.R. (Administrative Regional Court) of Lombardia regarding a claim sought against a resolution adopted by the City Council of Nerviano. The resolution specified that in the area where the buildings owned by the claimant were located, it was only possible to establish single large retail outlets but no shopping-malls. The claimant argued that this would impede the legitimate possibility to transform the existing structures into a large shopping mall composed of a plurality of small and medium retail outlets. T.A.R. of Lombardia held that the claim was unfounded for the following reasons:

- The urban planning provisions are an expression of a wide discretionary power granted to local administrative authorities and, as such, these provisions are excluded from judicial review of legality/applicability, “unless they are clearly vitiated by errors or abnormal inconsistency”;
- T.A.R. of Lombardia agreed that large retail outlets have a lower incidence on the urban planning than shopping malls, especially as regard the impact on the local traffic flows;
- In T.A.R.’s opinion, Article 4 Decree 114/1998 distinguishes the mall from the medium and large retail outlets, defining the mall as a medium or large retail structure in which most outlets are encased with the purpose to manage together common infrastructure and service areas;
- The T.A.R. has considered the general reasons provided by the Municipality of Nerviano (need of urban requalification of that specific area and protection of local traffic) as sufficient to justify the prohibition to establish shopping malls in that specific area;
- The Court recalled the past jurisprudence that has made clear that the rejection of the arguments proposed by individuals during the adoption of urban planning provisions does not require specific reasons. The private subjects are entitled to collaborate with local Public authorities in the adoption of urban planning provisions, but they do not have effective decision-making powers.

35 See Appendix 4. A. 3. Italy – case study 1, p. 872.
132. Below is illustrated the case of Sweden:

**SWEDEN**  
**Case study 1**\(^{36}\) (establishment of a large retail outlet)  
Discretionary power – lack of appeal

Case study 1 for Sweden illustrates the attempted establishment of one of the bigger Swedish food retailers in Sweden in a municipality in the greater Stockholm area. Concretely, it is an example of the discretionary powers municipalities in Sweden have in connection with planning permit procedures. This case demonstrates:

- The problems that retailers meet when the process is discontinued. There is no remedy for the retailer to appeal a decision to suspend a planning permit procedure and it is not possible to require compensation for the costs incurred in the project. The municipality thus enjoys considerable discretionary power in the planning permit procedure since it may discontinue a given process at any point in time without any appeal being possible;
- That as the process is discretionary it may be influenced by local interests. Despite that the traders in question are not competitors the suspension has a big impact on the retailer’s possibilities to expand its operations in the area;
- That the approval process for a planning permit takes a long time. Even before the suspension it had been on-going for more than a year and the municipality still had to analyse the first round of consultations, issue a second round of consultations, analyse the second round and then draft a final proposal to be put in front of the municipal council.

### 2.1.5.2 Lack of clarity of the regulatory tools

133. The lack of clarity of regulatory tools often causes issues regarding retail establishment.

134. As illustrated in Table 5, this can be caused by the fact that the laws and regulations are not clear, which leaves room for interpretation and uncertainty and as such forms a barrier to retail establishment.

135. On the other hand, sometimes an abundance of regulatory tools creates a complex labyrinth for retailers and forms a barrier to retail establishment.

### Table 5: Lack of clarity of the regulatory tools

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<th>Countries</th>
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<td>Belgium</td>
<td>The applicable criteria regarding the socio-economic authorisation (introduced by the Law of 22 December 2009 implementing the Services Directive) have been introduced quite late in the legislative process, without any clear explanation of their content and scope. As a result, they cannot qualify as clear and unambiguous, at least until they have been interpreted by case-law.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>An environmental impact assessment is required in the case of the construction of a shopping centre. As the term shopping centre has not been defined by law, the scope of this requirement is not clear. As a result even an outlet operated by a single retailer might require an environmental impact assessment.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Additional legal instruments provide restrictions related to planning which are adopted on a municipal level. This means that local authorities can implement restrictions to retail establishment aside from and in addition to the generally adopted land use plans. This can lead to dispersed information and a lack of clarity of the regulatory tools.</td>
</tr>
<tr>
<td>Estonia</td>
<td>The Building Act does not explicitly outline the criteria used in the decision-making process, but instead provides cases in which a building permit will not be issued.</td>
</tr>
<tr>
<td>France</td>
<td>The applicable criteria taken into consideration in the decision-making process of the commercial development authorisation do not seem to be clear enough. In practice, it appears that sometimes in quite similar situations, similar criteria are relied upon either to grant the authorisation or to refuse it, and this makes it difficult for retailers to anticipate which projects are likely to be accepted and which projects will be refused by the authority when applying for the authorisation. This lack of clarity is one of the reasons for the recent amendments to the provisions of the Commercial Code regarding commercial development authorisations. The newly adopted Loi du 18 juin 2014 relative à l’artisanat, au commerce et aux très petites entreprises, provides details on the criteria to be to be taken into account in the decision-making process of the commercial development authorisation.</td>
</tr>
<tr>
<td>Hungary</td>
<td>The so-called “Plaza Ban” provides a prohibition for the establishment of retail outlets with a gross floor space exceeding 300 m² and the enlargement of existing commercial buildings. This prohibition is temporary and is effective until the end of 2014. It is however unclear whether this prohibition will be continued after this date. Exemptions can be granted by the Minister on the advice of a special committee. This committee sets its own rules which are not made available to the public.</td>
</tr>
<tr>
<td>Ireland</td>
<td>There can be a lack of clarity in the way local authorities express decisions. Given the amount of case law in the area of planning, this illustrates how the legislative framework can be sometimes open to interpretation.</td>
</tr>
<tr>
<td>Italy</td>
<td>The municipalities must comply with the relevant Regional Guidelines when assessing the retailers’ applications. The fact that both the Regions and the municipalities have legislative power in this area has resulted in an abundance of regulations governing retail outlets. This creates a labyrinth of commercial activity governance.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>The Spatial Planning and Building Code does not provide any guidelines on how the criteria the Building Authority has to apply must be balanced. Further, due to the fact that the Spatial Planning and Building Code does not clearly define “the necessity of the planned measure”, municipalities might perform a market study and take into account criteria such as the impact on existing businesses.</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Local spatial regulations are adopted by each municipality, stipulating restrictions and limitations regarding land available for construction purposes, the purposes for which constructions in a particular area can be used and the conditions for construction of a building. As these regulations are different in each municipality and change often, this can form a barrier to retail establishment</td>
</tr>
</tbody>
</table>

### 2.1.5.3 Multi-level regulation

In several Member States regulations are adopted at various levels: federal or national, regional, provincial or municipal (local) regulations have to be applied simultaneously or consecutively. This adds to the complexity of the legal framework.
137. Such multi-level regulation causes significant differences or discrepancies between various sub-parts of a Member State. Applicants face different requirements depending on the sub-part where they opt to establish their outlet(s). The outcome may vary and be unpredictable. This is particularly true in Member States that have granted significant autonomy to certain sub-parts (regions), such as Austria, Belgium, Germany, Italy and Spain; and even more so, if these regions grant important regulatory and decision-making powers to municipal or local authorities.

2.2 The authorisation process – Theme 2

2.2.1 Preliminary steps before authorisation / planning (permit) decisions

138. Before a planning (permit) decision is made, the application procedures throughout the Member States require several preliminary steps to be taken.

139. The preliminary steps we have identified are:
   - The requirement of an oral hearing;
   - The performance of an on-site inspection;
   - The possibility for the public to give comments, including a public hearing;
   - The consultation of other public authorities (whose opinion can be binding or non-binding);
   - The consultation of third parties (whose opinion could be binding or non-binding).

140. Nearly half of the Member States\(^{37}\), i.e. 43 % of the Member States, organise an oral hearing during the planning procedure, as highlighted in Figure 5.

\(^{37}\) Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Latvia, Lithuania, Luxembourg, Slovakia and Spain. For more details, see Table C in Appendix 6 (volume II of this Report).
Figure 5: Requirement of an oral hearing

141. However, in a majority of the Member States\textsuperscript{38}, the public does have the opportunity to make comments during the planning procedure, as highlighted in Figure 6 below. The public is also consulted in the framework of an environmental impact assessment (EIA).

\textsuperscript{38} Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia, and the United Kingdom. For more details, see Table C in Appendix 6 (volume II of this Report).
Figure 6: Possibility for the public to make comments

![Figure 6](image_url)

- Possibility for the public to make comments: 68%
- No possibility for the public to make comments: 32%

142. A general practice in all Member States is the consultation of other public authorities. Figure 7 shows that although other public authorities are consulted in every Member State, usually the opinion of these other public authorities is not binding for the planning authority. In some Member States, the opinion of (some of) the other public authorities is binding on the planning authority.

39 Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Latvia, Poland and Slovakia. For more details, see Table C in Appendix 6 (volume II of this Report).
Figure 7: Consultation of other public authorities

143. Further, as presented in Figure 8, our analysis shows that only 43% of Member States\(^\text{40}\) consult third parties during the planning procedure. This consultation of third parties often takes place in the framework of an environmental impact assessment.

144. Although in some Member States third parties are consulted during the planning procedure, their opinion is not binding for the authorities.

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\(^{40}\) Austria, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Slovenia, Sweden and the UK. For more details, see Table C in Appendix 6 (volume II of this Report).
145. Finally, as presented in Figure 9, our analysis shows that a majority of the Member States\textsuperscript{41} require an on-site inspection. If an on-site inspection is included in the procedure, this will often be the final step to receive a use permit or occupancy permit.

\textsuperscript{41} Austria, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Malta, Poland, Slovakia, Slovenia, Sweden and the United Kingdom. For more details, see Table C in Appendix 6 (volume II of this Report).
Figure 9: On-site inspection

- Performance of an on-site inspection: 57%
- No performance of an on-site inspection: 43%
146. Figure 10 below presents an indicator of the degree of involvement of third parties. The indicator was constructed by summing the preliminary steps (1 for involvement, 0 for no). The sum is then scaled down to a score of 6. This is done by multiplying the sum by 6 and dividing it by 5 (the number of involvement types explained above). As seen in Figure 10, public comments are always part of the process for countries that have a non-zero involvement indicator, except for the Netherlands, France and Estonia.

Figure 10: Indicator of involvement of third parties

147. As indicated in Table 6, the involvement of third parties will often form a barrier to retail establishment as this involvement is time consuming.

148. Moreover, a public hearing will often allow competitors to file objections or appeals against the decisions which will extend the procedures’ length even further.
### Table 6: Involvement of third parties in the decision-making process

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The application for business premises permits and for building permits requires the hearing and the right to object of neighbours. Further a consultation of other authorities or operators might be required.</td>
</tr>
<tr>
<td>Croatia</td>
<td>Various governmental and local authorities and/or companies are entitled to impose special conditions with respect to the design of a building in the framework of an application for a location permit or building permit. Furthermore, the Ministry requests the opinions of other institutions or bodies or local authorities in the framework of the application for an environmental certificate.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>During both the procedures for a concessional trade licence and the planning permission, the binding opinion of various other authorities might be required to be obtained by the decision-making authorities. These binding opinions impose a significant restriction to the discretionary powers of the decision-making entities.</td>
</tr>
<tr>
<td>Denmark</td>
<td>In order to adopt a new local plan, several public hearings are required, which allow the public and authorities (including competitors) to submit objections to the local plan which may cause delays and amendments. Interviews with retailers show that even minor objections in the planning process may impact the project.</td>
</tr>
<tr>
<td>Finland</td>
<td>The high degree of involvement of public and other authorities, legal proceedings could take several years in the event of complaints.</td>
</tr>
<tr>
<td>Hungary</td>
<td>In the framework of the environmental impact assessment, a public consultation must be held regarding the procedure and the proposed activity.</td>
</tr>
<tr>
<td>Ireland</td>
<td>A developer must give a public notice of proposals for the development before applying for a planning permission. Any member of the public can make submissions to the planning authority and as a result receives the right to appeal the decision. Furthermore, several public authorities must be involved in the procedure.</td>
</tr>
<tr>
<td>Italy</td>
<td>A Conference of Services is convened, which consists of a group of experts. This Conference of Services is open to the public and the representatives of neighbouring municipalities, consumer associations and retailers associations. These stakeholders have an advisory power and therefore do not influence the outcome of the decision-making process. Several regional laws adjust these rules, both a) to the advantage of retailers (Friuli Venezia Regional law authorises municipalities to grant authorisations without convening the Conference of Services, on the condition that the applicant has previously consulted with local retailers, consumers and employers syndicates. Abruzzo Regional law states that in cases where a representative does not participate at the Conference of Services he is deemed to have voted in favour of the applicant) and b) to the disadvantage of retailers (Lazio Regional law requests that a regional agency (Osservatorio Regionale) is established which assesses and monitors the regional commercial network. These studies are taken into account when assessing applications. Similarly, Emilia Romagna Regional Law has established an Osservatorio Regionale per il Commercio which advises the Conference of Services during the granting procedure).</td>
</tr>
<tr>
<td>Poland</td>
<td>The procedure for adopting a local plan and the procedure to issue an environmental decision are subject to a public consultation process with the parties concerned as well as opinions issued by the relevant administrative bodies. Further, construction projects require the approval of an expert within the field of fire protection.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Building permits are issued by the municipality, which has to obtain a binding opinion from all other affected authorities. Although the law states that obtaining these binding opinions is a responsibility of the municipality, in practice, the municipalities require the opinions to be submitted by the applicant himself. As the applicant is not able to determine which authorities are affected, it is common practice to apply for opinions from all possible authorities. This leads to a situation where a constructor has to go through 20 or more proceedings with the affected authorities.</td>
</tr>
<tr>
<td>Slovenia</td>
<td>During the procedure of obtaining a building permit, owners of the neighbouring plots may be included in the process as secondary participants for the protection of their rights. They have certain procedural rights and can appeal the decision to grant a building permit, which substantially prolongs the procedure of obtaining a building permit.</td>
</tr>
</tbody>
</table>
One of the conducted case studies shows that the fact that third parties, for example competitors, have the opportunity to file an objection against the planning application, can cause considerable delays.

Case study 2 for Denmark illustrates the procedure to establish retail outlets on land bought by a private developer to a Danish municipality, which was not designated for retail purpose according to the local plan and required a new land plan. Concretely, it shows several aspects of the Danish planning systems that are relevant for the establishment of retail outlets in Denmark, such as the involvement of private developers in the preparation of local plans, the public hearing and the possibility to object against a proposed plan.

This case demonstrates:

- The limitations relating to size of retail outlets set by the local plan and the Planning Act;
- The collaboration of the municipality with private developers to prepare and finalise the local plans, which speeds up the process of obtaining a local plan;
- The broad competence given to the municipal council in the local planning, i.e. that the adoption of new planning in the end is left to the municipal council’s sole discretion;
- The impact of the (required) public hearing before adopting new planning to the extent that these hearings have influence on the municipal council.

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UK (England)

Case study 1\(^{43}\) (Scania Way – King’s Lynn)

Judicial review

Case study 1 for the UK (England) illustrates the application procedure submitted by a retailer to develop a new food store at Scania Way, Kings Lynn. The proposal was subject to a number of objections, including a commercial objection from a competitor. As a result, the application took some time to proceed (18 months) and was further subject to a judicial review application by the same competitor. The retailer also launched a judicial review claim against the competitor’s competing application. Ultimately both parties agreed to withdraw proceedings, and the retail outlet is now trading.

The case illustrates that third parties, as for example competitors, can apply for judicial review of the planning decision in order to obtain the nullification of the decision of the Local Planning Authority.

In the specific case, one can observe a situation where 2 big retail companies are slowing down the planning application procedure of the other one by using the objections in an appeal procedure and the procedure of judicial review.

The case at hand is resolved with a settlement between the parties involved, but it shows that the involvement of third parties, e.g. competitors, can have a significant effect on (the length of) the procedure.

\(^{43}\) See Appendix 4. A. 10. United Kingdom – case study 1, p. 914.
SLOVAKIA

Case study 244 (establishment of a supermarket in the larger centre of the capital)

Case study 2 for Slovakia illustrates the establishment process of a supermarket by a supermarket chain (including shops of other merchants as well, thus forming a kind of a shopping centre of about 6,000 m²) in the larger centre of the capital. It demonstrates an usual procedure relating to the opening of a retail outlet in the capital.

The case demonstrates (that):

- Despite the fact that the building authority issued the planning permit, the reasoning of the planning permit as such does not provide much guidance, as to why the permit was issued and how the individual criteria were scrutinised by the building authority. Assumptions can only be made about the application of these criteria from the various “additional requirements” and “conditions”, which the affected authorities expressed in their binding opinions and which were almost verbatim reproduced in the planning permit;

- The importance of the Regional Heritage Authority (applying Act No. 49/2002 on Heritage Protection) that essentially approved of the planned construction and stated that no reasons of public interest represented by that authority (i.e. heritage protection) hinder the construction. Nonetheless, at the request of that Authority, the site had to be inspected and any valuable objects had to be either handed over to the regional authority, or secured in any other way. In addition, the authority wanted a listed building, situated in the vicinity of the planned supermarket, to be clearly isolated from the supermarket by a row of high trees;

- Some of the binding opinions were obtained by the applicant from the affected authorities longer before the application to the building authority was made. Some of them were even issued 1 year before the application to the building authority;

- Similarly to other cases in Slovakia, it is not fully clear whether the building authority (as well as the affected authority) indeed followed the criteria listed above in § 61 Building Act. In particular, the reasoning does not contain any assessment of the “technical level of the construction, in particular the use of appropriate construction elements, alternative energy systems and automatic driving and monitoring systems”. There is no weighting by the authority of the technologies, which are proposed to be used in the construction by the applicant, against the state-of-the-art in the respective professional area. In addition, no specific section has been identified in the building permit, where the building authority would “scrutinise the impacts of the future operations on the public interest”. On the whole, the building permit does not seem to be particularly easy-to-read, because the various requirements are not assessed, weighted and provided in a comprehensive manner, but rather listed verbatim in a row.

2.2.2 Requirement of market studies or impact assessments

149. In the authorisation process, all Member States’ regulatory frameworks require some sort of market or other studies to be conducted and/or impact assessments to be performed at some stage during the decision-making process regarding a required permit or authorisation. Often, the study or the impact assessment must be submitted by the applicant (retailer) to the competent authority. Hence, the retailer must commission one or more experts to conduct the study or to perform the assessment, and has to bear the costs incurred. This increases the cost of the retailer’s establishment.

150. Figure 11 summarises all the impact assessment requirements identified by the study:

- An environmental impact assessment;
- A retail impact assessment or retail market study;\(^{45}\)
- A traffic impact assessment;
- An impact assessment related to employment;
- Other assessments or reports. This group covers a wide variety. It includes for example:
  - A nature impact assessment (Croatia);
  - A management assessment (Cyprus);
  - A study on the accessibility of the commercial offer, space management, energy and pollution and landscapes and ecosystems (France);
  - A study of the impact on health, nature and economic necessity and viability (the Netherlands);
  - Undefined other assessments or studies (Romania);
  - A study of the impact on town centres and of the trading impact on other retailers (UK).

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\(^{45}\) The requirement to perform a market study (Czech Republic) was integrated into the category Retail impact assessment.
Environmental Impact Assessments (EIA) (see Figure 11 above) are required in nearly every Member State. In fact only the Netherlands appear not to have a statutory requirement, even though an EIA is often imposed or performed in practice. In Spain some regions require an EIA, whereas other regions do not.

These environmental studies or assessments are mostly used in the planning procedures, but also in the procedures on granting environmental permits, construction permits and use permits.

In several jurisdictions (see Figure 12, in green), the outcome of the environmental impact assessment is binding, or the environmental impact assessment must be approved at some point during the decision-making process. In the other jurisdictions the conclusions of the EIA are not binding (see Figure 12, in yellow).

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46 In this figure a value of 0,5 has been assigned to non-binding environmental impact assessments.
47 Bulgaria, Croatia, Cyprus, Hungary, Ireland, Lithuania, Malta, Romania and Slovakia.
154. **Retail impact assessments** or market studies, under various headings, are required in a number of Member States. These impact assessments focus on the establishment of large retail outlets, and in particular on their trading impact on existing centres, their economic impact on existing retailers in the catchment area, as well as traffic impact, environmental impact etc.

155. In some Member States, impact assessments related to employment (see Figure 11) must be conducted. These impact assessments focus on the effect of a contemplated retail establishment on local employment. As a rule, these assessments are not binding for authorities.

156. A traffic impact assessment must be conducted in several Member States (Figure 11). In other Member States an assessment of the establishment’s impact on traffic is often integrated in the EIA. Usually this assessment should take into account the availability of public transport.

157. The impact assessments can be required in several situations: in the context of an application for a **planning permit** or for a **building permit**, or in the context of a retail specific authorisation scheme.

158. Usually, these market studies and impact assessments are not binding as their purpose is to inform the decision-making authorities on the (expected, predictable

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48 The Netherlands are a special case: Performing an EIA is not a statutory requirement, but is often required in practice.

49 Austria, Cyprus, Denmark, France, Germany, Hungary, Ireland, Italy (some regions), Malta, Romania, Spain (some regions) Sweden and the UK (England & Wales, Northern-Ireland, Scotland).

50 This requirement is made in Italy and Spain for some of their regions, and sometimes in the Netherlands.

51 Cyprus, Finland, France, Ireland, Italy (certain regions), Malta, The Netherlands, Spain (certain regions), the UK.

52 E.g. Finland, Italy, UK (England).

53 E.g. Cyprus, Poland, Romania and Slovenia.

54 E.g. France, Greece, Hungary, Luxembourg, Spain (certain regions).
or potential) consequences of the establishment of the contemplated retail outlet(s). Sometimes they qualify as a material consideration in the decision-making process.

159. The requirement to perform such impact assessments or to conduct certain studies certainly makes the procedures more burdensome. They add to the formal requirement, they require time and (human as well as financial) resources. The extent of their impact on the procedural burden depends to a considerable extent on who must perform the assessment and incur the costs: the applicant or the public authority. Frequently, it is the applicant.

2.2.3 Entities involved in the authorisation process

2.2.3.1 Involvement of several authorities

160. As explained above, the consultation of other public authorities (whose opinion can be binding or non-binding) is a general practice in the Member States. It is a recurring preliminary step in the decision-making process.

161. As explained above (see above: Theme 1, Regulatory Framework), in many Member States several authorisations and permits are required. Very often, the applications for the various authorisations or permits must be addressed to different authorities, and the decisions are made by different authorities.

162. This adds to the burden of the procedure, sometimes because the same requirements are repeated: for example the applicant must provide the same information or documents again to a different body or authority. Sometimes it increases the burden because new, additional requirements are made.

2.2.3.2 Lack of consistency/centralisation of power (discretionary power)

163. The authorisation process in general involves entities from differing level of government. In Member States where regional or local authorities have large discretionary powers, a lack of consistency might occur. This may result in varying procedures and requirements, and an unpredictable outcome. Such variations give rise to uncertainty for retailers and may qualify as a barrier to the establishment of retail outlets.

164. Some Member States have a federal structure. Such a structure which entails state laws and regional laws, might give cause to inconsistency between the different levels of legislation. In some cases, regional laws do not comply with state or federal laws.
Table 7: Lack of consistency/centralisation of power

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>There is no Federal legislation on spatial planning, building permits and environmental permits, which are the responsibility of the regions (9 Länder). As a result these regulations vary from region to region. This means that procedures, competent authorities, length of procedures and outcome differ from region to region, which makes it complicated for retailers to obtain these permits.</td>
</tr>
<tr>
<td>Belgium</td>
<td>The socio-economic authorisation creates an overlap in the division of powers between the federal state and the regions. The relevant criteria regarding the location of the commercial site and protection of the urban environment (which are the most important of the criteria) are closely connected to the regional powers regarding spatial planning, whereas the retail specific authorisation is regulated at federal level. Legislative reform is about to bring all relevant powers at the same (i.e. regional) level.</td>
</tr>
<tr>
<td>Italy</td>
<td>Although the SUAP was established to create a single administrative authority entrusted with overseeing the entire procedure related to the granting of an authorisation for the establishment of retail outlets, it seems that the SUAP has not achieved the simplification objectives it was meant to pursue. The different municipal offices involved in this procedure do not always coordinate harmoniously for the success of the administrative procedure. The lack of coordination amongst the several local offices impedes the success of the administrative procedure. In addition, the insufficient clarity between State and Regional jurisdiction regarding competition law has caused great uncertainty, which can be considered as the first barrier a retailer is forced to deal with. Due to the fact that the regions have been the “centre of the decisional power” in regulating the commercial activity on their territory for many years, they now tend to impede every intervention of the State. Furthermore, some Regions are interpreting the Bersani law of July 2006 in a restrictive manner, excluding the opening of bars and restaurants from liberalisation measures. In particular, the Regions of Veneto and Sicily have circumscribed the application of the liberalising principles introduced in the Bersani law so as to retain their restrictive local planning mechanisms regarding a number of retail sectors, after having submitted the question to the ministry. The Italian Competition Authority has stated that such interpretation which allows limits to the scope of a national law is unacceptable.</td>
</tr>
<tr>
<td>UK (England &amp; Wales and Scotland)</td>
<td>The power of the local authorities as the decision-making authority and their large discretionary powers result in a lack of consistency between the different local planning authorities. Further, local authorities can take into account “material considerations” (which is left broad in legislation). This can act as a general sweeping provision by which any unique characteristic of the development can be brought into consideration.</td>
</tr>
</tbody>
</table>

165. The case studies’ analysis reveals that the following factors influence the degree of vertical and horizontal consistency:

- The type of regulation adopted by the authorities at different levels having the competence to decide on matters of retail establishment;
- The mechanisms of supervision and control on authorities at lower levels;
- The procedural system to obtain all the authorisations and permits required for retail establishment.

166. In Member States where the planning process is organised by numerous federal laws or guidelines, which are binding for regional and local authorities, it seems there is more horizontal consistency in the way these authorities decide on specific authorisations/planning proceedings. However, regional and local authorities manage to keep more or less discretionary powers, depending on the level of control and supervision.

167. Two types of systems can be distinguished in the 10 selected Member States:
- Jurisdictions where local authorities are bound by a strong national legal framework;\(^{55}\)
- Jurisdictions where local/regional authorities have a large power of discretion.\(^{56}\)

168. In the 10 selected Member States analysed, compliance with national regulation is controlled through various mechanisms of supervision on authorities at lower level:
- The mechanisms of supervision included in the decision-making process:
  - Instance of control/supervision\(^ {57}\);
  - Consultation/involvement of other authorities\(^ {58}\);
  - Binding opinion\(^ {59}\);
  - Prior approval, assessment or permit\(^ {60}\);
  - (Binding or non-binding) Guidelines\(^ {61}\);
  - Procedural or institutional mechanisms\(^ {62}\).
- Mechanisms of supervision and control after the adoption of the decision:
  - Remedies and possibilities of appeal available in case of non-compliance\(^ {63}\).

169. Generally, the right of appeal and the right to judicial review are the most important remedies in case of non-compliance with national/federal laws.

170. The procedural system to obtain all authorisations and permits required for retail establishment may also influence the level of consistency within one and the same country. It seems that the overlap of procedures may increase the lack of consistency between the different authorities and the decisions they adopt. On the contrary, in jurisdictions where a single authority is competent for all authorisations and permits required, there are more guarantees for a consistent decision-making process and, as a result, consistent decisions.

### 2.2.3.3 One-stop-shop a good practice to streamline the authorisation process

171. Figure 13 below shows the number of entities involved in the decision-making process. In some Member States\(^ {64}\), the establishment process is facilitated through a one-stop-shop system with one single authority deciding on all required authorisations or permits. While a one-stop-shop system reduces issues related to inconsistency, it does not necessarily reduce the duration of the process.

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\(^{55}\) Germany, The Netherlands, Poland and Slovakia.

\(^{56}\) Denmark, Italy, Slovenia, Spain, Sweden and the UK.

\(^{57}\) Sweden, The Netherlands.

\(^{58}\) Germany, Slovenia, the UK.

\(^{59}\) Germany, Slovenia and Spain.

\(^{60}\) Italy and Slovenia.

\(^{61}\) Germany, England and Italy.

\(^{62}\) Germany, The Netherlands and Sweden.

\(^{63}\) Denmark, Germany, Italy, Poland, Slovakia, Slovenia, Sweden, The Netherlands and the UK.

\(^{64}\) E.g. France, Hungary (recent reform: single installation procedure) Italy, the Netherlands, Slovakia, Spain. Add: the Walloon region in Belgium (as a result of the 2014 reform).
2.2.3.4 Involvement of competition authorities

172. We have examined whether or not the competition authorities are involved in the decision-making process regarding the establishment of retail outlets. Our analysis shows that in most jurisdictions, the competition authorities are not involved in the retail establishment procedure as such.

173. In all Member States the competition authorities take action in cases of anti-competitive behaviour or practices, and they examine concentrations resulting from mergers or acquisitions. This is, however, not specifically related to the retail sector, or to the establishment as such of retail outlets.

174. In some Member States, the competition authorities have issued reports or guidelines regarding the retail market but the effects on the market are rather limited. Moreover, these reports and guidelines rarely apply to the establishment of retail outlets.

175. However, in some jurisdictions, the competition authorities are genuinely involved in the retail establishment procedure. This is the case in Spain in particular, where several regional regulations require a report to be issued by the competition authorities before the retail establishment can be authorised:

- In Andalucía when a retailer has filed an application for a municipal licence, the Town Hall must request several reports, including a report from the competition authorities of Andalucía\(^{65}\).

- In Canarias, upon certain conditions being met (if certain aggregate thresholds are met), a report must be issued by the competition authority of the autonomous community before the commercial authorisation can be granted. The competition authority of the

\(^{65}\) Article 40.4 of the Act 1/2012.
autonomous community reviews the positive or negative impact of the establishment from a competition point of view, and issues a report. However, this report is not binding for the decision-making authority (i.e. the commercial licence may be granted regardless of the conclusion of the report)\(^{66}\).

- In Cantabria, the Department of Internal Trade must issue a report. The involvement of the competition authorities is not required, but if the Department of Internal Trade of Cantabria notices any situation or circumstances that may affect competition, it may request a report from the national or regional competition authority\(^{67}\).

- For the establishment of a large retail outlet in Castilla y León plenty of additional documentation is required, including reports from the Agency for the protection of Competition, the Tribunal for the protection of Competition and the Regional Council of Trade. This is confirmed and illustrated by a case study.

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**SPAIN**

**Case study 1\(^{68}\) (Establishment of a large retail outlet in Castilla y Leon)**

This case study illustrates the procedure to establish a large retail outlet in the autonomous community of Castilla y Leon for which a commercial authorisation was required as well as urban planning licenses.

The case study demonstrates the following:

- The applicable regulations are not clear and the interpretation of the relevant agent is required in order to understand what is sought with the submission of specific documentation;

- It is necessary to make a distinction between the applicable regulations and the actions that undertakings must carry out prior to the application for the granting of a commercial authorisation. For months, sometimes years, negotiations with the different authorities related to the location where the retail outlet will be established must be conducted, with respect to the granting of easements, the swap of properties, the services to be rendered or installed, etc. Only in the event of having a prior conviction that the commercial authorisation will be processed and granted, the application is submitted;

- The requirements that had to be fulfilled, in many cases, are not appropriate, necessary or proportionate. In addition, at times and depending on the autonomous communities, these requirements are not related to the overriding reasons of general interest that are used to justify the implementation of a system that requires commercial authorisations;

- The main difficulties encountered during the procedure were the unnecessary formalities, the excessive time to be devoted to this matter and the requirements that were intended to delay the procedure;

- The most negative aspects of the procedure were the duration, costs and

\(^{66}\) We have been verbally informed by the competition authority of Canarias that until the date of this report, they have never issued a negative report.

\(^{67}\) Article 10.2 of the Act 1/2002.

\(^{68}\) See Appendix 4. A. 8. Spain – case study 1, p. 897.
intangible cost, meaning the preliminary work to be carried out and the preliminary negotiations to be conducted with the relevant authorities and activity sectors.

- In Galicia, before the Department of Internal Trade issues a decision on the application, several reports must be requested from other authorities, including a report from the competition department (which, however, should not deal with economic issues).

- In Melilla several reports must be obtained, including a report issued by the national competition authority considering the application and all documentation relating to the application69 shall be obtained. This report is not binding70. If this report is not issued within 2 months of its request, the procedure for an authorisation continues.

- In Murcia several reports must be issued, including a report from the competition authority. The application and additional documentation must be submitted to the competent competition authority. However, the procedure will continue in cases where a report is not issued within one month. Furthermore, this report is not binding. We have been verbally informed by the competition authority of Murcia that they have never been requested to issue such report.

2.2.4 Appeal of the decision

176. In most Member States it is possible for retailers to appeal a decision refusing to grant the planning or building permit applied for, or to apply for judicial review. However, when a planning decision is not issued, or a zoning plan is not amended by the competent authority, some countries do not provide any possibility for appeal.

177. In Federal states, typically, the planning and/or building regulations are adopted at the regional level. Federal laws often provide general principles or guidelines, but in general detailed procedural requirements are defined at regional level.

2.2.5 A burdensome authorisation process

178. It was not possible within the framework of this Legal study to obtain sufficient comparable information or estimates of the time and costs incurred in order to establish a retail outlet in a given Member State. However interviews with local experts and case studies allowed us to gather some insight on the costs and length of the procedures. Often these procedures tend to be rather lengthy and costly.

2.2.5.1 High costs of the decision-making process

179. In the case of Commission v Spain, the Commission submitted that the fees required for processing licence applications and for the market share report represented, for the economic operators concerned, charges which had a deterrent effect as regards establishment on the territory of Catalonia. According to the Commission, since the fees charged were unrelated to the cost of the procedure, they were disproportionate. The Court however did not follow the Commission and stated that the method of calculating the fees reflected overall costs reasonably and accurately71.

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69 Article 8 c) of the Municipal Regulation.
71 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraph 129.
SWEDEN

Case study 2\textsuperscript{72} (Ikea in Uddevalla)

Cooperation with municipality

Case study 2 for Sweden illustrates the procedure carried out by a large retailer to establish a retail outlet in Uddevalla. Concretely, it shows that despite difficult circumstances on the construction site, cooperation between a municipality and a large retailer can have very positive results.

The case study illustrates that:

There is free competition between municipalities as regards retail establishments. I.e., there is no regulatory interference on a regional or national level;

The challenges met have mostly been related to the preparation of the ground (which is also a reason for the relatively long project time). The difficult process also meant a significantly more expensive project then initially planned for by the large retailer (as well as the municipality);

Although being a large project for a relatively small organisation it forced the municipality to reorganise its operations to meet the challenge. The same approach has then been used for other and later large projects with positive results. The public officials of the municipality consider that a strong political support for the establishment was essential for the completion of the project.

Table 8: High costs of the decision-making process

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland, Portugal, Sweden</td>
<td>The costs are unforeseeable which might form a barrier to retail establishment</td>
</tr>
<tr>
<td>Malta</td>
<td>A guarantee is requested from the retailer which forms a barrier to establish a retail outlet.</td>
</tr>
<tr>
<td>Spain</td>
<td>The Kingdom of Spain contended that the fees in question were set at a certain amount per square metre of the planned sales area. The amount had originally been calculated by dividing the processing costs incurred in 1994 and 1995 by the number of square metres concerned during those years, and had since been updated in line with inflation. That allowed operators to calculate the amount of the fees with certainty in advance. The Kingdom of Spain added that the fees were levied by instalments, so that an applicant withdrawing a project would not have to pay the full fees, and that the fees amounted, on average, to approximately 0.1% of the total cost of the project. The CJEU considered that that method of calculating the fees due reflected overall costs reasonably accurately and was likely to deviate little from actual costs in individual cases. In addition, that method of calculation, corresponding to an amount per square metre, had the advantage of allowing the cost of the procedure to be estimated beforehand in complete transparency. That part of the (third) complaint was therefore rejected.</td>
</tr>
<tr>
<td>UK (England &amp; Wales and Scotland)</td>
<td>The retailer is sometimes under an obligation to enter into a so-called section 106 agreement to mitigate the impact of the development, which may cause changes to the development, or require additional works to be performed. This is illustrated by a case study conducted for the UK:</td>
</tr>
</tbody>
</table>

UNITED KINGDOM (ENGLAND)

Case study 2\(^73\) (Belgrave Road/Melton Road, Leicester)

Section 106 agreement – NPPT – criteria

Case study 2 for the UK illustrates the procedure of establishment of a retail outlet in Leicester.

This case demonstrates:

- The requirement to complete a section 106 agreement to mitigate the impact of the development. These local Acts are uncommon, and deal with specific projects. In addition, they may apply depending on the area within which a development is proposed and should be considered on a case by case basis; In the case at hand, Section 106 obligations related, for example, to the demolition of all buildings currently on the Belgrave Road site save for any buildings which remained subject to the B&M lease by no later than 5 years from the opening of the store, the installation of necessary infrastructure within 2 months from opening for trade, the carry out of a monitoring exercise relating to the bus lane contribution within 3 months from the opening for trade of the store and the supply of full details thereof prior to the requirement to pay the bus land contribution.

- The application of the National Planning Policy Tests, applied through a sequential test, where it had to be demonstrated that there are no alternative sites closer to the town centre which are available and suitable;

- The application of the criteria related to the impact on town and district centres (if the application site is located outside an existing centre), as well as the more usual development control considerations such as impact on traffic and visual amenity. In England and Wales, the planning authorities should have regard to the development plans, being the local development and neighbourhood development plan (if applicable), and to any local finance considerations, so far as both are material to the application. On the basis, the planning authorities will assess the application on its own merits and will determine it in line with the relevant law, spatial planning and urban development policies, as well as considering environmental impacts. There is no exact science as to the measurement of the various considerations.

2.2.5.2 Length of the decision-making process (delays)

180. The length of the decision-making process is very often considered to form a barrier to retail establishment, as highlighted in Table 9.

181. Although in most Member States, the length of the procedure is theoretically quite limited, the procedure can often be delayed because of appeals filed.

182. Often, the process will also be very long if the application requires a change to the regulatory tools, in particular if amendments to the planning regulations or to zoning plans are required.

183. In the case of Commission v Spain, since the CJEU found that there was no justification for the obligation to obtain a market share report, there was no need to rule on the reasonableness or otherwise of the time allowed for the issuing and validity of the market share report\(^74\).


\(^74\) CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraph 131.
Table 9: Length of the decision-making process

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>The authorities have a term of 6 months to grant or refuse a building permit, after which an appeal can be filed. Often, permits are refused by political or environmental motives. If an appeal is filed, this appeal takes at least another 6 months.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>The environmental impact assessment procedure takes approximately 4-6 months, which may be further delayed because of a lack of coherency and interrelationship between authorities. The validity of a decision is not affected when a decision is not taken within the stipulated terms.</td>
</tr>
<tr>
<td>Estonia</td>
<td>The total length of the establishment procedure is much longer when the establishment of a retail outlet requires the construction of a building. The length of this procedure might take more than 2 years.</td>
</tr>
<tr>
<td>Germany</td>
<td>The average length of the building permit procedure is about 3 months. If however, the legal admissibility of the retail outlet requires that a new land-use plan must be issued, this planning procedure might take several years and the applicant does not have a legal claim against the municipality to issue a respective land-use plan.</td>
</tr>
<tr>
<td>Ireland</td>
<td>The timing of the procedure to obtain a planning permission can be delayed when objections or appeals are lodged.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>The recent amendments of the Law on Territory Planning introduce a requirement for the municipalities to arrange the adoption of municipal level planning documents at their cost (which was previously the responsibility of the applicants). It is envisaged that this may increase the workloads of municipalities and will negatively affect the terms of obtaining a construction permit.</td>
</tr>
<tr>
<td>Malta</td>
<td>For establishments exceeding 500 m² of sales surface, the competent authority has a term of 52 weeks to decide on the application of a development permit. In case of an establishment with a sales surface between 250 m² and 500 m², the authority has a term of 26 weeks.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Interviews with stakeholders show that the length of the procedures forms a barrier to retail establishment. The process to obtain the required authorisations can take a considerable amount of time (up to one year). During this term, the retailer cannot develop his enterprise because the result of the process is uncertain. If competitors object to the plan, the process can be delayed even further.</td>
</tr>
<tr>
<td>Poland</td>
<td>A retail establishment may require a procedure to change the zoning master plan, which is time consuming and complex. Moreover, the Spatial Planning Act does not provide for any determinants of the decision of a local governor in this regard. Therefore the process is very discretionary and the end result is unforeseeable.</td>
</tr>
<tr>
<td>Sweden</td>
<td>The process to establish a retail outlet can be very time consuming due to appeals by affected stakeholders. There are examples of procedures lasting over 7 -8 years. This is also illustrated by the abovementioned case study.</td>
</tr>
<tr>
<td>UK (England &amp; Wales)</td>
<td>The planning system is conceived as requiring too much detail and often suffers large delays because of the appeal and judicial review process. As a result, retailers have decided against establishing retail outlets in England and Wales, given the time and expenses of obtaining a planning consent.</td>
</tr>
<tr>
<td>UK (Northern Ireland)</td>
<td>Delays in the planning procedure are the most relevant barrier. Delays can be attributed both to the slow and inefficient nature of the planning system and to the fact that competitors can file objections and challenge the decision.</td>
</tr>
</tbody>
</table>

184. In several Member States day-to-day practice shows important delays as compared to the regulatory framework, due to the fact that the statutory timing and deadlines are not complied with, or because the authorities do not operate efficiently. Sometimes authorities “suggest” or “invite” applicants to introduce a new (identical) application, simply because they are not able to meet the statutory deadlines.

185. The more complex procedures are and the more bodies or parties are involved (for example in order to provide an opinion, to perform an assessment or to set up a public hearing), the higher the risk of delays.
### Table 10: Day-to-day practice

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>Delays may occur during the procedure to obtain a building permit and an environmental impact assessment, as public authorities can render their decisions after the statutory term without this having an impact on the validity of their decision. Such delays might also occur because of a lack of coherency and interrelationship between the administrations and authorities which may request and collect identical information and documentation.</td>
</tr>
<tr>
<td>Croatia</td>
<td>Certain regional and local authorities are known to take more time than provided by the law to treat applications for location permits, building permits and use permits. In such case legal remedies are available to the retailer.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>The legal deadlines are not always complied with. Extensions of the deadlines are mainly due to problems with respect to the development or the collection of data.</td>
</tr>
<tr>
<td>Ireland</td>
<td>The timing relating to the planning permission can be delayed when objections or appeals are lodged.</td>
</tr>
<tr>
<td>Italy</td>
<td>All Regional Laws require the convening of the Conference of Services. This means that in practice the Conference of Services is always convened. Unless there has been an express refusal 120 days after the Conference of Services has taken place, an application is deemed accepted. However, in practice, this Conference of Services is often regarded as a delaying factor in the process because it would sometimes take a long time before all different participants are available to gather.</td>
</tr>
<tr>
<td>Poland</td>
<td>Procedural deadlines are often not upheld by administrative authorities. The fact is that deadlines are of instructive character and are not binding for administrative authorities. Sometimes, even simple procedures may be very time consuming due to inefficiency.</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Delays in the procedure to obtain a construction permit occur often in day to day practice, because of the involvement of owners of neighbouring plots, the entry of the building into the Land Cadastre and the delay in the issuance of the use permit.</td>
</tr>
<tr>
<td>UK (England &amp; Wales, Scotland)</td>
<td>Delays often occur because of appeals filed by third parties, such as competitors.</td>
</tr>
</tbody>
</table>

186. The case studies that were conducted for Poland illustrate the following:
POLAND

Case study 175 (Jeronimo Martins)

Unequal treatment – length of the procedure

Case study 1 for Poland illustrates the administrative process for the location of a large retail outlet in Przezmierowo (municipality of 6,000 inhabitants near Tarnowo Podgórne), by an investor. The property owner requested the Municipal Council to indicate whether the construction of a commercial centre on his property would be consistent with local zoning plans. On 19.12.2008, the answer he obtained stated that such investment is in line with the local zoning plan for the property.

However, on 26.08.2010 the regional administrator (Starosta) in Poznań issued a negative decision with regards to the issuance of the construction permit, because of lack of compliance with the zoning plan. The investor then appealed the negative decision before the Voivode, who revoked the decision and conveyed the case to reexamination. The Starosta in Poznań issued a negative decision again. This time the decision was upheld by the Voivode in Poznań. The investor appealed the decision to the Voivodship Administrative Court, who revoked it and conveyed the case to reexamination. The Starosta issued the negative decision which then was upheld by the Voivode. The investor had finally to resign from realisation of the investment.

The main issues demonstrated by the case study are the following:

The unequal treatment between the investors resulting from the different interpretation of the provisions of a local spatial development plan (which is adopted by the council of the municipality) and the wide scope of discretion of administrative authorities in this regard. This is showed by the different position adopted by the different levels of authority;

The length of the proceedings (despite the fact that the authorities ruled in due instructive (and not binding) time stipulated in the Administrative Procedure Code) which is notably due to the different level of appeal possible.

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75 See Appendix 4. A. 5. Poland – case study 1, p. 878.
POLAND

Case study 276 (construction of a large retail outlet)

Length of the procedure

Case study 2 for Poland illustrates the administrative process for construction of a large retail market in cases where there is a lack of a zoning plan. The Investor intended to establish a big retail shop (1800 m²) in a city of 175,000 inhabitants.

The case study demonstrates that the length of the proceedings may be a main issue. In this case, the whole administrative procedure took almost 4 years before the building permit was issued, despite the fact that the authorities ruled in due instructive (but not binding) time stipulated in the APC where, in absence of a local spatial development plan (which is an act of local law adopted by council of the municipality) for the given area, a zoning decision is issued (in accordance with art. 59 of the Spatial Planning and Land Development Act).

It should be emphasised that, normally before a zoning decision is issued, the relevant authority (i.e. head of the municipality, mayor of the town or president of the city) may need to consult other authorities (such as a road administrator if the construction area borders with a road) which may further delay the proceedings (art. 60 of the Spatial Planning and Land Development Act). Moreover, since the planned construction area in the specific case was less than 2 hectares, the Investor was not required to obtain a decision on the environmental conditions (which in most cases is issued by head of the municipality, mayor of the town, president of the city) of the enterprise beforehand. Such a decision would be binding for the authority responsible for issuing a building permit (art. 71-72 of the Act on Access to Information on the Environment and Its Protection, Participation of the Society in the Protection of the Environment and on Environmental Impact Assessments).

The case of Slovenia is illustrated in the two case studies below:

2.3 Specific requirements – Theme 3

187. This section focuses on requirements that are specifically made for the establishment of retail outlets. Typically, these requirements depend on the size of the store the retailer is planning to establish in a Member State. Specific, or more severe, requirements are made for relatively large retail outlets.

2.3.1 Distinction between large, medium-sized and small retail outlets (including criteria applied and impact on the decision-making process)

188. Nearly all Member States make a distinction between large and small retail outlets in their regulatory framework. Latvia and Lithuania seem to be the only exceptions. Many Member States apply more than one threshold.

189. This can be explained by a variety of reasons:

- It can serve the purpose of identifying more than two categories of retail outlets (e.g. small, medium-sized and large outlets);
- It can be due to differences between regulations adopted by the regional authorities;
- Sometimes it can be explained by the intention to duly recognise the specific characteristics or requirements of certain locations or regions as

compared to others (e.g. small cities versus large cities; lack of space on small islands);

- Sometimes a Member State’s regulation does not have a single, coherent definition of large retail outlets, which results in the application of different size criteria in the various statutory provisions.

190. In some jurisdictions the number of thresholds is even higher, because they depend on regional and/or municipal regulations.

191. The size thresholds have an impact on whether or not certain authorisations or permits are required. The size also has an impact on the procedure to be followed. An overview of this impact is presented in Table 11.

**Table 11.a.: Impact of the size of the outlet on the location requirements**

<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>‘Small, standard or large business premises’ : impact on the costs and length of the procedure and on the requirement of environmental permit or EIA</td>
</tr>
<tr>
<td>Belgium</td>
<td>If outlet size is larger than 400m², a specific authorisation required (length of procedure: 50 days)</td>
</tr>
<tr>
<td></td>
<td>If outlet size is larger than 1.000m², the opinion of the NSECD required (length of procedure:70 days)</td>
</tr>
<tr>
<td></td>
<td>If outlet size is larger than 2,000m², surrounding municipalities have to be consulted (length of procedure: 90 days)</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>For outlets larger than 5,000 m²: EIA may be required (if effect on environment); Use permit to be issued by the NCCD (instead of chief architect).</td>
</tr>
<tr>
<td>Croatia</td>
<td>For outlets larger than 50,000 m²: (i) EIA may be required (ii) the public is informed, and (iii) other authorities are consulted in the planning decision-making process.</td>
</tr>
<tr>
<td></td>
<td>Different requirements regarding the size of the outlet depending on the type of retail and applicable regulation.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>There exist territorial restrictions related to outlet size:</td>
</tr>
<tr>
<td></td>
<td>Outlets larger than 50m² cannot be established in housing zones;</td>
</tr>
<tr>
<td></td>
<td>Outlets larger than 250-350m² cannot be established in commercial zones.</td>
</tr>
<tr>
<td></td>
<td>The size could imply a requirement to perform an EIA or a traffic impact and management assessment.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>For outlets larger than 50 m², assessment of energy demand and valid energy certificate required.</td>
</tr>
<tr>
<td></td>
<td>If gross floor space is lower than 300 m² and height is less than 10 m (or halls below 1,000m² and height below 15m), a simplified procedure applies. A notification procedure is then sufficient for the grant of a building permit.</td>
</tr>
<tr>
<td></td>
<td>The size of the building project can also impact costs of the procedure.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Territorial restrictions:</td>
</tr>
<tr>
<td></td>
<td>Location in local centre: outlets should be smaller than 3,000m²;</td>
</tr>
<tr>
<td></td>
<td>Location in town centres, district centres and secondary centres: outlet size must be lower than 3,500m²;</td>
</tr>
<tr>
<td></td>
<td>Location in towns with urban population ranged between 20,000 and 40,000: outlets</td>
</tr>
<tr>
<td></td>
<td>must be smaller than 5,000m².</td>
</tr>
<tr>
<td>Countries</td>
<td>Description</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------</td>
</tr>
<tr>
<td>Estonia</td>
<td>Detailed plan not required if &lt; 200m²</td>
</tr>
</tbody>
</table>
| Finland   | There exist requirements relating to location and size of retail projects:  
For sizes larger than 2,000m², additional requirements provided by the local master or local detailed plans. |
| France    | For sizes larger than 1,000m², specific authorisation required  
For surfaces ranging between 300 and 1,000m², the opinion of the CDAC is required in the planning permit procedure. |
| Germany   | For surfaces larger than 800m² + effect on regional and urban development (effect assumed if gross floor space > 1,200m²):  
Only permitted in areas subject to specific local land-use plans or in "core-areas"  
Large-scale retail outlet with city centre relevant core assortments must be established inside central supply area. |
| Greece    | Retail outlet licence required if > 1,500 m², > 500 m² or > 200m², depending on the prefecture and number of residents (never required in 2 prefectures)  
If > 2,000m²: additional requirements regarding the building permit procedure |
| Hungary   | If > 300m²: Plaza ban  
If > 5,000m²: additional procedural requirements (e.g. detailed impact assessment) |
| Ireland   | If > 1,000m²: Traffic and transport assessment required + impact on the costs of the procedure |
| Italy     | Simplified procedure if <150m² or <250m² depending on the municipality  
Territorial restrictions if > 1,500m² > X > 150m² or 2,500m² > X > 250m², depending on the municipality and number of residents  
Additional requirements and impact assessments required, depending on the applicable regional law |
| Luxembourg| Specific authorisation required if > 400m²  
Additional requirements and information to be provided if > 2,000m² |
| Malta     | If <250m²: may be established in residential and commercial areas (length of procedure: 12 weeks)  
If > 250m²: may only be established in commercial areas + consultation of other authorities (length of procedure: 26 weeks)  
If > 500m²: length of procedure: 52 weeks  
If > 10,000m²: EIA required |
<table>
<thead>
<tr>
<th>Countries</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Netherlands</td>
<td>Zoning plans may set additional requirements depending on the size of the outlet</td>
</tr>
</tbody>
</table>
| Poland          | EIA required if shopping centres >20,000m² or > 5,000m² within environmentally vulnerable areas  
Territorial restrictions: if >2,000m² -> must be authorised by local plan |
| Portugal        | If > 2,000m²: specific authorisation required (length of procedure: 30-60 days)  
If < 2,000m²: zero licensing regime (length of procedure: max. 20 days) |
| Romania         | if > 1,000m² -> criteria used in the decision-making process established at a ministerial level |
| Slovakia        | If <300m²: simplified procedure -> notification sufficient to be granted building permit  
EIA procedure required if >10,000 m² or >1,000 m² depending on the area |
| Slovenia        | building permit not required if <30m² |
| Spain           | Depending on the autonomous community:  
Commercial authorisation or binding report required if gross floor space > 2.500 m²,  
2.000m² or 1.500m², depending on the autonomous community  
If >750m²: municipal licence required |
| Sweden          | Impact of the size on the costs of the procedure |
| UK (England & Wales + Northern Ireland) | Specific procedure and requirements if >1,000m² (England) or > 5,000 m² (Scotland)  
Additional impact assessment required if > 1,000 m² (England + Northern Ireland) or 2,500m² (Scotland)  
Impact on the costs of the procedure |

192. Many of the Member States\textsuperscript{78} acknowledge the greater impact of large stores or outlets on the environment and therefore require an environmental permit or an environmental impact assessment. 
193. The only Member States applying a threshold above 5,000 m² (in other words: a retail outlet qualifies as large if its gross floor space exceeds 5,000 m²) are Croatia, which applies a threshold of 50.000 m² for the requirement of an EIA, and Malta, with applies an EIA threshold at 10.000 m².

\textsuperscript{78} E.g. Austria, Bulgaria, Croatia, Cyprus, Hungary, Italy, Malta, Poland, Slovakia, Spain and the UK.
2.3.2 Specific authorisation scheme for retail outlet establishment

194. Figure 14 below shows, in yellow, the jurisdictions requiring a retail specific authorisation: Belgium, Croatia, France, Greece, Hungary, Italy, Luxembourg, Portugal, Romania, Slovakia and Spain.

Figure 14 Retail specific authorisation
(yes = yellow; no = grey; waves indicate legislative reform; hatches refer to regional differences)
195. **Figure 15** shows which Member States, in addition to a retail authorisation, require a planning permit or planning permission included in a building permit. (Note: waves indicate legislative reform; hatches refer to regional differences).

**Figure 15 Retail authorisation & planning permit (including planning in building permit).**

196. Most of the Member States that require a specific retail authorisation do so only for relatively large retail outlets. These specific authorisation schemes are required depending on certain conditions and are granted on the basis of pre-defined criteria which are evaluated by the competent authorities.

197. In some jurisdictions the specific authorisation scheme applies to every retail outlet, irrespective of its type or size (e.g. Croatia, Romania, Slovakia).

198. In most of the jurisdictions concerned, however, the requirement of the specific authorisation depends on the size of the retail outlet, as is shown in the comparative Table. For the establishment of a retail outlet that exceeds a certain threshold (relatively large retail outlets), a specific authorisation must be obtained. Usually then, the establishment of smaller retail outlets is not subject to the specific authorisation or is subject to less demanding requirements. The size thresholds vary (see the comparative Table; see also below).

199. In some Member States the requirements regarding retail specific authorisations vary from region to region. Many variations exist, for example, in Italy and Spain.

200. **Belgium is also a special case:** due to legislative reform in the course of 2014 the matter is henceforth regulated at regional level, with varying effective dates, requiring:

79 Belgium, France, Italy, Luxembourg, Portugal, Spain and the United Kingdom.
- In the Walloon region: an integrated permit (planning permit, environmental permit and retail establishment permit combined);
- In the Brussels Capital region: only an urban planning permit;
- in the Flemish region: a socio-economic authorisation. However, if a planning permit is required, the socio-economic authorisation is included in the planning permit.

202. France is also a special case because of a recently adopted reform aiming to simplify the procedure. As a result of the reform the commercial authorisation application is integrated in the building permit application, whenever a building permit is required. However, if no building permit is required, a commercial authorisation is still required.

203. In most Member States, the authority having the competence to actually grant the specific authorisation is an authority at a decentralised level, be it the municipality or district, or the region. Exceptionally, a national authority (Minister, Government) is the competent authority (e.g. in Hungary and Luxembourg).

204. In several Member States, the criteria used in the decision-making process allow the authority a certain degree of discretion.

205. The most important criteria applied in the decision-making process are:
- Compliance with spatial planning and planning regulations;
- Protection of the environment;
- Protection of the urban environment;
- Consumer protection;
- Compliance with social legislation;
- The outlet’s location;
- The accessibility, impact on traffic, availability of public transport, parking facilities;
- Impact on employment (job creation);
- Protection of historical, cultural, artistic heritage.

206. Based on the information available, each Member State offers the possibility of appeal of the decision relating to a specific authorisation scheme, usually within 1 month of the adoption or communication of the decision. In many jurisdictions a judicial review application can be filed with the administrative courts.

207. In some Member States the length of the procedure depends on the size of the outlet: a more complex and lengthy procedure is applicable to the establishment of larger outlets. Obviously there is no such distinction in Member States which do not have a separate regime for large and small retail outlets.

208. The costs vary considerably from one country to another. In Greece for example, the costs of the procedure can amount to 5,000 EUR, in Hungary even up to 40,000 EUR, while in Slovakia, the cost is limited to 15 EUR.

2.3.3 Ban on retail establishment

209. Some Member States appear to have established (even though sometimes limited to certain regions) some type of ban on certain (large) retail outlets, or at least a system that may qualify as a sort of ban.

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80 E.g. Belgium, France, Greece, Hungary, Luxembourg, Portugal, Romania, Spain.
81 E.g. Belgium, Croatia, France, Hungary, Luxembourg, Portugal, Spain.
82 E.g. Belgium, Hungary, Portugal.
210. **Hungary** is the sole Member State to have adopted a clear and outright ban on retail establishment (so-called “Plaza ban”). This is not a complete ban:
- It is a temporary ban, effective as from March 2012 until the end of 2014;
- It is a ban on the establishment\(^{83}\) of retail stores with a gross floor space exceeding 300 m\(^2\);
- There is a possibility to apply for an exemption: exemptions (authorisations) can be granted by the Minister responsible for Trade and Commerce.

Note: for the establishment of retail outlets with a floor space exceeding 5,000 m\(^2\), in addition, a detailed impact assessment is required.

211. According to a certain point of view, a ban could also be identified in the **German** system regarding establishment or large retail outlets combined with the regulations on the assortments that can or cannot be sold in specific locations, in certain German regions. Prohibiting the sale of certain products in certain locations would, according to this opinion, have the effect of a ban on a certain type of retail establishment.

212. The German system limits the establishment opportunities for large retail outlets having a gross floor space that exceeds 800 m\(^2\) provided they can have an effect on the realisation of the objectives of regional development and planning and/or on the urban development and organisation.

213. Large-scale retail outlets are only permitted in areas which are subject to specific local land-use plans, if the plan provides for the determination “large scale retail outlets” or, within built-up area, in so-called “core areas”.

214. In order to assess whether a large-scale retail outlet may have an effect on the development of central supply areas in the city the assortment of goods of the large-scale retail outlet must be considered. Very often, large-scale retail outlets with “city centre relevant core assortments” are only allowed inside the central supply areas of the cities and municipalities. Hence, large-scale retail outlets may only be planned outside those central supply areas if they do not provide city centre relevant assortments (except for “marginal goods”, which means that those goods must generally have a share of less than 10% of the total sales area).

215. Whether or not this system qualifies as some sort of ban, is a matter of interpretation. In any event, the system entails a severe restriction of the freedom to establish relatively large retail outlets in certain areas, or, looking at it from a different perspective, on the assortment of goods these large outlets are allowed to sell.

216. This is illustrated by a case study that was conducted regarding the German retail establishment system:

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### Germany

**Case study 2\(^{84}\): large-scale sports retail market outside the city centre**

Involvement of competitors – city centre relevant assortment

Case study 2 for Germany explains how the retail project of a Company in the city of Rostock failed, due to the fact that the departure from the land development plan it applied for, was denied.

In order for the retailer to be allowed to establish its outlet, the required land-use

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\(^{83}\) Including the expansion of existing commercial buildings.

\(^{84}\) See Appendix 4. A. 2. Germany – case study 2, p. 867.
plan needed a departure from the superior state development plan. Such departure, however, was finally not granted.

The most important legal issues of this case were:
- the city centre relevant assortment and
- the application of the non-impairment and congruency principles.

This case illustrates in particular:
- The strong impact of the superior state development / regional development on the permissibility of large-scale retail outlets due to the fact that local land-use plans must comply with the objectives of state and regional planning;
- The legal difficulties and uncertainties regarding the application of the non-impairment and congruency principles, especially regarding the definition of centre relevant assortments and the assessment of possible negative effects on central supply areas in specific cases;

The difficulty to distinguish on the one hand between the protection of central supply areas, which is generally in accordance with the overriding interests of the German planning law which aims at the prevention of detrimental effects on the planned urban development and at the strengthening of the urbanity of the cities, and on the other hand the protection of retailers against competition which is not an overriding interest according to German planning law since the German planning law is generally neutral in terms of competition. This distinction is even more difficult in this case due to the fact that the negative decision of the state government to grant a deviation from the state development plan was at least influenced by the results of the working committee which was partly composed of competitors of the Company;
- That the definition of centre relevant assortments can be decisive for the permissibility of large-scale retail outlets. Here about 50% of the assortment of the Company was considered to be centre relevant. As far as the effect on local supply areas is concerned, it seems justified to distinguish between high priced branded articles and low priced own brands of the Company. Regarding those lower priced own brands it seems plausible that the Company rather competes with big supermarkets than with sports retailers in the city centre, provided that these retailers only sell higher priced branded articles;
- The importance of the fact that the chamber of commerce and the working committee conducted an analysis of the compatibility of the Company project with central supply areas of the city which was then used as a source of information for the decision of the public authorities regarding the deviation from the objectives of the state development plan. The working committee comprised not only the chamber of commerce, which is generally neutral in terms of competition, and public authorities, but also several competitors of the Company which may be presumed to have an interest to prevent any competition caused by a new large-scale sports retail outlet outside the city or district centres. Therefore the question could be raised whether competitors of a retailer are in a position to evaluate the effects of a large-scale retail outlet objectively and only with respect to the urban development situation or they rather just assess the economic effects on their own business. The Company therefore claimed that the arguments of the working committee and the chamber of commerce against the retail project were rather based on economic considerations instead of urban development aspects.
217. Another Member State that seems to have some sort of ban is **Italy**. Under the regional legislation of **Molise**\(^8\), large retail outlets can only be established in municipalities with more than 10,000 residents. The municipalities are entitled to refuse the establishment of a large retail outlet with a gross floor space larger than 5,000 m\(^2\) unless this outlet is a shopping mall in which small and medium-sized outlets occupy at least 50% of the total gross floor space. In other words, the regional law authorises the municipalities to deny the authorisation to establish retail outlets larger than 5,000 m\(^2\) without being obliged to provide the applicant with specific reasons. This refusal is deemed to be justified by overriding reasons of public interest related to the urban planning, as set by the guidelines of the Molise region, but comes rather close to a ban.

The region of **Sicily** seems to apply a *numerus clausus* system or quota system, i.e. a system that limits in each area the number of outlets occupying a certain surface.

This is illustrated by a case study that was conducted regarding the Italian retail establishment system.

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\(^8\) Regional Law nr. 33 /1999 and following amendments, available at: [http://www.regione.molise.it/web/crm/lr.nsf/0/B06B7 4DFA9D1 3 C94C12568 3 200606DE2?OpenDocument](http://www.regione.molise.it/web/crm/lr.nsf/0/B06B7 4DFA9D1 3 C94C12568 3 200606DE2?OpenDocument), Consulted 1 August 2014.
ITALY

Case study 286
(Council of Administrative Justice of Sicily Region
Decision Nº 895 of 14.11.2013)

Case study 2 for Italy illustrates the tension between the different levels of authority in Italy.

A company had applied for an authorisation to establish a large retail outlet in the Municipality of Melilli. After having been granted a building authorisation, the Conference of Services refused to grant the required authorisation to establish the large retail outlet. Even though the Municipal officer voted in favor, the Regional representative voted against on the ground that the retailer was in violation of the “quota system”.

The Company appealed this decision before the T.A.R. of Catania, which annulled it on the ground that it was in violation of Decree Nr. 59/2010 transposing the Services Directive 2006/123/EC (state law).

The Department for Commerce of the Sicily Region (DCSR) appealed the decision adopted by the T.A.R. Catania before the Council of Administrative Justice of Sicily Region, which ruled that the appeal filed by the DCSR should be regarded as admissible.

The Court decided that the “quota system” established by the Sicilian Regional Law (28/1999) was not in breach of Decree no. 59/2010, and more particularly, Art. 12 which provides that in cases where there are overriding reasons in the general interest, and subject to the condition that they are in line with the principles of proportionality and non-discrimination, the Region may impose restrictions on the establishment of new retail outlets on the basis of local population and a minimum distance between outlets.

In the case at hand, the “quota system” established by Sicilian Regional Law was found to be in the public interest in that it adequately took account of the particularities of the territory in terms of traffic and pollution and thus, was contributing to a sound urban planning and the protection of the environment.

218. In Ireland there is a ban on larger retail outlets. The Retail Planning Guidelines 2012 provide for caps on the size of retail outlets: floor space caps.

219. For convenience retail the floor space caps are:
- 4,000 m² in the four Dublin local authority areas (i.e. Dublin City, Fingal, South Dublin and Dún Laoghaire-Rathdown County Councils);
- 3,500 m² in the four other main cities of Cork, Limerick/Shannon, Galway and Waterford; and
- 3,000 m² in the remainder of the State (i.e. those areas outside of the four Dublin local authority areas, and the cities of Cork, Limerick/Shannon, Galway and Waterford).

While preparing retail strategies, local and regional planning authorities can introduce a small downward revision to the floor space cap where the size of the existing town centres is small in relation to the scale of the cap, and the potential for convenience goods expenditure growth is limited and where the development of convenience stores up to the full extent of the relevant floor space cap could have a negative impact on the vitality and the viability of the town in question. However, if a planning authority wishes to propose such a small downward revision, it must be fully substantiated by an expert study to show how effective local competition and consumer choice would be protected.

220. For retail warehouses the floor space cap is a gross floor space of 6.000 m². If specific criteria are met an exemption from this floor space cap can be allowed in city and town centre areas in the five so-called Gateway cities (Dublin, Cork, Waterford, Limerick/Shannon and Galway).

221. In Denmark the situation is similar.

222. Regarding size, the following thresholds are found in the Danish Planning Act:

- In towns with 20.000 to 40.000 residents – the total gross floor space for retail trade purposes in a district centre may not exceed 5.000 m²;

- In towns with more than 40.000 residents – the municipal council shall establish the maximum total gross floor space permitted for retail trade purposes for each district centre;

- In a local centre – the maximum total gross floor space permitted for retail trade purposes may not exceed 3.000 m²;

- In town centres, district centres, and secondary centres – a retail outlet may not exceed 3.500 m² of gross floor space for general shops or 1.500 m² of gross floor space for specialty shops;

- In town centres in towns with more than 40.000 inhabitants and in secondary centres in Greater Copenhagen, Aarhus, Odense, Aalborg and Esbjerg – the municipal council may decide to revise the municipal plan with the aim of establishing shop sizes for not more than 3 new specialty shops exceeding 2.000 m² of gross floor space each in each town and, in Greater Copenhagen, for each secondary centre;

- The size of individual shops in a local centre and for detached shops that solely serve a local area may not exceed 1.000 m² of gross floor space;

- The size of shops for the special section with goods that do not require unusually large quantities of floor space, but that are used in connection with lumber and construction materials, shall be prohibited from being established when exceeding 2.000 m² of gross floor space;

- New shops that are constructed based on local plans published before 1 July 2007 that do not contain any surface threshold stipulations, shall be prohibited from exceeding 3.500 m² of gross floor space for general shops, 2.000 m² of gross floor space for specialty shops, and 1.000 m² of gross floor space for shops that solely serve a local area.

223. The municipality is not entitled to grant exemptions with regard to the size thresholds stipulated in the Danish Planning Act.

224. It is common, especially in larger cities, that all dedicated areas for grocery stores are already occupied by existing stores when establishing a supermarket. Therefore, it will be necessary for the municipality to adopt new local planning (or dispensation issued to the existing planning) before a new supermarket may be established. The municipal council may grant exemptions with regard to the local plans, provided that such exemptions do not violate the principles of the plans.
The local plan includes provisions regarding the scope and purpose of the plan. If a requested exemption is in conflict with the scope or purpose, it will also be considered in conflict with the principles of the plan. As a result, the exemption cannot be granted. The municipal council decides on a case by case basis.

### 2.3.4 Other requirements

Often additional requirements are imposed on large retail outlets, which results in longer and more costly procedures, for example the obligation to conduct an environmental impact assessment, a retail impact assessment, a traffic impact assessment, an employment impact assessment or a detailed impact study.

Most countries assign certain areas for the establishment of large retail outlets in their spatial plans\(^{87}\).

### 2.3.5 Simplified procedure for smaller retail outlets

Several Member States provide for a simplified procedure for the establishment of smaller retail outlets.

In some Member States\(^{88}\), a building permit is not required for small retail outlets.

In some Member States separate procedures are organised and/or special authorisations are required for the establishment of large retail outlets, which do not apply to smaller shops\(^{89}\).

In some Member States, sometimes in addition to one of the abovementioned simplifications, smaller retail outlets are exempted from the requirement of an environmental permit or of an environmental impact assessment\(^{90}\).

Providing a simplified procedure for the establishment of small retail outlets can be considered as a good practice.

### 2.3.6 Comparison of the specific requirements

Specific requirements associated with size threshold can take many forms. Therefore, comparing specific requirements in Member States necessitates defining a clear comparison criterion. To do so we developed a scoring system.

To compute the specific requirements score, national authorisation schemes have been categorised in seven types of authorisation. The categories considered are:

- **No restriction**: Cases where there is no restriction at all. This category’s weight is 0;
- **Notification**: Situation where the applicant can start its activity immediately after notifying the competent authorities, without waiting for permits. The weight assigned to this constraint is 1;
- **Authorisation simple**: Situations where authorisations/permits are requested for commercial establishment. The weight for this constraint is equal to 2. The weight for Member States which do not have specific threshold-related requirements, is also 2. This value should be considered as a benchmark to compare Member States;
- **Authorisation plus**: Situations where additional requirements are requested (e.g. additional consultations, committees...) on top of the authorisations/permits requested by the authorisation simple procedure.

\(^{87}\) Estonia, Latvia and Lithuania do not make this distinction

\(^{88}\) Czech Republic, Slovakia and Slovenia.

\(^{89}\) France, Italy (certain regions), Portugal, Spain (certain regions), the UK.

\(^{90}\) Austria, Croatia, Cyprus, Hungary, Italy (certain regions), Malta, Poland, Slovakia, Spain (certain regions), the UK.
The weight of this constraint is equal to 3. For example, in Bulgaria, buildings with gross floor space above 5,000m$^2$ require a use permit from the NCCD, instead of the chief architect of the municipality. In this case, a score of 1 is assigned for intervals above 5,000 for the Authorisation Plus constraint. Below 5,000, scores of 1 are kept for Authorisation Simple;

- **Ban with derogation**: Cases where establishment is banned, but could be cancelled upon derogation. This high level constraint has a weight of 4. It is the case for Hungary that applies a plaza ban for outlets above 300m$^2$.

- **Ban with derogation plus**: Cases where the derogation implies also additional authorisation/permit requirements (e.g. Hungary where a detailed impact assessments are required for retail outlets with a gross floor space above 5,000m$^2$). The weight associated to this category is 5.

- **Ban**: Cases where the establishment is banned without any possibilities of derogation. The weight associated to this requirement is 6.

235. Each of the above types of authorisation schemes will be applied to specific store sizes. A same Member State may have several authorisation schemes depending on the store sizes.

236. The score allocated to each type of authorisation scheme has been weighted depending on the size of the stores to which they apply - the lower the store size threshold, the higher the weights associated. In a sense this weight captures the scope of application of the various authorisation schemes. This provides a flexible framework to compare the specific requirements.

237. When computing the score, only requirements related to store sizes have been taken into account, because they are easier to quantify. Requirements related to the local area and nature of the products sold have not been taken into account, since the impact of location and/or product specific regulation is difficult to extrapolate at country level.

238. Furthermore in some cases different requirements may apply to the same store size. Whenever this was the case we used the most conservative approach - i.e. the most restrictive store size threshold (the lowest) was used to determine the score.

239. Figure 16 presents the scores of requirements that are directly linked to the store size, in terms of permits or assessments. As expected the highest restrictions in terms of specific requirements are found in Member States with a ban or ban with derogation.

240. Furthermore, some Member States, have scores below 2 which is the score attributed to a normal authorisation process. This is caused by the existence of specific requirements that ease the establishment for small outlets in these Member States (e.g. in Estonia, no detailed plan is required for outlets with a floor space below 200 m$^2$).

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91 Legislation expiring on 1$^{st}$ of January 2015.
92 See 1.12.6 above, and footnote 22 with comment regarding small islands.
2.4 Summary and concluding remarks

This section based on a desk research of existing regulations and case studies, performed by local country experts and co-ordinated by the core team has, identified a number of potential regulatory restrictions for retail establishment. The findings of this section are summarized in the table below.

Table nr.11.b.: Summary based on three themes

<table>
<thead>
<tr>
<th>Theme</th>
<th>Restrictions identified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulatory framework</td>
<td>– Cumulative authorisation or permit requirements and cumulative procedures may be burdensome for retailers wishing to enter a market</td>
</tr>
<tr>
<td></td>
<td>– Rigid planning regulations may prevent entry</td>
</tr>
<tr>
<td></td>
<td>– Protection of city centres deters entry of large retailers</td>
</tr>
<tr>
<td>Authorisation process</td>
<td>– Lack of regulatory framework or lack of clarity of the regulations makes the authorisation process uncertain and leaves authorities with discretionary powers</td>
</tr>
<tr>
<td>Specific requirements</td>
<td>– May create higher barriers for large retail outlets</td>
</tr>
</tbody>
</table>
242. This section also identifies three good practices:
   - All-in-one permit. All-in-one permits reduce the number of authorisation requirements and thus the burden associated with cumulative procedures.
   - One-stop-shop. A one-stop-shop system simplifies the process for retailers and avoids inconsistent messages from and decisions by different authorities.
   - Lighter requirements for small retail outlets. This measure may favour the development of SME’s.

243. Overall, this section shows that:
   - The regulatory framework is rather complex in most Member States (theme 1);
   - The authorisation process tends to be rather burdensome (theme 2);
   - The regulatory framework, in many Member States, provides for important retail specific requirements applicable to the establishment (usually) of relatively large retail outlets (theme 3).
3. Legal analysis of the regulatory framework

244. In this Chapter we examine retail establishment regulations in light of the provisions of the Services Directive.

3.1 Requirements to be examined under the Services Directive.

3.1.1 Requests for and use of economic data.

3.1.1.1 Analysis of the situation

245. The regulatory framework of some of the Member States (or divisions thereof) includes some elements of economic assessment of the proposed development (e.g. potential to increase competition, impact on competitors or on incumbent retailers, potential to attract further consumers, catchment area, turnover, trade draw, impact on market demand, commercial synergy, promotion of economic regeneration, increase of employment, etc.) or requests for economic data to be provided or certain assessments which include or may include economic data to be performed (e.g. retail impact assessments, trade impact assessments, “suitability” assessments, market studies).

246. Such requirements may serve certain overriding public interest reasons, in particular “the protection of (...) the urban environment, including town and country planning”. Such overriding reasons recognised by the Court include\(^93\): environmental protection\(^94\), town and country planning\(^95\) and consumer protection\(^96\). This has also been acknowledged by the Services Directive which indicates in Article 14.5 that the prohibition of economic need tests does not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.

247. In this context it is crucial to determine the relationship between those two elements: economic factors and overriding public interest reasons, in order to determine whether or not the request for economic data is justified in the light of Article 14.5 of the Services Directive. This is a matter of interpretation of the Services Directive, which should be judged upon by the CJEU. The CJEU has ruled that purely economic objectives cannot constitute an overriding reason in the public interest\(^97\). Furthermore, it is for the Member State relying on an overriding reason in the public interest as justification for a restriction on freedom of establishment to demonstrate that its legislation is nonetheless justified but also appropriate and necessary to attain the legitimate objective pursued.

248. Certain requirements to provide or to assess economic data, in the framework of a procedure for retail authorisation, planning permission or any other permit or licence, may qualify as inappropriate or disproportionate requirements.

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\(^93\) CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraph 74 and the case-law cited.

\(^94\) See, inter alia, Case C-384/08 Attanasio Group [2010] ECR I-0000, paragraph 50 and the case-law cited.


\(^97\) See, to that effect, inter alia, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraph 74 and the case-law cited, as mentioned above p. 22.
In any event, the restrictions must be appropriate for securing attainment of the objective pursued and must not go beyond what is necessary for attaining that objective.98

In that respect the CJEU, in the case of Commission v Spain considered that “(...) 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.99

However, in the specific circumstances of the case, the CJEU considered the specific restrictions laid down in the contested legislation, taken as a whole, to significantly affect the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia.100

In such circumstances, according to the CJEU, 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”.101

In that respect, the CJEU noted that the Kingdom of Spain had not produced sufficient evidence to explain the reasons for which the restrictions at issue were necessary to achieve the objectives pursued. 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, the CJEU held that the restrictions on the freedom of establishment laid down in that regard were not justified.

The Commission also brought a claim against Spain (second complaint) regarding the requirement to obtain a specific retail licence to open large retail establishments, and the related conditions.

The Commission challenged the lawfulness of:

- A statutory provision requiring a specific retail licence to be obtained prior to the setting up of large retail establishments;

- The requirement that account 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;

- The requirement of a market share report which is binding if unfavourable and which must be unfavourable if the market share exceeds a certain value.


100 Paragraphs 81 and 82. 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.

256. The Kingdom of Spain contended 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. The Commission, however, claimed that those provisions pursued purely economic objectives, their aim being to protect small local traders.

257. With respect to the statutory provision requiring a specific retail licence to be obtained prior to the setting up of large retail establishments the CJEU was of the opinion that the Commission had not made clear how that requirement, of itself, pursued purely economic objectives, nor to what extent, of itself, the requirement to obtain a licence before opening a large retail establishment would go beyond what is necessary to attain those objectives. The Kingdom of Spain had stated that the achievement of the objectives relating to town and country planning and environmental protection, depended 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. According to the Advocate General 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, as well as the objective of town and country planning. 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 or on town and country planning, appears a less effective and more costly alternative to the system of prior authorisation.

258. As a result, the CJEU rejected this part of the (second) complaint.

259. On the other hand, the CJEU considered that the obligation to take account, for the purposes of granting such a licence, of the existence of retail facilities in the area and the impact of a new establishment on the commercial structure of that area concerned the impact on existing traders and the market structure, not consumer protection. The CJEU adopted the same reasoning with respect to the obligation 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.

260. The Court considered that those provisions required the application of ceilings as regards the market share and the impact on existing retail trade, above which it was impossible to open large retail establishments and/or medium-sized retail establishments.

261. Those considerations according to the CJEU qualified as purely economic considerations which could not, pursuant to the Court’s case-law, constitute an overriding reason in the public interest.

262. As a result, those parts of the (second) complaint were upheld.

263. An additional requirement under the challenged legislation was the requirement that the Competition Court be consulted.

264. According to the Advocate General an obligation to consult a body with responsibility for examining questions of competition, which issues a non-binding report, appeared appropriate for ensuring that the objectives relied on by the Kingdom of Spain were achieved without going beyond what was necessary to achieve them. Taking into account that the Commission did not

103 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 90-94.
104 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 95-99.
105 OPINION OF ADVOCATE GENERAL SHARPSTON, delivered on 7 October 2010, paragraph 96.
bring forward any arguments to the contrary, the CJEU followed the Advocate General’s Opinion and rejected the complaint in this respect.

The Spanish regulation also required the consultation of the Retail Facilities Committee.

The CJEU considered that the Commission did 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 was composed of potential competitors of the economic operator wishing to set up a new large establishment in Catalonia.

The CJEU ruled that 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.

The Court agreed with the Advocate General that the existence of the committee and its functions did not go beyond what was necessary to achieve those objectives of town and country planning and environmental protection.

On the other hand the CJEU considered that the provision requiring that committee 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, was not appropriate for ensuring that the objectives pursued were attained.

The Court noted that the only sectoral interest represented in that committee was 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, could not constitute an appropriate instrument for pursuing objectives relating to town and country planning, environmental protection or consumer protection.

As a result, the existence of the Retail Facilities Committee and the functions it was supposed to perform could be justified, but its composition was not appropriate for ensuring achievement of the objectives pursued by means of the establishment of that committee. Therefore, that part of the (second) complaint was upheld as regards the composition of that Retail Facilities Committee.

Finally in the second complaint, the Commission disputed the lack of precision of certain criteria on the basis of which the Generalitat or the municipal authorities had to rule on applications for retail licences. The Commission referred, 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’;

- The ‘right of consumers to a broad and varied supply in terms of product quality, quantity, price and characteristics’.

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106 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 100-103.
107 Article 11 of Law 18/2005 provided that the Retail Facilities Committee was to report, not only on issues relating to the decision whether a licence was to be granted by the Generalitat, but also on planning matters relating to the designation of areas where retail establishments could be opened, including the drawing up of proposals for amending the PTSEC and on the delimitation of ‘consolidated urban areas of municipalities’.
108 OPINION OF ADVOCATE GENERAL SHARPSTON, delivered on 7 October 2010, paragraph 102.
110 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 110-113.
273. In the Commission’s view, such criteria would make it impossible for applicants to evaluate accurately their chances of obtaining a licence and conferred too broad a discretion on the licensing authorities.

274. The Kingdom of Spain accepted that the criterion of the ‘right of consumers to a broad and varied supply in terms of product quality, quantity, price and characteristics’ could be regarded as insufficiently precise, but argued that that was not true of the other two disputed criteria. The Kingdom of Spain contended that, in any event, the criteria were not rendered inappropriate for the achievement of the aims of environmental and consumer protection simply because they lacked precise definition. It argued 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.

275. The CJEU considered that the Commission did not dispute the nature of the criteria in question, but merely their lack of precision. The CJEU accepted that integration into the urban environment, the effect on road and transport use and the range of choice available to consumers were legitimate criteria when deciding whether a retail establishment should be authorised, and agreed with the Advocate General\(^\text{111}\) that 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.

276. This leads the CJEU to reject that part of the (second) complaint since the criteria were 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 relied, or disproportionate in relation to those objectives\(^\text{112}\).

### 3.1.1.2 Analysis of the Member States’ Regulations

277. This chapter provides an overview of regulations and practices in the Member States which include economic elements in a variety of forms, ranging from a requirement to perform an assessment of the activity’s economic effects (including market demand, assessment of turnover and/or trade draw) or assessments (e.g. retail impact assessments, trade impact assessments, “suitability” assessments), market studies, reports and similar requirements examining economic factors, or a requirement to provide certain economic data, including for example the development’s impact on competitors or incumbent retailers.

278. The legal qualification of these requirements may vary: the requirements can be acceptable if they are justified by planning requirements which do not pursue economic aims but serve overriding reasons related to the public interest. However, the requirements may cause concern if they are disproportionate (i.e. go beyond what is reasonably necessary to attain the planning objective pursued), or are inappropriate to pursue such objective. Finally, in some cases, the requirements may, potentially, amount to an economic need test.

279. The case-by-case economic need test that used to exist under Belgian law has been eliminated from the law with the entry into force of the Act of 22 December 2009 implementing the Services Directive. Nevertheless, it remains uncertain whether the remaining criteria, in particular the criteria relating to the location of the development and protection of the urban environment,

\(^{111}\) OPINION OF ADVOCATE GENERAL SHARPSTON, delivered on 7 October 2010, paragraph 116.

\(^{112}\) CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 114-118.
would pass the test of the Services Directive. Indeed, as confirmed by legal scholars, they do not seem to be “objective” nor sufficiently “clear and unambiguous”. An economic interpretation of the criteria also appears to be performed in practice when granting authorisations.

280. If a retailer applies for a planning permit in Cyprus, the application must include a number of specialised studies, including an Assessment of Trade (and Social) Impact.

281. In Denmark a retail trade analysis (“detailhandelsanalyse”) is often required in day-to-day practice, in particular before adopting new planning that designates areas of land for retail purposes. Its purpose is to assess if there is a market (consumer base) for more retail outlets in the area. The municipality may request the private developers who apply for the new planning to present such analysis. The retail trade analysis is not a statutory requirement and it is not subject to any regulations.

282. Whether or not such analysis is required is decided by the municipal council on a case-by-case basis. The more significant the potential planning for retail purposes is, the more likely it is that such analysis must be carried out.

283. The French legislation has eliminated the case-by-case “economic need test” relating to retail with the entry into force of the Act of 4 August 2008 implementing the Services Directive. Even though the impact of the retail establishment on the “existing commercial businesses” is no longer one of the criteria, the “protection of a balance between small and large scale complexes” is still in the law as an objective of the commercial development scheme, and the criteria and sub-criteria of the impact on town planning, consumer protection and sustainable development may be equally economically inspired.

284. In Germany, it appears that potentially the economic effects of a proposed retail establishment project are examined, especially when adopting land-use plans for large-scale retail establishments.

285. The German system limits the establishment opportunities for large retail outlets having a gross floor space that exceeds 800 m² provided they can have an effect on the realisation of the objectives of regional development and planning and/or on the urban development and organisation.113

286. Large-scale retail outlets are only permitted in areas which are subject to specific local land-use plans, with the determination of large scale retail outlets114 or, within built-up area, in so-called “core areas”115.

287. In order to assess whether a large-scale retail outlet may have an effect on the development of central supply areas in the city the assortment of goods of the large-scale retail outlet must be considered. Very often, large-scale retail outlets with “city centre relevant core assortments” are only allowed inside the central supply areas of the cities and municipalities116. Hence, large-scale retail outlets may only be planned outside those central supply areas if they do not provide city centre relevant assortments (except for “marginal goods”, which means that those goods must generally have a share of less than 10% of the total sales area).

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113 The Federal Administrative Court decided in a landmark decision that retail outlets are considered as large-scale retail outlets if the sales area exceeds 800 m²: judgment of 24 November 2005 (Case nr. 4 C 2/08 – NVwZ 2010, 590). Available on: http://www.bverwg.de/entscheidungen/pdf/17 1209U4C2.08.0.pdf, consulted on September 14, 2014.

114 Section 11 Federal Land Utilisation Ordinance.

115 Section 7 Federal Land Utilisation Ordinance.

116 Section 11 (3) sentence 4 of the Federal Land Utilisation Ordinance.
288. Similarly in the case study 2 for Germany an external survey was conducted in order to evaluate the compatibility of the contemplated retail outlet with the existing sports markets\textsuperscript{117}.

289. In Hungary, the authorisation required for commercial stores exceeding 300 m\(^2\) is granted by a Committee which evaluates the planned retail outlet based on its impact on the environment, local community and the region, the existing retail services in the local area, the outlet’s catchment area and the local market conditions.

290. In case of retail units larger than 5.000 m\(^2\), the following criteria are taken into account: spatial location, urban planning, accessibility, local community and surrounding area, potential job creation, demographical considerations, environmental and economic impact. The retailer must prepare a detailed (retail) impact study, which includes among others several economic factors such as the outlet’s commercial catchment area (direct and indirect) and further development potential, indication of the number of daily visitors, expected trends in purchasing power, the economic impact of the outlet.

291. It does not seem unlikely, therefore, that the CJEU would consider the scrutiny of these criteria to include, or potentially to qualify as, an economic need test.

292. According to Ireland’s Retail Planning Guidelines 2012, the planning authority may request the applicant to perform a Retail Impact Assessment (RIA) in two cases:

- Where the planning authority considers an application for planning permission to develop a new retail development to be particularly large in scale compared to the existing city, town or district centre, or

- Where a retail strategy or development plan has allocated a specific type and quantum of retail floor space to a particular settlement and a proposed development absorbs on one site the bulk of that potential retail floor space.

293. Through the RIA the applicant must demonstrate compliance with the development plan and that there will not be a material and unacceptable adverse impact on the vitality and viability of any existing centre.

294. Where a development proposal fails to satisfy the sequential approach or is likely to have a significant adverse impact as demonstrated by an assessment of the criteria provided for in the guidelines, planning permission should be refused.

295. Taking into account the CJEU’s case law\textsuperscript{118} Ireland would have to show that the above requirements are appropriate (suitable) and necessary to achieve the objectives relating to town and country planning and environmental protection, and any other objectives, relied on by the Member State to justify the requirements, and that these measures are proportionate, in other words: do not go beyond what is required in order to achieve those objectives.

296. In view of the CJEU’s case law\textsuperscript{119}, the mere requirement to perform a Retail Impact Assessment as such does not seem likely to be a problem.

297. However, there may be some concern as regards the justification (proportionality), in particular, of:

- The requirement to show compliance with the development plan and that the project does not have a material and unacceptable adverse impact on the vitality and viability of any existing city, town or district centre;

\textsuperscript{117} For further information see page 26 above and Appendix 2 – Germany – Case Study 2.

\textsuperscript{118} CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, cited above.

\textsuperscript{119} CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, cited above.
The various criteria to be met, in particular those that are inspired by economic objectives;

- The fact that the threshold at which a RIA is required, is not necessarily known in advance but may be raised by the planning authority in pre-application discussions or in the course of determining the planning application. This seems to leave the authority a great deal of discretion and makes it difficult for the applicant to predict what exactly the requirements are.

298. In Italy, as a result of the federal system the establishment of retail outlets is a matter regulated by the Regions. To date, not all Regions have amended their legislation in order to be fully compliant with the Services Directive, even though the Decreto Legislativo 59/2010 has implemented article 14 of the Services Directive into national Italian law.

299. For example, under the Sicilian regional law, the establishment of outlets in historical areas requires an assessment of the impact on local small shops.

300. Under the Piemonte regional legislation with respect to the establishment of a large outlet (having a gross floor space exceeding 1,800 m²), the Conference of Services must evaluate the outlet’s impact on existing businesses and the applicant must present a report on such impact.

301. Due to the obligation to take account of the existing retail facilities and the impact of the new outlet on the existing businesses, there seems to be a risk that these requirements are based on economic considerations. Depending on the factual impact of the regulations, the situation may well be comparable to the one the CJEU condemned in Commission v Spain.

302. A previous study had identified regional regulations that potentially qualify as a prohibited requirement under article 14.1 of the Services Directive: requirements based directly or indirectly on nationality or residency. Those regulations required that the Declaration on the commencement of activity (Dichiarazione di inizio attività, or DIA), or another authorisation procedure be done with the competent authority (point of single contact, city council, chamber of commerce) of the applicant’s place of residence (thus implying a residency requirement). Such requirements had been identified in the Regions of Liguria, Lombardia and Marche. Meanwhile it appears that these provisions have been amended in order to refer to the competent authority of the municipality where the applicant intends to exercise its activities.

303. Under Luxembourg law, a retail outlet of a certain size, i.e. having commercial floor space exceeding 400 m² requires a special authorisation. When applying for such authorisation, the retailer must submit to the authorities, among other things, a map showing the limits of the commercial zone and studies about the expenses of potential customers in this zone. The decision-making process regarding the special authorisation takes into account: the number of jobs the project is expected to create, the impact of the project on transport and traffic and its integration in the public transportation network and the impact or consequence of the project on the balance between urban areas and rural areas, mainly between the city centre and the city outskirts.

304. In Malta the Interim Retail Planning Guidelines refer to the need for a Retail Impact Assessment, which “entails an economic evaluation of the proposed development’s likely impact on town centres and neighbourhood centres including consideration of the cumulative effect of recently completed developments and

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120 Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, Italy, July 2011, p. 3.
121 Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, Italy, July 2011, p. 5-6.
outstanding planning permissions\textsuperscript{122}. The assessment must identify the catchment area, estimate expenditure available within that area, estimate the turnover of existing centres in that area which are likely to be affected by the new development as well as the turnover of the new development, estimate the quantum of consumer retail spending available in the catchment area that will be diverted from existing centres to the new retail development and provide an aggregation of the zonal diversions from each centre to the new development in order to provide an estimate of trade diversion. Where the RIA applies criteria of an economic nature (e.g. turnover, trade draw, trading impact on existing centres, trade lost or diverted from existing retail centres, ...), there is a risk of a disproportionate requirement. Whether or not this is the case, will depend to a considerable extent on how and for what purpose these criteria are applied in real life cases.

305. In The Netherlands, for the establishment of a municipal zoning plan the municipality in practice performs a test aimed at assessing the local market and (the need for) new retail outlets before it takes a final decision. The Dutch planning system thus allows the municipality to take into account certain economic considerations for the establishment of certain retail establishments (such as DIY stores)\textsuperscript{123}.

306. The Spatial Planning Decree allows zoning plans, for the purpose of good spatial planning, to include rules regarding specific subsectors of, among others, the retail sector\textsuperscript{124}. A previous study has indicated that in practice rules on ‘branching’ in the retail sector can take into account economic considerations\textsuperscript{125}.

307. Our study has confirmed that many municipalities require a so-called distribution-planning investigation (in Dutch: distributieplanologisch onderzoek) when a new retailer wants to establish a new retail outlet or applies for an exemption from a zoning scheme. The investigation includes “an analysis of the local relevant market, and an assessment whether issuing a licence would lead to sustainable disruption of the level of services for the consumers”\textsuperscript{126}. If the aim is indeed to protect consumers and quality of life, the system could avoid a potential qualification as economic need test under art. 14.5. Services Directive.

308. However, the same previous study has shown that, at least in certain cities or municipalities, the test made regarding the new retail outlet refers to such criteria as: “not disturbing the already existing retail structures” and “a sufficiently demonstrated economic potential as shown in the market investigation”\textsuperscript{127}. It is not unlikely that the CJEU would consider that this investigation, by applying these criteria, could, potentially, qualify as an economic need test\textsuperscript{128}.


\textsuperscript{123} Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, the Netherlands, July 2011, p. 54.

\textsuperscript{124} Art. 3.1.2. (2) of the Spatial Planning Decree (Besluit Ruimtelijke Ordening) available at http://wetten.overheid.nl/BWBR0023798 consulted 10 December 2014.


\textsuperscript{126} Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, the Netherlands, July 2011, p. 7.

\textsuperscript{127} Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, the Netherlands, July 2011, p. 7.

\textsuperscript{128} The same conclusion was reached in: Services Directive: Assessment of implementation measures in Member States, Part two: Analysis of national requirements in specific service sectors, the Netherlands, July 2011, p. 7.
In addition, the Spatial Planning Decree provides that the contemplated urban development should respond to an actual regional need. This provision, as well as its practical application, caused quite some concern and led to complaints addressed to the Ministry. Therefore, the Minister of Infrastructure and Environment addressed a letter to the Dutch Parliament on 9 January 2014 (and a similar letter to Provinces and to the Association of Municipalities), announcing an amendment to the Spatial Planning Decree and explaining the reasons for it. The Minister explained that the investigation is not allowed to examine the economic need of the retail outlet, and that all provincial regulations and municipal regulations and practice must comply with the Services Directive. The amended provision states that if an investigation of the regional need relates to an economic need, a market demand or the assessment of the potential or actual economic consequences of the establishment, the investigation should only serve the purpose of examining whether or not the establishment complies with good urban planning.

Whether or not certain municipalities, based on their regulations or their application, perform a test that qualifies potentially as an economic need test, will depend on whether or not they follow the Minister’s comments and the amended provision of the Spatial Planning Decree.

Two case studies that were conducted illustrate the Dutch system in this respect:

THE NETHERLANDS
Case study 1
(DIY retail – decision Dutch Council of State (Spatial Planning Department) 20111281/1/R4 dated 27 March 2013)

Procedures involving requirement for economic data
The case study 1 of The Netherlands concerns the establishment of a DIY retail. In the specific case, the size of the floor space (number of m²) for a new DIY was not limited in the municipal plan, whereas the municipality had placed limits on the size in the past. Other DIY retailers raised objections arguing this would cause an irretrievable breakdown of the level of amenities of DIY retailers.

The Council of State ruled that the decisive criterion in this respect is that inhabitants of a certain region will keep a certain level of amenities, in that they can satisfy their needs within an acceptable distance of their residence. It resulted from the distribution planning research, that the new DIY retail store would not cause an irretrievable breakdown of the level of DIY amenities. The Council of State further ruled that it is not possible to create industry restrictions only because of economic reasons.

This case study illustrates (among others):

- The strong opposition by incumbent DIY retailers as against new entrants in The Netherlands. In several other cases DIY retailers raised objections when another DIY retailer wanted to establish a new retail outlet. Furthermore, several municipalities appeared to limit the number of DIY retailers available.

- The importance of the distribution planning research which is performed at the municipalities’ request when establishing a municipal plan.

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129 Article 3.1.6 (2)(a) Besluit Ruimtelijke Ordening.
130 Tweede Kamer, vergaderjaar 2013–2014, 33 473, nr. 4
THE NETHERLANDS

Case study 2132 (New shopping zone in Utrecht)

Procedures involving requirement for economic data

In the case study 2 of the Netherlands, the municipality of Utrecht intended to develop and upgrade a specific area (Groeneweg Midden) and to create a new shopping zone in a city district taking into account the consumers' interests. It appeared that the municipality was likely to test what would be the consequences for the economy and the spatial planning.

This case study illustrates that:

- Whether or not municipalities still in fact apply procedures involving requirement for economic data needs to be investigated. In the case at hand, in order to establish the municipal zoning plan, the municipality performed research into the local market. This research mainly looked into the available market space. The municipality investigated for example what kinds of shops were needed and which shops were already located in the particular area. In this research, the interests of the consumer were considered decisive. Furthermore, the researcher judged that Groeneweg Midden would cause no irretrievable breakdown of the already existing retail structure, which would actually affect the interests of the consumers;

- The involvement of the inhabitants of the particular area, who were able to give their opinion on the contemplated zoning plan, their impact on the project and on the time required to establish retail outlets.

312. In Romania, the criteria for authorisation and assessment of retail structures with a surface area exceeding 1.000 m² are determined at the ministerial level. The relevant legal provision is the following: “The examination and approval of placing selling structures with large surfaces will be based on the criteria established by the ministry responsible for domestic trade”. This provision was initially included in article 15 of the Ordinance, but has been removed in 2013. However, the same provision remains in force at art. 17 1 of the Norms. Consequently, it seems that the Romanian government has neglected to also amend the Norms. By means of historical and systematic interpretation the provision mentioned above should not apply (based on the relationship between primary and secondary legislation). However, to ensure better legal certainty, the norms should be amended.

313. In Slovakia, when deciding on the planning permit, the municipality should perform a certain kind of necessity test133. In theory, this provision could be used

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133 Article 37 (2) of the Building Act requires the municipality to consider “the necessity of the planned measure in the territory” (e.g. the necessity of a contemplated construction/outlet) when deciding on a planning permit application.
by the municipalities as a basis to restrict access of (certain types of) retail outlets to certain territories.

314. However according to the information available, this provision is not applied in this way in practice. In publicly available sources there is no trace of any case where construction of a retail outlet would have been rejected by the municipality for the said reasons.

315. In Spain the regional legislation of several Comunidades Autónomas requires an assessment taking into account factors of an economic nature, for example:
- The outlet’s impact on competition;
- The outlet’s territorial impact;
- The “proportionality” of the project;
- The “suitability” of the project.

316. Andalucía has reformed its regulation in 2014. The report on the outlet’s suitability (memoria de la idoneidad) does not seem to refer to economic criteria.

317. Asturias used to require a structural impact assessment including an analysis of the economic and social costs and benefits of the project. The structural impact study had to address such issues as the allocation of economic activities, infrastructures, services, etc. It could also propose corrective measures for the proper establishment of the retail outlet or to compensate negative effects. A complaint was filed by ANGED (“Asociación Nacional de Grandes Empresas de Distribución”). The European Commission was of the opinion that the regulations for the establishment of retail outlets in Asturias were not in compliance with the Services Directive. This has resulted in the adoption, quite recently, of new legislation amending the Act 9/2010 of 17 December 2010 on Internal Trade. The requirement to perform a structural impact assessment has now been removed from the proceeding for the establishment of retail outlets.

318. The regional regulations of Melilla require the applicant to provide a report on the economic impact of the retail outlet and a study of the project’s economic viability. In the decision-making the authorities take into account such factors as the existence of appropriate commercial infrastructure in the area and the effects the new outlet may have on the commercial structure of the area.

319. In Murcia the regulations require a suitability report: a report issued by the relevant Town Hall(s) assessing the suitability of the retail outlet considering, among others, the commercial offer in the municipality. This report therefore does seem to include economic criteria.

320. The regulations of Valencia require a report on the new outlet’s proportionality and suitability (in Spanish: Análisis de la proporcionalidad y adecuación de la implantación del uso comercial respecto del entorno urbano). The applicant must file a report on the planned investments, a financing plan and an operating account. When making a decision, the authorities take into account such factors as the adequacy of the outlet in relation to the commercial action plan of Valencia and its compatibility with the guidelines for economic activities in Valencia. The elements listed above do not necessarily mean that an economic need test is

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134 Decreto-Ley 12/2014, de 7 de octubre, por el que se modifica el Decreto Legislativo 1/2012, de 20 de marzo, por el que se aprueba el texto refundido de la Ley del Comercio Interior de Andalucía, Boletín Oficial de la Junta de Andalucía, 16 de Octubre 2014, núm. 202, p. 13 ; available at http://www.granada.org/inet/wordenanz.nsf/28e752918a597bc9c125788100412c4c/4876a2c0fa5c8b22c12579d10024c13/$FILE/decreto_ley_12_2014.pdf (consulted 10 December 2014).

performed. Whether or not that is the case depends to a considerable extent on what the economic data are used for.

321. As explained above, the Directive does not interfere with the Member States’ planning system, provided the planning requirements do not pursue economic aims but serve overriding public interest reasons. In this respect any regulation which makes the granting of authorisation subject to an economic test or to an assessment of the activity’s economic effects, requires careful scrutiny.

322. Under the Swedish regulations, the municipality when adopting planning measures must make an “assessment of the suitability of the location of the retail establishment”, which includes a consideration of the establishment’s effects on competition and current service supply in the surrounding area, as well as the proximity to streets, roads and public transportation. They must take into account a “sound economic growth and efficient competition”.

323. Based on these statements, some of the municipalities, albeit to a varying degree, have issued trade policies, and conduct trade assessments before approving the establishment of new retail outlets. Trade assessments are competition assessments made by the municipality (usually with the help of external consultants) to assess the effect of a contemplated retail outlet’s establishment on competition. Such assessments can function as a “second-guessing” instrument of the commercial rationale of the establishment of new retail outlets. Depending on the municipality in question trade assessments may be made on a more general level (mostly by smaller municipalities that have less budget) or specifically for each new retail establishment. Municipalities then try to fit new suggested establishments into these general assessments, whilst other municipalities seem to make trade assessments for each new retail establishment.

324. The assessment is partly discretionary as the municipalities enjoy considerable freedom. Within the “discretionary suitability assessment”, in some cases, a wider and largely discretionary assessment is made of the commercial rationale of the establishment.

325. Trade associations have raised concerns that these discretionary assessments sometimes may include an assessment of the commercial benefit of establishing the business seeking to be established.

326. Although it seems that, in practice, the assessments are based on objective criteria, they might theoretically be hiding what could potentially qualify as an economic need test.

327. In the United Kingdom, it seems that in practice any new retail proposal (unless in an existing centre) requires considerable detail of retail need, trading impact, and economic benefits.

328. For England & Wales, the National Planning Policy Framework and the Planning Practice Guidance promote a “town centre first” approach. Local planning authorities should plan positively, to support town centres to generate local employment, promote beneficial competition within and between town centres, and create attractive, diverse places where people want to live, visit and work.

329. Local planning authorities should assess and plan to meet the needs of main town centre uses in full, in broadly the same way as for their housing and economic needs, adopting a ‘town centre first’ approach and taking account of specific town centre policy. In doing so, local planning authorities need to be mindful of the

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136 Chapter 2, Section 3 of the Planning and Building Act.
137 A trade policy is a document adopted by the municipal council, imposing conditions on trade establishment such as conditions on the location for the trade establishment or conditions relating to the maximum area available for trade constructions.
different rates of development in town centres compared with out of centre\textsuperscript{138}. The National Planning Policy Framework sets out two key tests that should be applied when planning for town centre uses which are not in an existing town centre and which are not in accord with an up to date Local Plan – the sequential test and the impact test. These are relevant in determining individual decisions and may be useful in informing the preparation of Local Plans.

330. It is for the applicant to demonstrate compliance with the \textit{sequential test} (and failure to undertake a sequential assessment could in itself constitute a reason for refusing permission).

331. The \textit{impact test} should be undertaken in a proportionate and locally appropriate way, drawing on existing information where possible. Ideally, applicants and local planning authorities should seek to agree the scope, key impacts for assessment, and level of detail required in advance of applications being submitted.

332. A judgement as to whether the likely adverse impacts are significant can only be reached in light of local circumstances. For example in areas where there are high levels of vacancy and limited retailer demand, even very modest trade diversion from a new development may lead to a significant adverse impact.

333. Where evidence shows that there would be no likely significant impact on a town centre from an edge of centre or out of centre proposal, the local planning authority must then consider all other material considerations in determining the application, as it would for any other development.

334. In \textit{Northern Ireland}, any financial and economic considerations of a proposed development will be considered ‘in the round’ as part of other “material considerations” to be considered with regard to the compliance of the proposed development with the development plan.

335. Furthermore, a Retail Impact Assessment (RIA) is applied in Northern Ireland and in \textit{Scotland}. This RIA serves the town-centre-first principle. This principle as such corresponds with public interest reasons relating to urban planning. Where the RIA or the impact test applies criteria of an economic nature (e.g., turnover, trade draw, trading impact on existing centres, trade lost or diverted from existing retail centres, …), there is a risk that the requirement to provide economic data may appear to be disproportionate. Whether or not this is the case, will depend to a considerable extent on how and for what purpose these criteria are applied in real life cases.

\textbf{3.1.2 Direct or Indirect Involvement of Competitors}

336. Article 14 of the Services Directive prohibits the direct or indirect involvement of competitors.

337. According to that provision Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large\textsuperscript{139}.


\textsuperscript{139} Article 14.6 of the Services Directive.
3.1.2.1 Analysis of the situation

338. In a strict interpretation, the text of this provision allows:

- Professional bodies and associations or other organisations acting as the competent authority;
- The consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation;
- Consultations of the public at large.

339. In a strict interpretation it does, however, not allow:

- The direct or indirect involvement of competing operators in the granting of authorisations;
- The direct or indirect involvement of competing operators in the adoption of other decisions of the competent authorities;
- The direct or indirect involvement of competing operators within consultative bodies operating in the framework of the granting of authorisations or the adoption of other decisions of the competent authorities;
- The consultation of organisations, such as chambers of commerce or social partners, on individual applications for authorisation.

340. As explained above (see paragraph 1.3 above), the CJEU ruled on this matter in the case of Commission v Spain. The Spanish regulation required the consultation of a Retail Facilities Committee, which was composed of potential competitors of the economic operator wishing to set up a new large establishment in Catalonia.

341. The CJEU considered that the provision requiring that committee 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, was not appropriate for ensuring that the objectives pursued were attained.

342. The Court noted that the only sectoral interest represented in that committee was 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, could not constitute an appropriate instrument for pursuing objectives relating to town and country planning, environmental protection or consumer protection.

343. As a result, the committee’s composition was not appropriate for ensuring achievement of the objectives pursued by means of the establishment of that committee. Therefore, that part of the (second) complaint was upheld as regards the composition of that Retail Facilities Committee.\(^{140}\)

344. As a result of this Judgment one could wonder whether the CJEU would accept the involvement of competitors on a consultative committee, or other advisory board, if the existing local trade was not the only sectoral interest represented in such committee or board. In other words: would the presence of competitors be acceptable if counter-balanced by the presence of other sectoral interests and, if yes, which interests should be represented in order to strike the acceptable balance?

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\(^{140}\) CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraphs 110-113.
3.1.2.2 Analysis of the Member States’ Regulations

345. The present Legal Study shows that, usually, competitors are not directly involved in the decision-making process in view of granting the required authorisation, licence or permit. However, in some jurisdictions, depending on the type of authorisation or permit, competitors or competing retailers are or may be indirectly involved in the decision-making process.

346. In Belgium, the composition of the “National Socio-Economic Committee for Distribution” is being questioned: the involvement of the sector of integrated commerce, self-employed workers, small and medium enterprises and the small traders associations might be considered as a prohibited involvement of competing market operators/competitors. The NSECDS is involved, as an advisory body, in the decision-making process on individual applications for authorisation.

347. In order to adopt a new local plan in Denmark, several public hearings are required, which allow authorities and the public at large, thus including competitors, to submit objections to the local plan which may cause delays and amendments. Interviews with retailers show that even minor objections in the planning process may impact the project. Nevertheless, in a strict interpretation a consultation of the public at large is not covered by the prohibition, even if such consultation includes competitors.

348. In Germany, even though consultation of the public and of third parties is not provided for by the law, such consultation may be organised on a case-by-case basis as a preliminary step before deciding on a building permit application or adopting a land-use plan.

349. The case study 2 for Germany conducted in the framework of this Legal Study illustrates that such consultation can have a significant impact on the final decision of the competent authority. In this case, the local parliament of the city decided that the chamber of commerce should conciliate the planning process. The chamber of commerce set up a working committee with members from the local parliament, the chamber of commerce, local sport retailers, the trade association, the department of town planning, the department of spatial and regional planning, the business development of the city of Rostock, the surveyors and the retailer itself. This working committee, even though not required by law, organised negotiations between the various parties. It finally considered that the retail outlet concerned should be built in another area, near the city centre. This decision was sent to the mayor of the city, who rendered a final decision on the drafting of the local land-use plan in accordance with the decision of the working committee.

350. The case shows the involvement in the procedure for an individual application of the chamber of commerce, the trade association and even local sport (i.e. competing) retailers. The participation of the applicant itself may qualify as a mitigating factor.

351. In an interview conducted in the framework of the Legal Study, the following statement was made:

352. “From our perspective the main criteria are urban development and urban planning, in particular the protection of the city centres and which are set forth in the regional development plans imposing restrictions as to the size of a store and its assortment when the store is located outside a city centre or community centre. However, we sometimes have the impression that some restrictions in the regional development plans are based on the influence of the existing retail/commercial community so that new competitors can be excluded from competition.”

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141 For further information see page 26 and Appendix 4 – Germany – Case study 2.
142 See Appendix 5 – Interview 2 – Germany – IKEA.
353. In **Hungary**, in the framework of the required authorisation of retail stores exceeding 300 m² competitors are or may be involved in the decision-making process.

354. In **Italy**, the authorisation procedure for the establishment of medium-sized and large retail outlets requires an examination of the application by a “Conference of Services”. This group of experts consists of 3 members representing the region, the province and the municipality. The authorisation is granted on condition that the regional representative agrees. This Conference of Services is also open to the public and the representatives of neighbouring municipalities, consumer associations and the most important retailer associations who can make their voices heard in the decision-making process. Even though these stakeholders have a mere “advisory power”, this may qualify as a prohibited involvement of competitors, unless the way the Conference of Services operates could qualify as a consultation of the public at large (including competitors).

355. In addition, regional regulations sometimes require the retailer to obtain the opinion of retailers’ associations, chambers of commerce, and similar organisations. This is the case, for example, in Friuli Venezia Giulia, Valle d’Aosta, and Marche.

356. **Friuli Venezia Giulia**\(^{143}\)

- The municipalities can authorise the establishment of medium-sized retail outlets without having the obligation to seek the region’s approval, which means without convening the Conference of Services, upon the condition that the applicant has previously consulted the local retailers and consumers associations and employers syndicates. These stakeholders have an advisory role and their prior opinions are required to enable the municipalities to assess the general impact of the medium-sized outlet on the territory.

357. **Valle D’Aosta**\(^{144}\)

- Under this Regional Law the Regional Council must obtain the prior opinion of consumers’ organisations and retailers associations. This opinion is not binding. However, if it is not acquired, the entire procedure can be deemed vitiated and the persons who have the right (or a legitimate interest) can bring the final decision of the SUAP before the competent T.A.R.

- The establishment of retail outlets with a gross floor space larger than 1,500m\(^2\) is always subject to the region’s approval through the Conference of Services. The establishment of medium-sized or large retail outlets is allowed in the areas to which the urban planning allocates a commercial function. When defining the functions of the urban planning the region must decide in accordance with the municipalities after having obtained the prior (not mandatory) opinion of the consumers’ organisations and retailers’ associations.

358. **Marche**\(^{145}\)

- The regional council provides guidelines on the establishment of commercial activities within its territory, after having obtained the (non-binding) opinion of consumers organisations and retailers’ associations.


\(^{144}\) Regional Law nr. 5/2013 (amending Regional Law nr. 12/1999).

Even if this opinion is not binding, it has a great impact on the decisions adopted by the regional council (through the Conference of Services).

359. In Lithuania, when applying for a construction permit, the applicant must submit the consent from, or an agreement with, the owner or possessor of a neighbouring plot of land on the basis of specific legal instruments\textsuperscript{146}, even if this party is a competitor. What if the neighbour is a competitor which refuses to grant consent or to enter into an agreement with the applicant?

360. One could argue that this is a situation where the competitor has the same position as any other neighbour, and is not involved in the procedure in its capacity as a competitor but rather in its capacity as a neighbour. Nevertheless, if the actual positive consent is required (and such consent can be refused on a discretionary basis) this system seems to allow the competitor too much influence.

361. In Spain, the autonomous community of Melilla requires a report issued by the advisory body of experts on labour and social matters (“Consejo consultivo en materia social y de empleo”) or a report by the representative organisations of Melilla’s business people and the most representative union organisations of the city, with regard to the outlet’s effects on the commercial structure, the economic activity and employment of Melilla.

362. In many Member States, competitors have opportunities, along with all other interested third parties to be consulted, to make representations on the application or to raise objections, or to be involved in public hearings or consultations (cfr. “consultation of the public at large”). In many jurisdictions procedural remedies (appeal etc.) are available to competitors on the same basis as they are for any other interested party. These situations, arguably, are not considered as problematic under the Services Directive. Therefore we will not address them in further detail.

3.2 Requirements subject to evaluation (art. 15 Services Directive)

363. This section deals with existing restrictions on retail in a particular geographical area, based on the population (in actual numbers or density) of that area or the minimum distances between retail outlets (so-called "territorial restrictions") or limiting the number of providers that can exercise their activity in that area (so-called "quantitative restrictions").

364. The Services Directive does not prohibit such restrictions, but the Member States should verify whether they comply with the criteria of non-discrimination, necessity and proportionality\textsuperscript{147}. Article 15 of the Services Directive provides:

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:
   - Quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;
   - An obligation on a provider to take a specific legal form;
   - Requirements which relate to the shareholding of a company;

\textsuperscript{146} Examples of such legal constructions are lease or right of passage.

\textsuperscript{147} Art. 15 Services Directive.
- Requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;
- A ban on having more than one establishment in the territory of the same State;
- Requirements fixing a minimum number of employees;
- Fixed minimum and/or maximum tariffs with which the provider must comply;
- An obligation on the provider to supply other specific services jointly with his service.

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:
- Non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;
- Necessity: requirements must be justified by an overriding reason relating to the public interest;
- Proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them."

3.2.1 Analysis of the Member States’ Regulations

366. Generally speaking all Member States have rules and regulations regarding territorial planning (Raumordnung, ruimtelijke ordening, aménagement du territoire, etc.). These will determine, to a certain extent, where retail outlets or certain types of retail outlets can or cannot be established or, more generally, where buildings or certain types of buildings can or cannot be erected. Such rules and regulations are related to the powers of the State (or regional or local) authorities to organise the territory in a more or less structured way and to provide sufficient space for all of the functions that are present or required.

367. Such rules and regulations, as such, will not be discussed in this chapter. Our focus will be on the rules and regulations that create (or may create) restrictions to the establishment of, and competition between, retailers, in that they limit, be it directly or indirectly, the number of retailers allowed to establish an outlet in a certain area.

368. Our analysis has identified a number of situations that could, potentially, qualify as “quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers” (the first item of art. 15.2.). Our Study has also identified, even though exceptionally, certain requirements fixing a minimum number of employees (the sixth item of art. 15.2.)

148 Regarding the “potential” character, see above: section 1.13.1.
369. Many Member States do not provide for these types of restrictions (e.g. Austria, Belgium, Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Luxembourg, Malta (but see below), United Kingdom, etc.).

370. However, our analysis shows that in several Member States the criteria applied in order to grant the required permit or authorisation include a consideration of location and spatial planning relevant to that locality (i.e. city centre outskirts or urban/rural), population density or population numbers of the relevant commercial area, a list of existing retail outlets or commercial facilities in the relevant commercial area. We will explain this in more detail below, however, without neglecting the fact that such restrictions may be acceptable provided they comply with the criteria of non-discrimination, necessity and proportionality.

3.2.2 Minimum number of employees

371. In Italy some of the regions have adopted regulations that potentially require, a minimum number of employees. Actually, they do not exactly require a minimum number of employees, but provide for a system that comes close to such a requirement.

372. Campania

- Under this regional law, the applicant who intends to establish a large retail outlet must present a report evaluating the outlet’s impact on local employment. In addition, the law requires that at least 1/3 of the retail outlet’s employees have a contract (of at least a 3-year term).

373. Umbria

- Under this Law, the municipalities must give priority to the applications having the objective to merge small or medium-sized retail outlets when:
  - The new outlet has a sales area larger (by at least 10%) than the total surface area of the merging outlets;
  - The new outlet is located in the same municipality;
  - The new outlet maintains the same amount of employees.

374. Molise

- Under this Law, large retail outlets may be established only in municipalities with more than 10,000 residents. The applicant who intends to establish a large retail outlet must include in its application i.a. a document indicating the number of employees.

- The municipalities must give priority to an application having the objective to merge 2 or more large retail outlets when:
  - All the merged outlets have been operational for at least 3 years;

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149 Art. 15.2 (f) Services Directive.

150 Regarding the "potential" character, see above: section 1.13.1.


The sales area of the new outlet is smaller (by at least 20%) than the total of the surface area occupied by the merged outlets;

The number of employees is maintained.

### 3.2.3 Territorial restrictions or quantitative restrictions

375. In **Austria** there are specific rules regarding the use of land (Flächenwidmungspläne, planning schemes) for the different regions in Austria aiming at, e.g., concentrating the building land, defining industry zones and protecting the environment. Based on these planning schemes, municipalities in Austria define in more detail rules relating the individual use of land, e.g., what kind of buildings may be built in which parts of a city (Bebauungspläne, land-use plans). These land-use plans are established within the framework of the relevant regional planning scheme for a municipality. Thus, there are a lot of different land-use plans which are very often not available online. In land-use plans there are usually housing zones, zones for both houses and shops, zones for industry, recreation areas, and so on. Large retail outlets and shopping centres often are required to establish in special outside the city center in order to protect the city centre. Other retail stores are allowed in the city centre in accordance with the respective land-use plans and building regulations.

376. In **Cyprus** the regulations impose size restrictions which provide that an outlet operated in a housing zone cannot exceed 50 m². In a commercial zone the limit varies between 250 and 350 m².

377. In **Denmark**, the total gross floor space for retail trade purposes and the size of each retail outlet can depend on the location, e.g., whether the location in question is considered a district, local, town or secondary centre. Indeed, the municipality can set thresholds relating to the size of retail outlets in the district plan. In addition, the Danish Planning Act contains several thresholds relating to the size of retail outlets, which must be respected by the municipality in the preparation of district plans. The maximum permitted size and location of retail outlets may depend on the number of residents in the immediate surroundings. A minimum geographical distance between retailers can be imposed by the municipality in the district plans.

378. As a general rule, the municipality may not designate areas for retail outlets outside town and district centres. However, the municipality may designate other areas of land for the following purposes:

- Retail trade purposes in a local centre that solely serves a limited part of a town or town district, a village, a summer cottage area or the like;
- Shops that solely supply general goods to a local area;
- Shops that solely sell types of goods that require unusually large quantities of floor space;
- Small shops in connection with the production facilities of a company that sell the company’s products.

379. One of the purposes of Danish planning law is to avoid retailers moving out of city centres.

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154 Art. 15.2 (a) Services Directive.
155 One of the most important policy objectives of these restrictions is to protect the vitality and viability of city centres: see paragraph 2.1.4.2. above).
156 This is for instance the case in Vienna when their size exceeds 2.500 m².
157 E.g., motor vehicles, pleasure boats, campers, plants, gardening supplies, lumber, construction materials, gravel, stone and concrete products and furniture.
380. Town planning and the protection of city centres are highly likely to qualify as 
overriding public interest reasons, and therefore as valid objectives allowing 
certain restrictions to the freedom of establishment\textsuperscript{158}. As mentioned previously, 
such restrictions are acceptable if they meet the criteria of non-discrimination, 
necessity and proportionality. Whether or not that is the case with the Danish 
regulation depends, among others, on the factual situation and the impact of the 
regulation's application. If, as was the case in \textit{Commission v Spain}\textsuperscript{159}, the effect is 
to significantly affect the possibility of opening large retail establishments, the 
restrictions could potentially be considered as disproportionate.

381. In \textbf{Finland}, size matters in planning permits e.g. only outlets of a certain size 
might be permitted in the city planning of certain cities. There are no specific size 
limits in the legislation, but there may be restrictions set case by case in the city 
planning. The threshold size to which such limitations are set depends on several 
factors, including but not limited to volume of population in or environmental or 
historical value of the area in question, and is determined when city planning is 
decided upon.

382. For instance, in certain areas buildings cannot be higher than a certain limit as in 
some areas the aim is to maintain an attractive living environment and e.g. certain 
scenery instead of a maximum amount of building rights. These matters are 
considered case by case when e.g. city plans and/or amendments in the same are 
decided upon.

383. Under \textbf{French law}, there are no territorial restrictions or restrictions related to the 
location of retail establishment per se. However, where a project implies 
construction of a retail outlet with a surface between 300 and 1,000 m\textsuperscript{2} in 
municipalities of less than 20,000 residents, additional documents should be 
provided by the applicant together with the planning permit application and the 
municipalities may request the prior opinion of the CDAC before granting the 
building permit.

384. Furthermore, the location of the retail outlet may indirectly be taken into account 
when assessing the impact of the project on town planning, consumer protection 
and sustainable development.

385. In \textbf{Germany}, land use plans adopted at the regional level may impose territorial 
restrictions or restrictions related to the location of the retail establishment e.g. 
small communities are not allowed to set up local land use plans which allow retail 
outlets with a scale that is not in proportion with the number of residents of these 
communities.

386. At the federal level the \textbf{Federal Land Utilisation Ordinance}\textsuperscript{160} imposes major 
territorial restrictions on large scale retail outlets:

- Large scale retail outlets are only permitted in areas which are subject 
to specific local land-use plans or in core areas;

- Large scale retail outlets are only permitted in areas which specifically 
qualify for shopping centres and large scale retail outlets and which are 
subject to specific local land-use plans (Sondergebiete)\textsuperscript{161}, or in so-

\textsuperscript{158} In the case of \textit{Commission v Spain} the CJEU considered that "(...) 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" (CJEU, Judgment of 24 March 2011, in Case C-400/08, \textit{Commission v Spain}, paragraph 80).

\textsuperscript{159} In the specific circumstances of the case, the CJEU considered the specific restrictions laid down in the contested legislation, taken as a whole, to significantly affect the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia (Judgment, paragraphs 81 and 82).


\textsuperscript{161} Section 11 Federal Land Utilisation Ordinance.
called core areas (Kerngebiete). In other areas large scale retail outlets are not permissible, even if retail outlets in general are permitted in these areas.

387. This provision takes into account several types of impact, amongst others: impact on the environment, infrastructure, traffic, supply, town- and landscape and nature.

388. According to case law, the word "large" refers to outlets having a gross floor space that exceeds 800 m².

389. As a rule, the outlet’s impact is deemed to be material if its floor space exceeds 1,200 m². Deviations are, however, possible, taking into account the municipality’s organisation and size, consumer-oriented care for the population and the retailer’s product assortment.

390. Large-scale retail outlets may only be planned outside central supply areas if they do not provide city centre relevant assortments.

391. In addition, the respective land development plans and the subsequent regional plans of the majority of the regions (Länder) require that large-scale retail outlets with “city centre relevant core assortments” be planned only inside the central supply areas of the cities and municipalities. Most of the Länder have issued Assortment Lists which provide information on the city centre relevance of certain assortments, even though many cities have developed their own assortment lists. This results in the development plans usually requiring the municipalities to provide for areas for large-scale retail outlets in their local land-use plans, generally only in the city centres and not in rural areas.

392. Accordingly, large-scale retail outlets can only be planned and established outside those central supply areas if they do not provide city centre relevant assortments. There is, however, a de minimis exception for marginal goods, occupying less than 10% of the total sales area.

393. In addition, with the aim of protecting city centres the Federal Building Code provides that building projects, which are located within built-up areas (i.e. areas not covered by a local land-use plan) are only permissible if they do not have a detrimental effect on central supply areas of the respective municipality or other municipalities. That means a project is only permissible if it does not threat the functionality of central supply areas. The main objective of this regulation is the preservation of developed urban structures and the development of integrated sites also in the interest of a consumer-oriented supply. This regulation aims to prevent detrimental effects on the planned urban development and to strengthen the cities in their function as central supply areas.

394. Where the German regulation restricts the outlet’s size in view of the size of the population or of the municipality, it is likely to fall within the scope of article 15.2. of the Services Directive.

395. In order to be acceptable, the German regulation must pass the triple test of non-discrimination, necessity and proportionality. Whether or not that is the case with the German regulation depends, among others, on the factual situation and the impact of the regulation’s application. If, as was the case in Commission v Spain, the effect is to significantly affect the possibility of opening large retail

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162 Section 7 Federal Land Utilisation Ordinance.
163 As determined by the Federal Administrative Court (Bundesverwaltungsgericht), judgment of 24 November 2005 (Case Nr. 4 C 2/08, NVwZ 2010, 590).
164 On the basis of Section 11 (3) sentence 4 of the Federal Land Utilisation Ordinance.
165 Article 34 (3) of the Federal Building Code (Baugesetzbuch).
166 In the specific circumstances of the case, the CJEU considered the specific restrictions laid down in the contested legislation, taken as a whole, to significantly affect the possibility of opening large retail
establishments, the restrictions could potentially be considered as disproportionate.

396. Where the German regulation adds restrictions regarding the assortments that can be offered outside the central supply areas of cities or municipalities, and regarding the permissibility of building projects in built-up areas, it seems more difficult to justify the proportionality of the measures imposed in order to achieve the pursued objectives of city planning and city centre protection.

397. In Greece, a retail outlet licence granted at regional level by the competent prefecture authority, is required for retail outlets with a total net floor space:

- Exceeding 1.500 m² on the islands of Rhodos and Corfu, irrespectively of the distance of the retail outlet from a municipality;
- Exceeding 1.500 m² on the island of Crete, provided that the retail outlet is within a distance of 20 km from the centre of the capital or of each municipality;
- Exceeding 500 m² on the islands of Chios, Kos, Lesvos, Limnos, Samos, Syros, Zante, Kefalonia and Lefkada;
- Exceeding 200 m² on the other islands of Greece;
- Exceeding 2.500 m² in municipalities with a population of more than 100.000 residents, provided that the outlet is within a distance of 20 km from the centre of the municipality;
- Exceeding 1.500 m² in municipalities with a population of more than 20.000 and up to 100.000 residents, provided that the outlet is within a distance of 20 km from the centre of the municipality.

398. No retail outlet licence is required for the establishment of retail outlets, irrespectively of their net floor space, in the prefecture of Athens and Piraeus (though the islands of the Prefecture of Attica are excluded from such exemption).

399. Where the Greek regulation restricts the outlet's size in view of the size of the population or of the municipality, it is likely to fall within the scope of article 15.2. of the Services Directive.

400. In order to be acceptable, the regulation must pass the triple test of non-discrimination, necessity and proportionality. Whether or not that is the case with the Greek regulation depends, among others, on the factual situation and the impact of the regulation’s application. If, as was the case in Commission v Spain, the effect is to significantly affect the possibility of opening large retail establishments, the restrictions could potentially be considered as disproportionate.

401. Under Irish law, the focus of the planning process is on proper planning and sustainable development for the particular location. For example, in some locations that already have high traffic volumes, additional traffic impacts generated as a result of a new retail outlet may be a greater consideration than in other locations. Location is thus important in the application of the Retail Planning Guidelines, the purpose of which is to promote city/town centre vitality through a sequential approach to development. This is achieved through zoning in development plans and making provision for this within the retail strategies of local and regional

2. establishments on the territory of the Autonomous Community of Catalonia (Judgment, paragraphs 81 and 82).

168 In the specific circumstances of the case, the CJEU considered the specific restrictions laid down in the contested legislation, taken as a whole, to significantly affect the possibility of opening large retail establishments on the territory of the Autonomous Community of Catalonia (Judgment, paragraphs 81 and 82).
authorities. Locations which are outlined in the retail strategies as central retail areas, should attract more retail activity.

402. Retail strategies which are contained in local development plans will set out a retail hierarchy for the local authority area, along with guidance on the type and scale of retail appropriate for each level of the hierarchy. This inevitably means that the type of activity of the retail outlet will influence the location. For example and as provided in the Retail Planning Guidelines 2012, in order to minimise potential adverse impacts on towns/city centres, the range of goods sold in both existing and any future retail parks is generally tightly controlled and limited to truly bulky household goods or goods which are not portable by customers travelling by foot, cycle, or bus. This demonstrates an emphasis for high order convenience and comparison floor space in town/city centres. Also, large-scale retail warehouses which are capable of displaying a very wide range of bulky goods under one roof, together with a range of customer facilities require a regional, if not a national, population catchment. Accordingly, proposed exceptions to the 6,000 m² retail warehouse cap (see below) may be considered on the merits of individual development applications in the 5 NSS Gateway cities of Dublin, Cork, Waterford, Limerick/Shannon and Galway. In this way, for example, the type of activity interacts with such criteria as location and size.

403. The Retail Planning Guidelines 2012 set floor space caps for convenience retail, and retail warehousing. Planning decisions and retail strategies at a local and national level must have regard to these Guidelines. More precisely, planning authorities must, by law, and not just by practice, have regard to the provisions of the Retail Planning Guidelines when exercising their planning functions.

404. To the extent that the Irish regulation restricts the outlet’s size in view of the size of the population or of the municipality, it is likely to fall within the scope of article 15.2. of the Services Directive.

405. In order to be acceptable, the regulation must pass the triple test of non-discrimination, necessity and proportionality. Whether or not that is the case with the Irish regulation depends, among others, on the factual situation and the impact of the regulation’s application. If, as was the case in Commission v Spain, the effect is to significantly affect the possibility of opening large retail establishments, the restrictions could potentially be considered as disproportionate.

406. In Italy, different rules apply depending on the region.

407. In the region of Friuli Venezia Giulia, the Regional Council adopts guidelines in which it specifies the areas where large retail outlets can be established, the areas of historical interest, the areas subject to urban (re-)development and the commercial buildings subject to specific restrictions (i.e. restrictions related to specific buildings that have an important historical/traditional value; for example certain types of commercial activities can be prohibited in specific premises).

408. Under the regional law of Emilia Romagna, the Municipalities are entitled to identify areas of historical interest and require a mandatory distance between retail outlets in areas of historical interest and to impose limitations on the establishment of medium and large outlets in these areas.

169 In order to drive development in the regions, the National Spatial Strategy 2002-2020 (NSS) requires that areas of sufficient scale and critical mass be built up through a network of gateways and hubs. While the National Development Plan 2000-2006 identified Dublin, Cork, Limerick/Shannon, Galway and Waterford as existing gateways, the NSS designated four new national level gateways - the towns of Dundalk and Sligo and the linked gateways of Letterkenny/(Derry) and the Midland towns of Athlone/Tulamore/Mullingar (see: http://www.environ.ie/en/DevelopmentHousing/PlanningDevelopment/NationalSpatialStrategy/, consulted 10 September 2014).

170 Friuli Venezia Giulia Regional Law 15/2012.

171 Emilia Romagna Regional Law 14/1999.
409. Under the *Tuscany* regional law\textsuperscript{172}, the Municipalities are entitled to identify which areas are of historical interest and to impose limitations on the establishment of medium and large outlets in these areas. For example, new retail outlets may be established on the Ponte Vecchio (the most famous bridge in Florence, an area protected by UNESCO because of its historical value) provided they sell gold and jewellery\textsuperscript{173}.

410. The *Lazio* regional law\textsuperscript{174} authorises municipalities with a historical value and with a population exceeding 10,000 residents to allocate areas for the establishment of shopping centres with a surface not exceeding 2,000 m\textsuperscript{2} provided at least 50\% of the surface is occupied by small outlets.

411. Under the regional law of *Puglia*\textsuperscript{175}, the municipalities are entitled to determine which areas are of historical value and to impose restrictions (e.g. with respect to the surface area or the commercial activity undertaken) on applicants wishing to establish an outlet in those areas.

412. The regional law of *Calabria*\textsuperscript{176} entitles the Municipalities to impose certain restrictions with respect to the establishment of retail outlets in areas of historical interest (such as specific commodities-sector, minimum distance between outlets, dimension criteria and others) (e.g. with respect to the surface area or the commercial activity undertaken).

413. Under the regional law of *Sicilia*\textsuperscript{177}, the Municipalities are granted the power to identify the areas where medium and large retail outlets may be established, to determine the criteria for the protection of areas of historical value as well as for the protection of the environment.

414. As regards the establishment of retail outlets in areas of historical interest, the Municipalities are also entitled to impose certain restrictions (e.g. with respect to the surface area or the commercial activity undertaken). In any case, for the establishment of outlets in areas of historical value the application must also include a detailed description of the renovation works to the premises where the outlet will be located as well as a specific report about the impact of the outlet on the local small shops.

415. The region of Sicily seems to apply a *numerus clausus* system or quota system, i.e. a system that limits in each area the number of outlets occupying a certain surface.

416. This is illustrated by a case study conducted regarding the Italian retail establishment system (see 3.2.5. below).

417. Under *Luxembourg* law, a retail outlet of a certain size, i.e. having commercial surface area that exceeds 400 m\textsuperscript{2} requires a special authorisation. When applying for such authorisation, the retailer must submit to the authorities, amongst other things, a map showing the limits of the commercial zone and studies about the expenses of potential customers in this zone. The decision-making process regarding the special authorisation takes into account: the number of jobs the project is expected to create, the impact of the project on transport and traffic and its integration in the public transportation network and the impact or consequence of the project on the balance between urban areas and rural areas, mainly between the city centre and the city outskirts.

418. In *Malta*, the size of a retail outlet determines whether or not the outlet can be established in a residential or commercial area. Retail outlets smaller than 250 m\textsuperscript{2}
are allowed to be established in a residential area. However, retail establishments exceeding this threshold are only permitted in a commercial area.

419. Larger outlets are preferably situated in a town centre or on the edge of a centre where public transport is available. Furthermore, larger outlets are allowed in town centres, however this is decided by MEPA on a case by case basis after MEPA has reviewed the outlet plans and environmental impact. In practice, larger outlets are usually situated in the outskirts due to the fact that town centres in Malta are rather small.

420. In The Netherlands, the municipality is competent to determine for the entire territory of the municipality one or more zoning plans. The use of the plot of land needs to be included in the zoning plan.

421. Furthermore, the zoning plan adopted by the Municipality can provide rules concerning the (maximum) size of the outlet store. For example, the zoning plan of “Binnenstad Roermond” allows the establishment of a retail outlet near the city centre, however the zoning plan prescribes a maximum retail floor area of 26,000 m² for retail outlet stores.

422. In Poland, a zoning decision is issued in cases where there is no local plan for a given area. One of the criteria that must be met in order for such a decision to be issued is that at least one neighbouring plot accessible from the same public road has to be developed in a way similar to the planned investment (the so-called rule of good neighbourship).

423. Although it is not clear under the current regulations, the prevailing opinion is that large retail outlets, i.e. outlets with a floor space exceeding 2,000 m² can only be constructed if a local plan providing for retail development has been adopted for that specific area.

424. In some cases (depending on the location of the investment), some specific provisions may be applicable and some additional authorisations may be required from an investor. These are the permit to raise a given building in proximity of a monument/other object of cultural heritage or in proximity of environmentally vulnerable areas (e.g. NATURA 2000) or permit to localise an investment within the boundaries of a special economic zone (what makes an investor entitled to different kinds of incentives, mainly of fiscal nature).

425. In Romania, there are no territorial restrictions or restrictions related to the location of retail outlets at national level. However, at local level, Zonal Urbanism Plans and Local Urbanism Plans apply. These plans must be taken into account in the case of new projects in the course of construction authorisation and the urbanism certificate. Moreover, depending on the surface destined for retail and other aspects regarding the importance and impact of the project, more detailed planning may be required by the authorities issuing the urbanism certificate.

426. Furthermore, an urbanism certificate may require the establishment of Zonal Urbanism Plans or Local Urbanism Plans (should they not exist). In that case an opportunity permit is necessary before drafting the Urbanism Plan. The opportunity permit establishes (i) the territory to be governed by the Zonal Urbanism Plan; (ii) the development categories and any easements; (iii) the mandatory urban indicators that apply - minimum and maximum limits; (iv) the public facilities necessary to ensure the access to the site, parking lots, utilities; and (v) the transport capacities.

427. In the process of construction authorisation and the urbanism certificate, public authorities ensure a co-ordinated approach between the different authorisations (urbanism, construction and operating authorisations and permits).

428. Urbanism plans may be different for retail outlets developed in these areas for different reasons such as the public interest to develop a certain region and these criteria are taken into consideration in the decision-making process.
The justification presented for the differences based on the size of the construction includes several reasons such as greater impact on the environment and on the surrounding area from an economic and social perspective.

In Slovakia no explicit restrictions are imposed by the regulatory framework at national level. However, such restrictions could possibly be made in zoning plans issued by regions/municipalities. Restrictions could be derived from section 37 (2) of the Building Act, which requires the municipality to consider “the necessity of the planned measure in the territory” (e.g. of a planned construction/outlet) when deciding on a planning permit issue.

Furthermore, the law only requires a minimum distance as a technical requirement (i.e. minimal distance between 2 constructions).

In Slovenia, save for building in national parks and similar, the regulatory framework at the national level does not impose any general territorial restrictions or restrictions related to the location of a retail establishment. However, such restrictions and limitations are usually determined in local spatial regulations. The respective regulations usually determine whether a particular area is intended for construction (i.e. classify the area as agricultural land, construction land, etc.). If a construction is allowed in a particular area, the local regulations further determine the purpose(s) for which constructions in a particular area can be used and the conditions for construction of a building.

Furthermore the local spatial planning acts often determine that buildings in city centres are required to be of smaller size than buildings located in the city outskirts. By determining such construction conditions, the local spatial planning legislation limits the type of retail outlet that can be established on a specific location. For example one cannot construct a large scale supermarket on a location where the local spatial planning regulations only allow construction of a building with a relatively small floor space.

In Spain sometimes urban planning legislation, for which the autonomous communities have exclusive jurisdiction, establishes certain limitations on the opening of retail establishments. In this sense, each autonomous community with the requisite planning jurisdiction may establish, amongst others, the areas in which the retail establishments may be located.

In La Rioja, for example, criteria depend in part on the number of residents. The installation or expansion of large retail establishments for retail trade are subject to a commercial authorisation.

In Canarias and Islas Baleares maximum sizes vary depending on the island. There is no specific reference to the size of the islands’ territory nor to the size of their population.

The regulations of Cataluña provide for territorial restrictions. They have been ruled unconstitutional by the Constitutional Court but have been reconfirmed by the Catalan Parliament through the Law 2/2014 on tax, administrative and financial measures and on the public sector. The articles 9.3 and 9.4 of the Decree Law 1/2009 provide(d) that:

- Medium-sized and large retail outlets could only be established in urban areas and municipalities with more than 5,000 residents, or those municipalities that function as the capital of the region. Exceptionally, medium-sized retail outlets and large retail outlets could be established outside the urban areas if they meet a series of conditions;

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179 Comarca” has been translated as "region".
Large territorial retail outlets could only be established in the consolidated urban areas of municipalities with more than 50,000 residents, or similar municipalities, or municipalities that function as the capital of the region. Exceptionally, these retail outlets could be established outside the consolidated urban areas provided a series of conditions were met and the connection to the interurban public transportation was guaranteed.

438. This is illustrated by a case study conducted for Spain:

The reason for this action was, inter alia, the limitations to the freedom of establishment applicable to certain types of retail outlets without this being supported by any overriding reasons of public interest.

The Constitutional Court considered that:

- The additional restrictions imposed by Law 9/2011 were not properly justified. The restrictions of DL 1/2009 were based on the following objectives: the enhancement of the social cohesion, the obtaining of a territorial balance, reduction of mobility, environmental protection, and preservation of the agricultural land, historical and artistic heritage, and landscape;
- The wording of articles 9.3 and 9.4, as amended by article 114 of the Law 9/2011, were unconstitutional as the requirements foreseen in article 114 of the Law 9/2011, jointly considered, did not respond to urban planning, territorial ordination or environmental protection objectives, and thus, were not necessary by virtue of overriding reasons of public interest;
- The procedure took approximately 1 year as the ruling was issued on 21 November 2013. On 27 January 2014 the Catalan Parliament approved the Law 2/2014 (hereinafter, referred to as “Law 2/2014”) which purpose was to comply with the Constitutional Court ruling and render null and void the amendments provided by article 114 of the Law 9/2011.

Despite the foregoing, the Spanish Government considered that the Law 2/2014 does not comply with the ruling of the Constitutional Court. For this reason the Spanish Government announced its intention to file a new action of unconstitutionality before the Constitutional Court. However, in order to try to achieve an agreement and avoid a new claim, on 27 March 2014 a meeting was held by the “Sub-commission of Regulation Monitoring, Prevention and Solution of Conflicts of the Bilateral Commission Catalan Government-State Government” which decided, inter alia, to initiate the corresponding negotiations in order to solve the conflicts related to the above-referenced additional provision 27 of the Law 2/2014 and to designate a working group that would analyse and propose an appropriate solution.

In Sweden, generally there are no territorial restrictions. However, as explained above, the municipality when deciding on a planning permit, is required to make an assessment of the suitability of the retail establishment’s location. The assessment includes a consideration of the establishment’s effects on aspects such as

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as the competition and the current service supply in the surrounding area, as well as the proximity to streets, roads and public transportation.

440. In certain parts of Sweden it may be difficult to motivate opening a shop when there is a low population density. Consequently, municipalities are entitled to protect the city close-trade and block the establishments from external trade.

441. In the United Kingdom, and more precisely England and Wales and Northern Ireland, beside the requirements related to planning permission, there is no blanket restriction on the placement of a retail unit within certain distances from one another. The planning authorities will be able to take into account, when coming to their decision, how the proposal of a retail unit will affect the local area.

442. In England and Wales, any application will be assessed on its merits. Broadly speaking, if a site is located within a town or district centre, it has a much stronger chance of securing planning permission than if it is located outside such centres. The size and format of the development alone will not usually dictate the outcome, though, of course, during the Planning Officer's investigations and report making and Committee stage, regard shall be had to the development ‘in the round’ including but not limited to: size, architecture, spatial planning and the appropriateness of its proposed location. By and large, location is the criterion which attracts the greatest weight during decision making but it is not the sole focus of the decision makers.

443. However, it should be noted that, in England and Wales, the National Planning Policy Framework (NPPF) includes a policy (applied through a sequential test) that planning authorities should require applications for main town centre uses to be located in town centres, then in edge of centre locations as opposed to out of town locations. For these reasons, out of town retail outlets will require further justification. Also, an applicant for an edge of centre or out of centre site has to demonstrate that there are no other sites available which are closer to the town or district centre. Edge of centre means, for retail purposes, a location that is well connected and within 300 metres of the primary shopping area. The trading impact on other retailers may also be assessed. This is to protect the diminishment of town centre usage.

444. Furthermore, when assessing applications for retail developments outside of town centres, which are not in accordance with an up-to-date Local Plan, local planning authorities should require an impact assessment if the development is over a proportionate, locally set floor space threshold (default of 2,500 m²). The purpose of the test is to ensure that the impact over time (five-ten years) of certain out of centre and edge of centre proposals on existing town centres is not significantly adverse.

445. In Northern Ireland also, a policy for town centres and retail developments is applied and is a material consideration. Town centres should normally be the first choice for major new retail developments and DOE Planning will require a Retail Impact Assessment to be carried out in assessing proposals for major retail development (over 1,000 m² gross retail floor space) in locations outside a town centre, or where appropriate, outside the defined primary retail core.

446. In Scotland, a “sequential approach” is set at national level which should be used when selecting locations for all retail premises, unless the Development Plan indicates otherwise. The purpose of this policy is to protect town centres and to prevent them suffering from the effect of large out of town shopping centres drawing consumers away from the town centre, thus potentially damaging the economy of town centres.

447. There is no limit in relation to population/density, but the SPP sequential test directs development to town centres.
3.2.4 German assortment law

448. The German regulatory system, as explained in the previous paragraph, limits the establishment opportunities for large retail outlets having a gross floor space that exceeds 800 m² provided they can have an effect on the realisation of the objectives of regional development and planning and/or on the urban development and organisation.

449. Large-scale retail outlets are only permitted in areas which are subject to specific local land-use plans, with the determination large scale retail outlets or, within built-up area, in so-called “core areas”.

450. In order to assess whether a large-scale retail outlet may have an effect on the development of central supply areas in the city the assortment of goods of the large-scale retail outlet must be considered. Very often, large-scale retail outlets with “city centre relevant core assortments” are only allowed inside the central supply areas of the cities and municipalities. Hence, large-scale retail outlets may only be planned outside those central supply areas if they do not provide city centre relevant assortments (except for “marginal goods”, which means that those goods must generally have a share of less than 10% of the total sales area).

451. According to a certain point of view, a ban could also be identified in the German system regarding establishment of large retail outlets combined with the regulations on the assortments that can or cannot be sold in specific locations, in certain German regions. Prohibiting the sale of certain products in certain locations would, according to this opinion, have the effect of a ban on a certain type of retail establishment.

452. Whether or not this system qualifies as some sort of ban, is a matter of interpretation. In any event, the system entails a severe restriction of the freedom to establish relatively large retail outlets in certain areas, or, looking at it from a different perspective, on the assortment of goods these large outlets are allowed to sell.

453. This is illustrated by a case study that was conducted regarding the German retail establishment system (see above, p. 88-89).

454. In order to be acceptable, the regulation must pass the triple test of non-discrimination, necessity and proportionality. Whether or not that is the case with the German depends, among others, on the factual situation and the impact of the regulation’s application. If, as was the case in Commission v Spain, the effect is to significantly affect the possibility of opening large retail establishments, the restriction could potentially be considered as disproportionate. Comments received from stakeholders allege that this would be the case.

3.2.5 The regional legislation of Molise and Sicily (Italy)

455. Another Member State that seems to have some sort of ban is Italy.

456. Under the regional legislation of Molise\textsuperscript{181}, large retail outlets can only be established in municipalities with more than 10.000 residents. The municipalities are entitled to refuse the establishment of a large retail outlet with a gross floor space larger than 5.000 m² unless this outlet is a shopping mall in which small and medium-sized outlets occupy at least 50% of the total gross floor space. In other words, the regional law permits the municipalities denying the authorisation to establish retail outlets larger than 5.000 m² without being obliged to provide the applicant with specific reasons. This refusal is deemed to be justified by overriding reasons of public interest related to the urban planning, as set by the guidelines of the Molise region, but comes rather close to a ban.

The region of Sicily seems to apply a *numerus clausus* system or quota system, i.e. a system that limits in each area the number of outlets occupying a certain surface.

This is illustrated by a *case study* that was conducted regarding the Italian retail establishment system (see above, p. 91).

Under the regional law of Liguria\(^{182}\), with respect to areas of historical interest, small towns as well as towns located in the mountains, the Region grants the Municipalities a wide decision-making power. More particularly, the Municipalities are entitled to identify which areas are of historical interest and to impose limitations on the establishment of medium and large outlets in these areas. In other words, in this case the municipalities are entitled to provide restrictions and limitations such as: commodities-sector, dimension limits and others.

Because Italian regulations restrict the outlet’s size in view of the size of the population or of the municipality, require a minimum distance between outlets or take into account the outlet’s impact on the existing local small shops, they are likely to fall within the scope of article 15.2. of the Services Directive.

In order to be acceptable, the regulations must pass the triple test of non-discrimination, necessity and proportionality. Whether or not that is the case with the Italian regulations depends, among others, on the factual situation and the impact of the regulation’s application. If, as was the case in *Commission v Spain*, the effect is to significantly affect the possibility of opening large retail establishments, the restrictions could potentially be considered as disproportionate.

### 3.3 Legal analysis of the Member States’ authorisation schemes

Our descriptive analysis (see above: Chapter 2) has shown that the Member States’ regulations require several authorisations or permits. In some of the Member States retailers have to deal with a retail specific authorisation requirement. In all Member States they have to refer to planning and building regulations.

The Services Directive does not interfere with the Member States’ planning system, in so far as they do not contain requirements which specifically regulate retail activity and in, particular do not pursue economic aims but serve overriding public interest reasons. In this respect any regulation which makes the granting of authorisation subject to an economic test or to an assessment of the activity’s economic effects, requires careful scrutiny.

The Services Directive, requires reviewing of authorisation schemes to make them compliant with Articles 9 to 13 of the Services Directive Member States have to ensure

- That the authorisation scheme is necessary for an overriding reason relating to the public interest, and
- That the objective pursued cannot be attained by means of a less restrictive measure (proportionality).

This may create a presumption that there is no absolute need for a prior authorisation requirement and that less restrictive measures may well be suitable and effective in order to realise the objectives pursued.

In the case of *Commission v Spain* the CJEU considered that “(...) restrictions relating to the location and size of large retail establishments appear to be

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\(^{182}\) Liguria Regional Law 1/2007.
methods suitable for achieving the objectives relating to town and country planning and environmental protection, relied on (...)."

467. The CJEU also ruled that 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”.

468. The appropriateness and proportionality of the specific retail authorisation requirement will depend, among others, on the exact details of the requirement (authorisation or mere notification), on its (more or less significant) impact, on the procedure, on the time, effort and means the applicant has to invest in order to be authorised to start operating the retail outlet.

469. If the procedure is complex, time consuming and costly, if its restrictive impact, for example regarding the outlet’s location and/or size, is significant, if several additional requirements, for example the performance of a retail impact assessment, are made the restriction will be more difficult to justify.

470. When a Member State sets up an authorisation scheme, this should be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. These criteria shall be:
- Non-discriminatory;
- Justified by an overriding reason relating to the public interest;
- Proportionate to that public interest objective;
- Clear and unambiguous;
- Objective;
- Made public in advance;
- Transparent and accessible.

471. The authorisation must be granted as soon as it is established, in the light of an approximate examination, that the conditions for authorisation have been met.

472. All Member States pursue more or less the same objectives (town and country planning, urban development, protection of (viability and vitality of) city centres, protection of the environment, and the like). Now it appears that the majority of the Member States, while pursuing these objectives, do not see the need to impose a specific authorisation requirement, whereas some Member States do.

### 3.3.1 Overriding reasons relating to the public interest

473. Knowing that certain restrictions to the freedom of establishment can be acceptable if (among other conditions) they are based on one or more “overriding reasons relating to the public interest”, the Member States invoke several of such reasons to justify the permit and authorisation requirements and restrictions caused by their regulations.

474. Regarding the concept of ‘overriding reasons relating to the public interest’ to which reference is made in certain provisions of the services Directive, the Directive’s preamble states that it “has been developed by the Court of Justice in

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183 CJEU, Judgment of 24 March 2011, in Case C-400/08, Commission v Spain, paragraph 80. For further information, see pages 22 and following.
185 Art. 10.1. Services Directive.
186 Art. 10.2. Services Directive.
187 Art. 10.5. Services Directive.
its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

475. The case studies conducted for the 10 selected Member States reveal that the most important overriding reasons invoked are:
- The protection of the environment;
- The protection of the urban environment;
- The protection of public policy / public security;
- The preservation of the historical, cultural and artistic heritage;
- The protection of sustainable development;
- The protection of consumers;
- The protection of workers;
- The protection of social policy;
- The protection of human health; hygiene;
- Safety;
- The protection of transport and mobility;
- The protection of city centres / central supply areas (i.e. urban planning).

476. Occasionally the following reasons are also given as justification:
- The protection of economic development;
- The protection of competition;
- The protection of fairness of transactions and companies.

477. The protection of the environment and the protection of the urban environment are often invoked by the authorities of the 10 selected Member States and these overriding reasons mostly relate to planning in general (urban planning, territory planning).

478. The protection of human health and hygiene, the protection of transport and mobility and the protection of city centres are invoked as overriding reasons of public interest by all of the selected Member States.

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188 Services Directive, Preamble, paragraph 40.
479. Some Member States have quite a long list of overriding reasons of public interest (the United Kingdom, Slovenia, Sweden, Germany and Poland), as compared to the other Member States (Denmark, Spain, The Netherlands, Slovakia and Italy).

### 3.3.2 Specific retail authorisation schemes and planning regulations

480. The Member States that require a retail specific authorisation are: Belgium, Croatia, France, Greece, Hungary, Italy (Region of Friuli-Venezia-Giulia), Luxembourg, Portugal, Romania, Slovakia and Spain (certain regions).

481. At first sight, it seems that these Member States impose an additional requirement on the establishment of retail outlets or of certain retail outlets, as compared to the majority of the Member States. However, our descriptive analysis (see above: Chapter 2) shows this is not necessarily the case. Indeed, some of these Member States do not require a planning permit, which is a requirement made in many jurisdictions, and serves more or less the same objectives. Further analysis shows that all Member States require compliance with planning regulations and with the zoning plans adopted under those regulations. However, this does not always imply the need for a planning permit: in several Member States compliance with planning is included in the building permit procedure.

482. As illustrated in the previous chapter, planning regimes, while pursuing the same objectives, differ greatly across Member States.

483. Taking into account that the Member States justify the authorisation schemes by means of several, rather broad, public interest reasons, the test of the schemes will be in their necessity and proportionality. The higher the number of authorisations and permits required, the more difficult it will be for a Member State to justify the necessity and proportionality. Knowing that the number of authorisations and permits required varies from 1 to 5 (see above: Chapter 2), the requirement of 5 permits may be difficult to justify.

484. Even then, the restrictive effect of the authorisation schemes will depend to a considerable extent on the complexity, length and costs of the procedure(s), the number and burden of additional requirements, for example the performance of a retail impact assessment.

### 3.3.3 Environmental regulations

485. All Member States have adopted environmental regulations, which may be applicable to the establishment of retail outlets just as it applies to all other businesses, depending on their potential impact on the environment.

486. As a rule, most retail outlets can be presumed not to have a material adverse impact on the environment. However, depending on certain factors, such as their size, traffic generated, availability of public transport, waste generated, certain retail outlets (for example: shopping centres, hypermarkets, retail parks) may potentially have a considerable impact on the environment.

487. In several Member States, such potential impact results in protective measures, which may potentially have the effect of restricting the freedom of establishment, such as the requirement to perform an environmental impact assessment or the requirement to be granted an environmental permit.

488. With respect to the requirement to obtain an environmental permit, this is again an authorisation requirement similar to the ones discussed above. We refer to the criteria explained above.

489. As for the requirement of an environmental impact assessment (EIA), the performance of an EIA and (the absence of) a certain outcome will typically qualify as a condition for the granting of an authorisation (be it a retail authorisation, a planning permit, an environmental permit or even a building permit).

490. Except decisions granting the authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, must be fully
reasoned and must be open to challenge before the courts or other instances of appeal.  

491. Half (+/-) of the EU Member States require an environmental permit for the establishment of certain retail outlets: Austria, Belgium, Cyprus, Finland\(^{190}\), France, Hungary, Ireland, Italy, Malta, (the Netherlands – special)\(^{191}\), Poland, Portugal, (Romania), Slovakia, Slovenia, the UK (England & Wales).  

492. Nearly all Member States require an EIA for at least some of the retail outlets: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands (special)\(^{192}\), Poland, Portugal, Romania, Slovakia, Slovenia, Spain (Asturias), the UK.  

493. The vast majority of the Member States require an EIA in certain circumstances or under certain conditions. In most of the Member States the requirement only applies to large retail outlets, such as shopping centres, hypermarkets, retail parks.  

494. Even though the objectives pursued are the same for all jurisdictions, there are again certain considerable differences between the various legislations. For example, some Member States require (for all or some of the retail outlets concerned) merely a preliminary screening rather than a full-fledged in-depth impact study.  

495. Such differences can be important factors when the CJEU scrutinizes the proportionality of the restriction(s) resulting from the requirement to perform an EIA.  

496. Additional factors will be, among others, the complexity of the EIA required, whether or not it is time consuming and costly, whether the EIA is commissioned (and financed) by the relevant public authority or by the applicant.  

### 3.3.4 The authorisation procedure  

497. Complex, unclear or very lengthy or costly authorisation procedures can be dissuasive for a retailer wishing to establish. They can have the effect of creating a barrier to establishment.  

498. Therefore, the Services Directive provides for a set of rules with respect to authorisation procedures\(^{193}\):  

- Authorisation procedures and formalities must be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.  

- Authorisation procedures and formalities must not be dissuasive and must not unduly complicate or delay the provision of the service. They must be easily accessible and any charges which the applicants may incur from their application must be reasonable and proportionate to the cost of the authorisation procedures in question and not exceed the cost of the procedures.  

- Authorisation procedures and formalities must provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period should run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period could be extended once, by the competent

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\(^{189}\) Art. 10.6. Services Directive.  

\(^{190}\) If an environmental permit is required, it is an integrated (all-in-one) permit.  

\(^{191}\) Special case: the environmental permit is substituted by a notification of incorporation.  

\(^{192}\) Performing an EIA is not a statutory requirement, but is often required in practice.  

\(^{193}\) Article 13 Services Directive.
authority, for a limited time. The extension and its duration must be duly motivated and must be notified to the applicant before the original period has expired.

- Failing a response within the time period set or extended in accordance with paragraph 3, authorisation must be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

- All applications for authorisation must be acknowledged as quickly as possible. The acknowledgement must specify the following:
  - The period referred to in paragraph 3;
  - The available means of redress;
  - Where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.

- In the case of an incomplete application, the applicant must be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period referred to in paragraph 3.

- When a request is rejected because it fails to comply with the required procedures or formalities, the applicant must be informed of the rejection as quickly as possible.

499. As mentioned above, the Services Directive also requires regulations to preclude the competent authorities from exercising their power in an arbitrary manner\(^\text{194}\) and that competing operators cannot be directly or indirectly involved, including within consultative bodies, in the granting of authorisations or in the adoption of other relevant decisions\(^\text{195}\).

500. The barriers resulting from the procedure identified by the Legal Study can be divided in the following categories:

- Lack of consistency and centralisation of power;
- Involvement of third parties in the decision-making process;
- High costs;
- Lengthy decision-making process;
- Lack of transparency and publicity of the decisions.
- Discretionary powers of the decision-making authorities.

501. The application of urban planning regulations to retail establishment, and the application of urban planning objectives as reasons of public interest justifying restrictions to the freedom of retail establishment make clear that Member States pay considerable attention to the pursuit of certain objectives of general interest. In particular, many Member States seek to protect their city centres, with the aim of strengthening the urbanity of the cities, safeguarding the viability of the cities by limiting traffic, avoiding that (smaller) retail outlets move out of the city centre causing vacant shops and deserted city centres. In other words, they strive to develop, create or maintain attractive city centres. However, these regulations

\(^{194}\text{Article 10.1. Services Directive.}\)
\(^{195}\text{Article 14, 6) Services Directive.}\)
must be proportionate to the objectives pursued and not unduly prevent the establishment of retail outlets.

502. In this respect, procedures seem to raise quite some (potential) issues:

503. Procedures are often very complex and, in particular for larger retail outlets, require several preliminary steps to be taken (such as oral hearing, on-site inspection, comments from the public at large, consultation of other authorities and/or of third parties), as well as market studies and/or impact assessments to be performed;

504. If several authorisations and/or permits are required, as is the case in many jurisdictions, often several procedures have to be followed, with consecutive applications having to be made with various authorities. Some Member States have introduced some simplification through the all-in-one or integrated permit. Instead of having to apply for several permits, all requirements are integrated into one single permit (even though the content may vary). In some Member States, the establishment process is facilitated, in addition, through a one-stop-shop system with one single authority deciding on all required authorisations;

505. Procedures are also, partly as a result of their complexity, quite lengthy and costly. In several cases the time frame as provided in the legal framework is not complied with, and failure to respond in due time is not adequately sanctioned (i.e. by considering the authorisation granted);

506. Sometimes the requirements go as far as to impose some sort of ban on the establishment of (certain) retail outlets, or types of retail outlets;

507. Sometimes the authority deciding on the application has discretionary powers, which makes the outcome rather unpredictable, or sometimes leads to additional conditions being imposed on the applicant;

508. Sometimes there is a lack of transparency as regards the procedure and its requirements, and/or as regards the decisions adopted, and the criteria applied, by the authorities, which adds up to the unpredictable nature of the outcome, and makes it difficult to understand the reasons justifying the decision, and/or to appeal the decision;

509. Sometimes there is no possibility to appeal the decision, nor to apply for judicial review;

510. Regulations tend to be rather complex, and complexity often increases because the regulation is adopted at various levels (federal or national and regional, and even municipal or local), which means the rules, and their application, may vary significantly from region to region, or even from municipality to municipality.

511. As a result, it cannot be excluded that in some Member States the procedures impose requirements that are to be considered as disproportionate, i.e. requirements that go beyond what is necessary in order to attain the objective pursued. As a result, they may have a dissuasive effect and may unduly complicate and delay the establishment of (certain) retail outlets.

512. In these matters, we have observed significant differences between the Member States as regards the nature, number and scope of requirements imposed on retailers wishing to establish a (relatively large) retail outlet.

### 3.4 Summary and concluding remarks

513. In this Chapter we have examined retail establishment regulations in light of their compliance with the Services Directive.

514. First of all, our analysis shows that the regulatory framework of some of the Member States (or divisions thereof) includes some elements of economic assessment of the proposed development (e.g. potential to increase competition, impact on competitors or on incumbent retailers, potential to attract further consumers, catchment area, turnover, trade draw, impact on market demand, commercial synergy, promotion of economic regeneration, increase of
employment, ...) or requests for economic data to be provided or certain assessments which include or may include economic data to be performed (e.g. retail impact assessments, trade impact assessments, “suitability” assessments, market studies). In some cases, the requirement for economic data may be questionable. When a retailer who files a request for permission to establish a retail outlet is required to provide economic data there is at least a risk that these data may (also) be used for an economic assessment of the retail establishment project.

515. In this context it is crucial to determine the relationship between those two elements: economic factors and overriding public interest reasons, in order to determine whether or not the request for economic data is justified in the light of Article 14.5 of the Services Directive.

516. Our analysis also detected a few cases where Member States potentially make access to, or the exercise of, a service activity in their territory subject to compliance with certain regulations and procedures in which competing operators may (indirectly) be involved.

517. Then we have analysed the regulatory framework for requirements that are subject to evaluation under article 15 of the Services Directive.

518. In this respect, our analysis shows that the Member States’ regulations sometimes contain restrictions that potentially qualify as “territorial restrictions” (restrictions on retail in a particular geographical area, based on the population (in actual numbers or density) of that area or the minimum distances between retail outlets) or as “quantitative restrictions” (restrictions limiting the number of providers that can exercise their activity in that area).

519. We have also detected some regulations that potentially require a minimum number of employees, or at least provide for a system that comes close to such a requirement.

520. A limited number of jurisdictions present regulations that impose a ban, or could be interpreted as creating some sort of ban on (certain) retail outlets, or on the assortment of goods sold by such outlets.

521. The Member States’ authorisation schemes and procedures seem to be based on one or more overriding reasons relating to the public interest (in particular urban planning and protection of the environment). For some Member States, however, the requirements could potentially fail to pass the necessity and/or the proportionality test, e.g. because of the high number of required authorisations and permits, the complexity, length and costs of the procedure, and/or the number and burden of additional requirements (such as impact assessments or studies that must be conducted).

522. Our legal analysis shows that, as a rule and despite the significant differences, the regulatory framework in the Member States regarding the establishment of retail outlets tends to be (very) complex. Moreover, the application procedure(s) to be followed in order to have a decision on the authorisation(s), permit(s) and licence(s) required in order to be allowed to establish a retail outlet is (are) usually quite burdensome. In addition, the regulations often provide for a series of specific requirements and regulations, developed specifically for the establishment of retail outlets.
4. Impact assessment

The impact assessment of the restrictions is based on a theoretical analysis, the analysis of the possible links between potentially restrictive regulatory features and certain economic variables, as well as findings from the interviews with stakeholders. The theoretical analysis provides a conceptual framework to assess the impact of regulatory restrictions for retail establishments. The economic analysis seeks to identify a relationship between regulatory aspects and market structure and dynamics. Finally stakeholders’ interviews complete this analysis by providing practical insights on issues with retail establishments.

4.1 Theoretical analysis

This section presents a state-of-the-art literature review on the effects of barriers to entry. It first presents the general framework as well as the issues at stake, before covering the consequences of restrictions to retail establishment in terms of market structure, economic impact, and consumer welfare.

4.1.1 General framework

The regulation of entry into retail trade can have contrasting effects on citizens. On the one hand, the theoretical literature has long demonstrated that entry barriers distort competition by favouring incumbents. More concentration can lead to a decrease in efficiency and innovation, with potential impact on consumer welfare through lower employment, higher prices, and a lower degree of variety of goods available. On the other hand, entry restrictions are often advocated to pursue broader objectives of general interest than sole economic efficiency. Regulation of entry, particularly that of large stores, is typically used as an urban planning tool. For example, in the absence of entry restrictions small stores may disappear from the city centres with adverse consequences on attractiveness of such centres and the ability of some categories, such as the elderly, to have access to shops. Similarly, if shops tend to locate far away from city centres, consumers may have to travel long distances to shop, which may increase car traffic, reduce city attractiveness and cause harm to the environment.

In summary, regulation in retail trade is a trade-off between contrasting effects. This is a difficult task, as we find highly asymmetrical effects of regulation. In fact, a fairly consistent set of empirical studies has shown that the stricter economic predictions are borne out in the data: a more stringent entry regulation decreases economic efficiency. In contrast, very little is known on the effectiveness of entry restrictions in pursuing broader objectives of general interest, as very few studies have tackled this ambitious and difficult question.

4.1.1.1 Economic effects of barriers to entry

Entry barriers have a direct effect on the economic equilibrium. First, barriers to retail establishment restrain competition by creating de-facto monopolies or oligopolies, which are common forms of market distortions and inefficiencies. Secondly, restrictions prevent the increase in efficiency and the ensuing increase in economies of scale that is typically achieved by larger stores. Empirical evidence in the literature seems to back the idea that there is a clear negative relationship

between productivity and regulation. Unregulated entry fosters competition which leads to a decrease in price which in turn increases consumer welfare, an increase in variety and an increase in innovation which can be measured through investment in technology.

### 4.1.2 Rationale for restricting retail establishment

Various overriding reasons of public interest are invoked to restrict the freedom of establishment. Most Member States invoke more or less the same or similar reasons. Most of these relate to urban planning (city/town planning, protection of city centres, protection of the urban environment) and protection of the environment. The protection of the Member State’s or the city’s cultural, historical or artistic heritage also often serves as justification. Further motives presented by the Member States are: (public) health and safety, protection of consumers or of workers.

Moreover, when entry regulations take the form of restricting areas where stores can open, consumers benefit from the associated reduction in “search and transport cost” of comparing prices.

### 4.1.2 Potential impacts of removing barriers to entry

#### 4.1.2.1 Effect on the market structure (competition)

As already highlighted, the economic equilibrium is likely to be distorted by barriers to entry. The market structure is expected to be impacted by regulation, with fewer stores than in the non-distorted equilibrium.

Table 12 below provides empirical evidence of the impact of entry barriers on competition.

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on competition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Griffith and Harmgat, 2008</td>
<td>Simulations show that removing barriers “decrease the probability that the market equilibrium is a monopoly from 16.2% to 14.9% and increase the probability that the equilibrium will have more than one big store”.</td>
</tr>
<tr>
<td>Klapper et al., 2006</td>
<td>Multiple simulations show a negative impact of barriers to entry, measured as a fixed cost, on the creation of new firms. A one standard deviation increase in entry costs raises the average size of entrants by € 078M, which almost doubles the size of the median entrants (€ 0.87 M)</td>
</tr>
<tr>
<td>Maican and Orth, 2013</td>
<td>Strong competitive effects from large stores, decreasing the entry costs for small and large stores results in higher entry rates (respectively 4% and 1% on average) and lower long-run profits (respectively 4% and 3% on average). An additional large store decreases short-run and long-run profits about 4 times more than an additional small store</td>
</tr>
<tr>
<td>Nishida, 2013</td>
<td>Eliminating regulations would increase the total number of convenience store outlets in Okinawa, Japan, by 11%-14% in zone 1 (where no store can open) and 2%- 3% in zone 2 (where stores must seek approval to open)</td>
</tr>
</tbody>
</table>

---

198 Dube et al., 2007.
200 Schivardi and Viviano, 2010.
201 Basket and Noel, 2012.
533. The literature presented in the table above seems to back the conclusion that a reduction in barriers to entry fosters competition (Maican and Orth, 2013, Nishida 2013). As Basker and Noel (2012) note, regulations “limit or delay entry, increase costs, create opportunities for collusion, or affect competition in other ways”.

534. In terms of store size, while Griffith and Harmgat (2008) show that planning regulation leads to a decrease in large stores, looking at entry barriers in general. Klapper et al. (2006) find that potential new firms are excluded from the market. They highlight a negative relationship between entrepreneurial endeavours and barriers to entry, highlighting the obstruction of competitive effects. They note that “entry regulations indiscriminately screen out small young firms and inhibit the disciplinary effects of competition”, which is notably due to the costs of compliance such as fulfilling bureaucratic requirements to register a new firm, complying with labour laws, or accessing financing.

4.1.2.2 Effect on productivity

535. The following papers tackle the effect of regulation on productivity in selected E.U. countries.

Table 13: Effect on productivity

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on productivity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daveri et al., 2013</td>
<td>Reforms in the service sector, including retail, in France and Italy would yield to a respective increase in productivity of 3.5% and 3%</td>
</tr>
<tr>
<td>Maican and Orth, 2012</td>
<td>An extra retail store is associated with an increase in median productivity of about 2%</td>
</tr>
<tr>
<td>Schivardi and Viviano, 2010</td>
<td>Moving from the first to the third quartile of the regulation distribution decreases productivity by about 3%</td>
</tr>
</tbody>
</table>

536. The results of Daveri et al. (2013) and that of Schivardi and Viviano (2010) concur in concluding that regulation is associated with substantial labour productivity losses. The magnitude of these effects will depend on the size of the barrier.

537. Using data for the US in the 1990s, Foster et al. (2002) explain such increase in productivity in a more competitive setting, observing in the data that “aggregate productivity dynamics in retail trade are driven by the reallocation of inputs and outputs from less productive to more”. Moreover, most of the increase in productivity comes from more efficient entrants displacing less productive incumbents, which is a typical case of Schumpeterian creative distraction. Such reallocation is clearly dampened by entry restrictions which protect incumbents from potential entrants.

538. The literature shows that the productivity gap between the EU and the US has been significant, in the retail sector (Schivardi and Viviano, 2010, Maican and Orth, 2012). One reason for this productivity gap may be a less regulated market.
4.1.2.3 Effect on innovation

539. The following paper underlines the effect of regulation on innovation.

Table 14: Effect on innovation

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on innovation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schivardi and Viviano, 2010</td>
<td>Negative correlation between barriers to entry and innovation, measured through investment in information and communications technology (ICT). Moving from the first to the third quartile of the regulation distribution decreases innovation between 1% and 4%</td>
</tr>
</tbody>
</table>

540. The literature insists on the link between innovation and productivity. The economic theory says that an increase in competition will lead to better economic results because competition fosters innovation (Schivardi and Viviano, 2010). Whereas a new entrant must innovate to establish itself in the market, the incumbent has to innovate as well not to lose too much market power, or at least to adopt the next entrant’s best practices (Foster, 2002). Similarly, Schivardi and Viviano (2010) write “in the case of retail trade, process innovation is the main determinant of productivity growth”

541. Daveri et al. (2013) go a step further and show that economic performance does increase with deregulation, but only up to the point where the costs of research and development incurred by liberalisation become greater than the decreasing profits that result from a more competitive environment. Such Schumpeterian effect takes the shape of an inverted U curve.

4.1.2.4 Effect on job creation

542. The table below lists several papers analysing the effect of regulation on employment in the retail sector, both in the EU and in the US.

Table 15: Effect on job creation

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basket, 2004</td>
<td>Upon entry, Walmart generates 100 retail jobs. The long-run net gain is of about 50 jobs. Also, wholesale employment declines by about 20 jobs</td>
</tr>
<tr>
<td>Bertrand and Kramarz, 2001</td>
<td>10% loss in retail employment attributed to entry regulation</td>
</tr>
<tr>
<td>Neumark et al., 2005</td>
<td>In the retail sector, Walmart reduces employment on average by 2% to 4% whereas it increases total employment by 2% (the later result is not as robust as the former).</td>
</tr>
<tr>
<td>Neumark et al., 2007</td>
<td>Walmart store openings reduce retail employment by about 2.7%</td>
</tr>
<tr>
<td>Schivardi and Viviano, 2010</td>
<td>Moving from the first to the third quartile of the regulation distribution decreases hours worked in large stores by around 5%</td>
</tr>
<tr>
<td>Viviano, 2010</td>
<td>Entry barriers are associated to a 0.8% decline in sectorial employment</td>
</tr>
</tbody>
</table>

543. The literature on the effects of barriers to entry on employment is inconclusive.

544. A side effect related to the increase in productivity that large stores can achieve is a compression in labour cost, which can lead to an increase in employment, as highlighted in Bertrand and Kramarz (2001), as well as in Viviano (2005) and in Schivardi and Viviano (2010).

545. Studies in the US somewhat differ in conclusions. Basker (2004) finds a net gain of 50 jobs, whereas others Neumark et al. (2005, 2007) find that the impact on total employment is unclear. It is likely that more structural differences between the EU and the US, beyond the scope of this study, explain such difference.
4.1.2.5 Consumer welfare

Consumers can benefit from increased competition because it leads to lower prices and permits access to a greater variety of products. On the other hand, individuals can benefit from entry barriers if they lead to an improvement in the quality of life, through access to local convenience stores or a better protection of the environment.

4.1.2.5.1 Effect on prices

Consumer welfare is negatively impacted by higher prices found in non-competitive markets: as Basker and Noel (2012) write, “higher market power can ultimately increase the price that consumers pay”.

Schivardi and Viviano (2011) also identify such negative relationship between consumer welfare and entry barriers, noting that “regulation has a substantial social cost” and notably that “liberalisations are beneficial for low-income people”. Those gains in consumer welfare are also noted by Hausman and Leibtag (2005), who find that households substantially benefit from the presence of supercentres “both in terms of food expenditure and in terms of overall consumer expenditure”, arguing that “low income households benefit the most”.

Hausman and Leibtag (2005) also find greater benefits for lower income customers, because not only do they tend to shop more at low-priced outlets, they also have a higher “compensation variation” than higher-income households.

The literature presented below shows the expected rise in incumbent prices due to reduced competition.

Table 16: Effect on price

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on prices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Griffith and Harmgart 2008</td>
<td>On average, the prices of food products in a competitive market are 1.9% lower than prices in monopoly market. Regulations incur a cost for customers of nearly £11m per year</td>
</tr>
<tr>
<td>Schivardi and Viviano, 2010</td>
<td>Moving from the first to the third quartile of the regulation distribution increases prices by 0.3%</td>
</tr>
<tr>
<td>Basker, 2005</td>
<td>In the long run, Walmart entry reduces retail prices by about 7% to 13%. The immediate price effect upon entry is of about 1.5% to 3%</td>
</tr>
<tr>
<td>Hausman and Leibtag, 2005</td>
<td>The average exact compensating variation from the indirect price effect(^{202}) is estimated to be about 4.8% of food expenditure across markets and time periods</td>
</tr>
</tbody>
</table>

Both Schivardi and Viviano (2010) and Griffith and Harmgart (2008) find the relationship between competition and price to be small in absolute value, but negative.

Basker (2005) highlights two mechanisms through which a large retailer can lower prices. First, the “aggregate mechanism” refers to the fact that larger stores can obtain lower prices from their suppliers, which also benefits their competitors who get cheaper supply too. Second, competition is increased when large retailers enter a market, an effect the author calls “market-specific mechanism” on prices. Basker also shows that the smaller the number of incumbents, the larger the competitive effect on prices.

Such effect is also underlined by Hausman and Leibtag (2005), who write that “by changing the competitive structure of the industry, the new outlet introduction will lead to a decrease in prices at the existing outlets”.

\(^{202}\) The change in consumer welfare due to the change in the prices of existing outlets after the introduction of a new store
4.1.2.5.2 Effect on product variety

554. Hausman and Leibtag (2004) estimate consumer welfare by disentangling the price effect from the “variety effect”, the increase in shopping options for consumers. Their findings are presented in the table below.

Table 17: Effect on product variety

<table>
<thead>
<tr>
<th>Paper</th>
<th>Findings on variety effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hausman and Leibtag, 2005</td>
<td>The average variety effect across market and period is substantial at an estimated exact</td>
</tr>
<tr>
<td></td>
<td>compensating variation of 20.2% of food expenditure</td>
</tr>
</tbody>
</table>

555. Hausman and Leibtag’s total increase in consumer expenditure following the entry of a giant retailer is then estimated by summing the indirect price effect (see above) and the variety effect, which is 25% on average (20.2% + 4.8%).

4.1.3 The benefits of increased regulation

4.1.3.1 Effect on smaller local stores

556. Depending on individual preferences, consumer welfare could increase with the availability of smaller, local stores. Regulation would then be a trade-off between the aforementioned costs in terms of prices, innovation, jobs, and the urban planning objectives of protecting local stores and city centres where they are typically located.

557. The papers in the table below analyse the impact of entry barriers on small shops.

Table 18: Effects on small shops

<table>
<thead>
<tr>
<th>Papers</th>
<th>Findings on small shops</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basker, 2004</td>
<td>Walmart’s entry is associated with a decline of 4 small retail establishments within 5</td>
</tr>
<tr>
<td></td>
<td>years, 3 of them within 2 years of entry</td>
</tr>
<tr>
<td>Jia, 2007</td>
<td>Walmart’s expansion from the late 1980s to the late 1990s explains 37% to 55% of the</td>
</tr>
<tr>
<td></td>
<td>net change in the number of small discount firms, as well as all other discount stores</td>
</tr>
<tr>
<td>Sadum, 2013</td>
<td>Planning regulation as an entry barrier created an incentive for large retail chains</td>
</tr>
<tr>
<td></td>
<td>to invest in smaller and more centrally located formats, which competed more directly</td>
</tr>
<tr>
<td></td>
<td>with independents and accelerated their declines. The author uses employment as a proxy</td>
</tr>
<tr>
<td></td>
<td>and shows that a 44% decrease in big stores opening is associated with a 7% increase</td>
</tr>
<tr>
<td></td>
<td>in independent stores employment</td>
</tr>
</tbody>
</table>

558. The overall impact of legislation on local stores is ambiguous. On the one hand, Jia (2007) points out that an increase in larger outlets will ultimately lead to a decrease in the number of stores (“big drives out small”), in the wake of findings from Basker (2004). This suggests that barriers to entry protect small stores which cannot compete with larger formats.

559. But on the other hand, Sadum (2013) highlights an unexpected side effect of the 1996 UK zoning regulation. According to the author, barriers to entry do not protect small stores because legislation gives supermarkets an incentive to invest in small formats in city centres, directly competing with local shops. Stated differently, regulation of “big boxes” can be effective in preserving shops in the city centres, but not in protecting independent retailers from competition of large chains. In fact, the latter respond to restrictions in entry of large stores by opening small chain stores in urban centres.
4.1.3.2 Effect on quality of life

560. It has been argued that regulation protects the quality of life in certain areas. The example of zoning regulations in Japan is particularly illustrative. The 1968 City Planning Act set up 2 restriction zones: stores are completely excluded from zone 1, while authorisation from local authorities must be sought in order to open a store in zone 2. Even small convenience stores are excluded from the urban and residential zone 1 areas in order to preserve “quietness”. Zone 2 areas are typically located in the city outskirts.

Table 19: Effect on quality of life

<table>
<thead>
<tr>
<th>Paper</th>
<th>Potential benefits in terms of quality of life</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nishida, 2013</td>
<td>Protecting residential and agricultural spaces by isolating them from commercial spaces, provide open spaces, less disturbance, less traffic</td>
</tr>
</tbody>
</table>

561. As highlighted above, Nishida (2013) finds that eliminating barriers to retail establishment in Japan would have a significant impact on the number of stores, on total sales, and on profits. But as the author writes, the study “does not quantify the benefits in monetary units, such as the utility gained from quietness in residential areas (type 1 zoning) or the benefits from preserving farm land, scenery, or the natural environment (type 2 zoning)”. Quantifying such gains would give policy makers more tools when facing the trade-off economic benefits/positive externalities of entry barriers.

4.1.3.3 Effect on the environment

562. Regulation can have an impact on the quality of life because it is thought to decrease traffic generated by large stores located in the city outskirts.

Table 20: Effect on the environment

<table>
<thead>
<tr>
<th>Papers</th>
<th>Potential benefits in terms of quality of life</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basker, 2004</td>
<td>The opening of a Walmart can increase traffic in a vicinity, like an anchor store in a traditional mall</td>
</tr>
<tr>
<td>Flath, 2003</td>
<td>Accounting for fundamentals (car ownership, size of dwelling, geography) explains much of the variation in retail density between Japan and other countries</td>
</tr>
<tr>
<td>Nishida, 2013</td>
<td>1968 zoning regulation in Japan provided neighbourhood amenities such as less traffic</td>
</tr>
</tbody>
</table>

563. Basker’s (2004) example summarises the dilemma that is at stake with barriers to entry: an increase in traffic would be a negative externality on the environment, but at the same time the increase in business can lead to more jobs.

4.2 Economic analysis

564. The economic analysis in this section seeks to provide quantitative evidence on the link between commercial establishment regulatory aspects and retail market dynamic and structure. In particular it addresses the following questions:

- **Question 1** - Is there a link between the evolution of a market in terms of store creation and store surface, and retail establishment regulations?

- **Question 2** - Are all store formats (i.e. smaller and larger stores) similarly affected by retail establishment regulation?

- **Question 3** - Is there a link between the retail market structure and retail establishments regulation?
To answer these questions, an analysis of the correlation of economic outcomes with features characterizing Member state retail establishment regulations is performed. As previously mentioned in the methodological section the identified correlations will be informative and further information would be required to conclude on a causal relationship.

In the correlation analysis the following regulatory aspects have been considered:

- **Complexity of the legal framework (Theme 1).** To capture the complexity of the legal framework we use the number of permits required for establishment. The number of permits takes a value between 1 and 5 as illustrated in Figure 2. The permits considered here include planning, building, use and environmental permits and retail specific authorisations.

- **Burden of the decision-making process (Theme 2).** Three variables are defined to capture the burden of the decision-making process:
  a. **Number of entities to be contacted.** This represents the maximum number of entities contacted in the decision process. If the jurisdiction’s system qualifies as a one-stop-shop then it will take a value of 1. Figure 13 gives an overview of the number of entities to be contacted in the decision process in each Member State.
  b. **Number of impact assessments.** This variable includes all types of impact assessments and studies a retailer needs to perform. Figure 11 describes the number of assessments to be performed per Member State.
  c. **Third parties.** This variable is the sum of the steps where competitors may potentially be involved. As previously mentioned these steps include (i) oral hearings, (ii) on-site inspection (iii) public comments (iv) consultation of third parties (v) binding opinion of third parties. They are presented in Figure 10.

- **Specific requirements (Theme 3).** Specific requirements are captured by the score presented in Figure 17. This score takes into account the level of restrictiveness of the requirements concerning retail establishment and the store size thresholds triggering their application. Details on the computation of this score are provided in the Appendix.

Further details on the variables capturing the above features are provided in Table 21.

**Table 21: Variables describing retail establishment regulations**

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of permits required for establishment</th>
<th>Number of entities to be contacted</th>
<th>Number of impact assessments to be performed</th>
<th>Involvement of third parties</th>
<th>Specific requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>2,00</td>
<td>1,00</td>
<td>1,50</td>
<td>4,00</td>
<td>2,17</td>
</tr>
<tr>
<td>Belgium</td>
<td>3,00</td>
<td>2,00</td>
<td>1,00</td>
<td>2,00</td>
<td>2,53</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>2,00</td>
<td>3,00</td>
<td>1,00</td>
<td>5,00</td>
<td>2,33</td>
</tr>
<tr>
<td>Croatia</td>
<td>4,00</td>
<td>4,00</td>
<td>2,00</td>
<td>5,00</td>
<td>3,00</td>
</tr>
<tr>
<td>Cyprus</td>
<td>4,00</td>
<td>1,00</td>
<td>3,00</td>
<td>5,00</td>
<td>2,50</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>3,00</td>
<td>3,00</td>
<td>1,50</td>
<td>3,00</td>
<td>1,90</td>
</tr>
<tr>
<td>Denmark</td>
<td>2,00</td>
<td>1,00</td>
<td>1,50</td>
<td>4,00</td>
<td>4,10</td>
</tr>
</tbody>
</table>

203 In Table 21, the values of the number of impact assessments to be performed differs from the ones presented in Figure 11. Indeed, for the study of correlation a value of 0,5 was attributed to non-binding environmental impact assessments.
## Countries

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of permits required for establishment</th>
<th>Number of entities to be contacted</th>
<th>Number of impact assessments to be performed</th>
<th>Involvement of third parties</th>
<th>Specific requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>2,00</td>
<td>1,00</td>
<td>0,50</td>
<td>3,00</td>
<td>1,93</td>
</tr>
<tr>
<td>Finland</td>
<td>2,00</td>
<td>2,00</td>
<td>2,00</td>
<td>4,00</td>
<td>2,55</td>
</tr>
<tr>
<td>France</td>
<td>3,00</td>
<td>1,00</td>
<td>4,00</td>
<td>3,00</td>
<td>2,60</td>
</tr>
<tr>
<td>Germany</td>
<td>1,00</td>
<td>1,00</td>
<td>1,50</td>
<td>2,00</td>
<td>2,73</td>
</tr>
<tr>
<td>Greece</td>
<td>2,00</td>
<td>2,00</td>
<td>1,50</td>
<td>1,00</td>
<td>1,61</td>
</tr>
<tr>
<td>Hungary</td>
<td>5,00</td>
<td>2,00</td>
<td>2,00</td>
<td>3,00</td>
<td>4,13</td>
</tr>
<tr>
<td>Ireland</td>
<td>4,00</td>
<td>3,00</td>
<td>3,00</td>
<td>2,00</td>
<td>4,07</td>
</tr>
<tr>
<td>Italy</td>
<td>3,00</td>
<td>1,00</td>
<td>4,50</td>
<td>2,00</td>
<td>2,45</td>
</tr>
<tr>
<td>Latvia</td>
<td>2,00</td>
<td>1,00</td>
<td>0,50</td>
<td>4,00</td>
<td>2,00</td>
</tr>
<tr>
<td>Lithuania</td>
<td>1,00</td>
<td>2,00</td>
<td>1,00</td>
<td>4,00</td>
<td>2,33</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>3,00</td>
<td>1,00</td>
<td>0,50</td>
<td>5,00</td>
<td>2,42</td>
</tr>
<tr>
<td>Malta</td>
<td>3,00</td>
<td>1,00</td>
<td>3,00</td>
<td>3,00</td>
<td>2,00</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1,00</td>
<td>1,00</td>
<td>2,00</td>
<td>2,00</td>
<td>2,00</td>
</tr>
<tr>
<td>Poland</td>
<td>4,00</td>
<td>3,00</td>
<td>0,50</td>
<td>5,00</td>
<td>2,55</td>
</tr>
<tr>
<td>Portugal</td>
<td>3,00</td>
<td>2,00</td>
<td>0,50</td>
<td>1,00</td>
<td>1,56</td>
</tr>
<tr>
<td>Romania</td>
<td>3,00</td>
<td>2,00</td>
<td>2,00</td>
<td>2,00</td>
<td>2,67</td>
</tr>
<tr>
<td>Slovakia</td>
<td>5,00</td>
<td>3,00</td>
<td>1</td>
<td>5,00</td>
<td>2,07</td>
</tr>
<tr>
<td>Slovenia</td>
<td>3,00</td>
<td>2,00</td>
<td>0,5</td>
<td>4,00</td>
<td>1,98</td>
</tr>
<tr>
<td>Spain</td>
<td>4,00</td>
<td>1,00</td>
<td>3,5</td>
<td>2,00</td>
<td>3,26</td>
</tr>
<tr>
<td>Sweden</td>
<td>3,00</td>
<td>4,00</td>
<td>1</td>
<td>3,00</td>
<td>2,00</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>4,00</td>
<td>2,00</td>
<td>3,5</td>
<td>4,00</td>
<td>2,50</td>
</tr>
</tbody>
</table>

Important regulatory aspects previously described such as the requirement for economic data and the potential involvement of competitors could not be apprehended by the correlation analysis. The bimodal aspect of this regulatory trait makes correlation analysis non-robust and with limited relevance. In one Member State either there is a requirement for economic data or there is not. The same applies to the involvement of competitors. Furthermore, our data could not distinguish between economic development within and outside city centre. Thus regulatory aspects related to city centre were not considered.

Looking at the correlation between these regulatory aspects in Figure 17, we note that the number of permits is correlated to some extent to all the other variables. Hence, results related to the number of permits will have to be interpreted with care and identified correlations between economic outcomes and the number of permits may, in turn, reflect links with other regulatory aspects.
The economic outcomes analysed through the correlation analysis in this section include:

- **Market dynamics.** Two measures of industry dynamics were constructed: (1) the percentage of change in square metres of selling area between 2014 and 2009 and (2) the percentage of change in number of stores between 2014 and 2009. In addition, to be derived at country level, both values were computed for large and small store formats. Large store formats are retail outlets selling groceries with a selling space between 400 and 2,500 square metres (supermarkets) and above 2,500 square meters (hypermarkets). It excludes discounters, convenience stores and independent grocery stores. On the contrary small store formats correspond to the aggregation of those channels that are invariably non-chained and are, therefore, owned by families and/or run on an individual basis. Information on market dynamics is provided by Euromonitor. The analysis was also performed on discounters but it did not provide robust results from a statistical perspective. Neither did the analysis performed on hypermarkets.

- **Market structure.** To measure concentration two indicators are used.  
  (1) The consolidated market share of the 5 top retailers for each country
in 2013 provided by Euromonitor. The higher the market share, the more concentrated the market is. (2) We also used gross margin to explore possible links between retail establishment regulations and market structure (gross margins as a proxy for the level of competition). The most straightforward way to measure competition would be to focus on prices. However, the heterogeneity of goods and services traded in the retail sector in different countries makes it hard to interpret cross-country comparisons of retail price indexes. We used a method of measuring competition based on the size of margins instead. Data on the gross operating surplus were used and scaled by the total value added. These data are available from Eurostat. The resulting variable, gross operating surplus to value added, captures the size of the mark-ups firms are able to charge.

To answer the three questions the economic analysis breaks down in three parts:

- **The analysis of the overall market dynamics - Question 1.** This analysis seeks to identify potential links between the above regulatory features and market dynamics in each Member State. Potential correlations are successively presented and discussed. Then a multivariate regression analysis of new stores dynamics with respect to regulatory features is presented. The primary purpose of this model is to assess the strength of the link between differing regulatory aspects and number of store formats. Note that this model integrates findings from the legal analysis such as the requirement for economic data and the potential involvement of competitors. As such it allows testing for potential links with such regulatory aspects that could not be apprehended via the correlation analysis.

- **The analysis of store format specific market dynamics – Question 2.** Correlation analysis of regulatory features with market dynamics specifically to distinct store format is undertaken in order to assess whether regulatory features may vary depending on store format. As previously explained two store formats are considered here, small and large.

- **The analysis of correlation between market structure and regulatory aspects.** Here, the correlation of regulatory aspects with measures of concentration is undertaken.

### 4.2.1 Regulatory features seem to be linked to retail market dynamics

The analysis of potential links between market dynamics (i.e. the growth in number of stores and stores surface in each member state) has been undertaken in two steps:

- First, we examined for each regulatory aspect depicted above the correlations with market dynamics (growth in store number and in store size).

- Then, in order to assess the relative strength of the identified links, we model the growth in number of stores in each member state using all the variables describing the regulatory features as explanatory variables. When doing so we integrate a variable reflecting the requirement to provide economic data and the potential involvement of competitors to the variables depicted in Table 22 below.

Below we only present the results of this analysis with the strongest statistical relationship.
4.2.1.1 The most dynamic markets seem to require less permits (Theme 1)

573. Where the number of permits required for retail establishment increases, the number of new stores decreases. Likewise the retail surface growth is slower in Member States having more permit requirements. This result suggests the existence of a link that a high number of permit requirements for retail establishment may prevent the creation of new stores. The observed negative correlation between the number of permits and market dynamics also advocates for the use of all-in-one permits to decrease the complexity of the legal framework and in turn foster entry.

Figure 18: Effects of an increasing number of permits on retail markets dynamic (Theme 1)

4.2.1.2 An increasing number of entities to be contacted and impact assessments to be performed in the authorisation process reduce entry (Theme 2)

574. As illustrated in the Figure below, the number of entities contacted is negatively correlated with the creation of new stores. This suggests that the introduction of one stop shops by reducing the number of entities to be contacted, may have a positive effect on market dynamics.

575. It also suggests that smaller stores are most affected by an increasing number of entities to contact.
Figure 19: Effects of the number of entities involved on retail markets dynamic (Theme 2)

Correlation Entry rate vs Entities involved

Correlation Surface growth rate vs Entities involved

576. We then examine in Figure 20 the relationship between the number of impact assessments and market dynamics. As illustrated in this Figure, there is a negative correlation between the number of impact assessments and market dynamics.

577. As previously explained impact assessments are often burdensome procedures which raise the cost of entry. This may explain the potential negative link between the number of impact assessments and market dynamics.

Figure 20: Effects of the number of impacts assessments on retail markets dynamic (Theme 2)

Correlation Entry rate vs Number of impact assessments

Correlation Surface growth rate vs Number of impact assessments

578. When examining the involvement of third parties related to the burden of the authorisation process, no statistically significant relationships were found.

4.2.1.3 Stringent specific requirements seem to constitute an entry barrier

579. As illustrated in the Figure 21 below the impacts of specific requirements related to store size thresholds appear to be significant.
For Portugal and Greece this relationship seems less pronounced. The specific economic context of Greece may explain the fact that despite a relatively open environment retail market dynamics are weak in comparison to other Member States. Thus non regulatory aspects may explain the limited number of new store creation. In addition, Greece has a very heterogeneous legal framework with different requirements for larger and smaller islands, the city of Athens and other areas. This heterogeneity increases the complexity of the process for retailers wishing to establish in Greece. This complexity may potentially alter the Greek retail market dynamics and is not captured by our specific requirements score. In Portugal specific requirements are not too restrictive. Other retail establishment requirements may limit entry. For instance Portugal is one of the Member States requesting the highest number of permits for retail establishment.

Figure 21: Relationship between specific requirements and retail markets dynamics (Theme 3)

4.2.1.4 Multivariate regression analysis – specific requirements seem most determinant in explaining the creation of new stores

The table below provides the estimated results of the regression of the growth in number of stores over the various regulatory aspects. In the model supporting the below regression additional variables were introduced that could not be surveyed by the correlation analysis. These variables include:
- The requirement to provide economic data. This variable takes a value of 1 if the legal analysis has identified a requirement to provide economic data in a Member State and 0 otherwise.
- Potential involvement of competitors. This variable takes a value of 1 if the legal analysis has identified the potential involvement of competitors in a Member State and 0 otherwise.

Table 22 below provides details on the above variables.

---

204 Greece specific requirements score is based on the most restrictive mainland regime. The Greek island specific regimes were not taken into account.
<table>
<thead>
<tr>
<th>Countries</th>
<th>Existence of city centre regulations</th>
<th>Involvement of competitor (it takes a value of one for direct involvement, 0.5 for indirect involvement and 0 otherwise)</th>
<th>Requirement to provide economic data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Belgium</td>
<td>0</td>
<td>0.5</td>
<td>1</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Croatia</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Cyprus</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Czech Republic</td>
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</tr>
<tr>
<td>Denmark</td>
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<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Estonia</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Finland</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>France</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Germany</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Greece</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hungary</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Ireland</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Italy</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Latvia</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Lithuania</td>
<td>0</td>
<td>0.5</td>
<td>0</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Malta</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Poland</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Portugal</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Romania</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Slovakia</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Slovenia</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Spain</td>
<td>1</td>
<td>0.5</td>
<td>1</td>
</tr>
<tr>
<td>Sweden</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

The objective of this regression is to assess the relative strength of the correlation identified above and to gather insights on which regulatory aspect bears more weight for the creation of new stores in a Member State.
The above model has a good measure of statistical fit. Indeed the Rsquare for the above model is above 60%. This indicates that the model explains more than 60 percent of the observed variance in the creation of new stores across the various Member States. This suggests that regulatory aspects are important explanatory factors of difference in new store creations between Member States. Member States with less restrictive retail establishment regulations are more likely to have a higher growth in new stores.

Furthermore according to the model depicted in Table 23, the main factors driving the creation of new stores in a Member State are by order of importance:
1. The specific requirements. The less restrictive these specific requirements, the greater the number of new stores created.
2. The number of entities to be contacted. The larger the number of entities to be contacted, the lower the creation of new stores.
3. The number of impact assessments. The larger the number of impact assessments, the lower the creation of new stores.

According to this model the other regulatory aspects do not seem to affect on average the creation of new shops. Regarding the involvement of competitors and the existence of the requirement to provide economic data, these results are not surprising, because as highlighted in the legal analysis, both are potential.

The model results on the number of permits are more surprising. However as previously explained, the number of permits is correlated with the other regulatory aspects. This may explain the above results. Indeed for retail establishment one often needs to perform an impact assessment to obtain a permit. The same applies for specific requirements. Likewise the larger the number of permits required for retail establishment, the more entities that need to be contacted.
4.2.2 Large and small store formats do not seem to be similarly affected by aspects of retail establishment regulations

588. The study also analysed market dynamics for various store formats. Whereas a small store format corresponds in this study to traditional individual retailers (categorised by Euromonitor as traditional grocery retailers, including independent small grocers, food/drink/tobacco specialists and other grocery retailers), a large store format is more specific to hypermarket and supermarkets. The correlation analysis reveals that:

- The creation of new supermarkets and the surface growth appear to be most significantly linked with specific requirements,
- The creation of new small stores (which should be distinguished from small companies) seems linked with the number of entities contacted in the process.
- The analysis performed on hypermarkets did not provide robust results from a statistical perspective

589. This suggests that regulatory aspects affect the various store formats in differing ways.

590. As illustrated below (Figure 22) there appears to be a negative correlation between the level of restrictiveness of specific requirements and the rate of creation of new supermarkets and their surface growth. This is as expected since the restrictiveness of the specific requirements increases with the size of the retailer.

**Figure 22: Relationship between specific requirements and market dynamics of supermarkets**

591. On the other hand the development of small store formats in number of outlets and growth in their sales area is negatively correlated with the number of entities to be contacted by retailers to establish an outlet (see Figure 23). This suggests that the complexity and the burden of the authorisation process most significantly affect the smaller store formats.

592. As previously explained, small stores are individual stores that are usually not part of a chain. These can be smaller companies, for which the treatment of administrative procedures may be more burdensome. This may explain the below relationships.
Figure 23: Relationships between Theme 2 regulatory aspects and small store format market dynamics

4.2.3 Effect on market structure

593. In this section we shift our attention to measures of competition. As mentioned earlier, two indicators are used as proxies to measure competition: the consolidated market share of the five largest retailers and the gross operating surplus.

594. We analysed the relationship between the regulatory aspects and the gross operating surplus over value added. A commonly mentioned potential downside of entry regulation is that it shields incumbents from competition of new entrants; this increases their market power and may lead to higher prices. Looking to prices directly is impractical in this setting; therefore, we measured the extent to which entry regulation relaxes competition by examining margins. Normally, this would not be an ideal measure to draw conclusions from: margins can be high because firms are exercising market power and setting high prices or because they are very efficient in containing the cost (although a high degree of competition would imply that low costs are passed over to consumers as low prices). The implications are obviously quite different: only in the first scenario high margins signal that customers may suffer. We also examined the relationship between regulatory aspects and the consolidated share of the 5 largest retailers, a standard measure of market concentration.
595. As shown in the above Figure 24 the number of permits seems to be positively correlated with the margin. The relationship with market share is also positive but weakly significant.

596. While there seems to be a limited link between regulatory aspects and market structure, market structure is linked with the entry rate as illustrated in the Figure 25 below.

Figure 24: Relationship number of permits and measures of market concentration

![Figure 24: Relationship between entry rate and measure of concentration](image)

597. As expected there is a negative relationship between entry rate and our two measures of market concentration.

### 4.2.4 Summary of findings

598. The correlation analysis suggests:

- The existence of a link between the evolution of retail market in terms of store creation and stores surface and some regulatory aspects (Question 1). In particular the restrictiveness of specific requirements,
the number of entities to be contacted in the retail establishment process and the number of impacts assessments to be undertaken appear to be negatively correlated with the rate of stores creation and retail surface growth. Furthermore they also seem to explain a large share of store creation differences across Member States.

- Large and small store formats are not similarly affected by retail establishment regulatory aspects (Question 2). While the dynamics of large store formats (mainly supermarkets) are most affected by the restrictiveness of the specific requirements, small store formats are most affected by the number of entities to be contacted for the authorisation process. The latter findings could be explained by economies of scales for store networks in the treatment of administrative tasks.

- A link between the retail market structure and retail establishment regulation (Question 3). The correlation analysis does not reveal a direct link between the regulatory aspects and the degree of concentration of the retail market. However, it shows that the most concentrated markets are the ones with the lowest levels of store creation. Since store creation is affected by regulatory aspects, this suggests an indirect link between concentration and regulatory aspects.

4.3 Interviews with stakeholders

599. This section presents the stakeholders’ answers to the interviews we performed in the 10 identified Member States. It reflects the stakeholders’ opinions on the main issues with retail establishment regulations as well as their impacts. Below we present the different stakeholders interviewed:

- Institutional stakeholders (city councils and authorities in charge of granting authorisation for retail establishments and/or competition authorities);
- Consumers’ associations;
- Retailers’ associations;
- Retailers and investors;
- Academics.

600. In accordance with the request for tender, the interviews were conducted with a total of 50 respondents in 10 European countries: Denmark, Germany, Italy, The Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and UK.

601. The analysis of the answers completes the economic impact assessment and provides practical insights on retail establishments. The sample of respondents is, however, not large enough to be representative of all stakeholders. Thus the results provided in this section are only informative and should be interpreted with care.

Table 24: Analysis of the answers

<table>
<thead>
<tr>
<th>Countries</th>
<th>Academics</th>
<th>Retailers and investors</th>
<th>Retailers associations</th>
<th>Institutional stakeholders</th>
<th>Consumer associations</th>
<th>Business associations</th>
<th>Total</th>
</tr>
</thead>
</table>
| Denmark | 1 | 1 | 1 | 3 | 6
| Germany | 2 | 1 | 1 | 1 | 4
| Italy | 3 | 1 | 2 | 1 | 7
4.3.1 Issues with the retail establishments regulation

4.3.1.1 Overview

The collected answers were classified by issues reported by the interviewees. According to the comments expressed by the stakeholders interviewed, the 2 most pressing issues regarding the regulation of entry are the authorisation process (37% of the comments expressed by respondents) and local plans (28% of the comments expressed by respondents). The cost of compliance of the overall process appears to be less of a concern. Only 16% of the respondents mention compliance costs as a major source of concern. These results are, however, to be considered only as indicative since the sample of respondents is too small in order to generalize the outcome to all stakeholders.
Figure 26: Issues with retail establishment regulation that were raised during the interviews

As previously mentioned, retail establishment regulations vary greatly across Member States. Figure 27 shows that the main issues raised by stakeholders differ from one country to another. Among the countries where interviews were performed, 4 groups emerge:

- Countries where respondents point out local plan and cost of compliance as their primary source of concern. This group includes Sweden and The UK;

603.
- Countries where regulation is ineffective or not strong enough, such as in Poland and Slovenia;
- Countries where the authorisation process is burdensome. This is the case in Italy, Spain and Germany;
- Countries with only a few number of issues. Denmark, The Netherlands and Slovakia are in this group.
Figure 27: Country-specific issues with commercial establishment regulation, as highlighted during the interviews.
4.3.1.2 Issues with the authorisation process

604. Stakeholders complain mostly about the authorisation process. Figure 28 presents details of the grievances of the stakeholders interviewed regarding this process. Most of the concerns relate to the lack of transparency of this process. They deem the criteria used as vague and the overall decision making process as unclear. Respondents typically advocate for more transparency regarding the authorisation decisions. They also seek more clarity regarding the criteria used in the decision making process.

605. According to the stakeholders, the authorisation process often involves too many actors with different requirements, which increases the uncertainty of the process outcomes for applicants. Similarly, stakeholders consider that the process varies depending on the authority in charge and the location of the authorisation request. This increases uncertainty and incurs higher costs for retailers seeking retail establishment authorisation as retailers need to accommodate for various regulations.

606. The lack of transparency also provides opportunities for rent-seeking behaviour. These stakeholders consider that the authorisation process is an “old boys’ network” and are under the impression that entry decisions are based on the influence of existing retailers.

607. This lack of transparency is not only detrimental to retailers seeking retail establishment authorisation but also to the authorities, as applicants often submit incomplete applications. This in turn increases the burden for the administration.

608. In addition some respondents point out the fact that the authorisation process does not take into account the economic interests. In particular the positive economic impacts of the entry of a new retailer are often ignored.

Figure 28: Issues with the authorisation process

4.3.1.3 Issues linked to local planning

609. Most concerns expressed by stakeholders relate to the restrictive nature of the urban planning requirements. The system is deemed to be too rigid. This rigidity is sometimes not limited to localisation of stores but also applies to the form “design”
of the stores. In some countries regulations impose very strict design considerations. These design considerations are often subjective and do not take into account marketing objectives.

610. Some also point out that local planning regulations do not always allocate enough space to retail establishments. This shortage of space may lead to increases in real estate prices and prevent entry.

611. Some comments made by respondents also indicate that there are too many players involved in local planning and also a lack of sufficient expertise by city council in charge of local planning. Effective local planning and technical knowledge leads to effective coordination with multiple stakeholders at different levels of government. For instance authorities in charge of local planning need to coordinate with the authority in charge of transportation developments.

612. Figure 29 presents the issues expressed by the interviewed stakeholders on local plan regulations.

Figure 29: Issues linked to local plan

<table>
<thead>
<tr>
<th>Issues linked to local plan</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict regulation</td>
<td>11</td>
</tr>
<tr>
<td>Lack of space</td>
<td>2</td>
</tr>
<tr>
<td>Lack of transparency</td>
<td>1</td>
</tr>
<tr>
<td>Too many actors involved</td>
<td>1</td>
</tr>
<tr>
<td>Lack of expertise</td>
<td>1</td>
</tr>
</tbody>
</table>

4.3.1.4 Ineffective or lack of regulation

613. Some respondents expressed concern regarding the lack of regulation of retail establishments (Figure 30). These comments generally do not reflect the fact that there is no regulation but rather that those regulations are not applied in practice.

614. Respondents indicated that in their countries the main objective was to attract investment. Thus authorities generally accommodate entry of retailers and relax existing regulations.

615. The regulation is also sometimes said to be ineffective (Figure 30). In general these comments apply to regulations seeking to protect small stores and city centres. For such stakeholders, regulation has proven to be ineffective in protecting small stores as the share of small stores has reduced. However, the stakeholders interviewed did not pronounce on the effects on city centres and seem to consider that the protection of city center consists in protecting small shops.

616. Finally, according to some stakeholders, requirements of existing regulations are not deemed to be compliant with the Services Directive.
Figure 30: Ineffective or lack of regulation

<table>
<thead>
<tr>
<th>Ineffective or lack of regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of regulation</td>
</tr>
<tr>
<td>► “Regulation does not provide the size of the area for retail outlets as it is determined by in some other countries”</td>
</tr>
<tr>
<td>► “Lack of regulations restricting entry”</td>
</tr>
<tr>
<td>► “Lack of sufficient urban planning”</td>
</tr>
<tr>
<td>Ineffective regulation</td>
</tr>
<tr>
<td>► “The requirement of a commercial authorization for large commercial establishment has proven ineffective”</td>
</tr>
<tr>
<td>► “It is easier for - for example- big foreign DIY’s chains to establish new retail outlets.”</td>
</tr>
<tr>
<td>Non compliance with service directive</td>
</tr>
<tr>
<td>► “Requirement of a commercial authorization for the establishment which is not in compliance with Services Directive.”</td>
</tr>
</tbody>
</table>

4.3.1.5 Cost of compliance

Respondents also expressed concerns about the overall costs of the process (Figure 31). According to the stakeholders, the regulation requirements are often time consuming and in some cases impose additional costs as there is a need to hire consultants to complete the authorisation process. The overall complexity and lack of transparency of the process make it burdensome and very costly for stakeholders.
Figure 31: Cost of compliance

Cost of compliance

- **Time consuming**
  - “The planning regime was overly cumbersome”
  - “Procedure is quite long both the municipal procedure and the appeal process may be very long”
  - “For small retailers, the administrative burden is considered high and the process can take a considerable long time.”

- **Additional cost**
  - “Planning system requires too much detail”
  - “Cost of business rates”
  - “While the planning regime’s costs were not overly high, the length of the application procedure and the need to hire consultant to manage the process was prohibited for developers”

- **Lack of transparency**
  - “Lack of clarity and objectivity of the criteria applied which are discriminatory. Duplicity of authorizations and lack of overriding reasons of general interest.”

4.3.2 Impacts of retail establishment regulations

4.3.2.1 Overview

618. In the series of interviews conducted, the stakeholders named competition as the economic outcome which is most affected by regulation (70% of the views expressed). On this matter, direct evidence was provided in the descriptive chapter. The other most cited impacts were: town congestion, consumer welfare, and the desertification of city centres (see Figure 32 below). As further explained the impact on consumer welfare could either be positive (by providing more products at lower prices) or negative (by raising prices and reducing the number of available products).
4.3.2.2 Distortion of competition

While stakeholders widely argue that retail establishment regulations distort competition (see Figure 33), the actual impact on the economy is debated. As expected, general competition is distorted in favour of the incumbent. Retail establishment provides a competitive edge and market power to established retailers because it prevents the entry of competitors. This echoes previous...
findings that indicated a positive relationship between entry restriction and retailers margins.

620. Many stakeholders also indicated that retail establishment regulations favoured larger stores because companies which own larger stores are more able to cope with the burdensome requirements.

621. Some retail establishment regulations apply “city centre first” principles, which usually translate into regulations favouring the development of small shops with the aim of maintaining downtown vitality. These regulations have mixed results as large retailers have adjusted their business models and have also developed convenience stores, which are a small store format.

**Figure 33: Competition distortions**

<table>
<thead>
<tr>
<th>Competition distortions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Distort competition in favor of incumbent</td>
</tr>
<tr>
<td>“Discourage new retailers to invest in the Italian market”</td>
</tr>
<tr>
<td>“I have experienced a couple of situations where the retailers abandoned the idea to establish an outlet due to the discordant opinions inside the Municipality Broad”</td>
</tr>
<tr>
<td>Distort competition in favor of large store</td>
</tr>
<tr>
<td>“Many large shopping malls were established very quickly whereby small retail outlet disappeared”</td>
</tr>
<tr>
<td>“Small retail shops have significantly lost their market share”</td>
</tr>
<tr>
<td>Distort competition in favor of small store</td>
</tr>
<tr>
<td>“Promoting investment in town centers and ultimately benefited smaller stores”</td>
</tr>
<tr>
<td>“Consumers are able to visit smaller grocery shops for their days-to-days needs”</td>
</tr>
<tr>
<td>Distort competition in favor of new entrant</td>
</tr>
<tr>
<td>“Increase of convenience store impacts on local shops”</td>
</tr>
<tr>
<td>Distort competition across regions</td>
</tr>
<tr>
<td>“Differing treatments create geographical inequality across retailers”</td>
</tr>
</tbody>
</table>

### 4.3.2.3 Affect consumer welfare

622. Opening a new large-scale store can have negative and positive effects on consumers. On the one hand, it might increase the variety of products available and lower prices. On the other hand, the potential drop in smaller local stores could make city centres less pleasant and make less accessible retail services as consumers will need to travel to large outlets.

623. Such contrasting effect is put in the spotlight by the stakeholders we interviewed (see Figure 34). While they mention that consumer welfare could be improved by supplying a greater variety of products combined with a drop in prices, they also recall that some consumers have limited access to retail establishments and that their purchasing power is reduced.

624. Finally, one complain was made about the environmental damage on neighbourhoods caused by urban planning.
### Figure 34: Affect consumer welfare

<table>
<thead>
<tr>
<th>Impact</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduced services for some customer segments</td>
<td>2</td>
</tr>
<tr>
<td>Improve consumer choice</td>
<td>2</td>
</tr>
<tr>
<td>Increase consumer price</td>
<td>1</td>
</tr>
<tr>
<td>Reduced consumer price</td>
<td>1</td>
</tr>
<tr>
<td>Negatively alter the neighborhood</td>
<td>1</td>
</tr>
</tbody>
</table>

### 4.3.2.4 Desertification of city centres and congestion

Some stakeholders associate regulation with negative outcomes in terms of city centres’ vitality, congestion and welfare. Where new outlets tend to open far away from the downtown area (where new openings are more likely to be given the green light) the pollution may increase, as the number of people driving to access retail services increases. Concerning the effect on consumer welfare, interviewees mention instead that increased regulation can lead to insufficient supply (see Figure 35).
4.3.3 Link between the issues and impacts

626. Figure 36 plots the relationship between the issues and the impacts of retail establishment regulations as expressed by respondents.
**Figure 36: Link between issues and impacts**

<table>
<thead>
<tr>
<th>Issue with authorization process</th>
<th>Distort competition in favor of incumbents</th>
<th>Distort competition across regions</th>
<th>Reduced consumer price</th>
<th>Negatively alter the neighborhood environment</th>
<th>Increased congestion</th>
<th>Increase consumer price</th>
<th>Improve consumer choice</th>
<th>Distort competition in favor of small stores</th>
<th>Distort competition in favor of new entrants</th>
<th>Distort competition in favor of incumbents</th>
<th>Desertification of city center</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues linked to local plan</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Issues with ineffective or lack of regulation</td>
<td>Reduced services for some customer segments</td>
<td>2</td>
<td>Increased congestion</td>
<td>Distort competition in favor of small stores</td>
<td>Distort competition in favor of large stores</td>
<td>Desertification of city center</td>
<td>4</td>
<td>6</td>
<td>4</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Cost of compliance</td>
<td>Distort competition in favor of small stores</td>
<td>1</td>
<td>Distort competition in favor of large stores</td>
<td>Distort competition in favor of incumbents</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

627. Unambiguously, issues with the authorisation process and compliance costs of the overall process distort competition in favour of the incumbents. This echoes our findings related to margin and the impact of the retail establishment regulation restriction on competition. Burdensome requirements and an uncertain authorisation process limit entry and provide a competitive edge to incumbents. As far as possible entry regulation requirements should be streamlined and made more transparent. Otherwise rent seeking behaviour may develop.

628. Figure 36 also confirms that stakeholders deem that urban planning is protective of small shops. Often urban planning’s main objective is to preserve the vitality of the city centre. Such goal is achieved by passing regulations that are perceived as protective of small stores. Ultimately they do not prevent the development of convenience stores. Again this finding echoes the theoretical analysis’ findings that specific requirements seem to protect the traditional retail sector to the detriment of the development of convenience stores.

629. The stakeholders’ interviews also clearly indicate that there is a need for regulation of retail establishment. As highlighted in the theoretical analysis, the absence of regulation may lead to a domination of large stores in the market. Small stores
may disappear which will cause the desertification of city centres and increase congestion of the city. This in turn may be detrimental to the environment.
5. Conclusions, good practices and recommendations

In this part, the main conclusions are summarised. The section is structured to provide an overview of the main challenges and corresponding good practices for each of the themes covered by the study.

5.1 General conclusions

On the basis of an extensive description of the regulatory systems applicable to the establishment of retail outlets through the 28 EU Member States (Chapter 2 and Appendix 2), we have made a comparative legal analysis examining the nature and scope of the regulatory requirements and their compliance with the Services Directive (Chapter 3). Based on the findings of the legal analysis we have performed an economic impact assessment in order to analyse the economic effects of the regulatory framework and the restrictions it entails (Chapter 4).

The comparison of the regulatory framework shows important differences between the 28 Member States, even though the headlines of the systems are often quite similar.

The legal analysis has revealed the existence of numerous requirements and regulations adopted specifically for the establishment of retail outlets. The retail specific requirements adopted by the Member States range from a retail specific authorisation to the requirement of one or more impact assessments, to additional steps in the authorisation procedure or to the involvement of other authorities - whether for advisory purposes or at the level of decision-making.

Most of the Member States require some sort of authorisation or permit allowing the establishment of a retail outlet, in particular if the outlet exceeds a certain size threshold. Sometimes the regulation requires a specific retail authorisation, or sometimes a planning permit. In some jurisdictions both a retail specific authorisation and a planning permit are required.

Compliance with planning regulations, or the plans (such as zoning plans) that have been developed under such regulations, is required in every jurisdiction, in particular if the establishment is realised through the construction of a new building. As such planning regulations or plans may amount to restrictions to retail establishment. The systems to ensure or verify such compliance or to provide derogations to plans vary considerably. In some Member States this is checked through the authorisation process for a planning permit. In other Member States this is included in the application procedure for a building permit or the adoption of a derogation to the plan or the adoption of a plan. Some Member States require, in addition, a use permit to be granted before the retailer is allowed to open the outlet to the public.

Some Member States have integrated two or more permits into one single permit (all-in-one permit or integrated permit). Sometimes this is combined with a one-stop-shop system, which allows the entire process to be managed and coordinated by one single authority.

Most Member States require, at least for the establishment of large or complex retail outlets such as shopping centres or hypermarkets, the performance of an environmental impact assessment, the results of which are taken into account in the procedure for one of the compulsory authorisations or permits. In addition, some Member States require an environmental permit.

Before a decision granting or refusing authorisation or permission is made, the application procedures throughout the Member States require several preliminary steps to be taken. However, the nature and number of preliminary requirements vary to a considerable extent.
Most Member State’s regulatory framework requires some sort of market or other studies to be conducted and/or impact assessments to be performed at some stage during the decision-making process for such authorisation or permission. The nature and the number of studies or assessments to be performed vary to a considerable extent. Nearly all Member States make a distinction between large and small retail outlets in their regulatory framework. Most of the Member States that require a specific retail authorisation or specific impact assessments do so only for relatively large retail outlets.

The Services Directive does not per se prohibit the application of authorisation schemes, but makes such schemes subject to a number of conditions: certain requirements are prohibited, other requirements are subject to evaluation and must pass a non-discrimination test, a necessity test and a proportionality test.

Some Member States impose requirements that could potentially qualify as a prohibited requirement under Article 14 of the Services Directive, either because they could potentially qualify as an economic need test, or because they could potentially allow the involvement, be it directly or indirectly, of competitors in the authorisation process. The potential character of the qualification should be stressed, because to a certain extent the qualification is based on interpretation and therefore subject to debate. At the end of the day, it is up to the CJEU, taking into account all relevant circumstances, to decide upon this qualification.

Many Member States impose requirements that may qualify as restrictions to the freedom of establishment which are subject to evaluation under Article 15 of the Services Directive, but are not as such prohibited: e.g. the requirement of a minimum number of employees, territorial restrictions and/or quantitative restrictions. Those requirements are not prohibited provided they can be justified, i.e. if they are non-discriminatory, serve an overriding reason of public interest, and do so in a manner which is not disproportionate. Some of the restrictions seem difficult to justify in this respect, because they amount to a ban on certain types of retail outlets or on outlets exceeding a certain size. Some restrictions may be seen as disproportionate because they include authorisation schemes with complex, lengthy and costly authorisation procedures, lack of transparency and/or discretionary decisions.

Our analysis shows that various overriding reasons of public interest are invoked, even though most Member States invoke more or less the same or similar reasons. Most of these relate to urban planning (city/town planning, protection of city centres, protection of the urban environment) and protection of the environment. The protection of the Member State’s or the city’s cultural, historical or artistic heritage also often serves as justification. Further motives presented by the Member States are: (public) health and safety, protection of consumers or of workers.

The application of urban planning regulations to retail establishment and urban planning objectives as reasons of public interest justifying restrictions to the freedom of retail establishment indicate that many Member States pay considerable attention to the pursuit of certain objectives of general interest. In particular, some Member States seek to protect their city centres, with the aim of strengthening the urbanity of the cities, safeguarding the viability of the cities by limiting traffic, or avoiding that (smaller) retail outlets move out of the city centre causing vacant shops and deserted city centres. In other words, they strive to develop, create or maintain attractive city centres.

With respect to regulatory requirements that must be evaluated under the proportionality test there seem to be quite some (potential) issues:

- Procedures are often very complex and, in particular for larger retail outlets, require several preliminary steps to be taken (such as oral hearing, on-site
inspection, comments from the public at large, consultation of other authorities and/or of third parties), as well as market studies and/or impact assessments to be performed;

- If several authorisations and/or permits are required, as is the case in many jurisdictions, often several procedures have to be followed, with consecutive applications having to be made with various authorities. Some Member States have introduced some simplification through the all-in-one or integrated permit. Instead of having to apply for several permits, all requirements are integrated into one single permit (even though the content may vary). In some Member States, the establishment process is facilitated, in addition, through a one-stop-shop system with one single authority deciding on all required authorisations;

- Procedures are also, partly as a result of their complexity, quite lengthy and costly. In several cases the time frame as provided in the legal framework is not complied with, and failure to respond in due time is not adequately sanctioned (i.e. by considering the authorisation granted);

- Sometimes the requirements go as far as to impose some sort of ban on the establishment of (certain) retail outlets, or types of retail outlets;

- Sometimes territorial restrictions are applied which go as far as to limit the number of retail outlets in relation to the population size or density, to limit the retail outlet’s size in certain areas (e.g. city centres), to exclude (certain or all) retail outlets from certain areas (or to allow them only in certain areas), to impose a minimum geographical distance between providers, or to limit the assortment of goods sold at the retail outlet;

- Many Member States have adopted planning rules aiming to protect the vitality and viability of their city centres. Some Member States protect their city centres by keeping certain store formats (e.g. shopping centres, malls, hypermarkets, …) away from such centres, whereas other Member States apply a city centre first-rule which implies that for every establishment priority should be given to a city centre location, or a location as close to the city centre as possible;

- Sometimes the authority deciding on the application has discretionary powers, which makes the outcome rather unpredictable, or can lead to additional conditions being imposed on the applicant;

- Sometimes there is a lack of transparency as regards the procedure and its requirements, and/or as regards the decisions adopted, and the criteria applied, by the authorities, which adds up to the unpredictable nature of the outcome, and makes it difficult to understand the reasons justifying the decision, and/or to appeal the decision;

- Sometimes there is no possibility to appeal the decision, nor to apply for judicial review;

- Regulations tend to be rather complex, and complexity often increases because the regulation is adopted at various levels (federal or national and regional, and even municipal or local), which means the rules, and their application, may vary significantly from region to region, or even from municipality to municipality.

As a result, it cannot be excluded that in some Member States the procedures impose requirements that are to be considered as disproportionate, i.e.
requirements that go beyond what is necessary in order to attain the objective(s) pursued. As a result, they may have a dissuasive effect and may unduly complicate and delay the establishment of (certain) retail outlets.

646. In these matters, we have observed significant differences between the Member States as regards the nature, number and scope of requirements imposed on retailers wishing to establish a (relatively large) retail outlet.

647. Our legal analysis shows that, as a rule and despite the significant differences, the regulatory framework in the Member States regarding the establishment of retail outlets tends to be (very) complex. Moreover, the application procedure(s) to be followed in order to have a decision on the authorisation(s), permit(s) and licence(s) required in order to be allowed to establish a retail outlet is (are) usually quite burdensome. In addition, the regulations often provide for a series of specific requirements, developed specifically for the establishment of retail outlets.

648. In addition to the legal analysis we have performed an economic impact assessment of the retail establishment regulations. This impact assessment breaks down into three parts.

649. The first part consists in a review of existing empirical evidence on the economic impacts of retail establishment regulations. It provides a theoretical framework for the analysis of retail establishment regulations.

650. The second part seeks to provide quantitative evidence on the effects of retail establishment regulations. To do so it examines the correlation between economic outcomes and features of the retail establishment regulations.

651. The regulatory features scrutinized in this part include:

652. **Complexity of the legal framework (Theme 1).** To capture the complexity of the legal framework we have used the number of permits required for establishment. The permits considered here include planning, building, use and environmental permits and retail specific authorisations.

653. **Burden of the decision-making process (Theme 2).** Three variables have been defined to capture the burden of the decision-making process:

- **Number of entities to be contacted.** This represents the maximum number of entities contacted in the decision-making process.

- **Number of impact assessments.** This variable includes all types of impact assessments and studies a retailer must perform for retail establishment.

- **Third parties.** This variable is the sum of the steps where competitors may potentially be involved. These steps include (i) oral hearings, (ii) on-site inspection (iii) public comments (iv) consultation of third parties (v) binding opinion of third parties.

654. **Specific requirements (Theme 3).** Retail establishment is subject to quite different requirements depending on the store size. The restrictiveness of these requirements varies from the requirement to perform additional impact assessments to a complete ban. To capture these regulatory aspects a score has been built that takes into account the restrictiveness of the requirements and also the store size threshold to which these requirements apply. A regulation that bans stores of a size larger than 1,000 m² is considered more restrictive than a regulation that bans stores of a size exceeding 10,000 m².

655. The effects of the above features on the following economic outcomes have been considered:

- **Market dynamics.** Two measures of industry dynamics were constructed: (1) the percentage of change in square metres (m²) of sales floor space between 2014 and 2009 and (2) the percentage of change in number of stores between 2014 and 2009. In addition, to be derived at country level for all stores, both values were computed for large and small store formats, also at country level. Large store formats are defined here as retail outlets selling...
groceries with a sales floor space between 400 and 2,500 m². It includes hypermarkets and supermarkets (usually chained), and excludes discounters, convenience stores and independent grocery stores. On the contrary small store formats corresponds here to the aggregation of those channels that are usually non-chained and are, therefore, owned by families and/or run on an individual basis (categorised by Euromonitor as traditional grocery retailers, including independent small grocers, food/drink/tobacco specialists and other grocery retailers). The information on market dynamics is provided by Euromonitor.

**Market structure.** To measure concentration two indicators were used: (1) The consolidated market share of the 5 top retailers for each country in 2013 provided by Euromonitor (the higher the market share, the more concentrated the market) and (2) gross margin, in order to explore possible links between retail establishment regulation and market structure (gross margins as a proxy for the level of competition). The most straightforward way to measure competition would be to focus on prices. However, the heterogeneity of goods and services traded in the retail sector in different countries makes it hard to interpret cross-country comparisons of retail price indexes. We used a method of measuring competition based on the size of gross margins instead. Data on the gross operating surplus were used and scaled by the total value added. These data are available from Eurostat. The resulting variable, gross operating surplus to value added, captures the size of the mark-ups firms are able to charge.

656. The findings from the analysis suggest:

- The existence of a link between the evolution of the retail market in terms of store creation and store surface and some regulatory aspects. In particular the restrictiveness of specific requirements, the number of entities to be contacted in the retail establishment process and the number of impact assessments to be undertaken appear to be negatively correlated with the rate of store creation and retail surface growth.

- Large and small store formats are not affected by the regulatory aspects of retail establishment in the same way. While the dynamics of large store formats (mainly supermarkets) are most affected by the restrictiveness of the specific requirements, small store formats are most affected by the number of entities to be contacted for the authorisation process. The latter findings could be explained by economies of scales for store chains in the treatment of administrative tasks.

- A link between the retail market structure and retail establishment regulation. The correlation analysis does not reveal a direct link between the regulatory aspects and the degree of concentration of the retail market. However, it shows that the most concentrated markets are the ones with the lowest levels of store creation. Since store creation is affected by regulatory aspects. This suggests an indirect link between concentration and regulatory aspects.

657. In our analysis, we did not find sufficient statistical evidence of a significant relationship between the other regulatory aspects (such as the requirements to provide economic data and the involvement of competitors) and the market dynamics. However, these results might stem from methodological limitations due to difficulties with comparing provisions and practices across countries. The last part of the impact assessment has a complementary role. It summarizes the findings from interviews with stakeholders, which, should be viewed as informative.
The analysis of the replies made by the interviewed stakeholders indicates that the burden of the authorisation process and compliance costs of the overall process distort competition in favour of the incumbents. This echoes our findings of the economic analysis related to the impact of the retail establishment regulation restriction on competition. Burdensome requirements and an uncertain authorisation process limit entry and provide a competitive edge to incumbents. The analysis of the replies made by the interviewed stakeholders indicates that the burden of the authorisation process and compliance costs of the overall process distort competition in favour of the incumbents. This echoes our findings of the economic analysis related to the link between the retail establishment regulation restriction and competition. Higher margins and higher market concentration could be observed for countries with more burdensome requirements (mainly a high number of permits required), where also the entry rate of new retail companies is lower. The stakeholder interviews also indicate that there is a need for regulation of retail establishments.

5.2 Conclusions on Theme 1: Regulatory framework

5.2.1 Restrictions and impacts

The regulatory framework regarding the establishment of retail outlets, in particular those exceeding a certain size threshold in the relevant Member State, tends to be (very) complex. There are, of course, differences in the degree of complexity and there are some (few) exceptions.

We have identified a number of restrictions caused by the regulatory framework and its complexity:
- Numerous permits required for establishment;
- The obligation to go through cumulative procedures. Cumulative procedures are burdensome for retailers wishing to enter a market. This may distort competition in favour of incumbent retailers;
- Regulations specific to the outlet’s location (city centre/ outside city centre).
- Rigid planning regulations which prevent entry. This may distort competition in favour of small stores;
- The protection of city centres deterring the entry of large retailers. This may also favour investment in small stores;
- A lack of (sufficiently clear) regulatory framework making the authorisation process uncertain and leaving authorities with discretionary powers. The qualitative analysis reveals that this may distort competition in favour of large stores. This is echoed by the economic analysis. This may also contribute to the city centres being deserted.
5.2.2 Good practices

5.2.2.1 All-in-one permit (one integrated permit) combined with a reduction of the number of permits required

661. The analysis shows that in several Member States up to 4 or 5 authorisations, permits or licences are required (retail specific authorisation, planning permit, building permit, use permit, environmental permit).

662. The analysis has identified a good practice consisting in a reduction of the number of permits required. This can be achieved by abolishing the requirement of certain permits, or by abolishing it if one or more other permits are already required. A simplification can also consist in merging all permit requirements into one single permit requirement: e.g. a retail permit issued if the retailer meets all conditions under the various regulations. However, in this context the retail outlet should still meet all requirements that used to be made when the retailer applied for all separate permits, at least to the extent they remain relevant.

663. A single permit system also simplifies the procedure by reducing the number of decision-making authorities, by avoiding contradictory decisions and by avoiding reiterated formalities or requirements.

5.2.2.2 Simplify procedures

664. There is an overall tendency to simplify procedures and reduce administrative burden. The retail, planning, building and ideally also environmental, permission procedures should equally benefit from this.

665. Simplification could be realised e.g. by:
   - Reducing the number of permits required (see above), which results in a reduction of the number of procedures to be followed;
   - Eliminating the requirement of certain impact assessments to be performed, of certain (market) studies to be conducted or certain reports to be presented;
   - Simplifying the test(s) the application must pass in order for the authorisation or permit to be granted;
   - Reducing time limits for action by authorities or comments by the public.

5.2.2.3 Guarantee consistency – a coherent structure

666. Lack of consistency or of a coherent structure adds to the overall complexity and increases difficulty to predict the outcome of an application.

667. Lack of consistency or of a coherent structure results, among other factors, from the fact that the (regulatory) powers are divided over several levels but not clearly defined, and rules or regulations adopted by one level are not in line with those of the other level, or various entities of one level adopt very different rules (e.g. varying municipal regulations)

668. Specific actions could make action more concrete and, therefore, qualify as a good practice:
   - e.g. clearly define powers of each level of authority;
   - e.g. avoid or limit important differences between regions or municipalities, for example by issuing (binding) guidelines.
5.2.2.4 No complete ban on retail establishment outside of city centres

669. One can understand that it is not always possible to allow the establishment of large retail outlets (such as shopping centres, malls, hypermarkets, very large individual stores) in city centres. Difficulties can result from lack of available space, the protection of cultural heritage, historical buildings and monuments, traffic issues, insufficient public transport, and considerations such as the viability of the city centre.

670. The scarcity or limitation of available space in city centres entails that a complete ban on retail establishment outside of city centres is not recommended.

671. It is good practice (i.e. good public governance) to take into account all relevant considerations and to allow the establishment of retail outlets outside of city centres when opportunities in the city centre tend to be limited.

672. On the other hand it would be acceptable to take into consideration the vacancy of stores in the city centre.

5.2.2.5 Regulations protecting city centres cannot generally exclude new entrants or new, innovative retail concepts

673. Protecting city centres can be justified in order to protect the equilibrium in the use of the available surface a city aims for, taking into account the scarcity of such surface and the many functions a city has to provide for. This includes justification based on the aim of protecting or preserving the city’s (or the Member State’s) historical, architectural, artistic or cultural heritage. However, the regulation should not generally exclude all new entrants or specific, new, innovative retail concepts.

5.3 Conclusions on Theme 2: Authorisation process

5.3.1 Restrictions and impacts

674. The process in order for a retail development to be granted the required authorisation(s) and/or permit(s), tends to be (very) burdensome. There are, of course, differences in the weight of the burden.

675. We have identified a number of restrictions caused by the authorisation process:

- The involvement of third parties in preliminary steps before planning is often time consuming and may involve competitors;

- Lack of consistency between (requirements made by) entities involved in the process cause uncertainty and extend the length of the overall process;

- The authorisation process is often too long and costly.

5.3.2 Good practices

5.3.2.1 Outline permission or permission in principle (two-step approach)

676. It can be important for retailers to know as soon as possible whether or not their project is acceptable as a matter of principle. In a two-step approach the retailer has the opportunity in a first stage to apply for permission in principle upon the
presentation of the general outlines of the retail project. The complete application including all information and documentation and meeting all conditions and requirements can be filed at a later stage once the permission in principle has been granted. This allows the retailer to avoid making significant investments without having any guarantee of his project being accepted.

5.3.2.2 One-stop-shop (one authority)

677. Centralising the entire procedure with one single authority has also been identified as a good practice. This allows the retailer to file the application(s) and all documentation with a single authority, to communicate with a single authority, basically: to deal with no more than one authority, even if other authorities, bodies or stakeholders may be involved in the procedure.

678. The one-stop-shop gathers all information and documents required. Furthermore, it coordinates the procedure and ensures communication between the applicant, the authorities, advisory bodies, the stakeholders, the public, and anyone else involved.

5.3.2.3 Presumption of a successful outcome if no decision is made within the statutory term ("positive" administrative silence or tacit approval) -

and as a second-best or alternative: a presumption of a negative outcome if no decision is made within the statutory term ("negative" administrative silence or tacit refusal) => in particular for environmental permits

679. The analysis shows that sometimes retailers have to wait for quite a long time before a decision is adopted by the relevant authority or authorities.

680. Authorities not complying with deadlines imposed by the regulation appear not to be an exception. Sometimes retailers are even requested (forced) to file a new application simply because the authorities are not able to make a decision within the statutory timeframe. This pressure can be all the more compelling if there is a risk of having a negative decision, either because the authorities make clear that their decision would not be positive, or because administrative silence is considered to result in a negative decision.

681. As long as there is no formal decision, the applicant is not entitled to complain about the outcome. There is no possibility to appeal or to file for judicial review. As a result, the applicant could be kept waiting endlessly.

682. EU regulations impose a negative silence rule with respect to environmental permits. An express provision of the Services Directive states that the section on authorisations is not applicable to those aspects of authorisation schemes which are governed directly or indirectly by other EU instruments205

683. The positive silence rule should also be applied with respect to reports that must be issued or opinions that must be expressed by other authorities involved in the procedure. Having to wait for such reports or opinions can cause serious delays. However, if the law considers the result to be positive if no report is issued or no opinion expressed within the imposed timeframe, no delays are incurred.

205 Art. 9.3 Services Directive.
5.3.2.4 Use of internet and electronic format

684. Using electronic formats, online applications and webpages can help increasing access to information and transparency and reducing complexity.
685. E-tools can, for example, be used for:
- Filing of the application: the application as well as all documents and information could be filed electronically;
- Online tracking of the file status: an online tool could allow the applicant to track the status of the file: what steps have been taken, what formalities still need to be complied with;
- Online databases can provide useful information: for example a database could provide potential applicants with an overview of the requirements and of the procedure to grant authorisation or permission; similarly a database could inform the public of applications that are pending and on which the public is or is to be consulted;
- Publication of decisions (grant/refusal) and their reasons: this is useful in order to inform all stakeholders who were involved, or are simply interested in the outcome of the procedure; it also allows new applicants (and other parties) to understand how decisions are made, what criteria are applied, what are the points of attention.

5.3.2.5 Tailored procedures

686. Complex procedures are not suitable for rather simple establishment cases.
687. Procedures that are tailored to the actual needs of the project or project type, can be identified as a good practice:
- Based on the size of the retail outlet;
- Taking into account that smaller retail outlets have a less significant impact than large ones, the procedure should reflect this by including less requirements, being less complex and reaching an outcome faster and cheaper;
- Tailoring procedures on the basis of the type of development should also be contemplated;
- Tailoring procedures on the basis of the retail outlet’s location should also be contemplated.
688. However, due consideration should be given to the justification of the different approach, so as to avoid complaints regarding discrimination.

5.4 Conclusions on Theme 3: Specific requirements

5.4.1 Restrictions and impacts

689. Our analysis reveals that in many Member States the regulatory framework provides for important retail specific requirements, requirements specifically designed for, and applicable to the establishment of retail outlets, in particular outlets exceeding a certain size threshold. We have identified a number of restrictions resulting from those specific requirements:
- Retail outlets above certain size thresholds often have to meet additional requirements, for example obtain additional permits, perform additional assessments or studies or provide economic data;
A ban may be imposed on:

- retail outlets above certain size thresholds (even though sometimes a derogation from the ban can be granted);
- Certain retail outlets may be prohibited from establishing in certain areas or zones, or, on the contrary, obliged to establish in certain areas or zones (e.g. city centres, city outskirts, supply zones, etc.), depending for example on their size, store format or the assortment of goods sold.

690. In most Member States the requirements apply only to large scale retail outlets.
691. Among the specific requirements imposed some may raise concerns on their compatibility with the Services Directive. Good practices

5.4.1.1 Exemption from any (specific) authorisation, or mere notification requirement allowing for an immediate start, at least for relatively small outlets

692. A good practice is to allow smaller retail outlets to start their activities immediately without having to comply with any registration or permit requirement, or to do so as soon as they have made a notification to the competent authority in order to inform the latter of the outlet initiating its business.
693. Instead of performing supervision upfront (a priori), this system allows for supervision a posteriori. This is less burdensome for the retailer, as the latter is allowed to start operating immediately.
694. Similarly this practice could also be suggested with respect to retail outlets that are established in an existing building and do not require significant (re)construction works or a significant refurbishment of the building.

5.4.1.2 Economic data should only be requested to the extent necessary for the public policy objectives pursued and should only be used for those objectives

695. The analysis shows that in the framework of the various procedures on applications for the relevant authorisations or permits, the regulations or the public authorities dealing with the applications sometimes require economic data to be gathered and transmitted. These data are then examined by the public authorities before deciding on the application.
696. The request of economic data requires careful attention. The authorities should only request such data to the extent that they are needed for the public policy objectives pursued (such as urban planning, country planning, protection of the environment, and the like). The economic data should only be used for those objectives.
697. There is a presumption against the request and use of economic data, as there is a risk that such data are gathered and used for unjustified purposes, i.e. to make an assessment of the economic need of the actual retail project or an evaluation of its economic benefits and downsides of the retail project, and in particular in order to take into account the effect the retail project could have on the incumbent retailers.

5.4.1.3 No complete ban on the establishment of (large) retail outlets

698. A complete and general ban on the establishment of retail outlets, or of large retail outlets, cannot be justified. It can be said not to be a suitable measure to attain the public interest objectives pursued by the authorities, or at least to be a measure that goes beyond what is necessary to achieve the aims.
699. If a ban on the establishment of retail outlets is in the regulations of a Member State, such ban should be abolished.

700. Similarly, this practice can be recommended with respect to a relative ban, i.e. where the regulation offers the opportunity, subject to a number of conditions to be met and a decision to be adopted, to grant a departure from the ban. This system should be repelled and replaced by more suitable and less restrictive measures (e.g. a permit requirement).

### 5.5 Recommendations

701. Based on our analysis we have been able to identify a number of good practices. Member States that apply them are likely to reduce or limit restrictions on the establishment of retail outlets. Member States that do not apply these practices (yet) should be encouraged to incorporate them into their regulations or practice.

702. In this final section, taking into account the issues and good practices identified through our Legal Study and the conclusions drawn from our analysis, we propose some recommendations for potential future action by the EU Commission.

#### 5.5.1 Promote adoption of good practices, in particular a combination of many good practices

703. Implementing as many as possible of the good practices identified, should allow Member States to increase compliance and establish a sound balance between the retailers’ freedom of establishment and reasonable and justified limitations to that freedom based on lawful overriding reasons of public interest.

704. Therefore, the EU Commission could contemplate promoting, and the Member States could contemplate adopting and promoting (towards regional or local authorities), the good practices, in particular a combination of as many good practices as possible.

#### 5.5.2 Prepare a check-list and an analysis tree for the Member States’ federal, regional and local authorities in order to assess their regulations (self-assessment)

705. The EU Commission could envisage preparing a check-list and an analysis tree for the Member States’ federal or national, regional and local authorities. These tools could allow the authorities to check, step by step, whether or not their regulations, as well as the way these regulations are applied, are likely to comply with the Services Directive.

706. The Member States could envisage performing a compliance self-assessment of their regulations through the use of those tools.

707. Ideally, the assessment should address two levels:

- Ensuring that the regulations refrain from providing prohibited requirements, and requirements subject to evaluation or authorisation schemes that fail to pass the triple test of non-discrimination, necessity and proportionality.

- Ensuring that the regulations implement the good practices.

#### 5.5.3 Reporting by the Member States to the EU Commission

708. The EU Commission could contemplate urging the Member States to report to the Commission on their self-assessment. It would be recommendable that the Member States report in writing and within a reasonable timeframe.
5.5.4 Draft model legislation and guidelines

709. In a next step, the EU Commission could envisage drafting a Model Retail Establishment Act, that could serve as a model for the Member States. It has to be admitted that retail establishment is a very complex matter and is significantly influenced by planning regulations. Nevertheless, it should be feasible to issue model legislation leaving sufficient flexibility for various planning systems. The model could include the common elements, i.a. the principles and rules laid down in the Services Directive and applicable to all Member States, as well as the public interest concerns all Member States share. The Member States would be invited to adopt the Model, and would be entitled to adjust it to specific requirements or characteristics of the specific Member State’s retail market.

710. Accompanying guidelines could be issued, in order to provide guidance on how to implement and apply the Model Act, or to explain available options.

711. Applying the model should allow (guarantee) the Member States to be in compliance with EU laws and regulations, including the Services Directive.

5.5.5 Commission action before the CJEU

712. If no self-assessment is conducted, or the self-assessment shows serious shortcomings or cases of non-compliance, which are not remedied by the Member State through an amendment of its legislation or the adoption of the Model Retail Establishment Act, the EU Commission could contemplate bringing proceedings against such Member State before the CJEU.
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