

BELGIAN RETAIL NEWSLETTER

8 DECEMBER 2015



BELGIUM | The legislation on commercial establishments or so-called “socio-economic permit” legislation: from federal to regional

(PART II: FOCUSING ON WALLONIA)

1. INTRODUCTION

A prudent retailer seeking to open a point of sale in Belgium should check compliance with the legislation on commercial establishments¹ which may require a declaration and/or a permit prior to the effective opening date.

During various decades, the competence regarding commercial establishments was a competence of the Belgian federal state. Between 1975 and 2004 the Federal Act of 29 June 1975 on commercial establishments applied (the “1975 Act”). As of 1 March 2005, the 1975 Act was replaced by the Federal Act of 13 August 2004 on commercial establishments (as amended), hereafter referred to as the Federal 2004 Act.

In essence, it followed from the Federal 2004 Act that prior to operating a commercial establishment, a permit allowing a commercial establishment – a so-called “socio-economic” permit – was in principle needed from the municipality for a commercial establishment having a net commercial surface exceeding 400 m².

Since 1 July 2014, the competence regarding commercial establishments was transferred from the Belgian federal state to the three Belgian Regions, viz. the Brussels Capital Region (“Brussels”), the Flemish Region (“Flanders”) and the Walloon Region (“Wallonia”).

In light of this regionalization, each of the three Regions has the authority to issue its own legislation regarding commercial establishments.

Our [previous newsletter](#) addressed the legislation currently applicable in Brussels and Flanders. In the present newsletter, we have a look at the legislation currently applicable in Wallonia.

¹ “Handelsvestigingen” (Dutch) or “implantations commerciales” (French). With these terms, the legislator focuses on a retailer’s Belgian point(s) of sale.

2. THE LEGISLATION CURRENTLY IN FORCE IN THE THREE BELGIAN REGIONS

2.1 Brussels

[See section 2.1 in our previous newsletter](#)

2.2 Flanders

[See section 2.2 in our previous newsletter](#)

2.3 Wallonia

Wallonia abolished the Federal 2004 Act with effect per 1 June 2015 and adopted the Commercial Establishment Decree dated 5 February 2015 (“the 2015 Decree”)² which entered into force on 1 June 2015.

The 2015 Decree can be summarized as follows:

i. Events triggering the duty to “inform” the municipality

Prior to opening a commercial establishment and/or operating an expansion of a commercial establishment and/or modifying the nature of the commercial activity of a commercial establishment, the competent municipality should be “informed” about this, provided that the commercial surface of the commercial establishment does not exceed 400 m².³

ii. Events triggering the duty to submit a “declaration”

The following retail projects are subject to a prior written explicit declaration to be submitted to the municipality or to the Region (depending on the location and surface of the project):

- Projects aiming at expanding an existing commercial establishment, it being understood that the expansion should not exceed 20% of the existing net commercial surface and should not exceed 300 m² additional net commercial surface; and
- Projects aiming at moving an existing commercial establishment⁴ with a commercial surface not exceeding 400 m² within a radius of 1 km to another location in the same commune.

iii. Events triggering the need to obtain a “commercial establishment permit”

The following retail projects are subject to a prior

commercial establishment permit⁵ to be obtained from the municipality or the Region (depending on the location and surface of the project)⁶:

- A new construction aiming at a commercial establishment with a net commercial surface exceeding 400 m²;
- A commercial complex (e.g. a shopping center) with a net commercial surface exceeding 400 m²;
- An extension of a commercial establishment or a commercial complex of which the net commercial surface already exceeds or will exceed 400 m²;
- The intended operation of a commercial establishment or a commercial complex with a net commercial surface exceeding 400 m² in an existing building with a non-commercial destination; and/or
- A material change in the type of commercial activity of a commercial establishment or commercial complex in an existing building with a commercial destination of which the net commercial surface exceeds 400 m². The 2015 Decree Act does not define what “material change” means so this is to be verified on a case-by-case basis.

As a matter of principle, the College of Mayor and Eldermen of the municipality where the commercial establishment project is (to be) located is competent, but a number of larger projects fall within the Region’s competence⁷.

² I.e. “le Décret relatif aux implantations commerciales”.

³ An implementing decree clarifying the practical modalities of such “information” duty is not published yet. The 2015 Decree is silent on the scope and meaning of “expansion” and “modifying the nature of the commercial activity”.

⁴ Provided that the existing commercial establishment is covered by a socio-economic permit or a commercial establishment permit (see further point iii.).

⁵ “Permis d’implantation commerciale” (French).

⁶ Wallonia’s list of retail projects which are subject to a prior commercial establishment permit is inspired by the Federal 2004 Act’s list of projects which are subject to a socio-economic permit. Hence, in our view our comments set out in point 2.2 (ii) of our previous newsletter (clickthrough to previous newsletter) apply by analogy to Wallonia’s list.

⁷ E.g. commercial establishments with a net commercial surface exceeding 2.500 m².

The competent authority must motivate its decision on the basis of the following assessment criteria: consumer protection, urban planning protection, social politics and sustainable mobility. The decision should be issued within 45 days (net commercial surface < 2.500 m²) or 110 days (net commercial surface ≥ 2.500 m²). Failing a decision within this timing, the permit request is deemed to be refused. Within 20 days, an administrative appeal can be lodged by the applicant (while third parties with an interest can seek annulment of the permit before the Council of State). As a matter of principle, the permit has an unlimited duration. Within three years from its notification, the permit lapses with respect to (such part of the) premises which are not open to the public.

iv. Integrated permit

One of the innovations in Wallonia is the creation of an “integrated permit”⁸ which encompasses a commercial establishment permit and an urban planning permit and/or an environmental permit. Indeed, depending on the circumstances, it could be that an applicant not only needs a commercial establishment permit but also needs an urban planning permit (e.g. in view of rebuilding the façade) and/or an environmental permit (e.g. in view of specific equipment to be installed in the premises). In such case, the retailer should apply for an integrated permit.

As a matter of principle, the municipality is the competent authority (while for larger projects the Region is competent). An “environmental impact assessment study” is to be joined to the integrated permit request.

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Operating a commercial establishment without prior declaration (if applicable) or permit (if applicable), and/or operating a commercial establishment which deviates from the establishment described in the declaration (if applicable) or the permit (if applicable), qualifies as an infringement which could amongst others, depending on the circumstances and on the applicable (regional) legislation, lead to fines, an order to cease the renovation or fit-out works and/or the (temporary) closure of the store.

In addition, non-compliance with the socio-economic permit legislation could be the basis for a civil tort claim from a third party (e.g. a competitor).

3. CONCLUSION

Per 1 July 2014, the competence regarding commercial establishments was transferred from the Belgian federal state to the three Belgian Regions.

Currently, Brussels and Wallonia each have their own specific legislation which provides for various scenarios including those where a retailer should submit an official declaration to the authorities or obtain a permit prior to opening its store. Pending the adoption of new legislation, Flanders continues to apply the old Federal 2004 Act.

Preparing and securing compliance with the legislation on commercial establishments is time consuming. This may impact both the contractual process as well as operational planning.

⁸ “Permis intégré” (French).

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