

# BELGIAN RETAIL NEWSLETTER

18 NOVEMBER 2015



## BELGIUM | The legislation on commercial establishments or so-called “socio-economic permit” legislation: from federal to regional (PART I: FOCUSING ON BRUSSELS & FLANDERS)

### 1. INTRODUCTION

A prudent retailer seeking to open a point of sale in Belgium should check compliance with the legislation on commercial establishments<sup>1</sup> 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 m<sup>2</sup>.

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.

In this newsletter, we look at the legislation currently applicable in Brussels and Flanders. In a second newsletter, which will be sent in the coming weeks, we will address the legislation applicable in Wallonia.

---

<sup>1</sup> “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

Brussels abolished the Federal 2004 Act with effect per 1 July 2014 and inserted in its Brussels Town and Country Planning Code<sup>2</sup> specific provisions on commercial establishments. Such provisions entered into force on 1 July 2014.

The main highlights regarding retail can be summarized as follows:

#### i. Urban planning declaration

The following retail projects are subject to a prior written urban planning declaration<sup>3</sup> to be submitted to the competent municipality:

- a new construction providing for a commercial establishment;
- a modification or expansion of an existing commercial establishment in a building which currently is destined for commerce; and/or
- the establishment of a new commercial establishment in a building which currently is not destined for commerce.

This obligation applies irrespective of the surface of the project concerned and irrespective of whether or not an urban planning permit is to be obtained.

The urban planning declaration aims at giving the Brussels authorities a clearer view of the commercial mix of the various districts of Brussels, also allowing the authorities to proactively attract suitable businesses.

If the project does not require an urban planning permit and is not executed within six months following the municipality's confirmation that the declaration is complete, a new declaration is to be submitted.

An official circular providing for a template of an urban planning declaration is not yet available.

#### ii. Urban planning permit

A prior urban planning permit<sup>4</sup> is to be obtained for (i) a substantial change regarding the range or type of goods or services offered, provided that the net commercial surface currently or after the substantial change exceeds 400 m<sup>2</sup>, and/or for (ii) a substantial change regarding the surface currently operated, provided that the net commercial surface currently or after the substantial change exceeds 400 m<sup>2</sup>.

Up until present, no implementing decree was published providing a definition of what "substantial change" means. However, no urban planning permit is required for the

expansion of an authorized store provided that (i) the expansion does not exceed 300 m<sup>2</sup>; (ii) the expansion does not exceed 20% of the current net commercial surface, and (iii) the current commercial activity remains unmodified.

#### A number of points of attention:

- An impact report (for commercial surfaces between 1.000 m<sup>2</sup> but not exceeding 4.000 m<sup>2</sup>) or an impact study (for commercial surfaces exceeding 4.000 m<sup>2</sup>) is to be joined to the urban planning permit request<sup>5</sup>.
- For commercial surfaces exceeding 400 m<sup>2</sup> but not exceeding 1.000 m<sup>2</sup>, the urban planning permit request is to be submitted with the College of Mayor and Aldermen of the competent municipality. Requests regarding commercial surfaces exceeding 1.000 m<sup>2</sup> are to be submitted to the Competent Representative of the Brussels Region.
- The Brussels Town and Country Planning Code states that the competent authority should pay "special attention" to the consequences of a commercial establishment exceeding 400 m<sup>2</sup> in terms of consumer protection, safety, health risks for the premises and for the surrounding area, traffic circumstances, accessibility and parking, as well as the integration of the commercial establishment in its urban environment. However, the Code does not indicate whether or not on these grounds a permit can be refused.
- Depending on the specific scope of a retail project, the Brussels Town and Country Planning Code sets out various deadlines for the competent authority to issue its decision. Generally speaking, parties should allow at least four months to receive such decision. A permit refusal can be appealed by the applicant while a permit issued can be appealed by third parties having an interest. As a matter of principle, the permit lapses if the execution has not clearly been started within two years following its issuance.

<sup>2</sup> I.e. "Brussels Wetboek van de Ruimtelijke Ordening" (Dutch) or "Code Bruxellois de l'Aménagement du Territoire" (French).

<sup>3</sup> "Stedenbouwkundige verklaring" (Dutch) or "déclaration urbanistique" (French).

<sup>4</sup> "Stedenbouwkundige vergunning" (Dutch) or "permis d'urbanisme" (French).

<sup>5</sup> The difference between the two is that a report can be drawn up by the applicant itself while a study has to be carried out by a recognized consultancy firm. The Brussels Town and Country Planning Code describes the various elements which are to be described in the report and study (e.g. justification and timing of the project, impact of the project on the neighborhood, etc.).

## 2.2 Flanders

In February 2014, the Flemish government submitted to parliament a draft “decree regarding the integrated policy on commercial establishments”. This draft decree aims at replacing the Federal 2004 Act and would introduce various new procedures and concepts focusing on improving the retail activity in the center of cities and villages rather than in their peripheral areas.

However, at present, it is unclear when said decree will be finalized and enter into force (probably not in 2015). Pending the adoption of such decree, Flanders chooses to continue to apply the Federal 2004 Act for commercial establishments in Flanders. The Federal 2004 Act’s main highlights regarding retail can be summarized as follows.

### i. Events triggering the duty to submit a “declaration”

The following retail projects are subject to a prior written declaration to be submitted to the municipality where the commercial establishment is/will be located, provided that the net commercial surface of the commercial establishment exceeds 400 m<sup>2</sup> and is already covered by a socio-economic permit:

- 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 m<sup>2</sup> additional net commercial surface; and
- Projects aiming at moving an existing commercial establishment within a radius of 1 km to another location in the same commune.

Such declaration should be made by means of a mandatory, official template. The project can take off after receipt of the municipality’s acknowledgment of receipt.

### ii. Events triggering the need of a commercial establishment permit (so-called “socio-economic permit”)

The following retail projects are in principle subject to a prior socio-economic permit to be obtained from the municipality or the Region (depending on the location and surface of the project):

- A **new construction**<sup>6</sup> aiming at a commercial establishment with a net commercial surface exceeding 400 m<sup>2</sup>;
- A **complex**<sup>7</sup> of various retail stores whereby the total net commercial surface of the complex exceeds 400 m<sup>2</sup>;
- An **extension** of an existing commercial establishment or an existing complex of which the net commercial surface already exceeds or will exceed 400 m<sup>2</sup>;

- The intended operation of a commercial establishment or a complex with a net commercial surface exceeding 400 m<sup>2</sup> in an existing building with a **non-commercial destination**; and/or
- A **material change** in the type of commercial activity to be operated in an existing building with a commercial destination of which the net commercial surface exceeds 400 m<sup>2</sup>. The Federal 2004 Act does not define what “material change” means so this is to be verified on a case-by-case basis<sup>8</sup>.

The processing of a (complete) socio-economic permit application is subject to the following time frame (these are maximum periods expressed in calendar days):

- The (positive or negative) decision of the College of Mayor and Aldermen is to be notified to the applicant within 50 days (net commercial surface not exceeding 1.000 m<sup>2</sup>) or 70 days (net commercial surface exceeding 1.000 m<sup>2</sup>) as from the filing date of the permit application. If no decision is notified within the above time periods, the permit is deemed to be granted;
- The appeal against the issuance or against the refusal of the permit must be lodged within 20 days as from the above notification date<sup>9</sup>;
- The Interministerial Committee for Distribution must dismiss or uphold the appeal within 40 days as from the appeal filing date. If no appeal decision is notified within such period, the appealed decision is deemed to be confirmed; and
- Third parties having sufficient interest (e.g. competitors of the retailer-permit holder) can lodge an annulment and/or suspension procedure against the decision granting the permit with the Council of State. Such procedure is to be started within 60 days following the moment such third party had knowledge or could have knowledge of the decision concerned.

<sup>6</sup> E.g. on an unbuilt plot of land or replacing an existing construction.

<sup>7</sup> Viz. a group of points of sale (whether or not located in separate buildings and whether or not one and the same person is the promotor, owner or operator of the complex) which are located on one site and which are connected from a legal or a factual point of view, in particular from a financial, commercial or physical perspective, or which are subject to one urban planning permit. The scope of this legal description raises various questions, but it seems that the legislator has in mind amongst others shopping centers which could consist of various small shops which each in themselves do not exceed 400m<sup>2</sup>.

<sup>8</sup> A bowling alley which is turned into a shoe store could be an example of a “material change” in the type of commercial activity, while this would be less clear in case a store for women’s clothing is turned into a store for women’s and children’s clothing.

<sup>9</sup> An appeal against the permit issuance can be lodged by the National Socio-Economic Committee for Distribution and/or by at least seven members of said Committee. An appeal against the permit refusal can be lodged by the permit applicant.



The College of Mayor and Aldermen must motivate its decision on the basis of the following cumulative assessment criteria: consumer protection (e.g. is the new project a logic addition to the existing stores?), urban planning protection (e.g. traffic safety), compliance with social and labor legislation, and spatial integration of the commercial establishment (e.g. parking options).

A message confirming that the permit is granted is to be posted by the applicant on the commercial establishment

within 8 days following the notification of the decision of the College of Mayor and Alderman, up to the moment of opening of the commercial establishment. As a matter of principle, the socio-economic permit has an unlimited duration. However, the permit lapses automatically if the execution of the project did not start within four years (extendable with one year) following the issuance of the permit.

## 2.3 Wallonia

The legislation currently applicable in Wallonia will be discussed in a separate newsletter which will be sent out in the coming weeks.

\* \* \*

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.

---

### Steven Ongena

Attorney, member of the Brussels Bar  
songena@mcguirewoods.com  
+32 2 629 42 28  
Rue des Colonies 56 - box 3  
1000 Brussels

### Pol Cools

Attorney, member of the Brussels Bar  
pcools@mcguirewoods.com  
+32 2 629 42 16  
Rue des Colonies 56 - box 3  
1000 Brussels

Disclaimer: This newsletter is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. This newsletter is based on legislation as publicly available per 16 October 2015. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

© 2015 McGuireWoods LLP

[www.mcguirewoods.com](http://www.mcguirewoods.com)