INTRODUCTION

This topic is of importance to the EEA EFTA Forum because of the potential burden it may have on the administrative work of the municipalities and regions and subsequent impact on the local and regional self-governance.

The European Union adopted the Services Directive\(^1\) in 2006 and all EU and EEA EFTA countries implemented it by 2009. The objective of the services directive is to realise the full potential of services markets in Europe by removing legal and administrative barriers to trade.

Article 15 (7) of the Services Directive introduced a requirement for national authorities to notify draft national legislation (laws, plans, etc.) that could constitute an obstacle to the free movement of services, including obstacles to the freedom of establishment of service providers, to the European Commission, and for the EEA States to the EFTA Surveillance Authority, ESA. The recitals (the introduction) of the Services Directive exempt urban plans, while the Services Directive itself, does not contain a clause excepting urban plans.

In the years following the implementation of the Services Directive, Member States notified not much draft national legislation to the European Commission and/or the EFTA Surveillance Authority. The Commission therefore considered that the notification procedure did not work as intended and submitted a proposal for modified notification procedure for authorisation schemes and requirements related to services in the so-called Notification Directive\(^2\) in 2017, as part of the so-called Service Package\(^3\).

---

\(^1\) Services in the internal market, [https://ec.europa.eu/growth/single-market/services/services-directive_en](https://ec.europa.eu/growth/single-market/services/services-directive_en)


While the proposed Notification Directive was still in the decision-making process, the European Court of Justice (ECJ) ruled, in January 2018 in a case concerning the Dutch municipality Appingedam (called the “Visser-case”) that the Services Directive applies to territorial restrictions in urban and spatial plans\(^4\). In the case of Appingedam, the municipal council had adopted a zoning plan prohibiting the activity of retail in goods other than bulky goods in geographical zones situated outside the city centre, with the aim of protecting the urban environment.

In its ruling, the Court specifically pointed to the Dutch regulations that all retail shops, except shops for bulky goods, should take place in the city centre.

The Court further refers to the EU’s retail agenda, published in April 2018\(^5\), which aims at supporting retail growth by facilitating establishment, reducing day-to-day restrictions and new approaches to promote vital urban centres, not least in light of growing e-commerce.

The ruling in the Visser-case was a game changer in the understanding of the proposed modified notification procedure and caused uncertainty as to what extent it would also be applicable to local urban plans.

THE PROPOSED MODIFIED NOTIFICATION PROCEDURE

The purpose of the notification procedure is openness and transparency of administrative provisions, authorisation schemes and requirements related to services, as well as laws or regulations that may involve restrictions on services, including certain plans. The proposal intends to strengthen the mandatory notification already envisaged in the Services Directive where Member States are required to notify measures that are potentially restrictive of the service provision obligations under the Services Directive.

The draft modified notification procedure proposes a 3-month standstill period for draft national legislation (laws, plans, administrative schemes and requirements related to services), as well as a further 3-month period to evaluate the proposal. The European Commission argues that national authorities in other EU and EEA States and the Commission itself need time to consider whether such draft national legislation (laws, plans, administrative schemes and requirements related to services etc.) may impose restrictions on the free movement of services.

The proposal also gives the Commission a right of decision and competence of rejection.


\(^5\) A European retail sector fit for the 21st century, https://ec.europa.eu/growth/single-market/services/retail_en
THE EU’S INITIATIVES IN THE RETAIL SECTOR

The retail and wholesale services are of high importance to the EU economy. However, the European Commission has emphasised that the retail sector is undergoing a dramatic transformation due to the rapid development of e-commerce. In many EU countries, the regulatory framework has remained unchanged for decades and has not been adapted to the digital age.

E-commerce has increased the potential market for retailers and the scope of products available to consumers. The European Commission aims to ensure that EU wholesalers, retailers and consumers enjoy an integrated retail market, which is also competitive and innovative.

The European Commission argues that many European States have retail regulations that are not adapted to new technology or new services. Furthermore, retail restrictions such as the Dutch one give advantages for e-commerce and disadvantage for stores, as there are no regulations for e-commerce, the Commission says.

Municipal councils in the Netherlands have a wide scope to regulate retail and protect urban centres. Municipalities may prohibit the establishment of mega stores and forbid hypermarkets. Municipalities exceptionally allow stores for bulky goods such as furniture outside the city centres. In Amsterdam, there are particularly strict regulations on retail with the goal of preventing all retailers from targeting tourists.

The Court says such regulations must be proportionate, safeguard legitimate considerations, and be non-discriminatory. Hence the Commission's proposal that local and regional plans must be notified. The Commission argues that they do not want to look at spacial/urban planning, but on restrictions that they may pose.

The EU’s work to improve the situation of the retail sector affects the political discussion of the proposed modified notification procedure through the ECJ ruling in the Visser-case.

THE DISCUSSION ON THE PROPOSED MODIFIED NOTIFICATION PROCEDURE

The umbrella organisation of municipalities and regions of Europe, the CEMR (Council of European Municipalities and Regions), argues that the proposed modified notification procedure could cause significant administrative burdens and would be an infringement on the local decision-making process\(^6\). The CEMR points out that the possible effect of such an extension of the notification procedure from the ECJ ruling is that municipalities and regions would have to send a huge volume of local and regional plans to the European Commission and the EFTA Surveillance Authority.

---

\(^6\) Letter by the CEMR of 23 July 2019 to the European Parliaments’ Conference of Presidents and members of the IMCO committee.
Furthermore, the CEMR argues that the proposed modified notification procedure is unnecessary as local courts can check violation (illegal restrictions). The CEMR also points to the fact that the European Commission and the EFTA Surveillance Authority may in any case open infringement proceedings. Finally, CEMR argues that it will be difficult, and perhaps even impossible, to deal with the standstill period in the local democratic decision-making process. For example, when should a standstill period begin - before or after a discussion of the draft administrative provision or plan in the municipal council?

Following the ECJ judgement in the Visser-case mentioned above, several Member States have changed their view on the proposed Notification Directive and claim that the scope of measures proposed for notification is too broad.

As of 2018, the directive proposing a modified notification procedure has therefore been in trilogue\(^7\) negotiations between European Parliament (EP), the Council and the European Commission. The ECJ ruling in the Visser-case was included in the trilogue negotiations.

Both the European Parliament and the European Council disagree with the standstill period proposed by the Commission. Many fear it could entail a 6-month standstill period for local and regional authorities, with similar delay in the local and regional democratic decision-making process.

The common position of the European Council of December 2018 proposes exemptions for local and regional plans ("urban plans") from notification. At the same time, the Council proposes that national authorities can choose between two models for notification:

1) An overview sent to the Commission every 2 years,

2) National authorities may inform the Commission of national acts of territorial restrictions.

The CEMR believes that the first model of reporting may entail administrative burdens for local and regional authorities.

The European Parliament (EP) debated the notification directive before the ECJ ruling in the Visser-case. The CEMR has therefore urged the EP to reconsider the matter in light of the ECJ ruling. The EP has reopened the case and a new rapporteur is appointed. There is informal agreement between all political groups in the EP for exempting urban plans.

However, the Commission may withdraw the proposal if it considers the changes by the Council and the EP too substantial.

---

\(^7\) The EU treaties provide for trilogies negotiations. If the Council of the European Union does not agree to the amendments proposed by the European Parliament at the second reading, formal trilogue negotiations take place within the framework of a conciliation committee. The European Commission, the Council of the European Union and the European Parliament take part in the trilogue. The European Commission takes on the mediating function.
The EU's Committee of the Regions is collaborating with the CEMR on the issue and is planning to prepare a separate report on urban and local plans.

The Finnish Presidency (second half of 2019) has also announced that they will take up the matter. However, the process could not move before the new Commission was in office on 1st December 2019.

**DISCUSSIONS IN ICELAND, NORWAY AND SWITZERLAND**

The EEA EFTA countries submitted a joint Comment on the notification procedure to the Commission on 18 February 2019. In the opinion, Norway, Iceland and Liechtenstein emphasize the importance of adopting a new and improved notification procedure. If necessary, in order to reach agreement, EFTA proposes that the reference to the Commission's authority to make a decision/recommendation be deleted or amended.

The EEA EFTA countries further submitted a joint Comment on priorities for the Single Market beyond 2019 on 18 September 2019. In their opinion, the EEA EFTA States underline the need for an improved notification procedure for national draft legislation, with a standstill at government level for comments, without putting an unjustifiable administrative burden on local municipalities and other public authorities.

**Iceland**

The Icelandic Competition Authority (ICA) launched an investigation in 2009, focusing on the possible negative impact of local plans in two sectors: petrol stations and grocery markets. The investigation was not based on the Services Act, No. 76/2011, but rather on the Competition Act No. 44/2005. The ICA submitted its opinion in Case No. 3/2009 in December 2009, with recommendations to the Ministry for the Environment as well as guidelines to municipalities regarding local plans and land leases. The main idea with the investigation and opinion was to promote understanding among local authorities to use competition evaluation in the planning and land lease procedures.

It should be pointed out, with reference to this case, that it would seem that national competition authorities can be trusted to monitor disproportionate use of restrictions to retail businesses at

---


local level. It seems therefore utterly disproportionate and in contradiction with the subsidiarity principle to entrust such monitoring responsibilities to the European Commission or ESA.

Ten years after the above opinion, the Planning Act has not been changed in line with the ICA’s recommendation, to include an obligation for local authorities to make a competition evaluation a part of their planning procedure. Icelandic Association of Local Authorities has not supported the recommendation and views it as too burdensome for municipalities, who are in general more in favour of finding ways to streamline and shorten the planning procedure.

**Norway**

The Norwegian Services Act, which implements the Services Directive, states that the law does not interfere with the organisation and financing of public services, including duties related to the performance of these.

An example of the impact of the Services Directive in Norway is the introduction of ID cards on construction sites, originally implemented in a way that the EFTA Surveillance Authority (ESA) considered prevented foreign contractors from submitting tenders for contracts in Norway. Following a dialogue with ESA, the procedures were simplified and ID cards issued faster and more efficiently.

**Switzerland**

The 2009 Services directive is not relevant for Switzerland as there is no bilateral agreement on services between Switzerland and the EU.