

Comments from the Commission

IMI Notification Number: 357730.1 (FRANCE)

“Law No 2021-1104 of 22 August 2021 combating climate change and strengthening resilience to its effects”

The Commission would like to thank the French authorities for the notification of this law which is considered as a positive step towards the reduction of the net land take in view of achieving the goal of no net land take in the EU by 2050, confirmed in the EU Soil Strategy for 2030.

However, the notified law introduces restrictions on commercial establishment in the form of territorial restrictions within the meaning of Article 15 (2) (a) of the Services Directive (SD). The law provides a prohibition on the establishment or extension of a commercial surface on non-artificial soil. A derogation is foreseen for commercial areas of less than 10 000 m² on the basis of criteria laid down in the law which must be specified by a decree expected in March 2022.

According to Article 15 (3) SD, a notified measure in order to be compatible with the Services Directive, must be non-discriminatory, justified and proportionate to the general interest objective pursued. The Commission does not consider the measure as discriminatory and it is justified by the objective of combating land take. The Court of Justice has ruled that environmental protection is a reason of general interest that may justify restrictions on the freedom of establishment.

As regards the proportionality of the measure with the pursued objective, the French authorities claim that the principle of proportionality is respected, as the law provides derogations from the general prohibition principle.

To the understanding of the Commission, establishment possibilities exist (on the basis of certain criteria) for establishments below 10 000 m². The law, however, contains a total prohibition on establishment in respect of commercial areas with a surface area of more than 10 000 m².

The Commission would like to recall that the principle of proportionality requires that the measure is appropriate for securing the attainment of the objective pursued, that it does not go beyond what is necessary to attain that objective and that there are no other less restrictive measures to attain the same result. A general prohibition on establishment above a specific area does not appear to be in line with these conditions.

In view of the above, the Commission would like to ask on the criteria that were used to set up the threshold of 10 000 m². Moreover, the Commission would like more information as regards the motivation for the different thresholds (10,000 m² / 3,000 m² / 1,000 m²) referred in the law. The Commission would appreciate to be informed on the methodology used.

Furthermore, the threshold of 10 000 m² raises questions as regards the consistency of the measure: two shops of 10 000 m² would be able to be set up if they meet the criteria laid down by the law, instead of one shop of 20 000 m².

On the issue of proportionality once more, the Commission would like more clarifications on the existence of less restrictive measures. In this context, would it not be possible instead of a ban, to envisage measures such as suitable construction methods, green roofs and non-tarred car parks? Several developed innovations (within certain circumstances/criteria) could possibly be more suitable than a pure ban to ensure environmental protection. Have the French authorities considered any such alternatives?

The Commission understands that the ban on establishment does not apply to industrial complexes, although their impact on land take seems to be quite similar to that of large retail shops. In this sense, what would be the difference to such a treatment from the point of view of the objective pursued? The Commission would like to ask if the criteria for industrial complexes could not be used also for large retail outlets. Moreover, we would like to ask more information on the situation of warehouses, especially those used by e-commerce platforms.

The Commission would like to highlight the importance of exploring alternative measures given the potential impact that such a total ban could have on the retail ecosystem. By prohibiting new commercial establishments, such a ban would on one hand prevent new operators from entering the market and on the other, may prevent innovation as certain shops may need more floor surface than others (e.g. shops with a large number of products that customers can test on site).

Further to the above, the Commission would also have the following questions:

The justification of the measure refers to “natural areas, agricultural land and forest”. Are these the only forms of land take covered by the law? The Commission would like the French authorities to clarify further the concept of artificial soil and especially the type of soils concerned: agricultural land or any unbuilt soil.

Was there an impact assessment of the provision at issue prior to its adoption? It would be interesting to know how much land is taken up (artificialised) respectively by large retail shops, industrial complex and private housing.

The Commission would request the clarification of the following terms: “appropriate urbanisation district”; “region’s needs”; “action zone of an area-revitalisation operation”; and “priority neighbourhood”;

What are the objective criteria that the retail planning committees apply when using their discretion with regard to granting retail authorisations even if the conditions for an exception under subsection V of Article L752-6 are demonstrated?

The Commission would like to thank in advance the French authorities for their cooperation in replying to these comments.