

Comments from the European Commission on notification 170318

Verordnung der Oö. Landesregierung, mit der Grundsätze zur Feststellung der spezifischen Standorteignung für Gebiete für Geschäftsbauten festgelegt werden (Oö. Geschäftsgebieteverordnung 2021)

In accordance with the notification, shops selling non-bulky goods are allowed only within the main settlement area of a municipality. This covers the historic centre of the town or city that tends to be densely built up, has a high degree of mixed use and fulfils a fundamental function for the entire territory of the municipality and public life, beyond a merely residential function. Non-bulky goods are defined as goods that due to their nature, packaging or size, can, as a rule, be transported by bicycle, on foot or by public transport.

The notified measure amounts to a restriction on the location of shops based on the type of products sold. It falls within the ambit of Article 15§2(a) of Directive 2006/123 (Services Directive). As such, in accordance with Article 15§3 of the Services Directive, Member States must demonstrate that the measure is non-discriminatory, justified and proportionate.

As Austria indicates, this requirement is rather similar to the provision at issue in the *Visser* Court of Justice judgment of 30 January 2018 (joint cases C-360/15 and C-31/16).

In *Visser* ruling, the Court, in line with the Commission position, acknowledged that such restrictions could be justified by the objective of maintaining the vitality of city-centres. Austria indicates that the objective in this case is to protect the environment, which is also an overriding reason in the general interest recognized by the Court. We would therefore agree that the measure is justified. We would also agree that the measure is non-discriminatory.

However, we would be grateful if Austria could provide the Commission with an analysis of the appropriateness and proportionality of the measure.

Please provide the Commission with any documents, guidance that may have served as a basis for adopting the restriction.

In addition, the Commission would have the following questions:

1. Are exceptions provided to the requirement for shops selling non-bulky goods to establish in city-centre? Would it be possible, under certain conditions, for a shop selling non-bulky goods to establish outside the main settlement area of a municipality? Please provide us with the conditions for the granting of such exceptions. Such conditions for instance could address the situation when a business model does not fit in a city-centre because of the lack of appropriate surface or because the price of rents is too high.
2. What is the situation when a shop sells both bulky goods and non-bulky goods? Is it excluded from the measure? Do specific conditions apply?
3. Has Austria considered whether less restrictive measures could fulfil the objectives pursued?

The Commission has published a Small Retailer Guide which identifies success stories for revitalisation of city-centres that may be useful in this context. In particular, the Commission considers that a holistic approach is needed for revitalising city-centres, relying not only on retail and on establishment restrictions but also addressing other issues that draw consumers to city centres

such as housing, public transport, public services and green. Are such initiatives taking place in the area considered?

Please find below for ease of reference, the links to the Guide and to the workshops where experiences were shared. For information, a workshop took place in Vienna in April 2019.

Facing the Future guide: <https://op.europa.eu/en/publication-detail/-/publication/d606c517-4445-11e8-a9f4-01aa75ed71a1/language-en>

Revitalising 2020 workshop outcomes: <https://ec.europa.eu/docsroom/documents/44446>