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Delegations will find attached document COM(2018) 219 final.

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**A European retail sector fit for the 21st century**

{SWD(2018) 236 final} - {SWD(2018) 237 final}

## 1. Strengthening the competitiveness of the European retail sector

**A dynamic and competitive retail sector is important for consumers, businesses and hence the whole EU economy.** The sheer magnitude of companies and jobs involved as well as the contribution to the EU value added **make retail key for boosting long-term economic growth.**<sup>1</sup>

Driven by evolving consumer needs and technological progress, the sector has been rapidly transformed and is a catalyst for **innovation and productivity.**

EU households spend up to one-third of their budgets on goods distributed by retailers. Through price, choice and quality of the products on offer **the retail sector has an impact on the quality of life of those living in the EU.**

The 3.6 million companies active in the retail sector (mainly SMEs) interact with other economic sectors such as wholesalers and product manufacturers as well as transportation and logistics and other business services. **A better performing retail sector will as a result generate positive spill-over effects on the entire economy.**

**The Single Market enables retailers to access some 500 million potential consumers.** However, this requires a favourable business and regulatory framework that is fit for the needs of both on-line and off-line retailers and which assists in responding to challenges affecting the retail sector at a global level.<sup>2</sup>

**The rapid growth of e-commerce is transforming the sector.** E-commerce has become a fact of life for most EU citizens. This brings both new opportunities as well as challenges for the sector. The development of multi-channel retail and the blurring boundaries between off-line (physical premises) and on-line (e-commerce) promotes competition and fosters innovation in the sector. **However cross-border e-commerce in the EU still has much room for improvement.** In addition, not all companies find it easy to keep pace with the emergence of new business models – 80% of retailers do not yet sell on-line. Many small retailers, in particular, find it difficult to adapt.

**For the Single Market to deliver, appropriate action must be taken at national, regional and local level.** In the context of the European Semester, several Member States have already carried out reforms aiming to improve the regulatory environment for retailers.<sup>3</sup>

**Still, the productivity of the EU retail sector has been lagging behind other sectors and is less dynamic than in other comparable economies.**<sup>4</sup> Retail has also been less profitable than other sectors. **Accumulation of regulation has a negative impact on its performance.**

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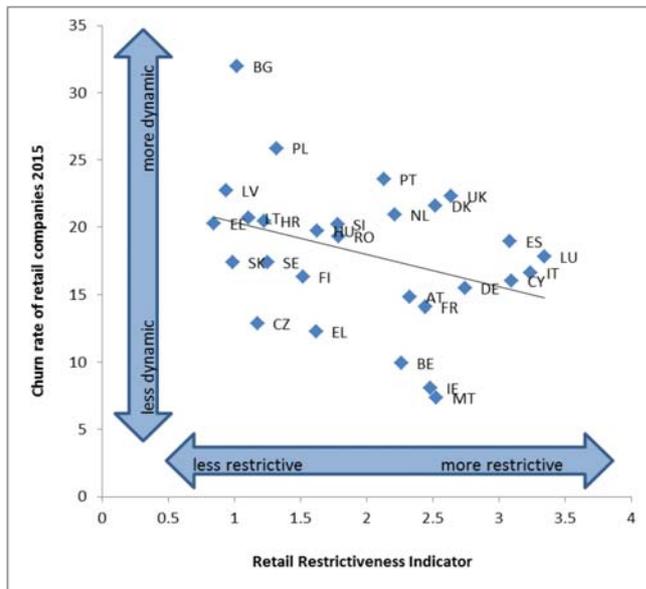
<sup>1</sup> Retail is the biggest sector in the EU non-financial business economy in terms of number of enterprises and persons employed, generating 4.5% of the value added of the European economy and providing 8.6% of all jobs in the EU; Eurostat, 2014.

<sup>2</sup> In the EU, 68% of Internet users (who account for 81% of the population) shopped online in 2017. Among those online shoppers, 33% purchased from sellers in other Member States, and 23% from sellers located in non-EU countries. Source: Digital Economy and Society Index (DESI) 2018.

<sup>3</sup> Such reforms have taken place e.g. in Belgium, Denmark, Finland, France, Italy, Luxemburg and Spain.

<sup>4</sup> For example, in Canada, Japan, Australia and the United States of America.

Retailers must comply with an accumulation of diverse and often complex regulatory frameworks set at the national, regional and local level. Such restrictive regulations lead to less dynamic retail markets with fewer entries and exits of retail businesses and lower employment prospects.<sup>5</sup>



Source: Own calculations based on information collected from Member States, from Eurostat and through dedicated studies<sup>6</sup>

**A modern retail sector needs more investment and a favourable business environment.** The **Investment Plan for Europe** supports a further deepening of the Single Market, notably by removing barriers to investment, fostering greater regulatory predictability and reducing excessive regulation.

**With the implementation of the Digital Single Market Strategy<sup>7</sup>,** the Commission took steps to make the Single Market fit for the digital age. Boosting cross-border e-commerce was one of the main objectives. The Commission proposals on geo-blocking<sup>8</sup>, cross-border parcel delivery services<sup>9</sup>, modernisation of the VAT system<sup>10</sup>, digital contracts rules<sup>11</sup> and the forthcoming initiative on on-line platforms<sup>12</sup> will help retailers to seamlessly operate on-line.

<sup>5</sup> See the analysis in the Staff Working Document accompanying this Communication, SWD(2018) 236.

<sup>6</sup> Data for the RRI reflect the state of play for 2017. In some cases, when important changes took place after December 2017, the information has been updated and taken into account in the scores. The most recent data from Eurostat available at the time of the analysis is for 2015.

<sup>7</sup> A *Digital Single Market Strategy for Europe*, COM(2015) 192 final.

<sup>8</sup> Regulation (EU) 2018/302 of 28 February 2018 on geo-blocking.

<sup>9</sup> Regulation on cross-border parcel delivery services [entry into force in May 2018].

<sup>10</sup> Directive 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods.

<sup>11</sup> Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final; Amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM(2017) 637 final.

<sup>12</sup> *Mid-Term Review on the implementation of the Digital Single Market Strategy*, COM(2017) 228 final.

The Commission is also proposing actions for a fair and effective taxation of the digital economy<sup>13</sup> and to ensure the independence of payment card schemes and processing entities.<sup>14</sup>

**New opportunities are emerging for start-ups active in the sector.** The start-up and scale-up initiative<sup>15</sup> aims specifically at removing barriers for start-ups to scale-ups in the Single Market, by creating better commercial opportunities and facilitating access to finance.

**The New Skills Agenda for Europe** proposed a number of actions, which will help equip EU citizens with the right skills to meet the challenges of the fast-changing global economy.<sup>16</sup> Retail needs skills matched to the requirements of digitalisation. In addition, Erasmus+ offers new opportunities for long-term apprenticeships abroad in a wide range of economic sectors including retail.

**The Single Market for goods is of particular importance for the retail sector.** In December 2017, the Commission tabled two legislative proposals to make it easier for companies, especially SMEs, to sell their products across the EU<sup>17</sup>, and to strengthen controls to prevent unsafe products from being sold to EU consumers.<sup>18</sup> In addition, the Commission tabled a proposal to eliminate key contract law-related barriers hindering cross-border trade.<sup>19</sup> The Commission is also taking further initiatives to improve the legal framework for consumers and businesses.<sup>20</sup>

**The Services Directive enables retailers to establish outlets throughout all Member States more easily.** In its judgment, in the *Visser* case<sup>21</sup>, the Court of Justice of the European Union ("ECJ") confirmed that retail is a service and as such is covered by the Services Directive.<sup>22</sup> The Directive ensures that certain very restrictive market access requirements are prohibited and others may only exist where they are non-discriminatory, justified by a legitimate public policy objective and proportionate. In that regard, the Directive also aims to guarantee efficient, objective and non-discriminatory procedures for market access within a reasonable time period. Similar requirements are imposed by the Treaty on the Functioning of the EU in situations falling outside the scope of the Services Directive, such as operational restrictions.

**The European Council stressed that the enforcement of existing legislation is key for the functioning of the Single Market.**<sup>23</sup> In the implementation of the Services Directive, Member States made a number of adjustments to the regulatory frameworks for services. Full compliance with EU rules would improve the regulatory environment for retail and allow companies and therefore also consumers to reap the benefits of the Single Market.

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<sup>13</sup> *A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM(2017) 547.

<sup>14</sup> Regulation (EU) 2018/72 of 4 October 2017 supplementing Regulation (EU) 2015/751 on interchange fees for card-based payment transactions.

<sup>15</sup> *Europe's next leaders: the Start-up and Scale-up Initiative*, COM(2016) 733 final.

<sup>16</sup> *A New Skills Agenda for Europe*; COM(2016) 381 final.

<sup>17</sup> Proposal for a Regulation on the mutual recognition of goods, COM (2017) 796.

<sup>18</sup> Proposal for a Regulation on compliance and enforcement, COM(2017) 795.

<sup>19</sup> Amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM(2017) 637 final.

<sup>20</sup> *A new deal for consumers*, COM(2018) 183.

<sup>21</sup> Recent judgment of 30 January 2018, *Visser*, C-31/16, par. 97.

<sup>22</sup> Directive 2006/123 of 12 December 2006 on services in the internal market (the Services Directive).

<sup>23</sup> European Council conclusions on Jobs, Growth and Competitiveness, 22 March 2018.

**The Single Market Strategy pointed at retail establishment restrictions and restrictions affecting day-to-day retail operations as significant impediments to a better performing retail sector.** The Commission committed "*to set out best practices for facilitating retail establishment and reducing operational restrictions in the Single Market... [to] provide guidance for Member States reforms and priority-setting for enforcement policy in the retail sector*".<sup>24</sup>

**This Communication aims to contribute to unlocking the potential of the retail sector for the EU economy by identifying best practices.** The best practices will support the competitiveness of the retail sector without undermining the public policy objectives pursued by Member States. As emphasised by the European Council, the EU needs to keep working towards a future-proof Single Market, fit for the digital age.<sup>25</sup> The retail sector is increasingly relying on multi-channel distribution and this trend will continue. Several Digital Single Market initiatives aim at ensuring that on-line retailers are able to sell cross-border effectively. This Communication addresses restrictions more prevalent in off-line retail.

**On the 25<sup>th</sup> anniversary of the Single Market,**<sup>26</sup> we should celebrate its achievements but also look forward. The retail sector deserves our attention and analysis. **Efforts are needed by the EU institutions and Member States to support the competitiveness of the sector at a time when the rapid growth of e-commerce is transforming it.**

## **2. Restrictions in retail affecting market performance**

**Retailers face numerous restrictions in varying degrees** in terms of the establishment of shops (e.g. on the shop's size and location or the procedure to obtain a specific authorisation) and operations (e.g. on opening hours, sales promotions and distribution channels, taxation, sourcing). Many of these restrictions may be justified by legitimate public policy objectives, yet their accumulation may create disproportionate barriers for new entrants and therefore negatively affect the productivity of the sector. Retailers emphasise that regulatory frameworks should be future-proof and flexible to allow businesses to swiftly adapt to a changing reality.<sup>27</sup>

**Reducing restrictions has positive effects on the functioning of the market.**<sup>28</sup> A less restrictive regulatory environment encourages more firms to enter the market, to reap the opportunities it gives and to succeed. Retailers have more flexibility in investing in the right location and format of their shops, and to respond better to the needs of local consumers. All this, together with the thriving of e-commerce increases competition and leads to the success of more efficient and innovative firms.

**As a result, productivity of the sector improves, also for the benefit of consumers.** Consumers can enjoy more variety, more innovation and higher quality of both products and

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<sup>24</sup> *Upgrading the Single Market, more opportunities for people and businesses*; COM(2015) 550 final.

<sup>25</sup> European Council conclusions on Jobs, Growth and Competitiveness, 22 March 2018.

<sup>26</sup> Joint statement on the occasion of the 25<sup>th</sup> anniversary of the Single Market by the Presidents of the European Parliament and the European Commission, and the Council Presidency, 20 March 2018.

<sup>27</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

<sup>28</sup> See the analysis in the Staff Working Document accompanying this Communication, SWD(2018) 236.

services offered. They are also likely to pay lower prices.<sup>29</sup> In addition, a stronger retail sector can offer additional employment opportunities. More and better jobs would be created not only in retail but also in supporting services such as transportation, storage and logistics.

**The Commission has developed a retail restrictiveness indicator** that illustrates the various restrictions to retail establishment and the day-to-day operation of shops.<sup>30</sup> Its components capture the complexity and diversity of the regulatory frameworks in place in the Member States. Overall, the indicator is a factual snapshot and shows a highly divergent restrictiveness picture across the EU. Both establishment and operational restrictions are present in all Member States. However, the specific type of restrictions and the restrictiveness level differ significantly. This level can be up to five times higher in some Member States than in others. While in the least restrictive regulatory frameworks only few types of restrictions are present, the most restrictive ones can accumulate up to 12 different types of restrictions.<sup>31</sup> This affects the environment in which retail businesses operate.

The task of regulating the retail sector lies primarily with Member States. However, when they set rules, Member States need to comply with EU law and not unduly restrict the freedom of establishment or the free provision of services. As a result, some restrictions are prohibited, whereas in other cases they may be maintained or introduced as long as they are non-discriminatory, justified on the ground of legitimate public policy objectives and proportionate. Less restrictive regulatory environment would support the competitiveness of the sector. In that context, regard should be paid to the fact that, due to their nature, establishment and operational regulations mainly affect off-line retailers. Furthermore, the restrictions add up and Member States should consider their cumulative effects.

### 3. Facilitating retail establishment

**Opening new shops is a retailers' way to access a market.** As multi-channel retail develops, it is important for retailers to be able to pursue a consistent strategy of market access, which combines an on-line and off-line presence. Moreover, such market access should be possible within a sensible time frame and without undue or disproportionate burdens. **Timely and swift access to the market is a prime issue for retailers.** They are

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<sup>29</sup> Commission research based on the OECD Product Market Restrictiveness indicator suggests that a reduction of the OECD index by one point would produce a reduction of 7% in the price level (European Commission, *Background documents for the European Semester (2018), The EU retail sector*).

<sup>30</sup> Building on the OECD methodology for the PMR index, in the RRI the Commission attributed numerical scores to regulatory situations in Member States within relevant aspects. Values assigned to each aspect range from 0 to 6 points, where 0 indicates the least and 6 the most restrictive regulations. Information underpinning the results has been gathered and verified through the consultation of Member States. The RRI methodology has also been consulted with Member States within the Services Directive Expert Group. For more details, see the Annex and the Staff Working Document accompanying this Communication, SWD(2018) 236.

<sup>31</sup> The first pillar of the retail restrictiveness indicator covers issues linked to retail establishment: specific conditions (such as size thresholds, location-specific rules, the level of detail in local planning requirements and the need for economic data) as well as procedures (number of permits and impacts assessments required, number of entities involved, length of the procedure and the publication of establishment decisions). The second pillar reflects restrictions on operations, such as shop opening hours, distribution channels for specific products, sales promotions, retail-specific taxes and fees and sourcing of products. The indicator constitutes a factual overview of restrictions in Member States. Rules on distribution channels for specific products, such as alcohol, tobacco and non-prescription medicines are included for the sake of completeness of the restrictiveness picture. This is without prejudice to the health and societal policy objectives pursued by Member States. The Commission shares these objectives and has developed dedicated policies and legislation, particularly on restriction of tobacco sales and advertising, and to guarantee high standards of quality and safety of medicinal products. It also supports Member States policies on the reduction of alcohol related harm.

concerned about restrictions on locations for new shops, product-related conditions or a general lack of legal certainty. Retailers indicate that establishment procedures are too long, too complex and too uncertain.<sup>32</sup>

Establishment restrictions amount to serious market entry barriers and as such have been repeatedly raised in the context of the European Semester.<sup>33</sup>

### *Establishment conditions*

All Member States regulate the establishment of retail outlets. Very often, retail establishment is regulated at regional and/or local level, which adds to the diversity of rules retailers have to comply with.

The Services Directive, by codifying the case law of the ECJ regarding the freedom of establishment, prohibits certain requirements such as **economic needs tests**.<sup>34</sup> Information requests to evaluate the offer (e.g number, the types and the formats of existing shops) or to measure market demand (e.g purchasing power or household consumption in the relevant establishment areas) fall in this category. Such requirements have been prohibited by the EU legislator because they either pursue purely economic interests or can be replaced by less restrictive means. Many Member States, when implementing the Services Directive, reviewed their conditions for establishment and removed requirements for an economic assessment.<sup>35</sup> Yet, in some Member States in law or in practice economic information is still required or used.

Rules on the establishment of retail shops are guided by **town and country planning considerations**, often with the objective of maintaining the vitality of city-centres or the protection of the environment. For example, these rules may limit establishment in the periphery of towns. These objectives are as such shared by the Commission which, under the Urban Agenda for the EU,<sup>36</sup> is working together with Member States, cities and other stakeholders to promote more urban-friendly, effective and efficient policies and to contribute to territorial cohesion.<sup>37</sup> At the same time, the pursuit by Member States of those objectives must be done in a proportionate manner.

The ECJ confirmed<sup>38</sup> that **the Services Directive applies to retail establishment irrespective of the way Member States regulate retail establishment**, whether through an authorisation scheme or through town and country planning. The ECJ confirmed that the Services Directive allows public policy objectives to be duly taken into account and that Member States have a margin of discretion in the way legitimate public policy objectives are

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<sup>32</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

<sup>33</sup> Restrictive rules on retail establishment have been raised in Country Specific Recommendations addressed to Belgium, Denmark, Finland, France, Germany, Hungary, Italy, Luxembourg and Spain.

<sup>34</sup> Article 14 paragraph 5 of the Services Directive prohibits economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or its appropriateness in relation to the economic planning objectives set by the competent authorities.

<sup>35</sup> Economic needs test have been removed in Belgium, France, Luxembourg, Italy, the Netherlands, Romania and from the concerned regions of Spain. See SWD(2012) 148 final accompanying the Communication on the implementation of the Services Directive.

<sup>36</sup> Launched in May 2016 with the Pact of Amsterdam.

<sup>37</sup> <https://ec.europa.eu/futurium/en/urban-agenda-eu/what-urban-agenda-eu>.

<sup>38</sup> Judgment of 30 January 2018, *Visser*, C-31/16, par. 124.

fulfilled. However, to be compatible with the Services Directive in that regard, Member States need to ensure that regulatory requirements relating to retail establishment are not only justified by an overriding reason relating to the public interest, but are also proportionate.

**Proportionality is an important feature of the Single Market freedoms. Proportionality is essential in retail.** The Services Directive requires that retailers are not subject to restrictions that would be disproportionate. This is the case of some requirements explicitly referred to in the Services Directive, which include **territorial restrictions**.<sup>39</sup> An example of these could be highly detailed spatial plans, specifying the types of goods to be sold.<sup>40</sup> The ECJ in the *Visser* judgment recalled the obligation for Member States, under the Services Directive,<sup>41</sup> to screen their regulations and practices to check the proportionality of territorial restrictions applying to retail establishment.<sup>42</sup>

In the services sector more broadly, the Commission proposed a Directive on a proportionality test in the field of the regulated professions.<sup>43</sup> Similarly, in the Commission proposal regarding the notification procedure for certain restrictions under the Services Directive<sup>44</sup>, a structured and uniform approach to proportionality is required.

Member States, by setting size thresholds, often apply different rules to retail establishment projects depending on **the size of the planned retail shop**.<sup>45</sup> This can result in artificially shaping the retail landscape by affecting the formats and sizes of the shops opened<sup>46</sup>, ultimately impacting productivity.

#### **Economic needs tests**

In accordance with the Services Directive, public authorities must review their rules and practices to ensure that economic data is neither required nor used for the purposes of establishment.

*Example: In most Member States economic data is not used in retail establishment procedures, whereas in some other Member States economic needs tests are still de jure or de facto in place.*

#### **Location-specific rules**

If applying location-specific rules, including with the objective of keeping city centres vibrant, in accordance with the Services Directive, public authorities need to assess the proportionality of these rules, in particular to ascertain whether less restrictive rules would be equally effective.

<sup>39</sup> Article 15 of the Services Directive.

<sup>40</sup> Such requirements reduce the ability to respond to changing consumer demands and can restrict the possibility for new retail to establish in vacant commercial locations, which runs contrary to the argument often advanced as a justification for regulating the location of shops.

<sup>41</sup> Article 15 paragraph 3 of the Services Directive.

<sup>42</sup> Judgment of 30 January 2018, *Visser*, C-31/16, par. 130.

<sup>43</sup> Proposal for a Directive on a proportionality test before adoption of new regulation of professions, COM (2016) 822 final.

<sup>44</sup> Proposal for a Directive laying down a notification procedure for authorisation schemes and requirements related to services, COM(2016) 821 final.

<sup>45</sup> For example, in France shops larger than 1000 m<sup>2</sup> require a special authorisation. In Germany, such a threshold is set at 800 m<sup>2</sup>, while Hungary fixes the threshold at 400 m<sup>2</sup>.

<sup>46</sup> See the Staff Working Document accompanying this Communication, SWD(2018) 236.

*Example: In France, the rules concerning retail establishment allows retailers to select the optimal location for their shop without placing constraints on the shop format and products assortment.*

### **Local spatial zones**

When designing local spatial plans, public authorities are encouraged to allow for a broad range of commercial activities to take place in commercial zones. Moreover, in accordance with the Services Directive, public authorities, under the principle of proportionality, must avoid overly prescriptive rules.

*Example: By indicating zones for broad range of business activities in local plans ("commercial use"), the Romanian authorities allow for flexibility in the use of the space.*

### **Size thresholds**

If setting size thresholds for retail establishment, in accordance with the Services Directive, public authorities under the principle of proportionality, must assess the consistency of thresholds' level with the public policy objectives pursued. Moreover, public authorities are encouraged to consider their effects on the market structure.

*Example: In Latvia, no threshold applies and regardless of the size of a shop, a single retail establishment process applies, as long as the project is planned in an area designated for "commercial use". Also in Denmark and in Finland, as a result of reforms of the retail establishment regulatory frameworks, higher size thresholds for shops have been set and certain floor caps have been removed. The reforms have been carried out with the aim to improve the functioning of the sector, increase productivity and provide consumers with greater choice and lower prices.*

Keeping **vibrant city centres** is a legitimate policy concern for national, regional or local authorities and the number of vacant shops is growing. To address this concern, some of these authorities apply restrictions to retail establishment outside city centres. If applied, these restrictions need to be justified and proportionate. In this context, relevant national authorities should consider a more comprehensive policy going beyond retail-specific rules. They should also take into account the e-commerce dimension and changing consumer shopping preferences, both of which affect retailers' presence in city centres.

### **New approaches to promote vitality of city centres**

Public authorities are encouraged to consider a wide range of actions and measures to attract consumers to city centres which do not rely exclusively on restrictions on retail establishment.

*Example: In a part of Amsterdam (Netherlands), known as the '9 streets', retailers came together to create a thriving community, building on the identity and cultural heritage of the area. Using a community manager, retailers are encouraged to coordinate common marketing and promotional activities linked to this heritage that can attract tourists or other consumers to the area, promoted via a website. This, together with other initiatives led by the competent authority such as the introduction of a car-free zone, has bolstered retail activity and demand for retail space in the '9 streets'.*

*In parallel to this Communication, the Commission is publishing a **Guide for fostering the revitalisation and modernisation of the small retail sector**. This guide contains success*

*stories of cities that have restored the vitality of their city centres and should help competent authorities assist small retailers in adapting to the new realities of the digital age.*

### *Establishment procedures*

**Simple, transparent and efficient establishment procedures ("cutting red tape") offer opportunities for the retail sector to improve its productivity.** Respondents to the open public consultation emphasised the need for streamlining the establishment process, more transparent procedures and a better and more systematic use of on-line procedures. Digital technologies should be used to facilitate this access.<sup>47</sup> The EU eGovernment Action Plan<sup>48</sup> aims at accelerating the digital transformation of government to make businesses' interactions with public administrations more efficient, transparent, faster and less costly.

Finding relevant and accurate information regarding legal requirements and procedures in a format that is easily understandable, as well as being able to access and carry out administrative procedures on-line, is crucial for all those willing to make use of the benefits of the Single Market and particularly for SMEs. To better address these needs the Commission has presented a legislative proposal to set up a single digital gateway.<sup>49</sup>

In practice, brick-and-mortar retailers still face important **delays** because of many procedural obstacles.<sup>50</sup> Such delays have a negative impact on the start and viability of a project – which may be designed for a specific market setting – and cause significant costs.

The full implementation of the Services Directive alone would allow for an ambitious programme of **administrative simplification and cooperation**.<sup>51</sup> In view of the *Visser* judgment, Member States should assess whether the administrative simplification in the retail sector has been ambitious enough or if more work is required. In the Directive, Member States are required to set up Points of single contact, to provide for the possibility to complete procedures at a distance and by electronic means and to make information on national requirements and procedures easily accessible. Applications must be processed as quickly as possible. The sector and public authorities would benefit from more efficient, more **transparent and shorter establishment** procedures.

### **Simplified procedures**

Simplified procedures are less time and resource intensive. In accordance with the Services Directive, public authorities must facilitate brick-and-mortar retailers' access to the market through simplified retail establishment procedures with fewer permits which can be applied for through a single on-line point of contact.

<sup>47</sup> Article 8 of the Services Directive obliges Member States to ensure that all procedures and formalities relating to the access to a service activity and its exercise may be easily completed at a distance and by electronic means through the relevant point of single contact and with the relevant competent authorities.

<sup>48</sup> EU eGovernment Action Plan 2016-2020, COM(2016) 179.

<sup>49</sup> Proposal for a Regulation on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012, COM(2017) 256 final.

<sup>50</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

<sup>51</sup> Article 5 to 8 of the Services Directive relating to simplification of procedures, setting up Points of single contact, right to information and procedures by electronic means.

*Example: In Belgium, to simplify the administrative process, the Regions introduced integrated procedures and one-stop-shops for retail establishment. These changes enable retailers to apply for a single integrated permit in one place.*

### **Transparency**

Transparency at all stages of the retail establishment procedure is beneficial for retailers. In accordance with the Services Directive, public authorities must make sure that all the necessary information about retail establishment procedures is made available to the retailer beforehand through a dedicated website. They are also encouraged to make publicly available all establishment decisions, whether positive or negative.

*Example: In Lithuania, both positive and negative establishment decisions are published electronically.*

### **Length of procedures**

Shortening the length of establishment procedures helps retail projects start swiftly. With the development of on-line trade, it is important to shorten deadlines for brick-and-mortar retailers to access the market. This would also support multi-channel development. In accordance with the Services Directive, public authorities must process applications as quickly as possible.<sup>52</sup> They are encouraged to consider all options to shorten the time needed for a retail activity to start, including through measures to avoid opportunistic appeals.

*Example: Recent reform in Finland aimed at simplifying and thus shortening the procedures for retail establishment.*

## **4. Reducing operational restrictions**

**On top of regulations affecting the establishment of retail shops, retailers face a number of regulations linked to their daily operations** (e.g. on opening hours, sales promotions, distribution channels and sourcing).

Operational restrictions have often been put in place to fulfil public policy objectives, such as the protection of employees, consumers, the environment and public health. E-commerce is changing consumer shopping habits (consumers are used to shopping anytime, anywhere, including cross-border).<sup>53</sup> This makes the case for Member States to assess and modernise, as necessary, their regulatory frameworks, taking inspiration, where relevant, from well-functioning and less disruptive solutions developed in other Member States.

Operational restrictions usually affect mainly brick-and-mortar retailers.<sup>54</sup> For example, because of their nature shop opening hours restrictions or retail-specific taxes based on the size of the selling space do not apply to on-line retailers. Public authorities should assess the

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<sup>52</sup> Article 13(3) Services Directive.

<sup>53</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

<sup>54</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

proportionality and efficiency of operational restrictions affecting brick and mortar retail to ensure a level playing field with e-commerce.

Operational restrictions may become a significant burden for businesses, affecting their productivity and as such have been repeatedly signalled in the context of the European Semester.<sup>55</sup>

### *Ensuring a level playing field in retail*

Brick-and-mortar retailers need to take into account new consumption patterns and adapt their commercial strategy accordingly.<sup>56</sup> **Small retailers** may find it difficult to adapt to the digital evolution of the market. They do not always easily embrace technology and generally have fewer resources, less knowledge and less capacity to design and implement structural changes.

#### **Help transition for small retailers**

Public authorities are encouraged to facilitate the adoption of digital technologies by small retailers.

*Example: In Belgium, to improve small retailers' knowledge of how to use digital technology, the Walloon Digital Agency developed a self-diagnostic tool that helps small retailers assess what digital technology suits their means and experience and the type of solutions they need in the short term to facilitate their adoption of digital technologies.*

*The **Guide for fostering the revitalisation and modernisation** of the small retail sector should help competent authorities assist small retailers in adapting to the new realities of the digital age.*

In Member States that have rules on promotions and discounts, consumers can usually take advantage of **promotions and discounts** that are offered by on-line shops located in Member States with more flexible rules (for example, those that do not impose strict end-of-season sales periods or allow sales below costs).<sup>57</sup>

E-commerce enables consumers to buy products on-line for which, when sold off-line, some Member States impose **specific distribution channels**.<sup>58</sup> This may create different conditions for off-line and on-line retail.

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<sup>55</sup> Restrictive rules on retail operations have been mentioned in Country Reports for Austria, Belgium, Finland, France, Germany, Hungary, Italy, Luxembourg, Portugal and Spain.

<sup>56</sup> See Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237.

<sup>57</sup> Article 20 of the Services Directive prohibits that recipients of services are discriminated on the basis of their nationality or of their place of residence. Regulation (EU) 2018/302 of 28 February 2018 on geo-blocking prevents discrimination on access to prices, sales or payment conditions, when buying products and services from a website based in another Member State.

<sup>58</sup> For instance, in some Member States the sale of non-prescription medicines is reserved to pharmacies. The Member States and the European Union have introduced legal provisions for the retail of non-prescription medicines sold online and off line in the light of their specific situation (e.g. role of the pharmacist in advising patients, control of the consumption, falsified medicines).

Regulations designed predominantly for off-line retail limit retailers' abilities to adapt and react to the changes brought by e-commerce. This is the case for example of restrictions on **shop opening hours**. These restrictions had often been put in place to protect employees as well as SMEs, which not always can afford sufficient staff to cover long opening hours. These concerns should be addressed while supporting off-line retailers in adapting to new consumers' habits.

The existing **retail-specific taxes** and fees based on the size of the selling space are only applicable to brick-and-mortar shops, which may put them at a disadvantage compared to on-line shops and other businesses.

### **Sales promotions and discounts**

Sales promotions and discounts can be part of a retailer's strategy in a multi-channel environment or for entering a new market. Public authorities must comply inter alia with the principle of non-discrimination, justification and proportionality when setting rules on sales promotions and discounts; this would also contribute to ensuring a level playing field with e-commerce.

*Example: A recent reform in Luxembourg aimed at facilitating end of business sales and authorising sales below cost. Greece extended the end-of-season sales periods in 2014.*

### **Specific sales channels**

Public authorities are encouraged to introduce a level playing field with e-commerce.

*Example: In Portugal, Italy, Sweden and Denmark, reforms have taken place to allow for the sale of certain non-prescription medicines in other places than pharmacies.*

### **Shop opening hours**

Shop opening hours are an important factor influencing consumers' accessibility to a retail shop. E-commerce is significantly changing consumers' shopping habits and brick-and-mortar retailers may have difficulties keeping up with competition by on-line retailers. Public authorities are encouraged to provide for flexibility to adapt to consumers' changing preferences and aim at a level playing field with e-commerce.

*Example: In Finland, the shop opening hours have recently been fully liberalised, with a significant positive impact on competition and employment.*

### **Retail specific taxes**

Public authorities are encouraged to ensure a level playing field with e-commerce as well as with all business sectors, ensuring that any specific tax is justified and does not unduly put at a disadvantage 'brick-and-mortar' retailers.

*Example: In most Member States, taxes are not specific to the retail sector and hence they do not discriminate this sector against the others.*

*In Hungary, a retail specific tax introduced in 2010 was withdrawn in 2014, which improved the balance not only between different sectors, but also between domestic and foreign operators.*

### *Ensuring fair and efficient supply chains*

Retail brings the Single Market to consumers. The EU Single Market allows retailers to buy products from anywhere in the EU. This increases efficiency, can be more productive and reduces costs to the ultimate advantage of consumers. The Single Market has had the effect of increasing the choice of products available. Regulatory barriers restricting the possibility to **source products cross-border** risk fragmenting the Single Market and run counter the Treaty principle of free movement of goods.

Efforts are also being made at EU and national level to promote balanced supply chains to reduce the environmental impact and to encourage sustainable consumption. The EU has already taken steps to tackle the issue on plastic waste.<sup>59</sup> In its January 2018 strategy for plastic in the circular economy, the Commission is planning further work on this issue.<sup>60</sup> The Commission is also proposing measures to promote the prevention of food waste.<sup>61</sup> Many Member States have also introduced regulations that aim to promote **fair trading practices**, in particular in the food supply chain. The Commission supports these efforts including through the proposal for a Directive concerning unfair trading practices in business-to-business relationships in the food supply chain.<sup>62</sup> However, it is important not to prevent suppliers and retailers from mutually beneficial cooperation.

The Commission is also aware of **territorial supply constraints** set by private operators which may limit retailers' possibilities to purchase products from whom and from where they want, having a detrimental effect on the Single Market.<sup>63</sup> It appears that in some cases, retailers based in one Member State and dealing with a multi-national supplier are not given the choice to decide from which national entity of the supplier the goods should preferably be sourced and are instead referred to a specific national subsidiary. Retailers face the same barrier, if the supplier prevents its network of independent wholesalers from delivering its products cross-border with an effect of market foreclosure or market partitioning along national lines. If the supplier imposing territorial supply constraints is in a dominant position or if they are applied as part of an agreement between the supplier and an independent wholesaler, competition law can under certain circumstances be used to sanction these constraints as anti-competitive behaviour. It does not, however, catch situations when such instructions are given by vertically integrated suppliers to their national subsidiaries. Currently, some suppliers use the fact that competition rules do not apply to such situations.<sup>64</sup>

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<sup>59</sup> Directive (EU) 2015/720 of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags.

<sup>60</sup> Commission Communication - A European Strategy for Plastics in a Circular Economy – COM(2018) 28 final.

<sup>61</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, COM(2015) 595 final.

<sup>62</sup> COM(2018) 173.

<sup>63</sup> Commission Staff Working Document *Public Consultation on Retail regulations in a multi-channel environment – Synopsis Report*, SWD(2018) 237. Such constraints could also be described as contradictory to the principle of non-discrimination contained in Article 20 of the Services Directive that partitions the market based on nationality or place of residence.

<sup>64</sup> On 31 May 2022, the validity period of the Commission Regulation relating to the exemptions of certain categories of vertical agreements and concerted practices will end (Regulation No. 330/2010 of 20 April 2010 on the application of Article

Territorial supply constraints drive market segmentation, limiting competition and resulting in likely significant discrepancies between wholesale and consumer prices or the choice of products offered to consumers across the EU.<sup>65</sup>

Such behaviour should be prevented, so that parallel imports by retailers become possible for all products allowing them to bring the Single Market even closer to European consumers. The Commission will undertake further fact-finding on the effects of such practices on the Single Market. Further action may be needed, if the situation does not evolve as a result of suppliers' voluntary change in approach.

#### **Regulatory sourcing restrictions**

In accordance with the Single Market for goods, retailers need to be able to enjoy the freedom to set up their supply chains, including cross-border, to enhance consumers' access to a wide choice of products at competitive prices.

*Example: The Czech Republic and Slovakia removed regulatory requirements for certain retailers to report on the proportion or percentage of turnover from the sale of food sourced or produced domestically.*

#### **Contractual practices of modern retail**

If public authorities regulate practices to protect vulnerable operators, in accordance with the freedom of establishment, they should not prohibit those contractual practices between retailers and suppliers which are mutually beneficial.

*Example: In Ireland, if a supplier expressly agrees in a contract to make a contribution to marketing costs, this is not prohibited, subject to safeguards such as requiring an objective and reasonable estimate of such a contribution.*

#### **Territorial supply constraints**

Private operators should not prevent retailers from exploiting fully the possibilities of the Single Market to source products cross-border. Retailers should be able to offer consumers access to a wide choice of products, including different versions of the same product, at potentially lower prices.

*Example: Retailers should be given the choice to decide from which national entity of the supplier the goods should preferably be sourced.*

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101(3) TFEU). It will need to be reviewed before its renewal. The accompanying Commission Guidelines on vertical restraints will also need to be reviewed at that time. The Geo-blocking Regulation enables customers to benefit from the same conditions as those customers located in the place of supply, for example, if they arranged collection of a delivery themselves. However, it excludes purchases for subsequent resale from its scope and would not apply if a supply contract is individually negotiated.

<sup>65</sup> The draft paper 'Towards a HLF Code of Good Practice in addressing 'dual quality food' forming the conclusions of the brainstorming session of the internal market subgroup of the High Level Forum for a better functioning food supply chain of December 2017, includes a call on the European Commission to assess the impact of so called 'territorial supply constraints' on consumer choice in various Member States. The final version should be endorsed in December 2018.

## 5. Alleviating the cost of compliance

Complying with regulations has a cost – **the cost of compliance** – which may amount to 0.4% to 6% of retailers' annual turnover.<sup>66</sup> For micro-companies, this is a particularly heavy burden.<sup>67</sup>

Respondents to the open public consultation identified areas where improvement could be made: reporting business information, notifying changes, inspections<sup>68</sup>, more proportionate fines and sanctions.

The Commission made a strong commitment to promote **better regulation principles** in recent years both at EU and at Member States level.<sup>69</sup> There is also a need for Member States to check whether national regulations are well-targeted, evidence-based and clearly drafted. Less complex regulations, better awareness of the sector's specificities and policy support would help the retail sector to be flexible and innovative.<sup>70</sup>

Fostering the development of the retail sector to the ultimate benefit of consumers requires a broad approach: simplifying regulatory frameworks, ensuring that they are fit for a multi-channel environment as well as **reducing the overly burdensome and costly measures** and procedures imposed on retailers to ensure compliance with these rules.

### Administrative burden and sanctions

When designing and applying regulations, in particular governing the day-to-day operation of shops, public authorities are encouraged to take into account the implied costs of administrative tasks and necessary equipment. This is particularly important for SMEs as well as public authorities.

*Example: Facilitating applications or reporting through on-line tools, as well as simplified administrative procedures and streamlined inspections lead to important savings and allow in particular small retailers to shift resources from administrative tasks to their core business, including innovation.*

## 6. Conclusions

**A well-functioning Single Market and a modernised regulatory environment are indispensable for an EU retail sector fit for the 21<sup>st</sup> century.** The legal guidance and best practices set out in this Communication should assist Member States in their reforms towards

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<sup>66</sup> Cross-country differences, LE Europe, Spark Legal Network and Consultancy, VVA Consulting (2018) *Operational restrictions in the retail sector*, study carried out for the European Commission.

<sup>67</sup> On average in the EU, micro retailers spend an equivalence of 3.3% of their turnover on regulation-related administrative tasks and equipment, whereas for small, medium and large companies it is up to 0.4%.

<sup>68</sup> Good inspection practices can help deliver a thriving and growing economy whilst poorly conceived inspections place a considerable burden on business limiting economic growth, J. Monk, *Reform of regulatory enforcement and inspections in OECD countries*.

<sup>69</sup> Commission Communication, "*Better regulation for better results - An EU agenda*", COM(2015) 215 final. In the case of retail, the use of the SME test in the impact assessment process is especially relevant.

<sup>70</sup> European Commission, High Level Group on Retail Competitiveness (2015), *Report of the preparatory working group on innovation*; [https://ec.europa.eu/growth/single-market/services/retail\\_en](https://ec.europa.eu/growth/single-market/services/retail_en).

a more open, more integrated and more competitive retail market without putting at risk the pursuit of legitimate public policy objectives.

**Reducing restrictions in retail would also have positive spill-over effects in other sectors of the economy, in particular upstream in manufacturing.** A more efficient retail sector and lower consumer prices create more demand and steer the upstream manufacturers towards more innovative products.

**While the rise of e-commerce offers unprecedented opportunities for the retail sector as well as consumers, restrictions affecting brick-and-mortar retailers do not enable them to adapt** to changing consumers' habits. On-line consumers are used to shop anytime and anywhere. It is therefore crucial that, when designing and implementing relevant regulations, national regional and local authorities take into account that multi-channel retail will remain the trend for retail in the coming years.

**The legal guidance and best practices set out in this Communication should help public authorities assess their regulatory frameworks and identify less restrictive measures.** Member States must continue assessing the existing and proposed measures for the retail sector to ensure that they are non-discriminatory, duly justified and proportionate. They are also encouraged to ensure that these measures are effective for the public policy objectives pursued, address their urban development concerns in a proportionate way, and are fit for the quickly changing retail environment. **The national competition authorities should play a role in this assessment.**

**The retail restrictiveness indicator will be used as a dynamic monitoring tool** to measure Member States' efforts in reducing retail restrictions, while taking into account justified public policy objectives, such as public health, and the impact of such reforms on market performance, including productivity, prices, innovation as well as the spill-over effects on other sectors.

**The Commission will continue to monitor the evolution** of the relevant regulatory frameworks and the trends in the retail sector. This monitoring will feed the Commission's economic analysis within the framework of the **European Semester**. It will also provide basis for priority-setting in the framework of the Commission's enforcement policy in the retail sector.

**An effective partnership between relevant EU and Member States' actors at all levels is necessary to improve the overall policy framework for the retail sector.** The Commission will continue the dialogue between the EU institutions and the national, regional and local authorities as well as the representatives of the retail sector on the future of this sector.