freedom of establishment –
(a challenge to retail planning?

Given the forthcoming referendum on European Union (EU) membership, it is perhaps appropriate to take time to consider recent developments in the European Commission’s regulation of retailing. Two reports have been published by the European Commission in the last few months which set out the thinking and framework for individual member state policies.

The EU has, perhaps belatedly, recognised the importance of the retail sector. Within the EU there are an estimated 29 million people employed in the retail sector, and one out of every four SMEs (small and medium-sized enterprises) in the EU is a retail enterprise. The sector accounts for 9.6% of EU added value and is viewed as important in stimulating growth and job creation.\(^1\)

The issues facing the sector are similar across the EU. Discounters have been very successful in achieving market entry and in challenging existing national retailers. There is considerable concern across the EU about the future of town centres.\(^2\)

Online retailing is recognised as being of increasing importance relative to bricks and mortar retailing.

A EuroCommerce briefing in March 2015 is enthusiastic about the EU’s key objectives of promoting a vital and competitive sector, making the single market a retail reality, and taking the opportunity to champion retail.\(^3\) The perspective taken by EU documentation on retailing is not necessarily in conflict with current UK policy, but the balance of underlying principles differs, and there are some aspects of emerging EU policy which UK planners need to reflect upon.

Over the past three years there have been particular developments in EU policy. In 2012 specific principles were set down for the service sector as a whole in the Services Directive.\(^4\) These principles extended beyond retailing. Harmonisation and a less nationally constrained market were underlying principles – integration within the EU is fundamental and colours all other principles. With respect to retail planning, a key proposal was that any
form of economic 'needs' test would be considered anti-competitive. Decisions on applications for particular sites should not be based on whether need can be demonstrated for extra retail space in that location. Although in the UK the need test has already been written out of retail planning law there were other countries, for example the Netherlands, where a version of the 'need test' still existed.

In 2013 a retail-specific application of the Services Directive began to be put in place. This started with the publication of the European Retail Action Plan. The emphasis in this plan is on freedom of establishment. It is underpinned by the idea that competition between retailers can be boosted by facilitating market entry:

‘Execution depends not only on the availability of suitable real estate, but also on the existence of commercial and spatial planning rules and procedures that do not inappropriately hamper competition.’ (p.9)

Korthals Altes critiqued this plan, showing that constraints on retail planning could not be justified by economic policies to protect current shopkeepers from competition. An example given was of a situation where a public health argument might be used to suggest that smaller retailers provide a better offering of fresh fruit and vegetables than larger stores. This would need to be shown in an evidence base which demonstrated that this is the case, or else the measure would be interpreted as anti-competitive.

Since publication of the European Retail Action Plan, further refinement and translation of the concepts it sets out has taken place. Such action takes as its starting point the importance of achieving greater integration into a single market for the retail sector across the 28 EU nations. The European Commission is challenging the previous national distinctiveness by emphasising the role of the single market in the retail sector.

A research group was set up following publication of the plan to examine the proposals, reporting in July 2015 in a publication entitled High Level Group on Retail Competitiveness. This group considered, among other things, freedom of establishment and reiterated the proposal in the European Retail Action Plan concerning the need in a single market for there to be such freedom. The findings were then translated into a document entitled Implementation of the European Retail Action Plan, which lays out a series of action points.

First, policy must be non-discriminating on nationality and open to retail investment by all EU members without any special measures for non-national companies. The UK has already made a minor adaptation to meet this recommendation. Online retailing should seek to be trans-European. Efforts should be directed towards making payment systems work better and encouraging measures which will facilitate the operation of online retailers at the level of the EU. There are many issues here, of course, not least taxation. There are also measures regarding labelling and transparency of operating environments.

‘This action point confirms the fact that while retail planning may have been regarded as a national competence, it is not immune to European Commission policy and national policy will have to be compliant’

With respect to retail planning, two action points are relevant. First, there is the principle that economic need must not be a criterion for the approval or rejection of sites. The intention is that it should be easier for retailers from any country to open stores in another country. The policy is disapproving of potential delays in the planning process and to obstacles to opening which could be construed as anti-competitive or intended to protect the interests of the incumbents. Countries will still have the right to restrict freedom of establishment in the public interest for environmental protection, town and country planning reasons and consumer protection, provided that such measures are appropriate and proportionate. This balance will not be necessarily straightforward. Non-compliance in terms of economic need will face a ‘zero tolerance’ policy.

A second relevant action point is the intention to launch a performance check in the retail sector to explore how commercial and spatial planning rules and plans are applied by the competent authorities where a potential service provider wishes to set up a small, medium or large retail outlet. This confirms the fact that while retail planning may have been regarded as a national competence, it is not immune to European Commission policy and national policy will have to be compliant.

The difference between the EU position and the UK planning position would seem to lie in the UK
planning system’s emphasis on the vitality of town centres and the emphasis of EU proposals on the freedom of establishment and facilitating market entry. In the UK there will need to be much more scrutiny of the reasons for rejections of retail planning applications and of evidence produced, to ensure that decisions are not anti-competitive.

In the wider public consciousness, prejudices and nimbysim become expressed in planning representations, particularly in an environment of localism, but it would be easy for these to be projected by applicants as anti-competitive. It is for the UK planning systems to work out how to articulate the EU proposals in terms of evidence and emphasis which will be compliant. The voice of the small-shop lobby in planning has been significant in the UK, but it will have to look to other ways of ensuring future viability, as its arguments with respect to planning will be further weakened.

While it has always been a principle in UK land use planning to take no account of the nature of the business or operator, and instead assess applications on their planning merits, the history of planning is littered with discussions about controlling formats, need, concerns over clone towns, retail saturation and market dominance. Future proposals and discussion will need to be aware of the stronger requirement to ensure freedom of establishment.

‘In Britain there will need to be much more scrutiny of the reasons for rejections of retail planning applications and of evidence produced, to ensure that decisions are not anti-competitive’

It was considered that the single market would open up new opportunities for SMEs and that they should seize the possibilities to expand online, open in other countries and develop their businesses. Concerns facing SMEs therefore need to be dealt with through licensing, subsidies or fiscal measures, and not through planning. EuroCommerce has called for a ‘retail reflex’ test to monitor how policy impacts on SMEs. Of course every country has to enact EU policy, but European Court of Justice rulings will set the tone for what is acceptable, as they provide the authoritative legal interpretation of European law. There might be challenges ahead, referendum or not.

**Notes**


9. Implementation of the European Retail Action Plan (see note 8), p.5

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