Does **the reform** of **the CoBAT** favour establishment of retail businesses in Brussels ?

Retail establishments have for a long time been governed by the so-called "IKEA law". Regions became competent to regulate establishment of retail business in 2014. We decipher it with Manuela von Kuegelgen, Partner Lawyer, Simont Braun

The Brussels-Capital Region repealed the "IKEA" law and amended the Brussels Code for town planning (the "CoBAT") by an Ordinance of 8 May 2014. The Brussels-Capital Region merged the authorisation of commercial establishments and the urban planning permit to leave only the latter in place, while regulating trade at various levels.

Far from simplifying administrative procedures, this hastily adopted ordinance has caused confusion and legal uncertainty, as the concepts it used were imprecise or at least unsuitable for urban planning law. In particular, the authorities had to pay particular attention to the impact of commercial development projects with a net commercial area of more than 400 sqm. An urban planning permit was also required to significantly change the retail activity in a building already used for commercial purposes. An impact report was also required as soon as an equipment reached a net surface area of 400 sqm and an impact study (a very cumbersome procedure) was needed if the surface area exceeded 4000 sqm.

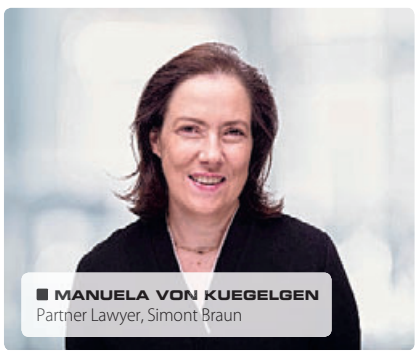
The subsequent reform of the CoBAT was an opportunity to put the work back on the job. The question is whether this improves the situation of retail businesses.

This reform, which entered into force on 1st September 2019 with regard to town planning permits, literally makes a clean slate of the past by removing almost all the provisions inserted by the Ordinance of 8 May 2014, except the need for a report or an impact study for establishments with a floor surface above 1250 and 5000 sqm respectively.

In particular, Article 4/2 of the CoBAT, which required the authorities to attach particular importance to the impact of establishments of more than 400 sqm, is deleted. The legislator thus intended to refocus the assessment of retail projects on the general objectives of CoBAT, such as meeting the social and economic needs of the community in a sustainable manner or ensuring social and economic progress and quality of life (Articles 2 and 3 of CoBAT).

A double authorisation

The requirement to obtain an urban planning permit to significantly change the retail activity carried-out in a building already used for commercial purposes is also repealed. The legislator notes in this respect the very many difficulties of application that this requirement had caused.



MANUELA VON KUEGELGEN
Partner Lawyer, Simont Braun

The preparatory work of the Ordinance of 30 November 2017 reforming the CoBAT specifies that the objective of regulating trade pursued by the former Article 98 §1st 13° of the CoBAT is met through the Regional Decree of 1st December 2002 on changes in use. In this respect, the CoBAT requires the issuance of a prior planning permit for any change in the use of a building, in the cases listed by the Government in order to control the compatibility of the planned use with its environment. Use is defined by this provision as "the specific activity that is carried on in or on the property".

The Regional Decree of 12 December 2002 imposes such a permit for a whole

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series of changes in use, in particular any change in a business to switch to horeca or, in the commercial core areas of the regional land use plan, any change from a business mainly oriented towards the sale of furniture to a business mainly oriented towards the sale of services. In practice, this means that establishing an horeca activity is subject to the obtention of a horeca permit from the municipality and to the obtention of an urban planning permit for change of use. This double authorisation obviously constitutes an additional burden, although little known to the general public and even to professionals, with a view to opening a horeca establishment.

The example of the KFC case

It is also almost certain that the Government will extend the number of changes in use subject to permits at the occasion of the announced reform of the Decree of 12 December 2002.

In addition, and although the issue is debatted, the authorities tend to apprehend new businesses in view of the diversity of the commercial offer in a district and therefore to refuse certain types of businesses when they would be likely to impoverish the commercial offer. A recent example of this policy is the KFC case in Ixelles for which the permit has been refused due to the alleged presence of too many fast food restaurants in the area.

Finally, it should be noted that if a permit is originally issued for trade without further specification, the first use is considered a change of use and is therefore possibly subject to a new permit. However, in the absence of a tenant known from the outset, it is impossible for the developer to define in his building permit the precise type of business that will be operated. He therefore runs the risk of having to reintroduce, or his tenant, a new application when the commercial activity has already been authorised.

A halfway simplification, therefore, for promoters and operators of retail businesses and potential additional legal burdens expected as a result of the announced reform of the Decree of 12 December 2012 on changes in use.