

Case C-325/20

Request for a preliminary ruling

Date lodged:

22 July 2020

Referring court:

Conseil d'État (Council of State, France)

Date of the decision to refer:

15 July 2020

Applicant:

[...]

Conseil national des centres commerciaux

Respondent:

Premier ministre

Ministre de l'Économie, des Finances et de la Relance

Ministre de la cohésion des territoires et des relations avec les collectivités territoriales

**CONSEIL D'ÉTAT
(THE COUNCIL OF
STATE)**

acting
in its judicial capacity

[...]

[...]

Having regard to the following procedures,

1° under no 431703 ... **[OR:2]**

[action dismissed]

2° under no 431724, by a summary application and a supplementary statement, lodged on 17 June and 17 September 2019 with the Judicial Affairs Secretariat of the Council of State, the Conseil national des centres commerciaux (National Council of Shopping Centres) is requesting that the Council of State:

1) annul, on grounds of ultra vires, Decree No 2019-331 of 17 April 2019 on the composition and functioning of departmental commercial planning committees and applications for commercial operating permits;

[...] **[Or. 3]**

The National Council of Shopping Centres is asserting:

- that the contested decree is illegal, because it was enacted on the basis of the provisions of Article L. 752-6 of the Commercial Code in the wording resulting from Article 166 of the Law of 23 November 2018, which are unconstitutional;

- that Article L. 752-6 of the Commercial Code, as amended by Article 166 of the Law of 23 November 2018, and Article R. 752-6 of that code, as resulting from Article 4 of the contested decree implementing it, introduce economic test criteria that infringe paragraph 5 of Article 49 TFEU and Article 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market;

- that Article L. 751-2 of the Commercial Code, as resulting from Article 163 of the Law of 23 November 2018, and Articles 1 to 3 of the contested decree implementing it, infringe paragraph 6 of Article 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, in that they require the presence of recognised experts describing the economic fabric on departmental commercial planning committees.

By a statement of defence lodged on 5 June 2020, the ministre de l'économie et des finances (Minister for the Economy and Finance) contends that the action should be dismissed. He submits that the pleas in law raised by the National Council of Shopping Centres are unfounded.

[...]

3. Under no 433921 ...**[OR:4]**

[Action dismissed]

Having regard to:

- [...];

- the Treaty on the Functioning of the European Union;

- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market;

- the Commercial Code;

[...]

Whereas:

1. The claim ...lodged under ... No 431724 by ... the National Council of Shopping Centres ... [has] been brought against the Decree of 17 April 2019 on the composition and functioning of departmental commercial planning committees and applications for commercial operating permits. Furthermore, the claim lodged under No 433921 [action dismissed].

On the forms of order seeking the annulment of the contested decree[Or. 5]

[...]

2. [...]

3. [...]

[Plea of inadmissibility raised by the Minister for the Economy and Finance ... — Proper consultation of the Council of State — No effect on the question referred for a preliminary ruling]

With regard to the articles relating to departmental commercial planning committees

4. Article L. 751-2 of the Commercial Code determines the composition of departmental commercial planning committees. In its wording resulting from Article 163 of the loi du 23 novembre 2018 portant évolution du logement, de l'aménagement et du numérique (Law of 23 November 2018 on development of housing, planning and the digital economy), that text requires that departmental commercial planning committees be composed, in addition to the elected officials they designate and recognised experts in the sphere of consumption, sustainable development and local planning, as follows: '*II. In departments other than Paris, ... 3. Of three recognised experts describing the economic fabric: one appointed by the chambre de commerce et d'industrie (chamber of commerce and industry), one appointed by the chambre de métiers et de l'artisanat (chamber of skilled trades and crafts), and one appointed by the chambre d'agriculture (chamber of agriculture). ... / III.- In Paris, ... 3. Of two recognised experts describing the economic fabric: one appointed by the chamber of commerce and industry and one appointed by the chamber of skilled trades and crafts. ...*'. It also states that: '*... The committee will hear any person who could provide clarification for its decisions or opinions. Although they will not take part in voting, the experts appointed by the chamber of commerce and industry and the*

chamber of trade and crafts will review the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric. Articles 1 to 3 of the contested decree implement these new provisions. Article 1 amends Article R. 751-1 of the Commercial Code in order to set the duration of the terms of office of the recognised experts describing the local economic fabric. Article 2 amends Article R. 751-3 of the Commercial Code, which determines the composition of departmental commercial planning committees in the specific case where the catchment area for a commercial infrastructure project exceeds the boundaries [Or. 6] of a single department, by making the adaptations made necessary by the inclusion on the committee of recognised experts describing the local economic fabric. Article 3 amends Article R. 751-4 of the Commercial Code to extend the obligation to declare functions exercised and interests held to the committee members who do not have voting rights, namely to the recognised experts describing the local economic fabric. Articles 10 and 11 amend Articles R. 752-15 and R. 752-16 of the Commercial Code to provide that the recognised experts describing the local economic fabric are not taken into account when calculating the quorum.

5. Article 14 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market lays down that; *'Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following: ... 6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large ...*'. The [applicant submits], by way of an exception, that the provisions added to Article L. 751-2 of the Commercial Code by the Law of 23 November 2018 infringe the provisions of Article 49 TFEU and those of Article 14(6) of Directive 2006/123/EC and that, therefore, Articles 1 to 3 of the contested decree are unlawful.
6. By virtue of Article L. 751-1 of the Commercial Code, departmental commercial planning committees provide opinions, which represent assent, on applications for commercial operating permits. The response to the plea raised by the [applicant] depends on establishing whether Article 14(6) of Directive 2006/123/EC of 12 December 2006 should be interpreted in the sense that it permits the presence, on a collegiate body responsible for delivering an opinion on the issuance of a commercial operating permit, of recognised experts describing the local economic fabric, whose role is limited to merely presenting the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric, without taking part in the voting on the permit application. This question, which is key to the outcome of the dispute, in that it deals with the legality of Articles 1 to 3 of the Decree of 17 April 2019, presents a serious difficulty. There are therefore grounds to refer the question to the Court of Justice

of the European Union in application of Article 267 TFEU and, pending a ruling from that Court, to stay proceedings on application No 431724, in so far as it seeks the annulment of Articles 1 to 3 of the decree under appeal.

[...] **[Or. 7]** [...]

[...] **[Or. 8]**

[...] **[Or. 9]** [...] **[Or. 10]** [...]

[Developments on the articles relating to the authorisation of independent bodies and applications for commercial operating permits — No effect on the question referred for a preliminary ruling]

D E C I D E S :

[...] **[Or. 11]**

Article 2: The court hereby issues a stay of proceedings on the forms of order sought by application No 431724 of the National Council of Shopping Centres, in so far as it seeks the annulment of Articles 1 to 3, 10 and 11 of Decree No 2019-331 of 17 April 2019 and seeks a form of order under Article L. 761-1 of the code de justice administrative (Code of Administrative Justice), pending a ruling by the Court of Justice of the European Union as to whether Article 14(6) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as meaning that it permits the presence, on a collegiate body responsible for issuing an opinion on the granting of a commercial operating permit, of a recognised expert describing the local economic fabric, whose role is limited to merely presenting the situation of the economic fabric in the relevant catchment area and the impact of the project on that economic fabric, without taking part in the vote on the permit application.

[...] **[Or. 12]**

[...]