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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Land Use Restrictions as Barriers to Entry held by the Competition Committee (Working Party No. 2 on Competition and Regulation) in February 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Restrictions d'Urbanisme et les Barrières à l'Entrée qui s'est tenue en février 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 2 sur la Concurrence et la Réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

(1) Market impacts of land use restrictions

Land use restrictions can serve legitimate purposes, but also prevent entry and raise costs.

Land use restrictions govern how land can be used and how uses can be changed. Land use restrictions are widespread. They affect a substantial volume of commerce, through zoning, planning rules, private contracts, location-specific rules and approval processes.

Land use restrictions often serve valuable social purposes. They can protect landowners from expropriation of value, reduce macroeconomic risks from natural disasters, enhance the environment and manage growth of cities in a way that reduces costs to society. The positive effects of land use oversight are substantial. The benefits of particular policies for land use must be balanced against the costs, though. A key element of these costs, which is often ignored, is the effect on markets and competition.

Costs of starting new business activities may be unduly increased, with the result of delaying, restricting or even preventing competitive entry. Land use restrictions can be a barrier to entry and restriction of supply. Previous observers have noted instances where land use regulation may restrict actions of new competitors. But little previous work has examined land use restrictions in terms of competition policy, to argue that they can raise the price of goods and services to consumers. The increase in price can be large. For example, Cheshire and Sheppard (2005) observe that in 2003, housing land at the outer boundary permitted for development in the city of Reading, UK cost about £3,000,000, while neighbouring agricultural land, not within the urban envelope, had a value of about £7,500 per hectare.

The social harms that can arise when land use restrictions create "entry barriers" are rarely considered explicitly. More careful integration of policy on land use restrictions with competition policy could benefit consumers and many entrepreneurs and reduce the likelihood that public or private restrictions will lead to supply scarcity. Competition agencies can play a critical advocacy role in this domain that would not typically be fulfilled by any other part of national government.

Land use regulation creates the most severe competition problems when:

- The regulations prevent new firms from entering markets where there is market power;
- The regulations prevent low-cost firms from entering in markets where existing firms are high-cost;
- The regulations reduce total supply of a good; or
- The regulations unduly delay the arrival of a good or service that consumers would value (such as ones resulting from innovation or differentiation).

Government authorities can eliminate or control excessive restrictions on land use. Authorities responsible for land use should: (1) be aware of the incentives of complaining competitors, who may seek to delay entry by raising objections during the planning process or by funding third parties to raise objections, (2) develop knowledge about the implications of restricting competition and (3) promote competition as part of land use policy.

Incumbents may submit false or misleading information during planning enquiries in order to delay or prevent new entry. Governments should question whether such companies are trying to maintain market power through illegitimate means, amounting tomisrepresentation, fraud and even, in some jurisdictions, violation of the competition law.

(2) Process of granting land use permits

The process of granting land use permits can be excessively costly and reduce incentives for entry.

Criteria for granting land use permits should be clear with a process that is speedy, quickly addresses appeals, limits costs and requires that any refusal of permission be justified in writing..

Applying for land use changes can be expensive. The cost of delay can exceed 50% of the owner's initial investment. For example, in the UK, for one sub-sample of grocery store sites, average holding time prior to opening was 3.65 years.

These costs are not based solely on opportunity costs of funds. There are also real investments required for paperwork, plans and representation. In the UK, for example, "Firms pay high direct transaction costs as a result of planning". Planning fees paid to government and fees paid to consultants and legal representatives likely range from £850 million to £1 billion per year. By increasing the costs of entry, these fees reduce firms' willingness to enter.

Written regulations are not all that matters. The approval and permit processes are also important because "zoning practice can differ substantially from what the law says." (Fischel, 1985, p. 59) Some projects undergo substantial qualitative evaluation. Refusals of a particular land use often do not require a well-reasoned basis. Sometimes properties are worth considerably more in a new use than in their existing use. In such conditions, it is possible for preferential treatment to be given to some projects over others. This preferential treatment need not involve corruption, but corruption is more likely to occur when there are no clear criteria required to reject an application. Land use rights and allocations account for a high percentage of local government corruption cases in some jurisdictions..

(3) Geographic density regulations

Controls on the geographic density of businesses are often excessive and ignore consumer benefits.

Land use restrictions are typically local or regional in nature. Products that have narrow geographic markets from an antitrust law perspective, such as retail outlets, hotels, hospitals, ports and other transport facilities can easily suffer competitive harm from restrictions. In contrast, products without an inherent local geographic content are less likely to be impacted by land use restrictions, unless there is a regional or national scarcity of supply and broad-based unwillingness to site an activity in communities. This can be the case with construction of major infrastructure facilities, such as liquefied natural gas plants and power plants.

Planning restrictions that prevent the opening of a large supermarket in a given site can have an effect on competition, even if a comparable site is available 20 kilometers away. Retail stores are differentiated based on their location because consumers prefer to shop near to their home or work. A number of OECD countries have special planning rules that apply to supermarkets and other large stores. Government restrictions include:

- limits on the total number of stores of a certain type per capita;
- rules that limit stores to small sizes; and
- rules that restrict the number of stores in a certain area, regardless of population and density.

OECD data suggests that there is high variability across the OECD in the extent to which large store building is overseen, but that in many countries there are substantial explicit restrictions. France introduced laws to raise the barriers to entry for large surface stores in 1973, and strengthened these barriers in 1996 (lois Royer and Raffarin, respectively). According to the Attali Commission Report on First Propositions on Purchasing Power (2007), between 1986 and 1994, 379 large surface stores opened on average each year, compared to 162 per year between 1995 and 2003.

(4) Adverse impacts test

Adverse impact tests should not be used by planning authorities because the tests are likely to hinder competition and harm consumers.

Whether a new firm will have an adverse effect on competing firms or whether there is sufficient demand to support new facilities are factors that planners or licensing authorities sometimes consider when evaluating a planning application. For example, in the United Kingdom, planning for certain new large retail developments includes a test of adverse impact on vitality and viability of existing centres within a catchment area. In the United States, at one time, new pipelines were not permitted until there was proof of under-supply.

Adverse effect tests are of dubious merit. Even if the government has altruistic motives for introducing adverse impact tests, the practical effect of such rules is to make it more difficult for competitors to start new businesses. The tests provide incumbents and others opposed to a property use with a procedurally legitimate basis for arguing against entry. The adverse effects test is a misguided policy benchmark in a market-based economybecause it inhibits the natural evolution of markets.

There are several reasons that adverse impact tests are not appropriate:

- Government policy should not be directed at protecting firms from competition but rather ensuring that consumers receive the maximal benefits from competition;
- Competitors that will adversely affect existing firms are exactly the ones that are likely to benefit consumers the most (because consumers will give such firms their business);
- Adverse effect tests reflect the self-interest of existing firms and can be an indication of captured regulators; and

- The demand tests used to judge necessity of a new retail outlet are problematic, because entrepreneurs are more likely to be good judges of whether there is sufficient demand for a new offer than government officials. The desire of a firm to construct a new site is de facto evidence of demand for its products.

(5) Rights of way

Pricing for access to public property should reflect scarcity and costs to the public authorities. In many cases, such prices would be zero.

Government is one of the largest land owners in many countries. Government ownership or control of rights of way is particularly important for infrastructure companies. Unless fixed telecommunications, electricity and gas companies can gain access to paths that connect their network backbones to individual customers, they cannot successfully reach customers or must face high costs for doing so (e.g., motorized delivery of liquid fuels to customers). There are well-established mechanisms for providing access to so-called public rights of way. But pricing of rights of way is often problematic.

When space is scarce, as with many concessions, a price that reflects scarcity of the good and opportunity costs of using the space is appropriate. When there is no scarcity of space (as with many cables over- or under-ground) the appropriate price to charge is one that reflects marginal costs. Marginal costs to the municipality can include costs of processing an application and the costs of providing paperwork that shows layout of underground pipes and wires. If the municipality builds in a profit for itself from the license, it can reduce the rollout of an otherwise desirable service.

The regulatory oversight governing access to rights of way varies substantially across the OECD. At times, national rules limit charges that local government authorities can make for accessing rights of way. At other times, local government authorities may have broad discretion to determine how access is provided and under what conditions.

When local authorities have substantial discretion, they can be tempted to look upon their control over rights of way as an opportunity to generate revenues. In some countries, local governments have charged revenue-based fees on facility providers, which have no relationship with the costs incurred by the local governments. In many countries, though, public rights of way are not subject to payment (Denmark, Germany, Luxembourg, Austria, Finland, the United Kingdom) though fees may be imposed aimed at recovering costs (such as costs of inspection and pavement restoration).

Imposing high charges for rights of way can have a particularly deleterious effect on competition, as costs are particularly likely to affect new entrants, who generally do not have a consequential revenue stream to cover such charges. At the same time, incumbents typically have a larger revenue stream and "grandfathered" capacity, such as ducts that are available to them at no cost. Local government policies that charge unduly high fees for new users of rights of way can serve as a cost for entry that is greater for entrants than incumbents and counteract general government policies intended to promote infrastructure competition.

(6) Private land use restrictions

Private land use restrictions that reduce competition with no counterbalancing social benefits should be reviewed by competition authorities.

Restrictions on entry do not arise solely from government restrictions. Private restrictions on entry may have anti-competitive effects. Private acts that restrict competition can include either covenants or purchases that make no economic sense except to prevent competition. Covenants are widespread and have diverse, often beneficial effects. But covenants that restrict uses of a site often merit review. These covenants are in fact quite common. Examples include:

- When selling land, a grocery retailer inserts a covenant that future uses cannot include grocery retailing.

- A fast food chain closing a restaurant and selling the land inserts a covenant that future uses cannot include beef-based fast food.

- A hospital chain selling one of its hospital sites inserts a land covenant that hospital services cannot be provided at the location in the future.

In general, covenants might not have any real impact when there are many equally attractive alternative retail locations to which the same set of consumers would be indifferent. For example, there may be many locations appropriate for coffee shops. If a coffee shop chain inserts a covenant when it disposes of or sub-leases a property, it may be unlikely to have any real effect to the extent that potential competitors could find many other equally attractive locations. In contrast, covenants can reduce competitive constraints when they prevent or deter entry that would have improved competitive conditions for consumers.

In one example, after its formation in 2001, a mushroom growing cooperative cooperative that included 15 of the largest mushroom growers in the eastern United States (accounting for over 60% of mushroom sales) spent about 6 m USD purchasing mushroom farms and sold them at a loss. The cooperative added deed restrictions that eliminated right to use land for mushroom growing. About 8% of of the total capacity of the eastern United States was closed and sold in this way. According to a court filing, the cooperative raised prices by about 8% in one of their first acts after formation.

Covenants have an economic effect, since they reduce potential uses for property. They can involve a sacrifice of profit for the implementer of the covenant because the value of the land may fall after inserting a covenant that prevents the most profitable use of property.

Covenants are not the only form of private restriction. Perhaps the most blatant form of private exclusion occurs when a firm buys blocking property to prevent initial assemblage of a site by a competitor or prevent expansion of a competing facility. For example, a hospital may purchase property surrounding another competing hospital, to make it more difficult for the competing hospital to expand. In most jurisdictions, it is an open question whether competition laws apply to such circumstances. Under a “no economic sense test”, such actions raise serious competition questions and, given an appropriate pattern of facts, merit investigation by public authorities or action by courts.

SYNTHÈSE

Par le Secrétariat

(1) Incidences des restrictions d'urbanisme sur le marché

Les restrictions d'urbanisme peuvent répondre à des objectifs légitimes, mais peuvent également constituer un obstacle à l'entrée et alourdir les coûts.

Les restrictions d'urbanisme régissent les modes d'utilisation des sols et la manière dont ils peuvent être modifiés. Ces restrictions sont répandues et portent sur un volume considérable de transactions commerciales, dans le cadre du zonage, des plans d'occupation des sols, des contrats privés, des réglementations concernant les utilisations spécifiques à certaines localisations et les procédures d'autorisation.

Les restrictions d'urbanisme poursuivent souvent des objectifs sociaux appréciables, tels que la préservation de la valeur des terrains en cas d'expropriation, la réduction des risques macroéconomiques des catastrophes naturelles, l'amélioration de l'environnement et la gestion de la croissance des villes d'une manière qui réduise les coûts pour la collectivité. Les effets positifs de la surveillance de l'utilisation des sols sont considérables. Cependant, les avantages des politiques particulières d'urbanisme doivent être mis en balance par rapport aux coûts. L'un des éléments clés de ces coûts qui est souvent laissé de côté est leur effet sur les marchés et la concurrence.

Les restrictions d'urbanisme peuvent accroître indûment les coûts de démarrage de nouvelles activités commerciales, avec pour conséquence de retarder, restreindre ou même empêcher l'entrée de concurrents sur le marché. Elles peuvent faire obstacle à l'entrée et restreindre l'offre. Dans le passé, les observateurs ont constaté des cas particuliers dans lesquels les réglementations d'urbanisme peuvent limiter les activités de nouveaux concurrents. Néanmoins, rares ont été les travaux qui examinaient les restrictions d'urbanisme sous l'angle de la politique de la concurrence et qui soutenaient qu'elles peuvent accroître le prix de biens et services pour les consommateurs. Les hausses de prix peuvent être considérables. Par exemple, Cheshire et Sheppard (2005) constatent qu'en 2003, à l'intérieur des limites de la ville de Reading (Royaume-Uni) dans lesquelles l'aménagement est autorisé, le coût du terrain à bâtir était d'environ 3 millions £ alors que les terres agricoles voisines, situées hors du périmètre urbain, avaient une valeur d'environ 7 500 £ à l'hectare.

Les inconvénients qui peuvent résulter sur le plan social de la création de « barrières à l'entrée » par les restrictions d'urbanisme sont rarement envisagés de manière explicite. Une meilleure intégration de la politique menée en matière de restrictions d'urbanisme et de la politique de la concurrence pourrait être bénéfique pour les consommateurs et pour de nombreux chefs d'entreprise, tout en réduisant le risque que les restrictions apportées par les pouvoirs publics ou par le secteur privé n'induisent une rareté de l'offre. Les organismes responsables de la concurrence peuvent jouer dans ce domaine un rôle essentiel de sensibilisation qui ne peut pas en général être assumé par d'autres secteurs des administrations nationales.

La réglementation d'urbanisme pose les problèmes les plus graves pour la concurrence dans les cas suivants :

- Les réglementations empêchent les nouvelles entreprises d'accéder aux marchés là où il existe un pouvoir de marché ;

- Les réglementations empêchent les entreprises à faibles coûts d'accéder aux marchés lorsque les entreprises en place ont des coûts élevés ;

- Les réglementations réduisent l'offre totale d'un produit ; ou

- Les réglementations retardent indûment l'arrivée d'un bien ou service auquel les consommateurs attachent de la valeur (notamment en ce qui concerne les produits de l'innovation ou de la différenciation).

Les autorités publiques peuvent supprimer ou contrôler les restrictions d'urbanisme excessives. Les autorités responsables de l'urbanisme devraient : (1) être au courant des motivations des concurrents qui formulent des plaintes et qui peuvent s'efforcer de retarder l'accès de nouveaux arrivants en émettant des objections au cours de la procédure de planification ou en rémunérant des tiers pour émettre des objections ; (2) acquérir des connaissances sur les conséquences des restrictions à la concurrence et (3) promouvoir la concurrence dans le cadre de la politique d'urbanisme.

Les entreprises en place peuvent remettre des informations fausses ou fallacieuses au cours des enquêtes de planification en vue de retarder ou d'empêcher l'entrée de nouvelles sociétés. Les pouvoirs publics devraient se demander si de telles sociétés s'efforcent de maintenir leur pouvoir de marché par des moyens illégitimes, sous la forme d'allégations fausses, de fraude et même, dans certains pays, de violation du droit de la concurrence.

(2) Procédure d'octroi de permis d'utilisation des sols

La procédure d'octroi de permis d'utilisation des sols peut être excessivement coûteuse et réduire les incitations à accéder au marché.

Les critères d'octroi de permis d'utilisation des sols doivent être clairs et la procédure doit être prompte, comporter un traitement rapide des recours, limiter les coûts et obliger les administrations à justifier par écrit le refus d'autorisation.

La demande de modifications de l'utilisation des sols peut être coûteuse. Le coût du délai peut excéder 50 % de l'investissement initial du propriétaire. Par exemple, au Royaume-Uni, pour un échantillon donné de sites de magasins d'épicerie, le délai moyen nécessaire pour obtenir l'autorisation d'ouverture était de 3.65 ans.

Ces coûts ne sont pas uniquement calculés à partir du coût d'opportunité des capitaux. Des investissements réels sont également nécessaires en matière de formalités administratives, d'établissement de plans et de représentation. C'est ainsi qu'au Royaume-Uni, « les entreprises supportent des coûts de transaction directe élevés du fait de la planification ». Les redevances payées à ce titre à l'administration et les honoraires versés aux sociétés de conseil et aux avocats sont de l'ordre de 850 millions £ à 1 milliard £ par an. En augmentant les coûts d'accès au marché, ces redevances et honoraires réduisent l'incitation des entreprises à y accéder.

Il est important de ne pas prendre exclusivement en compte l'impact des réglementations écrites. Les procédures d'approbation et d'autorisation sont elles aussi importantes dans la mesure où « les pratiques en matière de zonage peuvent différer sensiblement de ce qui est prévu par la loi » (Fischel, 198, p. 59). Certains projets sont soumis à une évaluation qualitative approfondie. Souvent, il n'est pas obligatoire que le refus d'un projet particulier d'utilisation des sols repose sur des motifs raisonnables. Parfois, un bien immobilier vaut beaucoup plus cher lorsqu'il est affecté à une nouvelle utilisation par rapport à son utilisation existante. Dans ces conditions, il est possible de faire bénéficier certains projets d'un traitement préférentiel par rapport à d'autres. Ce traitement préférentiel n'est pas forcément entaché de corruption, mais la corruption a plus de chances de se produire lorsque des critères clairs ne sont pas requis pour rejeter une demande. Dans certaines juridictions, les droits et affectations en matière d'utilisation des sols représentent un pourcentage élevé des cas de corruption impliquant les collectivités locales.

(3) Réglementations en matière de densité géographique

Les contrôles relatifs à la densité géographique des entreprises sont souvent excessifs et ne tiennent pas compte des intérêts des consommateurs.

Les restrictions d'urbanisme sont généralement locales ou régionales par nature. Les produits dont les marchés géographiques sont étroits dans l'optique de la législation antitrust, tels que des points de vente de détail, hôtels, hôpitaux, ports et autres infrastructures de transport peuvent facilement voir leur compétitivité réduite par les restrictions. En revanche, les produits dont le contenu n'est pas intrinsèquement local ont moins de risques de subir l'impact des restrictions à l'utilisation des sols, à moins que l'offre au niveau régional ou national soit insuffisante et que les collectivités s'opposent largement à l'implantation de ces activités. Cela pourrait être le cas d'installations importantes d'infrastructures, telles que des usines de gaz naturel liquéfié et les centrales électriques.

Les restrictions résultant des plans d'urbanisme qui empêchent l'ouverture d'un grand supermarché sur un site donné peuvent avoir une incidence sur la concurrence, même si un site comparable est disponible à 20 kilomètres de distance. Les magasins de détail se différencient en fonction de leur localisation car les consommateurs préfèrent faire leurs achats près de leur domicile ou de leur lieu de travail. Un certain nombre de pays de l'OCDE ont adopté des règles d'urbanisme spéciales qui s'appliquent aux supermarchés et autres grands magasins. Les restrictions imposées par l'administration peuvent comporter :

- des limitations du nombre total de magasins d'une certaine catégorie par nombre d'habitants ;
- des réglementations qui limitent la taille des magasins ; et
- des réglementations qui limitent le nombre de magasins dans une certaine zone, quelles que soient la population et la densité.

Les données de l'OCDE montrent qu'il existe de grandes différences entre les pays membres quant au degré de contrôle de la construction de grands magasins mais que, dans de nombreux pays, il existe des restrictions explicites considérables. La France a adopté des lois instaurant des obstacles à la création de magasins de grande surface en 1973 et elle a renforcé ces obstacles en 1996 (avec les lois Royer et Raffarin respectivement). Selon le rapport de la Commission Attali concernant les premières propositions sur le pouvoir d'achat (2007), entre 1986 et 1994,

379 magasins de grande surface ouvraient en moyenne chaque année alors que ce chiffre n'était plus que de 162 par an entre 1995 et 2003.

(4) Tests d'impact défavorable

Les autorités de planification ne devraient pas utiliser les tests d'impact défavorable parce que ces tests sont susceptibles d'entraver la concurrence et de porter préjudice aux consommateurs.

Parfois, l'un des facteurs que les autorités chargées de la planification ou de l'octroi de licences prennent en compte lors de l'examen d'une demande est la question de savoir si une nouvelle entreprise aura une incidence défavorable sur les entreprises concurrentes ou si la demande est suffisante pour permettre de nouvelles installations. Par exemple, au Royaume-Uni, les plans d'urbanisme applicables à certains grands complexes de commerce de détail comportent un critère d'incidence défavorable sur la vitalité et la viabilité des centres existants au sein d'une zone de captage. Aux États-Unis, à une certaine époque, la construction de nouveaux oléoducs n'était pas autorisée à moins que l'insuffisance des approvisionnements ne soit prouvée.

Les avantages des tests d'effet défavorable ne sont pas évidents. Même si l'administration poursuit des objectifs altruistes pour mettre en place de tels tests, l'effet pratique de telles règles est de rendre plus difficile aux concurrents le démarrage de nouvelles activités. Les tests assurent aux entreprises en place ainsi qu'aux autres personnes opposées à une utilisation de biens immobiliers une base légitime leur permettant d'engager des procédures pour contester l'accès au marché. Le critère des effets défavorables constitue une norme peu judicieuse dans le contexte de l'économie de marché parce qu'il entrave l'évolution naturelle des marchés.

Il y a plusieurs raisons pour lesquelles les tests d'impact défavorable ne sont pas appropriés :

- L'objet des politiques publiques n'est pas de protéger les entreprises de la concurrence mais plutôt de faire en sorte que les consommateurs bénéficient au maximum des avantages de celles-ci ;

- Les concurrents qui auront une incidence défavorable sur les entreprises existantes sont exactement ceux qui sont susceptibles d'apporter le plus d'avantages aux consommateurs (parce que ce sont ces entreprises que les consommateurs choisiront) ;

- Les tests d'effets défavorables reflètent les intérêts personnels des entreprises existantes et peuvent dénoter une prise de contrôle des autorités réglementaires par celles-ci ; et

- Les tests de demande utilisés pour juger de la nécessité d'ouvrir un nouveau point de vente de détail sont problématiques, dans la mesure où les chefs d'entreprise sont mieux à même d'apprécier si la demande est suffisante pour justifier un accroissement de l'offre que les responsables de l'administration. Le souhait d'une entreprise de construire un nouveau point de vente est une preuve concrète de l'existence d'une demande pour ses produits.

(5) Droits d'accès

La fixation des prix d'accès aux biens publics devrait refléter la rareté et les coûts pour les autorités publiques. Dans de nombreux cas, ces prix devraient être égaux à zéro.

Dans de nombreux pays, le secteur public est l'un des principaux propriétaires fonciers. La propriété ou le contrôle du secteur public en matière de droit d'accès est particulièrement

important pour les sociétés qui utilisent beaucoup d'infrastructures. Si les sociétés de télécommunications fixes, de distribution d'électricité et de gaz ne peuvent pas obtenir l'accès aux voies qui rattachent leurs réseaux aux clients individuels, il ne leur est pas possible d'atteindre ces clients ou elles doivent faire face à des coûts élevés pour y parvenir (par exemple par la livraison motorisée de combustibles liquides aux clients). Il existe des mécanismes bien établis permettant d'obtenir ce que l'on désigne sous le nom de droits d'accès publics. Néanmoins, la tarification des droits d'accès est souvent problématique.

Si l'espace est rare, comme c'est le cas pour de nombreuses concessions, un prix qui reflète la rareté du bien et les coûts d'opportunité de l'utilisation de l'espace serait approprié. En l'absence de pénurie d'espace (comme c'est le cas pour de nombreux câbles à l'air libre ou souterrains), le prix qu'il convient d'appliquer est celui qui fait apparaître les coûts marginaux. Les coûts marginaux pour la municipalité peuvent inclure les coûts de traitement d'une demande et les coûts des formalités d'établissement des plans des tuyaux et câbles souterrains. Si la municipalité tire un bénéfice propre de l'octroi de la licence, elle peut réduire la fourniture d'un service qui serait par ailleurs utile.

Le contrôle des autorités réglementaires sur l'accès aux droits de passage varie beaucoup selon les pays de l'OCDE. Parfois, les réglementations nationales limitent les redevances que les autorités des collectivités locales peuvent exiger pour octroyer des droits d'accès. Parfois aussi, ces autorités peuvent disposer de pouvoirs discrétionnaires larges pour déterminer les modalités et les conditions d'accès.

Lorsque les autorités locales disposent de pouvoirs discrétionnaires importants, elles peuvent être tentées de considérer le contrôle qu'elles exercent sur les droits de passage comme un moyen de générer des recettes publiques. Dans certains pays, les collectivités locales ont imposé aux fournisseurs d'équipements des redevances qui n'ont aucun rapport avec les coûts qu'elles supportent. Cependant, dans de nombreux pays, les droits d'accès publics ne donnent pas lieu à des paiements (c'est le cas en Allemagne, en Autriche, au Danemark, en Finlande, au Luxembourg et au Royaume-Uni) bien que des redevances puissent être appliquées pour compenser les dépenses effectuées (telles que les dépenses d'inspection et de remise en état de la chaussée).

L'application de prélèvements élevés au titre des droits de passage peut avoir un effet particulièrement dommageable pour la concurrence, dans la mesure où leurs coûts risquent surtout d'affecter les nouveaux arrivants, qui ne disposent pas en général d'un flux de recettes assez important pour couvrir de telles charges. Quant aux entreprises en place, elles disposent en général de flux de revenus plus importants et de capacités correspondant à leurs droits acquis, telles que des réseaux qui sont mis à leur disposition sans frais. Les politiques des collectivités locales qui consistent à appliquer des redevances excessivement élevées aux nouveaux utilisateurs de droits de passage peuvent constituer un coût d'accès plus important pour les nouveaux arrivants que pour les entreprises en place et entraver les politiques des administrations publiques visant à promouvoir la concurrence dans le domaine des infrastructures.

(6) Restrictions d'urbanisme d'origine privée

Les restrictions d'urbanisme d'origine privée qui réduisent la concurrence sans comporter en contrepartie d'avantages pour la collectivité doivent être examinées par les autorités de la concurrence.

Les restrictions à l'entrée ne sont pas seulement le fait des administrations publiques. Des restrictions d'origine privée à l'entrée peuvent avoir des effets anticoncurrentiels. Les actes privés qui restreignent la concurrence peuvent comporter des clauses de contrats ou des achats qui n'ont pas de justification économique, sauf d'entraver la concurrence. De telles clauses contractuelles sont très répandues et ont des effets divers, souvent bénéfiques. Néanmoins, celles qui restreignent l'utilisation d'un site méritent souvent d'être réexaminées. Elles sont en fait très fréquentes. On peut citer les exemples suivants :

- Lorsqu'il vend un terrain, un épicier détaillant insère une clause prévoyant que les utilisations futures du site ne peuvent comporter la vente au détail d'épicerie.

- Une chaîne de restauration rapide qui ferme un restaurant et qui vend le terrain insère une clause selon laquelle les utilisations futures du site ne peuvent comporter la restauration rapide spécialisée dans la viande de bœuf.

- Une chaîne hospitalière, en vendant l'un de ses sites, insère une clause foncière selon laquelle des services hospitaliers ne pourront être fournis sur ce site à l'avenir.

En général, il est possible que de telles clauses n'aient pas d'incidence réelle lorsqu'il existe un grand nombre de localisations alternatives de commerce de détail tout aussi attrayantes et auxquelles le même groupe de consommateurs serait indifférent. Par exemple, un grand nombre de sites sont appropriés pour les cafés. Si une chaîne de cafés insère une telle clause lorsqu'elle cède ou sous-loue un site, il est probable que cela n'a guère d'effet réel, dans la mesure où les concurrents potentiels peuvent trouver un grand nombre d'autres sites tout aussi attrayants. Au contraire, les clauses contractuelles peuvent réduire les contraintes de la concurrence lorsqu'elles entravent ou empêchent des accès aux marchés qui auraient amélioré les conditions de la concurrence au profit des consommateurs.

Par exemple, après sa constitution en 2001, une coopérative de culture de champignons qui comprenait 15 des principaux exploitants de l'Est des États-Unis (représentant plus de 60 % des ventes de champignons) a dépensé environ 6 millions USD dans l'achat d'exploitations de champignons et les a revendues à perte. La coopérative s'est dotée d'actes juridiques restrictifs qui supprimaient tout droit d'utiliser les terres pour la culture de champignons. Environ 8 % de la capacité totale de production de l'Est des États-Unis a été supprimée et vendue selon ces modalités. Selon un recours judiciaire, la coopérative a relevé ses prix d'environ 8 % dans le cadre de l'une des premières mesures qu'elle a prises après sa constitution.

Les clauses contractuelles ont un effet économique, dans la mesure où elles réduisent les utilisations potentielles des actifs. Elles peuvent comporter le sacrifice d'un certain bénéfice pour celui qui instaure la clause parce que la valeur du terrain peut baisser après l'adoption d'une clause qui empêche l'utilisation la plus rentable du bien.

Les clauses contractuelles ne sont pas la seule forme de restriction d'origine privée. La forme la plus flagrante d'exclusion d'origine privée est peut-être le cas où une entreprise acquiert un bien immobilier à des fins de blocage en vue d'empêcher l'aménagement initial d'un site par un

concurrent ou pour empêcher le développement d'installations concurrentes. Par exemple, un établissement hospitalier peut acquérir des biens immobiliers situés autour d'un autre établissement concurrent pour rendre plus difficile l'extension de ce dernier. Dans la plupart des juridictions, la question se pose de savoir si le droit de la concurrence s'applique dans de telles circonstances. Selon un critère « d'absence de justification économique », de telles actions posent de sérieux problèmes de concurrence et, dans un contexte approprié, justifient des enquêtes de la part des autorités publiques ou des procédures judiciaires.

BACKGROUND NOTE

By the Secretariat[1]

1. Introduction

Land use restrictions govern what can and cannot be done with land in specific parts of a territory, including how land can be used and how uses can be changed. Land use restrictions are widespread and affect a substantial volume of commerce, via both public and private oversight[2] of location-specific uses, as a consequence of zoning, planning rules, private contracts that restrict uses, location-specific use rules and accompanying approval and dispute processes.[3] This paper focuses on competitive effects of land use restrictions.

The paper argues that, while most land use restrictions may serve valuable social purposes, land use restrictions do, at times, unduly raise the costs of starting new business activities, delaying, restricting or even preventing competitive entry, thus serving as a barrier to entry[4] and restricting supply. While previous observers have noted individual instances in which land use regulation may act to restrict actions of new competitors, little previous work has placed land use restrictions within the framework of competition policy and argued that land use restrictions can, at times, raise the price of a variety of goods and services to consumers.[5] This area deserves attention because these price increases can be non-trivial. For example, Cheshire and Sheppard (2005) observe that in 2003, at the outer boundary permitted for development in the city of Reading, UK housing land cost about £3,000,000, while neighbouring agricultural land, not within the urban envelope, had a value of about £7,500 per hectare. To make progress in thinking about market impacts of land use restrictions, this paper categorizes ways in which land use restrictions restrict entry and

1 This paper was written by Sean F. Ennis.

2 At times, private contracts can and sometimes do substitute for government oversight of land use. Private contracts that constrain land use can be considered a form of self-regulation, entering within the overall rubric of land use restrictions. Possible ways that private actions can be restrictive include: purchasing a site to discourage efforts by a competitor to develop a potential parcel of land, inserting restrictive covenants in sales agreements that prevent use of land for certain purposes that would compete directly with the seller and exclusivity arrangements that guarantee a firm that no other competing firm will be permitted in the same area or development. These are not simply theoretical practices but actual, observed practices.

3 It is important to consider not just written regulations but also approval and permit processes, because "zoning practice can differ substantially from what the law says." (Fischel, 1985, p. 59) Land use restrictions are much broader than classifying land for different types of uses (zoning), and also commonly includes an institutional process for evaluating new proposals with a requirement for a positive decision from an approval body prior to new construction or changes in uses and often includes broad long-range planning goals, as well as particular types of regulations for different commercial and residential activities, and, at times, licensing for specific types of business to open in a given location. Land use can be restricted by government or by private contract (as with covenants that exclude certain future uses for a property).

4 See West (2005) for a description of potential definitions of barriers to entry.

5 Relevant recent work in this vein includes Fischel (2004) and Quigley (2006). Their main focus is on residential real estate impacts, while this paper emphasizes that scarcity impacts arise also from restrictions on retail and industrial real estate.

argues that restrictions to entry are, at times, excessive, harming consumers who would benefit from new entry and harming those seeking housing, notably the poor. The paper urges governments to pay greater attention to whether usage restrictions create excessive restrictions on entry.

While there are sound reasons for limiting land use in many circumstances, the social harms that can arise from creating "entry barriers" are rarely considered explicitly. More careful integration of policy on land use restrictions with competition policy could benefit consumers and many entrepreneurs, and reduce the likelihood that supply scarcity will be induced by government or private restriction over land use. Competition agencies can play a critical advocacy role in this domain that would not typically be fulfilled by any other part of national government.

In addition to effectively restricting entry, land use restrictions may have other potentially pro-competitive effects. Restrictions may promote competition, for example by enhancing access to real property, such as ports, airports or rights of way. Access rules can, at times, help to prevent the exercise of market power and can be an important tool of competition policy.

This paper does not argue, nor should it be taken to suggest, that land use restrictions are inappropriate. In fact, land use restrictions often serve valuable social purposes, such as protecting landowners from expropriation of their land value, reducing macroeconomic risks from natural disasters, enhancing the environment, managing growth of cities in a way that reduces costs to society, etc. This paper does not underestimate the positive effects of land use oversight on the quality of neighborhoods, the quality of services and the general quality of life of people living in "protected" or regulated areas. However, these benefits are not the focus of the current work. The paper's point is that the costs and benefits of particular policies for land use must be balanced against each other, and that one key element of these costs and benefits is the effect on competition. The paper focuses on explaining competitive effects of land use restrictions, which is a first step towards a balanced analysis of costs and benefits.

While some observers suggest that government intervention over land use is unnecessary (citing experiences of cities without land use regulation to support their point), land use restrictions can reduce the transaction costs of allocating rights of use in the presence of externalities.[6] There are substantial risks that the cost and logistics of multi-party negotiation combined with free-riding might prevent the efficient allocation of rights through a private negotiation process. In addition, there may be non-economic objectives of government that are best achieved through land use restrictions and which enhance societal welfare. This paper therefore regards land use restrictions as important economic and social tools.

Some observers have argued, however, that certain land use regulation promoted under the guise of preventing negative externalities is actually advocated by companies or individuals seeking to reduce competition or ensure scarcity.[7] Empirical evidence on this point is lacking,[8] but it is the case that land use

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6 The canonical example of a city without zoning is Houston, Texas where despite an absence of zoning, city development has operated relatively smoothly. As a substitute for centralized government authority, many properties are governed by restrictive covenants. For example, property developers building new housing developments had an incentive to insert provisions that would prevent retail or industrial uses in their developments, as this covenant would increase demand, at a given price, for its homes. However, public transportation is not highly developed, in part due to the low density of the population in Houston.

7 See J. Fred Giertz (1977).

8 See Ford (1935), for example, stating the UK's Federation of Journeyman Butchers called for a Parliamentary Bill "to limit the number of butchers' shops by licensing."

restrictions do, at times, have the effect of creating or increasing market power by ensuring scarcity of supply, so that incumbent companies may have a profit incentive for promoting restrictions.[9]

Land use regulation creates the most severe competition problems when:

- The regulations prevent new firms from entering in markets where there is market power;
- The regulations prevent low-cost firms from entering in markets where existing firms are high-cost;
- The regulations reduce total supply of a good; or
- The regulations unduly delay the arrival of a good or service that consumers would value (such as ones resulting from innovation or differentiation).

Government authorities have the ability to eliminate or control excessive restrictions on land use. Authorities responsible for land use should: (1) be aware of the incentives of complaining competitors, who may seek to delay entry by raising objections during the planning process or by funding third parties to raise objections, (2) have knowledge about the implications of restricting competition and (3) promote competition as part of land use policy. To the extent that existing companies seek to delay or prevent entry of new companies by submitting false or misleading information during planning enquiries, governments should question whether such companies are attempting to maintain market power through illegitimate means and whether such companies may be engaged in illegal conduct, including competition law violations, misrepresentation and fraud under the laws of some jurisdictions.

Land use restrictions are typically local or regional in nature, and are generally of concern from a competition perspective when they affect products that have narrow geographic markets from an antitrust law perspective, such as retail outlets, hotels, hospitals, ports and other transport facilities.[10] Products that do not have an inherent local geographic content to their delivery are unlikely to be impacted, from a competition perspective, by land use restrictions, unless there is a regional or national scarcity of supply.[11]

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9 Assessing impacts of land use restrictions on market competition can benefit from insights from competition policy on how to define relevant geographic markets.

10 Planning restrictions that prevent the location of a refinery in one zone may not have any effect on competition, if the proposed refinery can locate in a zone nearby that has comparable costs of delivering crude oil and if purchasers of refined goods are indifferent between the different locations of the refinery. In contrast, planning restrictions that prevent the opening of a large supermarket in a given site may have an effect on competition, even if a comparable site is available 20 kilometers away, because retail stores are differentiated based on their location and there may be many consumers who would have preferred and benefited from a competing store in the first location who would not otherwise benefit from competition.

11 For example, construction of an electricity generating plant, a LNG re-gasification facility and many infrastructure facilities typically have broader benefits than those that apply in the local area in which planning authorization may be given.

This paper focuses exclusively on restrictions that affect the vigor of market rivalry. Land use regulation may create inefficiencies in a variety of ways not discussed in this paper and can, at times, serve as a "taking" of rights over use of land.[12] These topics are not the focus of the work at hand.

Because land use practices differ substantially across the OECD Members, not all countries would have situations comparable to those in this paper. Detailed cross-national studies are lacking and would be a valuable area for future research. Nonetheless, to provide a preview of the conclusions, a number of practical lessons can be drawn:

- Land use restrictions are, at times, excessive and serve to raise the costs of entry, delay entry or prevent entry, all of which impact local conditions of supply and rivalry, with likely follow-on effects for consumer goods and services. Consequently policymakers should take account of consumer effects in land use policies that have major effects on rivalry and entry.

- Criteria for granting local land use permits should be clear with a process that is speedy, quickly addresses appeals, limits costs and requires governments to justify refusal of permission based on reasoned arguments that consider impacts on consumers.

- Regulations that control geographic density of certain types of outlets are often justified as ensuring adequate economies of scale for providing minimum service levels. Such regulations are unnecessary in urban areas and can, perversely, reduce supplier presence in rural areas.

- Government regulation generally should not take into account the effect of permitting a new company to enter on incumbent companies. The "externality" of lost profits to incumbents as a result of competition ignores the likely benefits to consumers from increased competition. Policymakers are generally not well-equipped to conclude that increased competition would not benefit consumers.

- Pricing for access to public property should reflect scarcity and costs to the public authorities. In many cases, such prices would be zero.

- Appropriate cost-benefit analysis is most likely to occur when most social benefits and costs of land-use decisions arise at the level of the political unit that makes the decision.

The remainder of this paper will focus, first, on rationales for land use restrictions and second on competitive impacts of selected restrictions (whether through market-shrinking exclusion or market-opening inclusion).

2. Rationales of land use restrictions

Land use restrictions arise both from public rules, laws and bodies and from private contracts.

Public land use restrictions, broadly defined, take many forms. They include:

[12] A taking occurs when the government deprives a landowner of substantial use of their property by virtue of government dictate or expropriation. In some countries, such as the United States, takings give rise to a right to compensation for the landowners. (Fischel (1985, pp. 150-178)). Such legal principles are not unique to the United States. In the European Union, for example, Article 288 of the EC Treaty states that "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

- Rules that categorize land and buildings for different uses (e.g., residential, commercial, industrial, office, recreational, mixed, single family homes, multi-dwelling homes, specific retail sectors, etc.);

- Location-specific licensing or uses;

- Limits on size of stores;

- Adjacency controls (geographic density limits for particular types of stores);

- Impact assessments, including environmental impacts; and

- Access rules.

Private land use restrictions arise from:

- Covenants that prevent certain land uses for properties subject to the covenant;[13]

- Blocking land, that is owned by one firm but may prevent development of nearby property by a competitor; and

- Exclusive contracts.

Land use restrictions serve a variety of important economic, social and environmental purposes. Commonly cited purposes include:

- Minimizing negative externalities (e.g., negative externality of industrial site on nearby home values and air quality);

- Protecting communities (e.g., small businesses);

- Protecting the environment (by refusing to grant new building permits on greenfield sites, limiting size of signs);

- Protecting public goods (e.g., historical areas);

- Protecting public safety (e.g., by ensuring housing is not built in a floodplain);

- Distributing costs of new public services appropriately (e.g., ensuring that a large new development will pay for the extension of roads, water mains and schools to the development);

- Ensuring local revenue streams (e.g., through local taxes based on property values or transaction price values);

- Increasing long-term focus on growth (e.g., requiring wide highway easements in relatively undeveloped areas);

[13] Covenants are restrictions on use imposed in the ownership or lease documents of a property. These are not easily changed by future owners or renters of the property, and are generally viewed as binding on future users during the life of the covenant.

- Providing a profit incentive for provisions of goods and services (e.g., protect pharmacies from competition so that they have an incentive to establish and maintain good services);

- Ensuring coexistence of different property regimes or tenure systems; and

- Enhancing competition (by ensuring access).[14]

The overall goal of land use restrictions (at least public restrictions) is to increase consumer welfare, which can be affected not just by price, quality, differentiation and choice of goods and services, but also by congestion costs for transport, environmental factors, tax revenue from businesses located in a locality, and commuting options, which are in turn influenced by density of housing.

Two rationales for land use regulations that are particularly common for restrictions with an impact on competition are the existence of externalities and the protection of community businesses. These are discussed in the following sections.

2.1 Externalities

Perhaps the most commonly discussed purpose for land use restrictions is to resolve problems of externalities. Externalities are impacts on others that are not taken into account by a private actor. Externalities can arise from, e.g., pollution, noise or other environmental factors (potentially high-density housing) and, in the case of real estate, can have an impact on both quality of life and property values. Externalities provide a rationale for government intervention when the private benefits (costs) to a given land use are outweighed by the costs (benefits) to others and compensation is not automatic.

A quick illustration of externalities follows. Suppose a company is considering building a factory on property in a residential area. If a factory is built in the middle of a residential area, it may reduce quality of life for local residents as a result of its smoke and truck traffic. The impact on the quality of life may then be reflected in falling property values. From the perspective of residents, they have experienced a negative externality, compared to their initial situation. The factory owner, however, does not experience or take account of the residential loss in value, but only experiences private gains from profit of factory operation.

When the net loss in value in the residential area exceeds the expected profits from the factory, the installation and operation of the factory creates a net social loss. Yet, in the absence of any restrictive rule, the factory would nonetheless be built and commence operation because it is privately profitable.[15] In this case, land use restrictions that prevent the location of a factory within a residential area would yield a social benefit compared to a situation in which each landowner has the right to do what they want on their land, regardless of effects on others.

If the net gains from factory operation exceed the residential loss, there could be a compensation mechanism between the residents and the factory that could make up for the loss. For example, the factory owner could pay residents for their lost property value and still have a profitable factory.[16] However, the

[14] The listing of these rationales is not an endorsement of their appropriateness. For example, the rationale of providing a profit incentive by excluding competitors may not be appropriate absent strong arguments in support of it.

[15] The factory might not be built if the residents jointly contributed to pay the land owner not to build a factory.

[16] This may be an incentive for the factory owner to locate in an area where no such payments would be required.

complexities of negotiations between one factory owner and hundreds of residents could be such that, if each resident had a right to veto the factory development, no agreement would be reached. On the other hand, if the factory had an absolute right to construct, residents would be left worse off. The transaction costs of negotiations can be so large that it is better to establish a centrally operated mechanism for allocating land uses in ways that minimize combinations of uses where one user experiences an externality from the other's operation.

See Appendix A for a fuller discussion of externalities.

2.2 Protection of community businesses

Another major reason for land use restrictions is to protect local community businesses. For example, in many localities, there are land use restrictions that make it difficult to establish new large format stores. The precise impacts of such entry are still hotly debated, but increasingly evidence suggests that preventing the development of large stores actually reduces employment and raises prices to a higher level. In the U.K., for example, Sadun (2007) finds that regulations that prevent construction of new large stores outside town centers have led grocery chains to instead develop smaller, local stores. These local stores have had a negative impact on pre-existing small grocery stores. In fact, employment in small, non-affiliated grocery stores appears to have fallen as a result of the switched entry patterns of large chains from greenfield sites to within-town sites. Basker (2005) finds that, overall, Wal-Mart entry appears to be associated with slight increases in employment, rather than decreases. In France, Bertrand and Kramartz (2002) examine the impact of stringency of entry regulations for large stores and find that restricting entry lowers employment. Hausman and Liebtag (2004, forthcoming) find that non-traditional retailing outlets like Wal-Mart charged lower prices for 19 of 20 products (with the exception being soda), with an average price difference of 27%. Hausman and Liebtag (forthcoming) suggest that this competition has caused traditional supermarkets to lower prices by approximately three percent. Basker and Noel (2006) find smaller price effects from Wal-Mart, with Wal-Mart's prices estimated to lie 10 percent below those of competitors. The ultimate question of the net effects of large discount-store entry is still debated. Boarnet et al. (2005) examined data for the San Francisco Bay Area, after Wal-Mart entry. They found consumer savings to lie "between $382 million and $1.13 billion per year" while they predict "wages and benefits in the grocery sector, and thus local earned income, to fall by between $300 and $576 million per year." Boarnet et al. (2005) suggest, however, that distributional effects may need to be considered in addition to simple efficiency considerations, so that simplistic conclusions on the impact of Wal-Mart entry are difficult to justify.

The next section will consider ways that certain land use restriction can impact competition, focusing first on the ways in which land use restrictions may tend to exclude competitors and create scarcity, and then on the ways in which land use restrictions may help to enhance access to essential facilities, thus promoting competition.

3. Competitive impacts of land use restrictions

Certain land use restrictions have significant effects on competition. Some of these effects are "exclusive" in nature, limiting either the commercial use of certain land or the establishment of new commercial services broadly in a geographic area. These restrictions can at times limit the number of providers of a service. If there are already many providers within an area that most consumers would consider local, then the effects of such restrictions are likely to be benign. However, if consumers feel constrained in the number of local choices of service provider, such restrictions can limit the beneficial effects for consumers of competing businesses.

Some of the effects are "inclusive" in nature, enhancing the ability of new entrants to operate successfully, often by providing access to monopoly elements that would otherwise be denied to them.

3.1 "Exclusive" land use restrictions

"Exclusive" land use restrictions have an effect that tends to exclude suppliers or reduce supply. Such exclusive restrictions can, in many circumstances, serve as barriers to entry. Such restrictions have several modes of operation:

- Impose a clear limit to the number, size or density of competitors;
- Impose a disguised limit to exclude competitors;
- Create a transaction cost for entry, e.g.
  - Delay;
  - Cost of preparing applications;
  - Influence peddling;
- Disallow a change in use or new use that may harm existing firms; and
- Establish a cost of gaining access to public lands that exceeds marginal cost to public or private property owner.

The OECD produced product market regulatory indicators in 1998 and 2003 which include measures of barriers to entry for retail stores.[17] These indicators focus on a number of aspects of regulation, including the extent to which there are regulatory barriers to retail entry. Questions that influence the retail indicators include the size of the store that triggers large store rules, whether competitors must be consulted prior to opening a new store and whether licenses or permits (in addition to planning approval) are needed prior to opening a new store. The indicators focus on measurable and comparable factors across countries. They therefore do not include effects, for example, of consistent procedural bias or decision-making bias. However, they are probably the best international measures of comparative barriers to entry in the retail sector.

The overall indicators on barriers to entry show that there is substantial dispersion across the OECD as to the extent to which barriers to retail entry exist. While the average rating is 2.3, the level of entry regulation overall rises to 4.2 (where 6 is the maximum possible score).[18]

Land use restrictions do not only pose barriers to retail entry. They can also impose barriers to non-retail commercial activity and to residential building.

Note that not all planning actions that restrict operating areas of companies are exclusionary in nature. For example, zoning rules that designate explicit retail areas (and prohibit retail operations in residential

[17] All of the data used to estimate the retail indicator were collected via the *OECD Regulatory Indicators Questionnaire*. The barrier to entry indicator combines information on limits for establishing large stores and other restrictive policies on retail establishment. The questionnaire and data are available from the Indicators of Product Market Regulation Homepage at: http://www.oecd.org/eco/pmr.

[18] These levels are averages of qualitative rating variables, so do not have a direct cardinal interpretation.

areas) are common. If the retail area is large, then the effect may be to concentrate stores without excluding any stores.[19] This could actually increase the vigor of rivalry between stores, by reducing search costs for customers who might otherwise have to visit highly dispersed locations in order to compare offerings. Ridley, Sloan and Song (2007) show that with respect to five store types, restricting their areas of operation (which increases density in the permitted areas of operation, thus lowering search costs) leads to greater densities of stores in appropriately zoned areas, reducing search costs, and may increase competitive rivalry to the extent that some stores that would otherwise exist are driven out of business. Notably, permissive zoning increases the number of sellers.[20]

In contrast, if zoning highly constrains the total space for retail activity, zoning can have a harmful exclusionary effect because it will result in retail monopolies. This can be seen from the example in Appendix 2 below.

3.1.1 Impose an explicit limit to number, size or density of competitors

Explicit restrictions on entry often exist. These can arise from government acts or from private acts.

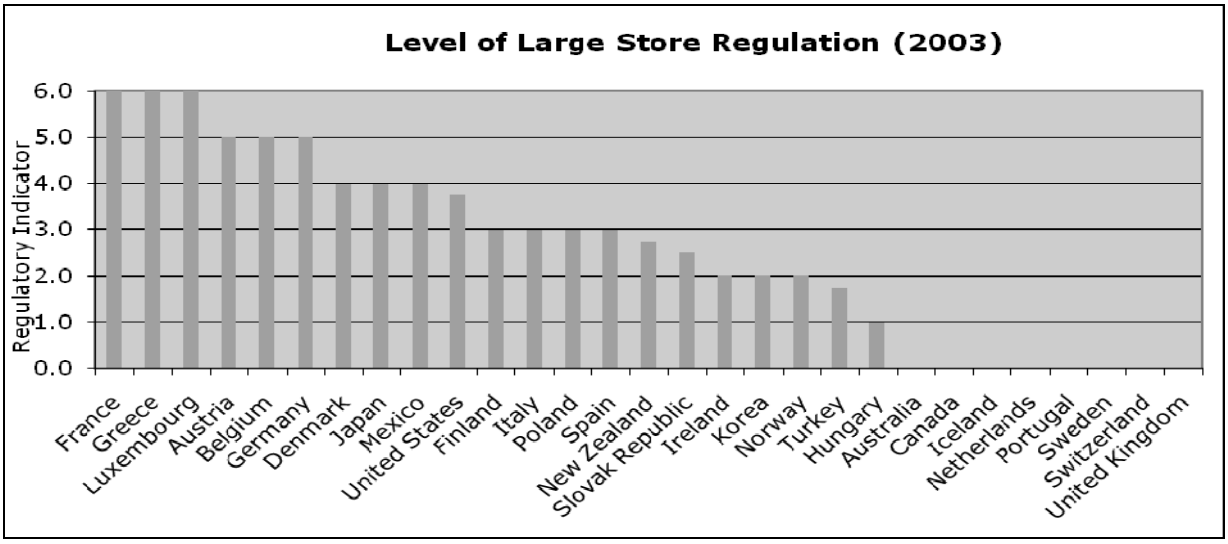
Government restrictions

Government restrictions can include limits on the total number of stores of a certain type per capita, or rules that limit stores to certain sizes, often involving a preference for small stores, or rules that simply restrict the number of stores in a certain area, regardless of population and density. In some regions, plans set a cap on the number of hypermarkets. If that number has already been reached, then there is a clear restriction to entry. The OECD regulatory indicator of Large Store Regulation is shown in Figure 1 and demonstrates that many countries have significant and explicit restrictions on large stores. The precise effects of such regulation depend not only on how the regulations are enforced but also on when the regulations were enacted, because if regulations were enacted after many large stores were already constructed (as in France), their impact would be different than if the regulations were enacted before many areas even had one large store (as in Italy). Some countries have no specific limits that single out large stores.

19 A store is "excluded" for these purposes when a store would have liked to open at land prices prevailing in the region, but is not able to enter due to scarcity of appropriately zoned space.

20 In their theoretical model, they state "one might expect a negative relationship between the number of sellers and price but we show that when zoning is added to the model, the relationship can instead be positive."

Figure 1.



Source: Conway, P. and G. Nicoletti (2006), "Product Market Regulation in non-manufacturing sectors in OECD countries: measurement and highlights", OECD Economics Department Working Paper.

Explicit numerical restrictions are not only common for large stores. They are also particularly common with respect to some other retailers, such as pharmacies.[21] The primary rationale for such limits is to ensure that there will be sufficient profits to ensure supply. In Ireland, there is a three-pronged test for opening new pharmacies. Notably, there is a population density requirement, a physical distance requirement and a no-adverse-effect condition. The three "public health need" tests are:

- New pharmacies cannot be established if they bring the ratio of pharmacies to population below 1:4000 in urban areas and towns over 3000 in population and below 1:25000 in rural areas;
- No other pharmacies are located within 250m in urban areas or within 5 km in rural areas; and
- No adverse affect on the viability of existing community pharmacies in the area.

These rules have substantial effects. For example, between 1996 and 2001, only 48 new pharmacies were granted permission to open in Ireland, while many more would otherwise have been expected to open.[22]

Geographic restrictions of this type are not unique to Ireland. Other countries, including Denmark, Italy, Spain, Hungary, Norway and France have restricted the number or location of pharmacies.[23]

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21 The rules over pharmacies arise from commercial licensing restrictions, which are not treated at length in this paper, as opposed to regulations from a land use agency. However, to the extent that the effects of the restrictions are to explicitly limit the nature of activities within a narrow geographic area, the restrictions can arguably be considered one aspect of land use policy.

22 During this period, there were also constraints on the number of training places available for new pharmacists.

23 In Hungary, for example, the ratio of pharmacies to population cannot be less than 1 for every 5000 people and the minimum distance between pharmacies is 250m. (See OECD, Enhancing Beneficial Competition in the Health Professions, 2004).

However many countries operate pharmacy systems without such rules. For example, in Germany, Mexico and the U.S., there is no "demand" or "market" examination of a proposed new pharmacy prior to issuance of a license by the local health authority. The result in Germany is a high density of pharmacies, with one pharmacy for every 3800 residents. Ireland, with its density limits, actually has a much lower density of pharmacies, contradicting the argument that density limits ensure availability of supply by ensuring profits. The experience with respect to entry limits in Germany suggests that an absence of the rules on minimum density, minimum distance and impact on competitors could actually promote the broader distribution of pharmacies.

France introduced laws to raise the barriers to entry for large surface stores in 1973, and strengthened these barriers in 1996 (lois Royer and Raffarin, respectively). According to the Attali Commission Report on First Propositions on Purchasing Power (2007), between 1986 and 1994, 379 large surface stores opened on average each year, compared to 162 per year between 1995 and 2003. Prices for food products in France rose by 14% between 1998 and 2003, while the average in the rest of Europe was 10%. The 1996 loi Raffarin made it difficult or impossible to construct new hotels of moderate or large size (greater than 30 to 50 rooms) in areas which the government deemed had adequate levels of hotel space. According to the Attali Commission, for the last 9 years, hotel prices in France have risen by 4.5% per year, while inflation rose at 1.7%, suggesting that the entry restriction may have had significant effects.[24]

Private restrictions

Restrictions on entry do not arise solely from government restrictions. Private restrictions on entry may have anti-competitive effects. Private acts that restrict competition can include covenants and purchases that make no economic sense, except through preventing competition. Covenants are widespread and have many different purposes and effects. The law underlying covenants is complex and varies across jurisdictions, so is not treated here. Those covenants that are of most concern for the current purposes are covenants that restrict uses of a site. These are in fact quite common. Examples include:

- A grocery retailer may insert a covenant that future uses cannot include grocery retailing.
- A fast food chain may insert a covenant that future uses cannot include beef-based fast food.
- A hospital chain that sells one of its hospital sites may insert a covenant that hospital services cannot be provided at the location in the future.

In the U.K., for example the Competition Commission has recently provisionally concluded:

- "The four largest grocery retailers own a significant number of landbank sites, as well as controlling further sites through leases to third parties, restrictive covenants and exclusivity arrangements."
- "In many cases, these landbank sites represent a pipeline of future development activity that does not raise competition concerns." However, approximately 10 per cent of all larger grocery stores have a nearby landsite which is controlled by the retailer and is likely to be constraining entry by competitors. "In addition, there are instances of local markets where controlled land holdings, particularly the use of restrictive covenants, may be constraining entry by convenience stores."(See Competition Commission (2007b)

[24] A fuller analysis would also consider the opportunity costs of land, which rose significantly during this period, as well as possible increases in demand.

Covenants apply to many circumstances outside grocery retailing. In general, covenants might not have any real impact when there are many equally attractive alternative retail locations to which the same set of consumers would be indifferent. For example, there may be many locations appropriate for coffee shops.[25] If a coffee shop chain inserts a covenant when it disposes of or sub-leases a property, it may be unlikely to have any real effect to the extent that potential competitors could find many other equally attractive locations. In contrast, covenants might have a real impact of reducing competitive constraints when they prevent entry that would have improved competitive conditions for consumers or make the conditions of entry inferior to those that would have existed absent a covenant. Covenants may serve to protect the firm implementing the covenant. For example, if a grocery retailer inserts a covenant for a large retail site that is ideally suited to large store grocery retailing, the pool of alternatives for a competitor may be small and those alternatives that exist may be notably inferior to the site with a covenant. (A6(2)-17) There are at least 46 covenants noted by the Competition Commission, of which more than 90% have no termination date.[26]

Covenants have an economic effect, since they reduce potential uses for property. They can involve a sacrifice of profit for the implementer of the covenant, as, after the covenant, the land may have a lower sales price or sub-lease price, especially to the extent that the initial use was superior for the site than other uses.[27]

In addition to exclusion that may arise from covenants, retailers are sometimes guaranteed exclusivity for their type of product in a retail development. The Competition Commission finds at least 45 occasions with exclusivity guarantees[28] and notes that:

> *"An exclusivity arrangement between the owner of a retail development, or with a local authority, may encourage a retailer to act as anchor tenant for a new scheme and could be welfare enhancing if it ensures that provision occurs (for example by enabling the infrastructure necessary for the development to be put in place because the anchor tenant has been secured). However, such arrangements could also act to restrict competition in a development that could support more than one grocery retailer. For example, M&S [a department store with large food sections] submitted that it has had difficulties securing a lease of grocery sales floorspace in retail parks in which a dominant grocer has an exclusivity arrangement with the landlord." (A6(2)p. 24)*

Perhaps the most blatant form of private exclusion occurs when a competitor buys blocking property. Such blocking property may prevent initial assemblage of a site by a competitor or prevent expansion of a competing facility. In one example, a hospital may purchase property surrounding another competing hospital, making it more difficult for the competing hospital to expand.[29] In most jurisdictions, it is an open

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25 Although even for the seemingly abundant resource of prime locations for coffee shops, for example, there can be allegations of improper conduct . An entrant coffee chain has sued Starbucks on the grounds that it has control, via covenants and other means, over prime sites.

26 The 46 covenants were agreed by the four largest grocers based on disposals they have made since 1 January 2000.

27 In the Competition Commission market investigation, at least one firm indicated that covenants were a way to extract value in case a later high-value use for a site was proposed.

28 These exclusivity guarantees relate to sites acquired by the four largest grocers since 1 January 1996 and in the case of some of these grocers, data could not be provided relating to acquisitions prior to 1 January 2000.

29 See Jackson, Tennessee Hospital Company v. West Tennessee Healthcare, Inc., 2004-1 Trade Cas. (CCH) ¶ 74,344 (W.D. Tenn. 2004) for a case in which this allegation has been made.

question whether competition laws apply to such circumstances. Under a "no economic sense test", such actions raise serious competition questions and, given an appropriate pattern of facts, merit investigation by public authorities or action by courts.[30]

Blocking land can be compared to blocking patents. In the case of blocking patents, the state may have an interest in fostering innovation through a patent system, and at times this could lead to protection of so-called blocking patents. But the state has no interest in promoting physical land use contrivances that serve simply to block competition. Excluding competitors from land that is otherwise not being used for their business activity does not contribute to economic growth and investment. Permitting businesses to install such covenants when land is scarce may give a firm the incentive to collect blocking land or covenants in order to prevent competition. The state has no interest in promoting this practice. While exclusive uses may arguably help to promote investment in new sites, competition-restricting covenants and blocking land are fundamentally different, as these private contracts yield no obvious social benefit, and have a clearly identifiable harm which can be easily remedied.[31]

3.1.2 Impose an implicit entry restriction

The absence of explicit rules on entry does not mean that land use rules will not have the effect of limiting new entry. For example, while England does not have a rule that prohibits the opening of new large format grocery stores, it does have a planning system that follows general rules that express strong preference for locating stores in central town locations, where large space is difficult to assemble, and secondly, in edge-of-town locations as opposed to out-of-town locations, where greenfield space may be plentiful. This helps to explain why a jurisdiction like the United Kingdom can report very low restrictions on opening new large format stores (as in OECD data of Figure 1) while the Competition Commission (2007a) states "the planning system will, quite deliberately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion for larger grocery stores. (Paragraph 6.115)

Implicit restrictions on entry do not necessarily originate with the planning process itself. They can also emerge from other types of restrictions. For example, to protect armoured car personnel, rules may be established that a cash machine must be within a certain distance of a public street and adjacent to appropriate parking for an armoured car. One implicit effect of such rules is to prevent cash machines from operating in hypermarkets, as the preferred site for a cash machine would be inside or next to a main entrance and, in both cases, the rule would forbid delivery. One side effect of the rule may then be to prevent hypermarkets from offering a full array of banking services, thus restricting competition between existing banking sites and hypermarket networks.

Local planning processes for telecommunications towers have often made it extremely difficult to build new mobile phone or communications towers. While placing a tower at a given location may not be prohibited by any set of rules, the qualitative element of planning approval means that no strong reason is required for planning rejection apart from opposition. While this opposition to new tower locations does not necessarily prevent installation of new mobile phone cells, it can in fact have an effect of severely

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30 When a firm owns "blocking land", there is little of fundamental economic importance at stake. The state may have an interest in fostering innovation through a patent system, and at times this could lead to protection of so-called blocking patents, but the state has no interest in promoting physical land use that blocks competition unless there is a compensating social advantage.

31 There may be a concern that such annulations would deprive property holders of value. In fact, many government actions deprive property holders of value, including mergers that are stopped as a result of government intervention. The relevant question is whether the value can be attributed to lost anti-competitive profits. The state has no interest in furthering, maintaining or expanding anti-competitive profits unless there are countervailing social benefits.

restricting the options of mobile communications companies. Often, their need for a new cell location is very precise in order to meld with their existing cell locations. Consequently, they may not have any practical option apart from dealing with an existing tower owner when locating a new cell, if alternative options are unavailable.

Box 1. UK Competition Commission Groceries Market Investigation and Land Use Planning

The UK Competition Commission recently published Provisional findings as part of its Groceries Market Investigation. The purpose of the investigation, which started in 2006, was to assess the state of competition in the groceries market and determine whether any government measures were necessary to remedy any competition problems that might exist. The investigation dealt with a broad range of topics, from buyer power to retail product pricing patterns to ways that control of land may influence competition. The Competition Commission collected extensive data and examined it in the report.

The report discusses both ways that private acts to control land may impact competition and ways that government planning rules can impact competition.

According to Competition Commission (2007a), "for larger grocery stores, the planning system acts to constrain new entry through the limits it places on edge-of-centre and out-of-centre development. These limitations are much less significant for mid-sized grocery stores and convenience stores, where suitable locations either in town centres or elsewhere that are not subject to planning restrictions are more easily found." (paragraph 6.53)

Planning framework

The planning framework in England is governed by the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004. There is a hierarchy of national, regional and local guidance against which planning applications are assessed, including Local Development Frameworks (LDFs) prepared by the Local Planning Authorities (LPAs). The Secretary of State sets policy and influences decisions through guidance, representations on draft development plans (with the ability ot modify them) and is able to "call-in" individual planning applications and make a decision following a public inquiry. The majority of individual applications are considered by LPAs, whose decisions may be appealed (to the Secretary of State). At times, planning permission is granted subject to conditions. These conditions are often expressed in the form of agreements entered into between the applicant and the local planning authority (commonly referred to as Section 106 agreements). Their purpose is not intended to extract planning gain but to ameliorate unacceptable elements or consequences of a proposed development, for example in terms of additional burdens placed upon existing facilities such as roads. They can nonetheless result in additional costs being incurred by the applicant.

Of the guidance most relevant to grocery retailing is national Policy Planning Statement 6 (PPS6) which promotes a "town centre first" approach to retail development, includes a "need test", requires developments to occur at an "appropriate scale" and requires that impacts of new developments on existing retail centres be considered.

"The key objective of PPS6 is the promotion of 'vital and viable' town centres through:

(a) planning for the growth and development of existing centres; and

(b) promoting and enhancing existing centres, by focusing development in such centres and encouraging a wide range of services in a good environment, accessible to all." (A6 (1) paragraph 5)

Prior to the introduction of PPS6, out-of-town retailing had been growing rapidly. (A6(1) paragraph 5)

PPS6 requires that proposed retail developments are of a scale appropriate to the catchment area that the proposed development will serve (i.e., regional provision in regional centres and local provision local centres). Two other objectives explicitly mentioned by the PPS6 are goals that are seemingly consistent with best practice for competition policy, namely "enhancing consumer choice" and "supporting efficient, competitive and innovative

retail, leisure, tourism and other sectors, with improving productivity". The Provisional findings state, however, that "planning authorities do not interpret choice and competition as meaning that they should consider the identity of an applicant in terms of how any new retail development will compete with existing retailers and ensure improved market outcomes for consumers in terms of factors such as price, quality or service. Rather, these objectives generally appear to be interpreted in terms of, first, providing for different types of retail developments, which for consumers may be complements rather than substitutes, and second, providing for the development of retail centres that can compete with other retail centres for shoppers through providing an attractive destination with a good range of shops." (A6(1) paragraph 7)

Planning applications

If an applicant seeks to develop a retail site outside the centre of town in an area that is not already slated for retail development, the applicant must first demonstrate that no centrally located sites would be suitable for development. If this is established, then applicants are required to show that there is "need" for the new development. The criteria for assessing need are both quantitative and qualitative, with substantial discretion accorded to LPAs to determine whether there is "need". The assessment is determined by reference to floor space, with the guidance specifying that the need for additional floorspace should normally be assessed no more than five years ahead (because of the possibility of town-centre sites becoming available within that period.)

PPS6 also requires that any development of more than 2,500 sq metres of gross floor area that is in an edge-of-center or out-of-centre location, and not in accordance with an up-to-date development plan, must be accompanied by a retail impact assessment (RIA). A RIA seeks to assess the impact of the proposed development on the vitality and viability of existing centres within the catchment area.

The Barker Report was a government-instigated report produced prior to the results of the Competition Commission's groceries market investigation. (Barker Review of Land Use Planning, Final Report – Recommendations 2006) It states that:

"The current system of needs tests in town centre first policy also can have perverse effects: it protects incumbents and gives preference to operators that have lower sales densities… Furthermore, incumbents may find it easier to expand incrementally while prospective local entrants fail at any one time to demonstrate sufficient need for a one-off increase of space. The needs test should therefore be removed."

The Department of Communities and Local Government has responded in a White Paper by agreeing that the "need test" is "in some respects a blunt instrument" with unintended effects on competition and limiting consumer choice. But the government states that a complete elimination of a "need test" could place at risk the goal to "support current and prospective town centre investment, which contributes to economic prosperity, to our social and environmental goals". (Planning for a sustainable future, White Paper, 21 May 2007, paragraphs 7.53 to 7.55.)

It appears that the Department of Communities and Local Government does not address the point that a needs test appears designed to create scarcity of supply. The Department may be arguing that scarcity of supply is necessary in order to ensure town centre development. But given that the planning system already contains a requirement that town centre developments be given preference over out-of-town developments for the same service, it is unclear what value, if any, is added by a "need test". A need test is highly subject to manipulation by competitors, who have a commercial interest in arguing that there is no substantial additional need or that a minor expansion of their own facilities would meet any need, without the addition of an entirely new stores. (Extension proposals could arise in reaction to the proposal for a new retail store, and such extensions pass the needs test more easily, as well as the retail impact assessment tests. The Competition Commission states that "it would seem that grocery retailers are, in some cases, using store extensions as a means of frustrating new entry by larger stores, which come within the ambit of the need test. We do not, however, have evidence to suggest that this activity is widespread." (paragraph 6.62)) More generally, a test that examines impact of new entry on competitors has no place in government policy. Absent compelling alternative objectives, government should not consider impacts on competitors or, through government planning decisions, express a preference for one competitor over another. These concerns about harmful impacts of the planning system are not purely hypothetical. According to the Competition Commission, 55% of LPAs stated that "they were aware, or had reason to believe, that grocery retailers objected to the planning applications of their competitors." (Footnote 155, Chapter 6.) Moreover, between the year 2000 and 2007, at least one grocery retailer

objected to 34% of grocery retail planning applications.[32] When the objections are made by incumbent retailers, the planning application was withdrawn or rejected between one third and one half of the time. While it is unclear whether the incumbent objections play a decisive role in decisions to withdraw or reject a planning application, it is clear that objections require the expenditure of resources by incumbents and they apparently find it profitable to expend resources in this way, suggesting that incumbents perceive a benefit from objecting.

For further information on these topics, see Competition Commission (2007a), Chapter 6 and Appendix A6(1). Text that is not in quotation marks should be construed as the interpretation of this paper's author and is not necessarily a finding or view of the Competition Commission.

3.1.3 Impose a transaction cost for entry

The land use process often requires approvals prior to new construction or to a change in use. These approvals can create a variety of costs for a new business, although if such costs are comparable for all firms, there may not be a discriminatory effect that arises from them. Moreover, to the extent the planning process achieves government objectives in ways that are more costly than necessary, the planning process creates deadweight losses and can result in raising the expected costs of a project, making some projects uneconomic that would otherwise be worthwhile.

Delay

The costs of delay for private firms can be substantial. As reported in the UK Competition Commission's recent Provisional findings, for example, for one sub-sample of completed land site, the average holding time for completed grocery sites in the UK, for example, is 3.65 years prior to opening (see Competition Commission (2007a), A6(2)-31).[33] The time cost of delay for a company is not simply the interest rate that it pays on borrowed funds while waiting for approval; it is the opportunity cost of its funds, which is higher than the interest rate. If the opportunity cost of money is 15 % per year, and planning adds 3 years to the time to opening a new site, as is possible with complex projects with appeals, the cost of delay is 52% of the initial investment.[34]

The costs of delay can also affect governments and consumers.They should not be trivialized as their costs can, at times, be high. For example, at the time of the California energy crisis, a number of independent power generation applications were under review across California. After the prices for energy increased by factors of 500%, the planning process accelerated, as described later. If plants which

32 In spite of these figures that suggest many objections to giving planning permission are filed by competitors, the Competition Commission concludes that "objecting to competitors' planning applications does not appear to be particularly widespread or a significant matter of concern in terms of barriers to entry or expansion." (Paragraph 6.62)

33 This sub-sample of 24 sites might not be representative of the total number of completed land sites. It does not address the length of time required to assemble a site, but rather the holding time between assembling the site until planning permission is lodged, (or 1 July, 2006, if no application has been lodged by that date.) The length of the planning approval or post-planning approval process is not included. The number cited here is therefore primarily for illustrative purposes.

34 Some of the delay costs may be unavoidable (such as those due to building time) and others may be reduced (i.e., if land is being used for alternative purposes during the application period, as opposed to lying fallow.

had been proposed as far back as 1997 had been online by the summer of 2000, the extent of blackouts and price spikes might have been avoided and the opportunities for supply manipulation reduced.[35]

Cost of preparing application

For planning applications that involve substantial investments, the planning process can often be quite complex, with spending on the planning process, and impact assessment.

The total costs of the planning process are non-trivial. In the UK, for example, "Firms pay high direct transaction costs as a result of planning. Planning fees paid to government are in excess of £200 million per year, with planning consultancies earning around £300 million from private sector fees in 2005-06. The interim report of the Barker Review of Land Use Planning suggested total solicitors fees in the region of £350-500 million (it did not estimate the likely cost of barristers fees)."

Influence peddling

In some circumstances, the planning process is subject to substantial qualitative evaluation of projects, often with no requirement for refusals of a particular land use to have a publicly released and well-reasoned basis. In such conditions, it is possible for preferential treatment to be given to some projects over others. This preferential treatment need not involve an exchange of value. But corruption is more likely to occur when there are no clear criteria required to reject an application. For example, if a property is worth twice as much when zoned as a hotel than when zoned as residential property, there could be a substantial premium paid to those approving hotel licenses. In some countries, for example, hotel prices for consumers are high, new sites are difficult to find and presence of international chains is low. One possible explanation for this is that there are influence peddling or protection expenses and international hotel chains do not like to operate in environments in which they cannot legally account for expenses. But one of the impacts of the scarcity of supply is to raise prices for consumers. That is, restrictions of supply that can arise from planning are not benign. They can have direct impacts on certain service costs.

Land use rights and allocations account for a high percentage of corruption cases. Based on a search of newspaper articles on state and local corruption in the United States, of 372 cases, 83 were related to land use . In short, land use accounted for 22% of total corruption cases, and was the second largest category of such cases.[36]

3.1.4 Adverse effects on existing firms

In many circumstances, one factor that planners or licensing authorities consider is whether a new firm will have an adverse effect on existing firms or whether there is sufficient demand to support new facilities. For example, in the United Kingdom, planning for certain new large retail developments includes a test of adverse impact on vitality and viability of existing centres within a catchment area.[37]. In Ireland, a

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35 The time between filing of applications and approval at the state level were about 15 to 18 months, but delays at local levels could be more variable. The delays were not a result of energy regulatory policy, since plant building decisions were left to the local market, but land use, notably relating to environmental impact.

36 This search was of newspaper articles between 1970 and 1976 as reported by Gardner and Lyman (1978)

37 Competition Commission (2007) states "PPS6 also requires that any development of more than 2,500 sq metres of gross floor area that is in an edge-of-centre or out-of-centre location, and not in accordance with an up-to-date development plan, must be accompanied by a retail impact assessment (RIA). An RIA seeks to assess the impact of the proposed development on the vitality and viability of existing centres within the catchment area." (A(6)1 paragraph 13)

new pharmacy is not supposed to have adverse effects on competing pharmacies. In the United States, new pipelines were not permitted until there was proof of under-supply. Adverse effect tests are of dubious merit. Even if the government has altruistic motives for introducing adverse impact tests, such as protecting the local commercial environment, the practical effect of such rules is to make it more difficult for competitors to start new businesses by providing competitors and others opposed to a proposed property use with a procedurally legitimate basis for arguing against the opening of competing facilities. This is a strange tool to wield in a market-based economy, as it inhibits market operation, absent a compelling and established public interest.

Such tests are widespread, and are reflected in the OECD Regulatory Indicator for 2003 on protection of existing firms (see Figure 2).[38]

Figure 2.

Source: Conway, P. and G. Nicoletti (2006), "Product Market Regulation in non-manufacturing sectors in OECD countries: measurement and highlights", OECD Economics Department Working Paper.

There are several reasons that adverse impact tests are not appropriate:

- Government policy should not be directed at protecting firms from competition but rather ensuring that consumers receive the maximal benefits from competition;[39]

[38] The indicator is derived from national responses to two questions, one of which is directly related to involvement of existing commercial interests in decisions related to new activities. The questions are: (1) Are professional bodies or representatives of trade and commercial interests involved in licenses or permits to engage in commercial activity (apart from siting), permits for siting or compliance with regulations for large outlets. (2) Are there products that can only be sold in outlets operating under a local or national legal monopoly (franchise)?

[39] Exceptions are appropriate when there are compelling social interests that motivate the restriction of competition, as with patent policy that is designed to protect new ideas from competition for a limited duration in order to provide gains that yield an incentive to invest.

- Competitors who have adverse effects on existing firms are exactly the ones who are likely to benefit consumers the most (because for reasons of quality or price consumers will give such firms their business);

- Adverse effect tests reflect the self-interest of existing firms and can be an indication of captured regulators; and

- Entrepreneurs are more likely to be good judges of whether there is sufficient demand for a new offer rather than government officials.

3.1.5 Impose cost of gaining access that exceeds costs

One important type of land use for infrastructure companies is rights of way. Unless fixed telecommunications, electricity and gas companies can gain access to paths that connect their network backbones to individual customers, they cannot successfully reach customers or must face high costs for doing so (e.g., physical delivery of liquid fuels to customers). In general, there are well-established mechanisms for providing access to so-called public rights of way. These are routes to which appropriate infrastructure providers and sometimes others can gain access. The issue of access to public rights of way is particularly important for the rolling out of new services (such as optical fibre in telecommunications) or competing services (when incumbents do not make their own facilities available to entrants and capacity construction by entrants can be profitable).[40] Rights of way access has become particularly important as competition in infrastructure sectors has increased.

The regulatory oversight governing access to rights of way varies substantially across the OECD. At times, national rules limit actions that local government authorities may take with respect to rights of way. (See Box 2) At other times, local government authorities may have broad discretion to determine how access is provided and under what conditions.

When there is no scarcity of space (as with many cables over- or under-ground) the appropriate price to charge is one that reflects marginal costs in order to seek best use of resources. Marginal costs to the municipality may include costs of processing an application, costs of providing paperwork that shows layout of underground pipes and wires, etc. If the municipality builds in a profit for itself from the license, it can reduce the rollout of an otherwise desirable service and reduce rivalry. If the space is scarce, as with many concessions, a price that reflects scarcity of the good and opportunity costs of using the space for one purpose when other purposes are possible would be appropriate.

When local authorities have substantial discretion, they can be tempted to look upon their control over rights of way as an opportunity to generate revenues. In a number of countries, public rights of way are not subject to payment (Denmark, Germany, Luxembourg, Austria, Finland, the United Kingdom) though fees may be imposed aimed at recovering costs (such as costs of inspection and pavement restoration.) In some other countries, local governments have charged revenue-based fees on facility providers, which have no relationship with the costs incurred by the local governments.

[40] For a recent study on telecommunications access to public rights of way, see DSTI/ICCP/CISP(2007)5/REV1.

Box 2. Accessing municipal rights of way in Canada

In Telecom Decision CRTC 2001-23, the Canadian telecommunications regulator granted the company Ledcor access to municipal rights of way in the city of Vancouver, ruling that Vancouver was entitled to recover causal costs only, such as plan review and inspection fees, relocation costs, pavement restoration and lost productivity, but it was not entitled to collect frees for the right to use those rights-of-way. The CRTC stated that the causal costs principle would assist local governments and carriers in negotiating the terms on which local consent would be given for carriers to construct, maintain and operate transmission lines on local government property. The decision was appealed and the Federal Court of Appeal upheld the CRTC ruling. The Supreme Court of Canada refused to hear a further appeal by the Federation of Canadian Municipalities.

Imposing high charges for optical-fibre deployment can deter the laying of fibre by competitors, who generally do not have as consequential a revenue stream to cover such charges as incumbents. Moreover, to the extent that incumbents have "grandfathered" capacity, such as ducts that are available to them at no cost, local government policies that charge for new building will serve as a cost for entry that is greater for entrants than incumbents and counteract general government policies intended to promote infrastructure competition.

3.1.6 Effects of exclusion

Having identified a number of different ways in which land use and local licensing rules hinder entry, a natural question is whether reduced entry is harmful. For example, if a grocery store is not permitted to enter on an otherwise suitable site, can there be harm? While it is not the intent of this paper to provide a thorough examination of the competitive effects of exclusion, it is appropriate to consider them in summary fashion.

Effects may occur either at a local level (in which case the externalities of harms may be taken into account by local citizens) or at a regional or wider level (in which case local planners and citizens may not perceive the regional benefits as counterbalancing local costs. If the benefits are widely dispersed and the harms narrowly local, there is little reason that a local planning process would support a project with a net negative effect, from the local perspective. This suggests that either planning for projects with broadly dispersed benefits should occur at a non-local level or that, in order to ensure that local citizens better take into account the impact of their decisions, pricing should be as local as possible. For example, it is better to have local "nodal" pricing of electricity than national pricing, as this will help to ensure that local users in a high cost area of electricity have a strong positive incentive to construct new generation capacity nearby (thus reducing the associated nodal price of electricity.)

In order for exclusion to have a negative effect, there are three necessary conditions:

- Firms are prevented from entering who would otherwise have entered;
- Either:
  - Consumer harm occurs from a real reduction in rivalry; or
  - Consumer harm occurs from a real reduction in supply; and
- These harms must arise from the exclusion.

Establishing that exclusion does occur is an exercise that must be based on individual facts of a situation, examination of actions and underlying regulations of a given jurisdiction. The sections below focus on how harm can arise from diminution of local rivalry or through overall reduction of supply.

Exclusion of local competitors and suppliers can be harmful.

Local effects can be shown for at least three major categories of real estate: retail, residential and commercial.

Retail effects

Location of competitors does matter. The fact that it is costly for consumers to travel is relevant both to competition between stores and decisions, for individuals and businesses, about where to locate. In models of local competition, it is common to feature travel costs or search costs.[41] The main points of search models are that:

- Travel distances matter for consumers;
- Competitors who are far away from their competitors may find it profitable to charge higher prices than when closely located to other competitors;
- When companies determine store locations, an important factor is the travel habits and costs of consumers; and
- When individuals determine housing locations, an important factor is the location of workplace(s) and of suppliers.[42]

For many businesses, their strongest rivalry comes from their geographically closest competitors.[43] One interesting piece of evidence on this comes from the recent Competition Commission "Supply of Groceries in the UK Market Investigation" which examines the impact of entry on the sales of nearby stores. It estimates the effect of entry of a new store on the revenue of incumbent stores. The impacts vary depending on the distance of the entrant from the existing stores and on the relative size of the stores. When an entrant is located in close proximity to an incumbent, the effect on the incumbent is much more

41 See the beginning of a long lineage of travel costs models in Hotelling (1929).

42 These are generalizations and so should not be taken to apply in all circumstances that are theoretically possible.

43 That nearest competitors would provide the strongest constraint arises from differentiated product models in which firms are differentiated by location. Examples include Stahl (1982),and Dudey (1990) Ridley, Sloan and Song (2007)suggest that zoning laws that restrict the area in which competitors can locate, can reduce search costs for consumers (once they are in the appropriate zone) and result in increased competition and lower prices.

pronounced that when the entrant is far away. This is not surprising, as for retail goods like groceries, we would expect consumer drive times to play an important factor in determining where they shop.[44]

The estimates impacts from entry on incumbent revenue are shown in Table 1:

Table 1. Estimated medium-term percentage revenue effect on incumbent stores from entry by another store

	Revenue effect (%) on incumbent stores 280-1400 sq m	Revenue effect (%) on incumbent stores greater than 1400 sq m
Entry of mid-size store (280-1400 sq m)	-5.4*	-1.6*
--within 5 minutes' drive time	-2.3*	-0.27
--within 5-10 minutes' drive time	-0.59	-0.44
--within 10-15 minutes' drive time	-0.38	0.3
--within 15-20 minutes' drive time		
Entry of large store (1400-4000 sq m)		
--within 5 minutes' drive time	-15*	-7.1*
--within 5-10 minutes' drive time	-2.1	-5.1*
--within 10-15 minutes' drive time	0.37	-2.3*
--within 15-20 minutes' drive time	-0.31	-0.7
Entry of very large store (>4000 sq m)		
--within 5 minutes' drive time	-12*	-11*
--within 5-10 minutes' drive time	-4.4*	-6.9*
--within 10-15 minutes' drive time	-.023	-2*
--within 15-20 minutes' drive time	0.54	-0.24
Store-quarter observations	28,070	21,868

* indicates that the medium-term estimate is significantly different from 0 with a confidence level of 99%.
Source: Competition Commission A4(3)-6, Table 3

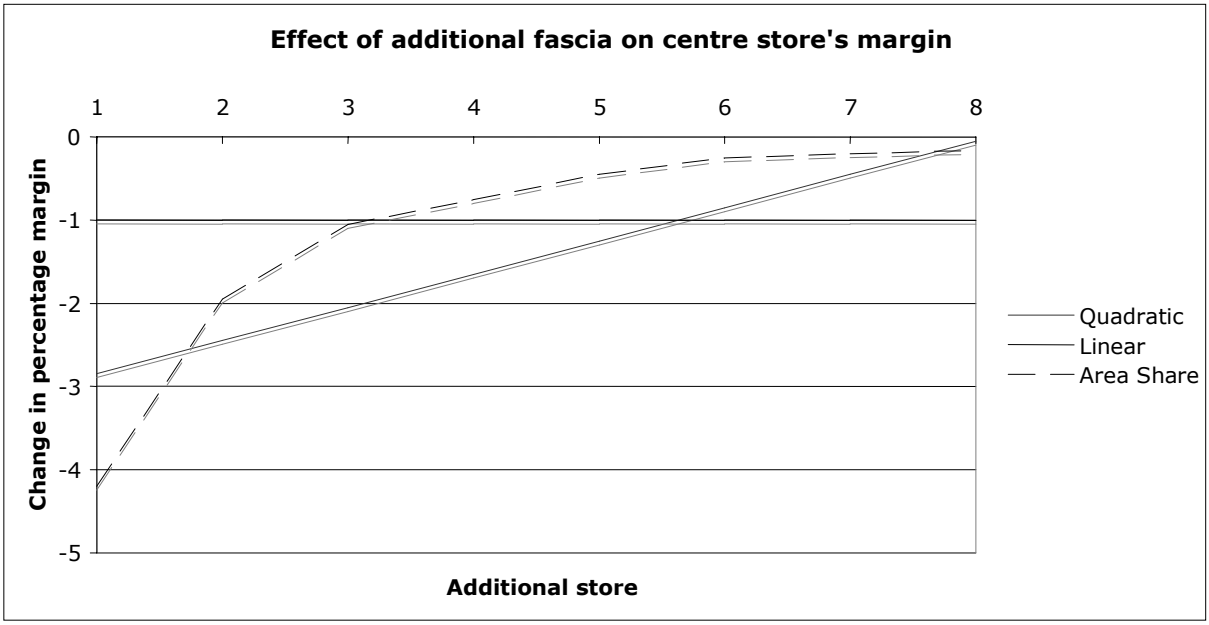
The Competition Commission proceeds to examine impacts of competition on grocery store variable profit margin. It finds "that competing large stores have a significant impact on the profit margin of other large stores, while smaller size stores do not appear to have any statistically significant effect." (A4(6)-4)[45] Moreover, they find that the impact of entry on profit margins is greater for the first entrant than the second, the second entrant than the third, and so forth.

44 This is not the only sector in which proximity is found to be important. Pinske, J, Slade, M and C Brett (2002) find that nearest neighbour variables help explain competitive effects in the US wholesale gasoline market. Ennis (1995) finds that even in a large geographic area with about 100 hospitals, the closure of one hospital permits the neighboring hospital, just three blocks away, to raise prices by more than 20%. Froeb, Tschantz and Crooke (2003) state that in the US Department of Justice's challenge to a merger of two parking lot operators, "As a condition for not challenging the Central Parking Systems-Allright merger, the U.S. Department of Justice asked for divestitures in five square block areas where the share of the merging parties exceeded thirty-five percent." Davis (2006) finds that "Price increases affect competing theaters more when they are close than when they are far away, and by the time theaters are twenty miles apart, the predicted revenue effects are entirely negligible."

45 In the US FTC's Staples case, the judge similarly found that large stores constituted their own market, and that other, mainly small suppliers (who accounted for as much as 90% of office supply sales) were not a constraint. (See *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (granting the FTC's motion for a preliminary injunction).)

They show several possible models of impact of an additional grocery chain (fascia) on the percentage margins of a given store. (See Figure 3.) One model (the linear specification) assumes a constant reduction in profits from each additional fascia. This is likely unrealistic, as evidence suggests that the decline in profitability is greater from the addition of the first competitor than the addition of further competitors. According to Competition Commission (2007a), the quadratic specification results in decreasing profits for the center store for each additional competitor as does a "specification using area share" model. In these two specifications, the decline in profits that arises when a store loses its monopoly and faces a duopoly is considerably larger than the loss in profits from going from duopoly to three firms.

Figure 3.



Competition Commission (2007a) A4(6)-20.

As a general matter, the addition of a new fascia reduces profit margins at an existing nearby grocery store. More particularly, the Competition Commission finds that the combined quality-price level of stores is higher for consumers in locations where there are more nearby grocery store competitors than those with less.[46]

[46] See Appendix 5.1, Local Concentration and Individual Indicators of the Store-Level Retail offer.

The UK Competition Commission is not the only competition authority to have investigated impacts of land use. The Spanish Competition Tribunal produced a report that examined land use patterns in Spain in 1992, finding that "extremely detailed definition of land use is a frequent cause of restricted competition in other sectors and a sure cause of higher prices for land and housing."[47] (DAFFE/CLP(93)17/06)

Residential effects

Exclusion of competitors (or reduction of supply) is not only harmful for retail real estate, it can also be harmful for residential developments. To the extent that land use planning in a geographic area restricts new housing construction, it raises the price of housing in an area. In particular housing that is low cost and appropriate for tenants with low income often has limited local political advocates.[48] Local zoning rules may limit density of new residential housing, ensuring that multi-unit apartment buildings cannot be constructed in a given area. Even when "soft goals"[49] to increase the presence of low-cost housing are part of an overall regional development plan, emphasis on other factors during land use planning may be used to prevent new building of low-cost housing.

Fischel (1999) states that "Zoning confers an interest in the property of each landowner to those who control the political power of the locality. This allows municipalities to shape their residential environments and their property-tax base." He assumes that voters will, out of self-interest, vote for policies that "accept developments that raise the value of their homes." He notes that there are significant transaction costs of selling zoning opportunities that change a use, so that it may be difficult to make mutually advantageous trades between existing voters and development-minded landowners. He concludes that the combined effect of the endowment from status quo property rights and high transactions costs of selling zoning create land-use patterns "with excessively low densities in American metropolitan areas."

Ault and Ekelund (1988) note that while zoning may exist to solve complex private contracting problems, zoning should be examined from a rent-seeking perspective, as zoning creates a scarce property right over which others will compete (via real spending). While developers are not generally allowed to buy rights directly, there are many indirect forms of spending (on consultants, lawyers, planners, architects) that involve the use of real resources, not simply wealth transfers.[50]

In a review of existing literature, Quigley and Rosenthal (2005) state that "Caps on development, restrictive zoning limits on allowable densities, urban growth boundaries, and long permit-processing delays have all been associated with increased housing prices." They note, though, that the data and methods used for many of these analyses leave room for doubt, particularly to the extent that regulatory

47 The Spanish Competition Tribunal put forward the following principles:

-- "the use of urban land should be defined as much as possible by general rules and as little as possible by the discretionary powers of regional and municipal authorities.

-- greater reliance on uses proposed by owners and developers; adequate reasoning of denials for uses proposed.

-- precise designation of non-buildable land which is reserved for specific purposes allowing urban development of any lot not specifically designated.

-- a reform of municipal financing more based on taxes and less on the possibility of trading with land uses as a form of revenue."

48 This varies by country and locality. In some OECD economies, there is strong local political pressure for affordable housing.

49 Soft goals are non-quantitative without penalties for failing to reach goals or rewards for reaching them.

50 For an explanation of welfare costs of rent seeking, see Tullock (1967).

variables may be endogenously determined. Quigley and Raphael (2005) find that, in California, growth restricting restrictions do indeed result in higher housing prices. They show that increased levels of local planning restriction have a substantial impact on supply and pricing of homes. Their study examines cities in California, which have substantial ability to determine their own planning and approval processes. Developers do not have a default right to proceed with projects that are in compliance with existing regulations. Quigley and Raphael assess the level of housing market regulation in 407 Californian cities. They use information from a survey of land-use officials to assess regulatory stringency based on 15 different growth control measures. Among others, growth control measures include "requiring supermajority city council votes for increasing densities ("up-zoning") or requiring voter approval." About one in five cities had not adopted any growth control measures, while 40% had adopted three or more provisions to control growth. By examining the relationship between regulatory measures and price indices for each city, they find that "each additional regulatory measure is associated with a statistically significant 3-percent (1990) and 4.5-percent (2000) increase in prices of owner-occupied housing, and a significant 1-percent (1990) and 2.3-percent (2000) increase in the price of rental housing."[51] (p. 325) They also find, as expected, that growth-restricting regulations are in fact associated with lower degrees of increase in the stock of residential housing. Glaeser, Gyourko and Saks (2005) find that prices for condominiums in Manhattan are 107% higher than the marginal cost of construction.

Commercial real estate effects

Reduction of land supply is not only harmful for retail and residential real estate, but also for commercial real estate. Cheshire and Hilber (2007) examine the extent to which prices for commercial real estate exceed the marginal construction costs. They interpret the ratio as a "regulatory tax". They explain the concept of the Regulatory Tax as follows:

> *"in a world with competition among property developers and free market entry and exit (both reasonable assumptions), price will equal (minimum) average costs since this includes 'normal' profit. Marginal cost rises with building height, so in the absence of restrictions on heights, buildings should rise to a point where the marginal cost of adding an additional floor equals its market price. If building higher is less profitable per m2 than building over a greater area, we still should expect the marginal cost of an extra floor to be equal to price: building would just be lower on average but the overall urban land take would be greater. Bertaud and Brueckner (2005) demonstrate the formal equivalence of height restrictions compared to land supply restrictions. Any gap between the observed market price and the marginal construction costs can be interpreted, therefore, as a 'regulatory tax' – the additional cost of space resulting – in aggregate – from the system of regulation in that particular market. If the sales price of an additional floor of office space exceeded the marginal cost of building this additional floor then developers would have an arbitrage opportunity. The difference between the price of floor space and its cost of construction must be due to some form of regulation." (Cheshire and Hilber (2007), p. 5)*

Cheshire and Hilber estimate levels of this regulatory tax across select European cities. Glaeser, Gyourko and Saks (2005) made an earlier estimate specifically for Manhattan. These regulatory tax rates are shown in Table 2.They suggest that certain parts of London have the highest regulatory tax among measured cities, with the average sales price in London's West End estimated as 8 times as large as the marginal construction cost. Many major European cities, have high regulatory taxes as well, with Brussels (0.89) and Manhattan (0) having the lowest regulatory taxes for commercial space. The figures in Table 2

[51] Including a county-level fixed effect reduces the point estimates by about two thirds, but the cross-sectional effects remain significant.

indicate both the cost impact of regulations on commercial space and the likely variety of regulatory intensity and effects across cities.

Table 2. Office Space Costs

Estimates of 'Regulatory Tax' for selected international office locations expressed as a tax rate on marginal construction costs (see Cheshire and Hilber 2007 for details)

	Estimated Regulatory Tax		
City	**1999**	**2005**	**Mean**
London West End[1]	7.62	8.37	8.00
London City[1]	4.68	4.31	4.49
Frankfurt[1]	5.44	3.31	4.37
Stockholm[1]	4.28	3.30	3.79
Milan[1]	2.07	4.11	3.09
Paris: City[1]	2.35	3.75	3.05
Barcelona[1]	2.23	3.16	2.69
Amsterdam[1]	2.12	1.92	2.02
Paris: La Défense[1]	1.41	1.93	1.67
Brussels[1]	0.52	0.84	0.68
Manhattan[2]	-	-	0
UK Cities			
Canary Wharf[3]	3.43	2.77	3.26
London Hammersmith[3]	2.77	1.87	2.19
Manchester[3]	2.71	2.50	2.30
Newcastle upon Tyne[3]	1.06	1.19	0.97
Croydon[3]	1.18	0.99	0.94
Edinburgh[3]	3.11	2.62	2.91
Glasgow[3]	2.33	2.05	2.04
Maidenhead[3]	3.72	2.27	2.70
Reading[3]	2.71	1.61	2.03
Bristol[3]	1.53	1.96	1.57
Birmingham[3]	2.59	2.68	2.50
Leeds[3]	2.15	2.17	1.93

1 Estimates are based on data provided by Jones Lang LaSalle (JLL), capital value data, and Gardiner and Theobald (construction cost data). The data from JLL are hypothetical capital values based on mid-point yields and prime rent information. We adjusted these values to predict actual capital values. The Gardiner and Theobald a*verage* construction cost estimates are adjusted by another scaling factor to estimate *margina*l construction costs. This scaling factor is derived by using marginal construction cost information from Davis Langdon. Details of the computation methods are available in Cheshire and Hilber (2007).

2 Estimate based on Glaeser, Gyourko and Saks (2005).

3 Estimates of capital values are based on data provided by CBRE, IPD and DCLG. Estimates of the marginal construction costs of space for each location were specially calculated for us by Davis Langdon. It is thought that these data together provide a more accurate estimate of underlying values of the 'Regulatory Tax' than do the average adjusted data used for Continental European locations. The parallel estimates for the two London locations provide a comparison. Details available in Cheshire and Hilber (2007).

Exclusion of competitors that reduces regional or national supply

The planning process is highly political, usually at the local political level. At the local level, a substantial part of elected council time is spent on issues related to planning, with one source reporting estimates that U.S. "municipal councils spend 60 to 90 percent of their time on zoning." (See Siegan (1976,

79, according to Fischel 1985 p. 38.) One study finds that between three and four objections at a planning hearing are sufficient for authorities to reject proposed commercial or industrial developments.[52]

At times, local planning processes are used by active local residents or lobbying organizations to stop or slow down projects that have a geographic impact of supply over an area much larger than the locality. Activists may deem certain projects as harmful to their living environment, inappropriate for the locality or likely to reduce the value of their homes. Lobbying organizations may have broader, non-local objectives (such as environmental objectives) that lead them to intervene in local planning discussion (e.g., over nuclear power plants or transmission lines)[53]. Among many projects that may be stopped by land use planning include, for example, waste dumps, electricity generation plants, transmission lines and LNG terminals.[54] These types of projects can have an economic importance that go beyond the affected locality to a broader region. In particular, when there is a scarcity of supply that exists (or will shortly exist) land use planning and restrictions on new capacity can actually have dramatic impacts on resource prices.

During and after California's energy crisis, there were claims that the planning process slowed down construction of new plant capacity that otherwise might have significantly reduced the shortfall between supply and demand of electricity that created record prices.[55] A deregulated market began operation in California in April, 1998 based on a law passed in 1996. During 1998 and 1999 the market operated with no price abnormality, however a number of factors combined to produce a supply/demand imbalance in 2000.[56] These negative conditions led to a 500% price increase in the wholesale price of electricity in the summer of 2000 that continued until the summer of 2001. One reason for the demand imbalance was a sometimes lengthy process of approval to locate and operate an electricity generation facility on a given piece of land. Once the de-regulated regime was clear, a number of applications to build large power plants were filed with the Energy Commission. The approval process involved both local and state officials. Right around the time of the crisis, Brennan (2001) notes that "A longer-run environmental constraint on supply in California could be so-called NIMBY ("not in my backyard") attitudes that impede power plant siting, approval, and construction." However, to the extent that such concerns were influential prior to the price spikes, they have apparently decreased in influence since that time, as generation capacity has increased regularly since the crisis. (See Figure 4.)

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52 See Tideman (1969).

53 An argument that was frequently cited prior to the electricity crisis, and is still popular, is that rather than building new generation capacity, policymakers should focus on preventing use, e.g., through machines that consume less, homes that minimize the transfer between interior and exterior temperature, and so forth.

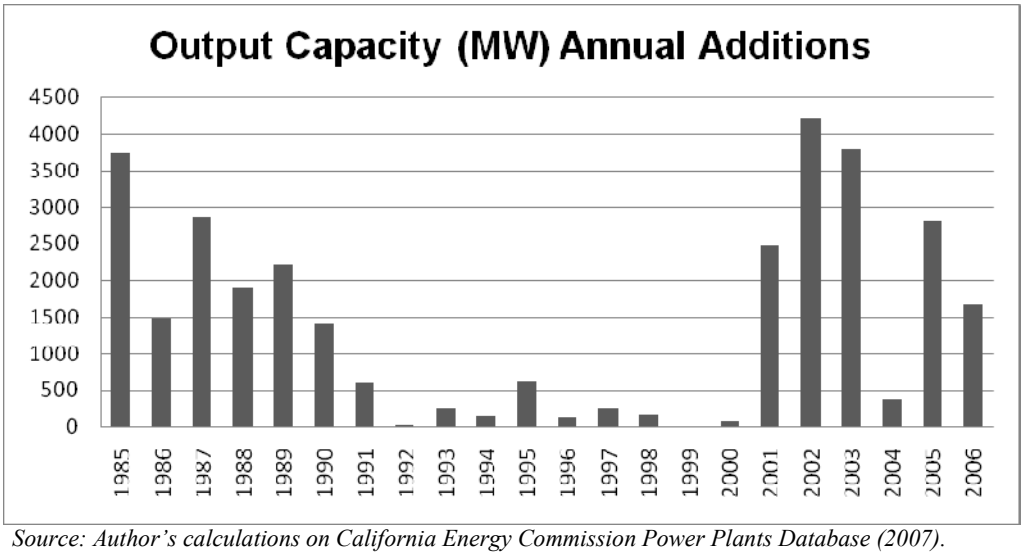
54 Transmission lines pose a particular challenge, and may be one of the most difficult parts of the infrastructure to construct, as expansion of capacity is increasingly critical to ensure secure supplies but expansion is difficult because the lines typically cross the boundaries of many different property owners and many different planning jurisdictions.

55 In IEA (2005), Stridbaek states "For example, the "not in my back yard" (NIMBY) syndrome obstructed new construction work that was needed to meet demand." Another acronym that is sometimes mentioned is "build absolutely nothing anywhere near anybody" (BANANA).

56 The negative conditions that helped to foster the price spike included a drought that reduced hydro-electric generation capacity compared to 1996, weather-related increases in consumption of electricity, continued regulation in many nearby electricity-producing regions that limited how much power neighboring utilities were able or willing to sell outside their service areas, a limited ability to price retail usage at rates that would reflect wholesale prices, a large increase in the price of natural gas that fueled the "marginal" generating capacity, and a large increase in the price of permits for NOx emissions. See Congressional Budget Office (2001)

The California Energy Commission, the state agency with the authority to approve construction of energy-related facilities, notes among the "critical issues" affecting siting "availability of emissions offsets, local agency and public opposition, [and] land use constraints." The total time between filing an application with the state's Energy Commission and beginning of operation of power plants was about 3-4 years for applications filed in 1997-1998, so that the three major new sites that were ultimately completed in 2001 had all been filed in 1997 or 1998.[57] Figure 4 shows the rate of building of new electricity generation capacity between 1985 and 2006.[58] It reveals a singular lack of building during the period prior to deregulation (which may be due to regulatory uncertainty) and then a dramatic increase in new capacity starting in 2001. One explanation for some of the increased capacity was that, after the energy crisis began, the governor of California was led to issue a directive to speed the approval process of emergency electricity production capacity.[59] This expedited approval process was used to construct a number of plants (construction time for such new plants was 2.5-3 months) and, by the fall of 2001, when new capacity was online and demand more modest, there were no rolling blackouts.

Figure 4.



Source: Author's calculations on California Energy Commission Power Plants Database (2007).

The costs were large from the delay in bringing new capacity online. Overall, "In summer 2000, wholesale electricity prices were $8.98 billion up from $2.04 billion in summer 1999." Borenstein, Bushnell and Wolak (2002) find that "21 percent of this increase was due to production costs, 20 percent to competitive rents, and 59 percent to market power." The State of California ultimately responded to the market problems by raising retail prices by 50% and purchasing over 40 billion USD worth of long-term contracts, up to 20 years in length, for electricity that locked in a high purchase price, estimated at "more than 50% above the expected future spot prices." (Borenstein (2002)). The total cost to consumers and taxpayers from the energy crisis lies in the multiple billions of USD.

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57 These sites were Sunrise (Docket 98-AFC-4), Sutter-Calpine (97-AFC-2) and Los Medanos (Pittsburg) (Docket 98-AFC-1).

58 The figure adds peak and baseload capacity, both being relevant for dealing with the times of peak demand.

59 "The Governor directed the Energy Commission to use its emergency power plant permitting authority under Public Resources Code 25705 to permit new peaking and renewable power plants that can be online by September 30, 2001. Emergency power plant projects permitted under this process are exempt from requirements of the California Environmental Quality Act." (See http://www.energy.ca.gov/sitingcases/peakers/index.html.)

3.2 "Inclusive" land use restrictions

"Inclusive" land use restrictions have an effect that tends to enhance access of suppliers or consumers to a good. Effects from such rules often increase the number of competitors in the short run, but can challenge property rights, particularly when applied to private property and, at times, can discourage investment. In order to promote infrastructure competition, access has been mandated in many different sectors. While not generally considered within the rubric of land use restrictions, such access requirements do often impact on the use of real property, sometimes by regulations that are specific to geographic locations, and hence are considered in this paper.

In the transportation sector, geographic features or land use patterns often confine participants in an industry to use a single terminus in serving each population center. Therefore there are natural reasons that just one facility may be available. Rules over access to that resource may then be developed, and often have been, with an objective of ensuring that consumers have choice and that competition can occur between rivals.[60]

Access issues are most complex and most important to competition when:

- Lack of access to a facility would impose a substantial cost disadvantage on any suppliers in the market;
- Such a lack of access for one or more suppliers would harm consumers;
- Capacity at the facility is constrained;
- The facility is not subject to timely expansion and entry (or product repositioning) is difficult;
- Access to the facility is not subject to compelling economies of vertical integration(efficiency or safety), scale, or scope; and
- Changes are feasible in the allocation of existing infrastructure capacity to and among independent suppliers that will benefit consumers.

These are the conditions in which the essential facilities doctrine originated and under which it is most commonly applied.

3.2.1 Non-discriminatory access

Simply imposing a contractual obligation to offer equal access to transportation infrastructure could be insufficient to ensure equal access on reasonable terms if the owner of the essential facility has incentives and the ability to discriminate or to indirectly deny access to entrants and existing competitors. The details of obligations over the use of real property are critical aspects of ensuring access, as the following examples illustrate:

[60] For much more detail in this area, see Hilke (2006) "Access to Key Transport Facilities" Competition Committee Roundtable No. 62. OECD: Paris.

- In ferry boat service, the incumbent undermined the ability of the entrant to operate. It scheduled its own service to disrupt the loading and unloading of passenger by the entrant.[61]

- In another case, a firm interested in entering was denied access to the existing harbour facility, but then found its efforts to construct a new harbour were blocked by government on behalf of the incumbent.[62]

- In the shipping industry, an entrant seeking to provide port services was able to obtain permission to offer services, but then was denied access to the incineration facility necessary to offer port services.[63]

- In the bus industry, a rival firm was required to use the ticketing system of the incumbent, but the incumbent delayed passing on the ticket revenues to the entrant.[64]

- In the airline industry, the space within the airport designated for the entrant was as far as possible from the airport entrance.[65]

- In the electric power industry, transmission owners employed more subtle and difficult to document forms of discrimination against independent generators when behavioral rules against transmission discrimination were put in place.[66]

Land use rules can clearly play a major role in ensuring that access occurs in a non-discriminatory way, as these examples illustrate actions that could, to some extent, have been ameliorated by restrictions over the use of land.

A substantial body of prior work has examined this topic, both at the OECD and elsewhere. A common theme which has developed is that ensuring non-discriminatory access may at times require the separation between ownership and operation of the monopoly bottleneck and of other services, combined with oversight of the monopoly bottleneck. This theme has been expressed with force by the OECD Council in the Recommendation of the Council Concerning Structural Separation in Regulated Industries.[67]

3.2.2 Access to intermediate owners of property

Increasingly, governments are seeking to ensure that access guaranteed over government controlled or historically regulated sites is not confounded at the very end of the distribution chain. For example,

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61 See B&I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd. (1992) 5 CMLR 255 (Case IV/34.174) 11June 1992.

62 See the European Commission decision concerning the Danish port of Rødby (Rødby, OJ L 55, 26.2.1994).

63 See Hilke (2006), p. 9.

64 See experience in bus station at Talinn, Estonia owned and operated by *JSC Eesti* Buss, reported in Hilke (2006), p. 38.

65 See Australian experience in Sydney airport and Perth airport, as reported in Hilke (2006), p. 42.

66 See US FTC comments on US Federal Energy Regulatory Commission proposed behavioral rules on access (FTC (1995)).

67 Recent OECD reports on this topic have included Restructuring of Public Utilities (2001), The Regulation of Access Services – with an Emphasis on Telecommunications (2004), Report on Experiences with Structural Separation (2006).

apartment buildings or multiple dwelling units (MDUs) may refuse to provide access for the provision of alternative cabling when there are multiple providers of cable services and may enter into exclusive contracts with specific multi-channel video programming distributors (MVPDs). Multiple dwelling units actually account for a high percentage of the population.[68]

When MDUs enter into exclusivity contracts, they deny their residents the benefits of competition. A number of studies have shown that overbuilt wirelines provide the strongest competition to existing cable offerings, with evidence suggesting that prices are 17% lower when wireline competition is present.[69]

On October 31, 2007, the U.S. Federal Communications Commission decided to issue an order that prohibits the enforcement or execution of existing exclusivity clauses and the execution of new ones by MVPDs subject to section 628 of the Communications Act.[70] Specifically the Order finds that:

- "exclusivity clauses that bar competitive entry harm competition and broadband deployment and can insulate the incumbent MVPD from any need to improve its service.
- exclusivity clauses are widespread in agreements between MVPDs and MDU owners.
- incumbent cable operators have increased the use of exclusivity clauses in their agreements with MDU owners with the entry of LECs into the video marketplace.[71]
- the use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice under Section 628(b)." (See FCC Press Release, 31 October, 2007)

4. Conclusion

Public and private land use restrictions are common. While generally such restrictions have no significant effect on competition, at times, social welfare may fall as a result of reducing either supply or rivalry between firms. When harms are real and caused by public regulation, private contract or the process of enforcing the regulation or private contracts, a number of questions must be answered. These include:

- Does the harm lie within the appropriate domain for government action, whether that action is administrative, judicial or other means, such as advocacy?
- Could government action have beneficial effects?

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68 In the U.S., for example, about 30% of people live in multiple-dwelling units.

69 The FCC notes: *Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 21 FCC Rcd 15087, ¶ 2 (2006) ("Prices are 17 percent lower where wireline cable competition is present."), 20 FCC Rcd 2718, 2721, ¶ 12 (2005) (the degree by which cable rates (monthly rates and price per channel) were lower in competitive areas compared to non-competitive areas was greatest where there was "wireline overbuild competition"), 18 FCC Rcd 13284, 13286-87, ¶ 5 (2003) (areas with competition from a wireline, overbuild, or municipal cable system had a lower average rate per channel than areas that had no competition or only DBS competition).

70 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 07-189, MB Docket 07-51, Report and Order and Notice of Proposed Rulemaking at ¶ 31 (rel. Nov. 13, 2007).

71 A LEC is a Local Exchange Carrier, a local telephone company typically with control over the telephone wiring and switching at a local level.

- On balance, would the action be socially beneficial?

In land use planning, the balancing between different social objectives and anti-competitive effects is complex. But it is clear that harm can arise from land use planning that affect consumers and that can be remedied. For example, planning processes that limit the provision of essential goods such as residential housing, retail alternatives or electricity have direct impacts on price or quality of offers.

With respect to private contracts that limit competition, the state has no consumer-benefitting motive to promote anti-competitive covenants and blocking land. Such actions can create harm through limiting local competition. Therefore direct remedies should be considered.

When exclusive contracts are entered that may serve to counterbalance investment costs and promote investment that might not otherwise occur, a more nuanced approach is appropriate.

Land use rules may play a role in promoting competition, for example through creating a small zone in which suppliers locate so that consumer search costs are reduced (without restricting supply to the extent that suppliers are monopolists) or ensuring access to key infrastructure that is not easily duplicated or that would otherwise restrict consumer choice. These benefits of land use rules should not be ignored.

While the potential pro-competitive effects of requiring access to facilities are often discussed, the anti-competitive effects of land use restrictions are rarely considered explicitly by competition policymakers. There is a strong argument to suggest that competitive effects should, at times, be taken into account in the planning process in balancing competitive effects against other effects.

Practical lessons can be drawn for policy making:

- Land use restrictions are, at times, excessive and serve to raise the costs of entry, delay entry or prevent entry, all of which impact local conditions of supply and rivalry, with likely follow-on effects for consumer goods and services. Consequently policymakers should take account of consumer effects in land use policies that have major effects on rivalry and entry.

- Criteria for granting local land use permits should be clear with a process that is speedy, quickly addresses appeals, limits costs and requires governments to justify refusal of permission based on reasoned arguments that consider impacts on consumers.

- Regulations that control geographic density of certain types of outlets are often justified as ensuring adequate economies of scale for providing minimum service levels. Such regulations are unnecessary in urban areas and can, perversely, reduce supplier presence in rural areas.

- Government regulation generally should not take into account the effect of permitting a new company to enter on incumbent companies. The “externality” of lost profits to incumbents as a result of competition ignores the likely benefits to consumers from increased competition. Policymakers are generally not well-equipped to conclude that increased competition would not benefit consumers.

- Pricing for access to public property should reflect scarcity and costs to the public authorities. In many cases, such prices would be zero.

- Appropriate cost-benefit analysis is most likely to occur when most social benefits and costs of land-use decisions arise at the level of the political unit that makes the decision.

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APPENDIX A. EXTERNALITIES IN LAND USE

1. Theory of Externalities

Externalities are impacts on others that are not taken into account by a private actor. Externalities can arise from pollution, noise or other environmental factors (potentially high-density housing) and, in the case of real estate, can have an impact on property values. For example, all else equal, a house close to a major airport runway will have a lower value than a comparable home in a neighborhood further away from the airport. When negative externalities are present, the marginal social cost (MSC) of an activity is higher than the marginal private cost (MPC). Therefore, there may be a public interest in limiting supply to a level where demand intersects the social cost curve rather than the private cost curve. In Figure A1, supply is limited and there are no externalities present. In this case, the quantity delivered is Q, even though the market clearing point, based on marginal private costs (MPC) would yield a quantity of Q'. The figure shows that limiting quantity when externalities are not present yields a welfare loss of the shaded area in Figure A1.

Figure A1

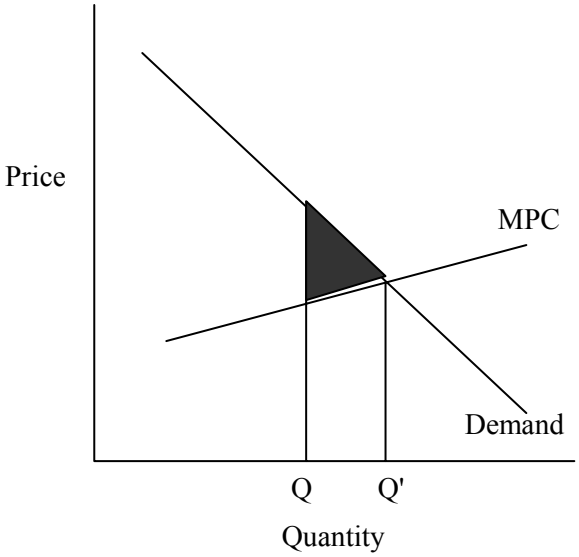
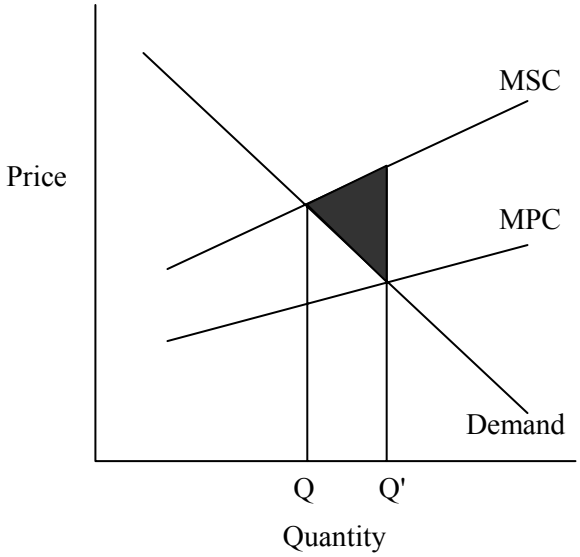


Figure A2



In contrast, when negative externalities are present, social costs are higher than private costs, so producing to the level of Q' would involve greater production than the socially optimal amount. The higher social costs are illustrated in Figure A2 by the MSC curve which lies above the MPC curve. In Figure A2, the optimal amount of output (where marginal social cost and marginal social benefit are equal) yields an output of Q. If output occurs instead rises to the level at which marginal private cost equals marginal social benefit, there is excess production. The social harm is indicated by the shaded area in Figure A2, which shows the excess of social cost over social benefit in moving from Q to Q'.

These two figures illustrate first, that limiting output on the vague grounds that externalities are present (when in fact there are no externalities) creates a social harm and second, when externalities are

truly present, limiting output can be beneficial (though excessive output limitations are still possible.)[1] Price rises when output is limited. This can have particularly serious consequences on the overall cost of housing. This price rise gives existing landowners an incentive to create a supply restriction (even if no externalities exist) in order to increase the value of their assets. Such restrictions may be particularly serious when broadly adopted in a region and when restricting multi-unit dwelling, which are typically the lowest cost real estate and extremely important for the poor.

To the extent that land use regulations reduce output to the socially desirable level, they are achieving a socially valuable objective. However, to the extent that they create excessive limits, they create a supply shortage.

2. Evidence on Externalities

A number of studies have examined whether there is indeed a relationship between zoning and property values, assuming that the elimination of negative externalities exhibited through zoning would manifest themselves in higher property values. Maser et al. (1977) examine prices in Rochester, New York and find that no price effect can be attributed to zoning. They suggest that "the externalities which zoning is supposed to prevent could not be detected…." Mark and Goldberg (1981) study Vancouver and conclude that "Rezoning does not necessarily lead to changes in land use and land value….No evidence was found to support the assertion that there are significant externalities at work in the residential property markets. (Mark and Goldberg, 1981, p. 431).

The research on the importance of externalities has no clear interpretation if Giertz (1977) is right in arguing that zoning often exists to promote local monopolies. In this case, zoning could be associated with higher values from eliminating externalities or higher values from creating market power. The ultimate effect of zoning on land values would then be ambiguous, depending upon the relative import of the externalities eliminated and the loss in value from creating market power.

More recent work by Quigley and Raphael (2005) finds significant impacts of land use policies on property values that may be socially harmful by making property more costly for the poor.

3. Transaction Cost Justification of Public Intervention as opposed to Private Solutions

Posner suggests that the law of easement, nuisance and restrictive covenants is designed to deal with situations where transaction costs prevent voluntary market transactions. That is, the legal system can serve to allocate rights in the absence of a market solution that would improve allocative efficiency.[2] Coase presents a transaction cost explanation of zoning, arguing that zoning regulation can be efficient:

> *if many people are harmed and there are several sources of pollution, it is more difficult to reach a satisfactory solution through the market. When the transfer of rights has to come about as a result of market transactions carried out between large numbers of people or organizations acting jointly, the process of negotiation may be so difficult and time-consuming as to make such transfers a practical impossibility. Even the enforcement of rights through the courts may not be easy. It may be costly to discover who it is that is causing the trouble. And, when it is not in the interest of any single person or organization to bring suit, the problems involved in arranging joint actions represent a further obstacle. As a practical matter, the market may become too costly to operate. (Coase, 1959, p. 29)*

1 See Quigley (2006).

2 See Posner, 1986, pp 54-57.

APPENDIX B. "TIGHT" ZONING IS EXCLUSIONARY

Suppose that the zoned area for retail includes space for X m^2 of store space. Suppose further that there are N different types of stores. A type of store might be an athletic shoe store, a cheese store, a children's clothing store, and so forth. It is assumed that each type of store would compete only with other stores of the same type, and not with stores of different types. So, for example, a new cheese store would not take business away from an existing children's clothing store, but would take business away from a pre-existing cheese store.

A landlord who controls all the land zoned for retail will seek to maximize the profits of the stores on that land. For simplicity, we will here exclude from store costs the payment from store owners for use of the land. However, it is assumed that as total profits from all stores increase, the payment for use of land would also increase. Therefore the landlord would have an interest to maximize the profits derived from the retail zoned area.

Let the profit per square meter of operation be declining hyperbolically in total area, above a minimum store size of x_m m^2. ($\pi/m^2 = x^{-1/2}$.) A picture of profits per square meter, varying based on store size, is shown in Figure *X*. A large store will earn lower profits per square meter than a more compact store. Further, when there is a second store of a given type, let each of their profits per square meter be a ratio r_1 ($0<r_1<1$) of profits without another store of the same type. That is, profits fall with the introduction of a competitor as a result of lost monopoly, due both to sharing business and price competition. The ratio is r_2 ($0<r2<r1$) when there are two other competitors and r_3 ($0<r_3<r_2$) when there are three or more other competitors. How will the space be distributed among different store locations by a profit-maximizing landlord? For simplicity, we assume there is one landlord. This landlord will be able to earn the highest rent from the land when it has the highest store-level profitability. Therefore the landlord will seek to choose a configuration of store sizes and types that would maximize profits. Note first that, in this model, a cheese store has equivalent profitability to a children's clothing store. So the landlord's profits from either store would be the same. Given a choice between adding one of two types of store, the landlord would prefer a type that is not already represented, because that type's profits will not be reduced by local competition. Note second that, ceteris paribus, the landlord prefers smaller stores, as these yield a higher profitability per square meter.

If $Nx_m < X$, then the landlord will maximize profits by ensuring that no store type is duplicated and thus that each store is the unique store of its type, earning monopoly profits.

If Nx_m is $> X$, then at least some stores will be duplicated. Consider then whether a landlord would prefer to have 2 stores in space that otherwise would be occupied by one store.

When there is only one store of each type, for a total of N stores, the profit per store is $(X/N)^{1/2}$. Given that there are N stores, the total profit for them all will be $(NX)^{1/2}$.

Holding total area constant, in the case with two stores of each type, the profit per store is $r_1(X/2N)^{1/2}$ and the total profit is $r_1(2NX)^{1/2}$.

In the case with three stores of each type, the profit per store is $r_2(X/3N)^{1/2}$. The total profit for all retail outlets is then $r_2(3NX)^{1/2}$.

In the case with four stores of each type, the profit per store is $r_3(X/4N)^{1/2}$. The total profit for all retail outlets is then $r_3 2\,(NX)^{1/2}$.

In order to select between these 4 options, a landlord would select the density of stores that yields the maximum profit of 1, $2^{½}r_1$, $3^{½}r_2$ and $2r_3$. As the total area of the landlord increases, holding the number of stores constant, the difference between the profitability of having multiple stores of a type and only one store of a type shrinks. That is, with a very "tightly zoned"area for retailing, a landlord may seek to rent to monopoly stores, but as the size of the area increases, the landlord instead ensures there are multiple stores in a sector, competing with each other, because with large areas, having multiple stores of the same type maximizes total profitability of the retail-zoned area.

NOTE DE REFERENCE

Par le Secrétariat[1]

1. Introduction

Les restrictions d'urbanisme conditionnent les différents usages qui peuvent être faits du sol sur un territoire donné et la manière dont ces usages peuvent être modifiés. Elles sont monnaie courante et touchent une part considérable des activités commerciales par le biais d'instruments de régulation spatiale à la fois publics et privés[2], comme le zonage, les règles d'urbanisme, les clauses contractuelles spécifiques et les procédures d'autorisation et de règlement des litiges dont ils sont assortis[3]. Nous nous intéresserons plus particulièrement ici aux effets de ces restrictions sur la concurrence.

Nous soutenons que si la plupart des restrictions d'urbanisme servent sans doute des objectifs utiles pour la collectivité, certaines d'entre elles ont parfois pour effet d'augmenter indûment le coût d'implantation de nouvelles activités économiques dans la mesure où elles retardent, limitent ou même empêchent l'arrivée de nouveaux concurrents sur le marché, ce en quoi elles constituent une barrière à l'entrée[4] préjudiciable à l'offre. Certains observateurs avant nous ont déjà relevé des cas particuliers dans lesquels les règles d'urbanisme peuvent entraver les activités de nouveaux concurrents, mais rares sont les travaux effectués jusqu'ici qui replacent ces restrictions dans le cadre de la politique de la concurrence et qui montrent qu'elles conduisent, parfois, à faire augmenter les prix de toute une gamme de biens et de

1 Ce document a été rédigé par Sean F. Ennis.

2 Il arrive parfois, en matière d'utilisation du sol, que le secteur privé joue un rôle de régulation à la place des autorités. On peut ainsi considérer les contrats privés qui organisent l'utilisation des sols comme une forme d'autoréglementation entrant dans le cadre général des restrictions en matière d'urbanisme. Les restrictions émanant du secteur privé peuvent prendre diverses formes : achat d'un terrain pour dissuader un concurrent d'aménager un site, ajout de clauses dans les contrats de cession interdisant l'affectation de terrains à certains usages qui feraient directement concurrence aux activités du vendeur ou encore signature d'accords d'exclusivité donnant la garantie à une entreprise qu'elle n'aura pas de concurrent dans une région ou dans un lieu donné. Ces exemples ne sortent pas uniquement de la théorie, ce sont des faits concrets et observés.

3 Il est important de prêter attention non seulement aux règles écrites mais aussi aux procédures d'autorisation et de délivrance de permis, car "en matière de zonage, il y a parfois une différence considérable entre les textes et la pratique" (Fischel, 1985, p. 59). Un plan d'urbanisme ne se limite pas à classer les terrains et leurs usages (zonage) ; il prévoit aussi généralement une procédure institutionnelle pour l'évaluation des projets de construction ou de changement de destination des sols soumis à autorisation préalable, il définit les grands objectifs d'aménagement à long terme, fixe les règles particulières applicables aux activités commerciales et résidentielles, et même, parfois, à l'implantation de certains types d'établissements à certains emplacements. L'usage des sols peut être réglementé par l'administration ou dans le cadre de contrats de droit privé (par exemple au travers de dispositions qui interdisent l'affectation de tel ou tel terrain à certains usages futurs).

4 Voir West (2005) pour une présentation des définitions possibles des barrières à l'entrée.

services pour les consommateurs[5]. Cette question mérite notre attention car les augmentations de prix en question sont loin d'être négligeables. D'après Cheshire et Sheppard (2005), par exemple, en 2003, les terrains à bâtir à la limite extérieure de la zone urbanisable de la ville de Reading, au Royaume-Uni, coûtaient environ 3,000,000 livres l'hectare, alors que dans la zone agricole adjacente, l'hectare de terrain coûtait environ 7,500 livres. Pour faire avancer la réflexion sur l'impact que peuvent avoir les restrictions d'urbanisme sur le marché, nous verrons par quels mécanismes les règles d'urbanisme agissent comme des barrières à l'entrée et comment elles imposent des restrictions parfois excessives au détriment des consommateurs qui auraient avantage à voir s'établir de nouveaux concurrents, surtout s'ils sont pauvres et qu'ils cherchent à se loger. Nous encourageons vivement les pouvoirs publics à prêter une plus grande attention aux restrictions d'usage qu'imposent les règles d'urbanisme et à se demander si elles ne dressent pas des obstacles abusifs à l'entrée.

Il y a certes de bonnes raisons de réglementer l'utilisation du sol dans de nombreuses circonstances, mais le préjudice que peut entraîner pour la collectivité le fait de créer des " barrières à l'entrée" est rarement reconnu de façon explicite. Une meilleure articulation entre la politique d'urbanisme et la politique de la concurrence serait donc bénéfique pour les consommateurs et pour de nombreuses entreprises, et elle réduirait le risque de voir une pénurie s'instaurer du fait de restrictions, de source publique ou privée, sur les usages du sol. Les autorités de la concurrence sont sans doute mieux à même que n'importe quelle autre instance publique de susciter une prise de conscience à ce sujet.

Parallèlement à leurs effets restrictifs, les règles d'urbanisme peuvent aussi avoir des conséquences potentiellement favorables à la concurrence, par exemple lorsqu'elles ouvrent plus largement l'accès à la propriété foncière, comme dans le cas des ports, des aéroports ou des droits de passage. Dans certains cas, elles peuvent aussi contribuer à empêcher la constitution de positions dominantes et offrir un instrument utile à la politique de la concurrence.

Notre propos n'est pas de démontrer que les règles d'urbanisme n'ont pas de raison d'être, et ce n'est pas ainsi qu'il doit être interprété. En fait, ces règles ont souvent des objectifs utiles pour la collectivité, par exemple protéger les propriétaires fonciers contre l'expropriation, réduire les risques macroéconomiques liés aux catastrophes naturelles, améliorer l'environnement, gérer la croissance urbaine de façon optimale pour la société, etc. Nous ne sous-estimons pas les effets positifs d'une régulation du territoire du point de vue de la qualité de l'environnement, de la qualité des services et de la qualité de vie en général de tous ceux qui vivent dans des zones "protégées" ou réglementées. Mais ces avantages ne sont pas le sujet de la présente étude. Nous voulons montrer ici qu'il faut tenir compte aussi bien des avantages que des inconvénients de certaines mesures de réglementation en matière d'urbanisme, et que l'un des facteurs clés à cet égard est celui des retombées qu'elles peuvent avoir sur la concurrence. L'étude de ces retombées est la première étape qui doit conduire à une analyse coûts-avantages équilibrée.

Si certains observateurs concluent à l'inutilité de l'intervention publique dans le domaine de l'utilisation du sol (citant à l'appui de leur argumentation l'exemple de villes dépourvues de ce type de réglementation), il n'en est pas moins vrai que les restrictions imposées par les règles d'urbanisme peuvent

[5] Parmi les travaux récemment effectués dans cette veine, on notera ceux de Fischel (2004) et Quigley (2006), qui s'intéressent principalement aux effets sur l'immobilier résidentiel. De notre côté, nous mettons également l'accent sur les effets de pénurie qui résultent des servitudes d'urbanisme sur le foncier commercial et industriel.

réduire les coûts de transaction liés à l'allocation des droits d'usage en cas d'externalités[6]. Le coût et la logistique de la négociation entre plusieurs parties, sans compter le problème des comportements opportunistes, risquent fort en effet d'empêcher une allocation efficiente des droits dans le cadre d'un arrangement purement privé. En outre, réglementer l'utilisation du sol peut être le meilleur moyen dont disposent les pouvoirs publics pour atteindre certains objectifs à caractère non économique comme l'amélioration du bien-être social. C'est pourquoi nous considérons ici les réglementations d'urbanisme comme un outil important aussi bien sur le plan social que sur le plan économique.

Certains auteurs prétendent néanmoins que sous le prétexte d'éviter des externalités négatives, certains projets de réglementation sont en fait défendus en sous-main par des entreprises ou des individus dont le but est de limiter la concurrence ou d'organiser la pénurie[7]. Les données d'observation sur ce point font défaut[8], mais il est un fait que les règles d'urbanisme ont parfois pour effet de créer ou de renforcer une position dominante en assurant la rareté de l'offre, si bien que les opérateurs en place peuvent être financièrement incités à promouvoir ces restrictions[9].

Les règles d'urbanisme ont les conséquences les plus graves pour la concurrence dans les situations suivantes :

- lorsqu'elles empêchent de nouveaux acteurs de pénétrer sur des marchés où d'autres entreprises ont acquis une position dominante ;

- lorsqu'elles empêchent des entreprises pratiquant des prix bas de pénétrer sur des marchés où les entreprises en place pratiquent des prix élevés ;

- lorsqu'elles ont pour effet de réduire l'offre totale d'un produit donné ; ou

- lorsqu'elles retardent indûment l'arrivée sur le marché d'un bien ou d'un service auquel les consommateurs attacheraient de la valeur (tels ceux qui résultent de l'innovation ou d'une stratégie de différenciation).

Les pouvoirs publics ont la possibilité de supprimer ou de contrôler les restrictions excessives qui découlent des règles d'urbanisme. Pour cela, il faut que les autorités compétentes en la matière : 1) soient conscientes des motivations de ceux qui cherchent peut-être à retarder l'arrivée de nouveaux concurrents en soulevant des objections pendant le processus de planification, soit directement, soit par l'intermédiaire de tiers payés par eux, 2) soient informées des retombées que peuvent avoir les restrictions à la concurrence,

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6 L'exemple par excellence de ville dépourvue de plan de zonage est celui de Houston, au Texas, où cela n'a pas empêché la ville de se développer de façon relativement harmonieuse. Lorsqu'il n'y a pas d'autorité administrative centralisée, beaucoup de propriétés sont en fait régies par des dispositions contractuelles. Ainsi, à Huston, les promoteurs qui faisaient bâtir de nouveaux ensembles immobiliers étaient incités à prévoir dans les contrats des clauses interdisant l'implantation d'activités industrielles ou commerciales sur le site de leurs projets, de manière à attirer plus de clients pour un prix donné. Toutefois, si les transports publics ne sont pas très développés, c'est en partie à cause de la faible densité de population qui en a résulté.

7 Voir J. Fred Giertz (1977).

8 Voir dans Ford (1935), par exemple, le cas de la fédération des ouvriers bouchers (Federation of Journeyman Butchers), au Royaume-Uni, qui réclamait au Parlement une proposition de loi visant à "limiter le nombre de boucheries moyennant l'instauration d'un régime d'autorisation".

9 La politique de la concurrence pourrait apporter une contribution utile aux évaluations d'impact économique des restrictions d'urbanisme en aidant à appréhender la juste dimension des marchés géographiques.

et 3) s'emploient à promouvoir la concurrence dans le cadre de la politique d'urbanisme et d'aménagement. Dans la mesure où les entreprises en place cherchent à retarder ou à empêcher l'entrée de nouveaux acteurs sur le marché en soumettant des informations fausses ou trompeuses dans le cadre des enquêtes publiques, il appartient aux autorités de se demander si le but de ces entreprises n'est pas de préserver une position dominante par des moyens illégitimes et si elles ne sont pas coupables de comportements délictueux et notamment d'infractions au droit de la concurrence, de déclarations mensongères et de fraudes au regard des lois en vigueur.

En règle générale, les règles d'urbanisme ont un caractère local ou régional et elles intéressent la concurrence lorsqu'elles touchent des biens ou des services qui ont un périmètre de chalandise géographiquement limité du point de vue du droit de la concurrence, comme les commerces de détail, les hôtels, les hôpitaux, les ports et autres équipements de transport[10]. Dans le cas contraire, c'est-à-dire lorsque la commercialisation du bien ou du service considéré n'est pas tributaire d'une clientèle purement locale, il est peu probable que la concurrence se trouve affectée par la réglementation du sol, à moins qu'il n'y ait rareté de l'offre à l'échelon régional ou national[11].

Nous nous intéressons ici exclusivement aux restrictions qui affectent l'intensité concurrentielle sur le marché. Les règles d'urbanisme peuvent nuire à l'efficience de différentes manières qui ne sont pas abordées dans cette étude et elles peuvent aussi conduire, parfois, à "l'appropriation" des droits d'utilisation du sol[12]. Ces questions n'entrent pas dans le cadre de notre propos.

Les pratiques en matière d'urbanisme étant très diverses au sein de la zone OCDE, il va de soi que tous les pays ne sont pas concernés par les situations décrites ici. On manque à cet égard de comparaisons internationales détaillées, et il serait bon que la recherche s'empare un jour de ce sujet. Néanmoins, pour donner un aperçu des conclusions de l'étude, on peut d'ores et déjà faire les observations suivantes :

- Les restrictions d'urbanisme sont parfois excessives et peuvent servir à rendre plus coûteuse l'entrée sur le marché, à la retarder ou à l'empêcher, ce qui a des répercussions sur les conditions de l'offre et l'intensité de la concurrence au plan local, et probablement aussi sur la consommation de biens et de services. Par conséquent, dès lors que des règles d'urbanisme ont des effets

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10 Les règles d'urbanisme qui interdisent l'implantation d'une raffinerie dans une zone donnée peuvent être sans effet sur la concurrence si la raffinerie en question peut s'installer dans une zone voisine où les coûts de livraison du brut seront les mêmes et s'il est indifférent aux acheteurs de produits raffinés de s'approvisionner dans l'une ou l'autre de ces zones. Par contre, l'interdiction d'ouvrir une grande surface sur un site donné peut avoir un effet sur la concurrence, même si sur un autre site comparable est disponible à 20 kilomètres de là, parce que les commerces de détail se différencient les uns des autres en fonction de leur emplacement et que de nombreux consommateurs auraient donc peut-être préféré le premier lieu d'implantation étant donné l'avantage qu'ils auraient eu à ce que vienne s'y installer un nouveau concurrent.

11 Par exemple, les avantages que procure la construction d'une centrale électrique, d'une installation de regazéification et de nombre d'autres infrastructures vont en général bien au-delà de l'aire géographique dans laquelle l'autorisation d'exploiter à été délivrée.

12 On parle d'appropriation lorsque le propriétaire d'un bien immobilier se voit privé de l'utilisation de ce bien en application d'une décision administrative ou par voie d'expropriation. Dans certains pays, comme les États-Unis, l'appropriation d'un bien donne lieu à un droit d'indemnisation pour le propriétaire (Fischel (1985, p. 150-178)). Ces principes ne sont pas propres aux États-Unis. Dans l'Union européenne, par exemple, l'article 288 du traité instituant la Communauté européenne est libellé comme suit : "En matière de responsabilité non contractuelle, la Communauté doit réparer, conformément aux principes généraux communs au droit des États Membres, les dommages causés par ses institutions ou par ses agents dans l'exercice de leurs fonctions".

sensibles sur l'intensité de la concurrence et sur les conditions d'accès au marché, il faudrait que les autorités se préoccupent aussi des effets qu'elles peuvent avoir pour les consommateurs.

- La délivrance des autorisations locales d'urbanisme devrait être soumise à des règles claires et faire l'objet d'une procédure rapide et peu coûteuse, avec des délais de recours strictement encadrés et l'obligation pour l'administration de motiver tout refus en tenant compte notamment des retombées pour les consommateurs.

- Les réglementations qui limitent la densité géographique de certains types de points de vente sont souvent justifiées par la volonté de permettre des économies d'échelle suffisantes pour la production d'un niveau minimum de service. Ces réglementations sont inutiles en zone urbaine et peuvent, paradoxalement, avoir pour effet de réduire le nombre de fournisseurs en zone rurale.

- De manière générale, la réglementation ne devrait pas tenir compte des conséquences que peut avoir pour les entreprises en place l'autorisation donnée à un nouveau concurrent d'entrer sur le marché. L'"externalité" qui résulte d'un accroissement de la concurrence pour les entreprises en place, sous la forme d'une perte de profits, ne doit pas faire oublier les avantages qui peuvent en découler pour les consommateurs. Les dirigeants ne sont généralement pas bien placés pour pouvoir conclure qu'une intensification de la concurrence ne profitera pas aux consommateurs.

- La tarification de l'accès aux biens publics devrait refléter leur degré de rareté et leur coût pour les autorités. Dans bien des cas, le prix de cet accès devrait être nul.

- Une analyse coûts-avantages a d'autant plus de chances d'être pertinente que la plupart des avantages et des coûts d'une décision d'urbanisme donnée se manifestent au niveau de l'instance politique qui prend cette décision.

Le reste de l'étude examine tout d'abord les raisons qui justifient les restrictions d'urbanisme, avant de voir les effets que certaines d'entre elles peuvent avoir sur la concurrence (au travers de phénomènes d'exclusion ou d'inclusion qui réduisent ou au contraire ouvrent plus largement l'accès au marché).

2. Les raisons qui justifient les restrictions d'urbanisme

Les restrictions qui pèsent sur l'utilisation du sol émanent soit de la réglementation, des lois et des instances spécialisées du secteur public, soit des contrats passés entre des agents économiques privés.

Les restrictions d'origine publique, au sens large, se présentent sous des formes très variées, en particulier :

- Classement des terrains et des constructions en fonction de divers usages (résidentiel, commercial, industriel, de bureaux, de loisirs, mixte, habitat individuel, habitat collectif, secteurs spécifiques de la distribution de détail).

- Régime local d'autorisation ou d'usage.

- Seuils de surface pour les commerces.

- Règles d'implantation (densité géographique maximale fixée pour certains types de commerce).

- Études d'impact, notamment d'impact écologique.

- Règles d'accès.

Les restrictions d'origine privée prennent les formes suivantes :

- Clauses restrictives (*covenants*) interdisant certains usages du sol pour les parties au contrat dans lequel elles ont été insérées[13].

- Rétention de terrain pour empêcher l'aménagement d'une parcelle voisine par un concurrent.

- Contrats d'exclusivité.

Les règles d'urbanisme répondent à divers objectifs économiques, sociaux et environnementaux jugés importants, notamment, parmi les plus courants :

- Minimiser les externalités négatives (par exemple l'impact d'un site industriel sur la valeur immobilière des propriétés situées à proximité et sur la qualité de l'air).

- Protéger certaines activités (par exemple, les petits commerces).

- Protéger l'environnement (en refusant d'accorder de nouveaux permis de construire dans des zones naturelles, en limitant la taille des panneaux, etc.).

- Protéger les biens publics (par exemple, les zones historiques).

- Assurer la sécurité publique (en empêchant par exemple la construction en zone inondable).

- Répartir les coûts d'équipement de façon équitable (lorsqu'un lotissement de grande envergure est créé, faire supporter aux propriétaires les coûts d'équipement que représentent l'extension des voies et réseaux et la construction des écoles qui desserviront le nouvel ensemble).

- Assurer des flux de recettes (par le biais des taxes locales assises sur la valeur des propriétés ou sur les prix des transactions).

- Anticiper sur la croissance à long terme (en prévoyant par exemple des servitudes de voirie dans des zones encore assez peu urbanisées).

- Offrir une incitation financière pour la fourniture de biens et de services (en protégeant les pharmacies de la concurrence, par exemple, pour qu'elles aient intérêt à s'installer et à assurer des services de qualité).

- Garantir la coexistence de différents régimes de propriété ou de différents modes d'occupation des sols.

- Accroître la concurrence (en assurant l'accès au marché)[14].

[13] Il s'agit de clauses restrictives faisant partie intégrante de contrats de bail ou d'actes de propriété qui ne peuvent pas être facilement modifiées par les acheteurs ou les locataires successifs, étant en règle générale considérées comme juridiquement obligatoires pour les futurs usagers pendant toute leur durée de validité.

De façon générale, l'objectif des restrictions d'urbanisme (du moins celles qui émanent des pouvoirs publics) est d'accroître le bien-être des consommateurs, lequel dépend non seulement des prix, de la qualité, de la différenciation et du choix des biens et services, mais aussi de la congestion des transports, de facteurs environnementaux, des recettes fiscales tirées des activités économiques locales et des options de déplacement entre domicile et travail, eux-mêmes fonction de la densité de l'habitat.

Parmi les raisons invoquées pour réglementer l'utilisation du sol, il en est deux en particulier, l'existence d'externalités et la protection des commerces de proximité, qui justifient très souvent l'adoption de restrictions ayant un impact sur la concurrence. Nous les examinerons l'une après l'autre ci-après.

2.1 Externalités

De tous les objectifs assignés à la réglementation du sol, celui dont on parle peut-être le plus souvent est la volonté de régler les problèmes d'externalité. Les externalités sont des effets qui s'exercent sur des tiers du fait de l'action d'un agent économique privé sans que celui-ci en tienne compte. La pollution, le bruit ou d'autres facteurs environnementaux (une augmentation potentielle de la densité de l'habitat, par exemple) sont des externalités qui, dans le cas de l'immobilier, peuvent avoir un impact à la fois sur la qualité de vie et sur la valeur des propriétés. C'est l'existence de ces externalités qui justifie l'intervention des pouvoirs publics lorsque les avantages (coûts) d'un usage du sol particulier pour un acteur privé ont moins de poids que les coûts (avantages) qui en résultent pour d'autres et que la compensation n'est pas automatique.

Pour illustrer rapidement cette notion d'externalité, prenons un exemple. Supposons qu'une entreprise envisage de bâtir une usine dans une zone résidentielle. Les rejets de fumée et le trafic de camions qui vont en résulter risquent fort de nuire à la qualité de vie des habitants du quartier, et cela pourra ensuite avoir pour effet de faire chuter la valeur des propriétés. Pour les riverains, l'implantation de l'usine, par rapport à leur situation initiale, se traduit par une externalité négative. Mais le propriétaire de l'usine, lui, n'est pas lésé par la perte de valeur des propriétés résidentielles et il ne la prend pas en compte : il enregistre seulement, en tant qu'agent économique privé, les gains que lui procurent l'exploitation de sa nouvelle usine.

Lorsque la perte de valeur nette subie par la zone résidentielle l'emporte sur les bénéfices attendus de l'usine, l'installation de celle-ci et son exploitation créent un coût net pour la société. Or, s'il n'y avait aucune restriction, cette usine pourrait s'implanter et fonctionner simplement parce qu'elle est rentable pour un agent privé[15]. Dans ce cas, les règles d'urbanisme qui interdisent l'installation d'une usine dans une zone résidentielle se traduirait par un avantage social par rapport à la situation dans laquelle chaque propriétaire a le droit de faire ce qu'il veut sur son terrain, indépendamment des effets que cela peut induire pour les autres.

Si les gains nets de l'usine l'emportaient sur la perte de valeur des propriétés résidentielles, on pourrait imaginer un mécanisme de compensation entre les résidants et l'usine. Ainsi, le propriétaire de l'usine pourrait dédommager les résidants pour la perte de valeur de leur propriété tout en conservant une affaire rentable[16]. Cependant, la complexité des négociations entre le propriétaire de l'usine et des centaines de

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14 Énumérer ces objectifs ne signifie pas qu'ils sont pertinents. Ainsi, à moins d'arguments particulièrement convaincants, il n'est sans doute pas très judicieux de vouloir offrir une incitation financière en empêchant la concurrence.

15 Elle pourrait ne pas être construite si les habitant du quartier se cotisaient et décidaient de payer le propriétaire du terrain pour qu'il n'accepte pas l'installation de l'usine.

16 Le propriétaire de l'usine serait peut-être alors incité à s'installer dans une zone où il n'y aurait pas de compensation à payer.

résidants pourrait être telle que, si chaque résidant avait le droit de s'opposer à l'installation de l'usine, aucun accord ne pourrait être conclu. En revanche, si le propriétaire de l'usine avait le droit de construire sans que personne puisse s'y opposer, les résidants seraient désavantagés. Autrement dit, les coûts de négociation peuvent être tels qu'il vaut mieux mettre en place un mécanisme centralisé pour répartir les différents usages en veillant à éviter le plus possible les situations où les activités des uns seront source d'externalités pour les autres.

Voir l'appendice A pour un examen plus complet des externalités.

2.2 Protection des commerces de proximité

Autre motif souvent invoqué pour justifier la réglementation de l'utilisation du sol : la protection des commerces de proximité. A titre d'exemple, dans beaucoup de communes, il existe des règles qui limitent la création de grandes surfaces commerciales. L'impact de ces mesures du point de vue de la concurrence est une question encore très controversée, mais il apparaît de plus en plus évident qu'empêcher le développement des magasins de grande surface a en fait pour conséquence de réduire l'emploi et de faire augmenter les prix. Au Royaume-Uni, par exemple, Sadun (2007) observe que la réglementation qui empêche la construction de nouvelles grandes surfaces en dehors des centres villes a conduit les chaînes de distribution à ouvrir des surfaces moyennes de proximité qui ont eu un impact négatif sur les petites épiceries de quartier. En fait, il semble que l'emploi ait chuté chez les petits épiciers indépendants lorsque la grande distribution a redéployé ses implantations de la périphérie vers les centres villes. De son côté, Basker (2005) conclut que, dans l'ensemble, l'ouverture des magasins Wal-Mart semble être associée avec une légère hausse et non une baisse de l'emploi. En France, Bertrand et Kramartz (2002), qui étudient l'impact des restrictions à la création de grandes surfaces, montrent que ces restrictions s'accompagnent d'une baisse de l'emploi. A propos des magasins de détail non traditionnels comme ceux de l'enseigne Wal-Mart, Hausman et Liebtag (2004, à paraître) relèvent des prix moins élevés pour 19 produits sur un échantillon de 20 (l'exception étant les boissons gazeuses), avec un écart moyen de 27 % par rapport aux autres magasins, et ils estiment que cette concurrence a obligé les supermarchés traditionnels à abaisser leurs prix d'environ 3 %. Basker et Noel (2006) constatent les mêmes effets de prix, mais de moindre ampleur, l'écart de prix avec les concurrents étant d'après leurs calculs de 10 % en faveur de Wal-Mart. Quant à la question de savoir quel est l'effet net, en fin de compte, de la concurrence exercée par les grandes surfaces de type maxi-discount, elle n'est pas encore tranchée. D'après les données recueillies pour la région de la baie de San Francisco, Boarnet *et al.* (2005) estiment que l'arrivée de Wal-Mart a permis aux consommateurs de réaliser une économie comprise “entre 382 millions et 1.13 milliard de dollars par an”, tandis qu'ils prédisent “une baisse des salaires et des bénéfices dans le secteur de l'épicerie, et donc des revenus du travail au niveau local, comprise entre 300 et 576 millions de dollars par an”. Les mêmes auteurs suggèrent toutefois qu'il faudrait peut-être aller au-delà de ces simples considérations d'efficience pour s'intéresser aussi aux effets de répartition, de sorte que l'on peut difficilement juger de l'impact de Wal-Mart d'après ces premières conclusions.

Nous verrons maintenant de quelle manière certaines règles d'urbanisme peuvent avoir une incidence sur la concurrence, en nous intéressant tout d'abord à leurs effets d'exclusion et de rareté, avant de voir ensuite comment elles peuvent aussi agir en sens inverse et promouvoir la concurrence en favorisant l'accès à des équipements essentiels.

3. L'impact des règles d'urbanisme sur la concurrence

Certaines règles d'urbanisme ont une incidence indéniable sur la concurrence. Ainsi, lorsqu'elles limitent l'usage commercial de certains terrains ou l'offre de nouveaux services dans un périmètre géographique donné, on peut dire qu'elles exercent un effet d'"exclusion". Parfois, quand le but est de limiter le nombre de prestataires de services dans un secteur particulier, les effets seront probablement

anodins s'il existe déjà, localement, un grand nombre de concurrents. Mais si les consommateurs se trouvent effectivement limités dans leur choix de prestataires, c'est que les restrictions entravent la concurrence et les privent des avantages qui pourraient en découler pour eux.

D'autres restrictions peuvent se caractériser par des effets d'"inclusion" dans la mesure où elles aident au contraire les nouveaux venus à s'installer avec succès sur le marché, souvent en leur ouvrant l'accès à des éléments de monopole qui resteraient autrement hors de leur portée.

3.1 Les règles d'urbanisme qui ont pour effet d'"exclure"

Les règles d'urbanisme qui ont un effet d'"exclusion" tendent généralement à écarter la concurrence ou à réduire l'offre sur le marché. Elles servent dans bien des cas de barrières à l'entrée. Les moyens employés pour cela sont les suivants :

- Limiter le nombre, la surface ou la densité d'une catégorie d'établissements donnée.
- Imposer une limite implicite pour exclure la concurrence.
- Créer un coût de transaction à l'entrée, moyennant par exemple :
  - un délai ;
  - le dépôt d'une demande préalable ;
  - un système favorisant le trafic d'influence.
- Ne pas autoriser un changement de destination ou la création d'une nouvelle utilisation qui risque de nuire aux entreprises en place.
- Faire en sorte que les frais d'accès à un espace public soient supérieurs au coût marginal encouru par un propriétaire foncier public ou privé.

En 1998 et en 2003, l'OCDE a publié des indicateurs de réglementation des marchés de produits qui comprennent des mesures des barrières à l'entrée pour les commerces de détail[17]. Ces indicateurs portent sur divers aspects de la réglementation, parmi lesquels l'étendue des barrières réglementaires à l'entrée dans le commerce de détail. Les questions posées à cet égard concernent les seuils fixés pour l'application des règles relatives aux grandes surfaces, les pratiques en matière de consultation préalable de la concurrence et les autorisations ou permis requis (en plus des autorisations d'urbanisme) pour l'ouverture d'un nouveau magasin. Les indicateurs privilégient les facteurs mesurables et comparables d'un pays à l'autre. Ils ne reflètent donc pas, par exemple, les effets de distorsion systématiques liés aux procédures ou au processus de décision. Cela étant, il s'agit sans doute des meilleures mesures dont on dispose pour comparer les barrières à l'entrée dans le secteur du commerce de détail à l'échelle internationale.

[17] Toutes les données utilisées pour calculer l'indicateur relatif au commerce de détail ont été recueillies par l'intermédiaire du *Questionnaire de l'OCDE sur les indicateurs de la réglementation.* L'indicateur relatif aux barrières à l'entrée assemble des données sur les limites à l'implantation de grandes surfaces et d'autres dispositions restrictives applicables à l'établissement de commerces de détail. Le questionnaire et les données utilisées sont disponibles sur la page d'accueil des indicateurs de réglementation des marchés de produits à l'adresse suivante : http://www.oecd.org/document/1/0,3343,fr_2649_34323_2367306_1_1_1_1,00.html.

Les indicateurs globaux des barrières à l'entrée font apparaître une grande dispersion entre les pays de l'OCDE. Pour un niveau moyen de 2.3, le score monte jusqu'à 4.2 (sur une échelle de 6 points au maximum)[18].

Le secteur du commerce de détail n'est pas le seul dans lequel les servitudes d'urbanisme imposent des barrières à l'entrée. Certaines activités de détail non commerciales ainsi que la construction résidentielle sont également concernées.

Il convient de noter que les règles d'urbanisme qui restreignent le rayon d'action des entreprises n'ont pas toutes un effet d'exclusion. Dans le cas du zonage, par exemple, mesure courante qui permet de délimiter physiquement les zones réservées au commerce de détail (et d'interdire le commerce de détail dans les zones résidentielles), tout dépend de la taille de la zone en question. Si elle est suffisamment vaste, l'effet sera simplement de concentrer les magasins sans en exclure aucun[19]. En fait, cela peut même intensifier la concurrence entre les points de vente en abaissant les coûts de recherche pour les clients qui pourraient être obligés, autrement, à se rendre dans des magasins très distants les uns des autres pour pouvoir procéder à des comparaisons. Ridley, Sloan et Song (2007) montrent, à partir de données sur cinq catégories de magasin, que le fait de restreindre leur périmètre d'exploitation se traduit par une plus grande densité de points de vente dans les zones autorisées, ce qui abaisse les coûts de recherche et peut accroître la concurrence dans la mesure où certains magasins sont obligés de fermer alors qu'ils auraient pu survivre autrement. On remarquera donc qu'un zonage souple a pour effet d'augmenter le nombre de vendeurs en concurrence[20].

En revanche, si le zonage réduit dans une large mesure l'espace total affecté au commerce de détail, il peut avoir un effet d'exclusion dommageable car il risque de conduire à la constitution de monopoles de distribution. C'est ce que montre l'exemple exposé dans l'annexe 2 ci-après.

3.1.1 Imposer une limite au nombre, à la taille ou à la densité des établissements concurrents

Il existe souvent des restrictions spécifiques à l'entrée, qui résultent soit de l'action publique, soit de l'action privée.

Restrictions imposées par le secteur public

Les restrictions émanant du secteur public comprennent, par exemple, le plafonnement du nombre de magasins autorisés dans un secteur d'activité donné par rapport à la population, les critères de taille applicables aux magasins, généralement favorables au petit commerce, ou encore les règles qui limitent tout simplement le nombre de magasins dans un certain périmètre, indépendamment des critères de population et de densité. Dans certaines régions, le nombre d' hypermarchés est plafonné. Si le nombre maximum autorisé est atteint, l'entrée dans le secteur est alors manifestement impossible. L'indicateur de l'OCDE relatif à la réglementation des grandes surfaces, illustré au graphique 1, montre que beaucoup de pays suivent une politique très restrictive dans ce domaine. Cependant, l'impact de ces mesures dépend non seulement de la façon dont elles sont appliquées, mais aussi du moment où elles ont été adoptées : les

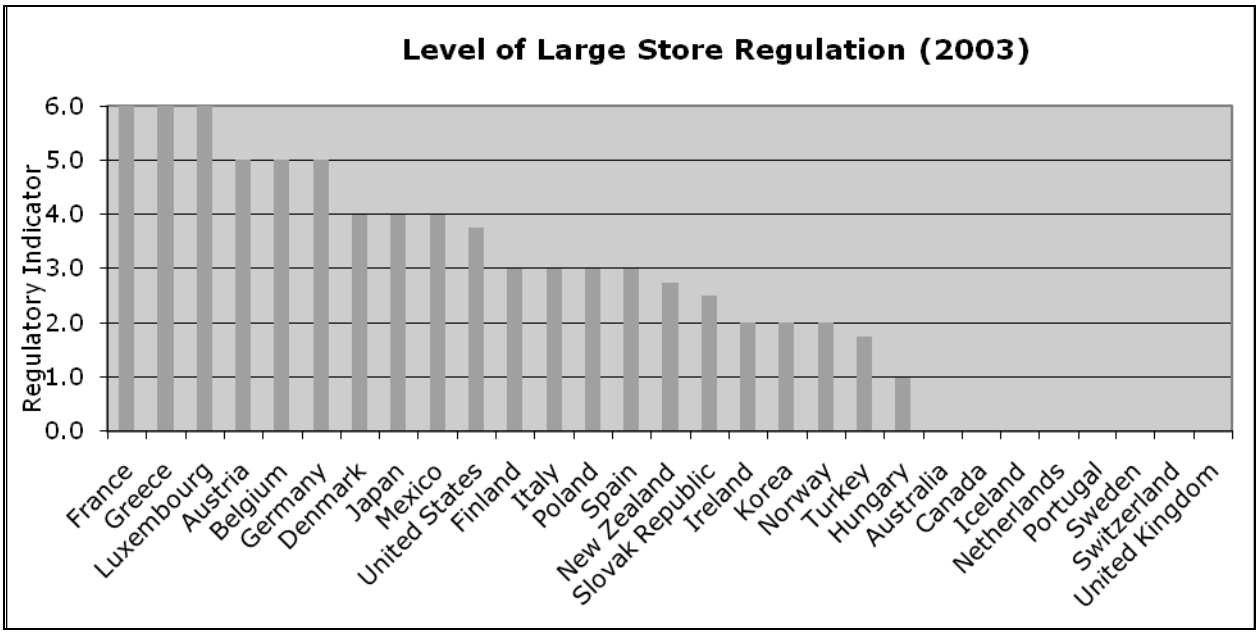
18 Ces niveaux étant des moyennes se rapportant à des variables qualitatives, il est impossible d'en tirer directement des conclusions définitives.

19 Au sens où nous l'entendons ici, un magasin serait "exclu" s'il n'était pas en mesure de s'établir dans la région, non pas à cause des prix des terrains, mais du fait du manque d'espace disponible dans le périmètre des zones dévolues à son activité.

20 Comme le font observer Ridley, Sloan et Song dans leur modèle théorique, "on pourrait s'attendre à une relation négative entre le nombre de vendeurs et les prix, mais nous montrons que lorsqu'on intègre le zonage au modèle, la relation peut au contraire être positive".

réglementations n'ont pas le même effet selon qu'elles sont entrées en vigueur alors que les grandes surfaces étaient déjà nombreuses (comme en France) ou avant même que beaucoup de régions en comptent au moins une sur leur territoire (comme en Italie). Certains pays n'appliquent aucune règle particulière qui distinguent les grandes surfaces des autres magasins.

Graphique 1.



Source: Conway, P. et G. Nicoletti (2006), "Product Market Regulation in non-manufacturing sectors in OECD countries: measurement and highlights", Documents de travail du Département des Affaires économiques de l'OCDE.

Les restrictions de type *numerus clausus* ne s'appliquent pas uniquement aux grandes surfaces, mais aussi bien souvent à d'autres acteurs de la distribution, par exemple les pharmacies[21]. La principale raison qui justifie ces dispositions est la volonté de garantir aux professions concernées des bénéfices suffisants pour maintenir l'offre. En Irlande, les ouvertures de pharmacies sont fonction de trois critères : densité de population, distance physique et absence d'effets préjudiciables. Au nom des "impératifs de santé publique", il faut en l'occurrence que les conditions suivantes soient remplies :

- L'ouverture d'une nouvelle pharmacie ne doit pas faire descendre la proportion de pharmacies par rapport à la population en dessous de 1 pour 4 000 en zone urbaine et dans les villes de plus de 3000 habitants et en dessous de 1 pour 25 000 en zone rurale.

- Aucune autre pharmacie ne doit être en activité dans un rayon de 250 m en zone urbaine et de 5 km en zone rurale.

- Il ne doit en résulter aucun effet préjudiciable pour la viabilité des pharmacies existantes dans la région concernée.

[21] Les règles applicables aux pharmacies découlent des régimes d'autorisation des commerces, qui ne sont pas traités en détail ici, et non pas de la réglementation en matière d'occupation des sols. Cependant, dans la mesure où les restrictions qui en découlent ont pour effet de limiter un certain type d'activité dans un périmètre géographique déterminé, on peut les considérer comme un aspect d'une politique d'aménagement et d'urbanisme.

Ces règles ont des effets non négligeables. Par exemple, entre 1996 et 2001, 48 ouvertures de pharmacies seulement ont été autorisées en Irlande, alors qu'il y en aurait eu probablement beaucoup plus sans de telles dispositions[22].

Les restrictions géographiques de ce type ne sont pas propres à l'Irlande. D'autres pays, dont le Danemark, l'Espagne, la France, l'Italie, la Hongrie et la Norvège réglementent le nombre ou le lieu d'implantation des pharmacies[23].

Cependant, beaucoup de pays ont un réseau de pharmacies qui n'est pas soumis à ces règles. En Allemagne, au Mexique et aux États-Unis, par exemple, il n'y a pas d'étude préalable de la "demande" ou du "marché" avant la délivrance par les autorités sanitaires locales de l'autorisation d'implantation d'une nouvelle pharmacie. Dans le cas de l'Allemagne, il en résulte que le secteur se caractérise par une forte densité, avec une officine pour 3800 habitants, alors qu'en Irlande, où il existe des quotas, la carte des officines est beaucoup moins dense, ce qui contredit l'argument selon lequel les seuils de densité garantissent la disponibilité de l'offre en soutenant les profits. Si l'on en juge par l'expérience de l'Allemagne, c'est plutôt l'absence de règles en matière de densité, de distance et d'impact sur la concurrence qui favorise une plus large répartition des pharmacies.

En 1973, la France s'est dotée d'une loi limitant l'implantation des grandes surfaces de vente (loi Royer), dont les dispositions restrictives ont encore été renforcées en 1996 (loi Raffarin). D'après le rapport de la Commission Attali pour la libération de la croissance française et ses premières propositions sur le pouvoir d'achat (2007), 379 grandes surfaces ouvraient en moyenne chaque année entre 1986 et 1994, alors que ce nombre est tombé à 162 entre 1995 et 2003. Les prix des denrées alimentaires ont augmenté de 14 % en France entre 1998 et 2003, contre 10% en moyenne dans le reste de l'Europe. La loi Raffarin de 1996 s'applique également au secteur de l'hôtellerie où elle entrave ou empêche l'ouverture d'établissements de taille moyenne et de plus grande taille (plus de 30 à 50 chambres) dans les régions où les autorités jugent la capacité hôtelière suffisante. Toujours d'après la Commission Attali, au cours des neuf dernières années, les prix de l'hôtellerie ont augmenté de 4.5 % par an en France, alors que l'inflation était de 1.7 %, ce qui donne à penser que cette réglementation a probablement eu des effets marqués[24].

Restrictions imposées par le secteur privé

Les restrictions à l'entrée ne sont pas seulement le fait des pouvoirs publics. Il en existe aussi de source privée qui ont pour effet d'entraver la concurrence. Tel est le cas, par exemple, des clauses contractuelles restrictives et des acquisitions sans justification économique, hormis la volonté de faire obstacle à la concurrence. Les clauses contractuelles sont très répandues et très différentes, aussi bien par leurs objets que par leur effets. Elles reposent sur des dispositions juridiques complexes et qui varient d'un pays à l'autre, raison pour laquelle nous ne les aborderons pas ici. Celles qui nous intéressent le plus sont les clauses qui limitent l'utilisation d'un site particulier. D'un usage très courant dans la pratique, quelques exemples en sont donnés ci-après :

- Clause utilisée par un distributeur pour interdire l'utilisation future d'un espace aux fins d'exploitation d'un commerce alimentaire de détail.

22 Cette période a également été marquée par des contraintes sur le nombre de places de formation disponibles pour les étudiants en pharmacie.

23 En Hongrie, par exemple, la densité maximale de pharmacies par rapport à la population est de 1 officine pour 5 000 habitants et la distance minimale entre deux officines, de 250 m. (Voir OCDE, Enhancing Beneficial Competition in the Health Professions, 2004.)

24 Une analyse détaillée tiendrait compte également du coût d'opportunité des terrains, qui a considérablement augmenté au cours de la période considérée, ainsi que de l'augmentation éventuelle de la demande.

- Clause utilisée par une chaîne de restauration rapide pour interdire l'utilisation future d'un espace aux fins d'exploitation d'un commerce de restauration rapide spécialisée dans les produits à base de viande de bœuf.

- Clause utilisée par une chaîne d'hôpitaux qui vend l'un de ses bâtiments pour interdire l'utilisation future de celui-ci aux fins d'exploitation de services hospitaliers.

Au Royaume-Uni, par exemple, la Commission de la concurrence, dans ses conclusions préliminaires, écrivait récemment ceci :

- Les quatre principaux distributeurs alimentaires détiennent un nombre important de sites qu'ils gardent en réserve et ils contrôlent par ailleurs d'autres sites faisant l'objet de contrats de location à des tiers, de clauses restrictives ou d'accords d'exclusivité.

- Dans bien des cas, ces réserves foncières représentent un potentiel de développement qui ne pose pas de problèmes sur le plan de la concurrence. Cependant, environ 10 pour cent de toutes les grandes surfaces alimentaires se trouvent à proximité d'un site contrôlé par l'un des distributeurs susvisés et susceptible de constituer une entrave à l'entrée de nouveaux concurrents. De plus, sur certains marchés locaux, l'existence d'emplacements contrôlés, notamment par le biais de clauses contractuelles restrictives, peut s'analyser comme une contrainte pesant sur l'entrée de commerces de proximité. Voir Commission de la concurrence (2007b).

On trouve des clauses restrictives dans des contrats relatifs à nombreux domaines en dehors de la distribution alimentaire. En règle générale, elles n'ont pas vraiment d'impact lorsqu'il existe un grand nombre d'autres emplacements également attractifs pour la clientèle visée. S'il s'agit d'ouvrir un café, par exemple, les emplacements appropriés sont sans doute très nombreux[25]. Par conséquent, si une chaîne de cafés utilise une clause restrictive dans un contrat de vente ou de cession-bail pour un de ses points de vente, il est probable que cela n'aura pas réellement d'effet dans la mesure où ses concurrents potentiels pourront trouver d'autres emplacements tout aussi attractifs. Par contre, une clause restrictive peut réellement réduire la contrainte concurrentielle lorsqu'elle empêche l'implantation d'un nouveau venu qui aurait amélioré la situation sur le marché pour les consommateurs ou lorsqu'elle dégrade les conditions d'entrée par rapport à ce qu'elles auraient été autrement. Parfois, des clauses restrictives servent à protéger les entreprises qui les appliquent. Par exemple, si un distributeur y a recours pour contrôler une parcelle idéalement située pour l'implantation d'une grande surface alimentaire, il est probable qu'il n'y aura pas beaucoup d'autres possibilités de localisation pour un éventuel concurrent et qu'elles seront nettement moins intéressantes que le site auquel s'applique la clause restrictive (A6(2)-17). La Commission a dénombré au moins 46 clauses restrictives, sans date d'expiration pour plus de 90 % d'entre elles[26].

Les clauses contractuelles restrictives ont un effet économique, puisqu'elles limitent les usages potentiels d'un terrain. Elles peuvent induire un manque à gagner pour celui qui les impose dans la mesure

25 Encore que même dans ce secteur d'activité où les possibilités d'implantation sont apparemment nombreuses, par exemple, des cas d'abus sont parfois dénoncés. Ainsi, la chaîne de cafés Starbucks a été attaquée en justice par un nouveau concurrent qui lui reprochait d'avoir pris le contrôle, par l'intermédiaire de clauses contractuelles restrictives et d'autres moyens, des meilleurs emplacements disponibles.

26 Ces dispositions ont été prises par les quatre principales chaînes de distribution alimentaire dans le cadre d'opérations de cession réalisées depuis le 1er janvier 2000.

où, une fois la restriction adoptée, le prix de vente ou de cession-bail du terrain peut baisser, surtout si la l'usage initial conférait au site une valeur plus importante[27].

Outre leurs effets d'exclusion potentiels, les clauses restrictives servent aussi parfois à garantir une exclusivité pour la vente de certains produits dans un complexe commercial. La Commission de la concurrence relève au moins 45 cas de garantie d'exclusivité[28] et note :

> *"Un accord d'exclusivité entre le propriétaire d'un espace de vente au détail ou une instance locale et un distributeur peut inciter celui-ci à se positionner comme principale enseigne d'un futur centre commercial et présenter un avantage pour la collectivité s'il permet effectivement au projet de centre de voir le jour (par exemple en facilitant la mise en place des infrastructures nécessaires grâce aux garanties données au principal distributeur). Cependant, ce type d'accord peut aussi avoir un effet limitatif sur la concurrence dans un centre commercial capable d'accueillir plusieurs grandes enseignes de distribution. Ainsi, M&S [une chaîne de grands magasins dotés d'un rayon alimentation assez développé] a fait part de ses difficultés à trouver des espaces de distribution alimentaire à louer dans les centres commerciaux où un grand distributeur avait passé un accord d'exclusivité avec le propriétaire" (A6(2)-24).*

Dans le domaine des restrictions émanant du secteur privé, la forme d'exclusion la plus flagrante est peut-être celle qui consiste à se rendre propriétaire d'un terrain pour faire barrage à la concurrence, par exemple parce que le terrain en question empêche le remembrement ou l'extension d'un site existant. Ainsi, un hôpital peut acheter des terrains adjacents à un établissement concurrent afin qu'il soit plus difficile pour celui-ci de s'étendre[29]. Dans la plupart des pays, la question de savoir si le droit de la concurrence s'applique en pareil cas reste ouverte. Au regard de leur justification économique, toutefois, ces actes posent de sérieux problèmes de concurrence et, selon le déroulement des faits, méritent éventuellement de faire l'objet d'une enquête ou d'une action en justice[30].

On peut faire une analogie entre l'acquisition de terrains à des fins défensives et les brevets dits de barrage. Dans le cas des brevets, l'État peut avoir intérêt à encourager l'innovation au moyen d'un systèmes de brevets, même si cela conduit parfois à couvrir des pratiques purement défensives. Mais l'État n'a aucun intérêt à promouvoir des règles d'urbanisme qui ont uniquement pour but d'empêcher la concurrence. Barrer l'accès des concurrents à un terrain qui n'est pas utilisé par ailleurs à des fins productives ne contribue ni à la croissance économique ni à l'investissement. Permettre aux entreprises d'appliquer des restrictions de ce type alors que les terrains manquent risque de les inciter à accumuler les parcelles défensives ou à multiplier les clauses restrictives pour éviter la concurrence. L'État n'a aucun intérêt à encourager ces pratiques. Si le fait d'accorder un droit d'usage exclusif peut d'une certaine façon contribuer à promouvoir l'investissement dans de nouveaux sites, les restrictions à la concurrence imposées par le

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27 Dans le cadre de l'enquête menée par la Commission de la concurrence, une entreprise au moins a indiqué que les clauses restrictives étaient un moyen d'anticiper sur l'augmentation de valeur éventuelle d'un site du fait de ses usages ultérieurs.

28 Ces garanties d'exclusivité concernent des sites acquis par les quatre principaux distributeurs alimentaires depuis le 1er janvier 1996, et certaines de ces entreprises étaient incapables de fournir des données sur leurs acquisitions antérieures au 1er janvier 2000.

29 Voir Jackson, Tennessee Hospital Company v. West Tennessee Healthcare, Inc., 2004-1 Trade Cas. (CCH) ¶ 74,344 (W.D. Tenn. 2004), une affaire dans laquelle cet argument a été mis en avant.

30 Lorsqu'une entreprise possède un terrain susceptible de faire barrage à la concurrence, l'enjeu économique n'est pas d'une importance fondamentale. L'État peut avoir intérêt à encourager l'innovation au moyen d'un système de brevets, et, parfois, cela peut amener à protéger des brevets dits "de barrage", mais l'État n'a aucun intérêt à promouvoir des usages du sol qui font obstacle à la concurrence, à moins qu'il n'y ait une compensation à la clé pour la collectivité.

biais de clauses contractuelles et par l'acquisition de terrains à des fins défensives sont des pratiques tout à fait différentes étant donné qu'il n'en découle aucun avantage évident pour la collectivité et qu'elles ont des effets pernicieux clairement identifiables et auxquels on peut facilement remédier[31].

3.1.2 Imposer une barrière implicite à l'entrée

L'absence de règles spécifiques relatives à l'entrée ne signifie pas que la réglementation de l'utilisation du sol n'aura pas pour effet de créer des obstacles dans ce domaine. Ainsi, bien qu'il n'existe pas en Angleterre de règle interdisant l'ouverture de commerces alimentaires de grande surface, les grandes orientations suivies en matière d'aménagement et d'urbanisme traduisent une nette préférence pour l'implantation des magasins en centre-ville, où les grandes parcelles sont rares, et éventuellement en proche périphérie, plutôt qu'en lointaine banlieue où les nouveaux sites à aménager sont sans doute beaucoup plus nombreux. C'est ce qui permet de comprendre pourquoi un pays comme le Royaume-Uni paraît doté d'une réglementation très peu restrictive en ce qui concerne les grandes surfaces (voir le graphique 1), alors que de l'avis de la Commission de la concurrence (2007a), "dans la poursuite de ses objectifs, le système d'aménagement de l'espace peut très bien faire obstacle – dans une certaine mesure – à l'entrée et/ou à l'expansion des grandes surfaces alimentaires (paragraphe 6.115).

Les restrictions implicites à l'entrée ne résultent pas toujours directement du plan d'urbanisme. Elles peuvent aussi découler d'autres types de règlement. Par exemple, pour assurer la protection des convoyeurs de fonds, il peut être décidé que les distributeurs de billets doivent être implantés à une certaine distance de la voie publique et à proximité d'un emplacement de stationnement approprié pour véhicules blindés. Or, l'un des effets indirects de ces règles est d'empêcher l'installation de distributeurs de billets dans les hypermarchés, à l'intérieur du magasin ou à côté d'une entrée principale, sites en principe les plus appropriés, car, dans un cas comme dans l'autre, les conditions ne seraient alors pas remplies pour qu'ils puissent être alimentés. Du coup, les hypermarchés se verraient dans l'impossibilité d'offrir toute la panoplie des services bancaires, ce qui limiterait la concurrence avec les banques.

L'installation de tours de télécommunications ou de pylônes pour la téléphonie mobile est souvent rendue extrêmement difficile à cause des plans locaux d'urbanisme. Ainsi, il se peut très bien qu'aucune règle formelle ne s'oppose à la construction de ces équipements sur un site particulier, mais l'aspect qualitatif du processus de décision fait que, même en l'absence d'opposition, il suffira de peu pour motiver un refus d'autorisation. Cela n'empêchera pas forcément l'installation de nouveaux relais de téléphonie mobile, mais le choix des opérateurs s'en trouvera sérieusement limité. Or, souvent, le matériel doit être installé en un lieu très précis pour des raisons techniques tenant à la configuration du réseau existant. Il n'y aura donc pas d'autre option dans ce cas que de négocier avec le propriétaire d'une tour déjà installée si la création d'une nouvelle infrastructure est impossible.

[31] L'annulation des clauses restrictives peut poser un problème car elle revient à priver les propriétaires d'une source de valeur. Mais de nombreuses décisions publiques ont pour effet de détruire de la valeur, comme on le voit par exemple lorsque l'État intervient pour empêcher des opérations de fusion. Ce qu'il faut se demander en l'occurrence, c'est à quoi correspond cette valeur dont les propriétaires vont être privés et si les profits perdus ne sont pas en réalité attribuables à des comportements anticoncurrentiels. L'État n'a aucun intérêt à favoriser les profits à caractère anticoncurrentiel, sauf si cela présente par ailleurs un avantage sur le plan de l'intérêt public.

Encadré 1. Enquête de la Commission britannique de la concurrence sur le secteur de la distribution alimentaire et politique d'aménagement et d'urbanisme

La Commission britannique de la concurrence a récemment publié les conclusions provisoires de son enquête sur le secteur de la distribution alimentaire. Lancée en 2006, cette enquête vise à faire le bilan de la concurrence au sein du marché de la distribution alimentaire et à déterminer les éventuelles mesures nécessaires pour remédier aux problèmes de concurrence. L'enquête couvre une grande variété de sujets, parmi lesquels le pouvoir d'achat, les politiques de prix dans le commerce de détail et l'influence de l'urbanisme sur la concurrence. La Commission a recueilli un volume important de données, qu'elle a analysées dans ce rapport.

L'impact sur la concurrence est étudié à la fois sous l'angle des actes privés d'utilisation des sols et de la politique d'urbanisme du gouvernement.

Selon la Commission de la concurrence (2007a), « pour les grandes surfaces, le code d'urbanisme limite l'installation de nouveaux magasins en imposant des contraintes sur les constructions en périphérie et hors du centre-ville. Ces restrictions sont beaucoup moins importantes pour les magasins de taille moyenne et les magasins de proximité, pour qui les sites adaptés en centre-ville ou ailleurs et qui ne sont pas soumis à des restrictions sont plus nombreux ». (paragraphe 6.53)

Code d'urbanisme

Le code d'urbanisme britannique est régi par le *Town and Country Planning Act* de 1990 et le *Planning and Compulsory Purchase Act* de 2004. Des lignes directrices sont établies au niveau national, régional et local afin d'évaluer les demandes de délivrance de permis de construire, notamment par le biais des plans locaux d'aménagement (*Local Development Frameworks* ou LDF) élaborés par les autorités locales d'urbanisme (*Local Planning Authorities* ou LPA). Le Ministère des communautés et des collectivités locales définit l'orientation politique et influence les décisions par le biais de recommandations sur les projets de plans d'aménagement (qu'il a le pouvoir de modifier) et il est autorisé à examiner les demandes individuelles de permis de construire et de rendre une décision à l'issue d'une enquête publique. La majorité des demandes de permis sont toutefois examinées par les autorités locales d'urbanisme, dont les décisions peuvent faire l'objet d'un recours (devant le Ministère). Un permis de construire peut parfois être délivré sous conditions, qui prennent généralement la forme de contrats entre le demandeur et l'autorité locale (plus connus sous le nom de contrats Section 106). L'objectif de ces contrats n'est pas d'ordre financier : il s'agit d'améliorer les éléments ou les conséquences inacceptables d'un projet, par exemple l'augmentation de la charge placée sur les infrastructures existantes (routes). Ils peuvent néanmoins se traduire par des coûts supplémentaires pour le demandeur.

Parmi les recommandations les plus adaptées au secteur de la distribution alimentaire figure la déclaration nationale de politique d'urbanisme (*Policy Planning Statement* ou PPS) n°6, fondée sur une approche de l'urbanisme commercial privilégiant le centre-ville. Elle prévoit une évaluation obligatoire des besoins et impose des restrictions sur la surface des nouveaux magasins et la prise en compte de l'impact des nouveaux projets sur les centres commerciaux existants.

« Le principal objectif de la déclaration PPS6 est de préserver le dynamisme et la viabilité des centres-villes :

(a) en planifiant la croissance et le développement des centres existants ; et

(b) en améliorant les centres existants, en leur accordant la priorité pour les projets de développement afin d'offrir une large gamme de services dans un cadre agréable et accessible à tous ». (A6 (1) paragraphe 5)

Avant l'adoption du PPS6, les centres commerciaux situés en périphérie des villes se multipliaient très rapidement. (A6(1) paragraphe 5)

Aux termes de la déclaration PPS6, les projets commerciaux doivent avoir une surface adaptée à la zone desservie (approvisionnement à l'échelle locale pour les centres régionaux et approvisionnement au niveau local pour les centres locaux). Deux autres objectifs cités dans la déclaration PPS6 semblent conformes aux pratiques

exemplaires recommandées par la politique de la concurrence : « offrir davantage de choix aux consommateurs » et « optimiser l'efficacité, la compétitivité et l'innovation des secteurs du commerce de détail, des loisirs et du tourisme notamment, en améliorant la productivité ». Néanmoins, selon les conclusions provisoires, les « autorités en charge de l'urbanisme ne considèrent pas qu'en vertu du choix et de la concurrence, elles doivent examiner les demandes de permis de construire selon les critères de l'impact sur les commerces existants et de l'amélioration des conditions pour les consommateurs en termes de prix, de qualité ou de service. Elles semblent plutôt privilégier les objectifs suivants : 1) garantir la diversité des commerces (offres complémentaires sans effet de substitution) et 2) favoriser la construction de centres commerciaux pouvant concurrencer d'autres centres grâce à leur profil attractif fondé sur une vaste sélection de magasins ». (A6(1) paragraphe 7)

Demandes de délivrance de permis de construire

Si une demande de délivrance de permis de construire est déposée pour un site commercial hors du centre-ville dans une zone qui n'est pas déjà réservée à cette activité, le demandeur doit dans un premier temps démontrer qu'aucun site du centre-ville n'est adapté au projet. Ensuite, il doit apporter la preuve qu'il existe un « besoin » pour ce nouveau projet, selon des critères à la fois quantitatifs et qualitatifs. Ce sont les autorités locales de l'urbanisme qui se prononcent sur l'existence ou non de ce besoin. L'évaluation est fondée sur la surface de vente, les recommandations préconisant une évaluation des besoins futurs en surface de vente à horizon cinq ans maximum (des sites en centre-ville pouvant se libérer dans l'intervalle).

La déclaration PPS6 prévoit également que tout projet dont la surface de vente est supérieure à 2 500m², situé à la périphérie ou hors du centre et qui ne respecte pas le dernier plan d'aménagement local doit faire l'objet d'une évaluation de l'impact sur les commerces existants. Cette procédure vise à déterminer les conséquences du projet sur le dynamisme et la viabilité des centres existants dans la zone concernée.

Le rapport Barker, commandé par le gouvernement, a été publié avant les résultats de l'enquête de la Commission de la concurrence sur le marché de la distribution alimentaire. (*Barker Review of Land Use Planning, Final Report – Recommendations* 2006) Il indique notamment :

« Le système actuel d'évaluation des besoins dans la politique d'urbanisme qui vise à protéger les centres-villes peut également avoir des effets pervers : il protège en effet les opérateurs historiques et privilégie les magasins à la rentabilité au mètre carré la plus faible. Par ailleurs, les opérateurs peuvent plus facilement augmenter leur surface de vente de manière progressive, alors que les nouveaux arrivants potentiels ne parviennent jamais à démontrer un besoin suffisant pour justifier une augmentation ponctuelle de la surface. C'est pourquoi la procédure d'évaluation des besoins devrait être supprimée. »

Le Ministère des communautés et des collectivités locales a répondu dans un Livre blanc, en convenant que l'évaluation des besoins « manquait de nuance à certains égards » compte tenu de ses effets involontaires sur la concurrence et limitatifs sur le choix offert aux consommateurs. Néanmoins, la suppression totale de la procédure d'évaluation des besoins pourrait mettre en danger l'objectif de « soutien aux investissements actuels et futurs dans le centre-ville, qui contribuent à la prospérité économique et à nos objectifs du point de vue social et environnemental. » (*Planning for a sustainable future*, Livre blanc, 21 mai 2007, paragraphes 7.53 à 7.55.)

Le Ministère des communautés et des collectivités locales ne semble pas préoccupé par le fait que l'évaluation des besoins paraît conçue pour restreindre l'offre. Il pourrait arguer qu'une offre limitée est nécessaire pour protéger le centre-ville. Néanmoins, le code d'urbanisme prévoit déjà que, pour un service donné, les constructions en centre-ville doivent être privilégiées par rapport aux constructions en périphérie. Dans ces conditions, la valeur ajoutée d'une évaluation des besoins semble difficile à déterminer, d'autant plus qu'il existe un risque certain de manipulation de la procédure par les concurrents, qui, pour protéger leurs intérêts commerciaux, peuvent affirmer qu'il n'existe pas un réel besoin de surface supplémentaire ou qu'une extension modeste de leurs propres magasins pourrait suffire à répondre à ce besoin. (Les projets d'extension pourraient se multiplier en réaction à la demande de délivrance d'un permis de construire pour un nouveau magasin. Or ces extensions passent plus facilement l'épreuve de l'évaluation des besoins, ainsi que les tests d'évaluation de l'impact sur les commerces existants. Selon la Commission de la concurrence, « il semble que les magasins d'alimentation de détail utilisent parfois les extensions de surface pour empêcher l'implantation de nouveaux magasins plus grands, qui sont soumis à la procédure d'évaluation des besoins. Néanmoins, aucun élément ne laisse à penser que ces méthodes sont répandues. » (paragraphe 6.62)) De manière plus

générale, un test conçu pour déterminer l'impact de l'arrivée de nouveaux concurrents n'a pas sa place dans la politique publique. En l'absence d'autres objectifs impératifs, les pouvoirs publics ne doivent pas tenir compte de l'impact sur les concurrents en place ni exprimer une préférence pour un concurrent par rapport à un autre dans leurs décisions d'urbanisme.

Les préoccupations liées aux conséquences négatives du code d'urbanisme ne sont pas purement théoriques. Selon la Commission de la concurrence, 55 % des autorités locales d'urbanisme déclarent « être informées ou avoir raison de croire que les acteurs du secteur de la distribution alimentaire sont opposés aux demandes de délivrance de permis de construire de leurs concurrents. » (Note de bas de page 155, chapitre 6.) Entre 2000 et 2007, au moins un distributeur a manifesté son opposition à 34 % des demandes de délivrance de permis de construire de concurrents[32]. Dans les cas où ces objections ont été déposées par des distributeurs historiques, entre un tiers et la moitié des demandes de permis ont été refusées. S'il est difficile d'affirmer que ces objections ont été décisives dans le rejet des demandes de permis de construire, elles mobilisent manifestement les ressources des opérateurs, qui semblent donc considérer ces dépenses comme rentables.

Pour de plus amples informations sur ces sujets, consulter le rapport de la Commission britannique de la concurrence (2007a), chapitre 6 et annexe A6(1). Le texte qui n'est pas présenté entre guillemets doit être considéré comme l'interprétation de l'auteur et non pas comme une conclusion ou une opinion de la Commission de la concurrence.

3.1.3 Imposer un coût de transaction à l'entrée

La réglementation en matière d'urbanisme exige souvent une autorisation préalable pour tout projet de construction ou tout changement relatif à l'utilisation du sol. Cette procédure peut entraîner une série de coûts pour une nouvelle entreprise, même si, appliquée uniformément à toutes les entreprises, il n'en résulte pas d'effet de discrimination. De plus, dans la mesure où les règles d'urbanisme remplissent leurs objectifs de façon plus coûteuse qu'il n'est nécessaire, elles entraînent des pertes d'efficience et peuvent augmenter le coût d'un projet au point dans certains cas de le priver de sa justification économique.

Délais

Les coûts liés aux délais d'instruction des dossiers peuvent atteindre des niveaux élevés. Comme le note la Commission de la concurrence du Royaume-Uni dans ses conclusions préliminaires, par exemple, sur la base d'un sous-échantillon de 24 sites, le délai moyen de réalisation d'un projet de surface alimentaire dans ce pays est de 3.65 ans (Commission de la concurrence (2007), A6(2)-31)[33]. Pour une entreprise, le coût de ce délai ne se limite pas seulement aux intérêts à payer sur les emprunts en attendant l'octroi de l'autorisation ; il correspond aussi au coût d'opportunité des fonds consacrés au projet, qui est plus élevé que le taux d'intérêt. Si le coût d'opportunité du capital est de 15 % par an et que le délai d'instruction de la demande d'autorisation ajoute 3 années au calendrier prévu pour l'ouverture d'un

32 En dépit de ces chiffres qui suggèrent que de nombreuses objections aux demandes de permis de construire ont été déposées par des concurrents, la Commission de la concurrence conclut que « la contestation des demandes de permis de construire des concurrents ne semble ni une méthode particulièrement répandue ni une cause d'inquiétude majeure en termes de barrière à l'entrée ou à l'expansion. » (paragraphe 6.62).

33 Ce sous-échantillon de 24 sites n'est peut-être pas représentatif de l'ensemble des projets réalisés. Il ne tient pas compte du temps nécessaire pour monter et achever le projet, mais plutôt du délai jusqu'au dépôt de la demande de permis (ou jusqu'au 1er juillet 2006 si la demande n'a pas encore été déposée à cette date). Le délai requis pour la délivrance du permis ou pour les étapes ultérieures n'est pas pris en compte. Le chiffre cité ici est donc purement indicatif.

nouveau site, ce qui est possible lorsque le projet est complexe et donne lieu à des recours, le coût du délai représente 52 % de l'investissement initial[34].

Les délais de réalisation des projets peuvent aussi infliger des coûts aux pouvoirs publics et aux consommateurs. On aurait donc tort de les juger sans importance, d'autant que ces coûts peuvent être élevés. A titre d'exemple, à l'époque de la crise énergétique en Californie, un certain nombre de demandes de permis pour des centrales électriques étaient à l'étude dans diverses communes de cet État. Comme on l'a su plus tard, lorsque les prix de l'énergie ont augmenté de 500 %, l'examen des dossiers s'est accéléré. Mais si les installations dont le projet remontait pour certaines à 1997 avaient été en activité à l'été 2000, les coupures d'électricité et les brusques hausses de prix auraient peut-être pu être évitées et il y aurait eu moins de possibilités de manipulation de l'offre[35].

Préparation des demandes d'autorisation

Pour les projets qui exigent de gros investissements, les procédures d'autorisation, y compris les études d'impact, sont parfois très complexes et peuvent donc s'avérer coûteuses.

Au total, le coût des autorisations d'urbanisme ne sont pas insignifiants. Au Royaume-Uni, par exemple, “les règles d'urbanisme imposent des coûts de transaction élevés aux entreprises. Les frais que perçoit l'administration à ce titre se montent à plus de £ 200 millions chaque année, et les dépenses du secteur privé auprès des sociétés de conseil en urbanisme se sont élevées à environ £ 300 millions en 2005-06. Dans la version préliminaire du Rapport Barker sur la politique d'urbanisme, les honoraires versés aux "*solicitors*" (représentants juridiques) sont estimés aux alentours de £ 350 à 500 millions (les honoraires versés aux "*barristers*" (avocats du barreau) ne sont pas pris en compte)”.

Trafic d'influence

Dans certaines circonstances, la procédure des autorisations d'urbanisme donne lieu à une évaluation qualitative approfondie des projets, sans que la décision de refus éventuelle n'ait souvent à être dûment motivée ni notifiée publiquement. Il est donc possible dans ces cas-là qu'un traitement de faveur soit accordé à certains dossiers et pas à d'autres. Cela n'a pas nécessairement des implications pécuniaires, mais le risque de corruption est plus grand lorsqu'aucune raison précise n'est exigée en cas de refus. Si le prix d'une propriété passe du simple au double selon qu'elle est classée en zone résidentielle ou que l'on peut y implanter un hôtel, on peut imaginer que l'octroi des agréments pour ce type d'établissement puisse donner lieu au versement de fortes primes. Dans certains pays, on constate par exemple que les prix des chambres d'hôtel sont élevés, les nouveaux sites exploitables rares et les chaînes hôtelières internationales peu présentes, ce qui peut s'expliquer notamment par l'existence d'un système qui favorise le trafic d'influence ou le versement de rémunérations destinées à obtenir une "protection", dans la mesure où les grandes multinationales hôtelières évitent généralement les environnements qui les empêchent de comptabiliser légalement leurs dépenses. Or, l'un des effets de la rareté est de faire monter les prix pour les consommateurs, ce qui veut dire que les restrictions de l'offre qui peuvent résulter des règles d'urbanisme ne sont pas anodines. Elles ont un impact direct sur les coûts de certains services.

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34 En matière de délais, certains coûts sont inévitables (par exemple ceux qui sont liés au délai de construction) mais d'autres peuvent être en partie évités (notamment si, au lieu de rester vacant, le site est utilisé à d'autres fins pendant l'instruction de la demande).

35 Au niveau de l'État, le délai entre le dépôt de la demande et son approbation était de l'ordre de 15 à 18 mois, mais il pouvait être plus variable au niveau local. De ce point de vue, ce ne sont pas les mesures de réglementation de l'énergie qui étaient en cause, puisque les décisions en matière de construction de centrales relevaient de l'échelon local, mais les règles d'aménagement et d'urbanisme, notamment en ce qui concerne l'impact des projets sur l'environnement.

La délivrance des autorisations d'urbanisme représente un fort pourcentage des cas de corruption. D'après une étude réalisée à partir d'articles de presse sur la corruption au niveau local et au niveau des États aux États-Unis, sur 372 affaires de corruption, 83 étaient liées au droit des sols. Autrement dit, le droit des sols était à l'origine de 22 % des affaires de corruption, en deuxième place parmi toutes les catégories de cas examinées[36].

3.1.4 Prévenir les effets préjudiciables pour les entreprises en place

Les autorités qui fixent les règles d'urbanisme ou qui sont chargées de délivrer les autorisations dans ce domaine se posent souvent la question, face à l'arrivée potentielle de nouveaux concurrents, des effets qui peuvent en résulter pour les entreprises existantes ou du niveau de la demande. Au Royaume-Uni, par exemple, l'ouverture de certaines grande surfaces de distribution est subordonnée à l'évaluation de leurs effets sur la vitalité et la viabilité des centres existants à l'intérieur d'une zone de chalandise donnée[37]. En Irlande, l'ouverture d'une nouvelle pharmacie ne doit pas avoir d'effets préjudiciables pour les autres officines. Aux États-Unis, de nouveaux projets sont restés bloqués tant que la preuve de l'insuffisance de l'offre n'a pas été apportée. Or, le critère des effets économiques est pour le moins ambigu. Car même si les pouvoirs publics y ont recours pour des raisons louables, par exemple pour préserver localement les équilibres commerciaux, dans la pratique, il fournit un argument procédural légitime à tous ceux qui s'opposent à un projet, avec pour conséquence de rendre encore plus difficile l'établissement de la concurrence. C'est donc un instrument curieux à utiliser dans une économie de marché, puisqu' il a précisément pour effet d'en enrayer les mécanismes, à moins qu'un but d'intérêt général clairement établi ne soit poursuivi.

L'évaluation des projets d'implantation d'activités commerciales sous l'angle de leurs effets économiques est une pratique très courante, comme le reflète l'indicateur de la réglementation relatif à la protection des entreprises existantes publié par l'OCDE en 2003 (graphique 2)[38].

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36 Cette étude porte sur des articles parus entre 1970 et 1976, ainsi que l'indiquent Gardner et Lyman (1978).

37 D'après la Commission de la concurrence (2007), "la PPS6 (déclaration de politique d'urbanisme) exige aussi que tout projet de surface commerciale de plus de 2 500 m² SHOB situé en proche ou lointaine périphérie qui n'est pas en conformité avec un plan d'urbanisme à jour donne lieu à une évaluation d'impact sur le commerce de détail, c'est-à-dire de ses effets sur la vitalité et la viabilité des centres existants à l'intérieur de la zone de chalandise considérée" (A(6)1 paragraphe 13).

38 Cet indicateur est calculé sur la base des réponses des pays à deux questions, dont l'une a directement trait aux intérêts commerciaux existants et à la participation de leurs représentants aux décisions concernant l'exercice de nouvelles activités commerciales. Ces questions sont les suivantes : 1) Les organismes professionnels ou les représentants des intérêts professionnels et commerciaux sont-ils associés aux décisions relatives à la délivrance des autorisations ou des permis nécessaires pour exercer une activité commerciale (indépendamment des autorisations liées à l'emplacement du point de vente), à la délivrance des autorisations ou des permis concernant l'emplacement du point de vente, ou au respect de la réglementation visant spécifiquement les grandes surfaces ; 2) La vente de certains produits est-elle réservée à des points de vente bénéficiant d'un monopole conféré par la loi (concession) au niveau local ou national ?

Graphique 2.

Source: Conway, P. et G. Nicoletti (2006), "Product Market Regulation in non-manufacturing sectors in OECD countries: measurement and highlights", Documents de travail du Département des Affaires économiques de l'OCDE, n° 530.

Les règles relatives aux effets économiques des projets sont inadaptées pour plusieurs raisons :

- L'action publique ne doit pas avoir pour but de protéger des entreprises de la concurrence, mais plutôt de veiller à maximiser les avantages de la concurrence pour les consommateurs[39].

- Les concurrents dont les projets ont des effets économiques préjudiciables sont précisément ceux qui présentent sans doute le plus d'avantages pour les consommateurs (pour des raisons de qualité ou de prix).

- Les critères d'évaluation fondés sur les retombées économiques reflètent l'intérêt de entreprises en place et peuvent être le signe d'un pouvoir réglementaire captif.

- Les entreprises sont mieux à même de juger si la demande est suffisante pour un nouveau produit que ne le sont les services administratifs.

3.1.5 Imposer des frais d'accès supérieurs aux coûts

Dans le secteur des infrastructures, les droits de passage sont un aspect important des réglementations d'urbanisme. Si des compagnies de télécommunications fixes, d'électricité et de gaz n'ont pas accès aux espaces nécessaires pour raccorder leurs réseaux aux usagers, il leur est impossible d'atteindre les consommateurs ou alors moyennant des solutions très coûteuses (livraison physique de combustibles liquides, par exemple). En règle générale, les droits de passage sur le domaine public, auxquels les fournisseurs d'infrastructure et parfois d'autres opérateurs peuvent avoir accès, sont régis par des

[39] Des exceptions sont possibles lorsqu'il y a de bonnes raisons de restreindre la concurrence au nom de l'intérêt général, comme c'est le cas par exemple avec la politique des brevets, dont le but est de protéger des idées nouvelles pendant un certain temps afin d'en tirer des profits qui inciteront à investir.

mécanismes bien établis. La question de l'accès aux droits de passage sur le domaine public est particulièrement importante pour le déploiement de nouveaux services (par exemple pour les réseaux de télécommunications à fibre optique) ou de services concurrents (lorsque les opérateurs historiques ne mettent pas leurs installations à la disposition des nouveaux entrants et que la construction de nouvelles installations peut être rentable)[40]. Elle l'est d'autant plus que la concurrence s'est accrue dans le secteur des infrastructures.

Le dispositif réglementaire qui régit l'accès aux droits de passage varie grandement d'un pays à l'autre dans la zone OCDE. Dans certains cas, les règles nationales limitent le champ d'action des collectivités locales en matière de droits de passage (encadré 2). Dans d'autres, les collectivités locales jouissent d'une grande liberté pour déterminer les modalités et les conditions d'accès.

Lorsque l'espace ne manque pas (ce qui est souvent le cas pour les réseaux de câbles en surface ou souterrains), le prix de l'accès doit en principe refléter les coûts marginaux si l'on veut faire le meilleur usage possible des ressources. Pour une commune, ces coûts marginaux peuvent être liés au traitement des demandes d'autorisation, à la production de la documentation requise, etc. Si la commune y intègre un profit pour elle-même, cela peut peser sur le déploiement d'un service par ailleurs souhaitable ainsi que sur la concurrence. Lorsque l'espace manque, ce qui est le cas pour de nombreuses concessions, la tarification de l'accès devrait être fonction de la rareté du bien considéré et du coût d'opportunité de l'occupation de l'espace par rapport aux autres usages possibles.

Lorsque les autorités locales jouissent d'une grande liberté de décision, elles peuvent être tentées de considérer les droits de passage qu'elles contrôlent comme une source de recettes. Dans plusieurs pays, les droits de passage sur le domaine public sont gratuits (Danemark, Allemagne, Luxembourg, Autriche, Finlande, Royaume-Uni) même si une contribution destinée à couvrir les frais peut être réclamée (frais d'inspection et coûts de réfection de la chaussée, par exemple) . Dans d'autres, les municipalités taxent les opérateurs en fonction de leurs revenus, qui n'ont aucun rapport avec les coûts encourus par la ville.

Encadré 2. Accès aux droits de passage sur le domaine municipal au Canada

Dans sa décision Télécom CRTC 2001-23 accordant à l'opérateur Ledcor un droit de passage sur le domaine public municipal, le régulateur canadien des télécommunications (CRTC) a statué que la ville de Vancouver était en droit de recouvrer uniquement les coûts causals, par exemple les coûts d'approbation des plans et d'inspection, les coûts de déplacement des installations, les coûts de réfection de la chaussée et la perte de productivité, mais qu'elle ne pouvait pas percevoir de redevance d'occupation. Le CRTC explique que le principe des coûts causals doit permettre aux municipalités et aux opérateurs de négocier les termes selon lesquels une municipalité accorde à un opérateur la permission de construire, exploiter et entretenir des lignes de transmission sur le domaine municipal. La ville a fait appel auprès de la Cour d'appel fédérale, qui a confirmé la décision du CRTC, et la Cour suprême du Canada a rejeté un nouveau recours de la Fédération canadienne des municipalités.

Imposer des charges élevées pour le déploiement de la fibre optique peut décourager les concurrents potentiels de l'opérateur historique, qui n'ont généralement pas les mêmes sources de recettes que lui. En outre, dans la mesure où les entreprises en place bénéficient d'un "droit acquis", disposant déjà de fourreaux de câbles qui ne leur coûtent rien, les mesures prises par les autorités locales qui taxent les nouvelles installations créent ainsi un droit d'entrée plus élevé pour les nouveaux entrants que pour les opérateurs historiques, cela même en contradiction avec les politiques publiques générales visant à promouvoir la concurrence sur le marché des infrastructures.

[40] Pour une étude récente sur l'accès des opérateurs de télécommunications aux droits de passage sur le domaine public, voir DSTI/ICCP/CISP(2007)5/REV1.

3.1.6 Effets de l'exclusion

Après avoir vu quelques exemples de la manière dont les règles d'urbanisme et les régimes d'autorisation en vigueur au plan local peuvent constituer des obstacles à l'entrée sur le marché, la question se pose naturellement de savoir si cette situation est dommageable. Par exemple, si un commerce alimentaire se voit refuser l'autorisation de s'installer sur un site par ailleurs approprié, cela a-t-il des conséquences préjudiciables ? Bien que notre but ne soit pas d'analyser dans le détail les effets des situations d'exclusion sur la concurrence, il nous paraît néanmoins utile d'en dire quelques mots.

Les effets en question peuvent se manifester au niveau local (auquel cas les externalités induites peuvent être prises en compte par les résidents qui les subissent) ou au niveau régional, voire à plus grand échelle (auquel cas les autorités chargées de l'urbanisme et les résidents risquent de ne pas se rendre compte, localement, que les coûts supportés ont une contrepartie positive au plan régional). Si les avantages induits sont largement dispersés et les coûts, au contraire, concentrés au niveau local, il n'y a guère de raison pour qu'un projet dont l'effet net est négatif au plan local soit approuvé. On peut en conclure soit que l'examen de ce type de projet ne doit pas voir lieu au niveau local, soit, pour que les résidents concernés tiennent mieux compte de l'impact de leurs décisions, que la tarification soit aussi locale que possible. A titre d'exemple, il vaut mieux avoir un prix "nodal" (local) de l'électricité qu'un prix national, car cela encouragera vivement les usagers locaux, s'ils se trouvent dans une zone où l'électricité est chère, à accepter la construction de nouvelles capacités de production à proximité (ce qui aura pour effet de réduire le prix nodal).

Pour que le fait d'être exclu du marché ait un effet négatif, il faut que trois conditions soient réunies :

- que les obstacles à l'entrée bloquent l'accès d'entreprises qui, sans cela, se seraient implantées sur le marché ;
- que les consommateurs soient lésés :
  - soit par une véritable limitation de la concurrence,
  - soit par une véritable limitation de l'offre ;
- que ces effets préjudiciables soient dus à l'exclusion des candidats à l'entrée.

Établir la condition d'exclusion est un exercice qui doit se fonder sur les faits propres à chaque situation, sur l'examen des mesures prises et sur la législation qui les a motivées. Nous verrons ci-après comment les consommateurs peuvent être lésés par une limitation de la concurrence au plan local ou par une réduction globale de l'offre.

Exclure du marché les concurrents et fournisseurs locaux peut avoir des effets préjudiciables.

Au plan local, les effets néfastes de l'exclusion peuvent être mis en évidence dans trois domaines : l'immobilier commercial, l'immobilier résidentiel et l'immobilier de bureaux.

Effets sur l'immobilier commercial

La localisation d'un commerce est un facteur très important. Le fait que les déplacements aient un coût a une incidence non seulement sur la concurrence entre points de vente, mais aussi sur les décisions des

particuliers comme des entreprises quant à leur lieu d'installation. Les modèles de concurrence locale intègrent souvent des coûts de déplacement ou de recherche[41]. Leurs principaux critères sont les suivants :

- Les distances de déplacement comptent pour les consommateurs.
- Les commerces peuvent avoir avantage à pratiquer des prix plus élevés lorsqu'ils sont éloignés de leurs concurrents que lorsqu'ils en sont proches.
- Lorsque les entreprises font le choix d'un emplacement, elles tiennent compte en particulier des habitudes de déplacement et des coûts de transport supportés par les consommateurs.
- Lorsque les particuliers choisissent leur lieu de résidence, ils tiennent compte en particulier de la distance par rapport à leur(s) lieu(x) de travail et par rapport aux commerces[42].

Pour nombre d'entreprises, la concurrence la plus forte est celle qui vient des commerces les plus proches géographiquement[43]. L'"Enquête sur le marché de la distribution alimentaire au Royaume-Uni" menée récemment par la Commission britannique de la concurrence, qui étudie l'impact des nouveaux entrants sur les commerces situés à proximité, livre des données intéressantes à ce sujet. Il en ressort que l'impact varie suivant la distance des entrants par rapport aux commerces existants et la taille relative de ces derniers. Lorsqu'un nouveau concurrent s'installe dans le voisinage immédiat d'un autre commerce, l'effet est beaucoup plus marqué que s'il s'installe sur un site plus éloigné. Cela n'a rien d'étonnant dans la mesure où, pour les achats alimentaires, le temps de trajet en voiture entre sans doute pour une part importante dans le choix du magasin[44].

Les effets estimés de l'entrée d'un nouveau commerce sur le chiffre d'affaires des commerces existants sont indiqués au tableau 1.

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41 Voir le début d'une longue lignée de modèles de coûts de déplacement dans Hotelling (1929).

42 Ces généralisations sont à prendre comme telles et ne sauraient s'appliquer dans toutes les circonstances théoriquement envisageables.

43 Le fait que la contrainte concurrentielle la plus forte vienne du concurrent le plus proche apparaît dans divers modèles de produit dans lesquels les points de vente sont différenciés par leur emplacement. Entre autres exemples, Stahl (1982), Dudey (1990) Ridley, Sloan et Song (2007) montrent que des règles de zonage qui réduisent le périmètre à l'intérieur duquel les concurrents peuvent s'installer, peuvent aussi réduire les coûts de recherche pour les consommateurs (dès lors qu'ils se trouvent dans la zone appropriée), ce qui renforce la concurrence et fait baisser les prix.

44 L'alimentation n'est pas le seul secteur dans lequel la proximité des commerces est un facteur important. Pinske, J, Slade, M et C Brett (2002) relèvent que les variables relatives à la proximité immédiate contribuent à expliquer les effets de concurrence sur le marché de gros de l'essence aux États-Unis. De son côté, Ennis (1995) montre que même dans une grande zone géographique comportant une centaine d'hôpitaux, la fermeture d'un établissement permet à l'établissement voisin, distant de trois rues seulement, d'augmenter ses prix de plus de 20 %. Froeb, Tschantz et Crooke (2003) rapportent que “pour donner son agrément à la fusion Central Parking Systems-Allright [deux exploitants de parcs de stationnement], le ministère de la Justice des États-Unis a posé comme condition préalable le démantèlement des activités des candidats à la fusion dans cinq pâtés de maisons où ils détenaient ensemble plus de 35 % du marché”. Davis (2006) constate que dans le secteur des cinémas, "les hausses de prix ont plus d'effet lorsque les salles sont proches que lorsqu'elles sont éloignées, et leurs effets sur les recettes deviennent tout à fait négligeables lorsque la distance dépasse 30 kilomètres”.

Tableau 1. Effet estimé à moyen terme de l'implantation d'un nouveau commerce sur le chiffre d'affaires des commerces existants (en pourcentage)

	Effet (%) sur le chiffre d'affaires des commerces ayant une surface comprise entre 280 et 1400 m²	Effet (%) sur le chiffre d'affaires des commerces de plus de 1400 m²
Entrant : moyenne surface (280-1400 m²)	-5.4*	-1.6*
-- temps de trajet : moins de 5 minutes	-2.3*	-0.27
-- temps de trajet : entre 5 et 10 minutes	-0.59	-0.44
-- temps de trajet : entre 10 et15 minutes	-0.38	0.3
-- temps de trajet : entre 15 et 20 minutes		
Entrant : grande surface (1400-4000 m²)		
-- temps de trajet : moins de 5 minutes	-15*	-7.1*
-- temps de trajet : entre 5 et 10 minutes	-2.1	-5.1*
-- temps de trajet : entre 10 et15 minutes	0.37	-2.3*
-- temps de trajet : entre 15 et 20 minutes	-0.31	-0.7
Entrant : très grande surface (> 4000 m²)		
-- temps de trajet : moins de 5 minutes	-12*	-11*
-- temps de trajet : entre 5 et 10 minutes	-4.4*	-6.9*
-- temps de trajet : entre 10 et15 minutes	-.023	-2*
-- temps de trajet : entre 15 et 20 minutes	0.54	-0.24
Données trimestrielles pour le magasin	28,070	21,868

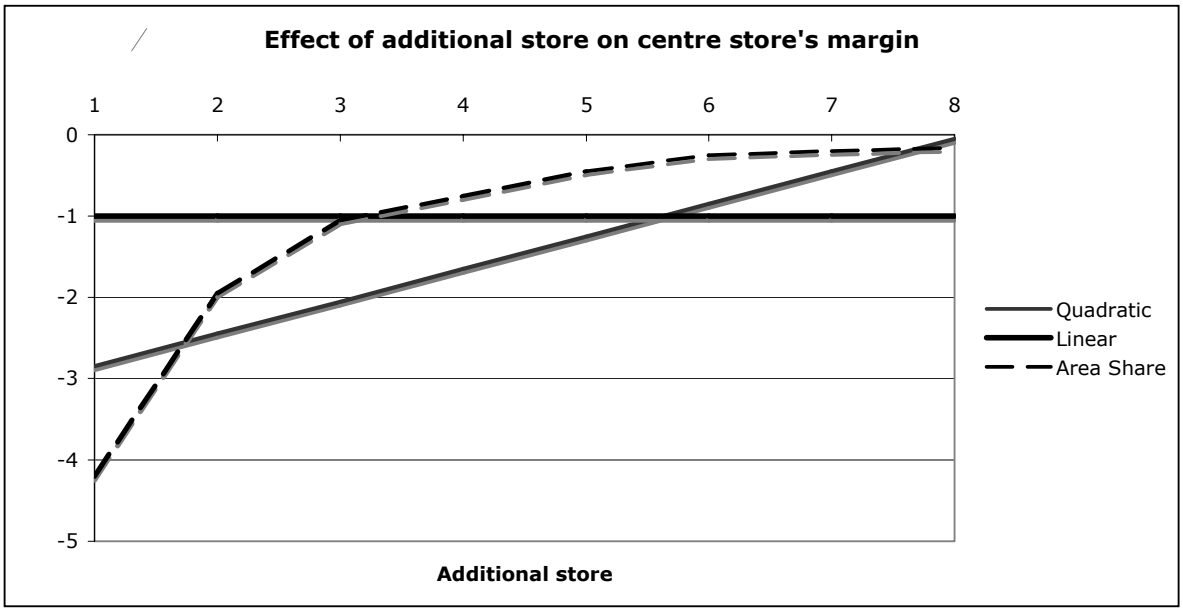
* indique que l'estimation à moyen terme est sensiblement différente de 0 au seuil de 1 %.
Source : Commission de la concurrence A4(3)-6, tableau 3

La Commission de la concurrence examine par ailleurs l'impact de la concurrence sur les marges bénéficiaires variables des commerces alimentaires et arrive à la conclusion que "les grandes surfaces ont un impact non négligeable sur les marges bénéficiaires des autres grandes surfaces, alors que les magasins de plus petite taille ne semblent pas avoir d'effet statistiquement significatif"(A4(6)-4)[45]. De plus, elle constate que l'impact sur les marges bénéficiaires est plus grand pour le premier entrant que pour le deuxième, plus grand pour le deuxième que pour le troisième, et ainsi de suite.

Plusieurs modèles sont ensuite examinés pour mesurer l'impact de l'arrivée d'un distributeur alimentaire supplémentaire (enseigne) sur la marge exprimée en pourcentage d'un magasin donné (graphique 3). L'un d'entre eux (la spécification linéaire) suppose une baisse constante des bénéfices avec l'arrivée de chaque nouvelle enseigne, ce qui est peu probable puisque les données montrent que la baisse de rentabilité est en réalité beaucoup plus grande avec l'arrivée du premier concurrent qu'avec celle des suivants. D'après la Commission de la concurrence (2007a), la spécification quadratique fait apparaître une baisse des bénéfices du magasin central avec l'arrivée de chaque concurrent supplémentaire, de même que le modèle utilisant la "part de surface". Dans ces deux derniers cas, la diminution des bénéfices qui survient lors du passage du monopole au duopole est beaucoup plus importante que lors du passage du duopole à la présence de trois entreprises.

45 Dans l'affaire US FTC (Commission fédérale du commerce) contre Staples aux États-Unis, le juge constate de même que les grandes surfaces forment leur propre marché, et que les autres magasins, c'est-à-dire essentiellement les petits commerces (qui pouvaient représenter jusqu'à 90 % des ventes de fournitures de bureau) ne constituent pas une contrainte concurrentielle (voir *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (faisant droit à la demande d'injonction provisoire soumise par la FTC).)

Graphique 3.



Commission de la concurrence (2007a) A4(6)-20.

De manière générale, l'arrivée d'une nouvelle enseigne réduit les marges bénéficiaires des commerces alimentaires installés à proximité. Qui plus est, comme le constate la Commission de la concurrence, le rapport qualité-prix des commerces est meilleur pour les consommateurs dans les quartiers où les commerces sont plus rapprochés que dans ceux où ils sont plus éloignés[46].

La Commission britannique de la concurrence n'est pas la seule autorité à avoir enquêté sur l'impact des réglementations d'urbanisme. En Espagne, le tribunal de défense de la concurrence a publié un rapport faisant le point sur le droit de l'urbanisme et son application dans le pays en 1992, dans lequel il est écrit que "des spécifications extrêmement précises en matière d'urbanisme constituent une cause fréquente de restrictions à la concurrence dans d'autres secteurs et une cause certaine de relèvement des prix des terrains et du logement"[47] (DAFFE/CLP(93)17/06).

46 Voir l'appendice 5.1, "Local Concentration and Individual Indicators of the Store-Level Retail offer" (Concentration au niveau local et indicateurs individuels de l'offre au niveau du point de vente au détail).

47 Le tribunal espagnol chargé de défendre la concurrence pose les principes suivants :

--"L'utilisation des sols urbains doit être définie dans toute la mesure du possible sous la forme de règles générales et aussi peu que possible en vertu des pouvoirs discrétionnaires des autorités régionales et municipales.

-- Il faut s'en remettre davantage aux utilisations proposées par les propriétaires et les promoteurs ; les refus des utilisations proposées doivent être suffisamment motivés.

-- Il faut désigner avec précision les terrains non constructibles réservés à des fins précises en permettant l'exploitation à des fins d'urbanisme de tout lot non spécifiquement désigné.

-- Il faut procéder à une réforme des finances municipales fondée plus sur la fiscalité que sur la possibilité de négocier les utilisations des sols afin de dégager des recettes."

Effets sur l'immobilier résidentiel

L'exclusion des concurrents (ou la réduction de l'offre) n'est pas seulement dommageable pour le commerce de détail, elle peut l'être aussi pour la construction résidentielle. Dans la mesure où les règles d'urbanisme en vigueur restreignent la construction de nouveaux logements dans un secteur géographique donné, elles y font monter les prix de l'immobilier. C'est notamment la raison pour laquelle les logements bon marché destinés aux ménages modestes ne trouvent souvent à l'échelon local qu'un soutien politique limité[48]. Ainsi, les règles de zonage qui limitent la densité de logements neufs dans un quartier peuvent servir à empêcher la construction d'immeubles d'habitation collectifs. Même lorsque des "objectifs incitatifs"[49] pour développer le logement social ont été intégrés au plan d'aménagement régional, d'autres facteurs peuvent être privilégiés dans les décisions d'affectation des sols de manière à empêcher ce type de projets.

D'après Fischel (1999), "le zonage confère à ceux qui détiennent le pouvoir politique à l'échelon local un intérêt dans le bien de chaque propriétaire foncier. C'est ce qui permet aux municipalités de modeler comme elles l'entendent leur environnement résidentiel et leur assiette fiscale sur le foncier". Pour lui, les électeurs voteront donc, par intérêt personnel, pour les mesures "qui augmenteront la valeur de leur bien". En outre, fait-il remarquer, les coûts de transaction liés à la possibilité de négocier les changements d'affectation du sol sont tels qu'il peut être difficile de parvenir à des solutions mutuellement avantageuses pour les électeurs et pour les propriétaires fonciers soucieux d'urbaniser leurs terrains. Sa conclusion est que l'effet conjugué de la dotation que représente le statu quo sur les droits de propriété et du niveau élevé des coûts de transaction associés à la vente des utilisations du sol donne lieu à une urbanisation du territoire caractérisée par "des densités extrêmement faibles dans les zones métropolitaines américaines".

Ault et Ekelund (1988) font observer que si le zonage peut se justifier pour résoudre des problèmes contractuels complexes entre personnes privées, il conviendrait de l'examiner sous l'angle de la recherche de rente, car il fait du droit de propriété une ressource rare qui suscite la concurrence (entraînant de ce fait des dépenses réelles). En effet, si les promoteurs immobiliers ne sont généralement pas autorisés à acheter directement des droits d'urbanisation, il existe de nombreuses formes de dépenses indirectes (pour les services de consultants, d'avocats, d'urbanistes, d'architectes) qui passent par l'utilisation de ressources réelles, et pas seulement par des transferts de richesse[50].

Dans une étude des travaux existants, Quigley et Rosenthal (2005) observent que "l'encadrement de l'urbanisation, les plafonds de densité imposés par le zonage, les restrictions à la croissance urbaine et les délais d'instruction des demandes d'autorisation sont autant de facteurs qui ont contribué à la hausse des prix des logements". Ils notent cependant que les données et les méthodes utilisées dans de nombreuses analyses laissent place au doute, dans la mesure notamment où les variables représentatives de la réglementation peuvent être des variables endogènes. Quigley et Raphael (2005) estiment qu'en Californie les restrictions à la croissance urbaine se traduisent effectivement par une hausse des prix de l'immobilier. Ils montrent que des niveaux de restriction accrus en matière d'urbanisme ont un impact considérable sur l'offre et le prix des logements. Leur étude porte sur plusieurs villes de Californie qui jouissent d'une assez grande liberté en matière d'aménagement et de délivrance des autorisations d'urbanisme, et où les promoteurs n'ont pas par défaut le droit de réaliser leurs projets dès lors qu'ils sont conformes aux réglementations en vigueur. Quigley et Raphael utilisent les résultats d'une enquête auprès des services

48 Cela n'est pas vrai dans tous les pays ni dans toutes les communes. Dans certains pays de l'OCDE, on observe en effet localement une forte pression politique pour la construction de logements bon marché.

49 C'est-à-dire des objectifs non quantitatifs qui ne donnent lieu à aucune pénalité ou récompense selon qu'ils sont ou non respectés.

50 Pour une explication des coûts de la recherche de rente en termes de bien-être, voir Tullock (1967).

chargés de l'aménagement territorial pour évaluer le degré de restrictivité de la réglementation immobilière dans 407 villes californiennes, sur la base de 15 mesures différentes parmi lesquelles, notamment, l'obligation "d'un vote du conseil municipal à la majorité qualifiée ou de l'approbation des électeurs pour l'accroissement des densités ". Une ville sur cinq environ n'avait adopté aucune mesure restrictive en matière d'urbanisme, tandis que 40 % en avaient trois ou plus. En étudiant la relation entre mesures de réglementation et indices des prix pour chaque ville, les auteurs constatent que "chaque mesure réglementaire supplémentaire est associée à une hausse statistiquement significative de 3 % (1990) et de 4.5 % (2000) des prix des résidences principales, et de 1 % (1990) et de 2.3 % (2000) des prix des logements locatifs"[51] (p. 325). Il relèvent aussi, comme on pouvait s'y attendre, que les réglementations d'urbanisme ont en fait pour corollaire une progression plus lente du stock de logements. De leur côté, Glaeser, Gyourko et Saks (2005) observent qu'à Manhattan les prix des logements en copropriété dépassent de 107 % le coût marginal de construction.

Effets sur l'immobilier de bureaux

La réduction de l'espace disponible n'est pas seulement préjudiciable pour la distribution au détail et le secteur résidentiel, elle l'est aussi pour l'immobilier commercial. Selon Cheshire et Hilber (2007), l'écart entre les prix de l'immobilier commercial et les coûts marginaux de la construction peut s'analyser comme une "taxe réglementaire" pour les raisons suivantes :

> *"dans un monde où les promoteurs immobiliers sont en concurrence et où l'on peut librement entrer sur le marché ou en sortir (deux hypothèses plausibles), le prix sera égal au coût moyen (minimum) puisque cela englobe un bénéfice 'normal'. Le coût marginal de la construction augmentant avec la hauteur des immeubles, s'il n'y a pas de limite de hauteur imposée aux bâtiments, les immeubles devraient en principe s'élever jusqu'au point où le coût marginal de l'étage supplémentaire devient égal à son prix marchand. S'il est moins rentable au m² de bâtir en hauteur que de bâtir sur une plus grande surface, le coût marginal d'un étage supplémentaire n'en devrait pas moins rester égal au prix du marché : les bâtiments seront simplement plus bas en moyenne, et le bâti globalement plus étalé. Bertaud et Brueckner (2005) ont démontré l'équivalence formelle entre les limites de hauteur et les restrictions sur l'offre de terrains à bâtir. Par conséquent, tout écart entre le prix observé sur le marché et le coût marginal de construction peut s'interpréter comme une 'taxe réglementaire' – c'est-à-dire le coût supplémentaire de l'espace résultant – globalement – du système de réglementation en vigueur sur le marché considéré. Si le prix de vente d'un étage supplémentaire de bureaux dépassait le coût marginal de sa construction, les promoteurs auraient alors une possibilité d'arbitrage. La différence entre le prix de l'espace et son coût de construction est donc forcément imputable à une forme ou une autre de réglementation" (Cheshire et Hilber (2007), p. 5).*

Cheshire et Hilber calculent le niveau de cette taxe réglementaire dans un certain nombre de villes européennes, comme Glaeser, Gyourko et Saks (2005) l'ont fait avant eux pour Manhattan. Les résultats de ces calculs sont présentés au tableau 2. Parmi les villes étudiées, on s'aperçoit que certains quartiers de Londres supportent la "taxe réglementaire" la plus forte, le prix de vente moyen des bureaux dans le *West End* étant huit fois supérieur au coût marginal de construction. Beaucoup d'autres grandes villes européennes subissent aussi une "taxe réglementaire" élevée, Bruxelles (0.89) et Manhattan (0) ayant quant à elles la plus faible pour l'immobilier de bureaux. Le tableau 2 indique à la fois l'incidence de la réglementation sur le prix des bureaux et la diversité probable des niveaux de réglementation et de leurs effets selon les villes.

[51] L'intégration d'un effet fixe au niveau du comté réduit les estimations ponctuelles des deux tiers environ, mais les effets en coupe demeurent importants.

Tableau 2. Coût de l'immobilier de bureaux

Estimations de la "taxe réglementaire" sur l'immobilier de bureau (par rapport au coût marginal de construction) dans diverses grandes villes (voir Cheshire et Hilber 2007 pour plus de précisions)

	Taxe réglementaire estimée		
Ville/quartier	**1999**	**2005**	**Moyenne**
Londres-West End[1]	7.62	8.37	8.00
Londres-City[1]	4.68	4.31	4.49
Francfort[1]	5.44	3.31	4.37
Stockholm[1]	4.28	3.30	3.79
Milan[1]	2.07	4.11	3.09
Paris[1]	2.35	3.75	3.05
Barcelone[1]	2.23	3.16	2.69
Amsterdam[1]	2.12	1.92	2.02
Paris-La Défense[1]	1.41	1.93	1.67
Bruxelles[1]	0.52	0.84	0.68
Manhattan[2]	-	-	0
Au Royaume-Uni			
Canary Wharf[3]	3.43	2.77	3.26
Londres-Hammersmith[3]	2.77	1.87	2.19
Manchester[3]	2.71	2.50	2.30
Newcastle upon Tyne[3]	1.06	1.19	0.97
Croydon[3]	1.18	0.99	0.94
Edimbourg[3]	3.11	2.62	2.91
Glasgow[3]	2.33	2.05	2.04
Maidenhead[3]	3.72	2.27	2.70
Reading[3]	2.71	1.61	2.03
Bristol[3]	1.53	1.96	1.57
Birmingham[3]	2.59	2.68	2.50
Leeds[3]	2.15	2.17	1.93

1 Les calculs reposent sur des données fournies par Jones Lang LaSalle (JLL) pour les valeurs vénales des immeubles, et par Gardiner et Theobald, pour les coûts de construction. Les données de JLL sont des valeurs hypothétiques fondées sur les rendements médians et les loyers sur le marché haut de gamme. Nous les avons ajustées pour obtenir les valeurs réelles. Les estimations du coût *moyen* de construction de Gardiner et Theobald sont ajustées à l'aide d'un autre facteur de réduction, déduit des données fournies par Davis Langdon, pour obtenir le coût *margina*l construction. Les méthodes de calcul sont exposées en détail dans Cheshire et Hilber (2007).

2 Estimations d'après Glaeser, Gyourko et Saks (2005).

3 Les estimations de la valeur des biens reposent sur des données fournies par CBRE, IPD et DCLG. Le coût marginal de construction des immeubles de bureaux dans chaque ville ou chaque quartier a été spécialement calculé pour nous par Davis Langdon. On estime que ces données fournissent ensemble une meilleure estimation des valeurs implicites de la 'taxe réglementaire' que les moyennes ajustées utilisées pour l'Europe continentale. Les deux estimations parallèles pour la ville de Londres fournissent un point de comparaison. Voir Cheshire et Hilber (2007) pour plus de précisions.

Exclusion des concurrents et réduction de l'offre régionale ou nationale

La planification territoriale est un enjeu éminemment politique, surtout au niveau local. Les conseils municipaux passent une grande partie de leur temps à examiner des problèmes d'aménagement et d'urbanisme, comme en témoigne par exemple une source estimant qu'aux États-Unis "les conseils municipaux consacrent 60 à 90 pour cent de leur temps à la question du zonage" (voir Siegan (1976, 79) cité par Fischel (1985) p. 38). Une autre étude révèle par ailleurs que trois ou quatre objections suffisent

généralement, lors de l'examen de projets d'urbanisme industriel ou commercial, pour entraîner le refus des autorités[52].

Parfois, la planification urbaine locale est un moyen pour des résidents actifs ou des organisations militantes de bloquer ou de ralentir des projets dont l'impact géographique sur l'offre dépasse largement la commune concernée. Certains jugeront par exemple tel projet néfaste pour leur cadre de vie, inadapté à la situation de la commune ou de nature à faire baisser la valeur de leur propriété. Les organisations peuvent avoir quant à elles des objectifs plus vastes (par exemple en matière d'environnement) qui les amènent à intervenir dans les débats locaux (à propos de l'implantation des centrales nucléaires et des lignes électriques, notamment)[53]. Les décharges, centrales électriques, lignes de transport d'électricité et terminaux GNL sont quelques exemples de projets parmi tant d'autres qui risquent d'être rejetés au nom des réglementations d'urbanisme[54]. Or les projets de ce type ont une importance économique qui n'est pas simplement locale mais intéresse toute une région. Dans une situation où l'offre est insuffisante (ou menace de l'être), en particulier, les règles et d'urbanisme et les restrictions qu'elles font peser sur la construction de nouvelles installations peuvent effectivement avoir de graves répercussions sur le prix des ressources.

Durant et après la crise énergétique en Californie, certains prétendaient que les règles d'urbanisme ralentissaient la construction de nouvelles centrales électriques qui auraient pu combler en grande partie l'insuffisance de l'offre à l'origine de la flambée des prix[55]. Un marché déréglementé a commencé à fonctionner en Californie en avril 1998 conformément aux dispositions d'une loi adoptée en 1996. En 1998 et en 1999, aucune anomalie n'a été observée au niveau des prix, mais un certain nombre de facteurs se sont conjugués qui ont entraîné un déséquilibre entre l'offre et la demande en 2000[56], aboutissant au cours de l'été à une hausse de 500 % du prix de gros de l'électricité qui n'allait plus redescendre avant l'été 2001. Des délais d'instruction parfois longs pour obtenir les autorisations d'implantation et d'exploitation des installations de production électrique sont l'une des causes qui expliquent le déséquilibre de la demande. Une fois le marché déréglementé et les nouvelles règles de fonctionnement clairement établies, un certain nombre de projets de construction de centrales de grande capacité ont été déposés auprès de la Commission

52 Voir Tideman (1969).

53 Un argument souvent invoqué avant la crise énergétique, et qui a encore des adeptes, est qu'au lieu de construire de nouvelles centrales électriques, les pouvoirs publics feraient mieux de réduire la consommation d'électricité, en encourageant l'utilisation d'équipements moins énergivores, les constructions qui réduisent le plus possible les transferts de température entre intérieur et extérieur, etc.

54 Les lignes électriques posent un problème particulier et sont peut-être l'un des équipements les plus difficiles à mettre en place, car si l'expansion de la capacité de production est de plus en plus indispensable pour garantir l'approvisionnement énergétique, il est difficile d'étendre le réseau parce que les lignes de transport traversent généralement une multitude de terrains privés et le territoire de nombreuses communes.

55 Dans AIE (2005), Stridbaek écrit “Par exemple, le syndrome "surtout pas chez moi" (“*not in my back yard*” ou NIMBY en anglais) a fait obstacle à tous les nouveaux travaux de construction qui étaient nécessaires pour satisfaire la demande”. On rencontre aussi parfois en anglais l'acronyme BANANA (“*build absolutely nothing anywhere near anybody*”, c'est-à-dire grosso modo ne construisez jamais rien nulle part ni à côté de personne) pour désigner la même attitude.

56 Les conditions défavorables qui ont contribué à la hausse brutale des prix sont notamment les suivantes : un épisode de sécheresse qui a réduit la capacité de production hydro-électrique par rapport à 1996, un accroissement de la consommation d'électricité lié aux conditions météorologiques, le maintien de la réglementation dans bon nombre de régions voisines avec pour conséquence de limiter la quantité d'électricité que les producteurs étaient en mesure ou désireux de vendre en dehors de leur zone de desserte, une tarification de la consommation domestique difficile à aligner sur les prix de gros, une forte augmentation du prix du gaz naturel qui alimentait les installations de production “marginales”, et une forte augmentation du prix des permis d'émissions d'oxyde d'azote (NOx). Voir Congressional Budget Office (2001).

de l'énergie. La procédure d'approbation faisait intervenir à la fois les autorités locales et les services administratifs de l'État. Au moment de la crise, Brennan (2001) estimait qu'"à plus long terme, ce qu'il est convenu d'appeler l'attitude NIMBY ("*not in my backyard*", c'est-à-dire "surtout pas chez moi"), qui consiste finalement à empêcher toute localisation, approbation ou construction d'une centrale électrique, est une contrainte environnementale qui pèse sur l'offre énergétique en Californie". Cependant, si ces préoccupations avaient leur importance avant la flambée des prix, elles ont apparemment perdu de leur pertinence depuis lors, puisque la capacité de production installée n'a cessé d'augmenter depuis la crise (graphique 4).

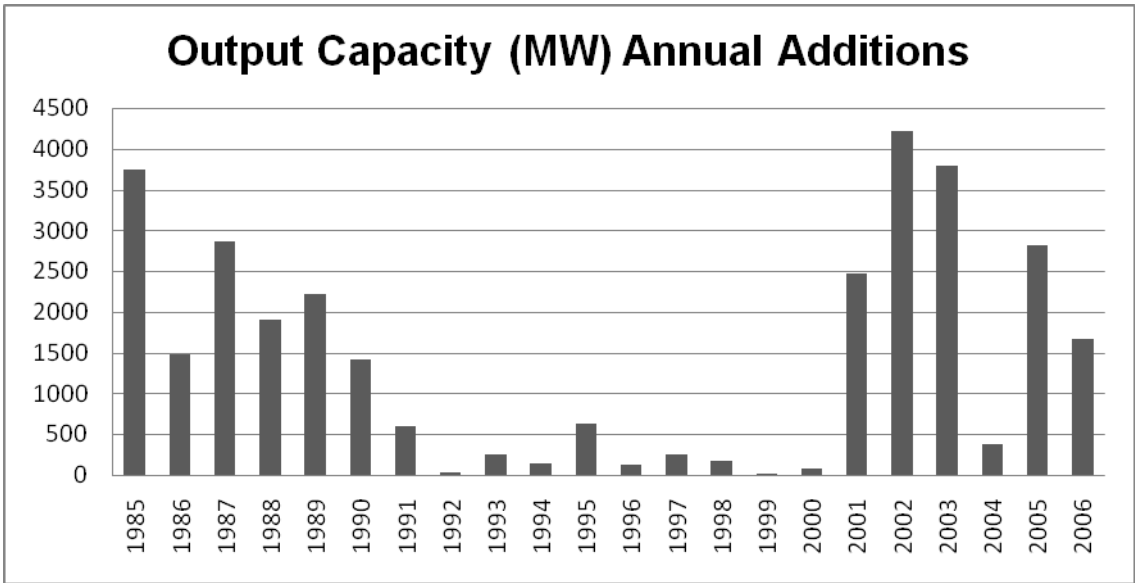
La Commission de l'énergie de la Californie, organe habilité à autoriser la construction de centrales électriques sur le territoire de cet État, cite parmi les "éléments déterminants" qui conditionnent l'implantation de nouvelles installations "la disponibilité de projets de compensation des émissions, l'opposition du public et des administrations locales, [et] les contraintes d'urbanisme". Le délai entre le dépôt d'une demande de permis auprès de la Commission de l'énergie et l'entrée en service d'une installation était au total de l'ordre de 3 à 4 ans pour les dossiers déposés en 1997-1998, ce qui signifie que les trois grandes unités achevées en 2001 avaient toutes fait l'objet de demandes déposées en 1997 ou en 1998[57]. Le graphique 4 illustre le rythme de construction des centrales électriques entre 1985 et 2006[58]. On y observe un singulière absence d'activité pendant la période qui a précédé la déréglementation (peut-être due à l'incertitude de la situation) puis une augmentation spectaculaire de capacité à partir de 2001, laquelle s'explique en partie par le fait qu'après le début de la crise, le gouverneur de Californie a été amené à signer un décret en vue d'accélérer la procédure d'approbation pour la mise en place en urgence de nouvelles unités de production d'électricité[59]. Cette procédure d'approbation accélérée a permis de construire rapidement un certain nombre de centrales (dans un délai de 2.5 à 3 mois), dont l'entrée en service, conjuguée à une demande plus modeste, a marqué la fin des coupures tournantes à l'automne 2001.

57 Il s'agit de Sunrise (Docket 98-AFC-4), Sutter-Calpine (97-AFC-2) et Los Medanos (Pittsburg) (Docket 98-AFC-1).

58 Les chiffres additionnent la capacité en pointe et la capacité en base, toutes deux nécessaires pour fournir la puissance de pointe.

59 "Le gouverneur a demandé à la Commission de l'énergie de se prévaloir de son pouvoir d'autorisation de nouvelles installations de production électrique en cas d'urgence, conformément aux dispositions du Code des ressources publiques, section 25705, pour donner son feu vert à la construction de nouvelles centrales de pointe et de centrales exploitant des énergies renouvelables en vue d'une mise en service d'ici le 30 septembre 2001. Les projets de centrales électriques mis en route dans le cadre de cette procédure sont autorisés à déroger aux dispositions du California Environmental Quality Act (loi californienne relative à la qualité de l'environnement" (voir http://www.energy.ca.gov/sitingcases/peakers/index.html).

Graphique 4.



Source : calculs de l'auteur à partir de la base de données sur les centrales électriques de la Commission de l'énergie de l'État de Californie (2007).

Le retard avec lequel les nouvelles installations sont entrées en service a eu de lourdes conséquences en termes de coût. Globalement, "à l'été 2000, le chiffre d'affaires du commerce de l'électricité sur le marché de gros était passé à 8.98 milliards de dollars contre 2.04 milliards un an plus tôt". D'après Borenstein, Bushnell et Wolak (2002), " cette augmentation était imputable pour 21 pour cent aux coûts de production, pour 20 pour cent à la rente de crise concurrentielle et pour 59 pour cent au pouvoir de marché". Face aux problèmes du marché, l'État de Californie a fini par relever de 50 % les prix de détail de l'électricité et acheter pour plus de 40 milliards de dollars de contrats à long terme, d'une durée pouvant aller jusqu'à 20 ans, pour un prix d'achat bloqué à un niveau élevé, supérieur de "plus de 50 % aux futurs prix spot escomptés" (Borenstein (2002)). Au total, c'est en milliards de dollars que se chiffre le coût de la crise énergétique en Californie pour les consommateurs et les contribuables.

3.2 Les règles d'urbanisme qui ont pour effet d'"inclure"

Les règles d'urbanisme qui ont pour effet d"inclure" tendent à élargir l'accès des fournisseurs ou des consommateurs à un bien particulier. A court terme, cela se traduit souvent par une augmentation du nombre de concurrents, mais cela peut aussi mettre en cause les droits de propriété, particulièrement en ce qui concerne la propriété privée, et parfois même décourager l'investissement. Afin de promouvoir la concurrence sur le marché des infrastructures, l'accès a été rendu obligatoire dans de nombreux secteurs. Bien qu'elles ne soient pas considérées de manière générale comme relevant de la rubrique des restrictions d'urbanisme, ces obligations d'accès n'en ont pas moins dans bien des cas un impact sur l'affectation des sols, parfois du fait de réglementations applicables à des lieux spécifiques, et c'est pourquoi nous les examinerons ici.

Dans le secteur des transports, les caractéristiques géographiques ou l'organisation du territoire obligent souvent les acteurs économiques à utiliser un seul terminus pour desservir chaque centre urbain. Il y a donc des raisons naturelles qui justifient l'existence, parfois, d'une seule installation, dont l'accès peut

ensuite être régulé, comme cela a souvent été fait, de manière à garantir le choix du consommateur et l'exercice de la concurrence[60].

Les problèmes d'accès les plus complexes et les plus importants du point de vue de la concurrence apparaissent dans les situations suivantes :

- lorsque l'impossibilité d'accéder à une installation risque de constituer un sérieux handicap en termes de coûts pour un fournisseur quelconque sur le marché ;

- lorsque l'impossibilité d'accéder à une installation pour un ou plusieurs fournisseurs risque de nuire à l'intérêt des consommateurs ;

- lorsque la capacité de l'installation est limitée ;

- lorsque le développement de l'installation n'est pas assez rapide et que l'entrée (ou le repositionnement du produit) est difficile ;

- lorsque l'accès à l'installation ne donne pas lieu à des économies d'intégration verticale (efficience ou sécurité), d'échelle ou de gamme incontestables ;

- lorsqu'il est possible de redistribuer la capacité offerte par l'infrastructure existante entre des fournisseurs indépendants dans l'intérêt des consommateurs.

Telles sont les conditions qui ont donné naissance à la théorie des infrastructures essentielles et dans lesquelles celle-ci est le plus souvent appliquée.

3.2.1 Accès non discriminatoire

Le simple fait d'imposer une obligation contractuelle pour garantir l'égalité d'accès aux infrastructures de transport risque de ne pas être suffisant pour que cet accès soit effectivement offert dans des conditions raisonnables si le propriétaire de l'installation essentielle est incité à opérer une discrimination à l'encontre des nouveaux entrants et des concurrents existants ou à leur refuser indirectement l'accès et s'il a la capacité de le faire. Le détail des obligations d'urbanisme est un élément déterminant pour la garantie d'accès, comme le montrent les exemples ci-après :

- Dans le secteur des transports par ferry, l'entreprise en place entravait le fonctionnement du nouvel entrant en organisant ses propres services de manière à gêner les opérations d'embarquement et de débarquement de passagers effectuées par le concurrent[61].

- Dans un autre cas, une société désireuse de prendre pied sur le marché s'est vu refuser l'accès aux installations portuaires existantes, et elle a ensuite constaté que ses efforts pour construire un nouveau port étaient bloqués par les autorités pour le compte de l'entreprise en place[62].

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60 Pour une étude beaucoup plus approfondie à cet égard, voir Hilke (2006) "Access to Key Transport Facilities", Les tables rondes sur la politique de la concurrence, n° 62, OCDE, Paris.

61 Voir B&I Line plc *v* Sealink Harbours Ltd et Sealink Stena Ltd. (1992) 5 CMLR 255 (Case IV/34.174), 11 juin 1992.

62 Voir la décision de la Commission européenne concernant le port danois de Rødby (Rødby, OJ L 55, 26.2.1994).

- Dans le secteur du transport maritime, un entrant qui cherchait à fournir des services portuaires a été en mesure d'obtenir l'autorisation nécessaire, mais s'est ensuite vu refuser l'accès aux installations d'incinération dont il avait besoin pour son activité[63].

- Dans le secteur des transports par autobus, un concurrent était obligé d'utiliser le système de billetterie de l'opérateur en place, alors que celui-ci ne lui reversait pas les recettes correspondantes en temps voulu[64].

- Dans le secteur des transports aériens, l'espace attribué à un nouvel entrant à l'intérieur de l'aérogare se trouvait aussi loin que possible de l'entrée[65].

- Dans le secteur de l' électricité, des propriétaires de lignes de transport sont passés à des formes de discrimination plus subtiles et plus difficiles à prouver à l'encontre des producteurs indépendants lorsque des règles de conduite antidiscrimination ont été mises en place dans le domaine de la distribution[66].

Les règles d'urbanisme peuvent à l'évidence jouer un rôle très important pour garantir un accès non discriminatoire au marché, comme l'illustrent toutes ces situations où l'application de restrictions dans ce domaine aurait pu dans une certaine mesure apporter des améliorations.

Il existe un considérable corpus d'études sur ce sujet, à l'OCDE et ailleurs. L'une des idées qui s'en dégagent est qu'il est parfois nécessaire, pour garantir un accès non discriminatoire, d'opérer une séparation entre propriété et exploitation au niveau du monopole qui constitue le goulet d'étranglement et d'autres services, et d'exercer parallèlement une surveillance sur les activités monopolistiques. C'est ce qu'affirme avec force le conseil de l'OCDE dans sa recommandation concernant la séparation structurelle dans les secteurs réglementés[67].

3.2.2 Accès aux propriétaires intermédiaires

De plus en plus, les gouvernements cherchent à faire en sorte que la garantie d'accès aux sites contrôlés par les pouvoirs publics ou historiquement réglementés ne se trouve pas remise en cause à l'extrémité des réseaux de distribution. En effet, sur le marché de la télévision, par exemple, lorsque plusieurs opérateurs de services câblés sont en concurrence sur le marché, le propriétaire d'un immeuble peut très bien décider de passer un contrat d'exclusivité avec un seul distributeur de programmes vidéo multicanaux (MVPD) et refuser l'accès aux autres. Or les immeubles collectifs rassemblent une proportion importante de la population[68].

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63 Voir Hilke (2006), p. 9.

64 Voir le cas des stations de bus détenues et exploitées par la compagnie *JSC Eesti* Buss à Talinn (Estonie), tel que rapporté dans Hilke (2006), p. 38.

65 Voir le cas des aéroports de Sydney et de Perth, en Australie, tel que rapporté dans Hilke (2006), p. 42.

66 Voir les commentaires de la FTC sur les règles de conduite en matière d'accès proposées par la Commission fédérale de régulation de l'énergie, aux États-Unis (FTC (1995)).

67 Parmi les publications récentes de l'OCDE à ce sujet, on peut citer : Restructuring of Public Utilities (2001), La réglementation des services d'accès, principalement les télécommunications (2004), Rapport sur la recommandation concernant la séparation structurelle (2006).

68 Aux États-Unis, par exemple, l'habitat collectif concerne environ 30% de la population.

Lorsque le propriétaire d'un immeuble passe un contrat d'exclusivité avec un MVPD, il prive en fait les résidents des avantages que pourrait leur procurer la concurrence. Un certain nombre d'études montrent que dans le secteur du câble, l'arrivée d'un deuxième opérateur sur le marché est la contrainte concurrentielle la plus forte pour l'entreprise en place, les prix pouvant alors descendre de 17 %, d'après les données observées[69].

Le 31 octobre 2007, aux États-Unis, la Commission fédérale des communications (FCC) a décidé d'interdire l'application des clauses d'exclusivité existantes et la signature de nouvelles clauses accordant des droits exclusifs aux MVPD conformément aux dispositions de la section 628 du Communications Act (loi sur les communications)[70]. La FCC note en particulier ce qui suit dans son ordonnance :

- "Les clauses d'exclusivité qui empêchent l'entrée de nouvelles entreprises sur le marché portent atteinte à la concurrence et au déploiement du haut débit et peuvent affranchir le MVPD en place de la nécessité d'améliorer ses conditions de service.

- Les clauses d'exclusivité sont très répandues dans les accords passés entre les MVPD et les propriétaires d'immeubles collectifs.

- Les câblo-opérateurs historiques ont plus souvent recours aux clauses d'exclusivité dans les accords qu'ils passent avec les propriétaires d'immeubles collectifs depuis l'entrée des LEC (*local exchange carriers* – les exploitants de télécommunications locales) sur le marché de la diffusion vidéo[71].

- Le recours aux clauses d'exclusivité dans les contrats passés avec les propriétaires d'immeubles collectifs pour la fourniture de services vidéo constituent une méthode déloyale sur le plan de la concurrence ou encore une action ou une pratique déloyale en vertu de la Section 628(b)" (communiqué de presse de la FCC, 31 octobre 2007).

4. Conclusion

Qu'elles soient d'origine publique ou privée, les restrictions en matière d'urbanisme sont monnaie courante. En règle générale, elles ont peu d'effet sur la concurrence, mais elles peuvent diminuer le bien-être collectif lorsqu'elles se traduisent par une réduction de l'offre ou une moindre rivalité entre les

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69 La FCC note à ce sujet dans *Implementation of Section 3 of the Cable Television Consumer Protection & Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* Report on Cable Industry Prices, 21 FCC Rcd 15087, ¶ 2 (2006) ("les prix sont plus bas de 17 pour cent lorsqu'un opérateur de réseau câblé concurrent est présent sur le marché"), dans 20 FCC Rcd 2718, 2721, ¶ 12 (2005) (la baisse des tarifs du câble (abonnement mensuel et prix par chaîne) dans les zones soumises à la concurrence par rapport aux zones non soumises à la concurrence était plus prononcée lorsque la concurrence prenait la forme d'un deuxième réseau câblé), et dans 18 FCC Rcd 13284, 13286-87, ¶ 5 (2003) (dans les zones où la concurrence prenait la forme d'un autre réseau de diffusion, d'un deuxième réseau câblé ou d'un système municipal par câble, le tarif moyen par chaîne était plus bas que dans les zones où il n'y avait pas de concurrence ou bien seulement la concurrence de la télévision par satellite).

70 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 07-189, MB Docket 07-51, Report and Order and Notice of Proposed Rulemaking ¶ 31 (publié le 13 novembre 2007).

71 Un *Local Exchange Carrier* est un opérateur qui contrôle généralement le réseau et les commutateurs téléphoniques au niveau local.

entreprises. Lorsque la réglementation publique ou les contrats privés, par leurs dispositions ou leur application, ont de véritables effets néfastes, il convient de se poser plusieurs questions :

- La situation considérée relève-t-elle du domaine de l'action publique, que cette action soit administrative, judiciaire ou exercée par d'autres moyens, notamment par l'information et la communication ?

- L'intervention des pouvoirs publics pourrait-elle être bénéfique ?

- Tout bien pesé, une intervention serait-elle bénéfique pour la collectivité ?

En matière d'aménagement et d'urbanisme, les objectifs d'intérêt général et les effets anticoncurrentiels imposent des arbitrages complexes. Mais il est indéniable que les règles d'urbanisme peuvent avoir des effets qui sont préjudiciables pour les consommateurs et auxquels on peut remédier. Ainsi, les réglementations qui limitent la fourniture de biens essentiels comme le logement résidentiel, le commerce de détail ou l'électricité ont un impact direct sur les prix et la qualité de l'offre.

S'agissant des contrats privés, il est impossible pour l'État d'invoquer l'intérêt des consommateurs pour encourager des clauses anticoncurrentielles et des pratiques de rétention de terrain qui ont des effets néfastes en limitant la concurrence au niveau local. C'est pourquoi des recours directs doivent être envisagés.

Dans le cas des contrats d'exclusivité qui visent à compenser des coûts d'investissement et à encourager des investissements qui sans cela n'auraient pas lieu, il convient d'être plus nuancé.

Les règles d'urbanisme peuvent contribuer à promouvoir la concurrence, par exemple lorsqu'elles permettent de délimiter un espace réduit dans lequel les fournisseurs vont pouvoir se rassembler de manière à réduire les coûts de recherche supportés par les consommateurs (sans pour autant restreindre l'offre au risque de transformer les fournisseurs en monopoleurs) ou bien de garantir l'accès à des infrastructures essentielles qui ne sont pas facilement reproductibles ou qui risqueraient sans cela de restreindre le choix du consommateur. Ce sont là des avantages que l'on ne peut pas ignorer.

Si les effets proconcurrentiels potentiels de l'obligation d'accès aux infrastructures donnent souvent matière à discussion, les effets anticoncurrentiels des restrictions d'urbanisme, en revanche, sont rarement considérés en tant que tels par les autorités chargées de la concurrence. Il serait pourtant tout à fait souhaitable qu'à côté d'autres effets, l'aménagement de l'espace mette aussi dans la balance, parfois, les retombées qu'il peut avoir sur la concurrence.

Les conclusions de l'étude qui revêtent un intérêt pratique pour l'action publique sont les suivantes :

- Les restrictions d'urbanisme sont parfois excessives et peuvent servir à rendre plus coûteuse l'entrée sur le marché, à la retarder ou à l'empêcher, ce qui a des répercussions sur les conditions de l'offre et l'intensité de la concurrence au plan local, et probablement aussi sur la consommation de biens et de services. Par conséquent, dès lors que des règles d'urbanisme ont des effets sensibles sur l'intensité de la concurrence et sur les conditions d'accès au marché, il faudrait que les autorités se préoccupent aussi des effets qu'elles peuvent avoir pour les consommateurs.

- La délivrance des autorisations locales d'urbanisme devrait être soumise à des règles claires et faire l'objet d'une procédure rapide et peu coûteuse, avec des délais de recours strictement encadrés et l'obligation pour l'administration de motiver tout refus en tenant compte notamment des retombées pour les consommateurs.

- Les réglementations qui limitent la densité géographique de certains types de points de vente sont souvent justifiées par la volonté de permettre des économies d'échelle suffisantes pour la production d'un niveau minimum de service. Ces réglementations sont inutiles en zone urbaine et peuvent, paradoxalement, avoir pour effet de réduire le nombre de fournisseurs en zone rurale.

- De manière générale, la réglementation ne devrait pas tenir compte des conséquences que peut avoir pour les entreprises en place l'autorisation donnée à un nouveau concurrent d'entrer sur le marché. L'"externalité" qui résulte d'un accroissement de la concurrence pour les entreprises en place, sous la forme d'une perte de profits, ne doit pas faire oublier les avantages qui peuvent en découler pour les consommateurs. Les dirigeants ne sont généralement pas bien placés pour pouvoir conclure qu'une intensification de la concurrence ne profitera pas aux consommateurs.

- La tarification de l'accès aux biens publics devrait refléter leur degré de rareté et leur coût pour les autorités. Dans bien des cas, le prix de cet accès devrait être nul.

- Une analyse coûts-avantages a d'autant plus de chances d'être pertinente que la plupart des avantages et des coûts d'une décision d'urbanisme donnée se manifestent au niveau de l'instance politique qui prend cette décision.

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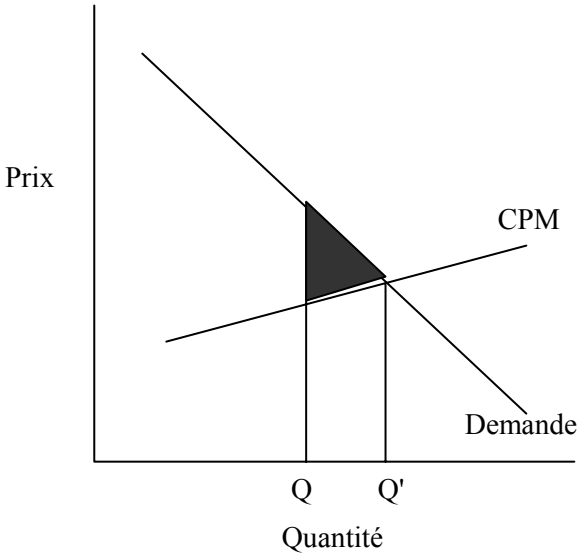
ANNEXE A. EXTERNALITÉS DANS LA POLITIQUE D'URBANISME

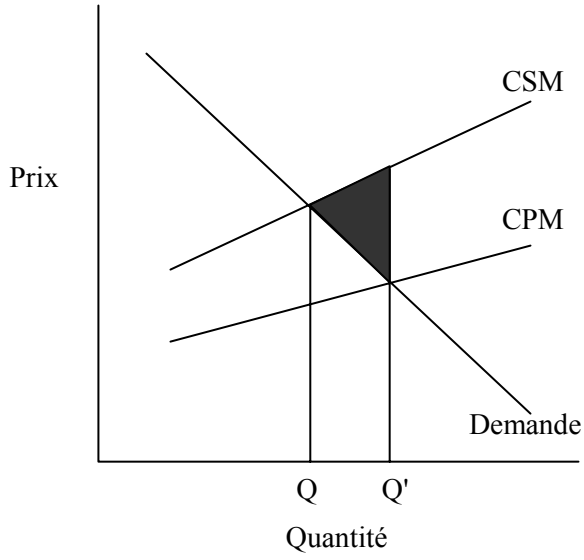
1. Théorie des externalités

Les externalités sont les effets externes qui ne sont pas pris en compte par un acteur du secteur privé. Ces effets externes peuvent englober la pollution, les nuisances sonores ou d'autres facteurs liés à l'environnement (dans les zones à forte densité de logements par exemple) et ils peuvent avoir un impact négatif sensible sur la valeur d'un bien immobilier. Ainsi, toutes choses égales par ailleurs, une maison située à proximité de l'une des pistes d'un grand aéroport aura une valeur inférieure à celle d'une maison comparable située dans un quartier comparable loin de l'aéroport. En présence d'externalités négatives, le coût social marginal (CSM) d'une activité est supérieur au coût privé marginal (CPM). Dans ces conditions, il peut être pertinent, dans l'intérêt général, de limiter l'offre au niveau où la demande croise la courbe du coût social plutôt que la courbe du coût privé. Le graphique A1 illustre une situation où l'offre est limitée et aucune externalité n'est observée. Dans ce cas, la quantité fournie est représentée par Q, bien que le point d'équilibre du marché, fondé sur les coûts privés marginaux, aboutisse à une quantité Q'. Comme le montre le graphique, la restriction de l'offre en l'absence d'externalités entraîne une perte de bien-être, représentée par la zone grisée.

Graphique A1



Graphique A2



A l'inverse, en présence d'externalités négatives, les coûts sociaux sont plus élevés que les coûts privés, ce qui signifie que la production nécessaire pour atteindre le niveau Q' sera supérieure au montant optimal du point de vue social. La hausse des coûts sociaux est illustrée dans le graphique A2 par la courbe CSM, située au-dessus de la courbe CPM. Ce graphique montre que le niveau optimal de production (qui correspond à l'équilibre entre coût social marginal et avantage social marginal) s'établit à Q. Si la production augmente pour atteindre l'équilibre entre coût privé marginal et avantage social marginal, l'on obtient un excédent de production. Les dommages sociaux sont représentés par la zone grisée dans le graphique A2, qui illustre le niveau de coûts sociaux supérieur à celui des avantages sociaux lors du passage d'une production Q à une production Q'.

Ces deux graphiques démontrent 1) que la restriction de l'offre justifiée par l'hypothèse d'externalités (alors qu'elles sont inexistantes) nuit au bien-être social et 2) qu'en présence d'externalités, la limitation de l'offre peut être avantageuse (même si le risque de restrictions excessives persiste)[1]. Une offre limitée se traduit par une augmentation des prix, ce qui peut avoir des conséquences notables sur le coût global du logement. Cette hausse des prix peut inciter les propriétaires fonciers à restreindre l'offre (même en l'absence d'externalités) de manière à accroître la valeur de leurs biens. Or ces restrictions peuvent avoir des conséquences très importantes si elles sont adoptées à l'échelle régionale ou qu'elles portent sur les unités résidentielles multiples, qui sont généralement les logements les plus économiques et revêtent un caractère crucial pour les populations les moins aisées.

Dans la mesure où la réglementation de l'urbanisme limite l'offre de logements à un niveau compatible avec l'intérêt général, elle remplit un objectif précieux du point de vue social. Néanmoins, si elle impose des restrictions trop élevées, elle peut entraîner une pénurie d'offre.

2. Étude des externalités

Un certain nombre d'études ont été consacrées à la relation entre zonage et prix immobiliers, dans l'hypothèse où la suppression des externalités négatives par le biais du zonage doit se traduire par une augmentation du prix des biens immobiliers. Maser *et al*. (1977) ont analysé les prix de l'immobilier à Rochester (New York), pour aboutir à la conclusion que le zonage n'a aucun effet sur les prix : « les externalités censées être éliminées par le zonage n'ont pas pu être identifiées… ». Mark et Goldberg (1981) ont étudié le cas de Vancouver pour en conclure que le « rezonage n'avait pas nécessairement de conséquences sur l'utilisation des sols et la valeur des biens… Aucun élément n'a été identifié qui permettrait de corroborer la thèse selon laquelle le marché de l'immobilier résidentiel est affecté par d'importantes externalités » (Mark and Goldberg, 1981, p. 431).

Il est difficile d'évaluer l'importance des externalités si l'on en croit Giertz (1977), qui estime que le zonage est souvent utilisé pour favoriser les monopoles au niveau local. Dans ce cas, le zonage peut être associé à une hausse des prix (liée à la disparition des externalités) ou par une baisse des prix (sous l'effet de l'amélioration du pouvoir de marché). Au final, l'impact du zonage est donc ambigu, en fonction de l'importance des externalités éliminées et de la baisse des prix liée au pouvoir de marché.

Selon une étude plus récente publiée par Quigley et Raphael (2005), la politique d'urbanisme a une incidence majeure sur la valeur des biens immobiliers, susceptible de nuire au bien-être social en rendant le logement moins accessible aux populations les plus défavorisées.

3. Justification de l'intervention de l'État fondée sur les coûts de transaction

Posner suggère que la loi sur les servitudes et les nuisances et les clauses contractuelles restrictives sont conçues pour remédier aux situations où les coûts de transactions freinent les transactions de marché. En fait, le système juridique peut permettre d'allouer des droits en l'absence de solution de marché susceptible d'améliorer l'efficience allocative[2]. Coase propose une explication du zonage fondée sur les coûts de transaction, en faisant valoir que la réglementation peut avoir des effets bénéfiques dans ce domaine :

> *« Si les dommages touchent de nombreuses personnes et que leurs causes sont multiples, il est plus difficile d'aboutir à une solution satisfaisante par le biais du marché. Lorsque le transfert de droits découle de transactions de marché réalisées entre un grand nombre de personnes ou de*

1 *Cf.* Quigley (2006).

2 *Cf.* Posner, 1986, pp 54-57.

sociétés agissant conjointement, le processus de négociation peut se révéler si difficile et fastidieux que le transfert devient impossible dans la pratique et que même le recours à la justice devient complexe. Il peut alors s'avérer coûteux de découvrir qui est à l'origine du problème. Par ailleurs, lorsqu'une procédure judiciaire n'est pas dans l'intérêt d'un individu ou d'une société, les difficultés inhérentes aux procédures collectives constituent un obstacle supplémentaire. Du point de vue pratique, le fonctionnement du marché peut donc s'avérer trop coûteux (Coase, 1959, p. 29).

ANNEXE B. IMPACT DU ZONAGE SUR LA CONCURRENCE

Supposons que la zone délimitée pour l'activité commerciale couvre une surface de vente de X m^2. Le nombre de types de magasins différents est représenté par N. On entend par type de magasin une boutique de chaussures de sport, une fromagerie, un magasin de vêtements pour enfants, *etc.* La concurrence n'existe qu'entre magasins du même type et non pas entre magasins différents : ainsi, une nouvelle fromagerie ne peut s'approprier la clientèle d'une boutique existante de vêtements pour enfants, mais peut menacer l'activité d'une fromagerie déjà implantée.

Le propriétaire qui détient l'ensemble des terrains destinés à la construction de commerces de détail cherchera à optimiser la rentabilité des magasins qui y seront implantés. A des fins de simplification, nous ne tiendrons pas compte, dans le calcul des coûts, du loyer versé par les propriétaires des magasins pour l'utilisation du terrain. Cependant, il est prévu que ces loyers augmentent avec l'amélioration de la rentabilité totale de l'ensemble des magasins. Dans ces conditions, le propriétaire foncier a intérêt à maximiser les profits tirés de la zone dédiée aux activités commerciales.

Supposons une diminution hyperbolique du bénéfice par mètre carré au sein de la zone commerciale, au-delà d'une taille minimum de magasin de x_m m^2 (π/m^2 = x$^{-1/2}$). Le graphique X illustre la variation du bénéfice par mètre carré en fonction de la taille du magasin. Un magasin de grande taille génère un bénéfice par mètre carré inférieur à celui d'un magasin plus modeste. En outre, s'il existe deux magasins du même type, le bénéfice par mètre carré de chaque magasin correspond au ratio r_1 ($0<r_1<1$) des bénéfices réalisés sans concurrence : la rentabilité diminue donc à l'arrivée d'un nouveau concurrent sous l'effet de la perte de monopole (partage de la même activité et concurrence sur les prix). L'arrivée de deux nouveaux concurrents se traduit par un ratio de r_2 ($0<r2<r1$) et de r_3 ($0<r_3<r_2$) en présence de trois concurrents supplémentaires ou plus. Comment la surface sera-t-elle distribuée entre les différents magasins par un propriétaire qui chercherait à optimiser les profits ? Notre hypothèse est fondée sur l'existence d'un seul propriétaire pour plus de simplicité. Le loyer perçu pour l'utilisation du terrain est supérieur lorsque la rentabilité du magasin est à son maximum. Par conséquent, le propriétaire tendra à privilégier la configuration de types et de tailles de magasins la plus à même de maximiser les bénéfices. Notons que, dans notre modèle, une fromagerie affiche une rentabilité équivalente à celle d'un magasin de vêtements d'enfants. De cette manière, les bénéfices perçus par le propriétaire sont équivalents quel que soit le type de magasin. S'il doit choisir entre deux types de nouveaux magasins, le propriétaire privilégiera celui qui n'est pas encore représenté, dans la mesure où ses bénéfices ne seront pas menacés par un concurrent existant. Notons également que, toutes choses égales par ailleurs, le propriétaire a une préférence pour les magasins de taille plus modeste, qui se distinguent par une rentabilité supérieure au mètre carré.

Si $Nx_m < X$, le propriétaire optimise ses bénéfices en veillant à ne pas autoriser deux magasins du même type, de manière à constituer un monopole.

Si $Nx_m > X$, plusieurs magasins du même type peuvent coexister. Dans ce cas, le propriétaire préférera deux magasins de petite taille plutôt qu'un seul magasin de grande surface.

S'il n'existe qu'un seul magasin de chaque type, pour un total de N magasins, le bénéfice par magasin s'établit à $(X/N)^{½}$, tandis que le bénéfice total est équivalent à $(NX)^{½}$.

Dans l'hypothèse où la surface totale demeure constante et où il existe deux magasins de chaque type, le bénéfice par magasin correspond à $r_1(X/2N)^{1/2}$ et le bénéfice total à $r_1(2NX)^{1/2}$.

S'il existe trois magasins de chaque type, le bénéfice par magasin est représenté par $r_2(X/3N)^{1/2}$ et le bénéfice total par $r_2(3NX)^{1/2}$.

S'il existe quatre magasins de chaque type, le bénéfice par magasin s'établit à $r_3(X/4N)^{1/2}$ et le bénéfice total à $r_3 2\ (NX)^{1/2}$.

Pour choisir entre ces trois possibilités, le propriétaire doit sélectionner la densité des magasins qui affichent la meilleure rentabilité de 1, $2^{1/2}r_1$, $3^{1/2}r_2$ et $2r_3$. Lorsque la surface totale augmente et dans l'hypothèse d'un nombre de magasins constant, l'écart entre la rentabilité générée par plusieurs magasins du même type et un magasin par type diminue. Autrement dit, si la zone dédiée aux commerces est limitée, le propriétaire cherchera à louer à des magasins en situation de monopole. En revanche, lorsque la zone s'élargit, le propriétaire veillera à ce qu'il existe plusieurs magasins du même type en concurrence, car cette situation a un impact positif sur la rentabilité totale de la zone commerciale.

BELGIUM

1. Do rules that limit the number of stores of a certain type create market power?

It should first be pointed out that the present Belgian legislation on the establishment of *grandes surfaces* will be reviewed in the light of the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market), and especially in the light of the prohibition of economic tests in its article 14(5).

We have no evidence that the limitation of the number of mega-stores, which is the inevitable consequence of the limitation of locations made available for such stores, has created market power that could qualify as a dominant position in the meaning of article 82 EC or the equivalent article 3 of the Belgian Competition Act. There are on the contrary indications that competition between the various chains is fierce. Except for discounters and specialised stores, the limited profitability of the mega-stores raises concerns. Smaller neighbourhood supermarkets are expected to grow more than the mega-stores, again with the exception of discounters or specialised stores.

Market power of mega-stores is mostly discussed because of the impact of their purchasing power on competition with other types of distribution. The purchasing power of mega-stores is, however, not a consequence of the rules of establishment. It is if anything rather contained by the restrictions on the number of stores.

2. What policies should be adopted with respect to pricing of public and private rights of way or for other uses of public land (like allowing a restaurant to place tables on public land)?

Rights of way and other rights to use public land must be granted in accordance with the rules governing the granting of concessions, which are similar to the public procurement rules.

3. In the case of environmental sensitive facilities for which an authorization is usually required, what is the most appropriate level of government for granting the authorization?

Environmental policy is for most matters within the powers of the regional governments of Flanders, Wallonia and the Region of Brussels.

The regional legislations on environmental authorisations all provide for procedures requiring a consultation of the local community (neighbours), but the local community does not have a veto power.

4. Can private actions with respect to land use restrict competition in a way that violates antitrust laws?

Private actions with respect to land use can in exceptional circumstances violate antitrust law but only:

- if they qualify as an abuse of a dominant position in the meaning of article 82 EC or the equivalent article 3 of the Belgian Competition Act, or

- if they are result of an agreement, concerted practice or decision of an association of undertakings in the meaning of article 81 EC or the equivalent article 2 of the Belgian Competition Act, and if the actions can not be explained as a legitimate protection of the rights of companies.

5. What market failures exist that justify restrictions on real property use, for example impeding that an apartment building be transformed in a hotel?

The fears that certain types of economic activity and use of land (e.g. offices, *grandes surfaces*) would claim a disproportionate percentage of available land at the expense of economically weaker users (e.g. for housing, nature protection, recreation or agriculture), and the fear that certain types of economic activity would disturb the existing environment by generating additional traffic, causing parking problems, noise etc.

6. When an activity depends on the use of public land, like a harbour or an airport, is access to this land available for competitors? What justifications can be used for not granting access?

Please see earlier reference to the rules on the granting of concessions.

7. What role exists for competition authorities with respect to real property use restrictions?

The Belgian Competition Authority has no role with respect to real estate use restrictions. Its director general is, however, member of the Round Table on the Evaluation and Modernisation of (federal) Belgian Economic Law which reviews i.a. the various rules on establishment. The directorate general for competition is also invited to advise on the implementation of the Services Directive.

CZECH REPUBLIC

1. Introduction

This document describes the main Czech legislation concerning use of real property. As will be discussed below, there are no specific provisions of real property use that could be capable of distorting competition in the Czech Republic. So far, there has been no need to enforce competition law in this area and the Czech Office for the Protection of Competition has not adopted any decision.

2. General regulation

General legal provisions regulating land use are included in Act No.183/2006 Coll., on town and country planning and building (the Building Act), as amended, effective as of July 1, 2006. The Building act regulates planning process, which is a necessary prerequisite for any use of land. The current Building Act was adopted in 2006 and it has brought an important change by significantly shortening length of procedure and by introducing new legal instruments simplifying it.

Jurisdiction in the planning process is carried out by local authorities (municipalities); they are to ensure the protection and development of the characteristics and significance of the area of the municipality. In cases exceeding the municipalitie´s area the powers are delegated to regional authorities, which may nonetheless interfere with municipal authorities only in cases specifically stipulated by the law; they proceed in coordination with the authorities of the municipalities. The local and regional authorities proceed on the basis of general regulatory plans. These plans determine detailed conditions of land use, prescribe protection of values and character of the area and enhance creation of a favourable environment.

As regards the planning of land use by municipalities, their task is especially to examine and assess the need of changes in the area, public priorities, benefits, possible problems, risks to public health, environment, geologic structure of the area etc., impacts on public infrastructure and its economical utilization. For any constructions, their changes or changes of the land use, it is necessary to obtain a planning permit or the planning approval.

When deciding, the individual municipalities do not necessary have to take into consideration the decisions of other municipalities or authorities. Thus for example, the number of hypermarkets per capita in the Czech Republic is the highest in the Central Europe.[1]

Protection of public interest is ensured by special regulations. Competent authorities (specific for every area of concern) are obliged to issue binding assessments, which are prerequisites for the decision of municipal or regional authorities. Obligation to issue binding assessments is prescribed for example in the Act No. 114/1992 Coll., on the Protection of Nature and the Landscape (concerning use of land in protected areas, the Act No. 344/1992 Coll., on the conservation of agricultural land (concerning non-agricultural use of land), or the Act No. 86/2002 Coll., on Clean Air Protection (concerning sources of pollution).

[1] According to the study of Incoma Research and GfK Praha, published on March 13, 2007.

3. Private restrictions

There is no particular regulation concerning the land use. Competition clauses are generally provided for in the Commercial Code (Act No. 513/1991, as amended) and must be in compliance wit the competition law; there is no specific experience concerning these clauses as far as land use is concerned.

4. Special regulation

Legal regulation of the energy sector is provided for by the Act No. 458/2000 Coll., on Business Conditions and Public Administration in the Energy Sectors and on Amendment to Other Laws (the Energy Act), as amended. Business activities in the energy sectors in the territory of the Czech Republic may only be pursued by individuals or legal entities on the basis of government authorisation in the form of a licence granted by the Energy Regulatory Office.

The electricity and gas markets are organised on the basis of regulated access to the transmission and distribution system and contracted access to the underground gas storage facilities. As regards the connection of electricity generating plants, distribution systems and supply points of end customers to the grid, method of calculation of the proportion of costs associated with the connection and provision of power demand are provided for by the implementing regulation of the Energy Regulatory Office No. 51/2006 Coll. on the conditions for connecting to the grid. Building of electricity generating plants is possible only on the basis of authorisation, granted by the Ministry of Industry.

The electronic communications and postal services are regulated by the Act No. 127/2005 Coll., on Electronic Communications (the Electronic Communications Act), as amended. The responsibility for state administration in matters set out in this Act, including market regulation and determination of business terms and conditions in this area, is dedicated to the Czech Telecommunications Office.

Special regulation concerns undertakings with significant market power in the relevant market, which provides a publicly accessible electronic communications network. Such an undertaking can be obliged by the decision of the Czech Telecommunications Office to meet the reasonable requirements of another undertaking for the use and access to its specific network elements and associated facilities for the purpose of achieving a stable competitive environment in the relevant market in the interests of the end users and consumers.

5. Use of public places

Rules regarding use of public places, including fees for it, are issued by municipal authorities. The specific details are different in every case and they cannot be generalised.

FINLAND

In this memorandum, the Finnish Competition Authority (FCA) has focused on issues which have had a major impact, nationally. These include the decrease of entry barriers in zoning, with large retail outlets as a special theme, and the restrictive conditions related to the rental and sales of building sites. At the end of this paper, some special issues will be discussed. As an introduction to zoning and land use issues, the memorandum starts with a description of the Finnish zoning system and the related norms.

1. Land use planning in Finland – legislation and system in brief

The aim of land use planning is to create preconditions for a favourable living environment and to promote ecologically, economically, socially and culturally sustainable development. The over 400 municipalities in Finland are responsible for land use planning in their region[1].

In the last few years, Finland has reformed its land use planning system. The new system has three levels of land use plan with a clear division of labour between them: the regional land use plan, the local master plan and the local detailed plan.

In addition, the Government defines National Land Use Guidelines, which should be taken into account throughout the country in all land use decisions and land use planning.

The land use planning system is hierarchical; higher level plans steer lower plans. The National Land Use Guidelines are implemented mainly through regional plans. Regional and local plans are drawn up through participatory planning procedures, which give local residents the chance to get involved in the planning processes that affect them.

The municipalities are independently responsible for drafting and approving master plans and local detailed plans. The statutory functions regarding building control are the charge of a municipal committee. The municipality must have a building inspector who advises in and supervises building issues.

The most important legislation controlling land use, spatial planning and construction in Finland is contained in the Land Use and Building Act, which came into force in 2000.

The Land Use and Building Act aims:

- to organise land use and building to create the basis for high-quality living environments,

[1] In Finland, the 416 municipalities (as per 1 January 2007) have far-reaching powers, a fairly independent economy – with the right to tax the income of their residents – a total budget over 30 billion euro, and a personnel of more than 430,000. In comparison, there are approximately 120,000 state employees, and the private sector employs around 1 500,000 persons.

A major project to restructure local government and services in Finland was launched in 2005. The project particularly focuses on the possibilities of local authorities to provide services, i.e. on the structural and financial foundation of the system. One further goal is also to promote voluntary municipal mergers. The number of municipalities is clearly decreasing.

- to promote ecologically, economically, socially and culturally sustainable developments,
- to ensure that everyone has the chance to participate in open planning processes,
- to guarantee the quality of openly publicised planning decisions and participatory processes, and to ensure that a wide range of planning expertise is available.

2. FCA's zoning project in the 1990s – aim: decreasing entry barriers

The FCA began to invest resources in land use and zoning issues at the start of the 1990s when the office commissioned a study on the topic[2].

Based on the results of the study, the FCA submitted an initiative e.g. to the Ministry of the Environment in 1993 to remove the detected defects (diary no 240/71/93). In the initiative, the FCA e.g. proposed that

- the municipalities' land ownership should not be used as a condition to zoning,
- the zoning procedure should be alleviated,
- competition should not be restricted by conditions on the rental and sales of building sites,
- the position of the site's end user should be improved and
- slight oversizing in zoning is necessary.

The office commenced a separate zoning project in 1994. It was set up as complaints were lodged with the office where attempts were made to block competing supply and new business ideas by the use of needs testing. The cases mainly involved the daily consumer goods trade and the service station business. During the project, negotiations were conducted with the Ministry of the Environment and positive results were obtained particularly regarding the service station business.

A major case was Du Pont JET Oy (diary no 28/61/94), where apparent attempts were made to prevent or complicate the setting up of service stations by the use of needs testing. The business idea of Du Pont JET was to set up unmanned stations, and the opposition was justified e.g. by employment reasons. The Ministry of the Environment found that the number of petrol stations should not be increased.

After the FCA had engaged in discussions with the Ministry of the Environment, the Ministry specified its views regarding competitive considerations. The founding of automatic petrol stations became possible for new entrants as well. For example Du Pont JET was able to enlarge its station network to the extent that the building of its own petrol import terminal could be realized.

The Supreme Administrative Court also found in a decision issued on the basis of the Land Use and Building Act that needs testing is not a lawful basis to prevent e.g. the founding of a large retail outlet.

[2] The zoning practice and site policy of business sites. The FCA's investigations 1/1993

3. Large retail outlet issue

3.1 On the development of the legislation on large retail outlets

In the 1990s, there was an increasing amount of discussion on the founding of so-called large retail outlets in Finland. The number of retail outlets in Finland exceeding 2,500 m² with more than half the floor space devoted to non-food nearly doubled in the 1990s. The legislation which was effective at the time was considered too weak to steer the development.

In 1996, the Ministry of the Environment set up a working group to prepare a proposal on how the founding of large retail outlets should be regulated in Finland. The FCA was also represented in the working group.

The working group proposed a stricter steering of the locations of the large retail outlets. The FCA left a dissenting opinion in the report, and stated e.g. that the proposal is harmful to new entrants.

Restrictions in the founding of large retail outlets have been justified e.g. by the following arguments:

- sustainable community development,
- availability of the trade's services – different regions and different population groups are placed in an unequal position when the store network becomes sparser and many residential areas are left without services; particularly vulnerable population groups include households without a car and old people,
- decline of city centres – large retail outlets are often situated in the fringes of population centres or outside of them,
- particularly in the last few years, the climate change – large retail outlets increase private motoring and hence emissions.

In the FCA's estimate, complicating the founding of large retail outlets causes at least the following types of competitive concerns:

- the threat of potential competition for large retail outlets already in the market decreases,
- competition between existing large retail outlets decreases and their monopoly power increases in the local markets,
- the incentives for the development of trade practices decrease and the efficiency of the entire daily consumer goods trade weakens,
- the price level increases and the benefit of the consumers decreases.

The FCA has pointed out that the public sector could also develop the availability of the services by other means than by restricting the founding of the large retail outlets, e.g. by:

- removing restrictions on business hours,
- increasing parking space in town centres,

- developing mass transport routes,
- increasing the joint measures of the municipalities and business which enliven town centres,
- enabling good locations for near stores and bigger floor spaces for stores in the town centres.

After extensive political debate and preparation of legislation, legal provisions governing the location of retail outlets exceeding 2,000 m² of floor space entered into force in March 1999[3]. The Land Use and Building Act provides that commercial property of more than 2,000 square metres will only receive planning approval if the site is specially designated for such purpose in the local plan. Local authorities have power to make independent decisions in land-use planning matters. The Act has subsequently been tightened so as that any major extensions of the retail outlets, resulting in the exceeding of the said limits, are now covered by the Act.

3.2 FCA's initiative in 1999 (diary no 967/71/99)

After the new legislation had entered into force, the FCA reminded the Association of Finnish Local and Regional Authorities by its initiative of the need to pay attention to competition policy aims in the communal policy. Underlying the initiative was a complaint received by the FCA from a company which found itself unjustly supplanted in the allocation of market sites, where the city reserved space for two companies in a situation where three companies were interested of the said business site.

In issues involving land use, a frequent problem caused by the special features of the product is that it is only possible to reserve a specific site, business location etc. for one operator, two sites for two operators etc. This basic setting creates a first mover advantage, and it is possible that particularly the lost competitor requests that the competition authority intervene with the matter.

The FCA found in its initiative that because the competitive and other conditions vary by region and by project, there is no single right way to choose e.g. the builders of a retail outlet project. In spite of this, the following demands may be set on municipal decision-making: the methods and criteria should be known by the parties and they should be clear. They should also be primarily related to the realisation of the said project. Additionally, they should be applied in a fair, consistent and open manner.

The FCA wished to communicate by its initiative that neither the office nor the competition legislation is meant as a (primary) solution to situations where the underlying problem is the allocation of an inherently sparse resource in individual administrative or other processes. The rules described above are still important to minimize competitive concerns in such situations.

3.3 Report of the Nordic competition authorities in 2004

In 2004, the Nordic competition authorities drafted a common report *Nordic Food Market – a taste for competition*[4]. It also examined issues relating to zoning.

The competition authorities stated as their common recommendation, "The composition of shops in the retail sector has changed towards more discount shops and hypermarkets. Access to buildings or building sites is essential for new retailers. Therefore, planning authorities should acknowledge the value of competition for consumers and only limit entry of new retailers where there are objective reasons for it. Application procedures should be transparent and applicants should be ensured the possibility to appeal."

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3 These were integrated into the new Land Use and Building Act from 1 January 2000.

4 http://www.kilpailuvirasto.fi/tiedostot/Nordic_Food_Markets.pdf

3.4 Trade and Competition Working Group of the Ministry of the Environment in 2007

The impacts of zoning and land use policy e.g. on competition were discussed in the Trade and Competition working group by the Ministry of the Environment which published its report in November 2007. The FCA had representation in this group as well. The task of the working group was e.g. to assess the impacts of the present legislation on the development of the retail outlet network, the availability of the services and the competitive scene between the different types of stores[5].

The working group found that to promote effective competition it is important that zoning creates possibilities for the development of new business ideas and preconditions for new entrants. Zoning solutions which are flexible and leave alternatives for their realisation are desirable from the viewpoint of competition. Even the potential of new entrants will create competitive pressure. On the other hand, the working group drew attention to the need caused by the climate change to curb the dispersing of the community structure and to decrease the need for traffic.

The working group unanimously presented a bunch of recommendations for further measures. These included the following:

- The promotion of the operational preconditions of the trade is contained in the Land Use and Building Act. It will be investigated whether a provision on the promotion of competition should be included in the Act. Also in reviewing the National Land Use Guidelines, the possibility to include the securing of the preconditions of competition should be investigated.

- Via pilot projects, the means and possibilities of zoning to promote competition will be examined.

- In cooperation with the FCA and the Association of Finnish Local and Regional Authorities, the Ministry of the Environment will prepare materials on the impacts of zoning on competition to be used by the zoning authorities.

- In the context of the reform of regional administration, the possibility to include in the duties of some regional authority the securing of competition issues in zoning will be examined.

- The Ministry of the Environment will commence an investigation where the relevance of the present size of the large retail outlet (2,000 m^2) is evaluated from the viewpoint of competition and the location steering of the trade.

It may be deduced from the Ministry's working group recommendations that the arguments relating to competition issues have been absorbed better than before, and due to years of advocacy activities, the FCA's views have gained more prominence. However, the discussion on climate change has shifted the emphasis on environmental viewpoints. It remains to be seen whether the recommendations result in concrete regulatory or policy changes.

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5 In addition to zoning and land use, the regulation of the trade's opening hours has an impact on the competitive conditions of the trade. These regulations are also connected. The ground rule is that stores are permitted to stay open between 7 am and 9 pm from Monday to Friday and from 7 am to 6 pm on Saturdays. Sunday trading has been permitted since 2000, but only between 12 am and 9 pm and only in November and December and from June till August. Food shops smaller than 400 square metres are permitted to stay open every day except on public holidays. The kiosk and service station trade is entirely free, as are the opening hours of stores located in the sparsely populated areas.

4. Conditions attached to the rental and sales of building sites

4.1 Case: Prohibition to found a grocery store in the vicinity of a competing store (diary no 8/213/90)

The city of Jyväskylä sold a building site from a new residential area for the purpose of founding a shopping centre for three companies. The companies were setting up e.g. two supermarkets in the shopping centre. Reciprocally, the companies had to commit to maintaining small near stores in the said residential area.

The city sold more business sites from the vicinity of the shopping centre. A condition was included in the deeds of transfer of these documents, according to which the founding of a grocery store was not allowed on these sites. The prohibition was based on the three above-mentioned companies having to maintain small near stores which were not as profitable, and they found that there were no preconditions for overall profitability, if other grocery stores would be established near the more profitable supermarkets, to compete with them.

A corresponding situation was related to the founding of hypermarkets. The city of Jyväskylä gave permission to two operators to set up hypermarket stores and required at the same time that the companies had to commit to maintaining small near stores in certain parts of the city.

The FCA negotiated on the matter both with the companies within the trade and with the city of Jyväskylä. As a result of the negotiations, the city waived the obligation to maintain small near stores, and the commitment in the deed of transfer not to found a grocery store expired. The FCA found that zoning should not be used to prescribe on the preconditions of starting and conducting business, and no restraints should be imposed on the conducting of free trade e.g. by prescribing that it is a precondition to founding profitable business to maintain business which is unprofitable.

4.2 Case: Obligation to use the services of the city's own service company included in the rental and sales of the building site (diary no 62/281/90)

In 1990, the FCA issued a decision in which it found that a service company operating and owned by the city Tampere had abused its dominant position. The dominant position had been formed by the decision of the city of Tampere, according to which the buyer of the building site had to purchase the services relating to property maintenance from the service company owned by the city. The condition had been imposed by the city of Tampere when it sold the land.

The FCA found that the abuse of dominant position had ceased when the service company had committed to renewing all its property management contracts. The city of Tampere announced that the contracts would no longer contain a condition, according to which the customer company had to have the maintenance, monitoring and cleaning duties attended to by the service company owned by the city alone.

4.3 Case: Obligation to choose district heating as the real property's heating form included in the rental and sales of the building site I (diary no 418/61/96)

The municipality of Kempele situated in Northern Finland had included an access condition in the rental or sales conditions of the building site, according to which the property had to be connected to district heating. The condition applied to the apartment house and detached house sites which were in the immediate vicinity of the district heating pipeline or in the region of which there were plans to build a district heating pipeline. Thus, in these sites, the form of heating could not be chosen. A municipal energy company was responsible for building and maintaining the district heating network (Oulun Seudun Lämpö Oy).

In the FCA's estimate, the district heating network was a natural monopoly and the customer connected to it did not have the possibility to tender the heating provider.

The FCA found that, as regards the rental or sales activities of the sites, the municipality of Kempele was a business undertaking referred to in the Act on Competition Restrictions (Competition Act)[6], and the Act could be applied to it.

The rental condition limited the tenant's freedom to choose a desired heating form and would hence have eliminated competition at the stage the heating form was chosen. At the same time, the condition consolidated the market power of the owner of the district heating network. The arrangement decreased or was likely to decrease efficiency within the economy, and complicated the conducting of business by the construction company who had obtained the rented site, and the FCA considered it a harmful competition restraint[7]. The municipality of Kempele subsequently removed the restrictive condition from the rental site agreements.

4.4 Case: Obligation to choose district heating as the real property's heating form included in the rental and sales of the building site II (diary no 1032/61/04)

In 2004, the FCA was requested to investigate a condition related to the rental or sales of the real estates in the city of Lahti, according to which the city imposes an obligation on the buyer of a detached house to join in the district heating network of the energy company (Lahti Energia Oy) owned by the city. Also pending is a similar case on another city.

According to the complainant, the rental or sales condition had to be eliminated because it limited the competition between different forms of energy and distribution methods and the operations of the small and medium-sized companies and the competition in the HPAC sector.

In its rejoinder, the city of Lahti argued that the obligation creates efficiency benefits for the residents in the area, for the more residents who join in the district heating network in one area, the smaller the heating costs per customer. Additionally, district heating is the most favourable form of heating in the light of current knowledge and also to be supported for environmental reasons.

The case is still pending at the FCA. It should be noted that, as part of the climate change discussion, there is now debate in Finland as well on the need to increase energy efficiency e.g. in heating. It has e.g. been suggested that residents should be obligated to join in a district heating network wherever such a one exists. A ban on direct electric heating has also been proposed. The possible reforms in relevant legislation would have a bearing on the FCA's competition law assessment of the case.

5. Competition policy vs. land use policy

The municipal land use policy, composed of both zoning and land policy (e.g. the rental and sales conditions of sites), involves both the use of public power and the conducting of business comparable to the rental and sales of land by private landowners. To the extent that the municipalities govern the land use

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6 Act on Competition Restrictions 480/92, amended 318/04

7 Based on the Act on Competition Restrictions then effective, the FCA was able to intervene through negotiations not only in forbidden competition restraints but also so-called harmful competition restraints. These include e.g. restraints where the implementor has market power but not a dominant position. The restraint was considered harmful if it "in a manner inappropriate for sound and effective competition, decreases or is likely to decrease efficiency within the economy, or prevents or hinders the conducting of business by another".

— e.g. the location of trade — by their zoning monopoly, it is a question of using public power, and the Competition Act thus cannot be applied to it. The proper tools in this respect may be found from the advocacy activities. In addition to dissolving competition restraints, it is the FCA's task to intervene, e.g. by means of initiatives and opinions, in other than conducting of business when the use of public power restricts, prevents or distorts economic competition in a harmful manner[8]. The majority of the FCA's interventions in regulations of real property have been advocacy activities by nature.

When land use policy deals with marketized sales and rental of land for compensation either by renting or selling real property and the related choice of trading partners, the activities may be considered the conducting of trade referred to in the Competition Act. Whether the municipality is a business undertaking and whether the Competition Act applies shall be separately assessed each time.

The FCA has not assessed a situation where a company would have used land ownership as a strategic means to block competition. In the memorandum drafted by the Secretariat, there is an example of a situation where a company buys land due to competitive reasons and does not build on it with the purpose of preventing the establishment of a competitor. In principle, there is no obstacle to the application of the Competition Act but to prove the infringement is challenging. For the application of the Competition Act, a dominant position is a likely precondition. As a potential form of abuse, the "limiting of production, markets or technical progress to the detriment of consumers" could possibly apply[9].

6. Other (implicit) restrictions

6.1 Telecommunications towers

A building permit is frequently needed to build telecommunications towers. The building of towers has environmental impacts on the landscape, which limits their further building. The companies who have built the towers first have a first mover advantage compared to other operators.

According to the Communications Market Act (393/2003), the Finnish Communications Regulatory Authority may impose an obligation on a telecom company to lease an antenna spot for a radio tower. The obligation is subject to the condition that either the telecoms company owning it has considerable market power or that the building of a parallel radio tower is not expedient e.g. for reasons of environmental protection.

The FCA has heard unofficial estimates on that the lease of telecoms towers would contain restrictive features. The level of rent has been suggested to be unreasonably high. Official complaints have not been made, however, and the competitive problem would not appear to be significant.

A similar problem might appear in a situation where the telephone operator owns the cable channels, to which fibre could be rolled without expensive excavations in the future. The company owning the ducts has a first mover advantage, which it can use strategically by overpricing in a manner distorting competition.

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8 Act on the Finnish Competition Authority 711/88, Decree on the Finnish Competition Authority 66/93, amended 175/99

9 Act on Competition Restrictions, 6 §

IRELAND

1. Introduction

This contribution focuses on the potential competitive effects of the Irish *Retail Planning System* as applied to the grocery sector. The submission is partially based on on-going work the Competition Authority is doing in the context of its *Grocery Monitor* Project and any results reported here should, therefore, be regarded as preliminary.

The *Grocery Monitor* Project was undertaken by the Competition Authority following a Government decision to abolish the *Restrictive Practices (Groceries) Order 1987* (the "Groceries Order"), by means of the *Competition (Amendment) Act 2006*. On the coming into force of the Amendment Act on 20 March 2006, the Minister for Enterprise, Trade and Employment (the "Minister") asked the Competition Authority:

> *"to review and monitor the structure and operation of the grocery trade for the foreseeable future to see how it responds to the new legislative environment".*[1]

When consulting with stakeholders during the early phases of the *Grocery Monitor* Project, the Competition Authority queried what potential barriers to entry or expansion might exist in the grocery sector. A number of stakeholders identified the *Retail Planning System* as a potential barrier to entry.

From a consumer perspective, markets typically underperform when entry is restricted. The Competition Authority and others have argued that the retail planning system may have the effect of restricting entry to retail sectors of various kinds. Based on information requested from the largest retailers, on outlets opened between January 2001 and March 2007, various aspects of the planning process were examined. It is expected that the preliminary examination of the *Retail Planning System*, as applied to grocery, will inform future work of the Competition Authority relating to the *Retail Planning System*.

This contribution is structured as follows:

- The next section briefly describes the legislative background of the retail planning system and the roles of the various bodies involved.
- Drawing from information requested from the largest grocery retailers[2] on stores opened between 2001 and 2007 the last section addresses some of the competitive effects of the retail planning system.

1 See press release of 20 March 2006, available at: http://www.entemp.ie/press/2006/20060320.htm.

2 Large multiples that perform their own wholesale and distribution functions.

2. The Irish Planning System

2.1 Legislation

The physical planning system in Ireland commenced in earnest in the mid 1960s; since then a considerable body of planning legislation and regulations have been passed. The following are the principal pieces of legislation that govern the retail planning system in Ireland.

- Ireland's planning system commenced on the 1 October 1964, with the introduction of the *Local Government (Planning and Development) Act*, *1963*.

- An Bord Pleanála, the Planning Appeals Board, was established in 1977.[3]

- In 1982, specific 'retail' planning controls were introduced in Ireland by the *Local Government (Planning and Development) General Policy Directive*, *1982* (the "1982 Directive"). This was the result of lobbying by small independent retailers concerned about the growing presence of large-scale shopping developments.[4]

- In June 1998, the *Local Government (Planning and Development) General Policy (Shopping) Directive*, (the "1998 Ministerial Directive") was introduced; this provided for a cap of 3,000 square metres on the size of 'supermarkets'.

- Comprehensive *Retail Planning Guidelines* were prepared and came into effect on 1 January 2001.[5] The guidelines state that local planning authorities must incorporate strategic retail policies and proposals in the development plans for each area. Each local authority is required to publish a 'development plan' for its area every six years.[6] Planning authorities must take into consideration a variety of objectives including town and district centre improvement, socio-economic factors, rural development, accessibility, traffic flow and sustainability, when drawing up development plans and assessing applications. The guidelines extended the floor space cap for supermarkets to 3,500 square metres for all major urban areas, and introduced a cap of 6,000 square metres on 'retail warehouses'.[7]

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3 Prior to this, appeals were made to the Department of Local Government, now called the Department of the Environment, Heritage and Local Government, and were decided by the Parliamentary Secretary.

4 Goodbody Economic Consultants (2000), *The Impact of the Draft Retail Planning Guidelines on the Retail Sector*, p. 15.

5 A discussion of the objectives and principles contained in the *Retail Planning Guidelines* is provided in the next sub section.

6 The Development Plan shows the local authorities' objectives for *"the sole or primary use of particular areas (eg residential, commercial, industrial, agricultural), for road improvements, for development and renewal of obsolete areas, and for preserving, improving and extending amenities"*. Development plans are the "*main instrument of development and control"* and deliver planning policies promoted by the Department of the Environment, Heritage and Local Government. For more information see: http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/Planning/Overview/DevelopmentPlans/

7 Retail warehouses are stores that sell mainly bulky household goods and require extensive areas of showroom space. The Retail Planning Guidelines state that retail warehouses do not fit easily into town centres, given their size requirements and the need for good car parking facilities and ease of servicing. Roger Tym & Partners in association with Jonathan Blackwell & Associates (2005) *Retail Planning, Guidelines for Planning Authorities,* p. 28.

- In 2005, following a consultation undertaken by the Department of the Environment, Heritage and Local Government, the *Retail Planning Guidelines* were amended to provide that the floor space cap on retail warehouses would no longer apply within the functional areas of the four Dublin local authorities and in the other National Spatial Strategy Gateways, of which there are nine in total.[8]

2.2 The Operation of the Retail Planning System

2.2.1 The Role of the Department of the Environment, Heritage and Local Government

The Department of the Environment, Heritage and Local Government is responsible for planning legislation. This includes legislation in relation to development plans, planning permission, exempted development, appeals against decisions and enforcement. In recent years, this work has been influenced by Ireland's membership of the European Union.[9]

2.2.2 The Role of the Planning Authorities

Eighty eight local planning authorities control the implementation of the physical planning system. Planning permission is needed for any development of land or property unless the development is exempted.[10] "Development" includes building, demolition, alteration on land or buildings and the making of a significant change of use of land or building. An applicant applies for planning permission from their local planning authority. All planning applications are checked against the policies and objectives specified in the local planning authority's 'development plan', which incorporates the principles set out in the *Retail Planning Guidelines*.

Once an application for planning permission is made, members of the public have the right to view and comment on it. Where permission is given it lasts five years from the date granted.[11] Where an application is refused, the reasons for refusal are included in the notification.

2.2.3 The Role of An Bord Pleanála

All planning decisions made by planning authorities may be subjected to independent review by An Bord Pleanála. The appeals system is designed to be independent, open and impartial. The Government cannot exercise any power in relation to particular appeal cases. An Bord Pleanála can also advise the Department of the Environment, Heritage and Local Government on issues of policy, in light of its

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8 The National Spatial Strategy for Ireland 2002–2020 (NSS) is a 20-year planning framework for all parts of Ireland. It aims to achieve a better balance of social, economic and physical development across Ireland, supported by more effective planning. All development plans at regional and local levels must have regard to the NSS. It required that areas of sufficient scale and critical mass be built up through a network of gateways and hubs. For more information see:

http://www.environ.ie/en/DevelopmentandHousing/PlanningDevelopment/NationalSpatialStrategy/

9 Following the publication of the European Strategic Development Perspective (ESDP) in 1999, an agreement on common objectives and concepts for the future development of the territory of the European Union, the National Spatial Strategy was published in 2002.

10 The purpose of this exemption is to avoid controls on developments of a minor nature, such as certain interior alterations and small business advertisements.

11 This may be extended, however, if substantial works have already been completed or if the relevant local planning authority is satisfied that the development will be finished within an acceptable time.

experience in considering individual planning appeals. Appeals to An Bord Pleanála fall into three categories or a combination of categories:[12]

- First party appeals against decisions of planning authorities to refuse permission;
- First party appeals against conditions attached to permissions by planning authorities; and
- Third party appeals against decisions of planning authorities to grant permission. This allows for appeals from local residents, schools, community councils, developers, An Taisce (the non-governmental National Trust for Ireland) etc., however it also allows appeals from competitors and associations of competitors.

3. Competitive Effects of the Retail Planning System

A number of issues arise from the planning process in Ireland that have potential competitive effects. These include the restrictions in the *Retail Planning Guidelines*; third party right of appeal; and the pace of the planning process.

3.1 Retail Planning Guidelines

3.1.1 Background

The unprecedented growth of the Irish economy during the 1990s had a significant impact on retail markets. As population and incomes increased, and with it the demand for retail services, retailers attempted to expand and enter new markets. This development was evident not only in the major urban centres but also in small and medium size towns across the country. Pressure for retail development of a larger size, to achieve economies of scale, became more and more common. At the same time, small store owners argued that they would not be able to compete with these new large scale developments, that local monopolies would ultimately result and that the economic infrastructure of towns would be damaged.

In response to the increased pressure on planning authorities, the Department of the Environment, Heritage and Local Government (DOEHLG) concluded that planning authorities did not have the resources or guidance to carry out their functions effectively and consistently. Consequently a cap on the size of 'supermarkets' was introduced. Planning permission would no longer be granted for a supermarket if the retail floor space exceeded the cap, whether such a development involved the extension of an existing development or otherwise. Following this, *Retail Planning Guidelines* were introduced The guidelines would aim to control retail development by restricting both the location and the size of outlets The *Retail Planning Guidelines* outlined five key objectives which have equal weight. The objectives are as follows:[13]

- Objective 1: All future development plans must incorporate clear policies and proposals for retail development;
- Objective 2: Facilitation of a competitive and healthy environment for the retail industry of the future;

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12 See : http://www.pleanala.ie/guide/characteristics.htm

13 Roger Tym & Partners in association with Jonathan Blackwell & Associates (2005) *Retail Planning, Guidelines for Planning Authorities,* p. 7.

- Objective 3: Promotion of forms of development which are easily accessible, particularly by public transport, in a location which encourages multi-purpose shopping, business and leisure trips on the same journey;

- Objective 4: Support for the continuing role of town and district centres; and

- Objective 5: A presumption against large retail centres located adjacent or close to existing, new or planned national roads/motorways.[14]

3.1.2 Competitive effects of floor space cap

The Retail Planning Guidelines state that

> *"one effect of the imposition of a cap could be to reduce the potential for creating local monopolies."*[15]

Elsewhere it states that

> *"it is not the purpose of the planning system to inhibit competition, preserve existing commercial interests or prevent innovation. In interpreting these guidelines, local authorities should avoid taking actions which would adversely affect competition in the retail market."* [16]

The Competition Authority made submissions during the initial study on the *Retail Planning Guidelines* and following the request for comments on the review of the floor space cap on retail warehouses in 2003; in the latter the Competition Authority concluded that:

> *"the existing floor-space limit prevents the entry of new suppliers, domestic or foreign, and reduces the incentives on existing operators for efficiency and innovation. The availability of larger sized stores would give consumers the ability to exercise choice over a wider range of products at affordable prices. The present limit thus protects existing retailers at the expense of Irish consumers. Limiting floor-space means that Irish consumers experience less choice, (for example less inter-brand competition due to lack of shelving space), and higher prices. "*[17]

In advance of the first set of *Retail Planning Guidelines* the Department of the Environment, Heritage and Local Government and the Department of Enterprise, Trade and Employment jointly commissioned a study into the anticipated effect of the guidelines; this was carried out by Goodbody Economic Consultants. The Goodbody Report indicated that the Retail Planning Guidelines were not in conflict with competition legislation, but that they did have the potential to raise retailing costs and consumer prices, reduce competition, limit choice and hinder innovation and that any or all of these would be to the detriment of consumers. The Goodbody Report stated:

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14 The underlying theory is that such centres can lead to an inefficient use of costly and valuable infrastructure and may have the potential to undermine the regional/national transport role of the roads concerned.

15 Roger Tym & Partners in association with Jonathan Blackwell & Associates (2005) *Retail Planning, Guidelines for Planning Authorities,* p. 17.

16 ibid, p. 7.

17 The Competition Authority (2003), *Submission on the Review of the floorspace cap on Retail Warehouses contained in the Retail Planning Guidelines (2000)*, p. 3.

> *"Controls on provision of retail space could constitute a serious barrier to entry and could lead to a situation where the interests of incumbent retailers were protected and promoted. This would be anti-competitive, would tend to stifle innovation, and would be contrary to the interests of consumers. Assessments of retail space requirements should be regarded as minima, and should be flexible and capable of amendment to meet future needs."* [18]

In 2005 the *Retail Planning Guidelines* were amended to provide that the floor space cap on retail warehouses would no longer apply within the functional areas of the four Dublin local authorities and in the other National Spatial Strategy Gateways, of which there are nine in total. The change in the guidelines was intended to facilitate new operators that require large floor space to enter the Irish market and potentially to allow existing operators to operate larger formats.[19] IKEA has since announced plans to open a store in Dublin.[20]

Floor space caps still remain in all other areas. The *Retail Planning Guidelines* specify development control criteria and a number of floor space caps/thresholds to be applied to various types of retail development. The present caps are as follows:

- Large Foodstore (3,000 square metres). This cap applies to the total net retail sales area of superstores[21] and the convenience goods net retail sales space of hypermarkets[22] delineated on application drawings;
- Large Foodstore Greater Dublin Area (3,500 square metres);
- Retail Warehouse (6,000 square metres); and
- Retail Warehouse - no cap within the functional areas of the four Dublin local authorities, and other National Spatial Strategy Gateways.

The Goodbody Report questions why the application of caps differ for superstores and hypermarkets. If the cap was just applied to the convenience goods space, as for hypermarkets, the range of store formats would likely be extended increasing consumer choice. As it stands retailers might be encouraged to move to a hypermarket form to acquire the flexibility it provides.

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18 Goodbody Economic Consultants (2000), *The Impact of the Draft Retail Planning Guidelines on the Retail Sector*, p.54

19 The change also facilitated the 1998 Urban Renewal Scheme by contributing to urban renewal in those areas covered by Integrated Area Plans (IAPs), in the nine Spatial Strategy Gateways. IAPs address the physical, economic, social and environmental regeneration of a declining area. The targeting of new forms of retail development into these IAP areas was intended to provide an additional source of employment for such areas. *Retail Planning, Guidelines for Planning Authorities*; Non-application of Retail Warehouse Cap in Certain areas covered by Integrated Area Plans under the Urban Renewal Act, 1998, pg 31.

20 This has been planned in co-operation with Ballymun Regeneration Limited, a company established to facilitate the regeneration of the area. IKEA said up to 500 new jobs would be provided with half of these for local people. http://www.rte.ie/business/2006/0126/ikea.html

21 Superstores – Single level, self-service stores selling mainly food, or food and some non-food goods, usually with at least 2,500 square metres net sales floorspace with dedicated surface level car parking.

22 Hypermarkets – Single level, self service stores selling both food and a range of comparison goods, with net sales floorspace in excess of 5,000 square metres with dedicated surface level car parking.

Results from the *Grocery Monitor* Project show that overall, most new grocery stores that opened between January 2001 and March 2007 were in the middle of the store size range (1000 -2500 square metres). During the same period 10 of 168 stores opened were over 5000 square metres.

Table 1: Trend and size of new stores opened from 2001 – March 2007

	2001	2002	2003	2004	2005	2006	2007*	Total
New Stores opened	23	10	21	35	37	40	2	168
Size of development:								
Store < 500 ḿ	0	1	2	2	1	0	1	7
500m^2≤ store ≤ 1,000 m^2	0	0	2	2	1	1	0	6
1,000 m^2≤ store ≤ 1,500 m^2	15	6	6	13	9	10	0	59
1,500 m^2≤ store ≤ 2,500 m^2	2	3	4	12	18	21	0	60
2,500 m^2≤ store ≤ 5,000 m^2	5	0	4	3	7	7	0	26
store > 5,000 m^2	1	0	3	3	1	1	1	10

*2 Stores had opened as of March 1st 2007
Source: Retailer Responses to Grocery Monitor Questionnaire.

3.1.3 Competitive effects of location

One of the principal objectives of the *Retail Planning Guidelines* is support for the continuing role of town and district centres in a way that is efficient, equitable and sustainable. The purpose of limitations on retail floor space is that, left to free market forces and in the absence of planning controls, retailers would probably opt for larger stores than planners are likely to permit in neighbourhood, town or district centres. The optimal location for new retail development is defined as:

> *"somewhere which is accessible to all sections of society and is of a scale which allows the continued prosperity of traditional town centres and existing retail centres."* [23]

The guidelines state that established centres should be the preferred locations for developments that attract many trips. This policy should also support their role as centres of social and business interaction in the community. If there are no development sites available within a town centre, the next preference should be a location on the edge of the town centre. Out-of-centre development should be contemplated only where there are no sites, or potential sites, within a town centre or on its edge, or where satisfactory transport accessibility (including park-and-ride) cannot be ensured within a reasonable period of time.

[23] Roger Tym & Partners in association with Jonathan Blackwell & Associates (2005) *Retail Planning, Guidelines for Planning Authorities,* p. 6.

The Goodbody Report warned that the impact of the guidelines could require a retailer to reduce the scale of its outlet to fit into available town centre sites. Also, to refuse permission to develop a larger store out of town could impact adversely on costs, consumer choice and prices.

Results from the *Grocery Monitor* Project show that, overall, most new stores that opened between January 2001 and March 2007 were reasonably evenly distributed across 'town centre', 'edge-of-centre' and 'out-of-centre' developments, with 'out-of-town' developments accounting for a relatively small proportion of new developments. When consulting with stakeholders during the early phases of the *Grocery Monitor* Project, parties identified the low availability of suitable sites and the retail planning system as the most significant barriers to new entry/opening new stores. The location of a store is a strategic choice made by the retailer. Retailers wish to locate in areas that maximise profitability and so consider criteria such as the market size, customer profile and competitive conditions within an area before locating. However, in view of the fact that the *Retail Planning Guidelines* specify that the preferred location of stores is within town centres, out-of-town development is limited, even if the area meets the criteria of retailers.

The Competition Authority doubts that restricting competition through uniform restriction on floor-space is a proportionate response to the possible, but by no means inevitable, negative impact on town centres. The hierarchical approach to location creates a barrier to entry, as the requirement to develop in town centres may prevent the opening of new stores of a scale capable of competing with existing stores.

In a submission to the Joint Parliamentary Committee on Enterprise and Small Business in April 2000, the Competition Authority did not advocate that all superstore development be allowed to proceed regardless, but rather that it was a matter that should be left to local authorities to decide:

> *"the siting of developments are best made locally, based on local conditions, rather than on foot of a blanket decision which will not suit everywhere".*

3.2 Third Party Appeals

An applicant for planning permission can always appeal the decision of a local planning authority. Other interested parties may appeal on condition that they originally made submissions in writing to the relevant local planning authority prior to the initial decision. Exceptions to this are bodies that were entitled to be notified of a planning application but were not so notified, or persons with an interest in land adjoining the site.[24]

Allowing third parties to make appeals is the exception rather than the rule in most other European countries.[25] Apart from Ireland, only Denmark and Sweden facilitate third party appeals. In 2002, the *Centre for the Protection of Rural England* (CPRE), along with a number of environmental groups, commissioned a research project examining third party rights of appeal.[26] They concluded that the main reasons systems do not facilitate third party appeals include:

- Landowners need the ability to appeal because they have an expectation that they will be permitted to develop their land, which has been taken away; third parties do not have an equivalent expectation and so are not being denied a right.

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24 See: http://www.pleanala.ie/guide/appeal_guide.htm

25 See : http://www.pleanala.ie/guide/characteristics.htm

26 Green Balance, Leigh Day & Co Solicitors, John Popham, Prof Michael Purdue (2002), *Third Party Rights of Appeal*.

- There exist ample opportunities for third parties to express views on planning applications and have them properly considered at the most appropriate time - that is, before the decision is made.

- Any benefits to third parties would be outweighed by the disadvantages, not least the delay to development.

- Decisions can be subject to legal challenge through the courts.

In Ireland, facilitating the right to appeal by third parties is supposed to strike a balance between the benefits, in terms of equality, and the costs in terms of increased financial costs and delays. The *Planning and Development Act 2000*, provides that An Bord Pleanála may dismiss appeals or referrals if they are vexatious, frivolous, without substance or have the intention of delay.

The Competition Authority is aware of allegations that retail competitors use the planning system with anti-competitive intent. By lobbying, making objections at the local authority stage and appealing decisions made by local authorities to An Bord Pleanála, competitors can increase the applicant's costs, delay the planning process, frustrate competitors and even prevent the granting of planning permission, thus stifling competition within an area even in the face of public support for a new entrant.

As part of the *Grocery Monitor* Project, the Competition Authority requested that the major grocery retailers supply planning information relevant to any retail outlets opened since 2001.[27] As of 1 March 2007, 172 grocery retail outlets of major retailers had opened in Ireland in the period since January 2001. The Competition Authority received planning information on 168 of these developments.

Across all retailers, 39.3% of decisions were appealed; these include first party appeals, third party appeals and appeals withdrawn. In comparison, the Department of the Environment, Heritage and Local Government state that in 2006 only 6.9% of all planning decisions were appealed. While heterogeneity may exist in the appeal rate of different development categories, an appeal rate of 39.3% in the grocery retail sector is significantly higher than a 6.9% appeal rate for all planning decisions.

Retailers provided the Competition Authority with the names of third parties that appealed planning permission granted by the local authority. Of 66 decisions which were either appealed or for which the appeal was withdrawn, third party names were obtained in 53 cases.[28] Results show that 38% of these appeals were made by a competitor.[29] When a competitor makes an appeal, the entire planning process

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27 Retailers were asked to supply planning history information on the application for the store that resulted in the eventual construction of the store; therefore the data excludes developments that were ultimately abandoned. Data supplied included the number of new stores opened since 2001, the type of planning application, the number of applications that were appealed, the average time for decisions (with and without appeal), the number of applications appealed depending on who applied (developer or company) and information on who appealed in each case. In reality, retailers often make many planning applications on a site after permission is granted, either to change some of the conditions of permission, or to apply for change in signage or layout of the store. Assembling every planning application made on a site was beyond the scope of this initial examination.

28 Two retailers have been omitted from this analysis. One did not supply third party names, and the other had only one appeal case, which was subsequently withdrawn.

29 "Competitor" was defined to include RGDATA (the Retail, Grocery, Dairy and Allied Trade Association), local trader associations and local retailers.

takes, on average, just over 18 months. This compares with 12 months when the appellant falls into the "Other" category.[30]

Of 91 appealed cases, 21 decisions were reversed by An Bord Pleanála (this includes first party and third party appeals). This implies a reversal rate of 23%. For all appealed planning decisions in 2006, according to the Department of the Environment, Heritage and Local Government, 32.8% of local authority decisions were reversed by An Bord Pleanála, 33.1% were varied and 33.9% were confirmed.

It is difficult to separate legitimate objections from spurious ones simply by looking at third party submissions to An Bord Pleanála and examining the "grounds for appeal". The majority of third party appeals allege that the application is in breach of the local authority's development plan and so we have not included the "grounds for appeal" as an explanatory variable.

3.3 Length of the planning process

The planning process is slow and could in theory hinder competition by discouraging grocery retailers from submitting applications. There is a statutory deadline of eight weeks for planning decisions at the local authority 'first instance' stage. The strategic target of An Bord Pleanála is to give decisions within 18 weeks in 90% of appeals. Combined with local authority statutory deadlines, cases should take no longer than 26 weeks.

According to results from the *Grocery Monitor* Project the planning process for opening a new grocery store appears to take, on average, approximately 10 months. However, there is substantial heterogeneity by retailers. The longest average length of time, reported by one retailer, to get a decision following the submission of the planning application to the relevant planning authority, was just over 12 months. The shortest reported average time was just five months, although this figure was for a single application. Other large retailers reported times varying between 7 and 11 months. These are average figures; and include applications where decisions were appealed and not appealed. It takes an average of 15.6 months (over 62 weeks) for retailers to obtain a planning determination when the decision of the local authority is appealed by third parties. When appeals are made by the first party it takes, on average, 14.6 months to obtain a successful decision (though it should be noted that this analysis is based on small numbers). When appeals are withdrawn, on average it takes 7.2 months to obtain a decision, 20 weeks longer than the deadline. The longest reported time for a decision on a single application was 40 months. In this case the local planning authority accepted the application, but the decision was appealed; the application was ultimately accepted by An Bord Pleanála on appeal.

The majority of timelines reported to the Competition Authority were longer than the strategic targets of the local authorities and An Bord Pleanála. For all planning appeals in 2006, 53% were decided within An Bord Pleanála's strategic target; this has fallen to 49% in 2007. An Bord Pleanála states that it is taking all possible measures to achieve its strategic target.[31]

4. In Summation

The planning system does not have as its primary objective the aim of influencing competition in retail sectors. However, it can impact on competition in retail sectors primarily through the creation of barriers to entry and expansion.

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30 "Other" was defined to include any other third party making appeals such as local residents, schools, community councils, An Taisce and developers.

31 See: http://www.pleanala.ie/news/20071109.htm

First, a proportionality test should be applied and in this regard floor space caps are not the most proportionate policy response i.e. floor space caps do not achieve the desired objectives in a manner that minimise the cost to consumers. Other policy instruments to achieve the desired objectives would be more effective; for example, using trading hours and improving infrastructure in response to traffic congestion. More confidence should be placed in allowing markets to respond to consumer needs directly, rather than policy makers guessing consumer preferences.

Second, retailers' experiences with the Retail Planning System suggest that, at the very least, the system may be delaying entry and retail development. One of the causal factors appears to relate to the right of third parties, and especially competitors, to appeal decisions of local authorities.

ITALY

1. Introduction

Retail distribution is one of the sectors where land use regulation has most affected competition. The sector had been characterized for many years by a regulation that strictly controlled entry of new shops and expansions of existing ones, based on a structural control of supply. The 1998 reform eliminated all economic regulations and left the sector to be governed only by planning laws. The reform was realised through a national law but its application was devolved to regional governments. As a result of a provision of the 1998 law that promoted an equilibrium between different forms of retail distribution, many Regions did not liberalize as much as expected and reintroduced many of the restrictions that the reform had eliminated.

While retail distribution has been already liberalized, there are a few sectors, such as pharmacies, gasoline stations and newspaper kiosks, where economic regulation continues to constrain entry, limiting the number of outlets through a series of instruments (minimum distances, maximum number of outlets based on population etc.). The objectives pursued by these regulations do not concern land planning, but aim (at least when originally introduced) to guarantee sufficient demand to every outlet.

2. The regulation of the retail distribution industry in Italy

2.1 The structure of the retailing sector in Italy

The Italian retailing sector has a prevalence of traditional small stores. When compared to other European countries the density of retail stores appears much more dispersed. Although this dispersed structure might find different explanations (historical and cultural factors, consumers' preferences, etc.) the strict regulation of entry, only partially lifted in 1998, has certainly influenced market structure.

Table 1. Retail stores density

Number of stores/10.000 inhabitants

FRANCE	68.8
GERMANY	33.2
UNITED KINGDOM	33.6
ITALY	121.5
SPAIN	125.4

Source: Eurostat data, 2004, reported in Unicredit

The barriers to entry undermined the development of big surface outlets (especially hypermarkets) which , as shown in Table 2, are much less important in Italy than in the rest of Europe.

Table 2. Distribution channels (food industry, number of outlets) (2006)

	ITALY	SPAIN	GERMANY	FRANCE	UNITED KINGDOM
Hypermarkets	18%	38%	29%	51%	46%
Supermarkets	53%	43%	54%	44%	43%
Traditional stores	29%	19%	17%	5%	11%

Source: Federdistribuzione, Mappa del sistema distributive italiano, 2007

The structure of the Italian retail distribution market is also very differentiated at the regional level. These differences reflect the different policies adopted at the local level. The changes introduced with the reform of 1998 did not significantly alter this differentiated situation, since sometimes the Regions that introduced restriction were also the ones were the development of the retail network had been slower. In general, regions in the North and the Center adopted less restrictive policies towards large surfaces.

2.2 Regulation before the reform

Before the reform the regulation of the retailing sector was based on Law n. 426 11 June 1971. The law contained several provisions restricting entry in the sector. The law required perspective retailers to enrol in a trade register (Registro degli esercenti il commercio). The opening of new outlets (independent of their dimension) was then conditioned on the municipality authorization.

The licenses were differentiated (there were detailed product tables establishing the products that could be sold in connection with each authorization). For large surface stores (exceeding 1,500 sq. m. in cities with more than 10,000 inhabitants and 400 sq. m. in towns with less than 10,000 inhabitants) a supplementary authorization from the Regional council was required.

The law empowered city councils to regulate commercial activities through "commercial plans". These plans, though supposed to be based on a balance between supply and demand, had the effect of protecting businesses already operating in the market to the detriment of newcomers. The associations representing retailers were involved in the planning process, thus making it possible for incumbents to raise obstacles to entry of competitors. The commercial plans, in fact, often established maximum surface for the retailing network. As a result of these provisions the development and modernisation of the Italian retailing sector was hampered. Rules concerning the development of large surface stores were not applied in a uniform way, thus determining a diverse market structure, with entry easier in the regions of the North.

In 1993 the Italian Competition Authority, in a detailed report to the Government, had strongly advocated the removal of the unjustified regulatory constraints in the retailing sector[1]. In particular, the Authority observed that regulation limited entry in the market and reduced competition. The Authority suggested the elimination of the commercial planning system, based on an administrative analysis of supply and demand, and recommended that entry in the market should only be subject to an assessment of compatibility with town planning. The Authority advocated, also, a simplification of the authorization process. Many suggestions contained in the Report were followed in the new regulation that reformed the sector.

[1] Italian Competition Authority, Report on competition and regulation in the Retail Distribution, January 1993, Suppl. Bull. N. 1/93

2.3 The reform of 1998

On 31 March 1998 the Council of Ministers approved Legislative Decree No. 114, containing a widespread reform of retail trade regulation in Italy. The Decree provided a significant market oriented reform of the sector aimed at increasing competition and fostering the modernization of the retail industry. The Decree eliminated any form of commercial planning devolving to regional governments the definition of zoning plans for retailing networks.

In February 1998, the Authority had submitted an opinion to Parliament and the Government containing specific remarks with respect to the preliminary draft of the legislative decree[2]. In its report the Authority pointed out the provisions of the draft decree that could usefully be amended to foster competition. In particular, it observed that the regional governments' lawmaking and planning powers should be more clearly defined, in order to prevent highly discretionary interpretations by the regional and local authorities, which could be inconsistent with the whole purpose of the reform. The final version of the decree partially took up the suggestions of the Authority, defining the powers of regional and municipal governments more specifically and restricting the scope for discretionary intervention.

The legislative decree marked a major step forward in the direction of a more market-oriented regulation of retailing. In particular, it made entry conditions significantly easier, liberalising the opening, extension and transfer of small retail shops and simplifying the permit system provided for large retail surfaces.

The reform eliminated many of the pre-existing entry barriers, such as the trade register and the specific licences limiting the range of goods that could be sold in an outlet. The law only distinguished two broad categories for retailing: food and non-food.

The authorization system was deeply modified making entry for small sized outlets much easier. The law, in fact, differentiates the authorization procedure according to the dimension of the stores. It defines three different types of establishments: small (not exceeding 150 sq. m. floor space), medium-sized (from 150 to 1,500 sq. m.) and large establishments[3]. Small outlets do not need any form of authorization. They must only inform the local council of their intention to open the outlet. Medium sized stores have to apply to the local council for an authorization (like before the reform), while large stores openings or enlargements are regulated at the regional level.

The reform, eliminating commercial plans, established that each regional government had to issue a zoning plan for the development of the retailing network, taking into account environmental and urban planning considerations.

2.4 The application of the reform at the regional level

The Regions should have defined, no later than 24 April 1999 (a year after the reform), the general lines for setting up commercial activities and the planning criteria to be applied to the commercial sector[4]. In the meantime the law blocked any pending authorization procedures with the result that no new permits

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2 Italian Competition Authority, Opinion on draft legislative decree on the reform of retail trade regulation, February 1998, in Bull. N. 7/98.

3 In cities with more than 10,000 inhabitants the thresholds are raised respectively to 250 and 2,500 square meters.

4 Art. 6 of Legislative Decree 114/98.

could be issued in the absence of regional zoning plans. None of the twenty regions respected the deadline and this delay in the adoption of the regulation had a restrictive effect on entry of new large stores.

The regional regulations were adopted between the end of 1999 and 2000. Many restrictions that the reform intended to eliminate were reintroduced at the regional level.

In April 1999 the Authority submitted an opinion on the general lines and criteria that the Regions should have followed in exercising their powers in the implementation of Legislative Decree no. 114/1998[5]. The Authority underlined that the regional guidelines for setting up commercial activities should ensure that permit applications could only be rejected in cases where acceptance might be prejudicial to the achievement of specific general interest objectives. The Authority stressed that any framework that merely protected the interests of incumbent firms had to be avoided and that the elimination of retail categories, as envisaged by the Legislative Decree no. 114/1998, was another key aspect of the reform of the sector, whose reintroduction at the regional level should be avoided[6].

In only three regions, Piedmont, Marche and Emilia Romagna, the general guidelines for the application procedure did not have any prior limit on the admissible floor space for new stores. All other Regions reintroduced stringent entry barriers. They divided the regional territory in areas (generally coinciding with the administrative boundaries of the Provinces) and for each area established a maximum floor space for the authorization of new large stores' openings. Some regions set a time limit (3-5 years) for their regional zoning plans while others did not indicate a time limit.

The Act August 4, 2006, n. 248, that amended several legislative provisions, liberalizing quite a number of activities[7], eliminated any residual regulation on entry based on minimum distance between outlets and on the range of products supplied. Furthermore article 3 extends these provisions to restaurants, bars and cafeterias.

It is widely believed that, contrary to its objectives, after the issuing of the Bersani Decree of 1998, regulatory barriers to entry for large stores have not diminished[8]. According to a report by Federdistribuzione (the association of firms operating in modern distribution) the administrative process for authorizing the opening of a 15,000 sqm outlet takes at least 6 years, not much different from the past[9].

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5 Italian Competition Authority, Opinion on regional measures implementing Legislative Decree no. 114/1998 on commercial distribution, in Bull. N. 13-14/99.

6 In another opinion, submitted in March 1999 to the Lombardy Region, the Authority had noted that it would be contrary to the principles of competition for the regions, in implementing Legislative Decree no. 114/1998, to use their powers in a way that led to the revival of forms of planning aimed at preserving the existing pattern of distribution. The Authority stressed that the aim of guaranteeing "balanced" development did not require quantitative restrictions on the opening of new shops. This objective could be pursued by having recourse to the measures provided for in the decree in question to recognize and enhance the role of small and medium-sized enterprises. Instead of blocking the evolution of the market, the aim should be to provide an environment in which small and medium-sized enterprises can adapt to the evolution of demand and find room to compete.

7 Act August 4, 2006, n. 248 "Urgent provisions regarding economic and social development, the control and rationalization of public expenditure, interventions in the fields of public revenue and repression of tax evasion".

8 ISAE, La liberalizzazione del commercio al dettaglio: una prima verifica, Rapporto Trimestrale, Aprile 2002

9 Federditribuzione, 2007.

The competitive restrictions in the retail distribution sector determined by the regulation seem to have negative effects on productivity, innovation and even employment. Schivardi and Viviano[10] found that (regulatory) entry barriers are associated with substantially larger profit margins and substantially lower productivity of incumbent firms. They also found that liberalization has a positive effect on investment in ICT. Consistently, lower productivity coupled with larger margins result in higher consumer prices.

Viviano[11] also tested the effect of different regional regulations on employment. She studied the effects of the rules implemented in Abruzzo and Marche, two otherwise very similar regions, that adopted different policies with respect to retail distribution: the first set tight restrictions on the opening of large stores; the second did not impose any. The results show that entry barriers have a negative and sizeable impact on employment growth. Some evidence is also found that fiercer competition encourages the development of more efficient small retail trade shops.

In 2007 the Italian Competition Authority conducted an extensive analysis of the implementation of the reform[12]. The analysis showed that many regional laws have reintroduced the restrictions that the Decree intended to eliminate. Furthermore, the trend, with very few exceptions, was a consistent one and even the more recent Regional regulations were becoming more and more restrictive. Only in Lombardia a less restrictive plan was adopted in October 2006[13]. This plan moves away from quantitative restrictions (such as limiting surface space, or establishing entry thresholds) to a case by case qualitative evaluation of the environmental impact of large surface outlets.

3. Restrictions on entry affecting specific sectors

There are some activities where specific rules contain entry restrictions that affect competition. The rationale for such restrictions was to guarantee a minimum level of demand so that supply would be uniformly distributed around the country. More than land planning, these restrictions originate from commercial planning. For example in the case of pharmacies, there is a fixed number defined at the municipal level by a plan that takes into account population density (a pharmacy every 5,000 inhabitants in municipalities with a population of 12,500 inhabitants or less and a pharmacy every 4,000 inhabitants in other cases; there is also a 200 meters minimum distance requirement).

Other sectors affected by entry restrictions such as minimum distance requirements, or maximum surface limits are gasoline stations and newspaper kiosks. Although some steps towards liberalization have been taken, restrictions are often reintroduced at the local level.

4. Rules on buildings' use and on the use of public space

The basis for the general principles of town planning were established in the national urban planning law approved on August 17 1942. The purpose of the law was a rationalization of town planning. These rationalisation was to be applied through individual town plans approved by city councils. It is through the town plans that zoning and constraints concerning construction and use of buildings (so called "use destinations") are established. Town plans contain constraints on the destination of buildings to specific

10 Schivardi F., Viviano E., Entry Barriers in Retail Trade, December 2007, available at htttp://digilander.libero.it/fschivardi/research.htm

11 Viviano E., Entry regulations and labor market outcomes: Evidence from the Italian retail trade sector, Bank of Italy, Temi di discussione, May 2006.

12 AGCM, Regulation quality and economic performance at the regional level: trade distribution in Italy, February, 2007.

13 Regional Deliberation n. VIII/215, October 2 2006.

uses, generally distinguishing residential use from other uses (such as business activities). When these constraints exist, changing the use of a building is very difficult, and it involves a lengthy administrative process. In particular a change in the destination of a building (for example opening a hotel in a building destined for residential use) has to be approved by the city council.

With the creation of the Regions in 1971, Regions have been given the responsibility to establish the general principles in urban planning that municipalities within the Region must follow. As a result there are now huge differences in the restrictiveness of planning rules at the local level, with some Regions setting more flexible rules, and simpler administrative procedures, when, for example, changes in buildings destinations do not imply new constructions. For example a regional law of Lombardia (Regional Law n.1 of 15 January 2001) has eliminated the requirement of predetermining the destination of buildings to a specific use. The law states that town plans only have to specify the uses that are expressly forbidden for a building, and not those that are permitted, thus lowering the administrative burden for a change of destination.

The use of public land for offering outside services is regulated at the municipal level. Cafes, restaurants and bars that want to place tables on public soil must ask for an authorization and pay a fee. The authorization is specific to the subjects that have filed the request and to the activity declared in the request. In case of a change in the activity the request of an authorization has, therefore, to be filed again. There is a fee associated with the use of land. The provisions on this fee have moved to a more market oriented determination. In the past, in fact, the use of public land was subject to a tax. Now it is a fee whose amount is based on a classification of the space (according to the importance of the areas involved).

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KOREA

1. Introduction

Land use regulations are mainly enforced to achieve certain goals such as promoting effective land use and public welfare, preventing overcrowding of cities and conserving environment by applying differentiated rules on land usage and development density within a certain area.

But, at the same time, these types of land use regulations can have the effect of reducing competition. For instance, regulations on establishment of buildings to prevent overcrowding of cities and on establishment of factories to protect environment can limit competition by making it difficult for new enterprisers to advance into the area in question.

The following are the current status of the "Total Maximum Factory Load Regulation in the Seoul Metropolitan Area," which is under vigorous discussion recently as part of efforts to reform land use regulations in Korea, and two perspectives towards the regulation. In addition, also introduced in the following is the Korea Fair Trade Commission (KFTC)'s case of deregulations on establishment of small-scale factories under the Act on Planning and Use of National Territory (APUNT) through demand-oriented deregulation efforts.

2. Total Maximum Factory Load Regulation in the Seoul Metropolitan Area

2.1 Overview and current status

Total Maximum Factory Load Regulation in the Seoul Metropolitan Area refers to an institution under which a total maximum load of new factories is set every year for Seoul and Incheon cities and Gyeonggi Province, and according to the maximum load, new construction or extension of factories is regulated so as to promote a national development in a way that all parts of the country can harmoniously develop and to prevent overpopulation of the metropolitan area. In other words, this is a system to encourage factories to move out of the metropolitan area into provincial areas by controlling the annual influx of factories (including new construction and extension) into the metropolitan area.

It was in early 1970s when factories, along with universities, were classified as representative facilities likely to cause overpopulation, and since then they have been under regulation in order to prevent overcrowding of the metropolitan area and to diversify its functions. Accordingly, through a sweeping amendment of the "Capital Region Readjustment Planning Act (CRRPA)" in 1994, the total maximum factory load regulation was first introduced and since then has been implemented to date.

Table 1. Set and executed total factory load of the Seoul Metropolitan area

(Unit: 1,000㎡)

Year	Set load	Executed load
1994	1,827	1,315
1995	4,260	3,384
1996	4,204	3,674
1997	4,226	2,757
1998	3,990	1,000
1999	2,746	2,662
2000	4,705	4,648
2001	2,942	2,681
2002	2,766	2,757
2003	2,766	2,718
2004	3,426	3,337
2005	3,006	2,300

Between 1994 and 1996 during which the regulation was in its infant stage, the proportion of the executed load to the set load stood around an average of 81%. But after 1997 when Korea suffered a severe recession due to the Asian financial crisis, the executed load dropped significantly to a point where it recorded just 25% of the set load in 1998. After that, in 1999, the economy began to recover and subsequently, the set load was used up faster than expected, and further became in shortage. This shortage posed an obstacle not just to the existing companies but also to new companies in newly constructing or enlarging their factories in the metropolitan area.

For instance, the total maximum factory load for Gyeonggi Province in 2000 was 3,921,000㎡, but once the investment delayed by the Asian financial crisis was made all at once, a shortage of land amounting to 1,984,000㎡ occurred.

Table 2. Set and executed total factory load of Gyeonggi Province

(Unit: 1,000㎡)

Year	Set load	Executed load	shortage
1999	2,228	2,227	580
2000	3,921	3,920	1,984
2001	2,602	2,601	700
2002	2,676	2,675	630
2003	2,676	2,648	1,139

2.2. Two perspectives towards the Total Maximum Factory Load Regulation in the Seoul Metropolitan Area.

So far, regulations on real property including land use in Korea have been discussed from the perspective of society and public good, such as promotion of a balanced national development, resolution of metropolitan overpopulation, and creation of a clean environment. In light of this, the Total Maximum Factory Load in the Seoul Metropolitan Area was introduced and in the same context, recently, the discussion on easing the regulation is taking place.

Recently, in Korea, transfer of power took place through the presidential election (December 2007), and the incoming government is pushing forward reform of regulations that hold back investment by businesses as its foremost and important reform agenda. As of now, abolition or easing of the Total Maximum Factory Load Regulation in the Seoul Metropolitan Area is under discussion as part of such reform agendas.

First of all, the arguments of those advocating abolition or easing of the regulation can be summed up as two parts. First, they argue that regulating construction or extension of factories within the metropolitan area could undermine national interest as it makes it difficult to attract foreign capital preferring presence in the metropolitan area and forces local companies to move their factories overseas such as China or Southeast Asia. In other words, a regulatory policy that tries to achieve a balanced national development by limiting location of factories in the overcrowded metropolitan area is very anachronistic given that companies do not have to settle for non-metropolitan area just because they can not build factories in the metropolitan area in this age of market-opening and market economy.

Second, from the perspective of economic efficiency and competition, mandatory regulations on factory establishment or extension through regulating land use stand to hamper competition among businesses by restricting entry of potential competitors and discouraging free business activities. What this means is that this type of regulation forces businesses to locate themselves in unreasonable areas and this leads to higher production costs and lower productivity, which in turn, reduces consumer welfare.

Meanwhile, those advocating the existence of the regulation argue that the regulation should not be eased, citing that the regulation is effective in revitalizing regional economies lagging behind the metropolitan economy and addressing the metropolitan overpopulation through a balanced national development. In particular, they maintain that at a time when the income gap between the metropolitan

area and the rest of the country remains wide, deregulation on the metropolitan area alone will only exacerbate the regional economies.

For now, the two sides are fiercely confronting each other and which side is right is still open to debate.

3. Cases of improvement of regulations on small-size factory establishment under the Act on Planning and Use of National Territory (APUNT)

The Korea Fair Trade Commission (KFTC) has not handled directly the actual cases to see what competition effects might result from regulations on real property including land use.

However, the KFTC is committed to minimizing anti-competitive effects stemming from land use regulations by recommending relevant ministries to improve regulations, thereby inducing law revisions that ease land use regulations under the APUNT and Framework Act on Environmental Policy.

The following is the case of deregulations on small-size factory establishment in the planning management area under the APUNT[1].

The KFTC, starting from early 2006, has been carrying out tasks to identify anti-competitive regulations through on-site inspection or surveys of businesses and encourage abolition or improvement of such regulations. Of the identified regulations is the one on small-size factory establishment in the planning management area under the APUNT.

That is, with the view to prevent reckless development of national territory and environmental degradation, the previous APUNT used to permit individual location of large factories with more than 10,000㎡ in floor space, which are capable of installing anti-pollution facilities, while in case of small factories unable to do so, letting municipalities determine whether to permit their location through ordinances after deliberations by the Urban Planning Committee (UPC).

Despite the provision, however, most of the municipalities have not amended their urban planning ordinances to permit small factory construction, making virtually impossible to build a small factory with less then 10,000㎡ in floor space. In addition, construction of small factories had to undergo a complex procedure that required UPC's deliberations.

The KFTC concluded that this regulation might cause serious adverse effects such as reduced construction of factories, discouraged opening business and investment, which could discourage business activities and in the end, reduce competition among businesses.

Accordingly, the KFTC suggested to the Ministry of Construction and Transportation, the competent authority in charge of the issue, that it should ease regulation on small factory construction in the planning management area. As a result, in early January of this year, Enforcement Decree of the APUNT was revised to allow the establishment of small factories in the planning management area in general and to simplify the procedure for factory establishment.

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[1] The APUNT divides the entire national territory into four areas according to their usage; city, management, agriculture & forest, and environment conservation, with the aim of promoting efficient land use and better public welfare. Depending on their usage, each area is subject to different regulations. The planning management area refers to the area that requires a systematic management as it is expected to be incorporated into the city area.

POLAND

1. Introduction

The present study relates to the act on large surface retail stores which introduces a limitation in creating new large surface retail facilities, consisting in the obligation to obtain a permit granted by the local government unit, and its impact on the competitiveness on the market. Following a brief presentation of the provisions of the act, I shall attempt to assess the compliance of this regulation to the competitiveness rules resulting from the European Community Treaty, taking as the basis the position of the European Court of Justice. Moreover, in the study I shall analyse the effect the new regulation may have on the competition on the market.

2. Polish act on large surface retail facilities.

The act of 11 May 2007 on creation and operation of large surface retail facilities entered in force on 18 September 2007. The act defines the rules and mode of granting permits to create and operate large surface retail facilities.

In the light of provisions of the referenced act, a large surface retail facility is considered to be every retail facility with retail area exceeding 400 m^2, in which any retail activity is conducted. The retail area must be understood as the part of the commonly accessible area of the retail facility assigned for retail sales, in which direct sale of goods takes place. Therefore, the act relates to the construction of new hypermarkets, most supermarkets and discount stores[1], as well as other retail facilities which conduct retail sales of goods on an area exceeding 400 m^2. It applies to retail sectors, in particular food, construction, clothing, vehicle and gardening sectors as well as the types of services which may be provided in a large surface retail facility.

The creation of a large surface retail facility requires that a permit is granted by the commune administrator (mayor, president of the city) specific for the location of the large surface retail facility, hereinafter referred to as the "granting body". The permit referred to above is issued by the granting body if the location of the large surface retail facility is compliant with the local zoning plan or the decision on land development and zoning, upon obtaining a positive opinion expressed by the specific commune council. The granting body, before presenting the application to the commune council for opinion, performs or commissions the performance of analyses and opinions relating to the assessment of effects of creation of a large surface retail facility on the commune (city) infrastructure, local communication system, local job market, existing urban system, existing retail facilities network, including the network of existing large surface retail facilities in the neighbouring communes and the effect on natural environment.

[1] hypermarket - store with retail area of 2500 m^2, which sells food and often other consumer goods and manufactured goods;

supermarket - store with retail area of 300 – 2499 m^2, which sells mostly food and often cosmetics and chemical products of limited selection;

discount store - store with retail area of 300 – 1000 m^2, which sells mostly food and often cosmetics and chemical products of limited selection, with a low level of service.

The opinion of the commune council takes into consideration the following premises:

- formation of favourable conditions for purchasing goods and services, improvement of the quality of consumer service and expansion of the retail and service offer;
- development of the retail network and maintenance of balance between various forms of retail;
- development of the job market;
- development of infrastructure;
- protection of the environment.

In addition, the act requires that the opinion of the commune council does not violate the rules of fair competition in the scope of conducting retail activity in the commune (city) and at the same time takes into consideration the position of the chambers of commerce and local consumer organisations as well as local business organisations.

The procedure leading to obtain the permit to build a large-surface retail facility with retail area exceeding 2000 m^2 is identical, except that the granting body issues the permit if the location of the large surface retail facility is compliant with the voivodship zoning plan and upon obtaining a positive opinion of the specific sejmik of the voivodship.

According to art. 1 of the abovementioned act, its objective is to protect the public interest and implement the principles of sustainable growth. The legislator, in the justification to the draft act, further discussed the issues of limiting the creation of large surface retail facilities. On one hand, the draft authors stressed the threats of infrastructure development related to the development of large retail chains, such as communication problems and decrease of revenues from taxes, on the other hand, they emphasized the loss of tens of thousands of jobs in the local retail sales and production. In the opinion of the Legislator, "the creation of a large surface retail store causes a potential threat for the neighbouring small and medium stores, in form of decrease of turnover, which in consequence may lead to bankruptcy. It is a specific social problem taking into consideration the fact that most small local entrepreneurs work at their companies as a kind of social employment, as due to lack of alternative jobs they hold on to retail sales."

3. Requirement to obtain permit to create a large surface retail facility vs. competition protection rules

The case of subjecting the opening of new shops to the grant of a licence issued by the mayor on the basis of the mandatory opinion of the municipal committee was discussed by the European Court of Justice in its judgement of 17 October 1995 concerning the joined cases C-140/94, C-141/94 and C-142/94 DIP SpA vs. Comune di Bassano del Grapa, LIDL Italia Srl vs. Comune di Chioggia, Lingral Srl vs. Comune di Chioggia (cf. judgement 1995, I-3257). In the opinion of the Court, the proper interpretation of community competition rules (prohibition of competition limiting agreements and prohibition to abuse the dominant position) does not exclude the Member State's regulations which make the opening of new shops subject to the grant of licence issued by the mayor on the basis of the mandatory opinion of the municipal committee, where the members of this committee, appointed or nominated by trade organisations in order to present the expert opinion, are in the minority, and their opinion must take into consideration the public interest and where the mayor, who holds the power of decision, is obliged to take into account the public interest criteria specified in the commercial development plan elaborated by the municipality.

At this point, one should note that the Polish act on large surface retail facilities does meet all the compliance criteria indicated by the ECJ, as the permit to create a large surface retail facility is issued by the commune administrator (mayor, president of the city) upon receipt of a positive opinion expressed by the commune council, which is the local government body consisting exclusively of elective representatives of the commune citizens. Moreover, both bodies are obligated to act in compliance with the protection of public interest and objective criteria listed in detail in point 2.

In the opinion of the Court expressed in the referenced judgment, this type of legislation neither requires nor favours the adoption of agreements, decisions or concerted practices contrary to the prohibition of competition limiting practices, nor does it reinforce their effects, or delegate to private operators the responsibility for taking decisions affecting the economic sphere. Moreover, such act does not create either a dominant position for the various traders taken individually or a collective dominant position for all the traders established in a municipality, a salient feature of which would be that traders did not compete against one another.

Therefore, to concord in the ECJ opinion, one has to answer negatively to the question whether the rules limiting the number of certain retail stores create a dominant position or a collective dominant position. These rules do not put any of the entrepreneurs already present on the market in a position which allows it to hinder the effective competition on the appropriate market by providing it with possibilities to operate, to a large extent, independently from its competitors, contractors and consumers. The introduction of the requirement to grant a permit to create a large surface retail facility does not form any kind of dependency between the operating traders which would mean they have the same market behaviour.

4. Impact of the new regulation on the state of competition on the market

However, the new regulation will undoubtedly have an impact on the state of competition on the market. So believe the entrepreneurs, who, by the intermediary of the Polish Confederation of Private Employers Lewiatan which represents them, pointed to the act on large surface retail facilities as one of the most serious hindrances in the growth of business which should be in the first place removed by the commission for debureaucratisation of economy created in the new parliament. However, until present, no empirical studies were conducted to analyse the impact of the new regulation on the market. In the present study, one may attempt only to analyse its potential effects, in particular on the food sector.

In the first place, one should note that pursuant to the last case-law of the European Commission, the relevant markets impacted by the new act are defined as local markets for daily consumer goods retail sales through modern distribution channels. The President of OCCP defined this market as the market of retail sales of everyday consumer goods in large surface stores, i.e. hypermarkets, supermarkets and discount stores. The market research conducted has largely confirmed that the market of daily consumer goods retail sales through modern distribution channels should be assumed to be a separate product market. In fact, the modern distribution channels offer larger retail areas, greater product assortment containing both food and non-food products as well as better promotions. Moreover, the modern distribution channels may be differentiated on the basis of behaviours of Polish consumers, who visit hypermarkets, supermarkets and discount stores less often than the traditional distribution channels, but each time spend more money. Despite the fact that the traditional distribution channels still represent the major part of the Polish retail market (depending on assumptions, between 40 and 60% of total consumer expenses for everyday consumer goods), the market participants expect that within the next 3-5 years the importance of modern distribution channels will increase and a decrease in traditional distribution channels will be noted. In the opinion of market participants, the modern distribution channels compete with the traditional distribution channels only to a certain degree, while the hypermarkets, supermarkets and discount stores compete between each other in case of most products.

Considering the above, one may risk the statement that the new regulation, which introduces an additional barrier for the large surface retail facility to enter the market in form of the requirement to obtain the permit, will above all decrease the competition pressure on the existing hypermarkets, supermarkets and discount stores. It should also be stressed that the permit granting procedure is not free of the risk of corruption. Such situation may lead to an increase of prices of products offered in the large surface retail facilities and the decrease in consumer service quality. At the same time, the effect of strengthening of local traders desired by the legislator may be achieved only partially or not achieved at all.

TURKEY

There may be restrictions on land use in its broadest meaning which might have repercussions on competition in the market. This contribution intends to respond various aspects on this issue to be discussed in Working Party No. 2 on Competition and Regulation by citing certain legislation as well as attempts to enact legislation on land use, and attitude of the Turkish Competition Authority (TCA) to the possible extent.

1. The Initiatives on Large Stores

Governments sometimes try to impose certain restrictions on large stores upon calls by several stakeholders affected by increasing number of such stores. Such legislative attempts in Turkey aiming at moving large stores to remote areas outside the cities or require authorisation for or restrict their establishment met objections in the past by the TCA as part of its advocacy role.[1] Against these legislative attempts, the TCA argued that such restrictions to be imposed were to create legal barrier to new entry, prevent expansion of larges stores, affect new investments and inflow of foreign capital, and would increase consumer prices with a negative impact on consumer welfare. The TCA also tried to draw attention to possible increase in mergers and acquisitions in case establishment of new large stores was not authorised and the fact that this might lead to increasing concentration levels and buying power and resulting negative effects on competition in the market. Fortunately, legislative attempts including restrictions on such stores currently lay dormant.

Regarding mergers and acquisitions in the retail market, the TCA takes into account availability of land for commercial activities and whether it takes long time to secure necessary legal permissions. Although in a study[2] published in 2005 it is cited that land/store availability is an important barrier for further growth of the organised retail sector, development of urban areas without a proper implementation of well-designed city planning in Turkey has the most adverse effect in retail sector and difficulties in finding a convenient place for large stores in city centres leads to high rents and prices for suitable places and areas, the TCA, in one of the most important merger cases involving retail stores, considered that it was easy to find suitable land or buildings in certain towns in question and it normally took only three months to obtain legal permissions necessary to operate a store and as a result it was considered that new entry would be timely.[3] Similarly, the study mentioned also provides in the conclusion part that there are no legal restrictions on entry in the retail market.

2. Liquid Fuel and LPG stations

A provision in the Petroleum Market Law provides an explicit restriction on trade regarding liquid fuel and LPG stations and requires that distances between liquid fuel and LPG stations on the same direction shall be no less than 10 kilometres on highways and 1 kilometre within the city. It can be

1 See Annual Reports of the TCA in 2001, 2003, 2004 and 2005 for further details.

2 The study entitled "Fast Moving Consumer Goods Competitive Conditions and Policies" is available at http://www.tepav.org.tr/eng/index.php?type=policypapers .

3 *Migros/Tansaş* (31.10.2005; 05-76/1030-287).

mentioned that there is no indication that such a provision has significant impact on competition in the market.

3. Base Stations

Construction of base stations has been taken into account among other factors in the past by the TCA while deciding on whether existing GSM infrastructure constituted essential facilities for the new GSM operators entering the market.[4] It was considered that constructing base stations involved technical difficulties, economic difficulties, and legal difficulties such as renting the necessary buildings where the base stations would be constructed (complications in finding place due to awareness that base stations may be harmful for public health, increasing trend of rents, revenue seeking attitude of the municipalities), supplying energy and obtaining construction permits.[5] However, in order to abolish the complications caused by necessary construction permits from municipalities, the relevant law, namely Telegram and Telephone Law, was amended to include in 2004 a clause removing the necessity to obtain construction permits regarding all types of movable and immovable property and equipments used to establish infrastructure for electronic communication such as masts, towers, antennas, energy transmission lines, facilities in the form of infrastructure etc.

4. Rights of Way regarding Telecommunications Services

The rules on the rights of way regarding telecommunications services have been regulated by a secondary regulation adopted by the Telecommunications Authority, the sectoral regulator. The secondary regulation aims to regulate methods and bases of rights of way necessary for the operators in telecommunication sector to establish and utilise infrastructural facilities and provides certain principles that should be taken into account during the implementation of rights of way such as;

- Efficient and productive utilization of the country resources,
- Provision of an effective and sustainable competition environment,
- The utilization of the rights of way being primarily dependent on the mutual agreement of the parties,
- Ensuring that the rights of way application be technically possible and economically proportional and reasonable,
- In case a telecommunication infrastructure exists on the immovable to be utilized in the scope of the rights of way and the Telecommunications Authority decided for common settlement and facility sharing on this infrastructure; giving priority to common settlement and facility sharing before way of right demand of the operator,

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4 *National Roaming* (9.6.2003; 03-40/432-186)

5 Such difficulties when combined with other circumstances surrounding the case complicated the activities of the new comers to construct the necessary infrastructure and the refusal to provide access to GSM infrastructures by the owners of the existing collectively dominant GSM operators with no objective justifications were regarded as amounting to abuse of dominant position. The TCA only imposed fines as it was the duty of the Telecommunications Authority to determine the conditions of access. Later on, the issue lost its importance as the new comers merged and access to rival undertakings' infrastructure lost its significance.

- Evaluation of applications containing rights of way to be done without admitting any delay and acting transparent without differentiation between the operators at similar conditions by Way of Rights Supplier Public Institutions and Establishments,

- Seeking the special conditions resulting from environmental protection, city and country planning.

The secondary regulation provides that the parties are free to make any agreements related to the rights of way provided that they abide by the related legislation, authorisation and concession agreement, telecommunication licences, general authorisation, and arrangements by the Telecommunications Authority. Moreover, the parties can freely determine the price for rights of way in a way that it does not lead to abusing of this right. In case parties can not reach an agreement, settlement is to be provided by the courts.

Istanbul Metropolitan Municipality has issued a tariff schedule regarding rights of way by taking into account the secondary regulation adopted by the Telecommunications Authority. According to the tariff, the price for right of way is fixed at 0.25 ytl (around 14 eurocent) for 2007. It is suggested that Istanbul Metropolitan Municipality, by charging minimal price for rights of way, aims to ensure widespread availability of broadband access services.

5. Access Requirements

First of all, in Petroleum Market Law there are certain provisions regarding access to transmission facilities and licensed storage facilities. According to the relevant article, transmission and storage licensees with spare capacity in their facilities are obliged to meet transmission and storage demands. However, such demands should satisfy certain requirements such as complying with the tariff[6] of the licensee, being appropriate for the capacity of the relevant facility, not having deteriorating or risk increasing negative effects on the licensee's facilities, operational rules and conditions and the petroleum transmitted or stored by the licensee, and conforming with the quality of the facility, transmitted or stored petroleum, and be at the minimum quantity determined in the tariff of the licensee. According to the Law, licensees are obliged to meet demands on non-discriminatory basis except for the capacity restrictions on transmission and storage.

It should also be mentioned that in both Electricity Market Law and Natural Gas Market Law which requires licenses to be obtained from the Energy Market Regulatory Board in order to operate in the market, cites, among provisions that must be included in the license, provisions regarding the conditions in relation to the utilization by other persons of the facility and/or facilities owned or operated by the license holder in accordance with the purposes of the license, when deemed necessary. In addition, licenses should also include provisions obligating the holder of a distribution or transmission license to provide non-discriminatory system access and use of system rights to all real persons and legal entities.

Regarding access to port services, it should be mentioned that during the privatization of certain ports via long-term concession contracts for the transfer of operating rights, certain clauses were inserted by the Privatization Administration into, for instance, the concession contract for the transfer of operating rights of Mersin port in southern Turkey, to avoid discriminatory practices following the conclusion of the privatization. The reason for this was the competitive concerns mainly resulting from absence of full substitute for the port in the relevant geographic region, articulated in the Opinion sent by the TCA to the

[6] Tariffs for transportation and licensed storage activities within the facilities connected to these lines under the scope of transmission licenses shall be prepared by the licensees and implemented pursuant to the approval of the Energy Market Regulatory Board.

Privatization Administration before the announcement of the tender conditions.[7] Therefore, it can be mentioned that access to port services to be offered for instance in Mersin port should be made available on a non-discriminatory basis according to the relevant concession contract. Regarding concerns whether such clauses inserted into the concession contract may deter investments to be made, it should be mentioned that the concession contract also includes requirements for investments in order to increase the capacity for the first five years and performance criteria to be satisfied in that period in order to ensure continuity of services provided in the port.

In another case[8] concerning privatisation of TÜPRAŞ (Turkish Petroleum Refineries Co.), the TCA sought whether its acquisition was compatible with merger control provisions of the Competition Act. TÜPRAŞ and a company, namely AYGAZ, belonging to acquiring party realised 58% of total LPG imports into Turkey. When production of TÜPRAŞ was taken into account, the share rose to 65%. Although there were around 50 LPG distributors, share of the biggest five LPG distributors amounted to 98.7% and the remaining ones depended on either production by TÜPRAŞ or imports. As the acquiring AYGAZ had 32% share in distribution whereas 31% in imports, production and importation of LPG by TÜPRAŞ was still important for the distribution companies despite decrease in its share in imports. Therefore, although TÜPRAŞ's share in imports was decreasing, because the acquiring AYGAZ was the market leader in distribution and the biggest importer of LPG it was obvious that importance of the ability to import would increase and as a result there was the need for additional safeguards to remove negative effects of the concentration in supply of LPG following the acquisition. Consequently, the TCA decided that facilities in one of the refineries of TÜPRAŞ in western Turkey which the LPG distributors heavily depended on should enable access to LPG distributors for direct imports.[9] The access requirement was limited to three years as there were investments in the region by other LPG distributors for the importation of LPG.

6. Environmental Impact Assessment Report

In Turkey, it is compulsory to prepare an environmental impact assessment report regarding certain projects such as refineries, nuclear power plants, certain iron and steel facilities, certain chemical facilities, airports, ports, cement factories etc as listed in the Implementing Regulation on Environmental Impact Assessment prepared by the Ministry of Environment and Forestry (the Ministry). A Commission is established with the participation of representatives of the relevant authorities and institutions, authorised personnel of the Ministry and project owner and/or his representatives in order to examine and assess the environmental impact assessment report. The Ministry, where it deems necessary, may invite representatives from universities, institutes, research and expert establishments, professional chambers, trade unions, and non-governmental organisations as members for the meetings of the Commission by taking into account the subject and type of the project and its place. Participation of the public is ensured via meetings in the place where the project is to be realised with the aim of informing the public about the investment and gathering their opinions and recommendations. Moreover, when the environment impact assessment report is prepared and submitted to the Ministry, it is announced by the Ministry and the relevant governorship that the report is available for the examination of the public in order to enable them to forward their opinions. The opinions gathered are to be taken into account by the Commission. Moreover, the Commission, while examining and assessing the environmental impact assessment report,

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7 See *Privatisation of Mersin port* (15.9.2005; 05-58/855-231).

8 *Privatisation of TÜPRAŞ* (21.10.2005; 05-71/981-270).

9 The investment cost for these facilities were paid by LPG distributors according to a protocol between TÜPRAŞ and these firms in 1992 and TÜPRAŞ imported and supplied LPG to those LPG distributors since 1995. The Protocol was still in force and LPG distributors operated through their purchases of LPG imported by TÜPRAŞ in the region.

considers whether meeting with the public has been done according to the relevant procedures and topics discussed during the meeting have been adequately addressed. Finally, the Ministry takes into account the works of the Commission on the report and decides either the environmental impact assessment is in the affirmative or negative. The Ministry is also authorised to decide whether environmental impact assessment is necessary or not regarding some other projects that are also listed in the Implementing Regulation on Environmental Impact Assessment. However, the Ministry, when it deems necessary, may delegate this authority to governorships provided that it delineates its boundaries.

The TCA considers that it is hard to get an environmental impact assessment report and this constitutes a legal barrier to market entry. However, the fact that it is not easy to obtain the report does not necessarily prevent new entry to the market. For instance, although such a report should also be obtained regarding cement factories, there are many investments in this sector made not only by local undertakings but also foreign ones.[10]

7. Private Restrictions on Land Use

Private restrictions on land use such as the ones agreed on in merger context may violate competition rules. Generally, non-competition clauses imposed on the vendor for a transitional period of time[11] in merger agreements are regarded as ancillary restraints and assessed together with the transaction if they are directly related with and necessary for the merger, restrictive only for the parties and proportionate. Such clauses aim to enable the purchaser to obtain the full value of the assets transferred and therefore the purchaser is granted some protection from the vendor via these clauses. However, non-competition clauses imposed on purchasers may not be given the same treatment like those imposed on vendors. This might be the case where the non-competition clause imposed on the purchaser leads to market sharing and complicates new entry as exemplified in a decision[12] by the TCA involving acquisition of a ro-ro ship where the purchaser was prohibited from using it between a particular Turkish port in Black Sea region and Russian ports for an unlimited period of time. The non-competition clause imposed on the purchaser in this case was not regarded as an ancillary restraint, assessed separate from the merger and considered as anti-competitive and the parties were imposed fines. Although this merger case does not involve restrictions on land use, it will not be wrong to state that the principle is applicable to such instances as well.

10 See *Cement* (01.02.2002; 02-06/51-24).

11 Non-competition clauses are justified for two years if the transfer involves goodwill and three years when the transfer includes know-how in addition to goodwill.

12 *Karadeniz Ro-Ro* (19.10.2005; 05-69/959-260)

UNITED KINGDOM

1. Introduction

This paper concentrates on the ongoing Competition Commission (CC) investigation into the Groceries market in the United Kingdom. Part of that investigation includes consideration of the UK planning regime and the conduct of grocers in respect of their land holdings.

2. Groceries Investigation

This paper describes briefly:

- the market investigation process, and the reasons why the OFT referred the market to the CC;
- provisional findings;
- planning regulation issues considered by the CC, including the CC's provisional findings;
- conduct of Grocery Retailers considered by the CC, including the CC's provisional findings; and
- remedial action under consideration by the CC.

It is important to note that the CC's inquiry is ongoing. The information included in this paper is based upon the most recent papers published, notably the Provisional Findings published on 31 October 2007 and the Notice of Possible Remedies published on the same date. The CC continues to meet with the parties and receive evidence so that the findings and views of the CC may change in the period prior to publication of its final report[1]. A key future development will be the publication of a working paper on Remedies which should be published prior to the meeting of WP2 (its content is not forecast in this paper).

2.1 The Groceries Market Investigation process and Reasons for the Reference

The investigation by the CC is a market investigation in which the CC must consider whether there are any features of the market that have an adverse effect on competition (AEC).[2] A feature can be the structure of a market and/or conduct of the grocery retailers or their customers. If it finds that there are features that result in an AEC it is required also to consider whether remedies are appropriate. These remedies can be ones implemented by the CC itself (the CC may accept undertakings from the parties concerned or may make an Order) and they can include recommendations to the Government for it to take action in respect of regulations.[3]

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1 The CC is required to publish its report by 8 May 2008.

2 Section 134 Enterprise Act 2002.

3 The Government gave a commitment to consider and respond to such recommendations, indicating the action it would take, within 90 days of the CC's report. "*Productivity and Enterprise – A World Class Competition Regime,* DTI 2001.

As explained in the introduction, the investigation is ongoing. The CC's administrative timetable is published on the Groceries webpage on the CC's website. Key documents, including parties' submissions, the CC's Provisional Findings Report and Notice of possible remedies are also available on the web-page.[4]

The CC's investigation commenced when the OFT referred the groceries market to it in May 2006.[5] The OFT made the reference stating that there were a number of features in the market that could reasonably be suspected of distorting competition, and in the case of at least some of them, the evidence suggested that consumers may be harmed as a result. Amongst the features that it identified were:

- The planning system could reasonably be suspected of restricting or distorting competition by raising the cost of, and also limiting the scope for, new local market entry, particularly by way of new large format stores.

- There were reasonable grounds for suspecting that the large holdings of the large supermarket multiples may reinforce their existing market position in some local areas. The OFT also found evidence of practices that could have an anti-competitive effect, including the use of restrictive covenants in relation to sites sold by the big supermarkets[6]

2.2 Provisional Findings

In the following paragraphs we summarise the main elements the CC's provisional findings relevant to the subject of this paper, highlighting the role of the planning regime and the private restriction of land use affect these findings.

2.2.1 Market Definition

Using store size as a separating criterion, the CC identified three separate product markets for the supply of groceries by grocery retailers in the UK:

- For larger grocery stores, all larger grocer stores (i.e. all stores larger than 1000 to 2000 sq metres) are in the same market;

- For mid-sized stores, all mid-sized and larger grocery stores are in the same market (i.e. all stores larger than 280 sq metres);

- For convenience stores, all grocery stores are in the same market.

The CC noted that these were basic categorizations; the precise delineation of the product market would differ across local geographic markets. For example, for larger grocery stores, the threshold for inclusion in this product market would vary across local markets depending on the distribution of stores of different sizes in each local market, and factors such as store amenities, and other facets of the retail offer.

While these local variations were important, when considering a large number of markets, the CC applied more precise thresholds. For this purpose, the CC used store size delineation of 280sq metres and 1400 sq metres for mid-sized and larger stores respectively.

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4 http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm

5 The terms of reference can be found on the groceries webpage

6 See OFT's reasons for making a reference to the CC, May 2006 http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft845.pdf.

The geographic market for the supply of groceries by grocery retailers was essentially local. More specifically, in relation to the three product markets the CC identified:

- Larger grocery stores were in general constrained by other larger grocery stores within a 10 to 15 min drive-time

- Mid-sized grocery stores were in general constrained by other mid-sized stores within a 5 to 10 minute drive time and by larger stores within a 10 to 15 minute drive time

- Convenience stores were in general constrained by other convenience stores within approximately half a mile, by mid-sized stores within 5 to 10 10 minute drive time and by larger grocery stores within a 10 to 15 minute drive time

The precise delineation of the geographic market for the supply of groceries by grocery retailers varied across local markets according to local topographic and other conditions, such as whether a store was in an urban or rural area. For the purpose of analysing a large number of local markets, a threshold of 10 to 15 minutes is appropriate.

2.2.2 Competitive assessment

In both the larger grocery store product market and the mid-sized and larger grocery stores product market, the CC found in its Provisional Findings that there were a significant number of stores that operate in areas of high concentration. In a number of cases these may be because small populations limit the number of large stores that could be supported. In other cases the CC found that barriers to entry may be constraining new entry.

The CC also found that areas of high concentration for grocery retailing had persisted over the past 5 years[7] suggesting the existence of barriers to entry and expansion in grocery retailing both in the larger grocery store product market and the mid-sized grocery store product market.

Because a large part of the retail offer (e.g. price) was set uniformly by national grocery retailers across all of their stores, the effect of weakened local competition on the retail offer fed through in two ways. First, the lack of competitive pressure at the local level enabled national or regional grocery retailers to weaken those components of the retail offer, such as prices, that they chose to apply uniformly, across all local markets in which they were present.[8] Second, in those local markets where competition was weak, a grocery retailer could worsen the variable part of its retail offer on a store-specific basis.[9] Based on the econometric results of its grocery store margin analysis, the CC estimated that for an average large grocery store, the effect of an additional local fascia translated into a profit reduction of £20,000 to £25,000 per month.

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7 The CC was able to compare current areas of high concentration with areas identified in an earlier report by the MMC.

8 To illustrate consider this extreme example where two grocery retailers have 50 per cent of national sales. In the case that this reflects their market share in each local market, each grocery retailer will be influenced by the actions of its competitor. As a result, the uniform price selected by each retailer is set at the duopoly level. In another case, however, a 50 per cent share of national sales might represent a local monopoly position for each grocery retailer. In this case, each grocery retailer would set a uniform price reflecting their monopoly position in each market.

9 For example, the product range and the quality of the retail service are aspects of the retail offer that tend to be store-specific.

The CC identified three different categories of barrier to entry or expansion:

- cost advantages for national grocery retailers;
- the planning regime that applies to grocery retailing;
- the conduct of grocery retailers relating to the planning system and controlled land by grocery retailers.

The planning regime and the conduct of grocery retailers may directly impact the use of land for grocery retailing. The CC's assessment of these two categories is described in the next two sections.

2.3 Planning regulation issues

2.3.1 The planning regime

The CC found that the planning regimes differed for England, Wales, Scotland and Northern Ireland. The following is a summary of the regime as it applied to England together with an explanation of relevant differences in the other parts of the UK.

The principal framework through which planning policies are delivered in England is the Town and Country Planning Act 1990 as modified by the Planning and Compulsory Purchase Act 2004. The key features of the framework includes a hierarchical structure of guidance and plans at national, regional and local level against which planning applications are assessed. These include Planning Policy Statement (such as PPS 6 which is of particular relevance to grocery stores) at national level and Local Development Frameworks (LDF) at local level, the latter being prepared by the Local Planning Authorities (LPA). The majority of decisions on planning applications are taken by the relevant LPA, in accordance with the LDF unless there are 'material considerations' sufficient to override the plan. Involvement of the Secretary of State in planning applications are limited to consideration of appeals of an LPA decision and decision taking of applications 'called in' by the Secretary of State. The latter tend to be confined to particularly complex and controversial cases, the decision being made only after a public inquiry.

In reaction to increased concerns in the 1990s regarding the growth of out-of-town shopping developments and their impact on town centres, the Planning Policy Statement 6 'Planning for Town Centres' (PPS6) was introduced. Its key objective is to promote vital and viable town centres through:

- planning for the growth and development of existing centres; and
- promoting and enhancing existing centres, by focusing development in such centres and encouraging a wide range of services in a good environment, accessible to all

In addition to normal planning considerations, under PPS6, applicants wishing to develop a retail site outside a town centre must pass two specific tests:

- The 'Town centre first' or 'sequential approach'
- The 'need' test

The sequential approach seeks to ensure that out-of-town-centre sites are only developed where there is no suitable site within the town centre, thus wherever possible protecting its integrity and viability. The

approach therefore requires applicants to consider potential sites for retail development in a designated sequence.

First, the applicant must demonstrate there are no town centre sites identified for retail development in a recent development plan that would be suitable for the proposed development. If no such site exists, the second step required the applicant to undertake a similar exercise in relation to "edge of centre" sites. It is only when those two steps has been undertaken, and no suitable site identified, that an out-of-town-centre site may be considered for retail development.

For the purposes of a retail development, a location is classified as being "edge of centre" if it is well connected to and within easy walking distance (ie. up to 300 metres) of the primary shopping area. The intention of the sequential approach is thus to ensure that retail development of any given size only takes place out of centre when there is no suitable alternative that is more centrally located.

Under the second of these tests, the applicant must additionally demonstrate that there is 'need' for the development. Need is assessed in both qualitative and quantitative terms. PPS6 states that in assessing need, LPAs should place greater weight on quantitative assessments, while still taking qualitative considerations into account. Quantitative assessments of need seeks to assess whether there is an excess of demand for retail floorspace within the broad categories of 'comparison' and 'convenience' goods. Such assessments will take into account factors such as existing and forecast population levels, expenditure on convenience (including groceries) and comparison goods in the catchment area, and existing levels of floorspace in the relevant category. The guidance states that need should normally be assessed for no more than five years ahead as sites in the centre may become available within that period.

PPS6 also requires that proposed retail developments are of a scale appropriate to the catchment area that the proposed development will serve (ie regional provision in regional centres and local provision in local centres).

PPS6 also requires that any development of more than 2,500 sq metres of gross floor area that is in an edge-of-centre or out-of-centre location, and not in accordance with an up-to-date development plan, must be accompanied by a retail impact assessment (RIA). An RIA seeks to assess the impact of the proposed development on the vitality and viability of existing centres within the catchment area.

Planning permission can be granted subject to conditions, which quite typically can be in the form of agreements entered into between the applicant and the local planning authority (commonly referred to as Section 106 agreements). Their purpose is not intended to extract planning gain but to ameliorate unacceptable elements or consequences of a proposed development, for example in terms of additional burdens placed upon existing facilities such as roads. They can result in additional costs being incurred by the applicant.

Substantially similar arrangements to those in England apply in Scotland, Northern Ireland and Wales. However, they are different administrative regimes.

Scotland

There is less emphasis, in most cases, on quantitative assessments of need, but a heavy reliance on ensuring that developments satisfy the sequential test (which is slightly different, in that it identifies an additional category of "other commercial centres" which must be considered after "edge of centre" sites before development can proceed in an out of centre location) and a greater emphasis on qualitative assessments of need. In some areas, local development plans incorporates quantitative assessments of need in a similar way to that in England. In its provisional findings, the CC stated that the differences did not appear to have any significant impact in terms of the pattern of grocery retail development.

Northern Ireland

The existing guidance is relatively general, and though currently without a 'need' test, there are plans for one to be introduced. The CC received evidence from the Retail Trade Association that the absence of the 'need' test has meant that in retailers has applied to build larger supermarkets in Northern Ireland than in England.

Wales

The regime closely resembled that of England. However, the Welsh Guidance notes that it is unlikely that the retail need currently exists for the development of any new large regional shopping centres (more than 50,000 sq metres of gross floor space).

2.3.2 Recent Policy Development

The Barker Report[10] expressed support for the 'town centre first' policy and the impact and sequential tests that underpin it, but recommended removing the need test:

> *"the current system of needs tests in town centre first policy also can have perverse effects: it protects incumbents and gives preference to operators that have lower sales densities. These incumbents may be operating in out-of-town shopping centres, leading to the effect that if need is demonstrated and there is no impact on the town centre, an existing out-of-town shopping centre could expand while there is no application for a sequentially preferable site in the town centre. Furthermore, incumbents may find it easier to expand incrementally while prospective local entrants fail at any one time to demonstrate sufficient need for a one-off increase of space. The needs test should therefore be removed."*[11]

In response, in a White Paper the Government proposed replacing the need and impact tests with a new test that has a strong focus on the town centre first policy, that promotes competition and that improves consumer choice:

> *"we recognise that there are issues around the practical effect of the current policy requirement on applicants to demonstrate the need for proposals outside town centres, where these are not supported by an up-to-date development plan. This 'need test' has proved in some respects a blunt instrument, and can have the un-intended effect of restricting competition and limiting*

10 The Government announced in the 2005 Pre-Budget Report that Kate Barker had been asked to lead an independent review of land use planning, focusing on the link between planning and economic growth. The final report for the review was published on 5 December 2006.

11 Barker Report Barker Review of Land Use Planning, Final Report—Recommendations, December 2006 paragraph 1.33.

consumer choice. For example, it is possible under current policy for a new retail development on the edge of the town centre to be refused because there is an existing or proposed out-of-town development which meets the identified 'need' even though the new retail development would bring wider benefits and help support the town centre. In addressing this issue, we have two clear objectives. First, we must support current and prospective town centre investment, which contributes to economic prosperity, and to our social and environmental goals. Simply to remove the 'needs test' could put this at risk. Second, we must ensure that planning promotes competition and consumer choice and does not unduly or disproportionately constrain the market. We therefore intend to review the current approach in PPS6 to assessing the impact of proposals outside town centres. We will replace the need and impact tests with a new test which has a strong focus on our town centre first policy, and which promotes competition and improves consumer choice avoiding the unintended effects of the current need test."[12]

2.3.3 Effect of the Planning Regime

In the provisional findings the CC noted that the planning system would quite deliberately for the purpose of meeting its objectives act as a barrier to entry and/or expansion for grocery stores. The restrictions that the planning regime placed on edge-of-centre and out-of-centre retail development, however, primarily applied to large grocery stores. Mid-sized grocery stores and convenience stores, in general, found it much easier to secure suitable sites where planning consent may already be in place or in town-centre locations where planning requirements were significantly less onerous.

Restrictions on the development of out-of-centre sites did not apply to town-centre locations or to the development of out-of-centre sites that were included in the local development plan (similarly for the development of edge-of-town centres). Given that assembling land sites suitable for large grocery stores in town centres (or even edge of centre sites) was more difficult than identifying suitable sites in out-of-centre locations, it seemed probable that the various requirements of PPS6 resulted in fewer large grocery stores than would otherwise be the case. Further, it was likely that the planning system encouraged the development of mid-sized stores than would otherwise be the case.

However, this likely effect needed to be considered against the fact that the annual rate of new openings of stores larger than 2, 200 sq metres between 2000 and 2006 was in line with historical growth rate supermarket numbers, while the growth in supermarkets overall (by implication supermarkets smaller than 2, 200 sq metres) had declined relative to the historical rate of growth for supermarket numbers.

A number of grocery retailers saw the need test, rather than any other tests, as the key barrier to the development of large grocery stores in many local areas. The CC's survey of LPAs indicated that 62% of those responding had identified a quantitative need for new convenience goods[13] floorspace, though in a number of cases, the level of need was relatively small and possibly insufficient to justify a new larger grocery store. The majority of LPAs that did not identify such a need were those without an up to date development plan.

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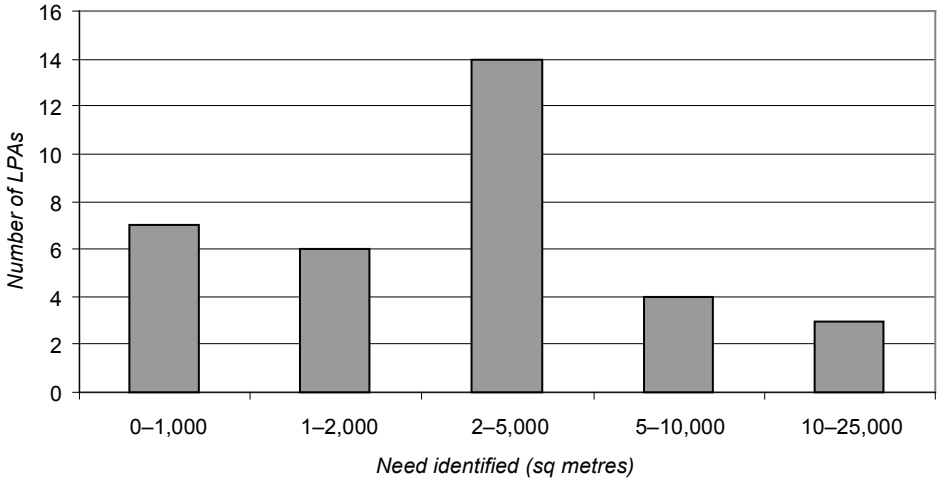
12 *Planning for a Sustainable Future*, White Paper, 21 May 2007, paragraphs 7.53 to 7.55.

13 Convenience goods were consumer goods purchased on a regular basis, including food, toiletries and cleaning products.

Figure 1. Need identified by LPAs



Source: CC survey of selected LPAs.

The CC noted that Tesco and Sainsbury, two of the four largest grocery retailers in the UK, had responded to the requirements of PPS6 by developing a strategy that focused on town-centre and edge-of-centre sites. They had developed mid-sized grocery stores and convenience stores in town centres.

Additionally, because it imposed significant risks and costs on applicants seeking permission for larger grocery stores the CC provisionally found that the planning system also had a different impact on potential entrants into any given local market.[14] National grocery retailers with substantial experience of working within the planning process were in much better position to mitigate or absorb these costs and risks compared with smaller grocery retailers or new entrants to the industry.

2.4 Conduct of Grocery Retailers that Impedes Entry

The CC examined two particular types of strategic conduct that might frustrate entry into local areas by competing grocery retailers:

- The use of the planning system to frustrate entry by a competing grocery retailer
- The control of landsites

2.4.1 Use of the Planning System to Frustrate Entry

The CC identified two ways by which a grocery retailer might be able to use the planning system to frustrate entry by a competitor:

- Objecting to competitors' planning applications

[14] Planning applications ran the risk of local objections, including from other grocery retailers in the area, and may be subject of being called in, leading to a public inquiry and further delay. Planning decisions may also be subject to appeal by others and this would result in substantial legal costs. The costs also included the need to commission and submit a number of different analyses, including a need assessment and, in some circumstances as described earlier in the paper, a retail impact assessment.

- Submitting applications for store extensions either in response to competitors' applications for a new store or so as to ensure that any additional 'need' for convenience retailing in the areas is taken up by the incumbent store.

The CC found that between 2000 and 2006 grocery retailers had objected to some 9 per cent of grocery retailing planning applications.[15] Objections seemed therefore to be on a relatively small scale. When they were made, the applications were either withdrawn or called-in for a further inquiry in around one-third to one-half of all cases. The CC was not able to assess the significance of these objections in terms of the final planning outcome.

As to the second type of conduct, the CC received evidence from one of the four largest grocery retailers of this conduct taking place and one third of LPAs that responded to the CC's survey indicated that they were aware of or had reason to believe that competitors submitted applications in response to a planning application made by another competitor.

The CC provisionally concluded that objections to planning applications were not widespread or significant. While the second type of conduct, namely using store extensions as a mean to frustrate entry by large stores, had occurred in a few areas the CC did not have evidence that this practice was widespread.

2.4.2 Control of landsites

Controlling access to land may be another means by which a grocery retailer could frustrate entry of new stores in a local area. Because sites to develop larger grocery stores were more difficult to assemble and obtain, the control of land was most likely to thwart entry by grocery retailers operating larger grocery stores and to a lesser extent mid-sized stores.

The CC noted that purchasing and holding land was not the only way in which a grocery retailer could frustrate entry. A retailer could, for example, purchase a site and lease it out for alternative use, or having purchased a site sell it to a third party with a restrictive covenant prohibiting grocery retailing on the site.

When assessing the extent to which land holdings were likely to prevent entry, it was necessary to distinguish between land that was controlled for the purposes of facilitating future development by the retailer (the CC had referred to these as landbank sites)and land that may be held as part of a strategy to impede entry.[16] The CC had therefore sought to distinguish between land held for the purpose of future development and land that may be held as part of a strategy to impede entry by a competitor (though the CC recognised that in some cases a land site may both impede competitors and facilitate future development).

The CC provisionally identified 886 controlled land sites held amongst the four largest grocery retailers which was equivalent to almost half the number of the existing number of landsites being used by these retailers to operate stores larger than 280sq metres.[17] Of these:

- 59 per cent (520 sites) were landbank sites;

15 This percentage increases to 34% if the objections by one of the smaller grocery retailers are included.

16 Land holdings may arise because of the time taken for an undeveloped landsite to go through the planning process and be converted into a store. For large store in particular, it may take time to assemble numerous parcels of land into a single landsite. In anticipation of new housing developments, retailer may hold land for future stores, and in this case there may not be any strategic purpose.

17 The figures presented in respect of restrictive covenants and exclusivity agreements were based on the data provided to the CC and were likely to be a lower figure than the actual position.

- 18 per cent (161 sites) were landsites also owned by the grocery retailers but currently leased to a third party;
- 14 per cent (127 sites) were landsites controlled through the use of restrictive covenants; and
- 9 per cent (78 sites) were landsites where exclusivity arrangements with a freeholder or other landlord prevented entry by a competing grocery retailer into a particular shopping area.

To assess the extent to which the four largest grocery retailers may be controlling land to frustrate entry by competitors, the CC first considered whether these controlled lands were in areas where the retailer had a strong local position. In the Provisional Findings the CC identified a number of stores with one or more controlled land sites in areas of high concentration (using three concentration measures). The main results are presented in the table below.

Table 1. Stores larger than 1,400 sq metres in areas of high concentration with a controlled landsite - four largest grocery retailers

	Monopoly and duopoly stores within a 15-minute drive-time		***Stores with >40% of floorspace within a 15-minute drive-time***		***Stores with >40% of floorspace within a 10-minute drive-time***	
	No of stores	***No of stores with controlled landsites***	***No of stores***	***No of stores with controlled landsites***	***No of stores***	***No of stores with controlled landsites***
Asda	[redacted]					
Morrisons						
Sainsbury's						
Tesco						
Total	343	71	567	200	995	173

Source: CC.

Notes: The measure of controlled landsites did not include additional grocery stores operated by the same grocery retailer within the relevant isochrone. For example, of the 343 monopoly and duopoly stores, approximately 50 had another larger grocery store operated by the same grocery retailer within 15 minutes' drive-time.

The proportion of stores with a controlled landsite varied from 13% for monopoly and duopoly stores to 17% for stores with more than 40% of floorspace within a 10 minute drive-time to 19% for stores with more than 40% of floorspace within a 15-minute drive-time. Based on this analysis the CC identified a total of 187 stores in high concentration area with 240 associated landsites.[18]

Second, the CC had reviewed in detail these 240 controlled landsites. The table below shows these landsites split into four distinct categories. [19]

[18] This analysis includes all stores greater than 280 square metres from the four largest grocery retailers.

[19] The numbers referred to are those reported in the Provisional Findings report and following further investigation may be different to those appearing in the Final Report.

Table 2. Controlled land sites (40 per cent share of floorspace within 10-minute drive-time), by category of controlled land

	Landbank sites	*Restrictive covenants*	*Exclusivity arrangements*	*Leases of sites to third parties*	*Total*
Asda Morrisons Sainsbury's Tesco	[redacted]				
Total	110	46	45	39	240

Source: CC.
Note: Controlled landsites within a 10-minute drive-time as at 1 July 2006.

The CC reviewed all the 110 landbank sites in detail and provisionally found that 20 of them were most likely to frustrate entry.[1]

The CC also considered the impact of exclusivity arrangements and restrictive covenants agreed to by grocery retailers, many of which restricted the use of land for grocery retailing purposes and had the effect of limiting new entry by competing retailers. The justification for such provisions put forward by these parties and their potential effect on entry varied from case to case. For example, the CC received evidence that a developer may grant a grocery retailer exclusivity within its development (a retail park or shopping centre) to encourage it to agree to be a tenant and that as an anchor tenant the developer was able to attract developers. If no grocery retailer would be willing to assume the costs and risk with establishing a store in a new development without the benefit of such an exclusivity, then the exclusivity may be welfare enhancing as it would ensure that a grocery store was available within the development. However, in some cases these exclusivity arrangements were not necessary as retailers competed to be awarded the anchor tenant position. Similarly the impact of restrictive covenant must be assessed on a case by case basis. Restrictive covenants restricting use for grocery retailing on sites that would not in any event be suitable for grocery retailing could not be said to act as a barrier to entry.

After a detailed examination, the CC found that 79 per cent of the exclusivity arrangements and 93 per cent of the restrictive covenants that most likely restrict entry had no time limitation.[2]

The CC also assessed third-party leases and considered that 18 of them were likely to frustrate new entry. In these cases the property has been sublet for non-grocery use and in a number of cases the property had also been split into more than one sub-lease which would make it difficult to reassemble the site into a space suitable for a grocery store.

Overall, of these 240 landsites the CC identified in its provisional findings 110 sites that were most likely to frustrate competitor entry. The table below presents the distribution of these sites.

1 Some sites were earmarked for sales and were therefore not considered any further. Other sites were planned for an additional new store or were held for the purpose of building a replacement store. However, for these cases, the CC reviewed in detail the competitive landscape of each local area.

2 See footnote 19.

Table 3. Controlled landsites most likely to frustrate competitor entry

	Landbank sites					
	New additional stores	*Other landholdings*	*Restrictive covenants*	*Exclusivity arrangements*	*Leases of sites to third parties*	*Total*
Asda Morrisons Sainsbury's Tesco	(			✂	)	
Total	12	8	30	42	18	110

Source: CC analysis.
Note: More than one store may have the same controlled landsite within a 10-minute drive-time.

Third, the CC examined the period of time for which grocery retailers were holding land without moving development forward. Retailers that held a site without developing incur significant costs. In the absence of other explanatory factors, such as delays in planning permission, the CC considered that it was likely that there was a benefit that offset the costs through the formation of a barrier to entry in the local market.

The CC considered the length of time the four largest grocers had held on to land without moving development forward. It first looked at the period between the acquisition of the last parcel and the time the planning application was made. The CC found that all but one of the four largest grocery retailer were taking longer than an historical benchmark. Secondly, the CC examined the period between which retailers obtained the planning permission and the date they open a new store. With respect to this none appeared to be holding sites for longer when compared against an historical benchmark.

Finally the CC considered the financial incentives for land holdings. In some instances, grocery retailers may be willing to absorb the costs of not developing the land if it protected their existing stores against competitor entry. In some cases it found that the cost of buying and holding land (or otherwise using it) would be less than the cost in lost revenues and profits arising from the competitor entry. This indicated that these grocery retailers may have had an incentive to frustrate competitor entry.

2.5 Remedies

The CC is currently discussing in detail its provisional findings relating to controlled land with the parties concerned and in particular examining the scope and effect in particular localities. Additionally it is considering whether to take any action. As explained, in the introduction, it is anticipated that the CC will have published a paper setting out its remedy proposals. The publication follows consideration by the CC of the evidence submitted to it from interested parties, including the grocery retailers. These were received in response to publication of the CC of a notice of possible remedies.

To address local concentration, measures would have the effect of opening up local markets by reducing barriers to entry. The CC identified two principal means by which this may be achieved:

- measures to address barriers to entry from the planning system; and
- measures to address barriers to entry from controlled land, including land holdings, in highly-concentrated local markets.

2.5.1 Measures addressing barriers to entry arising from the planning system

These include:

- Whether the planning system should distinguish edge-of-centre sites from out-of-centre sites
- The extent to which a possible amended planning test should be amended to recognise quantitative and qualitative aspects of need
- Whether the planning system should be streamlined by abolishing one or more of the various tests in the current system
- Whether a competition test should be included within the planning system or at some point in the planning process

2.5.2 Measures addressing barriers to entry from controlled landsites

These include:

- Prohibiting grocery retailers from imposing or entering into restrictive covenants or other agreements—either in relation to their sales or acquisitions of land—that have the effect of reducing the likelihood of the land being used for a competing grocery retail store.
- Prohibiting grocery retailers from enforcing restrictive covenants or other agreements that have the effect of reducing the likelihood of the land being used for a competing grocery retail store. This may be accompanied by a requirement on grocery retailers to write to all parties subject to such restrictive covenants or agreements informing them that these will not be enforced.
- Requiring grocery retailers to notify the OFT of all restrictive covenants that they impose, and all exclusivity arrangements from which they benefit.

2.5.3 Other Remedies identified in the Notice for Consideration

These include:

- Divestiture of land holdings (possibly to other grocery retailers)
- A requirement to divest land holdings if not developed within a specified period
- Store divestitures

UNITED STATES

Restrictions on land use can affect the competitive process by constraining or altering the supply of what can sometimes be a key input – land – in producing products and providing services. Of course, zoning and other land use restrictions are often imposed to satisfy objectives other than competition. For example, residents often want commercial businesses located outside of residential areas. Assessing the overall effect of land use restrictions requires balancing the effects on competition against the benefits from meeting other objectives, which is often difficult in practice. Based on the Call for Papers, below we present cases based on both public and private land use regulations that have raised competitive concerns.

1. Anticompetitive Public Regulation of Land Use

Public land use restrictions often enhance value and have efficiency benefits without harming competition. However, divorcement laws and zoning regulation are examples of public regulation of land use that might have a negative effect on competition.

1.1 Divorcement laws

Divorcement laws illustrate a type of public regulation of land use that can harm competition and might have an anticompetitive effect. Divorcement laws prohibit oil companies and refineries from operating retail stations, but allow them to own stations as long as they contract them out to independent franchisees. Divorcement is designed to prevent oil companies from using their power within the supply chain to manipulate prices and force independent and franchise gasoline station owners out of business.

In the United States, six states and the District of Columbia have adopted so-called divorcement laws.[1] Although they do not restrict the land from being used as a gasoline station, divorcement laws restrict refiners from operating gasoline stations on land they own. The primary justification for these laws has been to protect "lessee-dealers" (independent operators who lease land and capital from a refiner and sell that refiner's brand of gasoline) from competition from refiner-owned service stations.[2] However, as discussed below in more detail, these laws have a negative impact on consumers.

Gasoline refiners supply consumers through one of three types of service stations: those that they own and operate; those that they own, but lease to independent operators; and those that are both owned and operated independently. Nationally, 69 percent of the volume (in gallons) of wholesale gasoline is sold at the terminal to jobbers who primarily supply independent stations, 17.5 percent is sold directly to company-operated outlets, and 13.5 percent is sold to retailers through dealer tank-wagons.[3]

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1 The states of Hawaii, Connecticut, Delaware, Maryland, Nevada, Virginia, and the District of Columbia have divorcement laws.

2 *See* Asher A. Blass & Dennis W. Carlton, *The Choice of Organizational Form in Gasoline Retailing and the Cost of Laws that Limit that Choice*, 44 J. LAW & ECON. 511, 512 (2001).

3 *See* U.S. Department of Energy, Energy Information Administration, *Petroleum Marketing Monthly* at 20 (May, 2007), *at* http://www.eia.doe.gov/oil_gas/petroleum/data_publications/petroleum_marketing_monthly/pmm.html.

Depending on local market conditions, a refiner may find it more profitable to vertically integrate or to delegate operation to a lessee-dealer or an independent dealer. When refiners and operators are separate entities, they have different incentives to set prices and provide quality. For example, when both refiners and station operators have the ability to price above cost, each will add a mark-up to the final price. This "double mark-up problem" causes retail prices to be higher than the profit-maximizing price for a vertically-integrated seller that would mark-up the gasoline only once. The result is that consumers purchase less gasoline than they otherwise would and total profits (wholesaler plus retailer) fall below what they would be if gasoline were sold by an integrated firm. In this manner, the double mark-up problem leads to higher prices and lower profits, harming both consumers and producers. Further, because an unaffiliated dealer does not capture the full financial benefit from providing additional quality (*e.g.*, cleaner facilities, friendlier and more knowledgeable staff), he or she may have an incentive to provide a lower level of quality than a supplier would if it operated the retail service station.[4] Thus, a supplier may want to operate a service station directly to increase profits by charging lower retail prices and providing enhanced service. Direct operation allows a refiner to control – through an employee – pricing and quality decisions. Employees' incentives, however, are not necessarily aligned with those of the supplier, so a refiner must expend resources to monitor the station manager to ensure that he or she is taking the correct actions. Several empirical studies suggest that refiners choose whether to vertically integrate or to delegate operational decisions to an independent operator based on these efficiency concerns.[5]

Empirical evidence indicates that divorcement laws are likely to lead to higher retail prices. This is due both to higher operation costs, which will be passed on to consumers in the form of higher retail gasoline prices, and to the persistence of the double mark-up problem, which also is likely to lead to higher retail prices. Two studies have directly measured the impact of divorcement laws on retail prices and have found gasoline prices to be higher in the presence of bans on supplier operation of retail service stations. The most recent found that divorcement laws tend to increase retail gasoline prices by an average of 2.6 cents per gallon.[6] These results imply that repealing existing divorcement laws would generate an annual increase in consumer welfare – which includes substantial consumer savings and the value of additional gasoline purchased at lower prices – of approximately $112 million.[7] Another study found that Maryland's

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4 The difference between supplier and unaffiliated dealer incentives to provide quality stems from two sources. First, when an unaffiliated dealer provides high quality service, consumers may be more likely to return to this particular dealer, and also to patronize other dealers of the same brand. The dealer captures the financial benefits from increased demand for his or her station's services, but not increased demand for the services of other stations of the same brand. Second, because dealers share a portion of the additional profit from additional sales with the supplier, they do not have the incentive to provide the same level of quality as a vertically integrated firm. *See* Ralph A. Winter, *Vertical Control and Price versus Non-price Competition*, 63 Q.J. ECON. 61 (1993).

5 See Blass & Carlton, supra note 4; Margaret E. Slade, Strategic Motives for Vertical Separation: Evidence from Retail Gasoline Markets, 14 J.L. ECON. & ORG. 84 (1998); Andrea Shepard, Contractual Form, Retail Price, and Asset Characterization in Gasoline Retailing, 24 RAND J. ECON. 58, 64-65 (1993). One study, however, purports to present evidence that one instance of vertical integration led a refiner to charge higher wholesale prices to independent dealers. See Justine S. Hastings & Richard J. Gilbert, Market Power, Vertical Integration and the Wholesale Price of Gasoline, 53 J. INDUS. ECON. 469 (2005). Specifically, this study examines Tosco's purchase of Unocal's U.S. refining and marketing assets and presents evidence suggesting that Tosco attempted to raise its retail rivals' wholesale costs following the transaction by increasing the price it charged for unbranded gasoline in markets where its newly purchased retail stations faced competition from independent gasoline marketers.

6 Michael G. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. REG. ECON. 217 (2000).

7 *Id*. at 230. Blass & Carlton, *supra* note 4, estimate that a hypothetical national divorcement law would cost consumers between $.6 and $2.1 billion.

divorcement law, the first in the nation, raised self-service gasoline prices by 1.4 to 1.7 cents and full-service prices by 5 to 7 cents per gallon at stations that were formerly supplier-operated.[8] Further, this study also found that these stations reduced their operation hours by nine hours per week.[9] Based on this evidence, the staff of the Federal Trade Commission has recommended against the adoption of divorcement legislation in comments to policy makers.[10]

1.2 Zoning

In addition to divorcement laws, zoning regulations in the United States may also have an anticompetitive purpose or effect.[11] Indeed, the United States Supreme Court noted, in *Columbia v. Omni Outdoor Advertising,* that "the very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants."[12] The *Omni* case also made clear that actual, or perceived, anticompetitive zoning regulations are almost invariably protected from successful antitrust challenge based on the state action and Noerr-Pennington doctrines.

In *Omni*, the Supreme Court held that state action and Noerr-Pennington defenses protected a municipality and a firm that petitioned for allegedly anticompetitive zoning ordinances from antitrust challenge under the Sherman Act. In 1981, Omni Outdoor Advertising (Omni) entered the billboard market in Columbia, South Carolina. Columbia Outdoor Advertising (COA), which controlled more than 95% of the market and enjoyed close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. After passage of these ordinances, Omni sued COA and the City of Columbia, alleging, *inter alia*, that the ordinances were the result of an anticompetitive conspiracy in violation of the Sherman Act.

On appeal, the Supreme Court held that the city's restriction of billboard advertising was immune from federal antitrust liability under the state action doctrine, pursuant to which principles of federalism and state sovereignty render the Sherman Act inapplicable to anticompetitive restraints imposed by the States "as an act of government." The Court held that this immunity could be extended to municipal

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8 John M. Barron & John R. Umbeck, *The Effect of Different Contractual Arrangements: The Case of Retail Gasoline Markets*, 27 J.L & ECON. 313 (1984).

9 *Id*.

10 *See* Letter from FTC Staff to D.C. Councilmember Mary Cheh (June 8, 2007), at http://www.ftc.gov/os/2007/06/V070011divorcement.pdf; *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing House Comm. On Energy and Environmental Protection et al.* (Jan. 28, 2003) (testimony of Jerry Ellig, Deputy Director, FTC Office of Policy Planning), *at* http://www.ftc.gov/be/v030005.htm; Letter from FTC Staff to Gov. George E. Pataki of New York (Aug. 8, 2002), *at* http://www.ftc.gov/be/v020019.pdf; Letter from FTC Staff to Hon. Robert F. McDonnell, Commonwealth of Virginia House of Delegates (Feb. 15, 2002), *at* http://www.ftc.gov/be/V020011.htm.

11 *See* generally, E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, The Last Fifty Years*, 3 WASH U. J.L. & POL'Y 473 (2000).

12 *See Columbia v. Omni Outdoor Advertising,* 499 U.S. 365, 373 (1991).

restrictions of competition in an authorized implementation of state policy.[13] In the *Omni* case, South Carolina had unquestionably authorized the city to regulate the size, location, and spacing of billboards, and the city also had clearly been delegated authority to suppress competition, a foreseeable result of zoning regulations.

The *Omni* Court rejected a "conspiracy exception" to the state action doctrine, holding that with the possible exception of the situation in which the State is acting as a "market participant," any action that qualifies as state action is *ipso facto* exempt from the antitrust laws.[14] COA, in turn, was immune from liability under the Noerr-Pennington doctrine, which holds that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government.

In another case dealing with public land use restrictions, *Love Terminal Partners, L.P. v. City Of Dallas*,[15] the issue was legislation limiting competition among airports serving the Dallas/Fort Worth area in Texas. The City of Dallas owns Love Field, located near the Dallas downtown business district. Southwest Airlines, a low-cost carrier that began service in 1971 as an intrastate airline, had always operated out of Love Field. The neighboring cities of Dallas and Fort Worth opened Dallas Fort Worth Airport (DFW) for commercial service in 1974. DFW had long been the major hub for American Airlines. Beginning in 1973, Dallas, Fort Worth, and DFW filed a series of lawsuits in an unsuccessful effort to block Southwest from operating out of Love Field.

With the Airline Deregulation Act of 1978, Congress deregulated the domestic airline industry, allowing airlines to operate from any commercial airport and to serve any domestic route without prior regulatory approval. After airline deregulation, when Southwest gained the ability to provide service beyond the state of Texas, Congress adopted the Wright Amendment as a measure to protect DFW and the high-cost carriers serving it from unregulated expansion by Southwest. The 1980 Wright Amendment, as amended, restricted airline service from Love Field, prohibiting carriers serving Love Field (primarily Southwest) from providing any form of air service (including connecting service) by aircraft with more than 56 seats between Love Field and any point outside the states of Texas, New Mexico, Oklahoma, Kansas, Arkansas, Louisiana, Mississippi, Missouri, or Alabama.

In 2006, Congress passed the Wright Amendment Reform Act of 2006, which had the support of Dallas, Fort Worth, DFW, Southwest, and American Airlines. The Reform Act repealed the Wright Amendment eight years after the Reform Act's enactment and allowed immediate through service and ticketing to or from Love Field to all 50 states or any foreign destination, provided one stop is made in one of the original 9 Wright Amendment states.

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13 *Id.* at 370-74. With regard to the state action doctrine, in *New Motor Vehicle Board Of California v. Orrin W. Fox Co. ("NMVB"),* 439 U.S. 96 (1978), a state statute required an automobile manufacturer to obtain approval of a state board before opening or relocating a retail dealership within the market area of an existing franchisee if the latter protested. The Supreme Court held that this statute was constitutional and did not conflict with the Sherman Act: "[T]he Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption." 439 U.S. at 412.

14 Even when the municipality acts as a market participant, a court will distinguish between distinct government functions and market participant actions, applying the market participant exception only to those actions that do not qualify as distinct government functions. *Pennsylvania v. Susquehanna Area Regional Airport Authority*, 423 F. Supp. 2d 472, (M.D. Pa. 2006).

15 *See Love Terminal Partners, L.P. v. City Of Dallas*, 2007-2 Trade Cas. ¶ 75,964 (N.D. Tex. 2007).

On October 31, 2007, the federal district court for the Northern District of Texas dismissed a private antitrust suit filed by plaintiffs who held leasehold interests in land located on Love Field on which a passenger terminal was situated. In 2006, the plaintiffs had negotiated with Pinnacle Airlines, a possible new entrant at Love Field, to transfer their interests in the leases on the land and the terminal, but the deal collapsed when it became clear that the proposed Reform Act would erode the possibility of new competition from Love Field. The plaintiffs sued American, Southwest, DFW, and the two cities, alleging antitrust conspiracies leading up to the Reform Act and later in conduct pursuant to that Act.

Without reaching a state action defense, the court concluded that the defendants' negotiations and agreements concerning the desired outcome of the legislation were "clearly a part of their efforts to petition Congress" and that a Noerr-Pennington defense thus appeared on the face of the complaint. With respect to defendant's conduct after adoption of the Reform Act, the court held that the Act compelled the defendants to implement the terms of their agreement and thus immunized them from antitrust liability. "By reducing the flight output at Love Field through a 20-gate restriction, allocating the gates at Love Field to uphold Southwest's dominance over the short-haul market, and requiring that the [plaintiffs'] terminal be abolished, the Reform Act almost undoubtedly conflicts with the Sherman Act. But the Sherman Act and the Reform Act are capable of coexistence. Considered together, it is clear that Congress intends as the default rule that anticompetitive conduct be broadly prohibited by law. But in the case of airline competition in the North Texas region, Congress is willing to tolerate and sanction some anticompetitive behavior as a means of effecting the eventual end to the Wright Amendment restrictions that hamstring domestic flights to and from Love Field."[16]

2. Anticompetitive Private Land Use Restrictions

Most private restrictions upon land use are not anticompetitive, for the simple reason that the availability of sufficient alternative parcels of land for a given purpose usually prevents the use restrictions of any single private landowner from having an anticompetitive effect on prices.[17] Still, although the exception and not the rule, there are occasions when either placing a restriction on land use or making a particular land purchase will be harmful to competition.

United States v. Eastern Mushroom Marketing Cooperative,[18] is one of those rare instances. In December 2004, the DOJ filed a complaint and proposed consent decree, later approved by the district court, involving land use restrictions imposed by the Eastern Mushroom Marketing Cooperative (EMMC). The EMMC, representing 15 of the largest U.S. mushroom producers, controlled more than 90% of the common mushrooms grown in the Eastern U.S. It was organized under the Capper-Volstead Act, 7 U.S.C. §291 et seq., which gives farmers limited antitrust immunity to act together voluntarily in collectively processing, preparing for market, handling, and marketing their products. In January 2001, shortly after its formation, the EMMC and its members agreed to set increased minimum prices at which they would sell fresh mushrooms in different geographic regions, raising prices on average by 8%.

The Capper-Volstead Act provides no immunity, however, for cooperative members to conspire to prevent independent, nonmember farmers from competing with the cooperative or its members. Within three months of instituting the price increases, the EMMC launched a campaign to acquire and subsequently dismantle non-EMMC mushroom growing operations in the eastern U.S. Through membership dues and a "Supply Control Assessment," the EMMC collected approximately $6 million

16 *Id.,* at 109,786.

17 *See United States v. Syufy Enterprises*, 903 F.2d 659, 665 (9th Cir. 1990).

18 *See United States v. Eastern Mushroom Marketing Cooperative,* 2005-2 Trade Cas. (CCH) ¶ 74,933 (E.D. Pa. 2005).

from its members in 2001-2002 and purchased four mushroom farms and acquired lease options on two additional mushroom farms in the eastern U.S. for the purpose of shutting them down, thus reducing the mushroom production capacity available for nonmembers to grow mushrooms in competition with the EMMC. The purchased farms were resold at a loss with permanent deed restrictions prohibiting the conduct of any business related to the growing of mushrooms; similar deed restrictions were placed on the other two farms as permitted under the lease options.

The DOJ's complaint noted that these actions removed approximately 8% of total mushroom growing capacity in the eastern U.S., and that building a new facility takes much longer to generate revenue than purchasing or leasing an existing growing operation. "By eliminating the existing available productive capacity," the DOJ argued in its complaint, "the EMMC effectively forestalled competitive entry by at least 18 months."[19] The complaint alleged a violation of §1 of the Sherman Act that would harm actual and potential competition and deprive consumers of the benefits of competition. The consent decree required EMMC to nullify existing deed restrictions and prohibited EMMC from creating, filing, or enforcing in the future any similar deed restrictions on any real property in which it had an ownership or leasehold interest of any kind.

Zoning restrictions, community hostility to certain uses of land, and the scarcity of land can combine to make the existence of suitable real estate a significant issue in some merger cases. The competitive impact of waste management mergers, for example, often turns on the availability of alternative disposal sites that would allow likely and timely entry to undermine an anticompetitive price increase by the merged parties.[20] *U.S. v. Central Parking Corporation*,[21] is an example, in which a land purchase or use restriction can harm competition (as opposed to just competitors).

In *Central Parking*, the Department challenged the merger of Central Parking Corporation and Allright Holdings, the two largest private parking management companies in the United States, in terms of parking facilities, spaces, and parking revenues. The relevant market alleged was the provision of off-street parking services in the central business districts in 18 cities, where Central and Allright were direct and substantial head-to-head competitors. The district court subsequently entered a consent decree that required divestitures in each of these cities to restore competition. The Competitive Impact Statement filed by the DOJ described the critical significance of the shortage of parking spaces:

> *Entry into the relevant markets is unlikely to occur in response to a small but significant price increase. To enter a relevant market and discipline a non-competitive price increase, a firm must add to the supply of parking spaces that motorists view as substitutes. Creation of new parking spaces in a [central business district], however, is most often a by-product of construction or tearing down of buildings. Given the local character of competition, the cost of land, the limited availability of substitutable parking facilities, and the alternative options for the use of convenient land in the market, entry cannot be viewed as a likely and timely response that would undermine an anticompetitive price increase.*

It is imperative with regard to private land use restrictions to remember that the antitrust laws are designed to protect competition, not individual competitors. A number of private antitrust cases have involved claims concerning the competitive significance of real estate. Plaintiffs sometimes allege that competitors conspire to deny access to land or real estate considered essential to compete, either by acquiring all the available options and thus eliminating the possibility of new entry, or by securing

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19 Complaint at ¶ 12; for documents related to this case *see* http://www.usdoj.gov/atr/cases/eastern.htm.

20 *See United States v. Waste Management, Inc.*, 743 F.2d 976, 82-83.

21 *See U.S. v. Central Parking Corporation,* 2000-1 Trade Cas. (CCH) ¶ 72,809 (D.D.C. Feb. 11, 2000).

agreements that eliminate possible competing uses of the land or property. With regard to such allegations, it is critical to discern whether the allegations, assuming they are true, would lead to consumers having to pay more for the goods they want, and not just to a rival competitor being inconvenienced or disadvantaged.

RUSSIAN FEDERATION

Private actions on land use are not able to limit competition and lead to the violation of the antitrust legislation, ac such actions don't create possibility for individuals to eliminate competition on a certain commodity market. These actions also don't place limitations on the participants of the market, that don't lead to the goal achievement, don't promote concerted actions, transactions, and other activities. And also private actions can't limit competitions, if one of a result of these actions is production enhancement, competitive recovery of the "made in Russia" goods on the world commodity market, consumer benefits adequate to the economic entities benefits received in the result of transactions or concerted practices.

1. Limitations in the Land Code

Main limitations on the land use appear in the Land Code, Town Planning Code, and also in the Federal Law "On Protection of Competition".

According to the Land Law, limitations on the land use, are connected to the special use conditions of the real estate and regulations of the economic activity in the area of protective zones, due to the land reservation for the state and municipal needments, in order to conduct environment control, control over cultural monuments, and also needments connected to the beginning or end of construction on the land, repair or maintenance of automobile road, at the moment of rights granting for the land, belonged to the State.

Since the year 2005 state lands are provided for the housing construction only by the tender system. This norm was implemented to the Land Code of the Russian Federation, and till recently didn't work on case, when real estate was provided:

- Till March 1, 2007 – based on the decision of the advance approval of the object location, that was approved before October 1, 2005, but not earlier than three years before land provision.

- Till December 30, 2007 – without tender, based on the agreement concluded with Executive governmental authority or local government body, under set of conditions:

  – The agreement was concluded before December 30, 2004;

  – The agreement has made provisions for investor that at the moment of rental contract should be abided and satisfied.

Implementation of the tender system in the distribution of land resources, allows broadening the circle of potential applicants for the real estate.

2. Limitations in the Town Planning Code

Since January 1, 2007 treaties on development of the build-up area, that include reconstruction of the blocks of residential buildings, are concluded based on the system of the open auction. This norm was developed not to limit, but to broaden access of the participants of the market to such type of activity.

3. Limitations in the Federal Law "On protection of Competition"

Limitations of land distribution that belong to the individuals are part of the new Law "On Protection of Competition". These limitations cover big transactions between the companies, with actives that exceed the established by Law limits. These transactions may be on acquiring of the real estate based on the purchase and sale contract, rental contract and also on acquirement of the societies, companies that possess real estates, or creation of companies by settlement of its authorized capital of real estates.

Same requirements are applied to the transactions on acquiring of buildings, facilities any premises.

Also antitrust legislation of the Russian Federation prohibits any acts and actions of the federal executive bodies, executive bodies of the subjects of the Russian Federation, local authorities, State non0budgetary funds, Central bank of the Russian Federation that lead to the restriction of competition including distribution of real estate.

CHINESE TAIPEI

1. Restriction on Land Use：Gasoline Station

Chinese Taipei began its liberalization on SOEs (State-Owned Enterprises) in 1987. Before 1987, "the CPC Cooperation, Taiwan" (CPC) was the only business unit could set up gasoline station legally. Once a private-owned land was reserved for gasoline station, the land would not be allowed to use freely by the private unless the CPC purchased it and set up a gasoline station. To aim at liberalization on land use and service industry, the Ministry of Economic Affairs (MOEA) decided to open the market for private-owned gas stations in 1987. The MOEA also issued "The Regulations on the Set Up of Gasoline Stations" (the Regulations) to regulate the operations of gasoline stations.

In 1996, after 10 years' liberalization on gasoline station market, the Fair Trade Commission (FTC) reviewed the Regulations in the "Special Task Force for Promoting Gasoline Station Market Competition" and found that, though it had been amended 4 times, the Regulations still had some restrictions on the operations of gasoline station that might impede competition:

- regulations on the distance between two gasoline stations.
- regulations on the subsidiary business items.

In its 337th Commissioners' Meeting in 1998, the FTC made recommendations to the MOEA to deregulate the above restrictions for further liberalizing the market:

1.1 Regulations on the Distance between Two Gasoline Stations

According to the Regulations, the distance between two gasoline stations should be more than 500 meters. The reason for this regulation was based on the assumption that it may result in traffic problem if two gasoline stations were too close. However, gasoline station owners considered this is a protection measure by the government to prevent from over competition in the market.

The FTC recommended the restriction be aborted as it would create a real "geographic market allocation" effect and lessen competition. The FTC also considered this regulation on distance between gasoline stations may become an entry barrier for those potential market entrants. As for the issues of over competition and whether government should intervene, these ought to be the issues evaluated by those potential entrants, not to be protected by laws or regulations.

1.2 Regulations on the Subsidiary Business Items

The Regulations also stipulated that a gasoline station can sell only lubricant, LPG for car, and services on periodical car safety inspections in addition to gasoline. According to the explaining of the MOEA, the reason for this restriction was that subsidiary business items of a gasoline station should also be conformed to the zoning regulation. This regulation was referred to relevant business items of gasoline station in other countries and listed as legal subsidiary business items.

The FTC recommended that subsidiary business items be relaxed and decided by owners themselves as long as they were conformed to the zoning regulation and without affecting safety. The FTC also recommended that the Regulations adopt negative list on those prohibited items. The reasons for this change are:

- Subsidiary business items are a good measure for non-price competition. Even if the government liberalizes the gasoline market, it is still an oligopoly. "Intra-brand competition" and "non-price competition" are the major practices for competition. To relax subsidiary business items can promote competition in this market.

- The zoning regulation is included in other laws and regulations on land management. Besides safety reason, there is no need to add extra regulations on business items as long as the business operation conforms to the zoning regulation.

- The management of gasoline stations has been changed from "licensed" to "notification". There is no need to regulate subsidiary business items since the regulation on major business items has been relaxed.

Finally, the MOEA adopted the recommendations from the FTC. Though the regulation on the distance between two gas stations is still 500 meters in principle, the MOEA has authorized local governments to adjust freely under their own considerations. For subsidiary business items, the MOEA has relaxed the regulation and now gasoline station owners can operate convenient stores, parking garages and sell lottery, as well as provide commercial services which are not relevant to their major business items.

SUMMARY OF DISCUSSION

The Chair of the Working Party, Alberto Heimler, began the meeting by noting that the rules on land use do not seem to be at the forefront of the interests of competition authorities It is a difficult topic, maybe one not very relevant for the day-to-day activity of our agencies, but there is no question that land use restrictions may indeed reduce competition, sometimes even substantially. The recent groceries market investigation of the UK competition commission, about which we will hear later today, is a good example of the relevance for competition of planning laws.

Land planning rules govern what can be done with land and with buildings, both before and after construction. The Chair chose a very strict definition of land planning for the purpose of this discussion and, in particular, more narrow than in the request for contributions. The Chair said he would try to limit the discussion to instances where the purpose of the regulation is only the management of land for reasons of urban development, urban décor, landscape consideration, etc.. This implies that the discussion will not deal with all regulations that influence the way land is used, because some of these regulations influence land use only indirectly, their main purpose being fully commercial. For example, following the approach in the request for contributions, a few contributions classify under the "land use" category restrictive regulations in ports, gas, or in the gasoline sector, while the objective of these regulations is not land use as such, but some general interest objective, related to the characteristic of the business practice in question. In other words, the justification of the regulatory restriction is not the use of land, but universal service considerations, investment incentives, etc.. If those types of regulations are not excluded from the discussion today, suggested the Chair, the focus of this roundtable would be lost.

The Chair observed that the background paper lists a number of instruments that affect land use such as rules that categorize land and buildings for different uses, location-specific licensing or uses, limits on size of stores, adjacency controls, rent controls, impact assessments, including environmental impacts, access rules. The Chair stated that, from his perspective, what matters is the objective pursued, not the instrument used. For example if rent control has the objective of impeding downtowns from becoming exclusively office space, then the purpose of rent control is urban planning. If, on the other hand, rent control pursues the objective of helping the poor, it is an instrument of social policy. Very few contributions defined what the objectives of land use rules are and those that did, for example Finland, gave a very general definition. "The aim of land use planning is to create preconditions for a favourable living environment and to promote ecologically, economically, socially and culturally sustainable development." This definition, he noted, would cover quite a number of interventions, not limited to land planning.

The Chair introduced Professor Cheshire from the London School of Economics who has written extensively on land planning and who has studied the land planning rules under a competition-oriented approach started the discussion by describing what are (or should be) the major objectives of land planning and the instruments needed for achieving them and will illustrate the major trade-offs that exists between land planning and competition, showing the effects of unjustified restrictions.

Professor Cheshire gave a quick overview of land use planning from the perspective of an economist. He noted that there are different names for land planning in different countries. He began by noting that not only is land an environmental resource, but it is also a factor of production and a good that gives welfare directly. Land market regulation is in OECD countries the single most potent and most influential

form of regulation as measured by the size of economic asset overseen. But unlike other forms of regulation, it has grown up independently of economic analysis, coming from a different social and cultural perspective. The impacts of land use planning depend critically on the forms of control and instruments in place. The point he underlined is that the price distortions arising from land use planning can be extraordinarily large. These impacts come from the way in which land use planning regulations influence the price of land. The price distortions are fertile breeding grounds for rent seeking. The market impacts of land use regulation have been seriously neglected by regulators.

He drew mainly from British examples, which are of interest because Britain was one of the first countries to introduce land use regulation, and the effects are some of the largest in the OECD. Coming at land markets from the point of view of an economist, there are very good reasons for regulation. There are serious arguments for market failure. One reason it arises is that each piece of land is particular and effects on neighbours can be significant. If you have a clean office, and a lead smelter opens next door, this will have a serious impact. There is an externality. Moreover, there are public goods explanations, arising from open spaces and environmentally special areas. Then there are problems of coordination. Because of large scale infrastructure and the existence of many owners, it can be difficult for individual bargaining to solve problems. If land use regulation, had come out of an economic tradition, there would have been more recourse to Pigovian taxes to internalize externalities. However, planning and planners come from an architectural and civil engineering background. A 1947 Act in the UK set the framework that is still the basis for regulation today.

Professor Cheshire noted the importance of distinguishing land use regulation from restrictions of supply. Regulation on its own does not necessarily imply a restriction of supply exists. For example, he stated the Netherlands is strongly regulatory, but historically has not restricted supply, so the regulations have had a relatively limited impact on prices although tendencies for restrictions have been increasing. Restriction of supplies increases costs and price of entry. Many national systems have additional specific control, e.g. for large scale retail development, either explicitly or, as in the UK, or implicitly. There are also use restrictions. Planners can prevent a transfer of use from a travel agency to real estate agents. In Oxford, for example, the planning authority has decided there are enough real estate agents. In many boroughs in London, boroughs have decided they do not need any more hotels. This leads to higher prices.

This system interacts with the local fiscal structure. You can see this by comparing the U.K. to the United States. In Britain, there is a property tax on office space that is paid nationally, while local governments, who are the planning authorities, have the responsibility to provide services. This means allowing new office space creates extra costs for the locality without any compensating property tax benefit. In the US, local government receives tax benefits from commercial use. There can be an incentive to exclude poorer housing from a community by requiring minimal lot sizes, as poor often pay less in taxes than they receive in local service benefits. In the US, there are fewer restrictions on commercial uses but there are restrictions on subdividing lots.

In the U.K. since 1947, demand for residential and office/retail purposes has increased, while demand for industrial space has fallen. Price distortions have become very significant. Land on one side of a zoned boundary can be of much greater value than on the other side. In the modest-sized city of Reading, a hectare on which it is permissible for there to be residential development can be worth 5 million pounds, next to agricultural land that is worth 10 thousand pounds per hectare.

These price distortions have long run impacts. Land use regulation generally has impacts on new construction. So impacts are cumulative. In Britain, strict regulations have been enforced for more than two generations. So the effects of regulation can now be seen. Before 1947, the real price of land for housing was relatively constant, in real terms. Since 1947, the real price of housing land has increased

11.5 times. It has also become more volatile. Over time, the price of houses has increased less, by a factor of 3.5, because land can be substitute out of housing, for example by going to flats from detached homes.

The benefits from green belt determinations are highly regressive, benefitting some users more than others. The benefits accrue to those who own housing with the best access to the green belt who tend to be amongst the richest in the community: estimates suggest that allowing for the welfare effects of green belt land makes welfare even more inequitably distributed than the incomes of owner occupiers. The best estimates are that in a highly constrained cities (such as Reading) there is a net welfare cost from restricting space, equivalent to about a four percent of income.

In Birmingham, a modest city of 2.5 million in population, the price of constructing office space is 50% less than it is in Manhattan but Birmingham office costs are 44% more than Manhattan. The fundamentals driving the costs of space are city size, income level, construction costs, growth and transport systems. But to explain the price difference between Birmingham and Manhattan, it seems likely that land use regulation can be blamed. Costs of labour and construction materials cannot explain the difference.

Regulations can limit heights of buildings. For example, site lines are protected in London and "plot rations" are universally applied. As an economist, it would be interesting to know how much citizens are paying for these controls which effectively restrict the supply of office space.

Given that entry into development is free so the industry is competitive, one can call the difference between the price of space in an additional floor and (marginal) cost of building that space a 'regulatory tax'.

The measure of the gross costs of regulatory constraints – the 'regulatory tax' is perhaps best not thought of as a precise measure but as an index of the costs of constraints on supply. For example compliance costs will not be reflected in the 'regulatory tax' measure since they will be negatively capitalised into the price of land. Such compliance costs may be substantial. In Shanghai, it is reported that a developer needs 137 separate permissions to go from an unbuilt site to a saleable building.

In the City of London, the mean value of the tax I have calculated for the period 1999-2005 is 4.88. That's a 488% tax. In London's West End, where there are many listed buildings and other restraints on new construction, there was, for the same period, an average 800% regulatory tax. The London numbers are far higher than city of Paris, despite the high level of regulation in Paris. One reason is that the Paris region has a business district, La Défense, with a much lower regulatory tax. Only in Brussels, where there is an extremely permissive and flexible system of planning, is the regulatory tax very low (with an estimate of 68%). The impacts of regulatory taxes on prices are clear.

The impacts of rising land prices can range from arbitrary redistribution (from non-property owners to property owners and intergenerationally) to deadweight loss. In The Netherlands, homes are 38% larger, more than 50% cheaper per m^2 and built to a higher standard than in the UK. In the West End of London, it is not permitted to knock through from one house to another to create larger floorplan flats, so those few larger floorplan flats that there are have high premiums.

Moreover scarcity rents create rent-seeking behaviour. In Los Angeles, in one case, 38% of the gross income flows from a development came from getting an exemption on one Sunset Blvd location that forbade use of neon advertising signs, on the grounds that such signs were part of the cultural heritage of the area. Developers who know how to use system can get significant benefits over others and this itself is a significant barrier to entry.

At times, developers can have market power conferred on them by the restrictiveness of the system. About 90% of the available land permitted for development in South Oxfordshire in the early 1990s was owned by one developer.

In particular, Professor Cheshire noted that commercial real estate is an input into production. If the price was raised by restricting its supply without offsetting social gains, unless it were perfectly substitutable, there were efficiency losses He urged that policymakers need to seriously review impacts of land use regulation.

The Chair stated that when there are large price differences between uses for one purpose or another, there can be corruption of government officials.

Professor Cheshire noted that he used the phrase rent-seeking, noting that the UK is remarkably free of corruption given the extent of potential gains, while other countries may have different situations.

The Chair noted that many contributions concentrated on retail trade and indeed retail trade represents the most important part of our discussion. However there are a number of contributions that make more general points about land use and he started with those. He noted that in Korea a total maximum load regulation caps the total square meters of factories to be established in the cities of Seoul and Incheon and in the province of Gyeonggi. The objective of this regulation is to guarantee a more harmonious economic development in the country. According to the Korean contribution there is a very heated debate whether to eliminate or to maintain the system. The Chair asked (1) whether the system has actually been effective in guaranteeing its objectives; (2) if there is any evidence on how binding the system has been and how strictly it has been enforced; (3) the role, if any, the KFTC is playing in the process of reform of the total maximum load regulation; and (4) what end result might follow from the debate on these regulations.

A delegate from Korea stated that the total factory maximum regulation was introduced to achieve various purposes, such as more harmonious development and preventing over-population of metropolitan areas. It is difficult to tell whether system has been achieving purposes. The Korean Institute on Industry reported that system had not been effective, looking at performance from 1995 to 2000. The relative density and total number of manufacturers slightly decreased, but then increased after 1998, and reached highest level since 1981. On the other hand, those advocating effectiveness of the system argue that, without it, the overpopulation of the metropolitan area would have been exacerbated. They also argued that some essential measures taken since 1997 made system weaker. Although one province had 2.7 m m2, an additional 1.2m m2 were approved in a given year. Accordingly the maximum rose to 3.9 m m2.

The KFTC does not have a role in the reform of total maximum factory legislation. This has been discussed mainly as a social issue. The transfer of power took place through presidential election in 2007. The incoming government is pushing for reform of regulations that hold back investment of businesses. At this stage, it is very difficult to tell whether this will be eliminated or not.

The Chair noted that the US contribution addresses some very interesting cases where the competition issue originates from some restrictions attached to land use, in some cases even private restrictions. In the case United States v Eastern Mushroom Marketing Cooperative the Department of Justice challenged a practice by the cooperatives to acquire and subsequently dismantle competing companies in the Eastern part of the United States. The case is interesting because the market power originates from the control of land. But what makes this land so special for cultivating mushrooms? Is it regulation or the very particular characteristics of the land? Where does the scarcity originate? Furthermore how could the Department of Justice prove that the objective of the purchases was to shut these operations down?

A delegate from the United States stated that the cooperative included 15 of the largest mushroom growers in the eastern United States accounting for over 60% of mushroom sales. There is an antitrust exemption for agricultural cooperatives, but it does not provide for anticompetitive conduct directed at non-members. They raised prices by about 8% in one of their first acts after formation. After formation in 2001, the cooperative spent about 6 m USD purchasing mushroom farms and sold them at a loss with deed restrictions that eliminated right to use land for mushroom growing. This was about 8% of of the total capacity of the eastern United States.

Mushrooms were grown in buildings that were one-story windowless buildings kept at cold uniform dark temperature. The growing process is about 8 weeks. Forming a new business would be expensive and zoning could be difficult. The Department of Justice alleged that entry would be foreclosed for about 18 months.

The intent could be clearly deduced. The deed for each piece of sold property said that the property shall never be used for growing mushrooms. The 6 m USD for purchases came from membership dues and a "Supply Control Assessment" on cooperative members. Papers filed in the case stated that the cooperative boasted it had succeeded in eliminating 50 m pounds of mushrooms that would otherwise have been produced.

The Chair noted that the Turkish report addresses a number of land use restrictions. Most of them although they certainly have an effect on the way land is used, could be rationalized by different objectives than urban or landscape developments. For example rights of way regarding telecommunications services are a competition issue and so are access requirements. Also the regulation on gasoline stations is an economic regulation, trying to guarantee a protected market for each gasoline station. There is however one part of the report that addresses directly issue of land planning and that is when you discuss the obligation to prepare an environmental impact assessment report to accompany investment projects like nuclear power plants, chemicals etc. You say that that these obligations are a barrier to entry. Could you please elaborate a bit on this? Do you imply that an environmental impact report should never be prepared or that in the case of Turkey it is unnecessarily burdensome?

A delegate from Turkey stated that, first of all, in Turkey, it is compulsory to prepare an environmental impact assessment report for projects like refineries, nuclear power plants, cement factories etc. in order to determine the negative and positive impacts of the project, to prevent or decrease to acceptable levels the negative effects. The Competition Board in one of its decisions involving cement factories elaborates on the structure of the cement market and considers environmental impact assessment reports as a legal barrier to market entry as it is hard to secure such a report. However, when the legitimate aim of protection of the environment and the necessary measures for that purpose are taken into account the Competition Board does not mention that such a report should not be prepared or it is unnecessarily burdensome. It was just a fact finding as part of the assessment of the market.

The Chair observed that in Chinese Taipei the Ministry of Economic Affairs allows the entry of gasoline stations only if the distance between them is above 500 meters. What is the purpose of this regulation? Can it be rationalized as a land planning obligation, or is it a restriction that tries to ensure a protected market for each station?

A delegate from Chinese Taipei stated that the gasoline market was heavily regulated until 1997. After deregulation, the competition authority established a task force to review the provisions governing gasoline industry. The authority found that there are some regulations that might have an anti-competitive effect, notably the distance regulation. In order to set up a gasoline station there must be at least 500 m before or after any other gasoline station. The competition authority made a suggestion to amend this provision because of its impacts. The initial response was that the provision existed for safety reasons,

because a fire in one station could spread to another. The competition authority felt that the provision was still unnecessary. Although the distance minimum is still on the books, the local governments have been authorized to allow closer gasoline stations, and now there is experience with gasoline stations competing side to side and across the street. They look forward to impacts of abolishing this kind of regulation in the future.

The Chair noted that in Italy, there was a similar issue for gasoline stations. The distance was calculated form one gasoline station to entry to retail center justified by safety reasons, but the application showed that the safety argument was not appropriate. In the Czech Republic "for any constructions, their changes or changes of the land use, it is necessary to obtain a planning permit or the planning approval". The Chair asked the delegation to briefly explain the basis for receiving the permit, how discretionary the authorization is and whether the competition authority ever addressed this issue in advocacy reports?

A delegate from the Czech Republic stated that the regulation is extremely liberal. It is possible to build virtually anything anywhere. Next to the delegate's house, for example, the shop has changed use very frequently. The municipalities do not have any plan for how to influence uses in the city. If an individual wants to change their property, they need to have an approval. But the approval is from the technological side, such as whether the land is for building a house and whether there is enough space for a family in the house. It can take a long time to go through this administrative process. The delegate hoped that procedure will become simpler in the future.

The Chair noted that the Russian contribution suggests that competitive restrictions on land use can arise from either the land code or the town planning code. Tenders appear to serve increasingly as the mechanism used to distribute or privatize land. The Chair asked whether there have been any cases of bid rigging on these tenders and whether it has ever occurred that companies would buy land with the purpose of keeping it idle and preventing the establishment of a competitor?

A delegate from the Russian Federation stated that the open tender system has been used since 2005. The main idea of the mechanism was to not only to allow free competition in land use sector but to ensure that the corrupt system would be eliminated over land use approvals and dispositions by local authorities. In 2005, 90% of land was distributed without any competition based mechanism. In 2007, 90% of land for housing construction was distributed by tenders. Last year the Federal Antimonopoly Service, in cooperation with Federal Prosecutors Service, made an investigation into markets in Moscow and St Petersburg. One of the results of the investigation was that there was no evidence of bid rigging in those cities. But the delegate expected that bid rigging might arise in the future. Buying land to keep it idle is not a good way of doing business in Russia, because in a growing economy with rising incomes, entrepreneurs may buy land to keep for a year or two and then resell, but not to hold.

Professor Cheshire noted that there is a paper that compares Chinese tenders via sealed tender versus open outcry results, with sealed tenders producing lower prices because of greater ease of bid rigging in the written tender process.

The delegate from the Russian Federation noted that tenders are done with both sealed tender and open outcry and suggested that a comparison will be done.

The Chair noted that agricultural land is still public.

The delegate from the Russian Federation agreed that by law agricultural land is public, but suggested that in practice it is private.

The Chair asked the whether the report from the UK competition authority was the first time that the government has looked at land use planning? He wondered in particular about the needs test.

Professor Cheshire noted that in 2003 the Treasury and Bank of England observed that the housing market was subject to restrictive regulations. Because the Bank of England and Treasury have been concerned by affordability, there are increasing pressures to include economic outcomes within land use planning decisions. Within the ministry with responsibility for planning, there will be an increasing economic expertise. In the past, price has not been permitted to serve as a material consideration in planning decisions. That should have changed last year, when a national housing planning and advice unit has started to advise on impacts of planning on housing affordability.

With respect to the needs test, it applies to everything. The amount of land made available for housing is not determined by demand but by assessed needs, which is a completely different concept, based on densities, sizes, and projected household numbers. There is a target that 60% of new housing will be on brown field sites. This has had a huge impact on volume of building and size of houses being built. It is difficult to see how issue of need for retail space is interpretable. The city centre first policy makes developers identify city centre locations before being allowed to consider out of town ones. Out-of-town retail space has become almost impossible to develop. Existing city centre businesses lobbied hard for the policy, in the name of egalitarianism, because not everyone has cars, and environmental considerations. But the effect is to increase the price of goods for poor people. And the effect on energy use is not clear as the environmental impact of travelling into congested centres needs to be compared with the alternative, and in city centre areas, deliveries must be more frequent.

A delegate from South Africa noted that while meek may inherit the earth, they are unlikely to get hold of the mineral rights. It is common for state to own or nationalise mineral rights. In South Africa, there has been a complex set of laws applied with a redistributive goal in mind, to spread more equitably the rents for mineral rights. The state has compelled mining companies to use rights or lose them. Are there special considerations for mineral rights over and above other rights?

Professor Cheshire stated that one of the peculiarities of mineral rights is that systems governing them are so local, there is a veil of ignorance over what other countries do. In UK, the 1947 Act expropriated all development rights for land owners except for the Crown.

A delegate from the United States asked whether inter-jurisdictional competition has led cities or countries to attract businesses or services. For example, if governments aspire to have a capital with financial services, or to increase corporate headquarters, a Tiebout model of inter-jurisdictional competition might lead them to re-think of land use controls, especially with respect to office space.

Professor Cheshire noted Bill Fischel's work on the home-voter hypothesis. In the City of London and Docklands areas, business interests have controlled development. In other places in England, allowing local commercial development essentially imposes a fine on the local community because tax revenues from business property go to central government but local government has to pay to provide services. Local communities may nonetheless promote business as a result of concerns about employment. When local unemployment is higher, there is a lower regulatory tax. There is a different elasticity of response in business-controlled locations. The business-controlled locations are more responsive than other locations to the state of the local economy. The regulatory tax has been falling in City of London relative to other areas since the change in business property taxes in 1990. The City alone was partially exempted from the change, making revenues from business accrue to central government so retained some incentive to permit development. Moreover, being controlled by business interests the local planning system in the City responded to the threat of London's Dockland development. Around Europe, it is more difficult to see the perspective of inter-jurisdictional competition. There are cities like Paris, which are restrictive for historic and environmental reasons, but get out-of-town developments, as in La Défense and there are comparable out-of-town developments in Milan.

A delegate from the United States said it seems like jurisdictions attuned to factors sited in Cheshire's presentation may give local communities an incentive to compete more.

The Chair asked how business control might come about.

Professor Cheshire said that the City of London has been exempt from all local government reforms since 1300 (and certainly since 1834). The City of London only has a population of about 4-5000 residents. Owners of businesses have the right to vote and control the local government. The Docklands and Canary Wharf are also controlled by business. In order to develop 8 square miles, a special-purpose vehicle (London Docklands Development Corporation) was created that has planning powers. The vehicle has been abolished now, but the development has already occurred. 32 of 33 London boroughs are controlled by residents.

A delegate from Finland focused on figures comparing land prices in Birmingham to London and Manhattan. These showed the remarkable level of the regulatory tax in Birmingham. The delegate wondered how municipal officials react to this kind of situation and what municipalities can do.

Professor Cheshire said that because of the restrictions over the use of land, prices are being bid up well above costs of construction. Not all local municipalities are aware that this is happening or that their actions are making it happen. Decision makers tend to know only about their system. In the UK, all their professional life is embedded in the British planning system. Most would deny that there is any relationship between supply and price. One politician who was finishing his chairmanship of the planning committee for Reading said his main achievement while in office was that he did not allow any single large development during his period in control. Professor Cheshire noted that the economic efficiency costs of restrictions on office space are not fully known. No one has estimated a production function in which space is a factor. There is a real need to make estimates for both the office sector and retail space so one can quantify the impact of the price of space on productivity. These costs are all in terms of flows, as Bill Fischel has noted. These effects are capitalized into asset values. Once asset values goes up, current owners benefit and owners of property grow keen to prevent competition. Problems arise for new people trying to buy houses or buy or rent shop space, but this is difficult to take into account.

A delegate from Israel noted that in allocating land for gas stations, the competition authority blocked merger of gasoline stations. The process of getting a license to construct a gasoline station takes about 5 to 10 years, including the need for authorizations from ministry of environmental protection. This argument was presented to Supreme Court, which decided to support competition authority decision.

A delegate from Chinese Taipei noted that the other justification for distance restrictions between gasoline stations in Chinese Taipei was the congestion in the streets.

A delegate from Australia stated that in Australia land use development and assessment is driven by states and territories. The issue is not considered to be economic. The delegate asked what instigated the Barker reviews, and a focus on economic impacts.

Professor Cheshire stated that the reason for the review was that there were increasing distortions arising from housing, where housing contributes to higher costs of living (hence Bank of England interest) and Treasury (in part from its interest in access to housing for poor) led to these reports, as well as criticism in costs for mobility of firms and executives. The work began with a housing sector focus, but was expanded to other uses as it became clear the problem was not limited to residential real estate. There have been several reports.

1. Land planning for retail trade

The Chair observed that many contributions concentrate on retail trade. Indeed, he suggested that most land use restrictions that produce competition effects are designed for the retail trade sector. Some of these restrictions pursue a clear urban planning objective, for example making sure that downtown residents have enough shops from where to buy. They might even pursue the objective of maintaining the attractiveness of inner cities for middle class residents. However in some jurisdictions commercial plans continue to pursue the objective of protecting employment and the small shop keepers. The Chair suggested that when policymakers pursue protectionist objectives, these rules should not be classified as land planning since they structurally regulate markets, the effect on the use of land being only indirect.

He noted that in Poland the municipality has to grant an authorization for every retail shop greater than 400 m^2 based among others upon the following elements: a need test, the maintenance of balance between various forms of retail, the effects of new entry on the job market. My questions are: what sort of discretion does the municipality have? Do incumbents participate in the decision making? Don't you think that it is anticompetitive (though not in an antitrust sense) to constrain entry of medium-large shops based on employment considerations? Does the Polish competition authority have any advocacy report related to land use?

A delegate from Poland stated that the law takes into account a number of criteria but does not explain how they should be applied. The competition authority can participate, but its opinion is not binding. The effect of such rules is anti-competitive but does not create a dominant position, in the sense of antitrust law. But it creates more problems for new entrants to the market.

The Chair stated that the competition was not restricted per se in Italy, but number of players was restricted and new technologies that might have existed were hence restricted as well. In the Finnish contribution reference is made to a 2004 Nordic competition authorities report on *Nordic Food Market – a taste for competition*. The report suggests "planning authorities should acknowledge the value of competition for consumers and only limit entry of new retailers where there are objective reasons for it". The Chair asked what types of considerations would be counted as objective reasons.

A delegate from Finland stated that the objective reasons are not defined explicitly. The reasons are that they are transparent to all parties involved. They include balanced community structure and protection of environment. The competition authority believes that enhancing competition could be among these objective reasons. The regulations do not forbid the construction of new large retail outlets. Decision makers may interpret regulations in different ways. It is important to educate the land use authorities to pay more attention to negative impacts on competition. The competition authority opposed new regulation. But since the enactment of restrictions, the number of large new retail outlets has increased by 25%. The worst scenario did not come true. This was perhaps because municipalities took into account the competition aspect.

The Chair stated that in Italy, the 1998 retail trade reform eliminated all structural market regulations and left the sector to be governed only by planning laws. The reform was realised through a national law but its application was devolved to regional governments. The 1998 law contained a provision that promoted an equilibrium between different forms of retail distribution. Many Regions continued as before. Would it have been possible to prevent this from occurring?

A delegate from Italy stated that the provision had a town planning objective, not a commercial planning objective. But at planning level, restriction was used in a restrictive way. The application at the regional level was differentiated. There are some regions where the reform was applied in to promote competition. A recent example is Lombardia, in the North of Italy, where all forms of quantitative

restrictions were abandoned and replaced by qualitative restrictions. Local authorities are closer to special interests, and local authorities are less aware of competition issues. Perhaps what one should have done was to promote reform to the regions.

The Chair observed that in Ireland planning authorities, when granting an authorization, must take into consideration a variety of objectives including town and district centre improvement, socio-economic factors, rural development, accessibility, traffic flow and sustainability. How are these objectives pursued? What are these socio-economic factors that need to be taken into consideration?

A delegate from Ireland stated that the objectives are pursued through development plans. There are 88 local authorities in Ireland. They produce development plans for the town and identify socioeconomic factors. For example, residential plans are linked to a retail plan so that use of infrastructure in the area is optimized to ensure that those dependent on the availability of local shopping outlets are facilitated. Development plans are the main instrument of development oversight. The onus is on the applicant to demonstrate convincingly that their proposal complies with the plan. Unless appealed, planning decisions are made at a local authority level and are often subject to local lobby groups. Therefore in addition to the objectives mentioned there is a simple political economy story.

The Chair noted that the Irish retail panning guidelines introduced a cap on the size of supermarkets. Only retail warehouses have been excluded from the cap. All others supermarkets exceeding 3000/3500 m^2 in net retail space (in the case of hypermarkets the cap is restricted to convenience goods) are prohibited. This has not impeded mega stores from opening and in the past six years 10 stores were opened in Ireland with a floor space over 5000 m^2. The Chair asked what the cap impedes. He wondered, concretely, where is entry restricted? In any case, the NCA took a critical position against these caps, suggesting that local authorities be fully in charge of deciding on entry of superstores. According to you what should be the basis for their decision?

A delegate from Ireland stated that retail planning guidelines were introduced in 2001 and revised in 2005 and appear to be frustrating entry. This is due to a number of issues; including the cap on retail floor space which was first limited in 1998; in 2005, the cap for warehouses was lifted in major metropolitan areas. The ten stores that have opened were by two large supermarket retailers, selling more than food. The cap remains within these stores over space for convenience goods. There are complaints about the caps. The competition authority is monitoring the groceries sector at the moment, at the Minister's request. Other elements of the retail planning guidelines are frustrating entry. Grocery retailers, when applying for planning permission, must perform a catchment area analysis; this involves looking at turnover they may take from other retailers in the area. In Ireland, a lot of inconsistencies arise in the application of the retail planning guidelines from the fact that there are 88 authorities.

A delegate from Portugal noted that at times incumbents get licenses over plots of land in order to protect entry. Therefore the delegate suggested it is important to have a term limit on licenses, so that if not used, it disappears. The delegate noted that there also is important issue with ports. For example a cement company may buy all plots in a port that are appropriate for cement.

Professor Cheshire noted an analogy to the need for free trade. With trade, there are often many small gainers and a few big losers. The big losers have much more incentive to form effective lobbies. Particularly with land use, local decisions are important. Local London boroughs bear costs of expanding Heathrow, but the benefits are spread out. The Tiebout hypothesis that competition between many smaller jurisdictions leads to better outcomes with respect to the supply of local public goods because people can move from one jurisdiction to another is predicated on the idea that there are no spillovers. Community boundaries often do not internalize benefits while internalizing costs of developments.

The Chair stated that the U.S. submission is one of the few that concentrates on antitrust cases. The question of the competition legitimacy of zoning rules is just mentioned in the introduction. "Zoning and other land use restrictions are often imposed to satisfy objectives other than competition. For example, residents often want commercial businesses located outside of residential areas. Assessing the overall effect of land use restrictions requires balancing the effects on competition against the benefits from meeting other objectives, which is often difficult in practice". Many delegations report that the development of large surfaces has created a number of social problems sometimes addressed by land use restrictions. Since large surfaces started in the U.S. why was similar legislation not enacted in the U.S.? The submission states that zoning legitimately addresses the needs of residential communities. How can policymakers ensure that these needs are genuinely addressed and that social problems do not get addressed instead?

A delegate from the United States noted that for many years, the development of large surfaces grew before small business lobbies became effective. But increasingly there are restrictions. States and localities enjoy immunity from challenges. A deliberate effort to bribe zoning authorities in which they were paid to exclude other suppliers was deemed by the Supreme Court as not subject to antitrust laws. It is possible by the filing of an objection to obtain a delay of 18-24 months in many jurisdictions. At times, such objections are filed by intermediaries with in the background a puppet master with strong commercial interests to limit competition. Filing to create delay may be an antitrust violation. Competition enforcers are now looking at some situations in which the planning process is used to forestall entry. Local planning authorities are increasingly becoming aware that the filing of multiple objections may be aimed at restricting entry. This applies not just to entry by large retailers, but also to entry at small levels. Larger enterprises may be able to navigate permit process more easily than smaller enterprises. Hernando de Soto's research established costs of regulation to small entrepreneurs were large. There is a gauntlet of approvals that can make growth by small entrepreneurs difficult. The incumbents may have regrouped through the application of local zoning laws. Naturally they do not step forward and say protect our profits. Instead they make other arguments that have the effect of preventing or delaying entry, such as that there is a need to keep traffic congestion down.

The Chair stated that, as a last contribution, he wanted to ask the UK delegation to present the provisional findings of its groceries market investigation. The Competition Commission has recently studied the UK markets of grocery retailing providing a preliminary competition-oriented evaluation of the planning instruments of municipalities.

A delegate from the United Kingdom noted that this is not the first time the UK Competition Commission has investigated the grocery market. In a previous investigation, changes in planning guidelines were found to have an impact on entry. The OFT referred the grocery market to the Competition Commission on 9 May 2006. The evidence compiled by the OFT suggested the planning regime acts as a barrier to entry. The Competition Commission in its preliminary findings found asymmetric competitive constraints between stores of different sizes, with larger stores compete more with other larger stores and that the geographic market is essentially local. The Competition Commission identified several barriers to entry, among which is the planning regime. The planning regime pursues broad public policy objectives, not just competition objectives. The regime also found that allegations of strategic conduct by local incumbents could have an impact on competition. In the 1990s, there was a growing concern that out of town retail developments would destroy city center retail centres. In 1996, planning rules were changed so that there was a town centre first approach and a need test. These tests have had an impact on the shape of competition at a local level. The applicant must first seek a town centre site, then an edge of town site, and only then is an out-of-town site permitted. If the space is identified, the applicant must demonstrate need. Need is determined by excess demand relative to existing floor space. For large out-of-town and edge-of-town development (>25000 m^2) a retail impact assessment must be performed. The impact of the regime is more likely to affect development of larger grocery stores.

The Barker Report (2007) expressed support for the sequential approach, but recommended the removal of the needs test. The government has proposed to replace the needs test with a new test focusing on town centres.

The Competition Commission also looked at strategic conduct, such as the use of the planning regime to prevent entry and the control of land sites. The Competition Commission identified one retailer that systematically lodged objections when a new development would affect its stores. Incumbents would submit applications for expansion when new stores were proposed, making it harder for a new entrant to show need. There were allegations that land banks could assembled, and that owning land could make it difficult for rivals to develop sites that would be suitable for grocery retailing. There are also restrictive covenants or exclusivity arrangements that can be entered into, without ownership of land. Restrictive covenants may explicitly prevent competing retailers. The Competition Commission examined exclusivity arrangements. Sometimes these may be used to favour development of new sites. The exclusivity may have no limit. It is perhaps important that exclusivity serves its purpose, but not necessary to continue forever, that is, after retailer has amortized its investment. The Competition Commission did find a few instances of ransom strips, that is, pieces of land being acquired in the middle of a set of acquisitions by a competitor.

The Competition Commission proposed remedies shortly before the roundtable discussion was held. The Competition Commission recommended a competition test embedded in the planning process to prevent the establishment of local monopolies and also recommended the elimination of restrictive covenants and limits on the times of exclusivity.

The Chair thanked Professor Cheshire for his contribution to the roundtable. The Chair suggested that the fact that few submissions were made does not reflect the importance of the topic, but rather the difficulties for competition authorities in addressing this topic. Land use, he suggested, is an issue that needs to be addressed more frequently. The Competition Commission report shows some of the instruments that may be used.

COMPTE RENDU DE LA DISCUSSION

Le Président du Groupe de travail, M. Alberto Heimler, ouvre la réunion en constatant que les règles d'utilisation du sol ne semblent pas figurer au premier rang des préoccupations des autorités de la concurrence. C'est un sujet difficile, qui peut-être n'intervient pas tous les jours dans les activités de nos administrations, mais il ne fait aucun doute que les restrictions qui pèsent sur l'utilisation du sol peuvent affecter la concurrence, voire la réduire considérablement. La récente enquête de la Commission de la concurrence du Royaume-Uni sur le marché des produits d'épicerie, dont il sera question plus tard aujourd'hui, montre bien l'importance de l'aménagement de l'espace pour la concurrence.

Les règles de planification foncière régissent ce que l'on peut faire du sol et des immeubles, avant comme après construction. Le Président retient aux fins de ce débat une définition très stricte de la planification foncière et, en particulier, plus étroite que celle de l'appel à contributions. Le Président indique qu'il essaiera de limiter le débat aux cas où la réglementation n'a d'autre but que la gestion foncière pour des raisons d'aménagement et de paysage urbains, etc. De ce fait, le débat ne portera pas sur l'ensemble de la réglementation qui influe sur l'utilisation du sol, parce que certaines règles n'exercent qu'une influence indirecte sur l'utilisation du sol, leur principal objectif étant purement commercial. Par exemple, dans l'optique de l'appel à contributions, quelques contributions classent dans la catégorie « utilisation du sol » la réglementation restrictive applicable aux ports, au secteur du gaz ou à celui de l'essence, alors que l'objet de cette réglementation n'est pas l'utilisation du sol en tant que telle, mais un aspect de l'intérêt général, qui tient aux caractéristiques de l'activité économique visée. Autrement dit, la justification des restrictions réglementaires n'est pas l'utilisation du sol, mais des considérations de service public en général, l'incitation à l'investissement, etc. Selon le Président, si ce type de réglementation n'est pas exclu du débat d'aujourd'hui, la table ronde perdra son fil directeur.

Le Président observe que le document de référence énumère un certain nombre d'instruments qui influent sur l'utilisation du sol, par exemple les règles qui classent les terrains et les immeubles selon leur utilisation, les autorisations ou affectations localisées, la limitation de la taille des commerces, les règles de contiguïté, la réglementation des loyers, les études d'impact, notamment sur l'environnement, les règles d'accès. Le Président fait valoir que, à son avis, c'est l'objectif servi qui compte, et non pas l'instrument utilisé. Par exemple, si la réglementation des loyers a pour but d'empêcher que les centres-villes ne soient de plus en plus réservés à usage de bureaux, le but de cette réglementation est alors la planification urbaine. Si, en revanche, la réglementation des loyers poursuit l'objectif d'aider les pauvres, c'est un instrument de politique sociale. Très peu de contributions définissent les objectifs de la réglementation foncière et celles qui le font, par exemple celle de la Finlande, en donnent une définition très générale, selon laquelle la planification de l'utilisation du sol a pour but de créer les conditions préalables d'un cadre de vie favorable et d'assurer un développement écologiquement, économiquement, socialement et culturellement durable. Cette définition, note-t-il, s'étend à de nombreuses interventions qui ne se limitent pas à la planification foncière.

Le Président présente le Professeur Cheshire, *London School of Economics,* qui a beaucoup écrit sur la planification foncière et en a étudié les règles dans l'optique de la concurrence. Le Professeur Cheshire ouvre le débat en indiquant ce que sont (ou devraient être) les grands objectifs de la planification foncière, les instruments nécessaires pour les atteindre, et il montrera par des exemples les compromis qu'il faut parfois trouver pour concilier planification foncière et concurrence, ainsi que les effets des restrictions injustifiées.

Le Professeur Cheshire donne un bref aperçu de la planification de l'utilisation du sol du point de vue de l'économiste. Il fait observer que la planification foncière porte différents noms selon les pays. Il note tout d'abord qu'il ne s'agit pas seulement des ressources foncières ou environnementales ; la planification foncière est aussi un facteur de production et une source directe de bien-être. Dans les pays de l'OCDE, la réglementation des marchés fonciers est la plus puissante et la plus influente des normes réglementaires par l'importance de l'actif économique visé. Toutefois, à la différence des autres catégories de réglementation, elle s'est développée indépendamment de l'analyse économique, dans une logique sociale et culturelle différente. Les effets de la planification de l'utilisation du sol dépendent essentiellement du mode de contrôle et des instruments en vigueur. Il souligne que les distorsions de prix dues à la planification de l'utilisation du sol peuvent être extraordinairement fortes. Ces effets tiennent aux modalités de l'influence sur les prix fonciers des règles de planification de l'utilisation du sol. Ces distorsions de prix sont un terreau fertile pour la recherche de rente. Les autorités réglementaires ont gravement négligé les effets sur les marchés de la réglementation de l'utilisation du sol.

Il s'appuie essentiellement sur des exemples britanniques, qui sont intéressants parce que la Grande-Bretagne est l'un des premiers pays à avoir adopté une réglementation de l'utilisation du sol, et ses effets comptent parmi les plus forts dans la zone de l'OCDE. Si l'on considère les marchés fonciers du point de vue de l'économiste, leur réglementation est très justifiée. Leurs insuffisances peuvent être solidement établies. Elles tiennent notamment à ce que chaque parcelle est différente et à ce que ses effets sur le voisinage peuvent être importants. Si vous avez des bureaux propres et qu'une fonderie de plomb s'installe tout à côté, les effets seront graves. Il y a externalité. De plus, en présence d'espaces libres et de sites où l'environnement est particulier, la théorie des biens collectifs trouve à s'appliquer. Ensuite se posent des problèmes de coordination. Du fait de l'échelle des infrastructures et de l'existence de nombreux propriétaires, les transactions individuelles risquent fort de ne pas résoudre ces problèmes. Si la réglementation de l'utilisation du sol avait découlé de principes économiques, le recours aux taxes pigouviennes pour internaliser les externalités aurait été plus fréquent. Or, la planification et les planificateurs tirent leur origine de l'architecture et du génie civil. Au Royaume-Uni, une loi de 1947 définit de grands principes qui restent aujourd'hui à la base de la réglementation.

Le Professeur Cheshire souligne qu'il importe de distinguer réglementation de l'utilisation du sol et restrictions de l'offre. La réglementation en tant que telle n'implique pas une restriction de l'offre. Ainsi, rappelle-t-il, la réglementation est très forte aux Pays-Bas, mais l'offre n'y a jamais été limitée, aussi la réglementation n'a-t-elle eu qu'un effet limité sur les prix, même si les restrictions ont tendance à s'affirmer. Les restrictions de l'offre augmentent les coûts et le prix d'entrée. De nombreux pays ont complété leur dispositif national par des régimes restrictifs particuliers, applicables par exemple aux grands centres commerciaux, soit expressément, comme au Royaume-Uni, soit implicitement. Des restrictions peuvent aussi peser sur l'affectation. Les planificateurs peuvent interdire un changement d'affectation qui transférerait l'utilisation du bien d'une agence de voyage à une agence immobilière. Ainsi, à Oxford, les autorités chargées de la planification ont décidé qu'il y avait assez d'agences immobilières. De même, de nombreux arrondissements de Londres ont décidé que le nombre d'hôtels implantés sur leur territoire était suffisant. Il en est résulté une hausse des prix.

Ce régime réagit avec la structure budgétaire locale. Une comparaison du Royaume-Uni aux États-Unis permet de le constater. En Grande-Bretagne, un impôt immobilier sur les locaux à usage de bureaux est versé au niveau national, alors que c'est aux autorités locales, qui ont compétence en matière de planification, qu'il incombe d'assurer les services publics. Autrement dit, lorsqu'une collectivité autorise la création de locaux à usage de bureaux, cela lui vaut des dépenses supplémentaires, sans recettes compensatoires de l'impôt immobilier. Aux États-Unis, les autorités locales bénéficient des recettes fiscales qui résultent de cette affectation à l'usage de bureaux. Les autorités locales peuvent être incitées à exclure de leur territoire les logements à faible valeur locative en imposant une dimension minimale de parcelle, car les contribuables modestes paient souvent moins en impôts qu'ils ne reçoivent sous forme de

services locaux. S'il y a moins de restrictions pesant sur l'affectation à l'usage de bureaux aux États-Unis, le lotissement fait l'objet de restrictions.

Au Royaume-Uni, depuis 1947, la demande de locaux à usage d'habitation et de bureaux, ou destinés à la vente au détail, a augmenté, tandis que la demande de locaux affectés à une activité de production a diminué. Les distorsions de prix se sont beaucoup renforcées. D'une zone à l'autre du plan d'urbanisme, les valeurs foncières peuvent changer considérablement. Dans la ville moyenne de Reading, un hectare constructible à usage d'habitation peut valoir 5 millions de livres, devant la terre agricole qui vaut dix mille livres l'hectare.

Ces distorsions de prix ont des effets à long terme. La réglementation de l'utilisation du sol exerce généralement des effets sur les mises en chantier. Aussi les effets se cumulent-ils. En Grande-Bretagne, une réglementation rigoureuse est appliquée depuis plus de deux générations. Aussi les effets de la réglementation sont-ils aujourd'hui visibles. Avant 1947, le prix réel des terrains à bâtir pour le logement était relativement constant, en termes réels. Depuis 1947, ce prix réel a été multiplié par 11.5. Il est aussi plus instable. Avec le temps, le prix des logements a moins augmenté, d'un facteur de 3.5, parce que les terrains peuvent servir à plusieurs types d'habitations, de la maison individuelle à l'appartement.

Les effets bénéfiques des règles d'affectation en ceinture verte sont très régressifs, profitant à certains habitants plus qu'à d'autres. Ils vont aux propriétaires des logements qui ont le meilleur accès à la ceinture verte, c'est-à-dire généralement les plus riches des habitants : selon les estimations, si l'on tient compte des effets redistributifs de la ceinture verte, la redistribution est encore plus inéquitable que la répartition initiale des revenus des propriétaires-occupants. Au mieux, dans une ville très réglementée, par exemple Reading, restreindre l'offre entraîne une perte nette de bien-être collectif qui équivaut à environ 4 % du revenu.

À Birmingham, ville de 2.5 millions d'habitants, le coût de la construction d'immeubles de bureaux est deux fois moins élevé qu'à Manhattan, mais le coût des locaux à usage de bureaux y est 44 % supérieur. Les facteurs déterminants du coût de ces locaux sont la taille de la ville, le niveau des revenus, le coût de la construction, la croissance et les réseaux de transport. Cependant, pour expliquer le différentiel de coût entre Birmingham et Manhattan, il semble que l'on puisse incriminer la réglementation de l'utilisation du sol. Le coût de la main-d'œuvre et des matériaux de construction ne suffit pas à expliquer la différence.

La réglementation permet de limiter la hauteur des constructions. À Londres, par exemple, la perspective des sites est protégée et des « coefficients d'occupation » sont partout en vigueur. L'économiste souhaiterait connaître le coût pour l'habitant de ces restrictions qui limitent effectivement l'offre de locaux à usage de bureaux.

Dans l'hypothèse où l'entrée du secteur de la construction est libre, où donc ce secteur est en situation de concurrence, la différence entre le prix des locaux dans un étage supplémentaire et le coût (marginal) de construction de ces locaux est assimilable à « l'impôt de la réglementation ».

La meilleure façon de définir le coût global des contraintes réglementaires (« l'impôt de la réglementation ») ne passe peut-être pas par une mesure précise, mais par un indice du coût des contraintes qui pèsent sur l'offre. Par exemple, le coût de mise en conformité ne se retrouve pas dans la mesure par « l'impôt de la réglementation », car il est capitalisé en négatif dans les valeurs foncières. Ce coût de mise en conformité peut être important. À Shanghai, on dit qu'un promoteur doit obtenir 137 autorisations différentes entre le moment où il acquiert le site vierge et le moment où il commercialise l'immeuble.

Dans la *City,* à Londres, la valeur moyenne de l'impôt calculée sur la période 1999-2005 s'établit à 4.88. C'est un impôt de 488 %. À l'extrémité ouest de Londres, où se trouvent de nombreux immeubles classés et où d'autres restrictions pèsent sur la construction, on constate, sur la même période, un impôt de réglementation de 800 % en moyenne. Les chiffres de Londres sont très supérieurs à ceux de Paris malgré la forte réglementation qui est appliquée dans cette ville. Cela tient notamment à la présence en région parisienne d'un quartier d'affaires, La Défense, où l'impôt de la réglementation est beaucoup plus faible. On ne trouve un impôt de réglementation très bas (estimé à 68 %) qu'à Bruxelles, où le régime de planification est extrêmement souple. Les effets sur les prix de l'impôt de la réglementation sont manifestes.

Les effets de la hausse des valeurs foncières peuvent aller d'une redistribution arbitraire (des propriétaires d'actifs mobiliers aux propriétaires fonciers, et entre générations) à des pertes sèches pour la collectivité. Aux Pays-Bas, les logements sont 38 % plus spacieux, plus de 50 % meilleur marché au m^2 et construits selon des normes plus rigoureuses qu'au Royaume-Uni. À l'extrémité ouest de Londres, comme il est interdit de réunir deux habitations pour créer des appartements de plus grande surface, les rares appartements de grande surface existants sont très cotés.

De plus, la rareté suscite un comportement de recherche de rente. À Los Angeles, 38 % des revenus bruts d'un ensemble immobilier situé sur Sunset Boulevard sont imputables à une exemption de l'interdiction locale des enseignes au néon, au motif que ces enseignes font partie du patrimoine culturel du quartier. Les promoteurs qui savent exploiter le système peuvent en tirer d'importants avantages sur les autres, ce qui est en soi une barrière non négligeable à l'entrée.

Parfois, les promoteurs tiennent leur emprise sur le marché de la rigueur du régime. Au début des années 90, environ 90 % des terrains constructibles de l'Oxfordshire du sud étaient aux mains d'un seul promoteur.

Le Professeur Cheshire souligne que l'immobilier d'entreprise est un facteur de production. Si son prix augmente par limitation de l'offre sans tenir compte des gains collectifs, il y a perte d'efficience, à moins qu'il ne soit parfaitement substituable. Il insiste sur la nécessité que les responsables des politiques procèdent à un réexamen approfondi des effets de la réglementation de l'utilisation du sol.

Le Président ajoute que d'importants écarts de prix entre affectations concurrentes peuvent favoriser la corruption de fonctionnaires.

Le Professeur Cheshire fait observer qu'il a utilisé l'expression « recherche de rente », sachant que le Royaume-Uni est remarquablement exempt de corruption étant donné l'ampleur des gains possibles, alors que d'autres pays peuvent connaître une situation différente.

Le Président note que de nombreuses contributions sont centrées sur le commerce de détail qui, d'ailleurs, est le principal thème de notre débat. Toutefois, un certain nombre de contributions exposent des idées plus générales sur l'utilisation du sol et c'est par elles qu'il commence. Il constate qu'en Corée, la surface totale des usines qui s'implantent dans les villes de Séoul et d'Incheon, et dans la province de Gyeonggi, est soumise par la réglementation à un plafond global d'occupation. Cette réglementation a pour but d'assurer un développement économique national plus harmonieux. Selon la contribution de la Corée, l'opportunité de l'abroger ou de la maintenir suscite un débat très vif. Le Président demande (1) si le plafond s'est avéré efficace pour atteindre les objectifs visés ; (2) si des éléments permettent d'évaluer son caractère contraignant et la rigueur de son application ; (3) le rôle que joue éventuellement la Commission nationale de la concurrence *(KFTC, Korea Fair Trade Commission)* lors de la réforme du plafond ; et (4) à quelle conclusion pourrait finalement mener le débat sur cette réglementation.

Le Délégué de la Corée précise que le plafond global d'occupation applicable aux usines a été adopté pour atteindre divers objectifs, par exemple un développement plus harmonieux et la prévention du surpeuplement des grandes agglomérations. Il est difficile de dire si la réglementation permet d'atteindre ces objectifs. L'Institut coréen de l'entreprise indique qu'elle n'a pas été efficace, à en juger par les résultats obtenus de 1995 à 2000. La densité relative et le nombre total de producteurs ont légèrement diminué, puis ont à nouveau augmenté après 1998 pour atteindre un sommet depuis 1981. D'un autre côté, ceux qui défendent l'efficacité de cette réglementation font valoir que, sans elle, le surpeuplement des grandes agglomérations se serait aggravé. Ils font aussi valoir que certaines mesures essentielles prises depuis 1997 ont affaibli le dispositif. Une province comptait 2.7 millions de m^2, mais 1.2 millions de m^2 supplémentaires ont été autorisés une certaine année. Le total a donc été porté à 3.9 millions de m^2.

La KFTC n'a joué aucun rôle dans la réforme du plafond global d'occupation applicable aux usines. Cette réforme a été étudiée pour l'essentiel comme une question sociale. Un transfert de pouvoir est intervenu à l'occasion de l'élection présidentielle de 2007. Le nouveau gouvernement prône la réforme des réglementations qui freinent l'investissement des entreprises. Pour le moment, il est très difficile de dire si le plafond global d'occupation sera abrogé ou non.

Le Président note que la contribution des États-Unis traite de certains cas très intéressants où le problème de concurrence est né de certaines restrictions liées à l'utilisation du sol, voire de restrictions d'origine privée. Dans l'affaire qui oppose les États-Unis à l'*Eastern Mushroom Marketing Cooperative,* le Ministère de la justice a attaqué la pratique des coopératives qui consiste à acheter, pour les démanteler, des sociétés concurrentes implantées dans l'Est des États-Unis. Cette affaire est intéressante parce que l'emprise sur le marché découle ici de la maîtrise du sol. Mais pourquoi ce sol est-il si propice à la culture des champignons ? S'agit-il de la réglementation ou des caractéristiques mêmes du sol ? À quoi la rareté tient-elle ? De plus, comment le Ministère de la justice a-t-il pu prouver que les acquisitions avaient pour seul objet de faire cesser les exploitations concurrentes ?

Le Délégué des États-Unis indique que la coopérative réunit quinze des principaux cultivateurs de champignons de l'Est des États-Unis qui sont à l'origine de plus de 60 % des ventes. Les coopératives agricoles bénéficient d'une exemption de la législation antitrust, mais celle-ci ne prévoit aucune disposition contre les pratiques anticoncurrentielles visant les exploitations non membres. L'une des premières mesures prises par les coopératives une fois établies a été d'augmenter les prix d'environ 8 %. Après sa création en 2001, la coopérative en cause a consacré environ six millions de dollars à l'acquisition de champignonnières pour les revendre à perte avec des clauses restrictives qui interdisaient d'affecter le sol à la culture des champignons. Cette opération portait sur environ 8 % de la capacité de production de l'Est des États-Unis.

Les champignons étaient cultivés dans des bâtiments sans fenêtre d'un seul étage, maintenus à température faible et uniforme. La culture dure huit semaines environ. La création d'une nouvelle entreprise serait coûteuse et le zonage pourrait s'avérer difficile. Selon le Ministère de la justice, l'entrée serait barrée pour 18 mois environ.

L'intention était claire. L'acte de vente de chaque lot stipulait que la terre ne servirait jamais à la culture des champignons. Les six millions de dollars nécessaires aux acquisitions provenaient des droits des membres et d'une « Contribution à la maîtrise de l'offre » demandée aux membres de la coopérative. Les archives du procès mentionnent que la coopérative prétend avoir ainsi réussi à empêcher la production de 50 millions de livres de champignons.

Le Président note que le rapport de la Turquie traite d'un certain nombre de restrictions à l'utilisation du sol. La plupart d'entre elles, même si elles exercent certainement un effet sur l'utilisation du sol, peuvent se justifier par des objectifs autres que l'aménagement urbain ou la mise en valeur du paysage.

Ainsi, les droits de passage relatifs aux services de télécommunications posent un problème de concurrence, ainsi que les servitudes d'accès. La réglementation des postes de distribution d'essence est, elle aussi, une réglementation à caractère économique qui vise à garantir un marché protégé à chaque établissement. Toutefois, une partie du rapport traite directement la question de la planification foncière : c'est lorsqu'il s'agit de l'examen de l'obligation d'élaborer une étude d'impact sur l'environnement à l'appui de certains projets d'investissement, par exemple dans les centrales nucléaires, l'industrie chimique, etc. Il est dit que ces obligations sont une barrière à entrée. Est-il possible de préciser un peu ce point ? Est-ce à dire qu'il ne faut jamais élaborer d'étude d'impact sur l'environnement ou que, dans le cas de la Turquie, il est inutilement contraignant ?

Le Délégué de la Turquie rappelle d'abord qu'il est obligatoire dans son pays d'élaborer une étude d'impact sur l'environnement à l'appui de certains projets, par exemple les raffineries, les centrales nucléaires, les cimenteries, etc., afin de déterminer les effets négatifs et positifs du projet, d'empêcher les effets négatifs ou de les maintenir à un niveau acceptable. Le Conseil national de la concurrence, dans l'une de ses décisions concernant des cimenteries, précise ses vues sur l'organisation du marché du ciment et considère que les études d'impact sur l'environnement sont une barrière juridique à l'entrée sur le marché, car il est difficile de fournir ce type d'étude. Toutefois, compte tenu de l'objectif légitime de protection de l'environnement et des mesures nécessaires, le Conseil de la concurrence ne mentionne pas expressément que l'étude ne doit pas être élaborée, ni qu'elle est inutilement contraignante. Il s'agit seulement d'une enquête dans le cadre de l'évaluation du marché.

Le Président observe qu'au Taipei chinois le Ministère des affaires économiques n'autorise l'entrée de postes de distribution d'essence que si chaque établissement s'implante à plus de 500 m d'un autre. Quel est le but de cette réglementation ? Peut-elle se justifier comme une obligation de planification foncière ou s'agit-il d'une restriction qui vise à garantir un marché protégé à chaque établissement ?

Le Délégué du Taipei chinois indique que le marché de l'essence a été étroitement réglementé jusqu'en 1997. Après la déréglementation, l'autorité chargée de la concurrence a créé un groupe de réflexion pour réexaminer les dispositions qui régissent le secteur des carburants. L'autorité a constaté que certains aspects de la réglementation pouvaient nuire à la concurrence, notamment l'obligation de respecter une distance minimum entre établissements. Pour pouvoir ouvrir un poste de distribution d'essence, il faut qu'ils soient distants d'au moins 500 m de tout autre établissement. L'autorité chargée de la concurrence a proposé de modifier cette disposition en raison de ses effets. Il lui a tout d'abord été répondu que cette disposition avait été prise pour des raisons de sécurité, parce qu'un incendie dans un établissement pouvait se propager à un autre. L'autorité chargée de la concurrence a persisté à penser que la disposition était inutile. L'obligation de respecter une distance minimum reste inscrite dans les textes, mais les autorités locales ont été habilitées à autoriser des implantations moins distantes, et l'on trouve aujourd'hui des établissements concurrents l'un à côté de l'autre et de part et d'autre de la chaussée. Les autorités sont attentives aux effets qu'entraînerait à l'avenir l'abolition de ce type de réglementation.

Le Président note que les postes de distribution d'essence posent le même genre de problème en Italie. La distance se mesure de la station-service à l'entrée d'un commerce de détail pour des raisons de sécurité, mais l'application montre que l'argument sécuritaire n'est pas pertinent. En République tchèque, pour toute construction, modification d'une construction ou changement d'affectation du sol, il faut obtenir un permis de construire ou l'autorisation du projet d'aménagement. Le Président demande à la délégation d'exposer brièvement les conditions d'obtention du permis, le caractère plus ou moins discrétionnaire de l'autorisation et l'éventuel traitement de la question dans un rapport de sensibilisation dont disposerait l'autorité chargée de la concurrence.

Le Délégué de la République tchèque précise que la réglementation est extrêmement libérale. Il est possible de construire pratiquement n'importe quoi n'importe où. Ainsi, à côté de la maison du délégué, le

magasin a très souvent changé d'affectation. Les municipalités n'ont rien prévu quant aux modalités d'intervention dans l'affectation des locaux sur leur territoire. Si un particulier veut apporter une modification à sa propriété, il doit y être autorisé. Mais cette autorisation est d'ordre technique et vérifie, par exemple, que le terrain est bien destiné à la construction d'une habitation et qu'une famille aura suffisamment de place pour y vivre. Cette formalité administrative peut être longue. Le Délégué espère qu'elle ira en se simplifiant.

Le Président note que, selon la contribution de la Russie, les restrictions de l'utilisation du sol qui pèsent sur la concurrence peuvent venir du code foncier ou du code de l'urbanisme. L'appel d'offres paraît s'imposer comme le principal mécanisme d'attribution ou de privatisation du sol. Le Président demande si l'on a pu constater des cas de soumissions concertées et s'il est arrivé qu'une société achète un terrain en vue de n'en rien faire pour empêcher l'implantation d'un concurrent.

Le Délégué de la Fédération de Russie précise que la procédure d'appel d'offres ouverte est utilisée depuis 2005. Le principe de cette procédure est non seulement de permettre la libre concurrence en matière d'utilisation du sol, mais aussi de veiller à l'élimination de la corruption qui régnait sur les autorisations d'affectation et les cessions foncières des autorités locales. En 2005, 90 % du sol étaient attribués sans aucun mécanisme fondé sur la concurrence. En 2007, 90 % des terrains destinés à la construction d'habitations étaient attribués selon la procédure d'appel d'offres. L'an dernier, le Service fédéral antimonopole, en coopération avec le Service des procureurs fédéraux, a procédé à une enquête sur les marchés effectués à Moscou et à Saint-Pétersbourg. L'une des conclusions de l'enquête est que rien n'indique des soumissions concertées dans ces villes. Toutefois, le délégué s'attend à ce qu'il s'en produise à l'avenir. Acheter un terrain pour n'en rien faire n'est pas la bonne façon de faire des affaires en Russie : dans une économie en croissance où les revenus augmentent, des entrepreneurs peuvent acheter un terrain pour le conserver un an ou deux et le revendre ensuite, mais pas pour le conserver.

Le Professeur Cheshire indique qu'un document compare les appels d'offres par soumission sous pli cacheté aux enchères ouvertes à la criée, et que les premiers produiraient des prix inférieurs, car les soumissions concertées sont plus faciles par une procédure d'appel d'offres écrite.

Le Délégué de la Fédération de Russie précise que les appels d'offres se font à la fois par soumission sous pli cacheté et par enchères ouvertes à la criée et laisse entendre que les deux procédures seront comparées.

Le Président remarque que les terres agricoles restent dans le secteur public.

Le Délégué de la Fédération de Russie convient que les terres agricoles sont publiques aux termes de la loi, mais avance que, dans la pratique, elles sont privées.

Le Président demande si c'est à l'occasion du rapport de l'autorité chargée de la concurrence au Royaume-Uni que les autorités nationales se sont penchées pour la première fois sur la planification de l'utilisation du sol. Il s'interroge en particulier sur le critère des besoins.

Le Professeur Cheshire note qu'en 2003 la Banque d'Angleterre et le Trésor ont observé que le marché du logement était soumis à une réglementation restrictive. La Banque d'Angleterre et le Trésor s'inquiétant de l'accessibilité financière des logements, les autorités sont invitées de façon de plus en plus pressante à tenir compte des conséquences économiques de leurs décisions relatives à la planification foncière. Les compétences économiques seront renforcées au ministère chargé de la planification. Jusqu'à présent, le prix ne pouvait servir d'argument de fond pour motiver les décisions du planificateur. Il devrait en aller autrement depuis l'an dernier, car un service national de planification et de conseil dans le domaine

du logement a commencé de formuler des recommandations tenant compte des effets de la planification sur l'accessibilité financière des logements.

Pour ce qui est du critère des besoins, il s'applique partout. Les surfaces affectables au logement ne sont pas déterminées par la demande, mais par l'évaluation des besoins, principe tout à fait différent qui se fonde sur les densités, les tailles et les prévisions relatives au nombre des ménages. L'objectif est que 60 % des nouveaux logements soient implantés sur des friches. Cet objectif a exercé un effet considérable sur le volume de la construction et la taille des logements construits. Il est difficile d'interpréter le critère des besoins pour l'appliquer au commerce de détail. Du fait de la politique en faveur du centre des villes, les promoteurs doivent y rechercher une implantation avant de pouvoir se tourner vers la périphérie. Il est devenu presque impossible de construire des commerces de détail en périphérie. Les établissements situés au centre des villes ont activement soutenu cette politique au nom de l'égalitarisme, parce que tout le monde ne dispose pas d'une voiture, et pour des considérations d'environnement. Toutefois, le prix des produits n'en est que plus élevé pour les pauvres. Et l'effet sur la consommation d'énergie n'est pas tranché, car il faut tenir compte, lorsque l'on compare les différentes solutions envisageables, de l'effet sur l'environnement de la circulation dans les centres encombrés ; de plus, dans les quartiers centraux des villes, les livraisons doivent être plus fréquentes.

Le Délégué de l'Afrique du Sud fait observer que, si les doux peuvent recevoir la terre en partage, il est peu probable qu'ils obtiennent les droits d'exploitation du sous-sol. Il est fréquent que l'État possède ou nationalise ces droits. En Afrique du Sud, un ensemble complexe de lois est appliqué avec des visées redistributives, pour répartir plus équitablement le produit des droits d'exploitation du sous-sol. L'État a obligé les compagnies minières à utiliser ces droits sous peine de les perdre. Des considérations spéciales s'attachent-elles aux droits d'exploitation du sous-sol, au-delà des autres droits ?

Le Professeur Cheshire indique que l'une des particularités des droits d'exploitation du sous-sol est que les règles qui les régissent sont tellement locales qu'un voile d'ignorance pèse sur ce que font les autres pays. Au Royaume-Uni, la loi de 1947 a privé les propriétaires fonciers, à l'exception de la Couronne, de tous leurs droits à construire.

Le Délégué des États-Unis demande si la concurrence entre autorités publiques a conduit des villes ou des pays à attirer des entreprises ou des services. Par exemple, si les autorités publiques souhaitent que la capitale offre des services financiers, ou qu'augmente le nombre de sièges sociaux, un modèle Tiebout de la concurrence entre autorités publiques pourrait les conduire à revenir sur les restrictions de l'utilisation du sol, surtout pour les locaux à usage de bureaux.

Le Professeur Cheshire rappelle les travaux de Bill Fischel sur l'hypothèse de l'électeur-propriétaire-occupant. Dans la *City* de Londres et le quartier des Docklands, l'aménagement urbain a obéi aux intérêts des entreprises. Ailleurs en Angleterre, autoriser localement l'installation de bureaux, c'est essentiellement pénaliser la collectivité locale, car les recettes fiscales sur l'immobilier d'entreprise vont à l'autorité centrale, alors que c'est aux autorités locales d'assurer le financement des services. Les collectivités locales peuvent néanmoins agir en faveur des entreprises en réponse aux préoccupations relatives à l'emploi. Lorsque le chômage local est élevé, l'impôt de la réglementation est inférieur. L'élasticité de réponse est différente dans les localités qui sont aux mains des entreprises. Ces localités sont plus réceptives que les autres à l'état de l'économie locale. L'impôt de la réglementation a baissé dans la *City* de Londres par rapport aux autres circonscriptions depuis la réforme des impôts sur l'immobilier d'entreprise en 1990. Seule la *City* a été partiellement dispensée de la réforme qui attribue les recettes venant des entreprises à l'autorité centrale, ce qui est une incitation à autoriser la construction. De plus, étant aux mains des entreprises, le régime local de planification dans la *City* a répondu à la menace de l'aménagement des Docklands à Londres. Si l'on considère le reste de l'Europe, il est plus difficile de cerner les perspectives de la concurrence entre autorités publiques. Des villes comme Paris sont restrictives

pour des raisons historiques et environnementales, mais elles connaissent une urbanisation périphérique, par exemple à La Défense, et l'on observe à Milan une urbanisation périphérique comparable.

Pour Le Délégué des États-Unis, tout se passe comme si les autorités publiques répondant aux facteurs localisés dont il est question dans l'exposé du Professeur Cheshire pouvaient inciter les collectivités locales à se montrer plus concurrentielles.

Le Président demande comment se produit la prise en main des entreprises.

Le Professeur Cheshire rappelle que la *City* de Londres a été exemptée de toutes les réformes visant les autorités locales depuis 1300 (en tout cas depuis 1834). La *City* de Londres ne compte qu'environ quatre à cinq mille habitants. Les propriétaires d'entreprises ont le droit de vote et contrôlent l'autorité locale. Les Docklands et le Canary Wharf sont eux aussi aux mains des entreprises. Pour aménager huit miles carrés, un organisme à vocation spécialisée *(London Docklands Development Corporation)* a été créé qui a des pouvoirs de planification. Cet organisme est aujourd'hui aboli, mais l'aménagement a été réalisé. Trente-deux des trente-trois arrondissements de Londres sont aux mains des habitants.

Le Délégué de la Finlande s'intéresse plus particulièrement à la comparaison des valeurs foncières à Birmingham, Londres et Manhattan. Ces chiffres montrent le niveau surprenant de l'impôt de la réglementation à Birmingham. Le Délégué se demande quelle est la réaction des édiles à ce type de situation et quelles mesures les municipalités peuvent prendre pour y faire face.

Le Professeur Cheshire indique que, du fait des restrictions qui pèsent sur l'utilisation du sol, la demande porte la charge foncière à un niveau très élevé. Toutes les municipalités n'ont pas conscience de ce phénomène, ni de leur part de responsabilité par les mesures qu'elles prennent. Les décideurs ne connaissent en général que leur système. Au Royaume-Uni, leur vie professionnelle s'inscrit entièrement dans le régime de planification britannique. La plupart d'entre eux nieraient qu'il y ait un rapport quelconque entre l'offre et les prix. Un responsable politique, au terme de sa présidence du Comité de planification de Reading a dit que la principale réussite de son mandat était de n'avoir autorisé aucun grand projet. Le Professeur Cheshire note que les pertes d'efficience économique dues aux restrictions sur les locaux à usage de bureaux ne sont pas pleinement connues. Personne n'a jamais estimé une fonction de production où l'espace serait un facteur. Il serait vraiment nécessaire de procéder à des estimations portant à la fois sur le secteur des bureaux et sur celui du commerce de détail pour pouvoir quantifier l'effet du prix de l'espace sur la productivité. Comme l'a noté Bill Fischel, les coûts sont toujours exprimés en termes de flux. Les effets sont capitalisés dans la valeur des actifs. Lorsque cette valeur augmente, les propriétaires du moment en bénéficient et les propriétaires fonciers se soucient de plus en plus d'empêcher la concurrence. Les problèmes se posent aux entrants qui essaient d'acquérir un logement ou de trouver un magasin à louer ou à acheter, mais il est difficile d'en tenir compte.

Le Délégué d'Israël relève que, lors de l'affectation des terrains aux postes de distribution d'essence, l'autorité chargée de la concurrence a empêché leur fusion. Les formalités nécessaires à l'obtention d'une licence pour installer un garage ou une station-service durent de cinq à dix ans, notamment du fait des autorisations qu'il faut obtenir du Ministère de la protection de l'environnement. Cet argument a été présenté à la Cour suprême, qui a décidé d'appuyer la position de l'autorité chargée de la concurrence.

Le Délégué du Taipei chinois fait remarquer que le respect dans son pays d'une certaine distance entre les postes de distribution d'essence se justifie aussi par les encombrements dans les rues.

Le Délégué de l'Australie indique que, dans son pays, la définition et l'évaluation de l'utilisation du sol sont conduites par les États et territoires. La question n'est pas considérée comme économique. Le Délégué demande quelle est l'origine des examens Barker et de l'accent mis sur les effets économiques.

Le Professeur Cheshire indique que ces examens étaient motivés par les distorsions croissantes qui provenaient du logement, le logement contribuant au renchérissement du coût de la vie (d'où l'intérêt de la Banque d'Angleterre) et le Trésor (en partie du fait de l'intérêt qu'il porte à l'accessibilité des pauvres au logement) a conduit à l'élaboration de ces rapports, ainsi que les critiques visant le coût de la mobilité des entreprises et de leurs cadres. Les travaux ont commencé en privilégiant le secteur du logement, mais ils se sont ensuite élargis aux autres utilisations, car il est apparu que le problème ne se limitait pas à l'immobilier résidentiel. Plusieurs rapports ont été rédigés.

1. La planification foncière au service du commerce de détail

Le Président observe que de nombreuses contributions sont centrées sur le commerce de détail. Il pense d'ailleurs que la plupart des restrictions à l'utilisation du sol qui influent sur la concurrence sont conçues pour le secteur du commerce de détail. Certaines d'entre elles sont nettement axées sur la planification urbaine, par exemple pour s'assurer que les habitants des quartiers centraux des villes ont accès à suffisamment de commerces. Ces restrictions pourraient même servir l'objectif de préserver l'attrait des quartiers centraux des villes pour les habitants des classes moyennes. Toutefois, dans certaines collectivités, la planification des activités économiques reste au service de la protection de l'emploi et des petits commerçants. Selon le Président, lorsque les responsables de l'élaboration des politiques visent des objectifs protectionnistes, ces règles ne doivent pas être classées dans le domaine de la planification, car elles assurent une régulation structurelle des marchés, les effets sur l'utilisation du sol n'étant qu'indirects.

Il rappelle qu'en Pologne tout commerce de détail de plus de 400 m^2 doit faire l'objet d'une autorisation municipale qui repose notamment sur les éléments suivants : le critère des besoins, le maintien d'un équilibre entre les diverses formes de distribution au détail, les effets des entrées sur le marché de l'emploi. Il pose les questions suivantes : quel est le pouvoir d'appréciation de la municipalité ? Les bénéficiaires participent-ils à la prise de décision ? N'est-il pas anticoncurrentiel (en un sens différent de celui que la lutte antitrust donne au qualificatif) de restreindre l'entrée de commerces de grande et moyenne surface pour des raisons touchant à l'emploi ? L'autorité chargée de la concurrence en Pologne dispose-t-elle d'un rapport de sensibilisation à l'utilisation du sol ?

Le Délégué de la Pologne précise que la loi prévoit un certain nombre de critères mais n'explique pas comment ils doivent être appliqués. L'autorité chargée de la concurrence peut intervenir, mais son avis n'est que consultatif. L'effet de ces règles est anticoncurrentiel, mais ne crée pas de position dominante au sens de la loi antitrust. Toutefois, il pose plus de problèmes aux entrants sur le marché.

Le Président indique qu'en Italie la concurrence n'est pas limitée en tant que telle, mais que le nombre d'acteurs l'est, et du même coup les technologies nouvelles qui auraient pu voir le jour. Dans la contribution de la Finlande, il est question d'un rapport que les autorités nordiques chargées de la concurrence ont élaboré en 2004 sur l'appétit pour la concurrence du marché nordique des produits alimentaires *(Nordic Food Market – a taste for competition)*. Ce rapport tend à montrer que les autorités chargées de la planification devraient reconnaître l'intérêt de la concurrence pour les consommateurs et ne limiter l'entrée de détaillants que si des raisons objectives le justifient. Le Président demande quelles considérations seraient retenues comme étant des raisons objectives.

Le Délégué de la Finlande indique que les raisons objectives ne sont pas explicitement définies. Cela tient à ce qu'elles sont transparentes pour toutes les parties prenantes. Parmi elles, il faut citer l'équilibre de la population locale et la protection de l'environnement. L'autorité chargée de la concurrence pense que l'action en faveur de la concurrence pourrait figurer parmi ces raisons objectives. La réglementation n'interdit pas la construction de grands centres commerciaux de vente au détail. Les décideurs peuvent interpréter la réglementation de différentes manières. Il importe de sensibiliser les autorités chargées de l'utilisation du sol à la nécessité de prêter plus d'attention aux effets négatifs sur la concurrence. L'autorité

chargée de la concurrence s'est opposée à la nouvelle réglementation. Toutefois, depuis l'entrée en vigueur des restrictions, le nombre de grands centres commerciaux de vente au détail a augmenté de 25 %. Le pire ne s'est pas produit. Peut-être est-ce dû au fait que les municipalités ont tenu compte des considérations liées à la concurrence.

Le Président indique qu'en Italie, la réforme du commerce de détail de 1998 a éliminé l'ensemble de la réglementation structurelle des marchés pour laisser toute la compétence sectorielle à la législation de la planification. La réforme a été réalisée par une loi nationale, mais son application a été confiée aux autorités régionales. Dans la loi de 1998 figure une disposition qui favorise un équilibre entre les différentes formes de distribution de détail. De nombreuses régions n'ont rien changé à leur pratique. Aurait-il été possible de d'éviter une telle inertie ?

Le Délégué de l'Italie indique que cette disposition avait une visée urbanistique, et non pas un objectif de planification de l'activité économique. Toutefois, dans l'optique de la planification, les dispositions ont été utilisées de manière restrictive. L'application au niveau régional est différenciée. Dans certaines régions, la réforme a été appliquée pour favoriser la concurrence. Exemple récent : la Lombardie, au Nord de l'Italie, où toutes les formes de restrictions quantitatives ont été abandonnées et remplacées par des restrictions qualitatives. Les autorités locales sont plus proches des intérêts catégoriels, et elles sont moins conscientes des problèmes de concurrence. Peut-être aurait-il fallu sensibiliser mieux encore les régions à la réforme.

Le Président observe que, en Irlande, les autorités chargées de la planification doivent, lorsqu'elles accordent une autorisation, prendre en considération de multiples aspects, notamment la réhabilitation des quartiers centraux des villes, les facteurs socioéconomiques, le développement rural, l'accessibilité, les flux de circulation et la viabilité à long terme. Comment ces objectifs sont-ils servis ? Quels sont les facteurs socioéconomiques à prendre en considération ?

Le Délégué de l'Irlande indique que les objectifs sont servis par des plans d'aménagement. L'Irlande compte 88 autorités locales. Elles élaborent des plans d'aménagement pour la ville et recensent les facteurs socioéconomiques. Ainsi, le plan des quartiers d'habitation se rattache au plan des commerces de détail pour l'utilisation optimale des infrastructures locales au service des habitants tributaires des magasins de proximité. Les plans d'aménagement sont le principal instrument de contrôle du développement urbain. C'est au demandeur de montrer de manière convaincante que son projet est conforme à la planification. Sauf appel, les décisions du planificateur, prises à l'échelon local, subissent souvent l'influence des groupes de pression locaux. Aux objectifs mentionnés plus haut s'ajoutent donc des considérations politiques classiques.

Le Président note qu'en Irlande les principes de planification du commerce de détail limitent la taille des supermarchés. Seuls les magasins de détail sont exclus du plafond. Tous les autres supermarchés dont la surface nette de vente au détail dépasse 3000 à 3500 m^2 sont interdits (dans le cas des hypermarchés, le plafond ne s'applique qu'aux produits de consommation courante). Cela n'a pas empêché l'ouverture d'hypermarchés et, ces six dernières années, dix magasins ont ouvert en Irlande dont la surface de vente dépasse 5000 m^2. Le Président demande ce qu'empêche le plafond. Il se demande, concrètement, en quoi l'entrée est limitée ? En tout cas, l'autorité nationale chargée de la concurrence s'est montrée critique à l'égard de ces plafonds, estimant qu'il fallait laisser aux autorités locales la pleine responsabilité de décider de l'entrée des supermarchés. Sur quels critères devraient-elles se fonder pour prendre leurs décisions ?

Le Délégué de l'Irlande précise que les principes de planification du commerce de détail ont été adoptés en 2001, révisés en 2005, et qu'ils semblent faire obstacle à l'entrée. Cela tient à un certain nombre de problèmes, notamment le plafond de surface de vente au détail qui a été limité pour la première fois en 1998. En 2005, le plafond des magasins a été relevé dans les très grandes agglomérations. Les

dix magasins qui ont ouvert l'ont été par deux grands distributeurs au détail qui ne se limitent pas à l'alimentation. Dans ces magasins, le plafond reste applicable à l'espace de vente des produits de consommation courante. Les plafonds ont donné lieu à des réclamations. À la demande du ministre, l'autorité chargée de la concurrence procède en ce moment à l'observation continue du secteur de l'épicerie. D'autres aspects des principes de planification du commerce de détail s'opposent à l'entrée. Lorsqu'ils déposent une demande de permis de construire, les épiceries au détail doivent effectuer une analyse de la zone de chalandise ; il faut à cet effet qu'elles évaluent le chiffre d'affaires qu'elles pourraient prendre à d'autres détaillants du quartier. En Irlande, l'application des principes de planification du commerce de détail entraîne de nombreuses incohérences du fait de l'existence de 88 autorités différentes.

Le Délégué du Portugal note que les bénéficiaires obtiennent parfois un permis sur une parcelle pour verrouiller l'entrée. Le Délégué pense donc qu'il importe de limiter la durée des permis, pour qu'ils tombent s'ils ne sont pas utilisés. Le Délégué note que les ports soulèvent eux aussi une question importante. Par exemple, une cimenterie pourrait y acheter toutes les parcelles qui se prêtent à son activité.

Le Professeur Cheshire note une analogie avec l'impératif de libre-échange. Les échanges font le plus souvent beaucoup de petits gagnants et quelques gros perdants. Ceux-ci sont les premiers motivés à former de puissants groupes de pression. Les décisions locales pèsent particulièrement lourd sur l'utilisation du sol. Alors que les collectivités locales de l'agglomération londonienne voisines d'Heathrow supportent les coûts de l'extension de l'aéroport, les avantages de l'opération sont en grande partie exportés. La thèse de Tiebout qui veut que la concurrence de nombreuses petites collectivités locales conduise à l'offre optimale de biens publics locaux, du fait que les habitants peuvent se déplacer d'une collectivité à une autre, part du principe qu'il n'y a pas d'effets de débordement. À l'échelon local, l'internalisation des avantages est rare, alors que celle des coûts de l'urbanisation est courante.

Le Président indique que la contribution des États-Unis est l'une des rares qui se concentrent sur des violations de la législation antitrust. La question de la légitimité des règles de zonage dans l'optique de la concurrence est explicitement posée en introduction. Le zonage et d'autres restrictions pesant sur l'utilisation du sol répondent souvent à d'autres objectifs que la concurrence. Ainsi, les habitants souhaitent souvent que les entreprises s'implantent hors des quartiers d'habitation. Pour évaluer l'effet général des restrictions à l'utilisation du sol, il faut mettre en balance les effets sur la concurrence et l'avantage d'atteindre les autres objectifs, ce qui est souvent difficile dans la pratique. De nombreuses délégations font valoir que l'aménagement de grandes surfaces a créé un certain nombre de problèmes sociaux parfois réglés par des restrictions à l'utilisation du sol. Comme les grandes surfaces ont vu le jour aux États-Unis, pourquoi une législation de ce type n'a-t-elle pas été adoptée dans ce pays ? Selon la contribution, c'est à juste titre que le zonage répond aux besoins des habitants. Comment les responsables de l'action publique peuvent-ils s'assurer qu'ils répondent bien à ces besoins et non pas à des problèmes sociaux ?

Le Délégué des États-Unis rappelle que, il y a bien des années, les grandes surfaces se sont développées avant la montée en puissance des groupes de pression des petits commerces. Toutefois, les restrictions sont de plus en plus fréquentes. Les États et les collectivités locales jouissent de l'immunité de poursuites. La Cour suprême a jugé qu'une tentative délibérée de corrompre les autorités de zonage, celles-ci étant payées pour exclure les autres fournisseurs, ne relevait pas de la législation antitrust. Dans de nombreuses collectivités, il est possible en faisant opposition de retarder les opérations de 18 à 24 mois. Parfois, l'opposition est formée par des intermédiaires avec, en arrière-plan, un manipulateur qui a tout intérêt à freiner la concurrence. Les manœuvres dilatoires peuvent constituer une violation de la législation antitrust. Les autorités chargées de faire respecter la concurrence examinent aujourd'hui certaines situations où la planification sert à empêcher les entrées. Les autorités locales de planification prennent conscience que la multiplication des actions en opposition peut viser à limiter les entrées. Il ne s'agit pas

seulement de l'entrée des grands commerces de détail, mais aussi de celle des petits détaillants. Les grosses sociétés peuvent, plus facilement que les petites, instruire une demande de permis. Les travaux d'Hernando de Soto ont établi que le coût de la réglementation était considérable pour les petites entreprises. L'épreuve des autorisations peut compliquer singulièrement le développement des petites entreprises. Les bénéficiaires ont pu se grouper en appliquant les règles locales de zonage. Naturellement, ils ne mettent pas en avant la protection de leurs profits. Ils font valoir d'autres arguments qui ont pour effet d'empêcher ou de retarder l'entrée de concurrents, par exemple qu'il est impératif de maîtriser les encombrements.

Le Président indique qu'il souhaite demander à la Délégation du Royaume-Uni, dernière contribution, d'exposer les premiers résultats de l'enquête sur le marché des produits d'épicerie. La Commission de la concurrence a récemment étudié dans ce pays le marché des produits d'épicerie au détail, ce qui livre une première évaluation, dans l'optique de la concurrence, des instruments de planification des municipalités.

Le Délégué du Royaume-Uni note que ce n'est pas la première fois que la Commission de la concurrence de son pays examine le marché des produits d'épicerie. Lors d'une enquête antérieure, il a été constaté que la réforme des principes de planification exerçait un effet sur l'entrée. L'autorité chargée de la concurrence (*Office of Fair Trading,* OFT) a saisi la Commission de la concurrence du marché des produits d'épicerie le 9 mai 2006. Les éléments recueillis par l'OFT permettent de penser que le régime de planification sert de barrière à entrée. Dans ses premières conclusions, la Commission de la concurrence constate que les contraintes concurrentielles entre magasins de tailles différentes sont asymétriques, les magasins de grande taille se faisant concurrence essentiellement entre eux, et que le marché est essentiellement local. La Commission de la concurrence recense plusieurs barrières à l'entrée, notamment le régime de planification. Le régime de planification vise des objectifs généraux de l'action des pouvoirs publics, et non pas seulement des objectifs de concurrence. Il a aussi été constaté que les cas présumés de conduite stratégique de bénéficiaires locaux peuvent exercer un effet sur la concurrence. Dans les années 90, on s'est inquiété de plus en plus de ce que le développement des ensembles commerciaux de vente au détail à la périphérie des villes ne détruise le commerce de détail dans les quartiers centraux. En 1996, les règles de planification ont été changées pour une stratégie donnant la priorité au centre des villes, avec application du critère des besoins. Ce critère a exercé un effet sur les modalités de la concurrence à l'échelon local. Le demandeur doit d'abord chercher un site en centre ville, puis au pourtour, et c'est ensuite seulement qu'il lui est permis, faute d'autres solution, de s'implanter à la périphérie. Si le site est trouvé, le demandeur doit faire la preuve qu'il répond à un besoin. Celui-ci est fonction de l'excédent de la demande par rapport aux surfaces de vente existantes. Pour les aménagements en grande périphérie et en première couronne (plus de 25000 m^2), une évaluation d'impact sur le commerce de détail est obligatoire. L'effet de cette réforme devrait toucher surtout le développement des gros commerces d'épicerie. Le Rapport Barker (2007) s'est montré favorable à cette méthode séquentielle, mais il a recommandé l'abandon du critère des besoins. Le gouvernement a proposé de le remplacer par un autre critère axé sur les quartiers centraux.

La Commission de la concurrence s'est aussi penchée sur les conduites stratégiques, par exemple l'utilisation du régime de planification pour empêcher l'entrée et contrôler des sites. Elle a trouvé un détaillant qui formait opposition systématiquement dès qu'un nouvel aménagement menaçait d'affecter ses magasins. Les bénéficiaires soumettraient des demandes d'extension dès qu'une demande d'implantation nouvelle est proposée, ce qui fait qu'il est plus difficile à l'entrant de faire la preuve d'un besoin. Des réserves foncières se constitueraient et la possession de terrains compliquerait les projets d'aménagement de rivaux sur des emplacements se prêtant au commerce de détail de produits d'épicerie. On peut aussi, sans posséder le sol, souscrire une convention restrictive ou conclure un accord d'exclusivité. Les conventions restrictives peuvent interdire expressément la concurrence d'autres détaillants. La Commission de la concurrence a examiné les accords d'exclusivité. Parfois ceux-ci peuvent servir à favoriser l'aménagement de nouveaux sites. L'exclusivité peut être sans limite de durée. Il importe sans doute que l'exclusivité serve son objectif, mais il n'est pas nécessaire qu'elle soit perpétuelle, c'est-à-dire se

poursuive une fois que le détaillant a amorti son investissement. La Commission de la concurrence a trouvé quelques exemples de bande de verrouillage, c'est-à-dire de parcelle acquise dans un ensemble de terrains achetés par un concurrent.

La Commission de la concurrence a proposé des remèdes peu avant la table ronde. Elle a recommandé d'inscrire un test de concurrence dans les mécanismes de planification pour empêcher la constitution de monopoles locaux et elle a aussi préconisé l'élimination des conventions restrictives et la limitation de la durée d'exclusivité.

Le Président remercie le Professeur Cheshire pour sa contribution à la table ronde. Il pense que le faible nombre de contributions ne traduit pas un jugement sur l'importance du sujet, mais tient plutôt aux difficultés que rencontrent les autorités chargées de la concurrence pour le traiter. À son avis, l'utilisation du sol est un problème qu'il faudrait étudier plus fréquemment. Le rapport de la Commission de la concurrence mentionne certains instruments utilisables à cet effet.