CJEU judgment on European Services Directive brings profound changes to Dutch approach to retail zoning

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Dutch municipalities will see their workload greatly increased after a January 30 Court of Justice of the EU (CJEU) judgment on joined cases C-360/15 and C-31/16 on the European Services Directive (Directive 2006/123/EC).

After a request for a preliminary ruling on how the Services Directive applies to any retail zoning/planning decisions, the CJEU ruled that retail in goods qualifies as a service under the Services Directive, and that zoning and planning, regulating the geographical area of certain types of retail, qualifies as a requirement under Articles 14 and 15 of the Services Directive.

The consequences of the judgment for the Netherlands are huge. Before the CJEU judgment, the Dutch Council of State, which is the Netherlands' administrative high court, had consistently held that the Services Directive did not apply to retail in goods, nor to zoning and planning decisions. Territorial restrictions regulating the location of various types of retail are very common in the Netherlands, and until this decision, it was believed these regulations fell outside the scope of the Services Directive.

The Services Directive does not in itself preclude the regulation of zoning plans and planning decisions. Regulation, however, must comply with Article 15 of the Directive and must therefore be non-discriminatory, necessary (ie justified by public interest), and proportional (ie the least restrictive regulation that is still effective).

The CJEU has accepted that protecting the urban environment may qualify as a public interest that can justify regulation.
As a result of the CJEU judgment, Dutch local authorities will have to dramatically change their approach to zoning and planning decisions. All territorial restrictions imposed on retail of goods will have to be carefully considered and explained, and must meet the conditions of Article 15.

This will entail even more extensive preparation of zoning plans. For new plans, this requirement appears manageable. The problem is this obligation also applies to already established zoning. The Directive contains a requirement for Members States to evaluate all zoning and planning requirements within the meaning of the Directive, and to make amendments where necessary.

Also, Member States are required to report decisions falling within the Directive, which means that the European Commission must be notified about all new retail zoning plans. Given that all 380 Dutch municipalities have zoning plans in place for their respective territory, meeting this evaluation, amendment and reporting requirement will be a tremendous undertaking.