

Netherlands - Raad van State (Council of State) - 201900706/1/A1 - 19 February 2020 -
ECLI:NL:RVS:2020:520

**Article 15(3) of the Services Directive (2006/123/EC) - Allocation of the burden of proof
– Environmental permit - Clearly contrary to higher law**

(Municipal Executive of Diemen against the other party)

The case concerns the refusal by the Municipal Executive of Diemen (Municipal Executive) to issue an environmental permit for the purpose of derogating from a zoning plan which has been adopted and entered into force. This derogation is intended for the use of property in Diemen for ordinary retail trade, catering and an indoor playground.

There is no dispute that the zoning plan has to be classified as a ‘requirement’ within the meaning of the Services Directive (*see judgment of the Court of Justice in the EU, 30 January 2018, C-31/16, Visser Vastgoed, ECLI:EU:C:2018:44*). The parties disagree as to whether the zoning plan satisfies the conditions set out in Article 15(3) of the Services Directive.

The Administrative Jurisdiction Division of the Council of State of the Netherlands (Division) considers that, in granting an environmental permit, the Municipal Executive must substantiate whether the requirement (*the zoning plan*) is in line with the Services Directive. The Division considers that only if there is a clear breach of ‘higher law’ such as EU law, the zoning plan has to be declared ineffective or disapplied. A rule is only clearly contrary to higher law if the court can establish this without further investigation. This would be the case, for example, if there is no justification. The other party invoked and substantiated a breach of Article 15(3) of the Services Directive. The Division rules that the requirement is not ‘clearly contrary’ to the Services Directive because the Municipal Executive has provided a (posterior) explanation from which it becomes clear that the conditions of Article 15(3) of the Services Directive have been met.

The Municipal Executive wins the case.