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Friday, 15 March 2013

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Dear Rachel, Sharon and Walter

STREET TRADING AND PEDLARY LAWS – COMPLIANCE WITH THE EUROPEAN SERVICES DIRECTIVE

The Institute of Licensing (IoL) is the professional body for licensing practitioners across England, Wales and Northern Ireland with a growing membership within Scotland. Our 2500+ members are licensing practitioners from local authority, police, legal and industry backgrounds.

In considering this consultation the Institute of Licensing has invited comment from its members across the UK. This response has been drafted to reflect the views submitted by some of those members.

The proposals in the consultation document are a cause for concern. Our detailed observations are set out below, but can be summarised as follows:

The proposed repeal of the Pedlars Act should be a positive move, presenting as it does, the opportunity to bring pedlars within the discretionary control of local authorities through the Street Trading regime.

There are a significant number of local authorities who have experienced such problems under the provisions of the Local Government (Miscellaneous Provisions) Act 1982 with the Pedlar exemption in its current form and the complete lack of regulation for stationary traders 'offering a service' rather than selling goods, that they have gone to considerable time, effort and expense to introduce local legislation and set out local controls. London is one such example, with the London Local Authorities Act 1990 applying the following definition to street trading:

"street trading" means subject to subsection (2) below the selling or exposing or the offering for sale of any article (including a living thing) or the supplying or offering to supply any service in a street for gain or reward;

In Northern Ireland, the existing street trading legislation provides a more restrictive exemption for pedlars restricting them to house to house sales.

The proposals in this consultation ignore the opportunity to bring pedlars within the licensing regime and establish a level playing field for all street traders. The proposed exemption and related definition of pedlars clearly acknowledges that rather than travelling from door to door and town to town as was the case in 1871(!), today's 'pedlars' walk up and down the same street, causing ill feeling and disadvantaging licensed traders, and circumventing the local controls designed to protect and shape the street scene in cities towns and villages. Requiring local authorities to screen local street trading Acts to ensure compliance with the Directive is necessary, but the right amendments to the existing national street trading legislation, or alternatively new legislation addressing the issues which warranted the implementation of such local Acts would be a far more efficient solution.

We note the 'wider intention to reform the Street Trading Regime' and would be happy to work with BIS in taking this forward.

The IoL's response to the consultation questions is set out below:

Proposal to repeal the Pedlars Acts 1871 and 1881

Question 1: Do you agree with the proposed repeal of the Pedlars Acts 1871 and 1881 UK-wide?

Yes

Question 1.1: If you are a Police force:

- (i) what is the approximate annual cost of administering the pedlar certification scheme?
- (ii) what impacts would repeal of the Acts have in terms of cost, time and/ or other factors?

Question 1.2: If you are a pedlar, what do you consider are the impacts of repeal, both in terms of cost, time and/ or any other factors?

Question 1.3: Do you consider that repeal would have an impact on any other organisation, individual or group? If so, please provide details of that organisation etc and what you consider the impacts on them would be.

The repeal of the Pedlars Act in isolation to other proposed changes would bring pedlars within the licensing regime and alleviate the current situation whereby some traders are regulated and others are not. This would provide the local authority with the ability to more effectively influence the street scene in cities, towns and villages to avoid problems currently experienced in relation obstruction, overcrowding of traders etc.

Repeal would benefit other street traders provided the exemption is not renewed in another guise as all street traders would then be on the same legal footing and would compete on a level playing field. Currently other street traders are subject to conditions, pay fees to the licensing authority and can be easily inspected for compliance with other legislation e.g. trading standards or food hygiene.

By contrast pedlars are not subject to conditions, do not have the overhead of paying licence fees and because they are mobile are more easily able to avoid inspections for compliance with other law. Repeal should reduce the enforcement costs of licensing authorities and help meet the Government objective of reducing public expenditure. As indicated pedlary is simply another form of street trading and other than house to house trading should be regulated as such.

Chapter 2 - Proposals to amend Schedule 4 to the LG(MP)A

Question 2: Do you agree with our proposed new definition of a pedlar for the purposes of the pedlar exemption from the “national” street trading regime in England and Wales? Please fully explain your reasons for agreeing or disagreeing with any element of the proposed definition.

No

Local authorities experience problems as a result of pedlar activity at present, hence the number of local authorities who have gone to considerable time, effort and expense to introduce local legislation to deal with those issues.

The proposals to exempt pedlars with the proposed definition, simply provides another regime to mirror the current position minus the reassurance of police checks.

The proposed definition is far too complicated and will effectively allow pedlars to continue to trade in town and city centres without the need for a street trading consent. The exemption is open to abuse with the restrictions easy to circumvent and enforcing it would be very costly and time consuming for the police and licensing authorities. The legal position currently (under appeal at present) is that cost of this additional enforcement work cannot be recovered in any licensing fees or charges. [Provision of Services Regulations & Hemming (t/a simply pleasure ltd) & Other v. Westminster City Council 2012]

Quote from an IoL member:

The limitation on movement by way of time and distance would not be a problem to a pedlar walking from Twickenham London Road to the rugby stadium during the three hours or so before the kick off when the pavements roads are busy with fans, (stadium has over 80000 capacity) as the chance of being stopped on route between the 10 minute pauses is great and would in effect enable the pedlar to be a near static street trader in an area in which the licensed street traders are carefully managed through the licensing process. This sort of situation was experienced under the LLAA 1990 until the act was amended to require pedlars to trade door to door. Many successful prosecutions of pedlars for unlicensed street trading were undertaken. LBRichmond upon Thames. Ticket resale was also an activity of pedlars and touts.

Pedlars should be regulated in line with all other legislation of a similar type (i.e. Street Trading) with licensing responsibility passed to local authorities who would be able to conduct criminality checks (either through consultation with the police or a direct CRB check), register the person and activity, and regulate compliance with the terms of the licence.

The concept of a pedlar as a person going from ‘town to town or to other men’s houses’ with his goods on his back are totally outdated. Pedlars are simply another form of street trading and they should be subject to the same regulation as other street traders. In London that is generally the current position, and the only exemption for pedlars in London is trading from house to house since the law was changed (1999 in Westminster and 2004 for most of the rest of London). House to house sales by Pedlars are less of a concern, A position where pedlars were restricted to house to house sales would reflect the current position in London which we believe to be more successful.

The 'house to house' restriction on pedlars is also reflected in the existing terms of the Street Trading Act (Northern Ireland) 2001. Under this Act, a Pedlar is currently only permitted to sell house-to-house, while a 'mobile' street trader is defined as someone who trades from a vehicle. This could be bag, car/van and barrow; the provisions allows for someone selling on foot as long as they trade from a vehicle e.g. a bag or small trolley. There is currently no legal provision for someone selling purely by hand on foot and not on a house-to-house basis.

Finally the current position and proposed definition do not include traders offering services. For example hair braiders, tattooists, shoe shiners etc. Again these activities currently cause problems for local authorities due to their unregulated nature allowing them to set up their 'pitch' anywhere and circumvent the controls of street trading legislation. The London Local Authorities Act 1990 addresses this (as do other local Acts) by applying the following definition to street trading:

*"street trading" means subject to subsection (2) below the selling or exposing or the offering for sale of any article (including a living thing) **or the supplying or offering to supply any service** in a street for gain or reward;*

Question 3: If you are a local authority, do you envisage that there might be circumstances in which you would be able to designate a street as a licence/consent street in relation to established traders but not in relation to temporary traders?

No real views on this although one member suggests that this may be more likely the other way around.

Question 4: Do you agree that only one photo needs to be submitted with street trading applications which are made electronically?

Yes

Question 5: Do you agree with this proposal to replace this mandatory refusal ground? If not, please explain why you do not think that the 1933 Act provides adequate protection and why the minimum age requirement of 17 needs to be retained.

There are no concerns in relation to this proposal.

Question 5.1: If you are a local authority, can you indicate the approximate number of applications you would expect to be made from those under 17 years of age?

n/a

Question 6: Would it be helpful for BIS to issue guidance on the circumstances in which the discretionary grounds in 3(6) (a), (d), (e) and (f) can be used?

There is support for BIS to issue guidance although on the other hand the judgement at the end of the day must be the local authority's own. Clearly applicants in all licensing cases (not just street trading) should be fully informed of reasons for refusals.

Question 7: Do you think there are any circumstances in which the existing paragraph 3(6)(b) ground could be used compatibly with the Directive and, if so, please give reasons.

There are mixed views in relation to this question.

On the one hand, the relatively young Licensing Act 2003 allows the introduction of cumulative impact policies where a licensing authority is satisfied that the number and density of licensed premises in a particular area is having a detrimental effect (on the licensing objectives in this case). In some cases the number and density of similar stalls / trailers / pitches may have a cumulative impact on the area in terms of litter, noise (particularly at night) and in such circumstances the local authority may wish to take a decision on the extent of similar trading in the area. A likely example may be food trading, particularly late at night.

On the other hand, the local authority has the means to control the location and density of trading overall to prevent obstruction and overcrowding etc ground 3(6)(a).

Question 7.1: Do you consider that it is necessary to insert a new replacement “suitability” refusal ground into paragraph 3(6)?

There are mixed feelings about this proposal, and some question what would constitute ‘unsuitable’. There is no proposal to change the position where the licensing authority designates areas for street trading control (licence, consent and prohibited) therefore any area within the local authority which is ‘unsuitable’ for trading could simply be designated as a ‘prohibited’ area if necessary. This ground would therefore only be applied where the type of trading is considered unsuitable. Even so ‘suitability’ is a very wide refusal ground and whilst most Councils would use the discretion sensibly and proportionately there is potential for it to be used in a more draconian way.

Question 7.2: In relation to this new ground can you tell us:

(i) in what circumstances you would use this ground and how often?

(ii) whether this ground would produce costs on you as a local authority, or on you as a business and what these costs are likely to be?

Potential costs would most likely be court costs in defending a refusal on this ground.

Question 7.3: Would it be helpful for BIS to issue guidance on the circumstances in which this replacement ground could be used?

Guidance may assist here but even statutory guidance cannot give meaning to the Act and so this would ultimately be a matter for the courts.

Question 8: Do you think there are any circumstances in which either of these grounds could be used compatibly with the Directive in relation to temporary traders?

Don't know

Question 8.1: Do you think it would be preferable to pursue our proposed approach of expressly preventing the grounds from being used in relation to temporary traders or to repeal the grounds completely?

Views are mixed on this with some considering that they will continue to use the refusal ground for established traders, and other preferring removal of the refusal ground for both.

Question 8.2: Will local authorities continue to use these grounds in relation to established traders?

Mixed views as stated above.

Question 8.3: Do you foresee any difficulties with our proposals to limit the circumstances in which these grounds can be used in relation to established traders?

No

Question 9: Do you foresee any problem resulting from the proposed repeal of paragraph 3(8) of Schedule 4 to the LG(MP)A?

Again there are mixed views in relation to this proposal with some feeling that where a trader has been historically licensed and the licence would have continued in its existing form, the mere fact that the mechanism under which the authorisation is issued has changed should not result in the trader losing his right to trade. Noted that the provision referred to is not necessarily replicated in local Acts including London.

Question 9.1: Do you agree with our assumption that those who may benefit from this provision are more likely to be UK nationals than nationals of other Member States?

It will affect established traders where new arrangements are brought into effect – this does not necessarily mean those traders will be UK nationals.

Question 10: Do you foresee any problems with our proposal to give local authorities flexibility to grant licences for longer than 12 months or indefinitely?

No – the provisions in Part 5 of Schedule 4 allow the licensing authority to revoke the licence under certain grounds giving protection against improper conduct of the trader.

In Westminster, for example, licences are currently granted indefinitely but if there are problems such as conditions being breached the licence can be revoked. It is the same principle used in respect of premises licences under the Licensing Act 2003.

Having said that, an indefinite licence would not be revocable on the grounds that demand exceeds supply so some guidance on an appropriate maximum duration might be useful.

The cost of the licensing system must also be covered by licence fees, either by way of an annual fee in line with arrangements under the Licensing Act 2003 and Gambling Act 2005, or potentially through cost recovery of the licensing administration plus other services such as street cleansing etc which would be directly attributed to the licensed activities.

If you are a local authority can you further tell us:

Question 10.1: Whether lengthening the duration of licences would have a positive, negative or neutral impact on the ability of new street traders to obtain licences to trade in your licence streets?

Responses generally indicate that this would have a neutral impact on the ability of new traders to obtain licences, but this is likely to be very much a local issue and may change over time.

Question 10.2: (i) Whether you are likely to issue licences for more than a 12 month period or indefinitely?

(ii) If you are likely to issue licences for a defined period which is longer than 12 months, what period you are likely to choose?

Most responses indicated between 1 – 3 years.

Questions 11 Would it be helpful for BIS to issue guidance as to how the PSR may affect local authority's ability to use some or all of the revocation grounds contained in paragraphs 5(1)(a) to (c) in relation to established traders/temporary traders?

Yes

Questions 11.1 Do you think there are any circumstances in which the paragraph 5(1)(d) ground could be used compatibly with the Directive in relation to temporary traders?

It would depend on the duration of a temporary traders licence where the existence of their authorisation is preventing other authorisations from being granted, but the original authorisation is not being used. In such cases the licensing authority may look to revoke the authorisation to make way for another authorisation which will be utilised.

Questions 11.2 Do you think it would be preferable to pursue our proposed approach of expressly preventing that ground from being used in relation to temporary traders or to repeal the ground completely? Will local authorities continue to use that ground in relation to established traders?

Another view is that a full repeal would avoid confusion and a 'double standard' for established and temporary traders.

Questions 11.3 Do you foresee any difficulties with our proposals to limit the circumstances in which that ground can be used in relation to established traders?

Question 12: Do you foresee any problems with our proposals-

(i) to disapply regulation 19(5) of the PSR where a mandatory ground for refusal of the application exists; or

No

(ii) to leave it to local authorities to decide whether to put arrangements in place to disapply regulation 19(5) in other circumstances or to specify what conditions will automatically attach to a licence which is deemed to have been granted under regulation 19(5)?

There are mixed views on this question but overall it would be more beneficial if the regulation were disappplied nationally rather than relying on local arrangements.

Question 13: Do you foresee any problems with our proposals to allow local authorities to relax the prohibition in paragraph 7(7) in its entirety where appropriate?

No

Question 14: Do you foresee any problems with our proposals to amend paragraph 10(1)(d)?

No

Noted that under the current arrangements for street trading consents there are no provisions or procedures for revocation, and no right of appeal. This is something of an anomaly in licensing law and may fall foul of the Convention.

Chapter 3 - Screening of local street trading Acts in England or Wales against the Directive's requirements, and consequential amendments to other legislation.

Question 15: Please can local authorities tell us about any other local Acts regulating street trading which are not listed at Annex B of this document (or any Acts listed in Annex B which have in fact been repealed).

Requiring local authorities to screen local street trading Acts to ensure compliance with the Directive is necessary, but the right amendments to the existing national street trading legislation, or alternatively new legislation addressing the issues which warranted the implementation of such local Acts would be a far more efficient solution.

Chapter 4 - Proposals to amend the Street Trading Act (Northern Ireland) 2001

The Questions relating to the proposals for Northern Ireland have been considered and answered by the Institute of Licensing's Northern Ireland branch (IoL N.Ire).

Question 4: Do you agree with the repeal of the Pedlars Acts 1871 and 1881 in relation to Northern Ireland? Please provide any comments you may have.

No. The IoL N.Ire has two possible suggestions to make.

The only way to prevent abuse of the deregulation of Pedlars is that the Pedlars Acts are maintained for Northern Ireland and that the definition of what constitutes a Pedlar remains narrow and only allow trading 'house to house' and continues to be regulated by the police; or

To include Pedlars within the street trading regime. This would give district councils discretionary powers to tackle specific issues in the same way as street trading. It would provide a clear and consistent approach to the regulation of both street trading and pedlary, which could be easily understood by both residents and businesses.

Question 5: If you are a pedlar : Do you foresee any potential impacts of the repeal of the Pedlars Acts, both in terms of cost, time and/or any other factors? Please provide any comments you may have.

n/a

Question 6: Do you consider that the repeal of the Pedlars Acts 1871 and 1881 would have an impact on any other organisation, individual or group? Please provide any comments you may have.

The IoL N.Ire believes the repeal will impact on licensed street traders, established business premises, residents and tourists.

We are also concerned about 'Doorstep selling' when someone sells goods or services in someone's home or on their doorstep. Unfortunately, not all callers are genuine. Some use pressure selling tactics to rush people into a decision. It can be a convenient way to buy - but there is a risk that people may not understand their cancellation rights and they may be pressured into buying something they do not want or is not good value for money. Research conducted on behalf of the Office of Fair Trading highlights the elderly as being at risk of doorstep selling scams and they are also likely to be susceptible to mobility aid traders and targeted by home insulation sellers. With the deregulation of Pedlars this is likely to increase as the current certification scheme does allow some measure of control.

Question 7: Please indicate whether you would agree or disagree with the proposed new definition of a pedlar for the purposes of the pedlar exemption from the street trading regime in Northern Ireland. Please fully explain your reasons for agreeing or disagreeing with any element of the proposed definition.

IoL N.Ire disagrees and would question the reasons for such a definition.

The measures contained within the Street Trading Act (NI) 2001 provide for the proper regulation of trading in the context of public safety; public health; protection of consumers and protecting the urban environment and in our view are therefore permissible under the Services Directive.

At present, a Pedlar is only permitted to sell house-to-house, while a "mobile" street trader is defined as someone who trades from a vehicle - a vehicle, whilst not defined in the Street Trading Act is defined in a dictionary as a device or structure for transporting persons or things. This could

include a bag, car, van or barrow; the provision does allow for someone selling on foot as long as they trade from a 'vehicle' e.g. a bag or barrow etc. There is however no legal provision for someone selling purely by hand on foot and not on a house-to-house basis.

In Northern Ireland, a Mobile Street Trading Licence currently regulates this type of trader; consideration should be given to introducing mobile street trading licences through a national street trading regime in the rest of the UK to regulate this type of trader.

The consultation proposal ignores the arrangements currently in place, and gives 'Pedlars' significant benefits over street traders. If the proposal goes ahead, some traders will once again undoubtedly endeavour to argue that they are in fact Pedlars and therefore do not require a licence.

The arrangements for Mobile Street Traders as per the Street Trading Act (N.I.) 2001 should be preserved. It would be perverse that a person selling from their person or from a receptacle that they can carry or a small stall which is mobile in the street should not be subject to the same licensing controls as a person selling from a larger trolley or vehicle or a fixed street trading position in the same street.

Under the proposals Pedlars (who are in reality Mobile Street Traders), will become un-regulated in what they sell and where they go. So any person who was an illegal street trader can define themselves as a 'pedlar' and will 'legitimately' be able to return and decimate the town and city centres by setting up his illegal stalls as long as it's 1msq and on wheels. This means that a burger stall on wheels or tout for the sale of bus tour tickets will be able to freely move around plying his wares with no control over where or what he does destroying the already struggling businesses that are left in these tight economic times and encouraging the loss of vital inward investment.

The idea that this new classification of trader can remain static in the same location for a maximum of 10 minutes after his arrival there, then move on to a location which is at least 50 metres away from the first location, and again he should remain for no more than 10 minutes and not return to the first location within 3 hours of leaving that location is nonsensical. We have plotted a hypothetical route on a map of Belfast City centre, and it clearly demonstrates that a mobile trader will be able to freely trade in the City centre whilst complying with the proposal. In addition, the proposal cannot be policed, who and how are local authorities going to monitor these trader's movements and timings? The proposal is simply not workable.

Local authorities have been entrusted by parliament to regulate and enforce this legislation and these proposals will completely undermine our ability to do so. Furthermore, the proposed deregulation regarding pedlars will mean that local authorities will have no power to properly regulate the activities which take place in prime retail areas, which in Belfast also consists of important flagship, listed and historical buildings. Determining the types of trading activities that are permitted in certain areas is a well recognised principle, one which was affirmed by the Northern Ireland Court of Appeal in the case of *R v Ava Leisure Ltd* and also the House of Lords in the case of *Belfast City Council v Miss Behavin' Ltd*. It seems a nonsense that local district councils and the Planning Service can stipulate which types of trade are suitable for certain locations throughout the city but that mobile street traders will be granted a carte blanche to trade wherever they wish.

Question 8: The proposed amendment to the Act would remove the requirement for an applicant for a street trading licence to provide their date of birth. Please indicate whether you would agree or disagree with this proposal. Please provide any comments you may have.

Disagree. Please refer to our answer to '15' below.

A date of birth is an extremely important piece of information on any street trading application, it allows a district council to identify exactly a) who they are issuing a licence to, and b) who will actually be trading under the authority of the licence (i.e. assistants) if this is not the licence holder.

We acknowledge the logic in removing the requirement of providing a date of birth where the applicant is a Limited Company or Partnership for example however, as stated, as a means of ongoing control over trading under the authority of a council issued licence it will be necessary to carry out essential checks to ensure that persons who would not normally be granted a licence do not use such a loophole to obtain one. Furthermore, there is no mention of removing the restriction on persons of legal school going age from obtaining a licence; therefore a date of birth in these circumstances MUST be provided. In particular, when researching whether there are legitimate grounds for refusing a licence under section 9(1) (b) or 9(1) (c) for example a date of birth is necessary to ensure background checks relate to the right person. The date of birth requirement is not discriminatory as age is not a factor in determining applicant suitability.

Question 9: The proposed amendment to the Act would require an applicant to provide only one photo where an application for a street trading licence is made electronically. Please indicate whether you would agree or disagree with this proposal. Please provide any comments you may have.

Agreed.

Question 10: Please indicate whether you would agree or disagree with the following proposals: (i) to disapply regulation 19(5) of the Provision of Services Regulations 2009 where a mandatory ground for refusal of the application exists; (ii) to leave it to councils to decide whether to put arrangements in place to disapply regulation 19(5) in other circumstances; or (iii) to leave it to councils to specify the conditions which will attach to a licence which is deemed to have been granted under regulation 19(5).

Please provide any comments you may have.

The IoL N.Ire believes that Regulation 19 (5) of the Provision of Services Regulations should be disapplied in relation to ALL street trading licence applications and not just those circumstances in which a mandatory ground for refusal applies. The discretionary grounds for refusal are just as important as the mandatory grounds. For example, the discretionary grounds for refusal currently permit a district council to refuse a licence if a person is by virtue of their misconduct, or some other reason relating to trading activities, unsuitable to hold a licence. It also allows a district council to refuse or revoke if the trader has failed to pay their fees. If these sanctions are not applicable then there will be no effective deterrent to such actions, leaving local district councils powerless. There will potentially still be the power to prosecute but those of us involved in the enforcement of any licensed activity know it is the potential to lose a licence which ensures most traders act within the terms and conditions of their licence.

Regulation 19(6) of the Provision of Service Regulations 2009 provides that there can be a different arrangement where that arrangement can be justified by overriding reasons relating to the public interest, including a legitimate interest of third parties. The Directive states that overriding reasons relating to the public interest means reasons recognised as such by the European Court of Justice, including the following grounds: public safety; public health; protection of consumers; combating fraud; protecting the environment and the urban environment and the conservation of national historic and artistic heritage.

A number of these concerns will be adversely affected should tacit consent apply to street trading licence applications.

Under current procedure, district councils consult with a number of statutory agencies, local businesses and the public. This consultation exercise will become even more important given that any licence granted may now be permanent.

As already stated above, a district council takes into account many issues it considers relevant when determining a street trading licence, and which impact upon the public interest, public safety and the legitimate interests of third parties. These include:

- the safety of the public and any risks which may arise;*
- the future development plans for the location;*
- the appropriateness and suitability of the location and trading area route and commodities in relation to the location and to the potential adverse impact that it would have upon the character and appearance of Conservation Areas and on adjacent Listed Buildings;*
- the extent to which the sale of the commodity will prove useful to the local community, not otherwise provided in the area;*
- the potential environmental effects arising from the sale of the commodity, such as additional litter, cleansing requirements, noise, odour and the possibility of increasing anti-social activities;*
- Any Statutory grounds which would lead to refusal.*

Some of these considerations and how they will be affected by tacit consent are expanded upon below.

Visual Impact

Many of the current designated street trading sites are located in conservation areas and/or near listed buildings.

There is clear public interest in preserving the nature and character of these areas. It is difficult to control the appearance of stalls, yet they are semi-permanent and significant structures often erected daily, which arguably have as much impact on the cityscape as other less significant structures which are subject to planning control. In order to protect these areas it is important that only applications which have been fully consulted upon and considered should be granted.

Suitability of the Designated Site

When a site is designated by a district council as a street trading site, the proposals for the type of commodity to be traded at the site or the permitted operating hours are sometimes not decided for a number of reasons. In addition, the designated site can sometime lie vacant for a time and/or the nature of the locality changes, meaning it would no longer be appropriate to have a street trader licensed at that particular designated site.

It would be logistically impossible for a district council to monitor all designated sites to ascertain whether the locality remains suitable for street trading. In addition, even in cases where a district council have monitored the site, information often arises through the consultation process which a district council could not reasonably be expected to be aware of previously.

Noise

The hours during which trading may take place is also an important issue, particularly with regards to noise and the potential other effects on neighbouring properties. World Health Organisation Guidelines state that exposure to excessive noise has health implications and this is a further issue which demonstrates that tacit consent is not appropriate for street trading. Given that there are no set hours for street trading in the 2001 Act, tacit consent when coupled with the removal of periodic licences, means there is no remedy available to regulate any noise issues so as to avoid creating a statutory nuisance.

Mobile and Temporary Licence Applications

We are particularly concerned about tacit consent being applied to these areas as no prior consideration will have been given to the suitability of trading in the proposed area or to the type of mobile trade that is the subject of the application. This could have public safety implications if, for example, an application is received to have horse drawn carriages in the city centre or mobile hot food stalls which may give rise to issues around public safety generally and more specifically food safety. If tacit consent did apply, then by extrapolation this could result in mobile hot food stands being granted a licence and operating in the city without having been subject to all the relevant food safety requirements.

Illegal activities associated with street trading

Whilst the vast majority of traders operate legitimately there have been cases of street trading being used as a 'cover' for illegal activity, including for example the sale of smuggled cigarettes and alcohol. Information obtained suggests that this is a problem which will continue to escalate.

In light of the above, we consider that there are pressing reasons why tacit consent should not apply and that these specifically relate to a number of grounds which the Directive itself recognises as being grounds upon which derogation is possible.

The proposal to allow each individual district council to decide whether to disapply Regulation 19(5) regarding discretionary grounds will potentially create confusion for new and existing traders and may be contrary to Article 5 of the Directive, which relates to the simplification of procedures. When one considers question 10 (ii) and (iii) it appears that the Department accepts that there are circumstances in respect of which tacit consent would not be appropriate for certain discretionary grounds for refusal. In light of the above, we would urge the Department to provide consistency throughout Northern Ireland and disapply Regulation 19(5), i.e. tacit consent, to all street trading licence applications.

Question 11: Please indicate whether you would agree or disagree with the proposal to give councils the flexibility to grant licences for longer than 3 years or indefinitely? Please provide any comments you may have.

The IoL N.Ire disagrees with the Department and believes there are a number of reasons why Articles 11 (1) (b) and 11 (1) (c) should be considered to apply to the street trading regime in Northern Ireland.

The IoL N.Ire maintains that street trading licences should be for a fixed period and that limiting the duration of a licence is permissible under Article 11(1) (c) of the Directive, which states that a limited authorisation period can be justified by an overriding reason relating to the public interest.

Additionally, we would emphasise that Article 11(1) (b) of the Directive states that retaining a fixed period licence may be justified if the number of available authorisations is limited by an overriding reason relating to public interest. A permanent stationary street trading authorisation is only permitted at a site which a district council has designated as suitable for such a purpose. Therefore there are not an infinite number of street trading pitches available.

Street trading can be differentiated from other services such as food business operators, hair dressers etc, as there will always be premises available for those businesses to operate from. Those businesses are however subject to a whole raft of other statutory requirements imposed to ensure that the public interest is protected. For example, under food safety legislation there is the power to obtain an emergency prohibition order to close a food business under the Food Hygiene Regulations (NI) 2006. There are also obligations upon a business operator under Health & Safety at Work (NI) Order 1978, which provides for serving prohibition notices etc where there is a risk to safety. Street trading is however unique compared to other services which are caught by the Directive in that the Act is the only real effective enforcement tool against a street trader.

A district council considers a wide range of issues when determining whether to designate a site or grant a licence.

Furthermore, whilst stationary permanent sites must go through the designation process, the same is not true in relation to mobile and occasional traders.

District councils receive a wide range of applications for mobile trading licences and there has been a continual increase in enquiries about such licences. It therefore appears that such applications are likely to continue to increase. The majority of these all seek to trade from similar geographical locations in district council areas. However, a district council cannot grant licences ad infinitum and therefore the number of available authorisations will be limited.

The IoL N.Ire therefore believes that Article 11 (b) and (c) are applicable in these circumstances in that the number of authorisations is limited by an overriding reason relation to public interest and that a limited authorisation period can be justified by an overriding reason relating to public interest.

Question 12: Please indicate whether you think the proposal to lengthen the duration of licences would have a positive, no effect or negative impact on the ability of new street traders to obtain licences to trade. Please provide any comments you may have.

The IoL N.Ire believes the proposal to lengthen the duration of licence would have a negative impact on the ability of new street traders to obtain licences to trade. It is not unusual to have a number of applications for a particular site, as such we are concerned that the current proposal will effectively grant a licence for life and the licence itself will become a tradable economic commodity which could be passed on to others with the licensee remaining in name only. This may serve as an effective block to new entrants from other member states obtaining a street trading licence.

Question 13: As a council are you likely to issue street trading licences for longer periods (i.e. for longer than 3 years or indefinitely)?

IoL N.Ire understands that district councils are unlikely to grant licence for a longer period. It is essential in the public interest that there is fair access for all those wishing to trade to have the opportunity to apply for a licence should they wish to do so, which is also a fundamental right under EU law. It is difficult to see how granting a licence indefinitely will remove a barrier to trade for other EU nationals. A finite licence period allows for trading activity to be formally monitored by means of a regular application/ renewal process to ensure public health and safety and compliance with other relevant legislation (food safety for example).

Question 15: Please indicate whether you would agree or disagree with the proposal to remove the requirement that an applicant for a street trading licence is an individual. Please provide any comments you may have.

The IoL N.Ire disagrees with this proposal, it is necessary for licence holders to take personal responsibility of the stall, this means that the licensee cannot withdraw from the day to day operation of the stall, this view is in accord with the provision that licences should only be granted to individuals.

The IoL N.Ire questions why this proposal is specific in relation to the Northern Ireland, this requirement is precisely what the London legislation specifies and Westminster City Council (on which the Street Trading Act is based) has gone to a lot of trouble and expense to insist on personal trading by the licence holder.

The case of R v Southwark Crown Court ex p Watts (1992), gives judicial recognition to the fact that a council cannot properly control street trading if licensees are absentees. Russell LJ in giving the judgment of the court supported the proposition that the licence holders must be an individual authorised to trade in person. Street trading legislation did not permit the delegation of responsibility and was not repugnant to Art 52, which gave freedom to establish oneself in another member state with all that that might entail.

In addition, there are a number of well documented cases involving street traders using false identity papers to obtain licences such as in the case of George Ward and West Lothian Council where Mr Ward was a registered sex offender and obtained a licence by claiming he was someone else.

A district council is concerned not only with health and consumer protection of customers but also with the suitability of those who are street traders. Many street traders operate from remote locations including housing estates, lay-bys, or near schools or colleges and are accessed by schoolchildren and young people. Whilst the vast majority of street traders operate legitimately there have been instances of street trading being used as a 'cover' for illegal activity, including for example the sale of counterfeit goods, smuggled cigarettes and alcohol. Information suggests that this is a problem which will continue to escalate.

As a result of these concerns, a number of district councils require all those who apply for a street trading licence to provide two original identification documents. One showing proof identity in the form of photographic identification (e.g. driving Licence or passport) and one showing proof of home address (e.g. utility bills, bank statement) to confirm their identity. All applicants for a street trading licence must provide a current (less than 1 months old) Basic Disclosure of criminal convictions (Access NI) or a certificate of good conduct from the relevant embassy.

A criminal record check is to protect the public and for reasons of safeguarding. In our view it is not in the public interest to allow a licence to be granted absent to such a check being carried out. If the applicant is not an individual, these checks will not be able to be carried out. Where the trader is not the Licensee the employee's details are also obtained.

Question 16: In your view, are there any circumstances in which the discretionary ground for refusing an application in section 9(1) (a) (iv) can be used compatibly with the Directive? If you responded "Yes" to the above question, please provide any comments you may have.

Consideration should be given to the types of premises already trading in an area for which there is a street trading application, particularly fixed premises that are subject to substantial costs in terms of rates and rent. District councils would prefer to see fixed premises within the town being used rather than lying vacant and already offers incentives for businesses and operators to use such premises to promote the economic and environmental 'health' of the community.

Furthermore, it is considered that such matters will now have to be dealt with during the process of designation of the street and may result in councils not designating any new sites, as they may have a negative impact on established shop premises.

The two main concerns with the removal of the discretionary ground is:

Mobile street traders, district councils regularly get complaints from shops and residents about the number of vans operating in their area. On occasions it has been described as 'a train of vans' on a road all vying for business and using tactics to disrupt another traders business.

Where two applicants of equal merit make an application in relation to a designated site, how will a council actually refuse one of the licences? Currently a district council uses this ground of refusal after hearing from both or more applicants to refuse the other applications. We would welcome the introduction of provisions or guidance which would assist in those circumstances, particularly in light

of Article 12 of the Directive which states that where the number of authorisations is limited the member states shall apply a selection procedure.

Question 17: In your view, are there any circumstances in which the discretionary ground for refusing an application under section 9(1)(d) can be used compatibly with the Directive in relation to temporary traders? Please provide any comments you may have.

The IoL N.Ire believes that this ground for refusing a licence is necessary and justified to ensure that a person does not apply for and obtain a licence to operate in a prime designated site, and subsequently does not use it regularly thus preventing another trader from obtaining this pitch.

*Section 9 (1) (d), states that a local district council can refuse an application on the basis that the applicant has, **without reasonable excuse**, failed to avail himself to a reasonable extent of a previous street trading licence. Local Authorities are aware of their obligations in relation to discrimination and EU law. We do not see how this provision is incompatible with the Directive and would ask the Department to outline the basis on which it says that provision is incompatible with the Directive.*

Further the IoL N.Ire would take this opportunity to remind BIS and DSD about temporary traders, there appears to be some confusion around what is a temporary trader.

In Northern Ireland, the definition of what constitutes a temporary trader is one that trades with a temporary licence for a few days at special events such as St Patrick's day or 12th July and they can be established UK traders or cross border traders, in fact we issue many licences for these types of events to both types of trader with no difficulty.

Interoperability is vital to allow for businesses to succeed and grow. Northern Ireland is the only part of the U.K. to have a land border which facilitates easy cross border movement of people and services and in fact many district council areas have traders who reside in the Republic of Ireland and trade daily in Northern Ireland with no difficulty. Likewise, as previously stated district councils have a number of temporary licence traders who reside in the Republic and regularly trade here at special events.

Because of the ability of ease of movement across the land border, we believe it would be discriminatory to introduce this change as it would give an unfair advantage over established local traders.

In relation to the proposal regarding established traders, we do not see how that provision is incompatible with the objectives of the Directive, namely the elimination of barriers to the freedom of establishment for service providers in Member States and the free provision of services between member states. Indeed, it seems to us that the proposed amendment regarding established traders will simply make it harder to refuse established traders and therefore, by extrapolation, harder for new entrants into the market.

Question 18: In your view, would it be preferable to pursue the proposed approach of expressly preventing section 9(1)(d) from being used in relation to temporary traders, or to repeal the ground completely? Please provide any comments you may have.

We do not support either preference and believe that Section 9 (1) (d) is not incompatible with the Directive. Please refer to our answer at '17' above to support this view.

Question 19: As a council, are you likely to continue to use the discretionary ground in section 9 (1) (d) in relation to established traders? Please provide any comments you may have.

In the event that the proposed amendments are made, yes. Please refer to our answer at '17' above.

Question 20: Do you foresee any difficulties with the proposal to limit the circumstances in which this discretionary ground can be used in relation to established traders? Please provide any comments you may have.

The IoL N.Ire believes that this proposal is discriminatory against established UK based operators if those who are based in other Member States can apply for and obtain licences and not make full use of this with nothing to prevent them from doing so simply because they are not UK based. This would be a fundamental flaw in the impartiality ethos of the Directive if it was permitted. In amending the Act, the Department is only required to do so in so far as it is necessary to ensure compatibility with the Directive. As stated above, having considered the Directive we do not agree that it is necessary to limit this discretionary ground for refusal as proposed. This is particularly true in light of the fact that authorisations are limited.

Question 21: In your view, are there any circumstances in which the discretionary ground for revoking an application under section 10(1)(c) can be used compatibly with the Directive in relation to temporary traders? Please provide any comments you may have.

Please refer to our answer at '17' above.

Question 22: In your view, would it be preferable to pursue the proposed approach of expressly preventing section 10(1) (c) from being used in relation to temporary traders or to repeal the ground completely? Please provide any comments you may have.

Please refer to our answer at '17' above.

Question 23: As a council, are you likely to continue to use the discretionary ground in section 10(1)(c) in relation to established traders? Please provide any comments you may have.

Please refer to our answer at '17' above.

Question 24: Do you foresee any difficulties with the proposal to limit the circumstances in which this discretionary ground can be used in relation to established traders? Please provide any comments you may have.

Please refer to our answer at '17' above.

Question 25: Do you agree or disagree with the proposal that only one photo needs to be submitted with an application for a temporary licence which is made electronically? Please provide any comments you may have.

The IoL N.Ire agrees with this proposal

Question 26: Please indicate whether you would agree or disagree with the following proposals in respect of applications for temporary street trading licences: (i) to disapply regulation 19(5) of the Provision of Services Regulations 2009 where a mandatory ground for refusal of the application exists; (ii) to leave it to councils to decide whether to put arrangements in place to disapply regulation 19(5) in other circumstances; or (iii) to leave it to councils to specify the conditions which will attach to a licence which is deemed to have been granted under regulation 19(5).

We agree with the proposal not to apply tacit consent in cases where there is a mandatory ground for refusing a licence – it does not make sense to ‘permit’ an activity to take place during any administrative process to deal with an application that ultimately will be legitimately refused. Tacit consent should not apply to minimise the risk of a licence being granted inadvertently and subsequently resulting in public disorder, removal of protection to the public and a cumulative adverse environmental impact on the vicinity of the trader

It would be the intention of district councils is to disapply Tacit Consent in relation to ALL applications for the grant of any new licence as it is necessary to ensure that all documentation and checks and consultation with valid interested parties has taken place before trading is permitted to ensure that the protection of, for example, public health and safety, prevention of public disorder, and ensure there is not significant environmental impact in terms of noise, odour, litter etc.

Question 27: Do you agree or disagree with the proposal to remove the limitations placed on the frequency and duration of temporary licences? Please provide any comments you may have.

The Street Trading Act (NI) 2001 requires district councils to formulate and make available to any person the criteria with respect to the granting of Temporary Licences, as such, district councils in Northern Ireland agreed in 2001 that Temporary Licences would be issued to provide ambience and novelty and the provision of commodities that will add to the nature of temporary, special, one off events. Events in the nature of the Lord Mayors Parade, Christmas Lights Switch-on, New Years Eve, Halloween Events, Festival & Civic Events, Community Organised Events and Cultural Parades/Events are normally treated as events for the purposes of issuing Temporary Licences.

As such licences are issued to permit trading at a specific event, and may permit trading that otherwise would be prohibited (for example by a Designating Resolution, or because there was no such resolution) it is important that the trading coincides with the event and, as such, should cease when the specific circumstances of the event cease.

It is evident too that traders would have a legitimate interest in being able to apply for and obtain licences to trade at as many events as possible within a year within a particular council area – in practice the restriction on 5 licences per year is easily circumvented by spouses, siblings, friends etc applying for a licence. It is up to individual councils to ensure that licences issued, particularly in terms of duration, do not permit trading that would subsequently be contrary to resolutions or that would result in trading taking place that would otherwise be prohibited.

Question 28: As a council, do you envisage circumstances where a licensing regime may be justified in relation to established traders but may not be justified in relation to temporary traders?

No – as previous stated we believe that street trading has the potential to cause nuisance and interference and have a significant impact on the environment and the area in question. It is therefore essential that there are suitable controls in place to ensure that trading, if permitted, is carried out in a manner that does not have a negative impact on the community as a whole.

Street trading has long been associated with the potential for a certain criminal element including the sale of counterfeit and stolen goods, illegal tobacco, even money laundering and there is the potential for unscrupulous operators to restrict trade by preventing competition by, for example, buying up prime trading sites and not using them, or by flooding the market with a particular type of commodity. District councils are responsible for ensuring that those persons trading in the area do not pose a threat to the community either through the suitability (or unsuitability) of the goods they are selling or by protecting vulnerable residents – as a district council issues the licence they will have a degree of liability for granting a licence if they could reasonably have known that they should not.

Any rules imposed should not remove this discretion from district councils – Councillors are the elected representatives of their community and as such reflect the views of that community and should be permitted to act in the best interests of the community.

Furthermore, any amendments must also protect and reflect the rights of persons resident in the UK as fully as those from other EU states. There should not be an unfair advantage to persons resident in another Member State (most likely the Republic of Ireland) simply because they do not reside here. If traders from a Member State are permitted to avail of loopholes, for example, not needing to avail fully of a licence, then why can this not also be applied to local residents?

The IoL N.Ire believes that the Directive was not intended to be applied to small scale, localised street trading activities, which cannot be legislated for on a nationwide basis. Whilst some slight amendments to the existing legislation may be needed to update it and remove some obvious anomalies it is felt that the legislation is effective in ensuring that street trading does not have an objective negative impact on local communities.

Question 29: If you responded “Yes” to the above question, please provide details of any circumstances identified.

See above.

Chapter 5 - Proposals to repeal section 39(3)d of the Civic Scotland Act 1982 to take account of the repeal of the Pedlars Act

Question 1: Do you agree with the proposed repeal of the Pedlars Acts 1871 and 1881 UK-wide?

Question 2: If you are a Police force:

(i) what is the approximate annual cost of administering the pedlar certification scheme?

(ii) what impacts would repeal of the Acts have in terms of cost, time and/ or other factors?

Question 3: If you are a pedlar, what do you consider are the impacts of repeal, both in terms of cost, time and/ or any other factors?

Question 4: Do you consider that repeal would have an impact on any other organisation, individual or group? If so, please provide details of that organisation etc and what you consider the impacts on them would be.

This consultation proposes to abolish the Pedlars Act in Scotland as well as other UK jurisdictions. At present, Scotland has a dual system in which perambulatory traders may fall under the Pedlars Acts, or alternatively be classed as a street trader under the Civic Government (Scotland) Act 1982 depending on how they conduct their business.

*There has been some case law discussing the difference between the two. In *Watson v Molloy* [1988] 1 WLR 1026, a useful definition was given: "If the distinction is to be encapsulated in an aphorism, one might say that a pedlar is one trades as he travels as distinct from one who merely travels to trade".*

The proposal now is to abolish the Pedlar certificate and simultaneously remove the exemption under the 1982 Act, meaning pedlars would fall under the definition of "street trader" and require a licence.

The first question must be why the proposals for Scotland are so distinctly different from the proposals for England, Wales and Northern Ireland in that the proposals remove existing exemptions provided by the Pedlars Act but do not propose the provision of an alternative system for 'pedlars' to operate outside of local authority control (street trading regulation).

Anecdotal evidence suggests that several Scottish police forces have an active register of Pedlars so it would seem that any number of new licence applications will arise out of the removal of the exemption.

This will increase the scrutiny upon these traders as they will have to go through the civic licence application procedure in the same way as other street traders. It will be for local authorities to determine those applications. Any person could object, including of course the police, on grounds such as the person is not "fit and proper" to hold a licence.

The 1982 Act allows Scottish local authorities to only require a licence for certain "types" or "class" of trader so each authority may, for example, allow its own local list of exemptions. This means that in some areas all pedlars may need street trader licences but in others they may not depending on local resolutions.

There will be financial implications for pedlars who will be subjected to the civic licensing regime for the first time, involving application fees (and possibly legal costs if they require the services of a solicitor). In addition, pedlars will need a licence in each area they wish to trade in. This may result in some confusion as the ability of local authorities in Scotland to formulate their own exemptions may lead to inconsistency whereby pedlars are required to be licensed to operate in some areas but not others.

In common with our comments in relation to both England and Wales and Northern Ireland, a more structured exemption such as one which allows pedlars to operate house to house sales but not to sell in the street may at least provide a level of consistency.

Conclusion

Existing Street Trading and Pedlary laws are unarguably out of date, confusing and in need of review and potentially reform. The current system for street trading does however provide a licensing framework and regulatory control of street trading activities. The 1982 Act is seriously undermined by the exemption for pedlars, resulting in the various local Acts which have been brought into effect over the years to bring pedlars within the licensing framework or at least to restrict more tightly the activities exempted.

Any changes to the regime at this stage should be aimed at promoting a common ground but not to the detriment of arrangements which are in place and working well such as the definition of pedlars in Northern Ireland and local Acts including London which restrict the 'pedlar' to door to door sales and further definitions which bring within the street trading remit, traders selling services rather than physical goods.

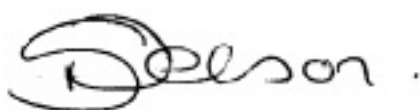
Sustainable economic growth, is most definitely high on the Government's agenda for the sustainable recovery of the UK's financial position, but the nature of pedlary is such that it undermines the established trader who is bound to pay rates, licence fees (where applicable) and other business overheads and may find themselves with an unregulated competing business operating virtually on their doorstep.

On the subject of door to door sales, it is not the case that these are entirely without concern, and BIS will be aware of the local authority and police partnership workings to prevent 'cold calling' which can be a source of intimidation to local residents and put undue pressure on residents to buy goods and services, particular to elderly and vulnerable residents.

The proposals as they stand will completely undermine the ability of local councils in England, Wales and Northern Ireland to positively influence their town centres to nurture thriving day and night time economies while providing the necessary protections and control to avoid the problems referred to throughout this response.

We welcome the intention to undertake a wider review of the licensing regime for street trading and would be happy to work with BIS in this regard, but the interim proposals within this consultation have the potential to create problems for regulators, businesses and residents. The Pedlars Acts should be repealed but there should be no moves to incorporate the exemption by way of another complicated and cumbersome definition within street trading Acts for the purposes of exempting what are essentially street trading activities.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sue Nelson' with a stylized flourish at the end.

Sue Nelson
Executive Officer