

In Parliament

Session 2010–12

House of Lords

**REPORT  
OF  
THE SECRETARY OF STATE  
FOR  
BUSINESS, INNOVATION & SKILLS (BIS)  
ON THE  
CANTERBURY CITY COUNCIL BILL  
LEEDS CITY COUNCIL BILL  
NOTTINGHAM CITY COUNCIL BILL  
AND  
READING BOROUGH COUNCIL BILL**

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The Bills are promoted separately by four Local Authorities (LAs), namely, Canterbury City Council, Leeds City Council, Reading Borough Council and Nottingham City Council.

The purpose of each Bill is to confer powers on the LAs in question for the better control of street trading in its area.

BIS has concerns about the compatibility of certain provisions in the Bills with the European Services Directive (Directive 2006/123/EC) ("the SD"). We set these out below and we would ask that consideration be given to the issues raised. It is important that legislation is not enacted which would be in breach of the SD. Various consequences may follow from such a breach, including the risk of infraction proceedings being brought against the UK by the Commission.

1. BIS have concerns about the compatibility with the SD of Clause 5 of each Bill. Our concerns are stronger in relation to the Nottingham City Council Bill and the Canterbury City Council Bill than in relation to the Leeds City Council Bill and/or the Reading Borough Council Bill. We also have a concern about the compatibility with the SD of clause 4 of each Bill.

#### Background

2. BIS has conducted extensive work in relation to the activities of street trading and pedlary over several years and previously commissioned Durham University to conduct research into the application and perception of local authority controls and pedlar legislation. Their report of this work (as relevant to this report) highlighted that various LAs remained concerned about the lack of enforcement powers available to them for effective enforcement against those certified pedlars who in fact traded as street traders rather than as pedlars, without obtaining a street trader's licence as required by the street trading regime. BIS is therefore aware of the enforcement problems experienced by LAs in relation to illegal street traders and is sympathetic to the promoters' intentions of trying to combat these issues.

3. However, BIS is working on amendments to the national street trading regime contained in Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 ("LGMPA") in order, in particular, to ensure its provisions comply fully with the SD. We also wish to ensure that private street trading legislation brought forward by LAs complies fully with the SD's requirements.

4. Our legal analysis of the national street trading regime contained in Schedule 4 of the LG(MP)A against the requirements of the SD has led us to the conclusion that certain provisions of that regime need to be amended in order to bring the regime fully into compliance with the SD. As a result of this, BIS will be consulting on proposed legislative changes towards the end of the year in order to enable it to amend the regime as soon as possible.

5. Our intention is to reform the legal framework for street trading and pedlary to remove the demand for private Bills on this issue. We are looking at how to give local authorities local discretion to regulate street trading and pedlary effectively within the confines of a reasonable interpretation of the Services Directive. The outcome we are seeking would be a new legal framework which empowers local authorities and respects the principle of localism, whilst defending the interests of legitimate pedlars and street traders. Local authorities would be required to permit genuine pedlars to operate, but the concept of a pedlar would be more clearly defined and local authorities would need to be able to effectively tackle any unlicensed street trader who fell outside that definition.

6. Whilst conducting our analysis of the national street trading regime, we have become concerned that certain provisions contained within local street trading Acts are unlikely to be SD compliant. We have therefore written to all LAs requesting that they screen their local street trading legislation against the SD's requirements and that they ensure that any non-compliant provisions are brought into line with the SD.

BIS concerns with these Bills

7. Our broader view is that these Bills should be screened for compliance with the SD prior to enactment in order to ensure that legislation is not enacted which would put the UK in breach of its obligations under European law. Our specific concerns about the compatibility of certain provisions of the Bills with the SD are as follows:

(a) Our first concern relates to clause 5 of both the Canterbury City Council Bill and the Nottingham City Council Bill.

SIMON CASEY

Paragraph (1)(2)(a) of Schedule 4 of the LG(MP)A exempts certified pedlars who are acting as pedlars from the national street trading regime. The effect of clause 5 of each of these Bills is that such persons would become subject to the national street trading regime in the relevant area, unless they trade only by means of visits from house to house. Thus genuine non door-to-door pedlars wishing to trade in streets which are designated as licence or consent streets would become subject to the street trading regime, and they therefore would be required to obtain a street trading licence/consent to trade in those streets. Since the nature of genuine pedlary is that the pedlar moves around to trade, and that a pedlar may, for example, wish to trade in several locations during the course of a day, or to make last minute decisions about where to trade on any particular day, the practical effect of making genuine pedlars subject to the national street trading regime is likely to be that genuine (non door-to-door) pedlars are no longer able to trade in such streets at all. (This is because they would have to decide much further in advance where they were going to trade on a particular day in order to be able to apply for a street trading licence/consent in time, and they would be likely to have to make multiple licence/consent applications to enable them to trade in different locations.)

In our view, it is unlikely that making genuine non door-to-door pedlars subject to the national street trading licensing regime (which is an "authorisation scheme" for the purposes of the SD) would satisfy the 3 stage test set out in Article 9 of the SD (for established traders) or Article 16 of the SD (for temporary traders). In particular, we doubt that applying that regime to such pedlars can be justified as required by the SD. Even if it can, the objective pursued may well be able to be attained by less restrictive measures (such as a power for local authority officials to require pedlars to move away from an area where their presence is giving rise to public safety concerns). In our view, it is therefore unlikely that these provisions are

1 discrimination  
2 OR RPI  
3. least restrictive measure  
1 nondisc.  
2 necessity  
3 proportionality

compatible with the SD. We therefore ask that consideration be given to the issue of whether these provisions are SD compliant.

We would like to make clear that our intention is to amend the exemption for pedlars contained in paragraph (1)(2)(a) of Schedule 4 of the LG(MP)A in order to substitute a modern, clear and workable definition of those pedlars who are covered by the exemption. This will make it easier for local authorities to enforce the national street trading regime against those who trade as street traders rather than as genuine pedlars. It will also make the legal position clearer for pedlars and street traders.

(b) <sup>Jonny</sup> Clause 5 of the Leeds City Council Bill and the <sup>Andy</sup> Reading Borough Council Bill would also have the effect of limiting the exemption for pedlars (contained in paragraph (1)(2)(a) of Schedule 4 of the LG(MP)A) from the national street trading regime. However these Bills are more flexible in their approach than the Canterbury and Nottingham Bills in that they would continue to exempt from the national street trading regime two types of genuine pedlar: firstly, door-to-door pedlars and, secondly, pedlars who carry, without any other means of support, all items used for any purpose connected with the trading. Our understanding is that the effect of this provision would be that a door-to-door pedlar using a reasonably sized trolley would continue to be exempt from the national street trading regime, but that a non door-to-door pedlar wanting to trade in a licence/consent street would become subject to that regime if he wished to use a reasonably sized trolley to transport his goods. Again, we have doubts as to whether the extension of the national street trading licensing regime to non door-to-door pedlars using a reasonably sized trolley is compatible with Articles 9 and 16 of the SD, though this is admittedly a more marginal case. Our own thinking is that genuine pedlars should be allowed to use a small trolley. (Otherwise, for example, the rules would favour the strong and able-bodied in the pedlar community.) Again we ask that consideration be given to this issue.

(c) We also note that clause 4 of each of the four Bills in question extends the national street trading regime contained in Schedule 4 of the LG(MP)A to cover the supply of services in a street for gain or reward. (Schedule 4 itself only covers the sale of articles in the street, not the provision of services in the street.) We assume that the promoters of the Bills consider that the extension of the national street trading licensing regime to street traders supplying services in the street meets the 3 stage tests set out in Articles 9 and 16 of the SD (in other words the reasons for regulating such persons are identical or very similar to the reasons for regulating street traders selling goods).

*Service  
"any self-employed  
economic activity"*

However, the exemption in paragraph 1(2)(a) of Schedule 4 of the LG(MP)A only covers "trading by a person acting as a pedlar under the authority of a pedlar's certificate granted under the Pedlars Act 1871". Since the definition of "pedlar" contained in the 1871 Act only covers persons who sell goods

*description*

*"or other person"*

*any self employed economic activity.*

and not those who provide services (as a result of amendments made to the definition of "pedlar" in section 3 of the Pedlars Act 1871 by regulation 45 of the Provision of Services Regulations 2009 (S.I. 2009/2999)), it seems to us that no itinerant trader providing services in the street will be able to benefit from the pedlars exemption in paragraph 1(2)(a). In other words, the effect of clause 4 is that all such persons will become subject to the licence/consent regime contained in Schedule 4 of the LG(MP)A. We do not know whether this effect is intended. *- yes it is*

*kills amount to prohibition*

We would propose to resolve this anomaly in due course by defining street trading and pedlary in the new regime as covering the retail sale of services as well as goods, but in the meantime we think that it is unlikely that the extension of the national street trading licensing regime to itinerant traders supplying services in the street meets the 3 stage tests in Articles 9/16 of the SD.

*why not as per SD Article (1) any self emp economic activity*

8. BIS would like to conclude by reminding members of the Committee that:

- (a) Our view is that genuine pedlary is a legitimate business activity, and pedlars should be free to trade with the minimum of restrictions placed on them. Clauses 4 and 5 of the Bills in question will restrict the activities of genuine pedlars.
- (b) We therefore strongly advise that in light of our views mentioned within this report, you ascertain whether the promoters of the Bills have thoroughly screened clause 4 and 5 for SD compliance before the Bills are enacted.

Signed By

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