

8 March 2012

Dear Sir Graham Watson,

Further to your 5th March email to me I accept your invitation to liaise with your office and I am pleased to include a bundle I have prepared for you in reference to the *Services Directive* (the SD) and to the fact that pedlars have been asked by HMG UK to be stakeholders in the BIS department's consultation on *Street Trading and Pedlary Law*.

Having contact with pedlars.info allows me to pass on to you a synopsis of considered opinions about Commissioner Barnier's 14 February 2012 reply to your question about *Criminal Sanctions and the Services Directive*: E-012568/2011.

It is important and vital to the continued existence of pedlary in the UK that the recent history of how HMG UK has dealt with pedlars is clearly set out and seen to be one of continual misinterpretation and contradiction of the aims of the *Services Directive*.

Background

At the SD transposition deadline date of 28 December 2009 HMG UK erroneously amended the *Pedlars Act 1871* using a Statutory Instrument to introduce to UK law the *Provision of Services Regulations 2009 (PSR2009)*. That this law can be considered to be erroneous is as follows.

On 29 October 2009 BIS consulted pedlars.info about the draft legislation *PSR2009* which under *Section 45*¹ amended the *Pedlars Act*.

Pedlars provided a written report to BIS that the proposal to remove “menders of chairs” and pedlars “selling or offering their skills in handicraft” from protection under the *Pedlars Act* was ill-considered as such pedlars would be exposed to criminal sanctions under *Street Trading* regulations. Despite such warning BIS failed to convey this concern to the Grand Committee of the House of Lords who approved the Statutory Instrument by the end of year deadline.

BIS reasoning was that because chair menders and handicraft pedlars were not trading in “goods” but in “services” only, the terms of the SD required that they be expunged from the *Pedlars Act* regardless of consequential sanctions. This was a wrong interpretation of the SD that was passed into law.

On 6 November 2009 BIS published a joint consultation on *Street Trading and Pedlar Laws* [URN09/1074](#)² which sought stakeholder views on updating the *Pedlars Act 1871* and proposed that in order to comply with the *Services Directive* pedlars of services would no longer require a certificate after 31 December 2009.

On 2 November 2011 Mr Branton from BIS gave [evidence](#)³ at col.496 to the House of Lords that his department interpreted the SD “not in a correct way” despite SD Article 4.1 being written in very simple English as “services means any self-employed economic activity” obviously including goods and services.

Pedlars consider this misconduct by BIS indicates serious incompetence and/or

¹ <http://www.legislation.gov.uk/ukdsi/2009/9780111486276/regulation/45>

² <http://www.bis.gov.uk/consultations/street-trading-and-pedlary-laws>

³ <http://www.publications.parliament.uk/pa/privbill/uncorr1.htm> scroll to col 496

negligence by government and are concerned that the erroneous amendment remains law.

Policy reversal

In March 2011 BIS published a government response to the consultation on Street Trading and Pedlar Law [URN11/542](#)⁴.

Whereas the 2009 government policy was to amend the *Pedlars Act* the 2011 report cited reinterpretation of the Services Directive as grounds for deregulating pedlary and repealing the *Pedlars Act*. This abrupt reversal in policy has not received due process and BIS will soon publish draft legislation without any consultation about this policy reversal or its impact on stakeholders.

The Pedlars Act

The UK *Pedlars Act* is unique in Europe and its history is part of the diversity of the social, cultural and economic sphere of life that has existed and been protected by national statute since 1697.

The principle of the Pedlars Act is encapsulated in contemporary language as “*providing common law privilege to any eligible pedestrian person to trade with complete freedom based on purely individual decisions within any part of the UK*”.

Street Trading Law

Street Trading legislation in the UK was introduced as adoptive local legislation under the *Local Government (Miscellaneous Provisions) Act 1982* to regulate static trading in designated streets. It contains exemptions from street trading regulation for several types of alternative trading including that of “*acting as a pedlar*”.

Since 1996 powerful lobby groups representing street traders have brought forward eleven private [Acts](#)⁵ to severely restrict the freedoms of pedlars.

The most recent batch of four [bills](#)⁶ petitioned against by pedlars were found by the House of Lords [Paper 242](#)⁷ to contain unjustifiable sanctions found in all previous Acts against the freedoms of pedlars to provide economic diversity and consumer choice.

Two further similarly worded [bills](#)⁸ are being debated in the current parliamentary session.

Impact of the House of Lords Paper 242

⁴ <http://www.bis.gov.uk/search?keywords=URN%3a+11%2f542&type=all>

⁵ City of Westminster Act 1999, Royal Parks (Trading) Act 2000, City of Newcastle upon Tyne Act 2000, Street Trading Act (Northern Ireland) 2001, Medway Council Act 2004, London Local Authorities Act 2004, Leicester City Council Act 2006, Liverpool City Council Act 2006, Maidstone Borough Council Act 2006, Bournemouth Borough Council Act 2009, Manchester City Council Act 2009

⁶ Reading Borough Council Bill, Leeds City Council Bill, Nottingham City Council Bill, Canterbury City Council Bill

⁷ <http://www.publications.parliament.uk/pa/privbill/uncorr1.htm>

⁸ Westminster City Council Bill, London Local Authorities Bill

This Press Release⁹ from pedlars.info is a summary of the most recent findings of the House of Lords and provides clear guidance to local authorities seeking to bring forward similar private legislation.

Impact of the Services Directive

The *Pedlars Act* and the seventeen aforementioned Acts and bills are Authorisation Schemes under the SD Article 9 that are specific to Street Trading and Pedlar Law. The UK government was responsible for making all Authorisation Schemes compatible with the SD by 28 December 2009.

In 2009 HMG/BIS informed stakeholders that government policy would seek amendment to the *Pedlars Act* to conform to the SD and justified this under Articles 4.8 & 9 ‘*overriding reasons related to the public interest*’. BIS wrote to pedlars.info summarizing the justification¹⁰. Pedlars have no objection.

In 2011 HMG/BIS informed stakeholders that reinterpretation of the SD required revised government policy to deregulate pedlary, repeal the *Pedlars Act* and bring forward draft legislation to redefine pedlary as an exempt activity under street trading regulation. Pedlars objected on the basis that the original justification to retain and amend remained an ‘*overriding reason related to the public interest*’.

Pedlars contend that BIS justification for the change in policy from 2009 lacks due process, stakeholder consultation or impact assessment.

Mr Barnier’s reply¹¹ to concern about criminal sanctions¹²

Mr Barnier confirms that “*the UK has amended the Pedlars Act 1871 as a consequence of implementing the SD*” but pedlars draw Mr Barnier’s attention to the fact that the said amendment found in Section 45¹³ of the *Provision of Services Regulations 2009* is fatally flawed because it relies on HMG/BIS own admission that in 2009 BIS erroneously considered that chair menders and handicraft pedlars were “*pedlars who provide services*” (URN09/1074 – point 13) and should therefore be removed from the Pedlars Act to meet the conditions of the SD. This catastrophic misinterpretation of the SD has not been revealed by HMG to the Commission and pedlars hereby alert Mr Barnier to this gross error made law in the name of the SD.

Stakeholders have lost confidence in HMG/BIS interpretation of the SD and whilst pedlars accept Article 1.5 that “*this Directive does not affect Member State’s rules of criminal law*” the criminal law to which this refers is Street Trading Law and not Pedlary Law which is a civil matter.

Article 1.5 continues with “*Member States may not restrict the freedom to provide services by applying criminal law provisions which specifically regulate or affect access to or exercise of a service activity in circumvention of the rules laid down in this Directive*”.

It is clear that HMG/BIS is intent on restricting the freedom of common law pedlars

⁹ <http://www.pedlars.info/news/102-lords-caution-to-councils.html>

¹⁰ <http://www.pedlars.info/bis-consultation/107-bis-justification-to-retain-pedlars-act.html>

¹¹ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-012568&language=EN>

¹² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-012568+0+DOC+XML+V0//EN&language=EN>

¹³ <http://www.legislation.gov.uk/ukdsi/2009/9780111486276/regulation/45>

to provide services by applying criminal law provisions under street trading regulation to specifically regulate or affect access to an historic civil right of pedlary.

Pedlars consider this sufficient evidence for the Commission to begin Infringement Proceedings against the UK for “non-conformity” and “bad application”.

Mr Barnier refers to the mutual evaluation process working paper¹⁴ but the only reference to pedlars in that paper refers to cross-border pedlars in Portugal with nothing specific to the UK and is of little assistance in resolving the issue of misinterpretation by the UK. The UK has not consulted stakeholders on justification to abolish the Pedlars Act on grounds of ‘public policy’ or of public health’.

The Commissioner notes that “*the Directive does not prevent Member States from maintaining authorisation schemes... on the basis that they are justified by a public interest objective and are proportionate*”.

On 4 November 2009 BIS wrote to pedlars.info with a detailed justification¹⁵ for retention and amendment of the Pedlars Act to conform with the SD.

The Commissioner’s attention is drawn to the arbitrary manner in which HMG/BIS has exercised its interpretation of the SD to mislead stakeholders and reverse policy. The extreme measures proposed by the latest BIS policy require due diligence consultation with stakeholders to establish the effect of such extreme policy and consideration of whether such measures are proportionate and whether less restrictive measures are available. Pedlars concur with the House of Lords Paper 242 that less restrictive measures are available.

From the Commissioners reply it is clear that the UK/HMG has not informed the Commission about the change in policy from 2009 to 2011 and that the justification in 2009 to protect consumers has been dropped by BIS and that there never was justification regarding safety of traffic or the urban environment as neither apply to ambulant pedestrian traders and apply only to static licensed traders whose apparatus may cause obstruction of the highway.

The 2011 justification is based on the “*residency*” and “*good character*” reference in the Pedlars Act but HMG/BIS has made no attempt to consult with stakeholders about amending the text. Instead stakeholders are informed by government report that “*the certification system for pedlars is untenable*” (URN11/542). Pedlars contend that textual amendment of the residency and good character reference could and should have occurred instead of the erroneous chair mender and handicraft pedlar amendment in 2009 but BIS may be attempting to cover up a legislative blunder.

Stakeholders have proposed that the residency requirement can either be removed or extended to include all eligible EU residents and vetting of an applicants good character may be discretionary as with vetting of licence applicants or may be done by Criminal Record Bureau check or be approved by two unrelated householders as in Sussex Police Form A Application for a Pedlars Certificate.

Sanctions in other legislation

¹⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=556310:EN:NOT> - scroll to page 67 last sentence

¹⁵ <http://www.pedlars.info/bis-consultation/107-bis-justification-to-retain-pedlars-act.html>

The only supported sanction on pedlars in the four bills considered by the House of Lords Paper 242 was one of scale and proportion of pedlars' apparatus. However, pedlars remain concerned that other sanctions of seizure, confiscation and forfeiture remain in a total of thirteen similar authorisation schemes. Those schemes therefore require substantial amendment to conform to the SD as being justified and proportionate.

A problem exists for the UK HMG BIS department as protocol prohibits comment on private legislation and in effect UK HMG has denied itself the power to alter such propositions in spite of the BIS Director of Consumer & Competition, Mr Branton admitting in the UK Parliament at [col.511](#) that incompatibility makes them "*already illegal*".

Mr Barnier's letter does not address the fact that UK local authorities do not differentiate between street traders. Street traders in the UK are authorised either by a locally effective street trading licence or by the nationally effective pedlars' self-authorising certificate.

It is case evident in the UK that pedlars suffer discrimination by local authorities unwilling to recognise the national civil law authority of the UK *Pedlars Certificate* preferring to prosecute pedlars with criminal provisions in variations to the *Local Government (Miscellaneous Provisions) Act*.

Such discrimination is an infringement of the SD Article 9. UK local authorities discriminate further by using an anomalous exemption provision in regulation between pedlars who trade only at houses and those who trade in the street. HL [Paper 242](#) found this discrimination was not justified for protecting consumers, for the safety of traffic or for the protection of the urban environment.

Considering all of the above: pedlars ask if the the following questions are appropriate for written answer by Mr Barnier and therefore seek your opinion :

Pedlars refer to Written Answer E-012568/2011.

Given that the UK erroneously amended the *Pedlars Act* on the basis of wrong interpretation of the SD, exposing chair menders and handicraft persons as only two types of pedlar to criminal sanctions: does the Commission consider that the SD should be used or abused to expunge the common civil law liberty of certified pedlary?

Is this misinterpretation a further example of the UK HMG's lack of understanding about the spirit of intent of the SD and does this justify UK HMG giving its local authorities power to secure unfettered discrimination against the economic diversity of open free market competition enjoyed by pedlars for 315 years?

Has the Commission's "*mutual evaluation process*" considered the uniqueness of the UK *Pedlars Act* with its recognised profession of pedlary as representative of a social, cultural and economic diversity worthy of conservation and preservation?

How does textual amendment to "*local residency*" and "*good character*" criteria in

the *Pedlars Act* conform to the SD?

Does the Commission accept UK HMG's retention of an amended *Pedlars Act* on justified grounds of an overriding reason related to the public interest as explained by UK HMG - reference [4 November 2009](#)?

Does the Commission consider that the purpose of the SD in regard to street trading service providers is to eliminate consumer choice and competition and to provide monopoly power to local authorities to exercise complete control on all street trading activities by licence and fees combined with criminal sanctions against any and all competition?

In regard to a separate street trading matter, does the Commission accept that a UK local authority licensing scheme for static traders may decide on an arbitrary basis what is or is not unfair competition or would the Commission agree with the statement in [HL Paper 242](#) that "*it is not the role of local authorities to decide what is or is not unfair competition*"?

yours sincerely,

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with Robert Campbell-Lloyd
and pedlars.info