Red box response

Casey

Department for Business, Innovation & Skills

Consultation Response form for England and Wales ONLY

Consultation on Street Trading and Pedlary Laws – Compliance with the requirements of the European Services Directive

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is **15 February 2013.**

Name: Natalie Casey.
Organisation (if applicable):
Address:

Please return completed forms to:

Name:	Rachel Onikosi, Policy Manager
Postal address:	Department of Business, Innovation and Skills Consumer and Competition Policy Directorate, 1 Victoria Street, London, SW1H OET
Tel:	020 7 215 5898
Email:	stcompliance@bis.gsi.gov.uk

If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group from the list below.

☐	Business representative organisation/trade body
☐	Central government

☐	Charity or social enterprise
☐	Individual
☐	Large business (over 250 staff)
☐	Legal representative
☐	Local Government
☐	Medium business (50 to 250 staff)
☐	Micro business (up to 9 staff)
☐	Small business (10 to 49 staff)
☐	Trade union or staff association
☒	Other (please describe) Consumer of pedlary services

Below we set out a variety of questions in relation to our draft set of regulations attached at Annex A of the consultation document

We would like all consultees to fully consider our proposals and **explain the reasons for your answers as fully as possible.**

Repeal of the Pedlars Acts:

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

☐ Yes ☒ No

Comments:

Repeal of the pedlars act appears to be an unnecessary and disproportionate response to the EU Services Directive. I have reviewed the EU Services Directive, albeit without legal conference and with significant time constraints due to the imminent closure of this consultation. I agree that 'do nothing' is not a defensible option. However, in support of the principles of necessity and proportionality the UK government should give consideration to amendments to the Pedlars act, and if this is found to be untenable, an impact assessment should be produced to outline the rationale behind this judgment.

The current BIS consultation and associated Impact Assessment does not include, or provide justification for the lack of 'copy out' from the EU Services Directive. 'Copy-out' preserves the underlying principle of necessity and proportionality, and should therefore be considered in preference to either repeal or applying re-interpretation.

The assertion that there is no legal difference in the pedlary definition moving into the LG(MP)A is incorrect. The pedlars act penalty is stated as level 1, whereas schedule 4 of the LG(MP)A is stated as level 3. A check of the penalty rates via Google (I appreciate that this is not necessarily a reliable source) has indicated that the increase in fines is five-fold, from £200 to £1000. Repeal should only be considered if it does not have a negative impact from a criminal record or penalties perspective. The UK approach must also ensure that changes are not implemented if they can be considered dissuasive. Please refer to EU Service Directive Recital (43) regarding dissuasive penalties.

It is my supposition that repeal of the Pedlars Act will also repeal all case-law associated with it, therefore the assertion that there is no significant difference between keeping the act and moving it into the LG(MP)A is a fallacy and strips the peddling community of the protection that has been built up through the highest courts in the land.

Whilst I agree that the current certification scheme for pedlars is not compliant, I do not agree that the authorisation per se provides justification for repeal. As far as I can determine the only changes necessary to certification relate to the requirement to be a resident of the member state prior to application. Even BIS assertions that good character checks can no longer be made are flawed, as the EU Service Directive Recital (53) clearly states that

The granting of licences for certain service activities may require an interview with the applicant by the competent authority in order to assess the applicant's personal integrity and suitability for carrying out the service in question. In such cases, the completion of formalities

by electronic means may not be appropriate.

Furthermore, in the current consultation it is proposed that applicants unsuitability will remain a ground for refusal of an application for Street Trading. With respect to being unable to judge a person as being of "good character" or "unsuitable", the two terms could be regarded as being synonymous, albeit taking opposing view-points; one highlighting the positive attributes, the other focussing on the negatives. Such contradictions appear to indicate a discrimination between council licensed (and revenue generating) "Street Traders" and Pedlars; this could be considered a misinterpretation of the EU Services Directive Recital (65) referring to the principle of equal treatment.

A member state has the right to implement authorisation schemes if there is an 'overriding reason relating to the public interest', of which consumer protection is a valid ground. As pedlars are in direct contact with members of the public, and in particular vulnerable members of society and minors, I fail to see how removal of certification is in the public interest. Removing certification has the potential to create a multitude of issues from increased public distrust of sellers (which is counter to the directives objectives), and increased durations of wasted seller and police time as no immediate form of identification will be available. Also, the EU Services Directive is aimed at opening up trade only to member states. Removal of certification will make it much easier for individuals from non-member states to trade without easy identification of their rights, placing an excessive burden of responsibility on the police to make posterioro checks. Repeal will remove the opportunity to ensure safe streets and accountable trading. By allowing anyone, licensed or not, to sell goods in the street, then the potential for non-EU residents or rogue traders / persons of unscrupulous or unsavoury character to exploit the public would be greatly increased. With no risk of losing the very license that allows them to sell on the street, there would be no effective means of barring offending pedlars from selling goods to the public.

In analysis of URN 11/775, it also appears that repeal of the pedlars act alone is in contravention of Section 2.11.

To avoid double-banking, you need to take a radical look at the whole area of legislation on which the Directive impacts. You should therefore review all related existing UK legislation well before transposition. Think about the best way to implement so that there is no overlap or contradiction with existing legislation. The best way of avoiding these traps is not to treat EU legislation as an add-on, but instead to create one coherent regulatory regime wherever possible, either by amending the existing legislation or repealing/revoking it and starting afresh with a new regime.

I appreciate that as part of the consultation the BIS have advised Local authorities that private bills must comply with the services directive, but I can see no evidence that a project plan exists for delivery within the transposition timelines, which would contravene URN 11/775 Section 3.7

involved parties (including devolved administrations, other government departments, lawyers and other relevant specialists) are committed to a project plan and in particular to the timetable with its stages and milestones for transposition at an early stage;

Excluding private bills from the direct scope of this consultation is likely to lead to double banking, which is counter to URN 11/775 Section 2.10

The test is whether maximum streamlining has been achieved between the new and existing regimes, and the opportunity has been taken to dis-apply domestic rules and guidance which serve less of a purpose under the new framework. Aim to achieve as much consolidation as possible by merging all the relevant regulations into one.

The UK government therefore has an obligation to ensure compliance across all statutory instruments on finalisation of transposition. Failure to address all regulatory changes required to comply with the EU Directive could result in the UK being liable for infringement proceedings in the European Court of Justice, specifically for 'failure to fulfil an obligation'.

All of the above leads me to conclude that the pedlars act should not be repealed under the current proposals.

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?

Comments:

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

Comments

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.

Comments

All UK residents
Repeal would have an obvious impact on the current population of traders, but consideration should be applied to the entire UK working population who are currently entitled to apply for a pedlars certificate. As the EU Directive is aimed at encouraging SMEs, the impact to future entrepreneurial ventures should not go without assessment. This is particularly true in the light of the current economic difficulties, and the changes in benefits entitlements, that may see an increase in pedlary due to the minimal entry requirements to trade.

Consumers
There is also an impact to consumers as a result of the current proposals. Consideration should be given to increased fraud, and the impact of not being able to identify sellers or obtain redress due to a lack of sellers' traceability. As one of the primary aims of the EU Services Directive is to increase seller protection, impacts to consumers should be given appropriate analysis.

Carers of minors, vulnerable adults
The public safety impact of repeal and certification removal should not go unchecked. Removal of certification would allow all EU member citizens to trade without having to present themselves at a police station for basic verification of their suitability to work in the public domain. Unchecked individuals would be given direct access to minors and vulnerable adults. Consideration should be given to the potential increase in crime against the public, due to posterioro checks. It is a sad state of affairs that identification is a minimum standard in modern society, but in reality this has become a necessary tool to ensure public safety.. The impact to the public by removing this requirement should not be under-estimated. As a mother with two young children I am sure that I speak for a wider population when I say that the UK needs to ensure that public safety is paramount in policy making and that one crime as a result of poor policy making is one crime too many.

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?

☐ Yes ☒ No

Please fully explain your reasons for agreeing or disagreeing with any element of the proposed definition.

Comments:

The proposed definition is too restrictive and in effect bars pedlars from operating the all but the largest metropolitan commercial areas. This is as big a barrier to freedom of trade as banning pedlary outright. The proposed definition would result in de-facto criminalisation of pedlary due to the 50 metre/3 hour rules in all but the largest city centres, thereby having a significant impact on the ability of pedlars to earn a living.

The definition of 50 metre rule would require a pedlar to trade only in very long roads because connections between adjacent streets could make a trader in breach of the 50 metre rule without them realising their proximity to their original location. Combined with the 3 hour rule, the current proposal would in all likelihood make pedlary unviable in the majority of UK conurbations.

As a consequence of these new rules, pedlars would be forced into the large city centres, where the amount of time that can be spent in one street will still allow a days work, thereby causing even more congestion and problems for businesses. This "forced migration" from small cities / town centres to those with a supporting infrastructure of streets would result in lifeless and "conformist" market towns, without the diversity and life given to them by pedlars "moving from town to town". These restrictions would rapidly stifle entrepreneurial activities and promote the established chain stores, which is counter to the intent of the Directive.

A more pragmatic approach and one more likely to open up the market to entrepreneurs would be one without defined distances (in order to avoid the over-zealous officials with a surveyors wheel), no restrictions on return time, but with a 10 minute static time (exempting time with customers obviously). Almost all definitions regarding distance would certainly be discriminatory and would have to be assessed for compliance with for example, pregnant women, those with physical difficulties or learning difficulties.

In terms of the size of the receptacle there is no suggestion in the consultation that this definition has this been checked against average items that one might push or pull in a public space, such as a multi-child buggy, pram or bicycle. These items are not considered to cause an obstruction and therefore they should be used as a benchmark for dimension calculations. I would suggest therefore that the current definition is too small, as it would not accommodate for example a push bike.

The current definition also introduces 'gold plating' through the 50 metre rule and 3 hour return rule. Whilst this is not illegal in terms of implementation it should only be used in exceptional circumstances, and then with clear justification for its introduction. This clarity and justification is currently lacking. URN 11/775 Section 2.7 states that

Government policy is that you should not to go beyond the minimum requirements of European Directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and consultation with stakeholders. Any gold-plating, as defined below, must be explained in your impact assessment and will need to be cleared by the Reducing Regulation Committee.

It is clear that the current changes go beyond what is necessary and proportional to achieve compliance and therefore I conclude that the current definition is not fit for purpose.

Amendments to Schedule 4 to the LG(MP)A

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?**

☐ Yes ☐ No

Comments:

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

☐ Yes ☐ No

Comments:

Question 5: **Do you agree with the proposal to replace the 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. (see paragraph 1.32).

☐ Yes ☐ No

Comments:

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?

Comments:

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? (see paragraphs 1.33 and 1.34 above).

☐ Yes ☐ No

Comments:

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. (see paragraphs 1.36 - 1.37).**

☐ Yes ☐ No

Comments:

Question 7.1: **Do you consider that it is necessary to insert a new replacement "suitability" refusal ground into paragraph 3(6)? (see paragraph 1.38)**

☐ Yes ☐ No

Comments:

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?

☐ Yes ☐ No

Comments:

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

☐ Yes ☐ No

Comments:

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? (see paragraphs 1.39 -1.42)**

☐ Yes ☐ No

Comments:

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?**

☐ Yes ☐ No

Comments:

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

☐ Yes ☐ No

Comments:

Question 8.3: **Do you foresee any difficulties with our proposals to limit the circumstances in which**

these grounds could be used in relation to established traders?

☐ Yes ☐ No

Comments:

Question 9: Do you foresee any problem resulting from the proposed repeal of paragraph 3(8) of Schedule 4 to the LG(MP)A? (see paragraph 1.43)

☐ Yes ☐ No

Comments:

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?

☐ Yes ☐ No

Comments:

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? (see paragraphs 1.44 – 1.47)**

☐ Yes ☐ No

Comments:

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?**

☐ Yes ☐ No

Comments:

Question 10.2:

(i) Whether you are likely to issue licences for more than a 12 month period of indefinitely?

☐ Yes ☐ No

(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?

Comments:

Question 11: **Would it be helpful for BIS to issue guidance as to how the PSR may affect a 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? (see paragraphs 1.48 – 1.50)**

☐ Yes ☐ No

Comments:

Question 11.1: **Do you think there are circumstances in which the paragraph 5(1)(d) ground could be used**

compatibly with the Directive in relation to temporary traders?

☐ Yes ☐ No

Comments:

Question 11.2: (i) 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?

☐ Yes ☐ No

(ii) Will local authorities continue to use that ground in relation to established traders?

☐ Yes ☐ No

Comments:

Question 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?

☐ Yes ☐ No

Comments:

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

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

☐ Yes ☐ No

To leave it to local authorities to decide whether to put arrangements in place to disapply the regulation 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)? Please give reasons for your views (see paragraphs 1.51 – 1.53)

☐ Yes ☐ No

Comments:

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? (see paragraphs 1.54 -1.57)

☐ Yes ☐ No

Comments:

Question 14: Do you foresee any problems with our proposals to amend paragraph 10(1)(d)? (See paragraph 1.59)

☐ Yes ☐ No

Comments:

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).

Comments:

Question 15.1: Please can local authorities tell us-

(i) whether having screened your local street trading Acts for compliance with the Directive, amendments /repeals need to be made to that legislation;

(ii) if such amendments/ repeals are needed whether you wish us to include them in our regulations.

Comments:

Question 16: Please can local authorities tell us-

(i) what consequential amendments are needed to the provisions listed in Annex C as a result of the repeal of the Pedlars Acts (and provide appropriately drafted provisions);

(ii) whether any consequential amendments are needed to other provisions of local Acts as a result of the repeal of the Pedlars Acts (and, if so, provide appropriately drafted provisions);

(iii) if any of the provisions listed in Annex C are no longer in force.

Comments:

Question 17: Can local authorities tell us-

(i) what consequential amendments are required to the provisions of local Acts listed above at paragraph 1.73 as a result of our proposed amendments to Schedule 4 to the LG(MP)A, and provide appropriately drafted provisions?

(ii) whether (and, if so, what) consequential amendments are required to <u>any other provisions</u> of local Acts as a result of our proposed amendments to Schedule 4 to the LG(MP)A (and again provide appropriately drafted provisions)?

Comments:

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Comments:

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes ☐ No

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. Visit www.nationalarchives.gov.uk/doc/open-government-licence, write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

URN 12/605RF