AMENDMENT OF PEDLAR AND STREET TRADING LEGISLATION TO ENSURE COMPLIANCE WITH THE SERVICES DIRECTIVE (DIRECTIVE 2006/123/EC)

INTRODUCTION

1. This note identifies the amendments to the Pedlars Act 1871 and to the national street trading regime contained in Schedule 4 to the Local Government (Miscellaneous Provisions) Act 1982 (“LG(MPA”) that we consider are or may be necessary in order to ensure compliance with the Services Directive (“the SD”).

2. As explained in the Government Response to the consultation on modernising street trading and pedlar legislation [URL], our interpretation of compliance with the SD has developed in the course of the formal evaluation of the SD amongst Member States, so that now the consensus is that the retail sale of goods is generally a service activity within the scope of the SD. Pedlar and street traders are engaged in the retail sale of goods. It is therefore essential to ensure that the requirements of the SD are met in relation to any authorisation regimes applying to such traders. Failure to do so may have various consequences, including rendering the UK liable to infraction proceedings (and large fines) before the ECJ.

3. The next step is to draft and consult on regulations that will make the necessary changes to legislation. We plan to do this towards the end of the year. The purpose of this note is to seek information from local authorities to assist our analysis about what changes need to be made. It is important that we understand properly how the scheme works, so that we can make only those changes we consider essential. Your help in this exercise is therefore crucial.

4. Annex 1 to this note identifies SD compliance issues we have considered in relation to which we have concluded that no amendment to the LG(MPA) is in fact needed. Annex 1 also deals with one specific legal issue we have considered in relation to a provision of local legislation, namely section 5 of the City of Westminster Act 1999.

5. Annex 2 sets out the provisions of the SD and of the Provision of Services Regulations 2009 (S.I. 2009/2999) (“the PSR”) which are referred to in this note.

6. This note does not deal with provisions of devolved street trading legislation in Scotland or Northern Ireland, nor (with the odd exception) with provisions of those local Acts which regulate street trading in particular areas. The devolved administrations will be making the amendments to their street trading legislation which are necessary to ensure compliance with the SD, and we will be working with them to ensure consistency of approach. We are still considering the approach...
which should be taken in relation to securing that local street trading legislation complies with the SD, and we will discuss this separately with the relevant local authorities.

OVERVIEW OF SERVICES DIRECTIVE

7. The primary aim of the SD is to make it easier for service businesses to set up or sell their services anywhere in the EU. (see e.g. recital 116 to the SD).

8. Although the SD contains more detailed provisions in relation to established services providers (“ESPs”) (i.e. providers established in the UK or seeking to establish in the UK) than in relation to temporary service providers (“TSPs”) (i.e. providers established in another EEA State), the SD makes it much more difficult to justify restrictions on a TSP’s ability to provide services here than it does for an ESP.

9. Article 9 of the SD, which applies in relation to ESPs, prohibits Member States from requiring those wanting to engage in a service activity to go through an authorisation scheme, unless a three stage test is met. In particular, the need for an authorisation regime must be justified by an overriding reason relating to the public interest (“ORRPI”). Article 4(8) defines what is meant by an ORRPI (see also recital 40). Such reasons include public safety, consumer protection, and the protection of the urban environment. “Authorisation scheme” is defined in Article 4(6). Both the pedlar certification regime and street trading licensing regimes are authorisation regimes for the purposes of the SD.

10. Article 16 of the SD, which applies in relation to TSPs, prohibits Member States from imposing any requirements on those wanting to engage in a service activity, if those requirements don’t meet a three stage test. In particular, the requirement can be justified for one of only four reasons: public policy, public security (which includes public safety – see recital 41), public health or the protection of the environment.

WHAT DOES THIS MEAN FOR LOCAL AUTHORITIES?

11. The SD was implemented by the PSR. Local authorities are competent authorities for the purposes of the PSR in relation to the street trading regime contained in the LG(MP)A (-see regulation 3 of the PSR).

12. So, where a provision of Sched. 4 to the LG(MP)A confers a power on a local authority which could, if read in isolation, be exercised both in a way which is compatible with the SD or in a way which is not so compatible, the PSR imposes a duty on the authority to exercise the power compatibly with the SD.

13. In theory, therefore, no amendment to the LG(MP)A power should be needed in order to comply with the SD. Rather, it should be for local authorities to ensure that,
when exercising the power, they comply with their duties under the PSR. Nevertheless, in certain cases it may be desirable for reasons of legal clarity to amend such powers in order to ensure that the full legal position on the issue is apparent on the face of Sched. 4 (particularly bearing in mind the likely users of the legislation).

14. Schedule 4 to the LG(MP)A also imposes certain duties on local authorities. Regulation 6(3) of the PSR sets out the relationship between requirements imposed on a competent authority by Part 3 of the PSR (duties of competent authorities in relation to provision of services in the UK) and Part 4 of the PSR (duties of competent authorities in relation to providers of services provided from another EEA State) and requirements imposed by legislative provisions which pre-date the PSR and which relate to specific aspects of access to, or the exercise of, a service activity. A requirement imposed by Part 3 or Part 4 of the PSR on a competent authority does not apply if, or to the extent that, the competent authority cannot comply both with that requirement and with the other legislative requirement.

15. So, if a duty imposed on a local authority by the LG(MP)A requires it to act in a way which is incompatible with the SD, that duty will prevail over the duty in the PSR to act compatibly with the SD. It will therefore be necessary to repeal the offending duty contained in the LG(MP)A (rather than being able to rely on the existence of the PSR), in order to ensure compliance with the SD.

16. The SD does not apply to service providers who are not established in a Member State (see Art 2(1) of the SD). Hence no amendment is required to the Pedlars Acts or to the LG(MP)A in relation to this category of service provider in order to ensure compliance with the SD. However, we intend to repeal the Pedlars Acts in relation to this category of provider too since we do not consider that it is necessary to retain a pedlars’ certification regime purely for such pedlars. Further, in order to keep the street trading regimes as simple as possible, we intend that street traders who are not established in a Member State (whether seeking to establish themselves here or to provide temporary services here from their home state) should be subject to the same rules that apply to ESPs.

ACTION FOR LOCAL AUTHORITIES AND FOR BIS: A SUMMARY OF THE MAIN ISSUES

17. Below we request information from local authorities on various issues, primarily in order to assist our analysis as to whether it is necessary/desirable to amend particular provisions of Sched. 4 to the LG(MP)A.

18. The main issues on which specific input from local authorities is needed are as follows:
a. how the definition of “pedlar” should be framed for the purpose of the exemption from the national street trading regime (para 24 below);

b. whether there is a need for those pedlars who are not currently covered by the exemption in para 1(2)(a) of Sched. 4 to the LG(MP)A (e.g. pedlars of foodstuffs) to be subject to some sort of an authorisation regime (para 26 below);

c. whether there is a need for pedlars in general to be subject in particular areas to some sort of an authorisation regime or for local authorities in those areas to have any other powers in relation to them (para 29 below);

d. whether each of the requirements to be met as regards street trading licence applications is justified in relation to TSPs (para 35);

e. whether it suffices for an electronic application for a street trading licence to be accompanied by only one photo (para 38)

f. whether each of the mandatory grounds for refusal of street trading licence/consent applications is justified in relation to ESPs and TSPs or should be amended in some way (para 42);

g. whether each of the discretionary grounds for refusal of street trading licence applications is justified in relation to ESPs and TSPs (paras 46 and 56);

h. whether an alternative discretionary ground for refusal to that contained in para 3(6)(b) of Sched. 4, and which would be permissible under the SD, is needed (para 53);

i. whether licence applicants who will benefit from para 3(8) of Sched. 4 are more likely to be UK nationals than nationals of other Member States (para 58);

j. whether there are any concerns with our proposals regarding the duration of licences/consents (para 65);

k. whether each of the grounds for revocation of a street trading licence is justified in relation to ESPs and TSPs (para 68);

l. whether the legislation needs to set out the conditions which will automatically attach to a street trading licence/consent which is deemed to have been granted because the application was not processed in time (para 71);

m. whether there is justification for disapplying in relation to all street trading licence/consent applications the rule that applications not processed in time are deemed to have been granted (para 72);
n. whether the legislation should be amended to include a provision disapplying reg 19(5) of the PSR in relation to an ESP’s application where a mandatory ground for refusal of the application applies (para 73);

o. clarification as to the need for the consent regime as opposed to the licence regime (para 74), the purpose of the prohibition in para 7(7) of Sched. 4 and the reason why para 7(8) of Sched. 4 does not permit a complete relaxation of the para 7(7) prohibition (para 75);

p. whether any provisions of local legislation listed in Annex 3 to this note are no longer in force (para 79);

q. whether any provision will need to be made as a result of the repeal of s.6 of the Pedlars Act 1871 (para 80).

19. On some issues we have already felt able to take a view on the legal position and have set out our view (although we will of course consider any views which local authorities wish to put forward on those issues).

20. Once local authorities have responded, BIS will consider the issues further and, having identified all the amendments that we think need to be made to the legislation, we will draft regulations to give effect to those amendments. We will consult on those draft regulations, towards the end of the year.

PEDLARS CERTIFICATION REGIME (PEDLARS ACTS 1871 AND 1881)

21. We are of the view that the Pedlars Acts need to be repealed in their entirety. In our view, a requirement for pedlars to be certified (which is an authorisation scheme for the purposes of the SD), based in essence on whether the pedlar is of good character, cannot be justified in relation to TSPs under Article 16 of the SD. Nor do we think that it can be justified in relation to ESPs under Article 9 of the SD.

NATIONAL STREET TRADING REGIME (SCHEDULE 4 TO THE LG(MP)A))

22. This section focuses on the amendments to the LG(MP)A we think are needed to secure compliance with the SD.

Exemption for pedlars trading under the authority of a pedlar’s certificate (para 1(2)(a)), and provisions of local Acts which limit the exemption to certain categories of pedlar

23. There are clearly implications for the street trading regime of repealing the Pedlars Acts so that pedlars are no longer required to obtain a pedlar’s certificate.
24. The exemption in para 1(2)(a) of Sched. 4 to the LG(MP)A from the street trading regime for pedlars trading under the authority of a pedlar’s certificate, will no longer have the effect of exempting any pedlars from the regime. Since we intend that “genuine” pedlars should continue to be exempt from the street trading regime, the exemption in para 1(2)(a) will need to be amended to define clearly what constitutes genuine pedlary. We would welcome your views as to how to frame this definition.

25. Certain pedlars, e.g. sellers of foodstuffs, are currently exempt from the requirement to obtain a pedlar’s certificate (see s.23 of the Pedlars Act 1871). In our view, even if such a pedlar has obtained a Pedlars Act certificate, the likely position is that he is not therefore covered by the exemption in para 1(2)(a) and is subject to the street trading regime. In our view, para 1(2)(a) should be amended to ensure that such pedlars are also exempt from the street trading regime, since (as with pedlars more generally – please see paras 24-25 below) we do not think that the application to such pedlars of an authorisation scheme which is essentially aimed at static street traders can be justified under either Article 9 or 16 of the SD.

26. If there is a need for some form of authorisation regime to apply to pedlars of foodstuffs etc (as to which local authorities are welcome to submit their views with supporting reasons), we think that this should be a separate regime targeted specifically at this category of trader. This will make it easier to ensure that any such regime meets the tests set out in Art 9/16 of the SD. Any such regime must also be able to be operated compatibly with the SD. However, we are not at present aware of any reasons why pedlars of foodstuffs etc need to be subject to such an authorisation regime.

27. Some local Acts contain provisions which limit the exemption in para 1(2)(a) of Sched. 4 to certain types of pedlars. In other words, some pedlars who would otherwise be exempt from the street trading regime in Sched. 4 by virtue of para 1(2)(a) are made subject to that regime in those areas.

28. Again, in our view these provisions should be repealed since we do not think that the application to pedlars of a licensing regime which is aimed at static street traders can be justified. If it is considered that an authorisation regime or other powers are needed for certain types of pedlars in particular areas, we think that this should be a separate regime which is targeted specifically at those traders. Again, any such authorisation regime will need to be justified in accordance with Art 9/16 of the SD and be able to be operated compatibly with the SD.

29. We think that the circumstances in which it will be possible to justify the application of an authorisation regime to pedlars are likely to be quite rare and to be limited in time and location. Further, it may be the case that, even if there is a good reason for controlling pedlar numbers at a particular time/location, the application of an authorisation regime would be disproportionate to the aim because the imposition of a less restrictive measure would suffice to achieve the aim (e.g. powers to require
pedlars to leave an over-congested area during a particular period). We would welcome the views of local authorities as to which powers (if any) they think they need in relation to pedlars and why, and, if it is thought that some sort of authorisation regime is needed, why less restrictive measures would not suffice.

Power to designate streets as licence streets/consent streets (para 2(1))

30. The effect of designating a street as a licence street/consent street under para 2(1)(b)/(c) is to make that street subject to the provisions of Schedule 4 applying to that type of street, i.e. to make that street subject to an “authorisation scheme”.

31. As mentioned above, the SD allows greater flexibility in relation to authorisation schemes applying to ESPs (-see Article 9) than in relation to authorisation schemes applying to TSPs (-see Article 16). Thus the possible grounds for justifying the need for a licensing regime are much more limited in relation to TSPs than in relation to ESPs.

32. Articles 9 and 16 are implemented by regulations 14 and 24 of the PSR respectively, to which local authorities are already subject. Thus, in our view, a local authority can only designate a street as a licence/consent street under para 2(1) of Sched. 4 in relation to ESPs if the 3 stage test in Art 9(1) is met. Similarly, it can only designate a street as a licence/consent street in relation to TSPs if the 3 stage test in Art 16 is met.

33. Thus, it is possible that a local authority may in a particular case be able to justify designating a street as a licence/consent street in relation to ESPs but not in relation to TSPs. Currently a designation in relation to a street may only be made in relation to all categories of street trader. We therefore think that para 2(1) should be amended to allow a local authority the flexibility to designate a street as a licence/consent street not only in relation to all street traders (as now) but also in relation to a more limited category of street trader, namely street traders who are not TSPs (i.e. ESPs and traders established outside the EEA).

Details to be included in a licence application (para 3(2)) and local authority’s power to require licence application to be accompanied by two photos of applicant (para 3(3))

34. In relation to ESP licence applicants, authorisation procedures and formalities must comply with the requirements of Art 13 of the SD (e.g. they must not be dissuasive etc - Art 13(2)). In our view, para 3(2)(a)-(c) of Sched. 4 are not likely to fall foul of Art 13.

35. However, in relation to TSP licence applicants, each of the requirements imposed on applicants by para 3(2)(a)-(c) can only be retained if it complies with the 3 stage test in Art 16(1). We need to be confident that this test is met in relation to each of those requirements. So we would welcome local authorities’ views as to whether
this test is met in relation to each of those requirements and the reasons for their views.

36. When a local authority is deciding what other particulars to require a licence applicant to submit (para 3(2)(d)) or whether to require the applicant to submit a photo of himself with his application (para 3(3)), the authority is already under a duty to exercise these powers compatibly with Art 13/16 of the SD, by virtue of regs 18/24 of the PSR. Hence, no amendment is needed to paras 3(2)(d) or 3(3) in order to ensure compliance with those Articles.

37. However, the fact that para 3(3) enables a local authority to require an applicant to submit two photos of the applicant with his application tends to suggest that what is intended is hard copy photos (since presumably there would be no point in attaching two copies of an identical photo to an electronic application). However, Article 8 of the SD requires that all procedures and formalities relating to access to a service activity must be capable of being completed by electronic means.

38. In our view, the requirement to submit licence applications “in writing” (in para 3(1) of Sched. 4) will enable applications to be submitted electronically (please see Annex 1 below), provided that there is no express provision in Sched. 4 which casts doubt on this interpretation. The reference to two photos casts doubt on whether electronic applications are permissible under para 3(1). We would prefer not to amend para 3(1) to refer expressly to the possibility of electronic applications since we do not want to cast doubt on whether provisions of other legislation which contain requirements to do something “in writing” allow it to be done electronically. We therefore think that the best option to ensure that it is clear that licence applications may be submitted electronically is to amend para 3(3) to state that a local authority can require the submission of two photos in the case of non-electronic applications but only one photo in the case of electronic applications. Do you agree?

Mandatory grounds for refusal of a street trading licence/consent (paras 3(4) and 7(3))

39. These provisions oblige local authorities to reject licence/consent applications in certain circumstances.

40. Each of these mandatory grounds for refusal can only be retained in relation to ESPs if it complies with the requirements of Art 10(1)–(3), in particular that it is justified by an ORRPI.

41. Each of these grounds can only be retained in relation to TSPs if it complies with the 3 stage test in Art 16(1), in particular that is justified for one of the 4 reasons specified in Art 16(1)(b).
42. So the reasons for the inclusion of each of these grounds will need to be identified. We would welcome local authorities' input on this. We note in particular, in relation to the prohibition on granting a street trading licence/consent to a child under the age of 17, that there are provisions in other national/local legislation (e.g. section 20 of the Children and Young Persons Act 1933) which impose restrictions on children (i.e. persons who are not over compulsory school age) engaging in street trading. Is it necessary (and, if so, why) for the street trading regime to preclude the granting of licences/consents to children in view of the existence of these other provisions? If so, should this mandatory ground for refusal reflect those other provisions more closely?

Discretionary grounds for refusal of a street trading licence (para 3(6)), and power to resolve that licence holder must trade for a minimum number of days per week (para 2(11))

43. Para 3(6) sets out the discretionary grounds on which an application for a street trading licence may be refused.

44. Again, each of the discretionary grounds can only be retained in relation to ESPs if it complies with the requirements of Art 10(1)–(3), in particular that it is justified by an ORRPI.

45. Each of these grounds can only be retained in relation to TSPs if it complies with the 3 stage test in Art 16(1), in particular that is justified for one of the 4 reasons specified in Art 16(1)(b).

46. So we need local authorities to identify the reasons why each of these grounds for refusal is needed. Since the possible grounds for justification set out in Art 16 are much more limited than those in Art 10(2), it may be that the retention of a ground can be justified in relation to ESPs but not in relation to TSPs. If that proves to be the case, the legislation will need to be amended to make clear that that ground does not apply in relation to TSPs. If the retention of a ground cannot be justified either in relation to TSPs or ESPs, the ground will need to be repealed completely.

**Para 3(6)(b): Enough existing traders**

47. Para 3(6)(b) enables a licence application to be refused on the ground that there are already enough traders trading in the street from shops or otherwise in the goods in which the applicant desires to trade.

48. In relation to TSPs it is very difficult to see which of the four grounds for justification set out in Art 16 could be relied on in support of retaining para 3(6)(b), so we do not think that that ground should be retained in relation to TSPs. *Do you agree?*

49. As regards retention of this ground in relation to ESPs, the Commission’s handbook on implementation of the SD makes clear (see e.g. paras 6.2.5 and 6.3) that
economic reasons, such as the protection of competitors, cannot qualify as an ORRPI for the purpose of Art 10(2).

50. Further, Article 14(5) prevents the access to, or the exercise of, a service activity being made subject to the case-by-case application of an economic test making the grant of an authorisation subject to proof of the existence of an economic need or market demand etc., although that prohibition does not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.

51. The way para 3(6)(b) is framed is such as to allow a local authority to apply it in a manner which is in breach of Art 14(5). However, Art 14(5) is implemented by regulation 21(1)(e) and (2) of the PSR, so local authorities are already obliged to ensure that they do not apply para 3(6)(b) in a way which contravenes Art 14(5).

52. Nevertheless, we have difficulty in seeing how para 3(6)(b) could be applied in a way which is not inconsistent with Art 14(5) or which did not have the effect of protecting the business of existing competitors in the street. Even if a local authority wanted to refuse an application for the purpose of ensuring that there was a wide variety of goods on sale to consumers in a particular location (i.e. for the convenience of consumers as opposed to for the purpose of protecting existing traders’ businesses), turning down an applicant’s application for a licence for that purpose would still have the effect of protecting traders already selling in that location the goods that the applicant wants to sell. We therefore think that para 3(6)(b) should be repealed in relation to ESPs too.

53. It would be helpful to know whether local authorities see this is an important ground for refusal of a licence application and, if so, why. Consideration could then be given to whether it might be possible to put in place an alternative ground for refusal of ESPs’ applications which meets the aims of local authorities so far as possible and is compatible with the SD.

**Para 3(6)(c): Limited trading days**

54. Para 3(6)(c) allows an application to be refused if the local authority has passed a resolution (under para 2(11)) prohibiting a licence from being granted to a person who intends to trade for less than a specified number of days per week.

55. We think that (by virtue of reg 15 of the PSR) a local authority could only pass a resolution under para 2(11) in relation to ESPs if such a ground for refusal meets the requirements of Art 10(2), in particular that it is justified by an ORRPI. Similarly, (by virtue of reg 24 of the PSR) a local authority could only pass such a resolution in relation to TSPs if the 3 stage test in Art 16 is met.

56. Since it is difficult to see how the Art 16 test could ever be met, we think that the legislation needs (at the very least) to be amended to make clear that a TSP’s
application cannot be refused under para 3(6)(c). Do you agree? We also need
to identify why this ground for refusal is needed, so that we can
come to a decision whether it could be justified by an ORRPI etc and so can be retained in
to ESPs.

**Reduced grounds for refusal of a licence application made by an applicant
previously licensed under a local Act to trade in that street (para 3(8))**

57. Broadly speaking, this provision prevents a licence application from being refused
on certain grounds (including lack of space in the street) where the applicant was
previously licensed to trade in that street under local legislation and was doing so
from a fixed position. This means that such existing licensees are in a better
position than new applicants. And if, as we suspect, it is more likely that persons
from other Member States are new applicants, rather than being such existing
licensees, this provision could constitute indirect discrimination against providers
from other Member States who are seeking to establish here or who wish to provide
services on a temporary basis here (in breach of Articles 9(1)(a), 10(2)(a) and 16 of
the SD). (There is no scope under the SD for being able to justify indirect
discrimination.)

58. Our preliminary view is therefore that this provision should be repealed. We would
welcome the views of local authorities as to whether our assumption is correct that
those who will benefit from para 3(8) are more likely to be UK nationals than
nationals of other Member States.

**Duration of street trading licence/consent (paras 4(6) and 7(10))**

59. Para 4(6) provides that a licence is to remain valid for 12 months from its grant or a
shorter specified period. Para 7(10) provides that a consent may be granted for any
period not exceeding 12 months.

60. As regards ESPs, we have considered which of Article 11(1) or Article 12(2)
applies. Both of these provisions deal with the period of time for which an ESP’s
authorisation must be granted. We think it is unlikely that Article 12 of the SD
applies, since it probably cannot be said that the number of authorisations available
for street trading is limited “because of the scarcity of available natural resources or
technical capacity”.

61. Hence in our view Article 11(1) applies in relation to ESPs. This precludes an
authorisation from being granted for a limited period, except in certain
circumstances. These include that (a) the number of available authorisations is
limited by an ORRPI or (b) a limited authorisation period can be justified by an
ORRPI.

62. Para 6.1.4 of the Commission handbook on the SD accepts that limitations on the
duration of an authorisation may be necessary to promote equal access to the
market. We are doubtful however that in every case local authorities will be able to rely on one of the exceptions to the requirement in Art 11(1) that authorisations be granted indefinitely.

63. If that is correct, the limitation on the duration of an ESP’s licence/consent contained in paras 4(6) and 7(10) will need to be replaced with a power for the local authority to grant the licence/consent for an indefinite period or for such period as it may in its discretion choose to specify. (We don’t think that we can leave those provisions as they are and seek to rely on the duty imposed on competent authorities by regulation 16(1) of the PSR (which implements Article 11(1)). This is because, if a local authority cannot rely on one of the exceptions set out in reg 16(1) to justify the licence/consent being granted for a limited duration, the local authority will be subject to two conflicting requirements: the requirement in reg 16(1) to grant the licence/consent for an indefinite period, and the requirement in para 4(6)/7(10) of Sched. 4 to grant it for a limited period. Thus, applying reg 6 of the PSR, the requirement in para 4(6)/7(10) will prevail over the requirement in reg 16(1).)

64. Once the limitations in para 4(6) and 7(10) on the duration of a licence/consent have been repealed, local authorities will be subject to the duty imposed on them by regulation 16(1) of the PSR, i.e. if an authority wishes to limit the duration of an ESP’s licence/consent, it will need to be able to rely on one of the exceptions in reg 16(1).

65. As regards TSPs, a time limit can only be imposed on a licence/consent if the stringent 3 stage test in Article 16 is met. So we think that a local authority needs to be able to consider in each case whether this test is met in relation to any proposal to limit the duration of a TSP’s licence/consent. Thus again the restriction on the duration of a TSP’s consent/licence contained in paras 4(6) and 7(10) needs to be replaced with a power to grant a consent/licence for an indefinite period or such period as the local authority chooses to specify. (Authorities will then be required by reg 24 of the PSR to apply the Article 16 test when deciding on the duration of a TSP’s licence/consent.) We would welcome local authorities’ views on these proposals.

Power to revoke street trading licence (para 5(1))

66. Para 5(1) confers a discretion on the local authority to revoke a licence on certain specified grounds.

67. Once again, to be compatible with the SD these grounds must comply with the requirements of Art 10(1)-(3) in relation to ESPs’ licences and with the 3 stage test in Art 16 in relation to TSPs’ licences.

68. We need local authorities to identify the reasons why each of these grounds for revocation is needed, so that we can decide whether the retention of each ground can be justified in relation to both ESPs and TSPs, only ESPs, or neither. The
legislation may need to be amended to make clear that a ground for revocation does not apply in relation to TSPs or a ground may need to be repealed completely.

**Period within which licence applications must be processed (para 6(1)) and effect of failure to process in time**

69. Para 6(1) requires a licence to be granted within a reasonable time of the application being made. (Para 7 does not say anything about the period within which a consent must be granted once an application has been made.)

70. Article 13(3) contains provisions about the period within which an ESP’s application must be processed. Art 13(3) is implemented by reg 19 of the PSR, to which local authorities are already subject. In our view, a local authority can comply with both para 6(1)/para 7 of Sched. 4 and reg 19 of the PSR, and thus no amendment to Sched. 4 is necessary to reflect Art 13(3).

71. However, it is important to note that reg 19(5) (which implements Art 13(4)) has the effect that a street trading licence/consent will be deemed to have been granted where the application has not been processed within the period required by reg 19, unless different arrangements (which must be justified by an ORRPI, including a legitimate interest of third parties) are in place. Since no different arrangements are set out in Sched. 4, it is open to each local authority to put SD compliant arrangements into place administratively (i.e. ones that can be justified by an ORRPI). If it doesn’t, our only question is whether there could be confusion as to the conditions on which the licence/consent is deemed to have been granted. If so, it may be prudent to insert provisions into Sched. 4 which set out the conditions on which licences/consents will be deemed to have been granted (by virtue of reg 19(5)). Would local authorities want us to do this or do they consider that it would suffice for them to set out administratively the conditions on which licences/consents will be deemed to have been granted?

72. If we were confident that putting different arrangements in place could be justified by an ORRPI in relation to every application by an ESP for a licence/consent, we could insert a provision in Sched. 4 which disapplies reg 19(5) of the PSR in relation to applications for street trading licences/consents. We would welcome local authorities’ views as to any reasons why different arrangements should be put in place.

73. Further, assuming that mandatory grounds for refusal of a licence/consent application are retained, we think that it would be prudent to include a provision disapplying reg 19(5) in relation to an ESP’s application where a mandatory ground for refusal of the application applies. Do you agree?

**Prohibition on consent holder trading in consent street from a vehicle/stall etc and local authority’s limited power to relax that prohibition (para 7(7) and (8))**
74. As a preliminary point, we should be very grateful for any advice local authorities are able to give us regarding whether the consent regime needs to be retained and, if so, why. Why would it not suffice to retain only the (more prescriptive) licensing regime? What is the purpose of the consent regime?

75. Para 7(7) prohibits the consent holder from trading in certain ways. It prevents the holder of a consent from trading in a consent street from a van or other vehicle or from a stall/barrow/cart. Para 7(8) enables the local authority to relax this prohibition to a certain extent but not in its entirety: it can permit the consent holder to trade from a stationary van, car, barrow or other vehicle or from a portable stall. (The local authority cannot, for example, allow the consent holder to trade from a stall which is not portable or from a non-stationary barrow.) We should be grateful for any advice local authorities can give us as to the purpose of the prohibition in para 7(7), and the reason why para 7(8) only enables a local authority to relax the para 7(7) prohibition in part.

76. As regards ESPs, the restriction in para 7(7) does not appear to fall foul of any provision of Articles 14 or 15 (requirements which are prohibited or subject to evaluation). However, the power to grant permission in para 7(8) is an authorisation scheme. Local authorities are already under a duty (by virtue of reg 15 of the PSR) to ensure that the requirements of Art 10(1)-(3) are complied with in relation to this regime, e.g. to publish the criteria they will apply when deciding whether to grant a permission. So we’ve concluded that in relation to ESPs these criteria do not need to be included on the face of the legislation in order to comply with the SD.

77. As regards TSPs, the prohibition in para 7(7) needs to be assessed for compliance with the 3 stage test in Article 16. Presumably it won’t be possible under Article 16 to justify that prohibition in all cases, so a local authority needs to be able to relax the prohibition in cases where its application can’t be justified. Since a local authority can currently only relax para 7(7) in part, we think that para 7(8) should be amended to allow a local authority to relax the prohibition in para 7(7) in its entirety. When granting a street trading consent to a TSP, a local authority will need (by virtue of reg 24 of the PSR) to apply the Article 16 three stage test to decide whether it needs to grant permission under para 7(8) and how far that permission needs to extend.

CONSEQUENTIAL AMENDMENTS TO OTHER LEGISLATION WHICH CONTAINS REFERENCES TO PROVISIONS OF (A) THE PEDI LARS ACT 1871 OR (B) SCHEDULE 4 TO THE LG(MP)A

78. The repeal of the Pedlars Act 1871 will necessitate the amendment of other legislation which refers to it (e.g. a provision which has amended/repealed a provision of the Pedlars Act). It will be necessary to identify each such provision and decide what action needs to be taken in relation to it.
79. An initial search (on both LexisNexis and Justis) for any general/local legislation (primary and secondary) which contains the words “Pedlars Act” has identified a number of relevant legislative provisions. Annex 3 to this note lists the legislation we have identified on our initial search. However, we should sound a note of caution: we understand that it is possible that some of the local legislation identified on Justis is in fact no longer in force (albeit that we searched for legislation which is currently in force). We should be very grateful if relevant local authorities could identify to us any local legislation which appears in Annex 3 which they are aware is no longer in force.

80. Consideration will also need to be given to whether any provision will need to be made as a result of the repeal of section 6 of the Pedlars Act 1871. Section 6 states that, for the purpose of the Markets and Fairs Clauses Act 1847 and any Act incorporating that Act, a certificate under the Pedlars Act 1871 shall have the same effect, within the district for which it is granted, as a hawker’s licence, and the term “hawker” in the 1847 Act shall be construed to include a pedlar holding such a certificate. We should be grateful for any views that local authorities may have on this issue.

81. Similarly, once a decision has been reached on all the amendments that are required to Sched. 4 to the LG(MP)A in order to ensure compliance with the SD, we will need to consider what consequential amendments are needed to Sched. 4 or to other legislation (i.e. if a provision of other legislation refers to a provision of Sched. 4 which is being amended/repealed).
ANNEX 1

SD COMPLIANCE ISSUES WHICH ARE CONSIDERED NOT TO NECESSITATE AMENDMENT TO PROVISIONS OF SCHEDULE 4 TO THE LG(MP)A

Limitation of licences etc to particular streets

1. The effect of the regime contained in Sched. 4 to the LG(MP)A, and of other street trading regimes for particular areas contained in local Acts, is that separate applications must be made to different local authorities in order for an applicant to street trade in different locations.

2. Article 10(4) of the SD requires that an authorisation must enable a provider to have access to the service activity, or to exercise that activity, throughout the national territory, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an ORRPI. (Art 10(7) provides that Article 10 shall not call into question the allocation of the competences, at local or regional level, of the Member States’ authorities granting authorisations.) In this regard, the Commission’s handbook on implementation of the SD states (at page 27) that Member States may limit the territorial scope of authorisations in cases in which individual authorisations for each establishment or a limitation of an authorisation to a certain part of the territory are justified by an ORRPI, are proportionate and non-discriminatory. It goes on to say that individual authorisations for each establishment will normally be justified where the authorisation is linked to a physical infrastructure (e.g. a shop) because an individual assessment of each installation in question may be necessary. Presumably similar arguments will apply to street traders since it is necessary to consider the local conditions when deciding whether street trading in a particular location would cause public safety issues etc.

Power to designate a street as a “prohibited street” (para 2(1)(a)); section 5 of the City of Westminster Act 1999

3. In our view, there is a reasonable argument that the power in para 2(1)(a) to designate a street as a “prohibited street” (i.e. a street where street trading (other than exempt street trading) is prohibited) falls outside the scope of the SD, by virtue of recital 9 to the SD, because it is a rule designed to enable local authorities to regulate the use of land. Hence the provisions regarding prohibited streets do not need to be assessed for compliance with the SD.

4. Further, in our view, similar arguments that be made in relation to section 5 of the City of Westminster Act 1999. Section 5 confers powers on Westminster City Council to pass resolutions (a) designating a street as a licence street, and (b)
specifying that in relation to a licence street (i) only specified things (or classes of things) may be sold in that street or (ii) the sale of specified things (or classes of things) are prohibited in that street. Again, it seems to us that a power for the Council to limit the use of a street to enable it to be the location for a particular type of specialised market (e.g. a flower market), or to impose a blanket prohibition on it being used to sell certain types of goods, is akin to other planning controls on the uses to which land can or cannot be put. Accordingly, we think that there is a respectable argument that these powers fall outside the scope of the Directive by virtue of recital 9.

Requirement that application for licence/consent be made “in writing” (para 3(1) and para 7(1))

5. Article 8 of the SD requires Member States to ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed by electronic means. Article 8 is implemented by regulation 32 of the PSR.

6. Paras 3(1) and 7(1) of Sched. 4 require applications for licences/consents to be made “in writing”. We do not think that this requirement of itself precludes the submission of applications by electronic means. Hence no amendment is required to paras 3(1) and 7(1) to comply with Art 8, i.e. we can rely on reg 32 of the PSR.

Power to grant a more restricted licence than that applied for instead of refusing a licence application (para 3(7)); matters to be specified in, and conditions that may be attached to, a licence (para 4(1), (2), (4) and (5)); power to vary the terms on which a licence was granted instead of revoking the licence (para 5(2)); power to attach conditions to a consent (para 7(4) and (5) and (9)) or to vary such conditions (para 7(6))

7. Local authorities already have to ensure (under regs 21 and 22 of the PSR) that any restrictions/conditions placed on an ESP’s licence/consent do not fall foul of Article 14/15 of the SD. Local authorities already have to ensure (under reg 24 of the PSR) that any restrictions/conditions placed on a TSP’s licence/consent comply with the Art 16 three stage test.

8. Thus, we don’t think that these provisions require amendment in order to comply with the SD.

Statutory right to appeal against decisions of the local authority (para 6)

9. Para 6(5) of Sched. 4 makes provision for appeals to be made to the magistrates’ court against some (but not all) decisions of a local authority relating to applications for licences or existing licences. (Para 6(6) enables an appeal against the decision of the magistrates’ court to be brought to the Crown
There is no specific provision in Sched. 4 for appeals to be made against decisions relating to applications for consents.

10. Art 10(6) of the SD requires any decision from the competent authority (other than the granting of an authorisation), including refusal/withdrawal of an authorisation, to be open to challenge before the courts or other instances of appeal. Obviously this requirement is met in relation to those decisions in respect of which there is a statutory right of appeal. We take the view that, due to the availability of judicial review of those decisions covered by Art 10(6) in respect of which no right of statutory appeal exists, Article 10(6) is also satisfied in relation to those decisions.

11. Nevertheless it may be thought desirable to create a statutory right of appeal in respect of those decisions. For example, as regards a refusal to grant a licence, para 6(5)(a) only confers a statutory right of appeal if the refusal was based on certain grounds. (If para 3(6) of Sched. 4 is amended, e.g. to repeal a discretionary ground for refusal of a licence application, para 6(5) may need amendment to reflect that in any event.)

Wide discretion to refuse to grant a consent (para 7(2)) and to revoke a consent (para 7(10))

12. Para 7(2) confers a power on a local authority to grant a consent if it thinks fit. Para 7(10) allows a local authority to revoke a consent. Unlike the licensing regime, the statute does not set out the discretionary grounds on which a consent may be refused or revoked. Thus a local authority appears to have a wide discretion to decide on what grounds it will refuse an application for a consent or revoke a consent which has already been granted.

13. However, in our view, it is not necessary (for SD compliance purposes) to include on the face of the legislation the grounds on which a consent may be refused/revoked. This is because, although for ESPs the requirements of Art 10(1)-(3) need to be met in relation to the grounds for refusing/revoking consents, and for TSPs the Art 16 three stage test needs to be met in relation to the grounds for refusing/revoking consents, local authorities are already under a duty (by virtue of regs 15 and 24 of the PSR) to ensure that these provisions of the SD are complied with in relation to the refusal/revocation criteria for the consent regime. For example, in relation to ESPs, a local authority is already obliged to ensure that the criteria on which the regime is based preclude it from exercising its power of assessment in an arbitrary manner, and that the criteria are non-discriminatory, justified by an ORRPI, proportionate to that ORRPI, clear and unambiguous, objective, made public in advance, and transparent and accessible. Local authorities therefore need to publish the criteria they will apply when considering applications for consent or whether to revoke a consent, and
they may need to apply more limited grounds for refusal/revocation to TSPs than to ESPs.

Charging of fees for grant of street trading licence/consent (para 9)

14. Para 9(1) enables a local authority to charge such fees as it considers reasonable for the grant/renewal of the licence/consent.

15. Art 13(2) of the SD requires any charges which an ESP applicant may incur from his application to be reasonable and proportionate to the cost of the authorisation procedures and not to exceed the cost of the procedures. Art 13(2) is implemented by reg 18(4) of the PSR, so we think that local authorities already have to limit the amount of the application fees they charge under para 9(1) in accordance with the limitations contained in Art 13(2).

16. As regards TSP applicants, an application fee constitutes a "requirement" for the purposes of Art 16, and so any such fee charged to a TSP will have to be justified in accordance with that provision. Again, since Art 16 is already implemented by reg 24(1), local authorities are already under a duty to ensure that any such fees comply with the 3 stage test in Art 16.

17. Hence we don't think that it is necessary to amend para 9 in order to ensure compliance with Art 13(2)/Art 16.
RELEVANT PROVISIONS OF THE SERVICES DIRECTIVE

Recital 9

This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.

Recital 40

The concept of "overriding reasons relating to the public interest" to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

Recital 41

The concept of "public policy", as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety.

Recital 116:
Since the objectives of this Directive, namely the elimination of barriers to the freedom of establishment for providers in the Member States and to the free provision of services between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

Article 2:

Scope

1. This Directive shall apply to services supplied by providers established in a Member State.

2. This Directive shall not apply to the following activities:

(a) non-economic services of general interest;

(b) financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice, including the services listed in Annex I to Directive 2006/48/EC;

(c) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC;

(d) services in the field of transport, including port services, falling within the scope of Title V of the Treaty;

(e) services of temporary work agencies;

(f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

(g) audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting;

(h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions;
(i) activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty;

(j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State;

(k) private security services;

(l) services provided by notaries and bailiffs, who are appointed by an official act of government.

3. This Directive shall not apply to the field of taxation.

Article 4:

Definitions

For the purposes of this Directive, the following definitions shall apply:

1) "service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty;

2) "provider" means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service;

3) "recipient" means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service;

4) "Member State of establishment" means the Member State in whose territory the provider of the service concerned is established;

5) "establishment" means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out;

6) "authorisation scheme" means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof;
7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive;

8) "overriding reasons relating to the public interest" means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;

9) "competent authority" means any body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof;

10) "Member State where the service is provided" means the Member State where the service is supplied by a provider established in another Member State;

11) "regulated profession" means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC;

12) "commercial communication" means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:

(a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;

(b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

Article 8:

Procedures by electronic means
1. Member States shall ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities.

2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider or to physical examination of the capability or of the personal integrity of the provider or of his responsible staff.

3. The Commission shall, in accordance with the procedure referred to in Article 40(2), adopt detailed rules for the implementation of paragraph 1 of this Article with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States, taking into account common standards developed at Community level.

Article 9:

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

Article 10:

Conditions for the granting of authorisation

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner.
2. The criteria referred to in paragraph 1 shall be:

(a) non-discriminatory;
(b) justified by an overriding reason relating to the public interest;
(c) proportionate to that public interest objective;
(d) clear and unambiguous;
(e) objective;
(f) made public in advance;
(g) transparent and accessible.

3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State or in the same Member State. The liaison points referred to in Article 28(2) and the provider shall assist the competent authority by providing any necessary information regarding those requirements.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is justified by an overriding reason relating to the public interest.

5. The authorisation shall be granted as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

6. Except in the case of the granting of an authorisation, any decision from the competent authorities, including refusal or withdrawal of an authorisation, shall be fully reasoned and shall be open to challenge before the courts or other instances of appeal.

7. This Article shall not call into question the allocation of the competences, at local or regional level, of the Member States' authorities granting authorisations.

Article 11:

Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except where:
(a) the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements;

(b) the number of available authorisations is limited by an overriding reason relating to the public interest;

or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

2. Paragraph 1 shall not concern the maximum period before the end of which the provider must actually commence his activity after receiving authorisation.

3. Member States shall require a provider to inform the relevant point of single contact provided for in Article 6 of the following changes:

(a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme;

(b) changes in his situation which result in the conditions for authorisation no longer being met.

4. This Article shall be without prejudice to the Member States' ability to revoke authorisations, when the conditions for authorisation are no longer met.

**Article 12:**

Selection from among several candidates

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social
policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.

**Article 13:**

Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and be such as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially.

2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.

3. Authorisation procedures and formalities shall provide applicants with a guarantee that their application will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance. The period shall run only from the time when all documentation has been submitted. When justified by the complexity of the issue, the time period may be extended once, by the competent authority, for a limited time. The extension and its duration shall be duly motivated and shall be notified to the applicant before the original period has expired.

4. Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

5. All applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following:

   (a) the period referred to in paragraph 3;

   (b) the available means of redress;

   (c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.

6. In the case of an incomplete application, the applicant shall be informed as quickly as possible of the need to supply any additional documentation, as well as of any possible effects on the period referred to in paragraph 3.
7. When a request is rejected because it fails to comply with the required procedures or formalities, the applicant shall be informed of the rejection as quickly as possible.

**Article 14:**

Prohibited requirements

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following:

1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular:

   (a) nationality requirements for the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies;

   (b) a requirement that the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies be resident within the territory;

2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;

3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have its principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

4) conditions of reciprocity with the Member State in which the provider already has an establishment, save in the case of conditions of reciprocity provided for in Community instruments concerning energy;

5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest;

6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the
consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large;

7) an obligation to provide or participate in a financial guarantee or to take out insurance from a provider or body established in their territory. This shall not affect the possibility for Member States to require insurance or financial guarantees as such, nor shall it affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations;

8) an obligation to have been pre-registered, for a given period, in the registers held in their territory or to have previously exercised the activity for a given period in their territory.

Article 15:

Requirements to be evaluated

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.

2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements:

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers;

(b) an obligation on a provider to take a specific legal form;

(c) requirements which relate to the shareholding of a company;

(d) requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;

(e) a ban on having more than one establishment in the territory of the same State;

(f) requirements fixing a minimum number of employees;

(g) fixed minimum and/or maximum tariffs with which the provider must comply;
(h) an obligation on the provider to supply other specific services jointly with his service.

3. Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions:

(a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office;

(b) necessity: requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

4. Paragraphs 1, 2 and 3 shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them.

5. In the mutual evaluation report provided for in Article 39(1), Member States shall specify the following:

(a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;

(b) the requirements which have been abolished or made less stringent.

6. From 28 December 2006 Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3.

7. Member States shall notify the Commission of any new laws, regulations or administrative provisions which set requirements as referred to in paragraph 6, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent Member States from adopting the provisions in question.

Within a period of 3 months from the date of receipt of the notification, the Commission shall examine the compatibility of any new requirements with Community law and, where appropriate, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.
The notification of a draft national law in accordance with Directive 98/34/EC shall fulfil the obligation of notification provided for in this Directive.

**Article 16:**

Freedom to provide services

1. Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;

(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;

(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;

(c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
(e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;

(g) restrictions on the freedom to provide the services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.

4. By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.
RELEVANT PROVISIONS OF THE PROVISION OF SERVICES REGULATIONS 2009

Regulation 3 – “Competent authority”:

(1) In these Regulations “competent authority” means a body or authority having supervisory or regulatory functions in the United Kingdom in relation to service activities (and includes in particular a professional body, professional association or other professional organisation, that regulates access to, or the exercise of, a service activity).

(2) In paragraph (1)—

(a) the reference to a body or authority includes a body or authority acting on behalf of the Crown;

(b) the reference to supervisory or regulatory functions includes the function of maintaining a register or other record of persons entitled to have access to, or to exercise, a service activity.

(3) Parts 3 to 6 of these Regulations do not apply to competent authorities to the extent that their functions involve the making of subordinate legislation.

Regulation 6 – Relationship with other requirements:

(1) A requirement imposed by Part 2, 5 or 6 of these Regulations on a competent authority or a provider of a service does not apply if, or to the extent that, the competent authority or provider cannot comply both with that requirement and with a requirement to which this paragraph applies.

(2) Paragraph (1) applies to a requirement imposed by—

(a) a provision of an enactment, where—

(i) the provision relates to specific aspects of access to, or the exercise of, a service activity,

(ii) the provision implements a Community obligation, and

(iii) the enactment is passed or made before the day on which these Regulations are made, or

(b) a provision of a directly applicable Community instrument, where—

(i) the provision relates to specific aspects of access to, or the exercise of, a service activity, and
(ii) the instrument comes into force before the day on which these Regulations are made.

(3) A requirement imposed by Part 3 or 4 of these Regulations on a competent authority does not apply if, or to the extent that, the competent authority cannot comply both with that requirement and with a requirement to which this paragraph applies.

(4) Paragraph (3) applies to a requirement imposed by—

(a) a provision of an enactment, where—

(i) the provision relates to specific aspects of access to, or the exercise of, a service activity, and

(ii) the enactment is passed or made before the day on which these Regulations are made, or

(b) a provision of a directly applicable Community instrument, where—

(i) the provision relates to specific aspects of access to, or the exercise of, a service activity, and

(ii) the instrument comes into force before the day on which these Regulations are made.

Regulation 14 – Authorisation schemes

(1) A competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless the following conditions are satisfied.

(2) The conditions are that—

(a) the authorisation scheme does not discriminate against a provider of the service,

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest, and

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after commencement of the service activity would take place too late to be genuinely effective.

(3) This regulation and regulations 15 to 20 do not apply to authorisation schemes to the extent that they are governed, directly or indirectly, by—
(a) a provision of an enactment implementing a Community obligation, where the enactment is passed or made before the day on which these Regulations are made, or

(b) a provision of a directly applicable Community instrument coming into force before that day.

Regulation 15 – Conditions for the granting of authorisation

(1) An authorisation scheme provided for by a competent authority must be based on criteria which preclude the competent authority from exercising its power of assessment in an arbitrary manner.

(2) The criteria must be—

(a) non-discriminatory,

(b) justified by an overriding reason relating to the public interest,

(c) proportionate to that public interest objective,

(d) clear and unambiguous,

(e) objective,

(f) made public in advance, and

(g) transparent and accessible.

(3) The conditions imposed by a competent authority for granting authorisation for a new establishment under an authorisation scheme must not duplicate requirements and controls—

(a) to which the provider of the service is already subject in the United Kingdom or in another EEA state, and

(b) that are equivalent or essentially comparable as regards their purpose.

(4) The provider of the service must assist the competent authority by providing any necessary information requested by the competent authority regarding the requirements and controls referred to in paragraph (3); and paragraph (3) does not apply if the provider has not provided that information within a reasonable time of being requested to do so.
(5) An authorisation granted by a competent authority under an authorisation scheme must enable the provider of the service to have access to the service activity, or to exercise that activity, throughout the United Kingdom, including by means of setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a particular part or area of the United Kingdom is justified by an overriding reason relating to the public interest.

(6) In the case of a competent authority whose functions relate only to part of the United Kingdom, references in paragraph (5) to the United Kingdom are to that part of the United Kingdom.

(7) A competent authority must grant an authorisation under an authorisation scheme as soon as it is established, in the light of an appropriate examination, that the conditions for authorisation have been met.

(8) Except in the case of the granting of an authorisation, any decision of the competent authority relating to an authorisation under an authorisation scheme, including refusal or withdrawal of an authorisation, must be fully reasoned.

Regulation 16 – Duration of authorisation

(1) An authorisation granted to the provider of a service by a competent authority under an authorisation scheme must be for an indefinite period, except where—

(a) the authorisation—

(i) is automatically renewed, or

(ii) is subject only to the continued fulfilment of requirements,

(b) the number of available authorisations is limited by an overriding reason relating to the public interest, or

(c) a limited authorisation period can be justified by an overriding reason relating to the public interest.

(2) This does not prevent the setting of a maximum period before the end of which the provider of the service must actually commence the activity after receiving authorisation.

(3) The provider of the service must inform the competent authority of the following changes—

(a) the creation of subsidiaries whose activities fall within the scope of the authorisation scheme;
(b) changes in the provider's situation that result in the conditions for authorisation no longer being met.

(4) This regulation does not prevent revocation or suspension of an authorisation when the conditions for authorisation are no longer met.

**Regulation 18 – Authorisation schemes: general requirements**

(1) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must—

(a) be clear,

(b) be made public in advance, and

(c) secure that applications for authorisation are dealt with objectively and impartially.

(2) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must not—

(a) be dissuasive, or

(b) unduly complicate or delay the provision of the service.

(3) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must be easily accessible.

(4) Any charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities.

**Regulation 19 – Authorisation procedures: time for dealing with application**

(1) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must secure that applications for authorisation are processed as quickly as possible and, in any event, within a reasonable period running from the time when all documentation has been submitted.

(2) That period must be fixed and made public in advance.

(3) When justified by the complexity of the issue, that period may be extended once, by the competent authority, for a limited time.
The extension and its duration must be notified to the applicant, with reasons, before the original period has expired.

In the event of failure to process the application within the period set or extended in accordance with the preceding provisions of this regulation, authorisation is deemed to have been granted by a competent authority, unless different arrangements are in place.

Any different arrangements must be justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

**Regulation 21 – Prohibited requirements**

A competent authority must not make access to, or the exercise of, a service activity subject to any of the following—

(a) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular—

(i) nationality requirements for the provider of a service, their staff, their shareholders or members of their management or supervisory bodies;

(ii) a requirement that a provider, their staff, their shareholders or members of their management or supervisory bodies be resident in the United Kingdom;

(b) a prohibition—

(i) on being established in more than one EEA state, or

(ii) on being entered in the registers of, or enrolled with professional bodies or associations of, more than one EEA state;

(c) restrictions on the freedom of the provider of a service to choose between principal or secondary establishment, in particular—

(i) an obligation on the provider requiring principal establishment in the United Kingdom, or

(ii) restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;

(d) conditions of reciprocity with the EEA state in which the provider is already established, other than conditions of reciprocity provided for in Community instruments concerning energy;
(e) the case-by-case application of an economic test making the granting of authorisation subject to—

(i) proof of the existence of an economic need or market demand,

(ii) an assessment of the potential or current economic effects of the activity, or

(iii) an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority;

(f) the direct or indirect involvement of competing operators, including within consultative bodies—

(i) in the granting of authorisations, or

(ii) in the adoption of other decisions of the competent authorities;

(g) an obligation to provide or participate in a financial guarantee or to take out insurance from a person established in the United Kingdom;

(h) an obligation—

(i) to have been pre-registered, for a given period, in registers held in the United Kingdom, or

(ii) to have previously exercised the activity for a given period in the United Kingdom.

(2) Paragraph (1)(e) does not affect planning requirements that do not pursue economic aims but serve overriding reasons relating to the public interest.

(3) Paragraph (1)(f)—

(a) does not prevent professional bodies and associations or other organisations acting as the competent authority, and

(b) does not affect the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large.

(4) Paragraph (1)(g)—

(a) does not affect any requirement of insurance or a financial guarantee as such, and
(b) does not affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations.

**Regulation 22 – Requirements subject to evaluation**

(1) A competent authority must not make access to, or the exercise of, a service activity subject to any of the requirements specified in paragraph (2) unless the conditions specified in paragraph (3) are met.

(2) The requirements to which this regulation applies are—

(a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between persons providing the service;

(b) an obligation on a provider of the service to take a specific legal form;

(c) requirements relating to the shareholding of a company;

(d) requirements, other than those—


(ii) provided for in other Community instruments,

which reserve access to the service activity in question to particular persons providing the service by virtue of the specific nature of the activity;

(e) a ban on having more than one establishment in the United Kingdom;

(f) requirements fixing a minimum number of employees;

(g) fixed minimum tariffs or fixed maximum tariffs (or both) with which a provider of the service must comply;

(h) an obligation on a provider of the service to supply other specific services jointly with the service activity in question.

(3) The conditions are—

(a) non-discrimination, that is, the requirements must be neither directly nor indirectly discriminatory with regard to—
(i) nationality, or

(ii) in the case of companies, the location of the registered office;

(b) necessity, that is, the requirements must be justified by an overriding reason relating to the public interest;

(c) proportionality, that is, the requirements—

(i) must be suitable for securing the attainment of the objective pursued, and

(ii) must not go beyond what is necessary to attain that objective,

and it must not be possible to replace those requirements with other, less restrictive measures that attain the same result.

(4) The preceding paragraphs of this regulation do not apply in relation to any requirement applying to a person entrusted with the provision of a service of general economic interest where the requirement is proportionate and necessary for the provision of that service by that person.

(5) In paragraph (4) “service of general economic interest” means a service which the competent authority determines, in accordance with Community law, to be of general economic interest.

(6) A competent authority must notify the Secretary of State of—

(a) any proposal to introduce a new requirement specified in paragraph (2) affecting access to, or the exercise of, a service activity, and

(b) the reasons for that requirement.

(7) The notification must state the reasons why the authority considers that the application of the requirement meets the conditions in paragraph (3).

Regulation 24 – Freedom to provide services

(1) A competent authority must not make access to, or the exercise of, a service activity subject to compliance with any requirement that does not respect the following principles—

(a) non-discrimination, that is, that the requirement must be neither directly nor indirectly discriminatory with regard to nationality or with regard to an EEA state in which the provider of a service is established;
(b) necessity, that is, that the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;

(c) proportionality, that is, that the requirement must be suitable for attaining the objective pursued and must not go beyond what is necessary to attain that objective.

(2) A competent authority may not restrict the right of the provider of a service to provide the service by imposing any of the following requirements—

(a) an obligation on the provider to be established in the United Kingdom;

(b) an obligation on the provider to obtain an authorisation from a competent authority in the United Kingdom, including entry in a register or registration with a professional body or association in the United Kingdom, except where provided for by—

(i) a provision of an enactment implementing a Community obligation, where the enactment is passed or made before the day on which these Regulations are made, or

(ii) a provision of any directly applicable Community instrument coming into force before that day;

(c) a ban on the provider setting up a certain form or type of infrastructure in the United Kingdom, including an office or chambers, which the provider needs in order to supply the services in question;

(d) the application of specific contractual arrangements between the provider and a recipient of the service which prevent or restrict service provision by the self-employed;

(e) an obligation on the provider to possess an identity document issued by a competent authority in the United Kingdom specific to the exercise of a service activity;

(f) requirements, except for those necessary for health and safety at work, affecting the use of equipment and material that are an integral part of the service provided;

(g) requirements referred to in regulation 29(1).

(3) Paragraph (2) does not prevent a competent authority from—

(a) imposing requirements that are justified for reasons of public policy, public security, public health or the protection of the environment (and which comply with paragraph (1)), or
(b) applying, in accordance with Community law, rules in force in the United Kingdom as regards employment conditions, including those laid down in collective agreements.

**Regulation 32 – Electronic procedures**

(1) A competent authority must ensure that—

(a) all procedures and formalities relating to access to, or the exercise of, a service activity may be easily completed, at a distance and by electronic means (through the electronic assistance facility referred to in regulation 38 or otherwise), and

(b) its website affords access to that electronic assistance facility.

(2) In paragraph (1), the reference to procedures or formalities does not include procedures or formalities consisting of—

(a) the inspection of premises or equipment, or

(b) physical examination of the capability or professional integrity of—

(i) a provider of the service, or

(ii) the staff of such a provider.
ANNEX 3

GENERAL AND LOCAL LEGISLATION WHICH REFERS TO THE PEDLARS ACT 1871

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