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SERVICES DIRECTIVE PROHIBITS UP-FRONT CHARGE FOR MAINTENANCE OF LICENSING REGIME COSTS AS PART OF LICENCE APPLICATION FEE (CJEU)

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On 16 November 2016, the Court of Justice of the European Union (CJEU) held that the fee structure of a local authority's licence scheme breached Article 13(2) of the Services Directive (*2006/123/EC*) in that it required applicants to pay up-front fees covering both the costs of the application process and the maintenance of the licence regime.

Article 13(2) requires that licensing and regulatory schemes must not be "dissuasive" and that any charges for authorisation must not exceed their cost. The Services Directive is implemented in the UK by the Provision of Services Regulations (*SI 2009/2999*) (POSR 2009). The POSR apply to licensing and regulatory bodies, including local authorities exercising statutory or discretionary authorisation schemes, in prescribed sectors.

The case related to Westminster City Council's licensing scheme for sex shops, of which the claimant in the earlier proceedings in the UK courts was a licensee. The council charged applicants for a sex shop licence a fee that comprised the costs of both processing the licence application (part 1) and managing the licensing regime (including its enforcement) (part 2). The part 2 fee was refundable to unsuccessful applicants.

On referral from the Supreme Court, the CJEU issued a preliminary ruling to the effect that Article 13(2) prohibited a licensing scheme from charging applicants for part 2 fees up-front. Part 1 fees could not exceed the costs of the application process. The council could only charge part 2 fees to successful applicants, upon their application being granted.

The CJEU's judgment makes it clear that the authorisation schemes of "competent authorities" under the POSR 2009 can only charge an up-front fee that covers, and does not exceed, the cost of assessment and granting of a licence application. The CJEU's judgment may require competent authorities to reconsider the mechanisms by which they seek part 2 fees in the application and authorisation process. (*Hemming and others v Westminster City Council (Case C-316/15) (16 November 2016)*.)

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BACKGROUND

Article 13(2) of the Services Directive (*2006/123/EC*) provides that "authorisation procedures and formalities" must not be dissuasive or unduly complicate or delay the provision of a service. Authorisation schemes for these purposes include licensing and regulatory schemes (that require authorisation to exercise a "service activity" (*Article 4*)) operated by a "competent authority". Any charges that an applicant may incur from an authorisation application shall be:

> "reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures."

The Provision of Services Regulations (*SI 2009/2999*) (POSR 2009) implement the Services Directive in the UK (*regulation 18*). The POSR 2009 do not apply to healthcare, financial or transport services, amongst other sectors (*regulation 2(2)*). Competent authorities under the POSR 2009 include bodies conducting licensing and regulatory functions outside of the services exempted by regulation 2(2), and can include local authorities exercising statutory or discretionary authorisation schemes (see *Practice note, Provision of Services Regulations 2009: implications for businesses: Definitions* and *Legal update, LGA publishes updated guidance on local authority fee-setting for licences and approvals*).

The Local Government (Miscellaneous Provisions) Act 1982 (LGMPA 1982) provides that an applicant for the grant or renewal of a licence must pay a reasonable fee, as determined by the appropriate authority (*paragraph 19 of Schedule 3*).

FACTS

Westminster City Council was the licensing authority for local "sex establishments", including sex shops. The claimant (H) was the licensee of a sex shop in Westminster.

Upon application for a sex shop licence, the council charged a prospective licensee a fee that covered the cost of both:

- Processing licence applications for the grant or renewal of sex establishments (part 1). Part 1 fees were non-refundable in all cases. In 2011-12, part 1 fees were £2,667
- Managing the licensing regime, including the inspection of licensed premises, enforcement action and prosecuting unlicensed sex establishments (part 2). Part 2 fees were refundable to unsuccessful applicants. In 2011-12, part 2 fees were £26,435.

CASE HISTORY

The Court of Justice of the European Union's (CJEU) decision in these proceedings is the latest in a long sequence of cases in this matter.

H's case was that the council was not entitled to charge part 2 fees because these were unrelated to the processing of applications. The UK courts held, successively, as follows:

- In May 2012, the High Court found in favour of H and held that the council had only been permitted to cover the costs of its application process in the application fee. It had not been permitted to charge part 2 fees as part of the application process (see *Legal update, Restitutionary claim for licence fees for sex establishments to be repaid successful (High Court)*). The High Court ordered restitution of a particular portion of H's payment of historic authorisation fees to the council.
- In May 2013, the Court of Appeal (CoA) upheld the council's appeal of the High Court's decision in part but, in respect of the issues in the present proceedings, held that the POSR 2009 did not allow licence application

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fees to include licence regime enforcement costs. The council's application fees could not exceed its costs of administering the application, meaning that the costs of maintaining its licensing regime would have to be funded by alternative means (see *Legal update, Services Directive does make it unlawful for licence fees to reflect enforcement costs against unlicensed operators (Court of Appeal)*).

- In April 2015, the Supreme Court upheld the council's appeal and held that under domestic law it was permitted to charge both part 1 and part 2 fees upon a successful application. The Supreme Court considered that it was "unclear", however, whether including the part 2 fee as a condition of the application constituted a charge, even if it was refundable to unsuccessful applicants, that was contrary to Article 13(2). The application fee, in incorporating part 1 and part 2 fees, exceeded the costs of processing the application. It referred this question relating to the phasing of fees to the CJEU (see *Legal update, Services Directive does not prevent licensing bodies charging for running costs of licensing schemes (Supreme Court)*).

DECISION

The CJEU issued the following preliminary ruling:

> "applicants for a licence cannot be required to pay costs relating to the management and enforcement of the licensing regime when submitting their application".

This rendered the council's extant licensing application fee structure unlawful to the extent that it included part 1 and part 2 fees in the application, regardless of whether an applicant was successful and notwithstanding that part 2 fees were refundable to unsuccessful applicants.

The CJEU held, in particular, that the part 2 fees constituted a "charge" under Article 13(2), regardless of whether or not the part 2 fee was refundable if the application was rejected. The part 2 fee was, simply, a "financial obligation...which the applicant must pay for his application to be considered".

In order to comply with Article 13(2), any charges must be "reasonable and proportionate" to the cost of the authorisation procedures, and not exceed the cost of those procedures. The purpose of Article 13(2) was to facilitate participants' access to and exercise of service activities. The CJEU considered that including the part 2 fees in the council's application fee would not serve that aim.

The CJEU held, therefore, that Article 13(2) did not permit the charging of a part 2 "prefinance" fee at the time of submitting an application for the grant or renewal of authorisation. The application fee could only cover the costs of the application process itself. This was the case even if part of that fee was refundable if the application was unsuccessful.

COMMENT

The CJEU's judgment makes it clear that the authorisation schemes of "competent authorities" under the POSR 2009 can only charge an up-front fee that covers, and does not exceed, the cost of assessment and granting of a licence application. A competent authority cannot charge part 2 fees at the point of application, even if these are refundable to unsuccessful applicants.

The CJEU's judgment may require competent authorities to reconsider the mechanisms by which they seek part 2 fees in the application and authorisation process. Notably, if part 2 fees are charged at the point of grant rather than application, they may be subject to the restrictive requirements of Article 16 of the Services Directive (Freedom to provide services).

The Supreme Court's judgment will still be of considerable comfort to licensing or regulatory bodies in that it clarified that the POSR 2009 do not prohibit the charging of part 2 fees altogether and to successful applicants. The Court of Appeal's judgment had, until then, implied that competent authorities would be required to finance their enforcement activity by alternative means.

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The POSR 2009 do not apply to healthcare, financial or transport services, amongst others, but do apply to a range of other sectors. The proceedings before the CJEU were notable for the interventions of several UK regulators, including the Solicitors' Regulation Authority, the Local Government Association, the Law Society and the Care Quality Commission.

CASE

Hemming and others v Westminster City Council (Case C-316/15) (16 November 2016).

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