

LGA advice note - European Court of Justice ruling in Hemming v. Westminster case December 2016

Purpose

This note provides advice to LGA members on the issue of licence fees, following the recent European Court of Justice (ECJ) ruling in the Hemming v. Westminster case relating to licensing fees for sex establishments. The case relates to the correct interpretation of the 2006 EU Services Directive, which is applied in the UK by the Provision of Services Regulations 2009. However, the Directive does not apply to taxis or gambling activities.

Background

In April 2015, the Supreme Court ruled in favour of Westminster City Council in a long running dispute relating to the licence fees charged to a group of sex establishments in Westminster. The Supreme Court overturned an earlier Court of Appeal ruling by concluding that the Services Directive 2006 does not prevent licensing authorities from charging fees that are proportionate to the cost of administering and enforcing the relevant licensing framework, to those who receive licences.

However, the Supreme Court sought an opinion from the ECJ regarding how such fees should be levied. It identified two different approaches to charging fees:

- Whereby a council charged a fee upon application (covering the costs of authorisation procedures) and a subsequent fee to successful applicants (covering the cost of administering and enforcing the framework) - the 'type A' approach, or
- Where a council charged a single fee on application covering all costs, on the basis that the relevant proportion of the fee would be refunded to unsuccessful applicants – the 'type B' approach.

The Supreme Court found the type A approach of charging two fees is permissible under the Services Directive but considered that the type B approach of charging a single fee was more problematic.

European Court of Justice Ruling - implications

The ECJ published its ruling on the issue on 16 November 2016, following an earlier opinion by the Advocate General in July 2016.

It is important to note that the **ruling of the ECJ applies solely to the issue that was referred to it**, that is whether a type B approach to fee setting is compatible with the Services Directive.

The ECJ ruled that the type B approach of fee setting is not compatible with the Services Directive, arguing that the Directive '*precludes the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of a authorisation, part of which corresponds to the costs relating to the management and enforcement of the authorisation scheme concerned, even if that part is refundable if that application is refused.*'

Therefore, **licensing authorities will need to amend their fee structures to ensure that application fees relate solely to the cost of authorisation procedures** (ie, the costs associated with reviewing an application and granting / refusing a licence). **Under the type A approach, on which the Supreme Court ruling still holds, successful licence applicants should subsequently be charged an additional fee** relating to the costs of administering and enforcing the relevant licensing framework.

It is worth noting on this point that the Supreme Court view – which again still holds – was that there is nothing to stop licensing authorities making the payment of such a fee a condition of holding a licence. This would mean that authorities could withhold a licence until payment of the relevant fee had been received:

‘...nothing in article 13(2) precludes a licensing authority from charging a fee for the possession or retention of a licence, and making this licence conditional upon payment of such fee. Any such fee would however have to comply with the requirements, including that of proportionality, identified in section 2 of Chapter III and section 1 of Chapter IV. But there is no reason why it should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences.’

Wider issues

The opinion of the Advocate General and the commentary contained in the judgement of the ECJ went beyond the specific issues that had been referred to it, and make further challenges on the issue of licensing fees highly likely. Of particular concern, both the opinion and the commentary in the ruling appeared to reopen the issue of whether including the costs of administering and enforcing licensing regimes within licence fees is compatible with the Services Directive, with a strong indication that the Advocate General and ECJ believed that it is not.

While the Supreme Court’s view on this issue remains in place at the current time, meaning councils can continue to include these costs in their licence fees, it seems inevitable that there will be a further challenge on this issue at some point in future.

Claims for restitution

As has happened already, licensing authorities will inevitably receive claims for restitution following the ruling of the ECJ. Some opportunistic businesses and legal advisors are likely to seek reimbursement of the whole of previously paid type B licence fees, on the grounds that they have now been ruled incompatible with the Services Directive. However, the only legitimate claim for restitution from type B fees relates to the loss of interest that a licence holder can be deemed to have suffered by virtue of paying the entirety of the fee upfront, rather than the fee being split into two payments on application and on successfully being awarded a licence.

Claimants should be expected to identify what they think these realistically minimal costs amount to. However, in order to defend these claims, councils will need to be able to identify the proportions of their fees that related to authorisation procedures and to administration and enforcement.

Next steps

The LGA is holding discussions with Government about this issue, and will continue to emphasise the need for licensing regimes to be self-funding, a view which we believe Government shares. The long term outcome of this case is clearly closely linked to future negotiations on the terms of Britain's exit from the European Union, and this will therefore be a key priority for us in our work on Brexit.

We would be grateful if any council receiving a new challenge on licence fees and the issue of enforcement costs following the ECJ ruling could make us aware of this at rebecca.johnson@local.gov.uk



Briefing

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