Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

16 November 2016*

(Reference for a preliminary ruling — Freedom to provide services — Directive 2006/123/EC — Article 13(2) — Authorisation procedures — Concept of charges which may be incurred)

In Case C-316/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 22 June 2015, received at the Court on 26 June 2015, in the proceedings

The Queen, on the application of:

Timothy Martin Hemming, trading as 'Simply Pleasure Ltd',

James Alan Poulton,

Harmony Ltd,

Gatisle Ltd, trading as 'Janus',

Winart Publications Ltd,

Darker Enterprises Ltd,

Swish Publications Ltd,

v

Westminster City Council,

interveners:

The Architects' Registration Board,

The Solicitors' Regulation Authority,

The Bar Standards Board,

The Care Quality Commission,

The Farriers' Registration Council,

The Law Society,

* Language of the case: English.

The Bar Council,

The Local Government Association,

Her Majesty's Treasury,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan (Rapporteur) and D. Šváby, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Administrator,

having regard to the written procedure and further to the hearing on 1 June 2016,

after considering the observations submitted on behalf of:

— Mr Hemming, trading as 'Simply Pleasure Ltd', Mr Poulton, Harmony Ltd, Gatisle Ltd, trading as 'Janus', Winart Publications Ltd, Darker Enterprises Ltd and Swish Publications Ltd, by P. Kolvin, QC, T. Johnston, M. Hutchings, V. Wakefield, Barristers, A. Milner and S. Dillon, Solicitors,

— Westminster City Council, by H. Davies, acting as Agent, and D. Matthias, QC, N. Lieven, QC, J. Lean and C. Streeten, Barristers,

— the Netherlands Government, by M. Bulterman, B. Koopman and M. Gijzen, acting as Agents,

— the European Commission, by H. Tserepa-Lacombe and T. Scharf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 13(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376 p. 36, 'the Services Directive').

2 The request has been made in proceedings between Mr Timothy Martin Hemming, trading as 'Simply Pleasure Ltd', Mr James Alan Poulton, Harmony Ltd, Gatisle Ltd, trading as 'Janus', Winart Publications Ltd, Darker Enterprises Ltd and Swish Publications Ltd ('Mr Hemming and others') and Westminster City Council concerning the fee to be paid at the time of submitting an application for the grant or renewal of a sex establishment licence.

Legal context

EU law

3 Recitals 39, 42, 43 and 49 of the Services Directive are worded as follows:

‘(39) The concept of “authorisation scheme” should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.

…

(42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.

(43) One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the ‘red tape’ involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.

…

(49) The fee which may be charged by points of single contact should be proportionate to the cost of the procedures and formalities with which they deal. This should not prevent Member States from entrusting the points of single contact with the collection of other administrative fees, such as the fee of supervisory bodies.’

4 Article 1(1) of that directive provides:

‘This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.’

5 Article 4(6) of the Services Directive defines the 'authorisation scheme' as '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'.

6 Article 9 of that directive, entitled 'Authorisation schemes', provides in paragraph 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.'

7 Article 10 of the Services Directive, entitled 'Conditions for the granting of authorisation', provides:

'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.

...'.

8 Article 11 of that directive, entitled 'Duration of authorisation', provides:

'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.

...

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

9 Article 13 of the Services Directive, entitled 'Authorisation procedures', provides in paragraph 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.'

10 Article 14 of that directive, entitled 'Prohibited requirements', provides:

'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:

...

(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;

...'.

The law of the United Kingdom

11 Regulation 4 of the Provision of Services Regulations 2009 implementing the Services Directive provides:

'"authorisation scheme" means any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity …'.

12 Regulation 18(2) to (4) of those regulations provides:

'(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.'

13 Paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 provides that an applicant for the grant or renewal of a licence must pay a reasonable fee determined by the appropriate authority.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Westminster City Council is the authority with responsibility for issuing licences for sex establishments, including sex shops, in Westminster. Mr Hemming and others were, for the whole of the period at issue in the main proceedings, holders of sex shop licences in Westminster.

15 It is apparent from the order for reference that during that period a fee could be charged under Paragraph 19 of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 to cover the cost not only of the processing of applications for the grant or renewal of a sex establishment licence, but also of inspecting premises after the grant of licences for the purposes of 'vigilant policing' in order to detect and prosecute those who operate sex establishments without licences.

16 Consequently, an applicant for the grant or renewal of a sex establishment licence for any year had to pay a fee made up of two parts, one related to the administration of the application and non-refundable, and the other (considerably larger) for the management of the licensing regime and refundable if the application was refused. By way of example, for the year 2011-12, the total fee was GBP 29 102 (approximately EUR 37 700) for each applicant, of which GBP 2 667 (approximately EUR 3 455) related to the administration of the licence and was non-refundable, while the remaining GBP 26 435 (approximately EUR 34 245) related to the management of the licensing regime and was refundable if the application was refused.

17 Mr Hemming and others submit that Westminster City Council was not entitled to charge the second part of the fee. The corresponding sums, although refundable in the case of unsuccessful applicants, were payable on account of the costs of enforcing the licensing regime, which were unrelated to the costs of processing applications, and should have been borne out of Westminster City Council's general funds or required only from operators whose applications had been successful.

18 Mr Hemming and others succeeded in their actions before the United Kingdom courts. Those courts regarded Article 13(2) of the Services Directive as encompassing charges made to both successful and unsuccessful applicants, and as preventing a licensing authority from charging those granted licences as well as unsuccessful applicants, without distinction, the cost of investigating and prosecuting those operating sex establishments in Westminster without a licence.

19 Consequently, unsuccessful applicants could only be charged with the costs of dealing with their application, including investigating their suitability to operate a sex establishment, while successful applicants could only be charged with similar costs, and, on any renewal, with the costs of monitoring and enforcing their compliance with the obligations related to their licence in the past.

20 Seised of an appeal against the judgment of the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), the referring court found that the approach challenged before it would result in the licensing authority having to bear the costs of operating the scheme in question for the benefit of the operators obtaining licences, since the authority could not require an applicant to contribute to the costs of enforcing that scheme against the operators of unlicensed sex establishments, even though such enforcement was for the benefit of the licensed establishments. To that end, the authority would have to have recourse to its general funds.

21 The referring court is uncertain as to what the remedy would be for other regulatory or professional bodies having recourse to similar regimes, which might have no general funds and no ability to raise funds in any such way.

22 Although the referring court is convinced that a regime under which an applicant must pay a further fee to cover the costs of the running and enforcement of the licensing regime when the application is successful is consistent with Article 13(2) of the Services Directive, it is uncertain whether the regime applied by Westminster City Council is compatible with that article.

23 That said, the referring court notes that it has no evidence before it to conclude that the requirement to accompany an application with a payment which is refundable if the application fails would be likely to dissuade operators from making any application for a sex establishment licence.

24 Lastly, the referring court asks whether having to advance a sum, in order to await a decision to grant or refuse a licence, is in fact a charge for a licence applicant.

25 In those circumstances the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘Where an applicant for the grant or renewal of a sex establishment licence has to pay a fee made up of two parts, one related to the administration of the application and non-returnable, the other for the management of the licensing regime and refundable if the application is refused:

(1) does the requirement to pay a fee including the second refundable part mean, as a matter of European law and without more, that the respondents incurred a charge from their applications which was contrary to article 13(2) of [the Services Directive] in so far as it exceeded any cost … of processing the application?

(2) does a conclusion that such a requirement should be regarded as involving a charge — or, if it is so to be regarded, a charge exceeding the cost … of processing the application — depend on the effect of further (and if so what) circumstances, for example:

(a) evidence establishing that the payment of the second refundable part involved or would be likely to involve an applicant in some cost or loss,

(b) the size of the second refundable part and the length of time for which it is held before being refunded, or

(c) any saving in the costs … of processing applications (and so in their non-refundable cost) that results from requiring an up-front fee consisting of both parts to be paid by all applicants?’

Consideration of the questions referred

26 By its questions, which must be examined together, the referring court asks, in essence, whether Article 13(2) of the Services Directive must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of 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 the application is refused.

27 According to the Court's settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, judgment of 14 July 2016, *Verband Sozialer Wettbewerb*, C-19/15, EU:C:2016:563, paragraph 23).

28 In that regard, it must be noted at the outset that whether the fee payable by an applicant is refundable when his licence application is rejected has no bearing on ascertaining whether there is a charge within the meaning of Article 13(2) of the Services Directive. The fact that a fee must be paid constitutes a financial obligation, and therefore a charge, which the applicant must pay in order for his application to be considered, notwithstanding the fact that the amount may subsequently be refunded if that application is rejected. That is true all the more so given that the objective of Article 13(2), read in the light of recitals 39, 42 and 43 of that directive, is to preclude certain aspects of the authorisation procedures and formalities from discouraging access to services activities.

29 In order to comply with Article 13(2) of the Services Directive, the charges referred to must, in the words of that provision, be reasonable and proportionate to the cost of the authorisation procedures and not exceed the cost of those procedures.

30 Since the amount of such charges may, in the light of those requirements, in no case exceed the cost of the authorisation procedure in question, it must be examined whether the costs relating to the management and enforcement of the authorisation scheme as a whole may be covered by the concept of the 'cost of the procedures'.

31 While the Court has not yet had occasion to interpret that concept in the context of the Services Directive, it has clarified, in another context, that in calculating the amount of duties paid by way of fees or dues, the Member States are entitled to take account, not only of the material and salary costs which are directly related to the effecting of the transactions in respect of which they are incurred, but also of the proportion of the overheads of the competent authority which can be attributed to those transactions (judgment of 2 December 1997, *Fantask and Others*, C-188/95, EU:C:1997:580, paragraph 30).

32 In addition, the Court has clarified — indeed, in relation to a provision of EU law expressly allowing the costs relating to the implementation, management and monitoring of a regime for issuing individual licences to be taken into account in calculating administrative costs — that the costs taken into account may not include the expenditure linked to the authority in question's general supervisory activities (see, to that effect, judgment of 19 September 2006, *i-21 Germany and Arcor*, C-392/04 and C-422/04, EU:C:2006:586, paragraphs 34 and 35).

33 That consideration applies *a fortiori* as regards Article 13(2) of the Services Directive which, first, is directed only at the 'cost of the procedures' and, secondly, pursues the aim of facilitating access to service activities. That aim would not be served by a requirement to prefinance the costs of the management and enforcement of the authorisation scheme concerned, including, inter alia, the costs of detecting and prosecuting unauthorised activities.

34 Consequently, the answer to the questions referred is that Article 13(2) of the Services Directive must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of 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.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 13(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, the requirement for the payment of a fee, at the time of submitting an application for the grant or renewal of 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.

Bay Larsen Vilaras Malenovský

Safjan Švaby

Delivered in open court in Luxembourg on 16 November 2016.

A. Calot Escobar
Registrar

L. Bay Larsen
President of the Third Chamber