OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 28 July 2016 (1)

(Case C-316/15)

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

(Request for a preliminary ruling from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Freedom to provide services — Authorisation procedures — Concept of 'charges which may be incurred')

I – Introduction

1. This request for a preliminary ruling gives the Court a first opportunity to interpret 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 (2) ('the Services Directive'). It concerns the payment of a fee for the grant or renewal of a 'sex establishment' (3) licence in the City of Westminster (London, United Kingdom), a fee that is made up of two parts, one related to the administration of the application which is non-returnable if the application is refused, and the other (much higher) related to the management of the licensing regime which is refundable if the application is refused.

2. The crux of this case is essentially whether the requirement to pay the second part of the fee is consistent with Article 13(2) of the Services Directive. To that effect, the case goes beyond the strict confines of the grant and renewal of sex shop licences, as illustrated by the fact that several professional associations, such as those representing lawyers and architects, intervened in the proceedings before the national court.

II – Legal framework

A – *EU law*

3. In Chapter I entitled ‘General provisions’, the Services Directive provides:

‘Article 1

Subject matter

1. 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.

…

Article 2

Scope

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

…

Article 4

Definitions

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

…

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 safety; 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;

…’

4. Section 1, entitled ‘Authorisations’, of Chapter III, entitled ‘Freedom of establishment for providers’, of the Services Directive states:

‘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.

…

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.

…

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.

…’

5. Section 1, entitled ‘Freedom to provide services and related derogations’, of Chapter IV, entitled ‘Free movement of services’, of the Services Directive states:

‘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.

…

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 [EU] law, its rules on employment conditions, including those laid down in collective agreements.

…'

B – *The law of the United Kingdom*

6. The United Kingdom of Great Britain and Northern Ireland transposed the Services Directive into domestic law by means of the Provision of Services Regulations 2009 (SI 2009/2999; 'the 2009 Regulations').

7. Under regulation 4 of those regulations, '"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'.

8. Regulation 18(2) to (4) of the 2009 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.'

9. The 2009 Regulations did not make any material amendments to the Local Government (Miscellaneous Provisions) Act 1982 ('the 1982 Act'), Schedule 3 to which, entitled 'Control of Sex Establishments', provides, in paragraphs 6, 8, 9, 12, 17, 19 and 23 thereof, as follows:

‘Requirement for licences for sex establishments

6 (1) Subject to the provisions of this Schedule, no person shall in any area in which this Schedule is in force use any premises, vehicle, vessel or stall as a sex establishment except under and in accordance with the terms of a licence granted under this Schedule by the appropriate authority.

…

Grant, renewal and transfer of licences for sex establishments

8 Subject to paragraph 12(1) below, the appropriate authority may grant to any applicant, and from time to time renew, a licence under this Schedule for the use of any premises, vehicle, vessel or stall specified in it for a sex establishment on such terms and conditions and subject to such restrictions as may be so specified.

9 (1) Subject to paragraphs 11 and 27 below, any licence under this Schedule shall, unless previously cancelled under paragraph 16 or revoked under paragraph 17(1) below, remain in force for one year or for such shorter period specified in the licence as the appropriate authority may think fit.

(2) Where a licence under this Schedule has been granted to any person, the appropriate authority may, if they think fit, transfer that licence to any other person on the application of that other person.

…

Refusal of licences

12 (1) A licence under this Schedule shall not be granted—

(a) to a person under the age of 18; or

(b) to a person who is for the time being disqualified under paragraph 17(3) below; or

(c) to a person, other than a body corporate, who is not resident in the United Kingdom or was not so resident throughout the period of six months immediately preceding the date when the application was made; or

(d) to a body corporate which is not incorporated in the United Kingdom; or

(e) to a person who has, within a period of 12 months immediately preceding the date when the application was made, been refused the grant or renewal of a licence for the premises, vehicle, vessel or stall in respect of which the application is made, unless the refusal has been reversed on appeal.

(2) Subject to paragraph 27 below, the appropriate authority may refuse—

(a) an application for the grant or renewal of a licence on one or more of the grounds specified in sub-paragraph (3) below;

…

(3) The grounds mentioned in sub-paragraph (2) above are—

(a) that the applicant is unsuitable to hold the licence by reason of having been convicted

of an offence or for any other reason;

(b) that if the licence were to be granted, renewed or transferred the business to which it relates would be managed by or carried on for the benefit of a person, other than the applicant, who would be refused the grant, renewal or transfer of such a licence if he made the application himself;

(c) that the number of sex establishments in the relevant locality at the time the application is made is equal to or exceeds the number which the authority consider is appropriate for that locality;

(d) that the grant or renewal of the licence would be inappropriate, having regard—

(i) to the character of the relevant locality; or

(ii) to the use to which any premises in the vicinity are put; or

(iii) to the layout, character or condition of the premises, vehicle, vessel or stall in respect of which the application is made.

(4) Nil may be an appropriate number for the purposes of sub-paragraph (3)(c) above.

…

Revocation of licences

17 (1) The appropriate authority may, after giving the holder of a licence under this Schedule an opportunity of appearing before and being heard by them, at any time revoke the licence—

(a) on any ground specified in sub-paragraph (1) of paragraph 12 above; or

(b) on either of the grounds specified in sub-paragraph (3)(a) and (b) of that paragraph.

…

Fees

19 An applicant for the grant, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority.

…

Offences relating to persons under 18

23 (1) A person who, being the holder of a licence for a sex establishment—

(a) without reasonable excuse knowingly permits a person under 18 years of age to enter the establishment; or

(b) employs a person known to him to be under 18 years of age in the business of the establishment,

shall be guilty of an offence.

…'

III – The dispute in the main proceedings and the questions referred

10. Under Schedule 3 to the 1982 Act, Westminster City Council is the authority with responsibility for issuing licences for the operation of sex shops in the City of Westminster. During the entire period in question, Mr Timothy Martin Hemming and James Alan Poulton, Harmony Ltd, Gatisle Ltd, Winart Publications Ltd, Darker Enterprises Ltd and Swish Publications Ltd ('Mr Hemming and others') were licensed to operate such establishments in that area.

11. Under paragraph 19 of Schedule 3 to the 1982 Act, an applicant for the grant or renewal of a sex shop licence is required to pay the appropriate authority a fee, which in this case is made up of two parts, one related to the administration of the application which is non-returnable if the application is refused, and the other (much higher) related to the management of the licensing regime (4) which is refundable if the application is refused.

12. In September 2004, Westminster City Council set the total amount of the fee in question for the period between 1 February 2005 and 31 January 2006 at GBP 29 102 (approximately EUR 43 435), of which GBP 2 667 (EUR 3 980) related to the administration of the licence and was non-returnable, while GBP 26 435 (approximately EUR 39 455) related to the management of the licensing regime and was refundable if the application was refused. It decided that the total amount of the fee would be reviewed annually.

13. Westminster City Council did not subsequently review or vary that amount, with the result that the total fee for the grant or renewal of a sex shop licence remained set at GBP 29 102 for the entire period between 1 October 2004 and 31 December 2012.

14. By their action for judicial review, Mr Hemming and others challenge the lawfulness of the fees imposed on them by Westminster City Council between 2006 and 2012.

15. As regards that entire period, Mr Hemming and others argue that, since Westminster City Council failed to determine the amount of the fee annually, the demands for payment of the fee in question were *ultra vires*. They also submit that, during the relevant period, Westminster City Council did not adjust the amount of the fee on the basis of the deficits or surpluses generated each year by payment thereof having regard to the costs of running the authorisation scheme.

16. As regards 2011 and 2012 in particular, Mr Hemming and others contend that Westminster City Council did not have the power, without contravening the Services Directive and the 2009 Regulations which came into force on 28 December 2009, (5) to include in the fee for securing or renewing a licence the costs of managing and enforcing the licensing regime, particularly the cost of investigating and prosecuting unlicensed sex shop operators.

17. On 16 May 2012, Mr Justice Keith held that Westminster City Council had not determined the fee for any of the years between 2006 and 2012; that in order to determine the amount of the fee in question, Westminster City Council ought to have taken into account, for each year, the deficits or surpluses, as the case may be, from the fee income having regard to the cost of the authorisation scheme; and that, since the entry into force of the 2009 Regulations, Westminster City Council had not had the power to include in the fees for granting or renewing sex shop licences the cost of investigating and prosecuting unlicensed operators of such establishments. (6)

18. On 12 June 2012, Mr Justice Keith also ordered Westminster City Council to set a reasonable fee for each of the years of the relevant period and to refund to Mr Hemming and others the difference between the fee paid and that reasonable fee. (7)

19. Westminster City Council appealed against the judgments of Mr Justice Keith before the Court of Appeal (England & Wales) (United Kingdom), which dismissed the appeal in part (as regards the interpretation and application of the Services Directive) and allowed it in part (as

regards the method for calculating the fees to be refunded). (8)

20. On 21 February 2014, the Supreme Court of the United Kingdom granted Westminster City Council leave to appeal against the judgment of the Court of Appeal (England & Wales).

21. The appeal before the Supreme Court of the United Kingdom essentially concerns whether Westminster City Council's practice of including the cost of investigating and prosecuting unlicensed sex shop operators in the fees for operating or continuing to operate a sex shop, at the time an application for the grant or renewal of a licence is made, is consistent with regulation 18(4) of the 2009 Regulations and Article 13(2) of the Services Directive.

22. Westminster City Council put forward two alternative arguments. (9) In the first alternative, it submitted that the concept of 'authorisation procedures and formalities' in Article 13(2) of the Services Directive (and regulation 18 of the 2009 Regulations) can be interpreted widely enough to cover all aspects of the licensing regime, including the cost of its enforcement against unlicensed operators. In the second alternative, it argued that Article 13(2) of the Services Directive (and therefore regulation 18) is concerned only with charges related to authorisation procedures and their cost, which does not cover the cost of investigating and prosecuting unlicensed sex shop operators. In those circumstances, the fee corresponding to that cost is not contrary to Article 13(2) of the Services Directive because it does not fall within its scope.

23. In its judgment of 22 June 2015, the Supreme Court of the United Kingdom first of all confirmed, as a matter of domestic law, the principle established in R *v Westminster City Council, ex parte Hutton* (1985) 83 LGR 516, according to which the fees charged under paragraph 19 of Schedule 3 to the 1982 Act could reflect not only the cost of processing applications for the grant or renewal of a sex establishment licence, but also the cost of investigating and prosecuting unlicensed operators of such establishments. (10)

24. Next, it had to decide whether that position under domestic law was compatible with EU law. In that context, the Supreme Court of the United Kingdom rejected the first alternative means of interpreting Article 13(2) of the Services Directive (and regulation 18) put forward by Westminster City Council, finding that those provisions were only concerned with authorisation procedures and formalities imposed on an applicant at the stage when he is seeking permission to access or exercise a service activity. (11)

25. According to the referring court, Article 13(2) of the Services Directive is concerned not with fees which may be required to be paid for the possession, retention or renewal of a licence, once the authorisation stage is satisfactorily past, but exclusively with fees related to the authorisation procedures and their cost. (12) However, there is nothing in the directive to permit the inference that the fee should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing regime, including the cost of proceedings against those operating sex establishments without licences. (13) Nonetheless, any such fee would have to comply with the requirements referred to in Articles 14 to 18 of that directive, including the principle of proportionality. (14)

26. On that basis, the Supreme Court of the United Kingdom distinguished between two types of authorisation scheme. Under type A schemes, the applicant has to pay, on making the application, the costs of the authorisation procedures and formalities and, on the application being successful, a further fee to cover the cost of running and enforcing the licensing regime. (15)

27. Under type B schemes, the applicant has to pay, on making the application, the costs of the authorisation procedures and formalities, as well as a further fee to cover the cost of running and enforcing the licensing regime, in the knowledge however that such fee is refundable if his application is rejected. (16)

28. As regards type A schemes, the Supreme Court of the United Kingdom held that if Article 13(2) of the Services Directive did not prevent an authority with responsibility for issuing licences such as those at issue in the main proceedings from levying on an applicant who has secured such a licence charges enabling the authority to recover the full cost of running and enforcing the scheme, it follows that that provision would not preclude the imposition of those charges on the application being successful. In its opinion, the requirement to pay a fee for the possession or retention of a licence, if the application is successful, does not turn that requirement into an authorisation procedure or formality or into a charge incurred from the application. (17)

29. The Supreme Court of the United Kingdom therefore held that a type A authorisation procedure was consistent with regulation 18 of the 2009 Regulations and with Article 13(2) of the Services Directive. (18)

30. However, since the authorisation scheme operated by Westminster City Council is a type B scheme, the court focused on two arguments put forward by Mr Hemming and others.

31. Their first argument was that the requirement to pay a fee corresponding to the cost of managing and enforcing the authorisation scheme, even if refundable on refusal of the grant or renewal of the licence, could have a dissuasive effect contrary to Article 13(2) of the Services Directive. The referring court dismissed that argument on the ground that the documents before it contained no facts or evidence supporting the conclusion that the requirement in question could or would be likely to dissuade Mr Hemming and others or other applicants from making an application for a sex shop licence. (19)

32. The second argument put forward by Mr Hemming and others was that even a refundable fee was a charge and infringed Article 13(2) of the Services Directive since it exceeded the cost of the authorisation procedures borne by Westminster City Council.

33. According to the Supreme Court of the United Kingdom, the question is therefore whether the requirement to pay a fee that includes a part corresponding to the cost of managing and enforcing the authorisation scheme, which is refundable if the application is refused, is a 'charge' contrary to Article 13(2) of the Services Directive, in so far as it exceeds the cost of processing the application. It is with respect to that issue that the Supreme Court of the United Kingdom referred 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 to Westminster City Council 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 to Westminster City Council 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 cost to Westminster City Council 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?'

IV – Procedure before the Court

34. This request for a preliminary ruling was lodged at the Court Registry on 26 June 2015. Mr Hemming and others, Westminster City Council, the Netherlands Government and the European Commission submitted written observations.

35. Under Article 61(1) of the Rules of Procedure of the Court, Westminster City Council was invited to answer the Court's questions in writing, which it did on 29 April 2016.

36. At the hearing held on 1 June 2016, Mr Hemming and others, Westminster City Council, the Netherlands Government and the European Commission submitted oral observations.

V – Assessment

A – *Preliminary remarks*

37. As is apparent from recitals 5 to 7 of the Services Directive, the aim of that directive is to remove barriers to the freedom of establishment and the free movement of services enjoyed by providers and recipients of services.

38. Under the rule laid down in Article 9(1) of the Services Directive, 'Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme' unless three cumulative conditions stipulated in points (a), (b) and (c) of that provision are met, including 'the need for an authorisation scheme [to be] justified by an overriding reason relating to the public interest'.

39. Similarly, as regards the duration of authorisations, Article 11(1) of the Services Directive provides that 'an authorisation granted to a provider shall not be for a limited period', subject to three exceptions set out in points (a), (b) and (c) of that provision, including where 'the number of available authorisations is limited by an overriding reason relating to the public interest'.

40. As a rule, it is thus not necessary to secure an authorisation in order to gain access to the provision of a service and, in any event, that authorisation must not be for a limited period. In this case, Schedule 3 to the 1982 Act makes the opening of a sex shop in the City of Westminster conditional on securing an annual authorisation.

41. To that effect, it departs from the principles laid down in Article 9(1) and Article 11(1) of the Services Directive, although Westminster City Council did not put forward any overriding reason relating to the public interest to justify that derogation from the rule.

42. The existence of an overriding reason relating to the public interest to justify an authorisation scheme in the light of Articles 9 and 11 of the Services Directive cannot be presumed, as Westminster City Council argued before the referring court, (20) but must be expressly pleaded and substantiated by the competent authorities of the relevant Member State.

43. However, I note that paragraph 23 of Schedule 3 to the 1982 Act makes it a criminal offence for an authorised sex shop operator to permit a person under 18 years of age to enter his establishment. Furthermore, a conviction for such an offence is sufficient, under paragraph 12(3)(a) of Schedule 3 to the 1982 Act, to refuse to renew such an authorisation.

44. It might therefore be said that the protection of minors is the overriding reason relating to the

public interest within the meaning of Article 9(1)(b) of the Services Directive, but that does not, in itself, justify the fact that paragraph 9(1) of Schedule 3 to the 1982 Act limits the duration of the authorisation to one year.

45. Article 11(1) of the Services Directive provides that the duration of an authorisation may be limited only if 'the authorisation is being automatically renewed or is subject only to the continued fulfilment of requirements', if 'the number of available authorisations is limited by an overriding reason relating to the public interest', (21) or if 'a limited authorisation period can be justified by an overriding reason relating to the public interest'.

46. At the hearing held on 13 January 2015 before the referring court, Westminster City Council relied on Article 11(1)(b) of the Services Directive to justify the existence of the authorisation scheme at issue in the main proceedings, stating that 'the scheme under the 1982 Act in Westminster is one where there is a *quota of authorisations* … for sex shops, there is a *quota*'. (22)

47. Although it is true that the number of sex shop authorisations for the period between 2003 and 2012 was subject to a quota which fluctuated during that period between 14 and 20, (23) I fail to see why those authorisations had to be limited to one year, particularly because the competent authority is always able, under paragraph 17(1)(b) of Schedule 3 to the 1982 Act, to revoke the authorisation if the holder is convicted of a criminal offence, including the offence specified in paragraph 23 of Schedule 3 to the 1982 Act.

48. I also note that paragraph 12(1) of Schedule 3 to the 1982 Act, concerning the grounds for refusing authorisations, contains in paragraphs (c) and (d) residence and nationality requirements of the kind prohibited by Article 14 of the Services Directive.

49. Even though those considerations do not fall within the scope of the questions referred for a preliminary ruling, they show that Schedule 3 to the 1982 Act, adopted more than 20 years before the Services Directive and not updated by the 2009 Regulations, raises problems of compatibility with the Services Directive other than those expressly mentioned in the main proceedings.

B – *The first question referred*

1. Introduction

50. By its first question, the referring court enquires whether the requirement to pay a fee for the grant or renewal of a sex shop authorisation — a fee made up of two parts, one related to the administration of the application which is non-returnable if the application is refused, and the other related to the management of the licensing regime which is refundable if the application is refused — constitutes a charge contrary to Article 13(2) of the Services Directive. (24)

51. It should be noted from the outset that a fee corresponding to the cost of the administration of an application for authorisation which is non-returnable if the application is rejected is, quite clearly, consistent with Article 13(2) of the Services Directive. This is not disputed by any of the parties or interveners before the Court.

52. As indicated in points 26 and 27 of this Opinion, the referring court distinguished between two types of scheme depending on whether the second part of the fee set aside to finance the management and enforcement of the licensing regime has to be paid only on the application for authorisation being successful (type A) or when the application is made, with a refund if the application is refused (type B).

53. In paragraph 26 of the request for a preliminary ruling, (25) the referring court held that type A authorisation schemes were compatible with Article 13(2) of the Services Directive. Thus, the questions referred are concerned only with type B authorisation schemes which, as a matter of fact,

is the type used by Westminster City Council.

54. Of course, the distinction between the type A and type B authorisation schemes is only relevant if, in the type A scheme, the fee corresponding to the cost of managing and enforcing the authorisation scheme is not a condition for the authorisation to provide the service in question. If, on the other hand, the competent authority is entitled to delay the grant of the licence, thereby preventing the provision of the service in question until such time as the fee has been paid, the scheme would clearly be a type B authorisation scheme, even if the fee is not due when the application is made.

55. According to the referring court's description of type A authorisation schemes, the second part of the fee is payable only on the application being 'successful', which suggests that the authorisation is not conditional on the fee being paid beforehand. Such a requirement would not fall within the scope of Article 13 of the Services Directive and, as the case may be, could be imposed only if the conditions laid down in other provisions of the Services Directive were met. (26)

56. That necessitates an examination as to whether such a requirement could be regarded as a 'requirement' as defined in Article 4(7) of the Services Directive, since Article 16(1) thereof provides that Member States may make access to or the exercise of a service activity in their territory subject to compliance with 'requirements'.

57. Article 4(7) of the Services Directive defines 'requirement' as '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'.

58. If the answer were in the affirmative, the fee would nevertheless, under Article 16(1) of the Services Directive, have to be non-discriminatory with regard to the nationality or residence of the provider; necessary in order to uphold public policy and public security or to protect public health or the environment; and proportionate to the objective pursued.

59. Without prejudice to a definitive answer in that regard, I would like to offer some remarks on this issue, in particular on the reasoning underpinning paragraph 12 of the request for a preliminary ruling, according to which the cost of investigating and prosecuting unlicensed sex shop operators must be borne by authorisation holders because it is they who benefit from the fact that access to the service is restricted by a quota of authorisations.

60. Advocates of that line of reasoning view authorisation schemes as a means of ensuring a 'monopoly' to the advantage of certain operators who form part of a 'club' to which access is restricted and subject to payment of a fee enabling members to benefit from the certainty that membership of the 'club' will remain restricted. That seems to be at odds with the aim of the Services Directive to establish 'a competitive market in services' by facilitating 'the access to, or the exercise of, a service activity'. (27)

2. Compatibility of type B authorisation schemes with Article 13(2) of the Services Directive

61. The remainder of my analysis is concerned with the question whether the second part of the fee which Westminster City Council charged to Mr Hemming and others when they submitted their applications for authorisation, corresponding to the cost of managing and enforcing the authorisation scheme, constitutes a 'charge' within the meaning of Article 13(2) of the Services Directive. The referring court expressed doubts as regards this question, as the fee is refundable if the application is refused. (28)

62. I note that paragraph 19 of Schedule 3 to the 1982 Act imposes the obligation to pay the fee on the '*applicant* for the grant, renewal or transfer of a licence' (my emphasis) rather than on the

'licence holder'. Put another way, an application for authorisation will not be considered unless the fee is paid when the application is made, as Westminster City Council acknowledged in paragraph 15 of its written observations. (29) Whether such payment amounts to a deposit (as Westminster City Council claims) or whether Westminster City Council irreversibly becomes the owner of that sum is irrelevant.

63. Thus, contrary to what Westminster City Council claims, the fee in question constitutes a charge (namely the compulsory payment of a given amount) which, under Article 13(2) of the Services Directive, the applicants 'incur' from authorisation procedures and formalities.

64. In order for a charge such as that at issue in the main proceedings to be consistent with Article 13(2) of the Services Directive, it must be 'reasonable and proportionate to the cost of the authorisation procedures in question and [must] not exceed the cost of the procedures'.

i) A charge which is '… proportionate to the cost of the authorisation procedures … and [which must] not exceed the cost of the procedures'

65. In order to settle this point, the first question to be asked is whether the costs of managing and enforcing the authorisation scheme are included in the concept of 'cost of the [authorisation] procedures'.

66. The Netherlands Government submits that the 'cost of the authorisation procedures' covers both the costs of processing the application for authorisation and the costs of managing the authorisation scheme.

67. In that connection, it relies on a statement made by the Commission in May 2006 according to which the cost of the procedures includes 'costs incurred in the management, control and enforcement' (30) of the authorisation scheme.

68. That statement is contrary to the stance taken by the Commission in its written observations, in which it argued that a fee covering the cost of prosecuting unlicensed sex shop operators cannot be regarded as falling within the scope of authorisation procedures, the processing of applications for authorisation and related costs.

69. At the hearing, the Commission denied that there was any contradiction between its 2006 statement and its written observations, arguing that an authority with responsibility for issuing authorisations may require applicants to pay the costs of managing, controlling and enforcing an authorisation scheme provided that the costs are certain and actual, but that in this case the cost of investigating and prosecuting unlicensed sex shop operators were not 'costs actually incurred'.

70. In my view, the expression 'cost of the procedures' appearing at the end of the second sentence of Article 13(2) of the Services Directive refers to the expression 'cost of the authorisation procedures' used earlier in that sentence which, in turn, refers to the 'authorisation procedures and formalities' mentioned in the first sentence of that provision.

71. I note that although the expression 'authorisation procedures and formalities' is not defined in the Services Directive, it must be distinguished from 'authorisation scheme' as defined in Article 4(6) of that directive.

72. During the hearing, Westminster City Council argued that the second part of the fee in question covered the cost of investigating and prosecuting both unlicensed sex shop operators and licensed sex shop operators who infringed the terms of their authorisation.

73. Even if the cost of investigating and prosecuting licence holders could form part of the cost of the authorisation scheme, (31) the cost of investigating and prosecuting third parties operating

sex shops without a licence could not, because those activities do not form part of the authorisation scheme.

74. Furthermore, it is impossible to see how the management and the enforcement of an authorisation scheme, even in so far as they are directed at offences committed by authorisation holders, could form part of 'authorisation procedures and formalities', because these are not activities which lead to the authorisation but rather activities which follow it. As regards action to combat offences committed by unlicensed sex shop operators, this has an even more tenuous link to 'authorisation procedures and formalities' and is directed at the conduct of third parties as opposed to authorisation holders.

75. It is therefore apparent from the wording of the second sentence of Article 13(2) of the Services Directive that the costs of processing an application for authorisation cannot include costs other than those incurred by the competent authority in connection with the administration of the application for authorisation. They cannot therefore exceed what is needed to cover the actual costs of the procedure leading to that authorisation.

76. The judgment of 24 March 2011 in *Commission* v *Spain* (C-400/08, EU:C:2011:172) fully supports my interpretation of Article 13(2) of the Services Directive. The fees at issue in that judgment were calculated on the basis of the overall cost of the administration, in 1994 and 1995, of applications for authorisation to establish shopping centres divided by the number of square metres referred to in each application.

77. It is clear that those fees did not take account of factors postdating the authorisation procedure, such as the costs of managing and enforcing the authorisation scheme. This is what led the Court to find, in paragraph 129 of its judgment of 24 March 2011 in *Commission* v *Spain* (C-400/08, EU:C:2011:172), that the amount of the fee was 'reasonably accurate … and [was] likely to deviate little from actual costs in individual cases'.

78. Mr Hemming and others relied on that judgment before the Court of Appeal (England & Wales) (32) which, based on that decision, held — correctly in my view — that Member States could not impose charges that went beyond the costs of the authorisation and registration procedure. (33)

79. In this case, it is common ground that the total amount of the fee in question not only significantly exceeds the cost of the administration of applications for the grant or renewal of a sex shop licence, but also, and more importantly, includes costs that were not incurred by Westminster City Council on account of the authorisation procedure, namely the cost of investigating and prosecuting unlicensed sex shop operators.

ii) A 'reasonable' charge

80. I will examine this point for the sake of completeness since the requirement that the charge be 'reasonable' is in addition to the requirement that it be 'proportionate … and … not exceed the cost of the procedures', which I have found not to be met.

81. Although it is true, as the referring court found, that the Court has not yet had the opportunity to rule on the interpretation of Article 13(2) of the Services Directive, (34) it did have occasion in the case giving rise to the judgment of 24 March 2011 in *Commission* v *Spain* (C-400/08, EU:C:2011:172) to consider the compatibility with the freedom of establishment of fees introduced by Spanish legislation before the Services Directive came into force which were charged for the processing of applications for authorisation to establish shopping centres in Catalonia (Spain).

82. Given that the amount of those fees had originally been calculated by dividing the costs related to procedures conducted in 1994 and 1995 by the number of square metres referred to in the

applications concerned and had thereafter been updated in line with inflation, the Commission had argued that those fees were disproportionate because they were unrelated to the cost of the procedure for issuing retail authorisations. (35)

83. The Court rejected that argument, holding that 'that method of calculating the fees due reflects overall costs *reasonably accurately and is likely to deviate little from actual costs in individual cases*. In addition, that method of calculation, corresponding to an amount per square metre, has the advantage of allowing the cost of the procedure to be estimated beforehand in complete transparency.' (36)

84. However, the Court did not lay down specific criteria permitting an assessment as to whether a charge or fee is reasonable, as that judgment was more concerned with the proportionality of the fee which must not exceed the actual costs of the authorisation procedure.

85. In my view, in order for a charge to be 'reasonable' within the meaning of Article 13(2) of the Services Directive, there must be a logical explanation for the elements which are taken into account for the purpose of calculating the fee and the calculation method. (37)

86. The Court asked Westminster City Council to provide a detailed written explanation of the factors which were taken into account to arrive at the fees of GBP 2 667 and GBP 26 435 as well as the calculation method used. Westminster City Council answered that question by producing two witness statements of its *service manager — noise and licensing* which it had submitted to the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), together with the documents annexed thereto.

87. Westminster City Council explained that, according to that testimony, the costs of the authorisation scheme were divided into three categories, namely direct costs (such as printing and advertising); costs related to authorisations but falling under services of Westminster City Council other than its licensing service (such as human resources and legal services); and the costs of enforcing the authorisation scheme.

88. However, in its written reply to the question put to it by the Court, Westminster City Council did not explain how, based on the total budget for the sex shop authorisation scheme, it arrived at the fees of GBP 2 667 and GBP 26 435 charged for an application for the grant or renewal of a sex shop licence.

89. At the hearing, Westminster City Council was unable to explain why the fee in issue had remained unchanged during the relevant period and why it seemingly had not taken account of a number of factors, such as the total fee income as well as any deficits or surpluses having regard to the actual cost of managing and enforcing the authorisation scheme which, according to Westminster City Council, varied from year to year. Nor does Westminster City Council seem to have taken account of the income generated by fines and other financial penalties imposed on licensed and unlicensed sex shop operators. (38)

90. For those reasons, the second part of the fee at issue in this case is not, in my view, a 'reasonable' charge.

91. Accordingly, subject to a more detailed analysis which could be conducted by the referring court, I propose that the Court answer the first question by declaring that Article 13(2) of the Services Directive must be interpreted as precluding the competent authority of a Member State from taking into account, when calculating the fee due for the grant or renewal of an authorisation, the cost of managing and enforcing the authorisation scheme, even if the part corresponding to that cost is refundable where the application for the grant or renewal of the authorisation in question is refused.

C – *The second question referred*

92. By its second question, the referring court asks if the answer to the first question depends on other circumstances, such as whether the part of the fee corresponding to the cost of managing and enforcing the authorisation scheme involves the applicants for authorisation suffering some cost or loss; the amount of that part and the length of time for which it is held; and any saving in the cost to the competent authority of processing applications for authorisation that results from the payment of that part of the fee in advance.

93. In view of my answer to the first question, it is not necessary to reply to the second question because it is clearly apparent from that answer that the very idea of requiring authorisation applicants to pay a fee a part of which relates to the cost of managing and enforcing the authorisation scheme is a charge contrary to Article 13(2) of the Services Directive.

VI – Conclusion

94. I therefore propose that the Court should give the following answer to the questions referred for a preliminary ruling by the Supreme Court of the United Kingdom:

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 the competent authority of a Member State from taking into account, when calculating the fee due for the grant or renewal of an authorisation, the cost of managing and enforcing the authorisation scheme, even if the part corresponding to that cost is refundable where the application for the grant or renewal of the authorisation in question is refused.

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1 – Original language: French.

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2 – OJ 2006 L 376, p. 36.

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3 – The concept of ‘sex establishment’ under English law covers both sex cinemas and sex shops. In order to simplify matters, since this case is exclusively concerned with licensed sex shop operators, I will refer only to those persons in this Opinion.

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4 – According to settled national case-law, since 1985, a fee may be charged under paragraph 19 of Schedule 3 to the 1982 Act to reflect the cost not only of processing applications but also of ‘inspecting premises after the grant of licences and for what might be called vigilant policing … in order to detect and prosecute those who operated sex establishments without licences’. See judgment in R *v Westminster City Council, ex parte Hutton* (1985) 83 LGR 516.

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5 – Article 44(1) of the Services Directive gave Member States until 28 December 2009 to transpose the Services Directive, being the date on which the 2009 Regulations came into force.

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6 – See judgment in *Hemming and others v Westminster City Council* [2012] EWHC 1260 (Admin), paragraph 49.

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7 – See judgment in *Hemming and others v Westminster City Council* [2012] EWHC 1582 (Admin), [2013] WLR 203.

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8 – See judgment in *R(Hemming and others) v The Lord Mayor and Citizens of Westminster* [2013] EWCA Civ 591.

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9 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 14.

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10 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 7.

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11 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 15.

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12 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraphs 15 and 17.

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13 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 17.

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14 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 17.

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15 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 18.

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16 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 18.

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17 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 19.

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18 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 26.

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19 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 22.

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20 – See the audiovisual recording of the hearing of 13 January 2015 before the referring court, Session 1, 40:20 et seq., available online on request at https://www.supremecourt.uk/contact-us.html, in which Westminster City Council argues that it is self-evident (‘axiomatic’) that the authorisation scheme at issue in this case is justified by an overriding reason relating to the public interest.

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21 – At the hearing held on 13 January 2015 before the referring court, Westminster City Council

relied on that provision to justify limiting the duration of the authorisations granted to Mr Hemming and others (see the audiovisual recording of the hearing before the referring court, Session 1, 39:51 et seq., available online on request at https://www.supremecourt.uk/contact-us.html).

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22 – See the audiovisual recording of the hearing before the referring court, Session 1, 39:51 et seq., available online on request at https://www.supremecourt.uk/contact-us.html. My emphasis. Also see, to that effect, paragraph 12(3)(c) and (4) of Schedule 3 to the 1982 Act.

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23 – See judgment in *R(Hemming and others) v The Lord Mayor and Citizens of Westminster* [2013] EWCA Civ 591, paragraph 29.

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24 – Article 13(2) of the Services Directive was transposed into UK law by regulation 18 of the 2009 Regulations. Since there is no difference between the wording of the relevant provisions of the Services Directive and those of the 2009 Regulations, I will refer to the provisions of the Services Directive in this Opinion.

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25 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25.

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26 – See, to that effect, *R (Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 17, in which the referring court held that 'any such fee would however have to comply with the requirements … identified in section 2 of Chapter III and section 1 of Chapter IV [of the Services Directive]'.

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27 – See recitals 2, 5, 8 and 9 of the Services Directive.

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28 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraphs 23 and 24.

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29 – '… it is correct to say that the applicant is required to pay that second part of the fee at the time of application …'.

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30 – Footnote not relevant to the English version of this Opinion.

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31 – However, is it not the case that any financial penalties imposed would have to be deducted from the overall cost of the scheme?

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32 – They also relied on the judgment of 19 September 2006 in *i-21 Germany and Arcor* (C−392/04 and C−422/04, EU:C:2006:586) which, however, is not of great assistance in this case since Article 11 of Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15) expressly permitted Member States to include the costs of managing, controlling and enforcing the authorisation scheme in the fee charged in order to secure a licence.

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33 – See judgment in *R(Hemming and others) v The Lord Mayor and Citizens of Westminster* [2013] EWCA Civ 591, paragraphs 80 to 84 and 88.

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34 – See judgment in *R(Hemming and others) v Westminster City Council* [2015] UKSC 25, paragraph 24.

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35 – See judgment of 24 March 2011 in *Commission* v *Spain* (C−400/08, EU:C:2011:172, paragraphs 127 and 128).

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36 – See judgment of 24 March 2011 in *Commission* v *Spain* (C−400/08, EU:C:2011:172, paragraph 129). My emphasis.

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37 – Since this case originates in the United Kingdom, I refer in that regard to Lord Greene's famous attempt to define 'reasonable' in administrative law (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, p. 229).

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38 – Paragraph 22(1) of Schedule 3 to the 1982 Act provides for fines of up to GBP 20 000.