Neutral Citation Number: [2021] EWHC 1198 (Admin)

Case No: CO/345/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 07/05/2021

Before :

HHJ DAVID COOKE

- -

Between :

R on the application of **Allan John Poole (1)** **Samantha Poole (2)**	**Claimants**
- and - **Birmingham City Council**	**Defendant**

- -
- -

Sarah Sackman and Conor Fegan (instructed by **Simpson Millar LLP**) for the **Claimant**
Jonathan Manning (instructed by **BCC Legal and Governance Department**) for the **Defendant**

Hearing date: 7-8 April 2021

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Approved Judgment

Covid 19: This is the approved final form of judgment deemed to have been handed down at 10.30 am on 7 May 2021 by release of electronic copies to the parties and to BAILII

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HHJ David Cooke:

Introduction

1. The claimants are street traders who for many years have sold flowers and souvenirs from two locations in Birmingham City Centre. Their stalls were closed recently as a result of the coronavirus epidemic, but they hope to reopen them in the future. They are also the chair and secretary respectively of the Birmingham Street Traders Association ("the BSTA"), an informal and unincorporated group with about 30 members.

2. Street trading in most parts of Birmingham requires a consent issued by the defendant Council pursuant to Sch 4 of the Local Government (Miscellaneous Provisions) Act 1982 ("the 1982 Act"). The claimants challenge the decision of the Council on 3 November 2020 to adopt the Birmingham City Council Street Trading Policy 2020 ("the Policy"), by which for the first time it set out a written policy for "the criteria and guidance that [the Council] will use as the regulatory framework for street trading". The Policy dealt in particular with the making of applications for consents, the conditions that applicants would have to meet, the considerations the Council would take into account in deciding whether to grant a consent and how it would deal with competition between applicants, ie situations where there was more than one applicant for a particular location (or "pitch") or more applications for pitches in one street or area than there were available pitches.

3. The challenge is wide ranging but centres on one of twelve "Key considerations when assessing an application" set out in section 8 of the policy, which is headed "Selling the right goods", and within that to the following wording:

> "The types of goods allowed to be sold will be considered on a pitch by pitch basis and specified on the consent. The quality of goods and innovative approach will be considered…
>
> Innovative products refers to goods that are not readily available within the High St market place…"

The reference to "innovative approach" or "innovative products" is referred to by the claimants as "the Innovative Products Criterion" or "IPC" and, the claimants say, offends various requirements of the Provision of Services Regulations 2009 ("the 2009 Regulations"), introduced to give effect in the UK to Directive 2006/123/EC of the EU ("the Services Directive") and in particular constitutes a criterion that is not "justified by an overriding reason relating to the public interest" contrary to Regulation 15 and/or amounts to an "economic test" of a type prohibited by Regulation 21 of those Regulations.

4. Pursuant to the new Policy the Council considered applications for consents that would come into effect from 1 April 2021 and last for 12 months. By their challenge, which was issued on 22 January 2021 the claimants seek relief including the quashing of the entire Policy and/or a declaration that the IPC is unlawful. They originally also sought an order quashing any consents granted under the Policy, but no longer pursue that relief in light of the facts that, in the event (a) the claimants elected not to make any application themselves for a consent and (b) there were significantly fewer applications than in previous years with the result that there was no competition between applicants for available pitches to which the IPC might have been relevant.

Legislative and factual background

5. Section 3 of, and Schedule 4 to, the 1982 Act provide for a scheme of regulation of street trading that local authorities may choose (but are not obliged) to adopt. In summary the authority may designate any streets (widely defined to include any area to which the public has access without payment) as (a) a prohibited street (b) a licence street or (c) a consent street. Birmingham City Council resolved to adopt this scheme in 1991.

6. Broadly, Birmingham designated certain key traffic routes as "prohibited streets", various formal markets as "licence streets" (which are subject to a more intensive form of regulation) and all other public roads in its area as "consent streets". Parks in the Council's area were excluded from these designations as they have a separate regulatory regime. In principle, an application for a street trading consent could be made for any of the consent streets, though in practice such applications have been made only for locations in the city centre where the footfall makes street trading potentially viable.

7. Para 7 of Sch 4 provides for the authority to have a broad discretion as to whether to grant a consent and if so on what terms:

> "7 (1) An application for a street trading consent or the renewal of such a consent shall be made in writing to the district council.
>
> (2) Subject to sub-paragraph (3) below, the council may grant a consent if they think fit…
>
> (4) When granting or renewing a street trading consent the council may attach such conditions to it as they consider reasonably necessary.
>
> (5) Without prejudice to the generality of sub-paragraph (4) above, the conditions that may be attached to a street trading consent by virtue of that sub-paragraph include conditions to prevent—
>
> (a) obstruction of the street or danger to persons using it; or
>
> (b) nuisance or annoyance (whether to persons using the street or otherwise).
>
> (6)The council may at any time vary the conditions of a street trading consent…
>
> (8)The council may include in a street trading consent permission for its holder to trade in a consent street—
>
> (a) from a stationary van, cart, barrow or other vehicle; or
>
> (b) from a portable stall.
>
> (9) If they include such a permission, they may make the consent subject to conditions—

> (a) as to where the holder of the street trading consent may trade by virtue of the permission; and
>
> (b) as to the times between which or periods for which he may so trade.
>
> (10) A street trading consent may be granted for any period not exceeding 12 months but may be revoked at any time."

8. Until recently, there has been no written policy relating to the grant or renewal of consents. In practice, although consents could only be given for a twelve month period, those of existing holders were automatically renewed each year.

9. In 2011 the Council commissioned a report from The Retail Group headed "Future Strategy for Street Trading in Birmingham" with the stated aim "to identify how street trading in the core city centre area of Birmingham… can be improved" and "identify an optimum street trading offer…given the needs of consumers, retailers, property owners, Birmingham City Council and the traders themselves". This identified significant criticisms of the existing provision, particularly from shop owners and others considered "stakeholders", the overall conclusions referring to "little consistency… in terms of how the stalls look…low average standard of retailing, well below the surrounding retail offer…many of the stalls are of poor quality, tatty and in need of urgent investment… customers want to buy better quality products, particularly food and drink…". Recommendations included improving the quality of goods food and drink offered and the visual design and appeal of the stalls and giving priority in the prime trading locations to the highest quality stalls.

10. This document was revisited by the same consultants in a "2018 Street Trading Review and Improvement Strategy" with broadly similar conclusions: "Put simply, if traders want to trade on Birmingham's premium retail streets, the quality of goods being sold, the standards of display and the design conditions of the stalls [need] to be similarly premium…matched by high standards of customer service".

11. Starting in November 2019, the Council consulted on the proposed introduction of a new policy to govern the grant and administration of street trading consents. It is fair to say the proposals were opposed from the beginning by existing traders, the majority of their responses being to the effect that they should be guaranteed renewal of their existing pitches without competition from new entrants. A response on behalf of the BTSA dated 21 February 2020, drafted by counsel, made unspecific references to the proposals being in breach of human rights, the 2009 Regulations and the Services Directive.

12. The proposals were revised and subject to a further round of consultation in July 2020. The BTSA again responded negatively, this time making more specific assertions that the wording of the draft policy and in particular reference in the then draft to the goods being sold "[complementing] those provided by nearby businesses/retail shops" amounted to an assessment of economic need or market demand prohibited by the 2009 Regulations. It alleged that the 1982 Act itself was incompatible with Convention rights and the Services Directive, particularly in the time limit imposed on duration of consents, which was said to be a deterrent to new entrants. Its view throughout has been that the Council should withdraw its proposals and continue the regime of de facto automatic renewal until a new policy formalising a right to renewal for existing traders could be put in place. This was not an outcome

the Council could properly have reached, since the ability to grant street trading licences is evidently a matter constrained by the availability of suitable pitches and the combination of the 1982 Act and Regulation 17 of the 2009 Regulations (see below) required that in such situations consents be granted for a defined period not exceeding 12 months with no automatic renewal or favourable renewal terms for existing holders.

13. The final version of the policy was put before the Council on 3 November 2020 with an Officers' Report referring to the consultation process and recommending adoption. It was adopted by resolution of the full Council at a meeting on that day. Although the Officers' Report referred to changes that had taken place in the city centre environment since 1991 neither it nor the policy itself refer to either of the Retail Group reports, and it is nowhere said that the objective or intention of the policy is to implement the recommendations of those reports.

Terms of the Policy

14. I do not intend to quote extensively from the policy document, but note the following:

i) Section 2 states that the purpose of the policy is to "[set] out the criteria and guidance that [the Council] will use as the regulatory framework for street trading".

ii) Section 1 states that the aim of the policy is to "create a street trading environment which is sensitive to the needs of the public and businesses, provides quality consumer choice and contributes to the character and ambience of the local environment whilst ensuring public safety, preventing crime disorder and nuisance", and that it will be reviewed in 2021/22 and thereafter kept under continuous review with a formal review every five years.

iii) Section 7 provides for an initial six week window for applications for consents to commence from 1 April 2021, which will be considered together after that window "against the criteria in this Policy", and that subsequent applications would be considered individually in order of receipt "against the considerations set out in this policy and its aim".

iv) Section 7 provides that "On any one street where we receive more applications for an annual consent than availability of suitable locations…all applications will be considered on the basis of the highest score awarded through the assessment framework".

v) Section 8 sets out 12 "Key considerations when assessing an application", each of which has a number of bulleted sub points. The 12 headings include public safety, prevention of crime and disorder, prevention of nuisance, the personal suitability of the applicant and the suitability of the trading unit (with reference to a design brief that might specify matters such as maximum size and colour).

vi) Under the heading "Selling the right goods" it states:

> "The types of goods allowed to be sold will be considered on a pitch-by-pitch basis and specified on the consent. The quality of goods and innovative approach will be considered.
>
> Quality of goods refers to traders making the proper (and legal) checks to ensure their goods are safe for use or consumption. In addition, the use of recyclable materials in the product or packaging or the reduced use of packaging to minimise plastic or other waste will be improving quality.
>
> Innovative products refers to goods that are not readily available within the High Street market place.
>
> Anyone wanting to have a stall must clearly state the nature of the proposed goods. The goods must not:
>
> • Cause a nuisance, disturbance or annoyance to nearby properties/ people, including cooking smells, smoke, noise, litter and additional cleansing requirements for the Council.
> • Cause or contribute to crime and disorder – including the selling of fake or counterfeit goods.
> • Have a negative public health impact e.g. vaping products, locality of fast food units near schools, gyms etc."

vii) The assessment framework referred to is an appended document by which each application would be awarded a points score up to 5 for each of the 12 Key Considerations set out in the policy. Against each of these 12 there are numbered or bulleted notes that summarise but do not repeat verbatim the sub-points listed in the main policy document. Under "11. Selling the Right Goods" these are:

> "• Quality of goods
> • Innovative products
> • Goods do not cause nuisance
> • Goods do not contribute to crime and disorder
> • Goods do not have a negative health impact"

viii) Section 15 sets out a non exhaustive list of situations in which "consents will not normally be granted". This includes matters relating to public health and safety and potential nuisance but makes no reference to the "quality" of goods or their not being "innovative".

The 2009 Regulations and the Services Directive

15. It is common ground that the scheme for granting consents is an "authorisation scheme" for the purpose of the 2009 Regulations, and that those regulations remain in force in modified form notwithstanding the UK has now left the EU as "retained EU law" which the court is bound by s 6 of the European Union (Withdrawal) Act 2018 to interpret in accordance with retained case law and retained general principles of EU law.

16. The 2009 Regulations provide:

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

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

(3) The conditions imposed by a competent authority for granting authorisation for a new establishment under an authorisation scheme must not duplicate requirements and controls—
(a) to which the provider of the service is already subject in the United Kingdom or in another EEA state, and
(b) that are equivalent or essentially comparable as regards their purpose…

16 (1) An authorisation granted to the provider of a service by a competent authority under an authorisation scheme must be for an indefinite period, except where—
(a) the authorisation—
(i) is automatically renewed, or
(ii) is subject only to the continued fulfilment of requirements,
(b) the number of available authorisations is limited by an overriding reason relating to the public interest, or
(c) a limited authorisation period can be justified by an overriding reason relating to the public interest…

17 (1) This regulation applies where the number of authorisations available from a competent authority under an authorisation scheme for a given service activity is limited because of the scarcity of available natural resources or technical capacity.

(2) The selection procedure established by the competent authority must fully secure impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

(3) Authorisation granted by the competent authority—
(a) must be granted for an appropriate limited period, and
(b) may not—
(i) be open to automatic renewal, or
(ii) confer any other advantage on a previously authorised candidate or on a person having any particular links with such a candidate.

> (4) Subject to paragraph (2) and to regulations 14 and 15, a competent authority may, in establishing the rules for the selection procedure, take into account —
>
> (a) considerations of public health,
>
> (b) social policy objectives,
>
> (c) the health and safety of employees or self-employed persons,
>
> (d) the protection of the environment,
>
> (e) the preservation of cultural heritage, and
>
> (f) other overriding reasons relating to the public interest. in conformity with [retained EU] law…
>
> 18 (2) Authorisation procedures and formalities… must not-
>
> (a) Be dissuasive or
>
> (b) Unduly complicate or delay the provision of the service…
>
> 21 (1) A competent authority must not make access to, or the exercise of, a service activity subject to any of the following—
>
> (a) discriminatory requirements…
>
> (e) the case-by-case application of an economic test making the granting of authorisation subject to—
>
> (i) proof of the existence of an economic need or market demand,
>
> (ii) an assessment of the potential or current economic effects of the activity, or
>
> (iii) an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority;
>
> (f) the direct or indirect involvement of competing operators, including within consultative bodies—
>
> (i) in the granting of authorisations, or
>
> (ii) in the adoption of other decisions of the competent authorities; …"

17. "Overriding reasons relating to the public interest" is not defined in the Regulations but Recital 40 to the Services Directive states that:

> "(40) The concept of 'overriding reasons relating to the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to evolve. The notion as recognised in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; …the protection of the environment and the urban environment, including town and country planning; …road safety; … cultural policy objectives, …"

and the term is then given a definition in Art 4(8), though in slightly different words.

Ground 1: the IPC is in breach of Regulation 15

18. Ms Sackman submits first that the IPC is a criterion on which the consent policy is based, but that it is not "justified by an overriding reason relating to the public interest", contrary to Regulation 15 (2)(b) of the 2009 Regulations. It cannot be so justified, she says, because it has an economic objective, and the ECJ's case law establishes that "purely economic objectives cannot constitute an overriding reason in the public interest", see *Commission v Spain* [2011] 2 CMLR 50. An economic objective, she submits, is anything targeted at influencing the market, what is sold or traded or by whom. It is to be contrasted with a permissible social objective, which must be something protecting the public from some form of harm. The Services Directive has as its aim she submits the prevention of interference by competent authorities in the market; leaving it entirely for the market to decide what goods should be sold. This point is taken separately from an argument based on Regulation 21 under Ground 2.

19. In *Commission v Spain*, the subject matter was an action by the Commission under what is now Art 49 of the Treaty on the Functioning of the European Union. The Services Directive was not in issue. The Commission complained of Spanish national legislation making the opening of large retail establishments (hypermarkets, in common parlance) dependent on a licence granted by the relevant local authority that in turn was required to take into account the adequacy of existing retail facilities and an assessment of the impact on existing traders, including a provision the effect of which would be automatic rejection of any application that would result give a market share exceeding a set threshold. It was these provisions that were held to be "purely economic" considerations; see para 95-8 of the judgment.

20. That decision, it seems to me, is far from establishing Ms Sackman's very wide proposition, which is effectively that any consideration intended to have an effect, of any degree, on what goods may be sold or by whom, is automatically unjustifiable. Nor do I accept that "social" objectives are confined to protecting the public from harm; social policy is characterised by seeking to improve social conditions, whether or not those existing may be said to amount to or involve any particular "harm".

21. The provision in question here is, Mr Manning submits, wholly different in its scope and effect. The IPC is not a threshold or precondition for a grant of a consent. There is no provision of the policy that a consent will be refused if an "innovative approach" is not demonstrated or the applicant is not proposing to sell "innovative products" as defined. Mr Manning accepted in argument that although the Council has a residual discretion under the 1982 Act whether to grant a consent at all, in practice it would be obliged to exercise that discretion only on the basis of the written policy. The result is, he submits that the IPC will only come into consideration at all in circumstances where there is competition for a particular pitch, or for the available pitches in a particular location, that falls to be resolved using the points scoring system, and even then that "innovative products" or "innovative approach" is only something that "will be considered" as one of five matters contributing to a score for "selling the right goods" which itself is one of 12 criteria to be scored.

22. In contrast to the position in *Commission v Spain*, there is no requirement to consider the effect of the proposed trade on competitors (whether other street traders or fixed shops), or market share. The sale of "innovative" goods as defined may still very likely be in competition with other retailers in any event, in that goods not themselves

"readily available" from other retailers may nevertheless be competitive alternatives to those that are so available.

23. Insofar as the Council takes any account of the nature of the goods sold, Mr Manning submits, it does so as part of the overall aim stated in the policy of maintaining and improving the street trading environment and the character of the city centre, which is a matter of legitimate social policy concern. No objection is taken by the claimants to other parts of the policy that bear on the nature of goods sold or where they are traded, for instance the explicit disapproval of sale of (legal) vaping products, or of fast food near to schools or gyms (also presumably not otherwise illegal).

24. There is force in Mr Manning's points, in my view. Insofar as the ECJ has held matters to be excluded from the permissible scope of public interest on the grounds of pure economic consideration it has been considering much more serious and targeted measures directly bearing on the freedom of establishment of businesses across state boundaries in violation of (now) the TFEU. The provision in question here is not such a measure; it is part of an overall package of considerations which are properly considered together since their application is one of combined evaluation by the Council rather than separate individual consideration.

25. That package is plainly not in my view "purely economic", though it is obvious that some or all of its components have economic effects, in the wide sense that they affect the way in which business is carried on or impose costs on businesses, or even in the almost as wide sense that Ms Sackman contends for. Rather, it is predominantly concerned with other matters such as the enhancement of the urban environment that are, in my judgment, equally plainly matters of proper concern for an authority such as the Council. They are within the wide scope of various of the matters that are recognised by Recital 40 to the Directive as legitimate; including public policy generally, social policy and protection of the environment, which extends beyond protection from harm and includes elements of desirability and appropriateness of activities such as are considered in the town and country planning matters that are explicitly recognised by the Recital to the Directive as being permissible.

26. Further, it seems also to me that the Services Directive sets out explicitly the extent to which competent authorities are prohibited from imposing criteria based on economic considerations, in terms that are reproduced in Regulation 21 of the 2009 Regulations. That provision is presumably intended to codify and perhaps extend the effect of previous ECJ jurisprudence on the economic evaluations that are illegitimate as matters of public interest for the purposes of the measures implemented by the Directive. It would be inconsistent with that provision for there to remain an overarching consideration, particularly one such as Ms Sackman argues for, of wider scope that the express provision, by which economic considerations could be disqualified from being matters "relating to the public interest" for the purposes of the regime the Directive puts in place.

27. I reject therefore the argument that the IPC is not justified by a reason relating to the public interest.

28. Ms Sackman submits next that even if so justified, the IPC is not "proportionate to that public interest objective" as required by Regulation 15 (2)(b). She refers me to *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 at para 33 where Lords Reed and Toulson (with whom the other Justices agreed) said :

> "proportionality as a general principle of EU law involves a consideration of two questions; first whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method…"

29. The court should she submits "examine closely" whether there could have been some equally effective but less restrictive measure adopted. I do not however accept that submission; the justices noted at para 34 that it was critical to examine the "intensity" with which the principle of proportionality had been applied by the ECJ in different situations, and in that regard looked at the way in which the principle had been approached in three categories of case: "the review of EU measures, the review of national measures relying on derogations from EU rights, and the review of national measures implementing EU law" (para 35). Para 61 on which Ms Sackman relies is in a section dealing with the second of these categories and is concerned with derogations from fundamental freedoms, in which context it is not surprising that a restrictive approach to justification would be adopted.

30. In contrast in relation to the third category at para 73 the Justices said:

> "…to the extent that [a] Directive requires the national authority to exercise a discretion involving political, economic or social choices… the court will be slow to interfere with that evaluation. In applying the proportionality test in circumstances of that nature the court has applied a 'manifestly disproportionate' test…"

The third category is the nearest to the situation before me, which concerns not even the national measure implementing a Directive (ie the 2009 Regulations) but a decision of a competent authority exercising a power given by that national measure.

31. Ms Sackman submits that the IPC can have no logical connection to an aim to provide increased quality of goods offered, since the quality of goods sold on stalls is not related to whether similar goods are or are not also available in shops. I agree, but that is not the aspect of the stated aims of the policy that consideration of "innovation" in approach or products seeks to pursue. Any ability on the Council's part to drive up the quality, in general terms, of the goods offered by street traders (which the Retail Group reports indicated would be highly desirable) has effectively been emasculated by the inclusion of language in the "Selling the right goods" section, apparently in response to objections made by the claimants' association, limiting the notion of "quality" of goods to (a) compliance with minimum legal requirements for them to be sold at all and (b) whether the goods have excessive or non- recyclable packaging.

32. Rather, the IPC in taking account of the variety (or otherwise) of what is offered to consumers is evidently relevant to the stated aim to "provide quality consumer choice". It is obvious that to the extent street traders offer goods that are not otherwise readily available from other retailers, whether they be shops or other street traders, the choice of goods available to consumers in the locality will be increased. Given the limitations on the policy's impact on "quality", it can be no objection that the choice made available may not necessarily be between goods of a high quality as that might be generally understood. An increased variety of goods also potentially contributes to the general character and ambience of the city centre environment, which is also part

of the policy's aims. Ms Sackman asserts that consumer choice can be provided without such "innovation" but she does not say how. The very minor extent to which consideration is included of the innovative nature of products cannot be described as "manifestly disproportionate" to that broad objective.

33. I reject therefore the argument that the IPC is not "proportionate" to the aims of the policy.

Ground 2: The IPC is in breach of Regulation 21

34. Ms Sackman's next submissions relate to Regulation 21, in that she submits the IPC:

    i) Amounts to a case by case application of an economic test making the granting of authorisation subject to an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority, contrary to Regulation 21(1)(e) of the 2009 Regulations, and

    ii) Creates an indirect involvement of competing operators in the granting of authorisations, contrary to Regulation 21(1)(f).

35. In support of her grounds generally Ms Sackman submitted that in practice, and certainly in cases of competition for desirable pitches, the IPC would be likely to be decisive in most or at least many cases. This was because, she said, the other criteria were in general either satisfied or they were not, so that although in theory applicants could be awarded a score up to 5 points, in practice all would either score zero (and be refused) or 5. The only exception was the IPC, which required evaluation, and accordingly that would in practice determine the outcome.

36. I do not accept that. The 11 other criteria assessed are not "all or nothing" issues, although it is no doubt the case that for many of them at least it would be possible for an applicant to be rated so low that his application would be bound to be refused. For instance an assessment must be made under the headings "Public Safety" and "Prevention of nuisance". Risks to public safety are not binary matters, in the sense that there either is such a risk or there is not. Some level of risk is inherent in every activity and assessment of risk is a matter of evaluating the extent of the risk (itself inevitably multifactorial) and whether it is or is not acceptable in all the circumstances. It is perfectly possible that one proposal might be assessed as posing identifiable risks that are nevertheless judged insufficient to justify outright refusal but another could be given a higher score because it posed lesser or better controlled risks.

37. Similarly, issues of "nuisance annoyance or disturbance" to neighbouring properties or potential for obstruction to traffic or pedestrians are not binary, and an application assessed as involving a lower level of impact on neighbours could be expected to get a higher score than another whose impact was potentially higher, even if not sufficiently high as to prevent the latter application being accepted if there were no alternative application to choose.

38. Further, there are numerous matters mentioned under the heading "Suitability of the trading unit". These relate to the design and construction of the stall or trailer used and the quality of its materials and appearance. Although there is reference to a design brief, it is clearly not prescriptive and there is ample scope for the Council to rank

different proposals differently, even if all of them were regarded as sufficient to meet a minimum acceptable level.

39. Within the heading "Selling the right goods" there are five bullet points in the assessment framework, of which "innovative products" is only one. The others are not necessarily binary choices- although "quality of goods" turns mainly on compliance with legal standards, which they either do or do not meet, it includes elements of assessment of the measures taken by the trader to ensure compliance with those standards, and of packaging for the products, either of which may vary. References to the goods causing nuisance or contributing to crime may be said to be duplicative of other headings, but as stated above these considerations are not binary matters and an adverse assessment may cause an application to be marked down under this head as well as another. There is also the reference to adverse health impacts, which may apply to some goods sold near to a school, for instance, but not others.

40. It is clear therefore that contrary to Ms Sackman's submission there is a real possibility that rival applications would receive materially different scores both in relation to other headings than "Selling the right goods" and within that heading, by reference to factors other than the IPC. Far from being determinative in most, or even a significant proportion, of cases, it would be a matter of chance whether consideration of the IPC tipped the balance between one application and another.

41. It follows in my judgment that even if it is accepted that consideration against the assessment framework amounts to a "case by case" analysis, the outcome for the application cannot realistically be said to depend upon the assessment of the degree to which the application satisfies the IPC, and so for the purposes of Regulation 21 that outcome is not "subject to" the outcome of that assessment.

42. In any event, however, Regulation 21 applies to an "economic test" assessing "appropriateness" of an activity against "economic objectives" of the authority. To the extent that the Council considers the IPC in relation to an application, it is not applying any economic test, since it does not consider the economic result or effect of selling the goods, either on the market as a whole or on other participants, but only whether they are different in some respects from others available locally. There is no consideration of demand or need for the goods. The IPC is not what would normally be described as a "test" at all, since it is not a consideration that must be satisfied, but only one aspect of a wider consideration that itself is not a question of passing or failing, but evaluating merit in circumstances of competition for limited availability. Insofar as the Council has any "objective" of its own against which it could be said to be assessing the "appropriateness" of selling the proposed goods, it is not in my judgment an economic objective, but one of its policy for the quality and ambience of the city centre environment.

43. It is not sufficient that the consideration can be said to relate to an aspect of economic activity, since that would be so broad that it would potentially encompass every aspect of its considerations- for instance, the determination of how many pitches were allowed would affect the amount of economic activity of street traders potentially competing with shop operators.

44. For all these reasons, the IPC is not in my judgment an economic test prohibited by Regulation 21 and I reject that argument.

45. Next Ms Sackman submits that the IPC entails the indirect involvement of competitors in the granting of a consent, because their actions may influence whether a street trader's products or approach are considered "innovative". If for instance a shop owner sees that products offered by a street trader sell well, he may decide to offer those or similar products himself, with the result that at the next application the street trader's products are no longer different from others available and so no longer deemed innovative.

46. It is obviously the case that some aspects of the assessment of a street trading application will involve a consideration of how the street trading will operate in an environment where potential competitors including other traders and fixed shops also operate. For instance, consideration of whether one trader's proposed activity would contribute to nuisance to surrounding properties, or to pedestrian or traffic congestion, is bound to be influenced by what business is being carried on in the neighbouring properties and what demands on pedestrian and traffic movement those businesses make. Those matters may vary over time, so that for instance if a fixed restaurant opens a facility for outdoor dining with tables on the street that may affect the space available for pedestrians, with a knock on effect on such traffic to other locations such as a street trader's stall that would be a matter for consideration when the trader next applied for a consent. The mere fact that the actions of a competitor may have to be taken into account in consideration of an application cannot of itself, in my judgment be sufficient to make the competitor "involved" in the granting of permission, whether directly or indirectly.

47. What Regulation 21(f) is aimed at, plainly, is involvement by competitors in the decision making process in a way which gives them a real ability potentially to influence the outcome to their advantage. The need for an effective influence is clear from the fact that the prohibition is on making the exercise of a service activity (ie in this case the obtaining of a consent) "subject to" the involvement of competitors. That would obviously be so if competitors were members of the body making the decision, and the Regulation itself expands this to include membership of a body that is consulted in relation to the application. But competitors, whether shops or other traders, are not involved in these ways, except possibly that they might participate in a public consultation, which is expressly permitted by sub para 21(3).

48. Conceivably, a competitor might be said to be "involved" in the decision if actions of his could create a situation amounting to a veto or a likely decisive influence on the outcome of the application, for instance if there were a bar on street traders selling fast food in the vicinity of a fixed restaurant. But that is not the case here; I have rejected the contention that the IPC is likely to be decisive in a significant number of cases. In any particular application, it may or may not be relevant at all and if it is it will be a matter of chance whether it has any determinative effect on the outcome.

49. In those circumstances, in my judgment, any connection between a competitor's actions and the outcome of an application is too remote and fortuitous for it to be considered that he is involved, even indirectly, in the making of the decision and I reject the argument to that effect.

Ground 3- The IPC is unclear and dissuasive

50. Next, Ms Sackman submits that the IPC is not "clear", "unambiguous" "objective" or "transparent and accessible" contrary to Regulations 15(2) (d)(e) and (g) and is such as to make the application procedure "dissuasive" and "unduly complicate" the

provision of the service, contrary to Regulation 18(2). She refers to correspondence in which the claimants have sought to press the Council on what evidence the Council would require to be submitted in relation to innovation, exactly how certain hypothetical factual scenarios would be evaluated and the inconsistency of the responses given.

51. In my judgment there is nothing in these points. It would be overinterpreting the Regulations and the Directive to require an absolute degree of certainty in advance as to the outcome of an application, such as the claimants in effect contend for. It is no doubt the case that to the extent the IPC comes in to consideration it involves an exercise in evaluation by the Council's officers, but so do many of the other criteria that are not objected to. It may be said that the drafting leaves something to be desired in that it states that "innovative approach" will be considered, but then goes on to define (and refer in the assessment framework to) a different term, "innovative products". But this is no more than the degree of inconsistency frequently encountered in all manner of documents and does not lead to any real difficulty in interpretation by the court or applicants as to what is meant- an "innovative approach" must mean selling "innovative products". The condition is sufficiently "clear" and "unambiguous".

52. It is a matter of objective fact whether the products to be sold are different in any respect from what is available elsewhere, and any applicant wishing to support his application by making such a submission (he is not required to do so, still less actually to demonstrate innovation) may choose himself what evidence to present and what submissions to make in respect of it. The submissions are thus made against an objective standard, as for instance submissions about impact on pedestrian or traffic safety would be, even though their significance and bearing on the outcome require evaluation by the decision taker.

53. "Transparency and Accessibility" refer to the ability of a potential applicant to obtain information on the procedure he must follow and the conditions he must satisfy to make his application. No criticism is made of the publication or availability of the policy, or that it does not clearly set out the steps to be taken to make an application. Any applicant can readily locate the policy and its terms, including the IPC and so know what his application should address. A requirement for "transparency" cannot mean that he must also be able to tell with certainty in advance whether his application will be accepted, particularly in a situation where he is or may be in competition with others.

54. The claimants say that the IPC is dissuasive because it may put off applicants who do not know what will be considered innovative or how their products will be judged, and that they themselves have been deterred from making application for a consent this year. Evidence as to the motivations of the particular claimants is of course self serving; it is of little weight in circumstances in which during their long involvement in opposition to the policy the claimants did not alight on any objection to the IPC until a very late stage, being apparently much more concerned to seek to preserve or at least extend their ability to have their existing consents automatically renewed. I do not accept that applicants in general are likely to be put off by knowledge that the council will take into account in circumstances of competition between applicants and as one of many factors the extent to which their products add to the choice available to consumers, any more than they would be by for instance consideration of the quality and appearance of their stall..

55. Nor can the requirement to provide evidence on this aspect, if the applicant wishes to make it part of his submission, be said to complicate the process of making the application to any undue extent. The applicant has to provide details of the products he proposes to sell; it can be no great complication for him also to say, if he wishes to do so, that they are different from what else is readily available and why this is so.

56. For those reasons, I reject this ground of challenge.

Grounds 4 - The general conditions are not reasonably necessary

Ground 5- The IPC is contrary to the statutory purpose of the 1982 Act

57. The last two grounds are taken together; Ms Sackman submits that the 1982 Act has a limited statutory purpose, ie to regulate street trading in the interests of safety, the protection of the public and protection of public rights such as rights of traffic. Anything beyond that, and in particular anything amounting to an economic objective such as influencing what goods are sold is outside that purpose and so unlawful. Certain of the conditions attached to consents are not, she says reasonably necessary for such a purpose and so not within the powers given to the Council under Sch 4. The statement of grounds seeks to attack the requirement of the policy that applicants must specify what goods they intend to sell and that the consent granted will be limited to sale of the specified goods as outside this purpose and a restriction on competition since no similar condition attaches to fixed shops.

58. In relation to that, it sufficient in my judgment to say that there is no foundation for such a statement of purpose whatever in the 1982 Act itself. On the contrary, the powers and discretions it creates are expressed in entirely general terms.

59. The requirement to specify the types of goods sold is, as is apparent from the policy and preceding documents, imposed because the Council wishes to ensure that street traders take adequate responsibility for ensuring that their goods are of minimum legal standards and are not, for instance counterfeit, and that their officers will have effective powers to enforce such matters. Pursuing such a purpose cannot be said to be outside the statutory purpose of the Act (and would be within even the limited purpose Ms Sackman argues for). It is no objection that there may be other measures available to enforce compliance with such legal standards, such as prosecution by trading standards officers. The Council is entitled to take the view that the possibility of revocation of a consent is an appropriate additional weapon in its compliance armoury.

60. Other conditions are objected to as going too far or being unnecessary:

    i) Condition 25 which requires a trader to be “clean in his person” is said to go too far to be reasonably necessary, but in my judgment it is perfectly reasonable for the Council to impose such a requirement for the benefit of the public dealing with a trader, and to have a sanction of revoking his consent if he does not comply.

    ii) Condition 6 requires compliance with statutory obligations and is criticised as a statement of the obvious- but again it is perfectly reasonable for the Council to wish to have available a sanction of revocation in the event of non compliance.

iii) Condition 14 which requires the trader to indemnify the Council against claims arising from the operation of the consent is said to be disproportionate in that it would make the trader responsible for matters that would otherwise be the legal liability of the council. But the condition does not have that effect, it merely ensures that the trader is liable to the council for the consequences of his own actions, even if a claimant may choose to make his clam against the Council, as he might do for instance if he is unable to locate the trader responsible or regards the Council as a more readily available defendant or a deeper pocket.

61. I therefore reject Grounds 4 and 5.

Conclusion

62. It follows that the claim is dismissed.

63. In case the matter goes further however I should say that had I been with the claimants on any of the matters relating to the IPC, which was the principal focus of their claim, I would not have made an order quashing the policy as a whole, or quashing the decision to adopt it, but limited any remedy to a declaration that would have prevented the Council from taking the IPC into account in any assessment of an application.

64. Ms Sackman submitted that where a decision was found to be unlawful, the normal remedy is for the decision to be quashed and remitted so that it may be taken again lawfully. But questions of remedy are as she accepts discretionary, and it would in my judgment be wholly disproportionate to quash the entire policy because one small aspect of it was found to be unlawful. If the policy were quashed, the Council would have no basis in place to regulate the existing consents or evaluate new ones, until it was able to put a new policy in place, which would likely entail the expense and delay of a further consultation process.

65. The policy would however be perfectly operable without the IPC, which is unlikely in any event to come into consideration until 2022 when existing consents fall to be renewed and there may be competition for pitches. By that time, the policy will have been reviewed and, if it had been found that the IPC was unlawful, it would no doubt be removed during any such review.

66. I will fix a date for this judgment to be handed down without a hearing, and invite the parties to agree the order resulting. It there are matters arising that cannot be agreed, they should if possible be dealt with on the basis of brief written submissions, to be received no later than the day before the handing down.