

Changing Markets and Street Trading legislation in the 21st Century / Digital Age

1. Introduction

It's been said that Markets are important and I agree they are, particularly if we want to preserve and support a retail networks of independent businesses. All over the globe Markets have been the unchallenged trading spaces for hundreds of years but through the 19th and 20th centuries the world evolved at an unprecedented pace with industrialisation, mass farming, faster transportation methods, new distribution networks, supermarkets, out of town shopping malls, Sunday Trading, E-commerce and home delivery. In some way, these and other factors have affected the way goods are produced, distributed and consumed. New legislation had to be written, to respond to these changes and in the 1980s and 90s legislation regulating markets and street trading industry was reviewed. The legislation is almost exclusively related to the administration and the monitoring of traders by local authorities, leaving I believe a lot of unanswered questions when trading happens on private land. Also unfortunately, for the industry, this review took place just before the invention of the internet and prior to the integration of the UK into the EU, (not that this matters much now), including been part of an open market. Therefore, the legislation was written to be compatible with the administrative technology available at that time. This unfortunate timing contributed to an outdated legislation, restraining, the administration of markets and street trading, from enjoying the benefits provided by digital technology. Which in turn, make the markets less efficient when trying to compete with the other sectors of the retail industry who are not subject to the same limitations.

2. The issues that need to be addressed:

2.1. What is a Market?

A market at common law is the franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given.

In the LGMPA 1982 temporary market means: a concourse of buyers and sellers of articles held otherwise than in a building or on a highway, and comprising not less than five stalls, stands, vehicles (whether movable or not) or pitches from which articles are sold.

This definition currently applies to all retail markets and it is generally used to enforce market rights.

Historically markets were a place where traders and sellers "met", implying that on an agreed date traders and customers will make their way to the market place. At the time when markets were the dominant form of retail, market rights were an extremely powerful tool, giving the owner of the charter the exclusive rights to raise tolls and fees within the common law distance of 6.66 miles radius. The distance corresponded to the time it would take a farmer to attend the weekly market with his flock or produce, conduct his business and go back home, before dusk. The major difference between a market and sedentary retail is that in the shopping mall the customers attend a shop that lease the premises. So what is the difference between an indoor market that only offers long term leases to the traders, and a shopping mall other than one is for small traders and the other for branded mutli-outlet companies? Why does an indoor market offering long leases or tenancies to traders or tenants enforce its market rights against a traditional market but does nothing to enforce such rights against a shopping mall?

This demonstrates that the legislation should differentiate between indoor markets which are only offering long lease to the trader with other more traditional type of markets when a lease does not apply. This is even more relevant when considering the application of the legislation regarding vat and business rate. (view related document on the business rate).

2.2. Creation or acquisition of markets:

Charter or Letters Patent / Prescription or Usage / Statute -

Again the various pieces of legislation behind this process are making matters confused and complicated. In an effort to simplify matters the legislation should cover four scenarios:

- The establishment of permanent or regular markets on public land and highway. Decision should be made by relevant local authorities accordingly to their own requirement, following public consultation and compliance/confirmation/agreement from the relevant government agency such as planning, public safety, fire brigade, highway..etc
- The establishment of markets on any land that is neither public or highway (planning permission condition should apply) planning permission required unless operating under General Development Order – 14 day rule
- The consent to hold temporary market (open to the public) on private land. In this case the legislation should focus mostly on public safety.
- The designation of street trading area for the purpose of hosting temporary markets and fairs (view below designating street trading area) on public land. My point is that designation of the street for the purpose of hosting market should be included in the same legislation since it 's purpose is to designate a location for the purpose of trading or operating a market.

2.3. Terms and condition related to the exploitation of markets

This is a concern that is probably more relevant to private operators, I could not find anywhere in the legislation (not that it doesn't exist, I am not a lawyer) that specifies public safety measures, records, documentation or procedures a private operator needs to provide when trading space is provided on private land.

Doesn't Health and Safety at Work Act / Food Safety Act / Consumer Legislation apply? You may ask. It does for the traders, but does it for the operator? An operator does not employ the traders, he does not sell food, the traders are his customers that's it. There is nothing I found that requires an operator to monitor the trader other than informing local environmental health agency that the sales of food stuff will take place. The point I am trying to make here is that if an operator license was introduced as part of a new legislation, and parts of the license conditions were that an operator could not allow a None Licensed individual to trade at his market without risking to have his license revoked (a warning first perhaps, etc,) only then we could start entertaining the idea of having a "clean" and fair market industry.

Perhaps the same protocols should apply as for a Temporary Event Notice, which implies the creation of an individual operator license to be held by anyone organising more than 5 markets a year or operating more than 14 days.

2.4. Monitoring trader and Public protection:

There are very important issues regarding the monitoring of traders and public protection

- Currently the monitoring of traders is done through either the market manager or the licensing officers. Solely when a market is operated by or on behalf of a local authority, systematic monitoring takes place. It is almost as if the public is considered immune of food poisoning, or from being sold fake or stolen goods, if the market is operated privately on private land. With most car boot sales or private markets operating at the weekend, inspections by appropriate officers are few and far between and with the ongoing impact of cuts within Local Authorities it is unlikely that additional funding will be available for out of hours working. In absence of necessary appropriate supporting legislation, even the most thorough private operator will find it very difficult to ask suspicious traders, with concerns surrounding identity theft, to provide the standard private and sensitive information generally required by a local authority.

- I have found that many local authorities tend to adopt a lenient approach when local charities and community events are concerned; PAT testing, gas certificates, risk assessments, hygiene certificates, fire extinguishers, hand wash facilities... are not necessary all of a sudden, as if these organisations are protected by “some unknown force”. The view that because they are just going to sell one or two cupcakes and it’s for a good cause there is no cause for concern. This view is not shared in the same way by regular traders who have to invest time and resources to comply with the legislation. For obvious reasons a charity would not be permitted to sell insurance or mortgages without being duly registered with the FSA. Why then should they be exempted as a retailer to comply with the legislation?
- Unnecessary workload linked to the legal requirements that associate a trader’s license with a specific location as it is the case under the current street trading licensing procedures. This is not a major issue for permanent license holder, and if we only consider the administrative cost from an isolated point of view. But from a global point of view, if a trader attend 5 weekly markets, he will be registered five times, its documentation will need to be monitored 5 times too. The trader will have to provide copy of his documentation as many times as he applies for a license, and update his documentation with all the operators he is dealing with every time a document reaches its expiry date, such as: Pat Testing certificate, Gas certificate, new employee Hygiene Certificate, PLI etc.. Witch in turn requires files, filing cabinets, audit, office space... and officers time
- To have a street trading license attached to a specified pitch also restrict market management flexibility, for example sometime trader may need to be moved to an empty pitch to keep the market in one block for the general benefit of the market and the public. It is not unusual for market manager to try to move stalls around to avoid a casual trader to be located next to a permanent trader selling the same commodity, however under the LLAA or the City of Westminster Act, this is not permitted.
- Forced attendance and assistant trader: In London under the LLAA many local authorities include in their terms and conditions the necessity for a trader to attend his stall at 90 percent of the time or more (just allowing them to go to the toilets), other have an holiday policy (when permanent trader are entitled a free rent a certain number of day per year. Some policies are allowing a trader to nominate an assistant trader to cover for them, this procedure generally takes a week or to be processed by licensing officers. Not a convenient solution when a trader is sick for example, If there is a nominated assistant, he will have to be available almost instantly which will only be rarely the case, if not the trader has no option but cease to trade for the period.
- Public safety regulations and other relevant legislation should also be considered

2.5. Designation of street trading areas

It is the responsibility of the Local Authorities to designate the streets and areas where street trading can take place before being able to issue a street trading license or consent.

The designation of street trading area is an extremely important step in the street trading licensing process. Each location should be identified precisely and includes all the relevant trading conditions attached to the individual pitch where necessary, before being submitted to public consultation and approved by the licensing committee. Accurate street trading designation is an absolute necessity to allow license application to be processed quickly, (almost instantly) while avoiding being accused of discriminatory or arbitrary decisions.

There is also a grey area when an event takes place in a park. Some local authorities, under the LLAA argue that if the stalls are more than 7 metres from the highway there is no requirement for the trader to hold a street trading license. However a fee will usually be charged to the event organiser for use of the park or a specified area within the park. The confusion here is highlighted by the definition of a street in the two relevant acts:

Under the London Local Authority Act 1990 a park or common is not considered as a street (unless a park or a common is considered as a footway)

"street" includes— (a) any road or footway; (b) any other area, not being within permanently enclosed premises, within 7 metres of any road or footway, to which the public have access without payment; (c) any part of such road, footway or area; (d) any part of any housing development provided or maintained by a local authority under Part II of the Housing Act 1985;

While under the Local Government (Miscellaneous Provisions) Act 1982 schedule 4,

"street" includes—

- (a) any road, footway, beach or other area to which the public have access without payment; and
- (b) a service area as defined in section 329 of the Highways Act 1980,

In this case my interpretation of the legislation is that a park or common is considered as a street.

2.6. Pricing, charges and fees applied to street trading activities (not markets)

This is the elephant in the room for almost every local authority. On its own this is justifying a change in the legislation. The Hemming vs City of Westminster case highlighted the inadequacy of the legislation, and fundamentally this is the reason: The legislation does not recognise the commercial value of a pitch on public land. Therefore as local authorities are not allowed to generate an income from street trading licensing activities, under the current legislation they are unable to realise the commercial value of a pitch held on public land. However a "savvy" trader will be quick to assess the potential value of a pitch and be ready to make an offer far above the administrative cost of a license. As it is hard for anyone to refuse money, local authorities trapped for cash can be creative with their accounting and financial processes but whatever the argument a local authority may have, trying to justify an administration fee in excess of £100 may prove difficult especially if you compare the costs related to the issue of a passport with the cost of issuing a street trading license, everyone will quickly realise that something is not quite right. Or how a local authority can justify charging as £1000 per week when another local authority few miles away will only charge £18 per week for the same.

When the charge is only £18 per week, it gives the street trader an unfair advantage compared to what a market trader may have to pay for a pitch at the local and sometimes adjacent marketplace. On the other hand paying £1000 per week for a piece of tarmac without any other provisions or services can prove to be impossible to justify in any circumstances.

Another common practice used to circumvent the legislation is to include, in the conditions of a license, the approval of a third party such as the local BID or Town Centre management company. The approval to trade almost always comes with an additional fee to be paid to the aforementioned third party. (Don't think this applies to the introduction of a new shop business?)

On the same subject, when a street is private, or part of a new development where the ownership of a road or a street is shared between the local authority and a private developer. The trader has to apply for a street trading license as required by the legislation but often will also have to pay the private developer a fee for the use of the land. This is mostly the case in recent city centre developments. South Gate in Bath or Broadmead in Bristol are good examples. In the case of Broadmead in Bristol, this is even more absurd as only half the street was redeveloped and is subject to a shared ownership where an additional charge for using public land applies in addition to the local licensing fee. Previously only street trading licenses were required anywhere in Broadmead. In addition to this (perhaps this is a loop hole in the legislation) these commercial spaces per se, are often managed by what is called a space asset management company and charge the trader for "promotional activity" adding VAT to their fee!?!?

Regarding the paragraph below, what I understood is that the European court didn't decide if a local authority should or should not include the cost of enforcing the legislation in the licensing fee.

Adding enforcement cost to the licensing fee:

As far as I know, in the Hemming vs City of Westminster case, the European Court did not make a decision, as if local authorities should include or not, the cost related to the enforcement and monitoring **of illegal** street trading activities. To my views and regardless of what the European court may decide, it will be discriminatory to do so. Big retailers, branded manufacturer and the public are the one who are mostly affected by rogue traders. To include these costs in the trader licensing fee implies that legal street traders are the only one asking to bear the cost of a service that is designed to protect others people from illegal activities. .

Only by applying a transparent and justified fee structure, can we truly evaluate accurately, street trading social and commercial benefits to rebuild trust between traders and local authorities. The industry needs functional legislation, fair to all parties, encouraging transparent policies and considering the technology available today to monitor trader and product traceability.

3. A four steps frame work for a new legislation:

3.1. The legal terms

As explained in section 2.2 the legislation need to clarify what is a market and will benefit from differentiating two or perhaps three market types, the legislation also needs to clarify other terminology: what is a stall? A trader?

A stall may be not needed as the word receptacle is normally used in legal terms. But explain to me what is the difference between a street trader a market trader, an exhibitor, a showman, a person trading from a kiosk, or selling from a stand at a festival, in a show, a fair? I know the French term who encompass all these activities, but I do not know the English equivalent. Saying so, I am probably wrong. In French they will be called "non-sedentary trader" this is not majorly important anyway and it may distract from the point I am trying to make.

- Permanent indoor Markets: this is for market operating through the provision of leases, perhaps the description could be "a concourse consisting of 5 or more stalls where sellers are permanent trader are set to receive customers for the purpose of trading goods and services.
- Traditional Markets this is for market are not operating through the provision of a lease: perhaps the description could be a concourse of 5 stall or more where buyers and sellers met for the purpose of trading goods and services.
- Mixed markets perhaps to allow the identification of market that are operating both of the above. Offering permanent unit with long lease and casual trading opportunity under the same roof.
- What is a stall: a temporary structure which can be dismantled or removed and used for the purpose of trading and storing good?
- What is a market traders (including street traders): A person who sells good from a stall, a kiosk or from a purposed vehicle regardless of its location.
- What is an assistant market trader? A person designated by a licensed trader and who is responsible of mending a stall on his behalf.

3.2. A nationwide individual personal license

Introducing an individual license for traders, assistant traders and private market operators, (same principle as for alcohol license, minicab driver license, doorman license...) The purpose of individual licenses is to certify that the named person has provided the relevant documentation, agreed to comply with all relevant legal requirements, and that he/she is legally authorised to work in UK, without restricting private operators, local authorities or private land owners to add any terms and condition related to the hiring of a pitch. Enforcement will be easy as long as the legislation stipulates that operators, event organiser, private or public, should only be allowed to accept licensed traders.

There are multiple advantages for this:

- It will provide the industry with a reliable database of traders which will help measuring the industry's performance.
- It will not affect the operators local trading terms and conditions as each trader will still need to comply with these separately.
- It will minimise the risk of identity theft as only the body issuing the individual trader license will have access to the personal information.
- It is estimated that only 6 officers working from a secure central location should be able to process and monitor over 100,00 licenses applications per year. This will also ensure procedure consistency allowing the passing of knowledge to new officers in a supervised environment (instead of having to provide training to individual officer at each local authority). Thus reducing the risk of misinterpretation of the legislation and facilitating the coordination and implementation of any new regulations where the traders fitness to trade is concerned.
- It will reduce the pitch application processing time for market operator and local authorities No need to constantly verify the traders fitness to trade. (View details below).
- No more need for a separate pedlars license (registration process is almost the same and could be provided by the same office.)
- Assistant trader licenses will allow businesses to grow without compromising trader monitoring and public protection.
- Paired with existing digital platform, relevant inspectors and enforcement officers, will be able to verify instantly the professional credentials of private operator, traders and assistant traders. Allowing cross local authority referencing and access to previous reports from colleague belonging to the same government agency.

3.3. Identifying the parameters allowing the establishment of market and the designation of street trading areas by local authorities

This area is mostly covered by the various current legislations. It simply requires a compilation of the various legislation including the argument described in section 2.2 and 2.5 of this document.

3.4. Applying justifiable fee that recognise the commercial value of a pitch.

Local authorities should be able to generate an income related to the commercial value of a pitch without having recourse to controversial fee structure.

To avoid excessive charges, (*currently some license fee are calculated on a per square feet basis and can be up to 30 times over the combined rate and rental value of an adjacent shop!*). Perhaps the commercial value of a pitch could be evaluated accordingly to the rental value of **other adjacent commercial properties**, taking consideration of the following

- That a pitch outdoor does not includes the benefit enjoyed by indoor commercial property such as sewage, heating, power, hot water, walls and roof (which make a considerable difference to the customer experience during inclement weather conditions – see below)
- The square footage should only consider the area occupied by the stall
- The influence of the weather condition affecting the commercial value of the property.

Any other services provided need to be charged in addition to the commercial value of the pitch this includes: initial cost related to the designation of street trading areas, processing of booking applications,

and any other services provided such as stalls, storage, power supply, rubbish collections, water supplies, street cleaning etc.

The cost of hiring a pitch should be itemised, with precise costs that relate to the commercial value of the pitch and those costs that are related to any additional services provided. Some markets operate a rent and service charge basis – mainly indoor market halls which is perfect, but technically all market should be operated on that basis.

4. Conclusion

I have raised these issues on a number of occasions over a period of time and until recently I have been repeatedly informed by Graham (Wilson) that “there is no appetite” from central or local government to change the legislation. I have to confess that I never took the time to explain my view as I have done here. For me there is no argument that can justify the complexity, contradiction and inadequacy of the current legislation. I can turn the problem upside down, switch it left to right but any way I look at it, it says that as long as we do not implement national individual licenses and as long as the legislation will not recognise the commercial value of a pitch, the industry will not be able to make the progresses it deserves and needs. There is no chance to develop a trusting relationship between the private sector, trader and local authorities when the goal post is consistently moving

For any business to grow and develop, stability is a must. Especially in an industry where businesses are dependent upon such a variety of factors, traders should not be subject to arbitrary decision making or be subject to inconsistencies in charges and fees.