

Open for business

LGA guidance
on locally set fees

LGA guidance on locally set fees

Councils are responsible for administering a range of licences and approvals resulting from both national legislation and discretionary functions that are agreed locally. For the majority of these regimes the costs are recovered through fees set by each council and paid by the licence applicant. Locally set fees are a vital means of ensuring that costs can be recovered by each and every council, rather than relying on subsidy from local tax payers.

While the licensing role within local government may be long established, the decisions that are being made by individual councils in this area are facing increased scrutiny from businesses, the public and in the media, particularly in relation to fee setting. Recent case law resulting from the European Services Directive, the introduction of new licences for scrap metal dealers and the pending introduction of locally set fees for alcohol licensing have all placed an added emphasis on the need for every council to set fees in a legally robust and transparent manner.

This guidance aims to help councils understand the full breadth of issues that should be considered when setting local licence fees in order to meet legal obligations and provide the necessary reassurances to local businesses. It does not contain a fees calculator because this assumes a uniformity of service design and associated costs and it is vital that councils are free to design the service that best serves the needs of their community and recover costs accordingly.

1. Key issues

Understanding businesses and supporting growth

Councils across the country are working hard to encourage economic growth in their area by providing practical support to businesses, tackling barriers to growth and creating the right conditions for businesses to thrive again. Regulation and licensing are key parts of the support package available to businesses through their council.

In the risk based world of regulation, licensing has become an anomaly that can imply a standard approach is required for every business, in so far as every business is required to apply for a licence. This contrasts with the operation of Trading Standards services where, broadly, the legislation sets out expectations and all businesses are expected to meet them with no paperwork needed. However, where it is appropriate and proportionate, licensing provides the opportunity to impose specific conditions to tackle issues in specific areas or properties that may not otherwise be available if the licensing system were not in place.

While we cannot alter the law that governs each licensing regime easily, it is possible to consider how resources can be focused on risk; whether business support is effective and how the burden of inspections can simply be removed where it is not necessary. A streamlined approach to licensing will ensure that fees are kept to a minimum and businesses can be encouraged to prosper.

Designing your service based on local priorities and need

While economic growth is a priority for every council in the country, there is also the need to ensure that licensing regimes can continue to protect communities and visitors; manage public health risks; and remain responsive to local concerns. The balance of all these factors, including the drive to encourage business growth, will vary for each local area. Councils can take the opportunity to work with businesses, community groups and residents to design a licensing service based on local priorities and understand the implications that this will have for the fees charged.

How does the European Services Directive impact on locally set licence fees?

The European Services Directive¹ aims to make it easier for service and retail providers to establish a business anywhere within Europe. The principle of ensuring that regulation is transparent and that the burdens placed on businesses are kept to a minimum resonates entirely with the way councils work. However, the legal requirements in the Directive do have practical implications for local licensing regimes, including fee setting.

¹ EU Services Directive - <http://tinyurl.com/EUServD>

Further guidance about the entirety of the European Services Directive is available on the Department for Business, Innovation and Skills (BIS) website². Councils should specifically note that the Directive does not apply to licensing of taxi or gambling activities, however, the principles remain a helpful way of providing a transparent and business-friendly approach to licensing.

Principles of the Services Directive

The general principles of the Services Directive apply to all processes and administrative procedures that need to be followed when establishing or running a service or retail business, including the setting, charging and processing of fees for licences. The core principles of the Directive – non-discriminatory; justified; proportionate; clear; objective; made public in advance; transparent and accessible – apply to fee setting and are already practiced by a large number of councils with the aim of ensuring a fair and transparent approach for local businesses and communities.

Most principles are self-explanatory, but the principle of ‘non-discrimination’ requires a little more explanation. In the Services Directive it is defined as meaning “the general conditions of access to a service, which are made available to the public at large by the provider [and] do not contain discriminatory provisions relating to the nationality or place of residence of the recipient.”

This applies at the local level when considering fee setting meaning that all applicants must be treated equally irrespective of location and/ or nationality. Councils should not, for instance, seek to subsidise businesses operating in one geographical area by offering comparatively lower fees than required of those operating in another. Such an approach discriminates against those businesses located elsewhere in the locality.

Administering payment of fees

Under the Services Directive councils need to ensure that full details of any fees are easily accessible online, including the ability to make payments online.

Councils should be able to separate out the cost of processing an initial application from those costs associated with the on-going administration of a scheme, because this latter element cannot be charged to unsuccessful licence applicants.

In practice, where the number of rejected applications is low, the simplest approach will be to charge the full fee from the outset but to ensure that any rejected applications receive a refund aligned to the on-going costs of delivering the licensing regime. Alternatively, where permitted by legislation, councils can choose to charge an initial administration fee paid by all applicants and only request a further fee from those applicants that are successful. Councils will need to consider whether this approach will create additional work and chasing late payments could have a detrimental impact on relations with businesses. Councils could opt to include the payment of the second fee as a condition of the licence if this was possible under the individual licensing laws.

² BIS guidance on the EU Services Directive - <https://www.gov.uk/eu-services-directive>

The process adopted and information available about this should be simple and cost effective for both the council and businesses.

Reasonable and proportionate

The Directive also includes specific requirements that apply to the charging of fees. Charges must be reasonable and proportionate to the cost of the processes associated with a licensing scheme. **Councils must not use fees covered by the Directive to make a profit or act as an economic deterrent to deter certain business types from operating within an area.**

Hemming v Westminster

The degree to which fees and processes are proportionate has been tested in a legal challenge brought against the fee charged by Westminster City Council for licensing sex establishments. The case established a number of key points about setting fees under the Services Directive.

In *Hemming v Westminster*³, the Court of Appeal ruled that the fees set must not exceed the costs of administering the licensing regime. This means the council was no longer able to include the cost of enforcement against unlicensed sex establishment operators when setting the licence fee, although the cost of visits to licensed premises to monitor compliance could be recovered through fees.

The judgement found that the annual reviews conducted by an officer of Westminster City Council were no substitute for determinations by the council. The judge rejected the council's submission that the fee had been fixed on an open-ended basis in 2004 so that the fee rolled over from one year to the next. Westminster City Council was consequently ordered to repay fees charged over that period.

A full briefing on the case can be found on the LGA website⁴. The case is on-going at the time of writing and decisions may yet be appealed by Westminster City Council.

Keeping fees under review

Fees should be broadly cost neutral in budgetary terms, so that, over the lifespan of the licence, the budget should balance. Those benefitting from the activities permitted by the various licences should not, so far as there is discretion to do so, be subsidised by the general fund.

To ensure that fees remain reasonable and proportionate it is necessary to establish a regular and robust review process. This has particular advantages in the early stages of a new licensing regime, as with the Scrap Metal Dealers Act, where fees have been set on best guess estimates of the number of applications that will be received.

³ Court of Appeal ruling for *Hemming v Westminster* – 24 May 2013
<http://cornerstonebarristers.com/wp-content/uploads/2013/05/Hemming-APPROVED-Judgement.pdf>

⁴ <http://www.local.gov.uk/regulatory-services-and-licensing>

Annual reviews allow for the fine tuning of fees and allow councils to take steps to avoid either a surplus or deficit in future years. This will not immediately benefit licence holders where the licence has been granted for a number of years and paid for in a lump sum, but will ensure new entrants to the licensing scheme are charged appropriately.

Where fees charged result in a surplus, *Hemming v Westminster* stated that this surplus must be used to reduce the fees charged in the following year. It is possible to extend the reinvestment of the surplus over more than one year⁵, but this will need careful consideration about whether contributors may leave the licensing system over that period and therefore lose out on the return. Deficits can similarly be recovered⁶, although where there is a significant deficit, councils may want to consider how recovery can be undertaken over more than one year so as not to financially harm otherwise viable businesses.

The case of *R v Tower Hamlets LBC (1994)*⁷ may also be of relevance, as the High Court indicated that “a council has a duty to administer its funds so as to protect the interests of what is now the body of council tax payers”.

Open route for challenge

In the interests of transparency it is helpful to give an indication of how the fee level has been calculated; the review process in place and a contact method for businesses to query or challenge the fees. Open consultation with businesses and residents to design a local service, including understanding the implications for fees, helps to provide a robust answer to challenge.

It may also prove helpful to engage elected members in the scrutiny of fees. They will use their knowledge as local representatives to consider councils’ assumptions and challenge them where necessary.

Councils may want to consider the following elements when setting licence fees. It should be noted that this list is for consideration only, as councils may choose not to charge for all the elements listed, or there may be additional areas of work carried out during the licensing process that were not highlighted during the development of this guidance.

Individual pieces of legislation may also have specific items that may or may not be chargeable under the scheme. The lists below will apply for most schemes, but should always be checked against the relevant piece of legislation. If councils have any concerns, they should seek the advice of their in-house legal department.

5 *R v Manchester City Council ex parte King* (1991) 89 LGR 696. <http://tinyurl.com/qyc97bz>

6 *R v Westminster City Council ex parte Hutton* (1985) 83 LGR 516.

7 *R v London Borough of Tower Hamlets ex parte Tower Hamlets Combined Traders Association*, 19 July 1993; [1994] COD 325 QBD Sedley J. Although the decision was about the London Local Authorities Act 1990, it would appear to have general effect as a principle. <http://tinyurl.com/oxmfuj6>

2. So what can be included in a licence fee?

Initial application costs could include:

- **Administration** – This could cover basic office administration to process the licence application, such as resources, photocopying, postage or the cost of handling fees through the accounts department. This could also include the costs of specialist licensing software to maintain an effective database, and printing licences.
- **Initial visit/s** – This could cover the average cost of officer time if a premises visit is required as part of the authorisation process. Councils will need to consider whether the officer time includes travel. It would also be normal to include ‘on-costs’ in this calculation. Councils will need to consider whether ‘on-costs’ include travel costs and management time.
- **Third party costs** – Some licensing processes will require third party input from experts, such as veterinary attendance during licensing inspections at animal related premises.
- **Liaison with interested parties** – Engaging with responsible authorities and other stakeholders will incur a cost in both time and resources.
- **Management costs** – Councils may want to consider charging an average management fee where it is a standard process for the application to be reviewed by a management board or licensing committee. However, some councils will include management charges within the ‘on-costs’ attached to officer time referenced below.
- **Local democracy costs** – Councils may want to recover any necessary expenditure in arranging committee meetings or hearings to consider applications.
- **On costs** – including any recharges for payroll, accommodation, including heating and lighting, and supplies and services connected with the licensing functions. Finance teams should be able to provide a standardised cost for this within each council.
- **Development, determination and production of licensing policies** – The cost of consultation and publishing policies can be fully recovered.
- **Web material** – The EU Services Directive requires that applications, and the associated guidance, can be made online and councils should effectively budget for this work.
- **Advice and guidance** – This includes advice in person, production of leaflets or promotional tools, and online advice.
- **Setting and reviewing fees** – This includes the cost of time associated with the review, as well as the cost of taking it to a committee for approval.

Further compliance costs could include:

- **Additional monitoring and inspection visits** – Councils may wish to include a charge for risk based visits to premises in between licensing inspections and responding to complaints. As with the initial licensing visit, councils can consider basing this figure on average officer time, travel, administration, management costs and on costs as suggested above.
- **Local democracy costs** – Councils may want to recover any necessary expenditure in arranging committee meetings or hearings to review existing licences or respond to problems.
- **Registers and national reporting** – some licensing schemes require central government bodies to be notified when a licence is issued. The costs of doing this can be recovered.

Unrecoverable costs

It is worth considering that the costs of defending appeals in the magistrate's court or via judicial review can be recovered through the courts. Including these costs within the fees regime could lead to recovering the costs twice, which would be inconsistent with the Services Directive.

Hemming v Westminster also means that costs of enforcement action against unlicensed premises cannot be recovered through the licence fee.

There is currently no guidance or case law describing the point at which recoverable compliance costs switch over to unrecoverable enforcement costs. It should be noted that Hemming v Westminster is likely to be appealed to the Supreme Court with a possible reference being made to Europe for determination. If that happens, there may be more to follow on this issue with, hopefully, greater clarification on the legal position. We are aware that some councils have drawn the line at the point where it looks probable that the licence will be revoked, while others include everything up until the point where the appeals goes to the magistrates' court. These approaches have not yet been tested in court.

Further support

The practical approach to designing a local licensing service, allocating costs accurately and considering legal implications can be a difficult task; therefore it is strongly recommended that licensing teams work with their legal advisors and finance teams to make the best use of all expertise.

In addition, councils should consider working collaboratively with neighbouring authorities to provide mutual support. Working with other councils and reviewing fees set by similar authorities can be an extremely valuable way of ensuring that fees are not perceived to be disproportionate by businesses.

Acknowledgments

This document was put out to public consultation between 5 and 29 November 2013. It has been reviewed and cleared by the LGA's in-house legal team and external Counsel.

We are very grateful to all those listed below who responded to the consultation exercise:

The Home Office

Bolton Council

Bristol City Council

Broadland District Council

Members of the LGA Licensing Forum

Oxford City Council

Southampton City Council

West of England Group of Local Authorities



Local Government Association

Local Government House
Smith Square
London SW1P 3HZ

Telephone 020 7664 3000
Fax 020 7664 3030
Email info@local.gov.uk
www.local.gov.uk

© Local Government Association, January 2014

For a copy in Braille, larger print or audio,
please contact us on 020 7664 3000.
We consider requests on an individual basis.