Appendix C

Local Government Association

LGA guidance on locally set licensing fees

This guidance aims to help councils to 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.

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Introduction

Councils are responsible for administering a range of licences and approvals relating to both national legislation and discretionary functions that are adopted locally. For the majority of these regimes the costs are recovered through fees set by each council and paid by the licence applicant. It is an accepted principle in relation to these functions that those who benefit from the system (such as licence holders) should cover the cost of it. Locally set fees are a vital means of ensuring both that full costs can be recovered by each and every council, reducing the risk of a subsidy from local taxpayers, and that businesses do not pay more than they should.

Licensing decisions that are made by councils can face scrutiny from businesses, the public and in the media, particularly in relation to fee setting. Therefore, every council should ensure it sets fees in a legally robust and transparent manner.

This guidance aims to help councils to 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, when it is vital that councils are free to design services that best serve the needs of their community and recover costs accordingly. Whilst this guidance is focused primarily on licensing fees, the principles of good fee setting apply equally to other fees set by council regulatory services (and beyond) so officers working in those fields may also find this guidance useful.

Key issues for consideration

Balancing the need for funding with a proportionate approach

Regulatory services are at the heart of councils' approaches to economic growth. Officers working in licensing, environmental health and trading standards have regular interactions with businesses and can therefore have an important role in helping them become established and grow, at the same time as ensuring they adhere to important safeguards.

To ensure that councils can promote growth and protect the public, there is a need to ensure that licensing and wider regulatory regimes are adequately resourced. This requires funding, and it is an accepted principle that licensed activities should be paid for by those benefiting from the licensed activity, rather than drawing on the public purse.

Where councils have the flexibility to set local fees, it is possible to consider how resources can be focused on risk; whether business support is effective; and how the burden of inspections can 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. However, councils should ensure they are accurately setting their fees, including checking that the hourly rates of licensing and other officers are correct and considering wider costs such as administration or on-site costs, to enable full cost recovery.

What are the Provision of Services Regulations 2009 and how do they impact on locally set licence fees?

Whilst the detail of what may or may not be chargeable under a licensing scheme is sometimes set out in individual pieces of legislation, or is established through case law, councils need to be aware of and comply with the **Provision of Services Regulations 2009**. These Regulations have important implications for licence fee setting, and there have been legal challenges to licensing fees based on the Regulations in the past.

The Provision of Services Regulations protect UK businesses and consumer rights by maintaining obligations on UK competent authorities to ensure that their regulation of service activity through authorisation schemes is proportionate, justified in the public interest and such authorisation schemes are administered in a fair, accessible and transparent way.

They were first introduced in 2009 and transposed the European Union Services Directive 2006, which aimed to make it easier for businesses to provide cross-border services with other European Economic Area countries by lowering non-tariff barriers to trade. This included reducing administrative and regulatory burdens on businesses providing a service activity. The European Services Directive no longer applies to UK law following the UK's exit from the European Union. However, the European Union (Withdrawal) Act 2018 preserved the Provision of Services Regulations 2009 under UK law, so councils still need to comply with the requirements of the Regulations. For example, the principles of no profit-making, no cross subsidies between licence types or leakage to the General Fund, taking forward deficits and surpluses when deciding following years' fee levels, and using fees to cover enforcement costs where relevant domestic legislation allows still apply.

Councils should note that the Government has been conducting a review of the Regulations and intends to reform the Provision of Services Regulations using the powers within the Retained EU Law (Revocation and Reform) Act.

Further guidance about the Provision of Services Regulations is available on the Department for Business and Trade's website. (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975587/provision-of-services-guidance-march-2021.pdf) Councils should specifically note that the Regulations do not apply to the licensing of taxis or gambling activities; however, the principles remain a helpful way of providing a transparent and business-friendly approach to licensing.

Principles of the Provision of Services Regulations

The general principles of the Regulations apply to the processes and procedures applied by competent authorities (regulators and councils) who administer authorisations schemes. These provide benefits to service providers when seeking a relevant authorisation, such as a licence, in order to establish their business.

The core principles of the Regulations – **justified by an overriding reason relating to the public interest (such as public safety, public health or public policy); proportionate to the public interest objective; clear and unambiguous; 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.

Councils should also ensure that the principle of non-discrimination applies. When considering fee setting, councils should ensure that all applicants are treated equally irrespective of protected characteristics, location and/ or nationality. However, councils do have a discretion not to impose a full cost recovery charge, provided this is to achieve a legitimate aim.

The importance of this approach has also been established by case law on taxi and PHV licensing which, although not covered by the Regulations, illustrates an important precedent which councils should adhere to. Cummings v Cardiff ruled that the charges within a licensing regime for different categories of licence should not subsidise each other; so, a surplus gained on hackney carriage licences should not reduce the cost of a private hire vehicle licence.

This can be logically extended to mean that the fees received under one licensing regime must not subsidise fees charged under another. For instance, a surplus generated by taxi fees must be reinvested back into taxi licensing and not used to reduce the cost of, for instance, a scrap metal dealer's licence. Councils should also be aware of the R (Rehman) v Wakefield case, which made it clear that driver enforcement costs cannot be covered by vehicle licences, but they can be covered by driver licence fees.

All councils should, therefore, ensure that they have individual, discrete cost-calculations for each of the licensing regimes that they operate. This may require a change in the way that some councils operate.

Administering payment of fees

Under the Provision of Service Regulations councils need to ensure that 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 ongoing administration of a scheme, because this latter element cannot be charged to unsuccessful licence applicants.

Hemming v Westminster

In Hemming v Westminster, the Supreme Court referred to the European Court of Justice (ECJ) the issue of how the charges were levied. The Court identified two different approaches to charging fees:

(a) Whereby a council charged a fee upon application (covering the costs of authorisation procedures) and a subsequent fee to successful applicants (covering the cost of administering and enforcing the framework) - the 'type A' approach.

(b) Where a council charged a single fee on application covering all costs, on the basis that the relevant proportion of the fee would be refunded to unsuccessful applicants – the 'type B' approach.

The Court found the type A approach of charging two fees is permissible under the European Services Directive and the Provision of Service Regulations but felt that the type B approach of charging a single fee was not compatible with the Services Directive or the Regulations.

Therefore, licensing authorities should confirm that their fee structures ensure that application fees relate solely to the cost of authorisation procedures (the costs associated with reviewing an application and granting / refusing a licence). Under the type A approach, successful licence applicants should subsequently be charged an additional fee relating to the costs of administering and enforcing the relevant licensing framework.

Not all legislation in England and Wales permits councils to separate out elements of the fee in this way. For instance, the Licensing Act 2003 has nationally set fees, which constrains councils' ability to adopt this approach. It is therefore unclear whether a council could offer a refund of the enforcement element if an application is refused under this Act: the LGA view is that this is not possible, as the legislation requires that the specified amount (fee) must be paid on application.

Nevertheless, despite these constraints, councils could consider calculating the notional costs of administration and enforcement separately and make applicants aware of the two elements to the fee. In addition to meeting the transparency requirements of the Provision of Service Regulations, this enables councils to examine the efficiency of their internal processes and make improvements where necessary. The process adopted and information available about this should be simple and cost effective for both the council and businesses.

Reasonable and proportionate

The Regulations 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 Regulations to make a profit or act as an economic deterrent to deter certain business types from operating within an area.**

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, where fees have been set on best guess estimates of the number of applications that will be received.

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.

Councils that divert fees' income from the relevant licensing scheme to fund other licensing work, or to fund other council activities, will be breaking the law.

Where fees charged result in a surplus, both ***Hemming v Westminster*** and ***Cummings v Cardiff*** 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 year, 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 recovered, 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)** 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 taxpayers".

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 processes 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.

What can be included in a licence fee?

Local authorities and organisations such as the LGA have previously identified that cost recovery and charging models for chargeable services is a key issue affecting the financial sustainability of regulatory services, and this can in part be due to outdated charging approaches. Councils should take a holistic approach to costs and think about the total cost of putting an officer on the ground, and not just their salary cost. As such, councils should 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 if they do not apply locally, or there may be additional areas of work carried out during the licensing process that are not included in 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.

More generally, when thinking about fees it is crucial that councils have a clear understanding of what the hourly rates of their licensing officers are. The LGA has a broad concern that councils often underestimate the overall hourly rate of officers, and this can lead to councils not recovering their costs.

Initial application costs could include:

Administration – This could cover basic cost of 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, IT hardware 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 Provision of Services Regulations require 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 and enforcement 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.

Charging for action against unlicensed traders

Councils' ability to charge for these costs as part of a licensing scheme depends on the licensing scheme in question. In **Hemming v Westminster**, the Supreme Court ruled that the Services Directive made no mention of enforcement costs. Councils' ability to charge these costs to applicants for licences is therefore dependent on the UK legislation.

The Court ruled that licensing authorities are entitled under the **Local Government (Miscellaneous Provisions) Act 1982** to impose fees for the grant or renewal of licences covering the running and enforcement costs of the licensing scheme; in this case, the licensing scheme for sex shops.

Taxi and PHV licensing case law is clear that driver enforcement costs cannot be covered by vehicle licences, but they can be covered by driver licence fees. This was established by the **R (Rehman) v Wakefield** case. The LGA believes that section 70(1) of the 1976 Act makes it clear that the costs of enforcement against licensed operators can also be recovered through a fee; however, the position on recovering these costs is contested.

Home Office guidance under the Scrap Metal Dealers Act (https://www.gov.uk/government/publications/scrap-metal-dealers-act-2013-supplementary-guidance),

Councils **must have regard to this guidance (https://www.gov.uk/government/publications/scrap-metal-dealers-act-2013-supplementary-guidance)**, which prevents the recovery of enforcement costs against unlicensed dealers only. Great care must therefore be taken when setting fees to check what is and is not permitted under that specific licensing regime.

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 fee's regime could lead to recovering the costs twice, which would be inconsistent with the Provision of Service Regulations

Do	Don't	Maybe
Check the relevant legislation	Use a surplus from one fee to subsidise another	Include the costs of enforcement against unlicensed traders
Calculate processing costs and enforcement costs separately	Allow fees income to be drawn into the council's general fund	Include a condition on the issued licence that requires the payment of the enforcement part of the fee, where this is not charged upfront
Clearly communicate to applicants the elements that make up the fee	Allow fee levels to roll-over each year without a review	
Ensure fees are determined by the right person	Forget to ask the courts to award costs during a prosecution	
Include staff on-costs		
Include training costs for officers and councillors		

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.

This document sets out high-level, over-arching principles for fee setting that apply across most licensing regimes. It is always important to check the specific details of the regime in question. The following links will take you to relevant legislation or guidance for the most common licensing regimes.

Relevant guidance links

Licensing Act 2003 (//www.gov.uk/government/publications/alcohol-licensing-fee-levels)

Gambling Act 2005 (http://www.legislation.gov.uk/ukpga/2005/19/section/212)and **The Gambling (Premises Licence Fees) (England and Wales) Regulations 2007 (http://www.legislation.gov.uk/uksi/2007/479/contents/made)**

Scrap Metal Dealers Act 2013 (https://www.gov.uk/government/publications/scrap-metal-dealer-act-2013-licence-fee-charges)

Taxis and PHV Licensing (Local Government Miscellaneous Provisions Act 1976 (http://www.legislation.gov.uk/ukpga/1976/57/section/70))

Sexual Establishments (Local Government Miscellaneous Provisions Act 1982 (http://www.legislation.gov.uk/ukpga/1982/30/schedule/3))

Street Trading (Local Government Miscellaneous Provisions Act 1982) (http://www.legislation.gov.uk/ukpga/1982/30/schedule/4)

Provision of Services Regulations 2009 (https://www.legislation.gov.uk/ukdsi/2009/9780111486276/contents)

Case law

Hemming v Westminster

The Hemming v Westminster case (https://www.supremecourt.uk/cases/uksc-2013-0146.html) tested the degree to which fees and processes must be proportionate, as well as the administrative processes for calculating fees, in the context of licensing sex establishments. The case established a number of key points about setting fees under the European Services Directive and Provision of Service Regulations.

The case has passed through a number of courts, including the Court of Appeal and Supreme Court, with different elements of the case being settled at different stages.

In 2013, the Court of Appeal ruled that the fees set must not exceed the costs of administering the licensing regime. This meant that the council was no longer able to include the cost of enforcement against unlicensed sex establishment operators when setting the licence fee. The Court of Appeal held that such costs could not be deemed to fall within the **EU Services Directive 2006** and associated **UK Provision of Services Regulations 2009.**

The Directive states that charges levied by a competent body on applicants under an authorisation scheme must be reasonable and proportionate to the cost of the *'procedures and formalities'* of the scheme and must not exceed these costs. However, the cost of visits to licensed premises to monitor compliance could be recovered through fees.

The judgement also found that the annual reviews were conducted by an officer of Westminster City Council who did not have delegated authority so to do, and that it was the Committee that was supposed to set the fees. However, the judgement did not suggest there was anything intrinsically wrong with an officer undertaking this function provided the function has been properly delegated (where it can be), and that the officer takes relevant considerations into account. 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.

The judgement would have left Westminster, and potentially other councils, liable to refund the proportion of sex shop licence fees deemed to be unlawful, dating back to the introduction of the Regulations in 2009.

Westminster appealed the Court of Appeal's judgement on the recovery of enforcement costs, and the case was heard by the Supreme Court in January 2016. Other matters determined by earlier hearings, such as the need to review fees annually and the requirement for councils to ring-fence income from licensing fees so that any surplus or deficit is carried forward to the next year's budget, were not contested.

The council's position that it was lawful for it to seek to recover all enforcement costs was supported by the LGA, which submitted written interventions to the Supreme Court. A range of regulatory bodies, as well as HM Treasury, also submitted written interventions in the case.

The Supreme Court ruled that licensing authorities are entitled under the **Local Government (Miscellaneous Provisions) Act 1982** to impose fees for the grant or renewal of licences covering the running and enforcement costs of the licensing scheme. Crucially, it reasoned that the **European Services Directive** deals only with the issue of authorisation procedures and fees relating to applications to exercise a service activity (such as operating a sex shop).

Therefore, the Directive does not prevent licensing authorities from charging those who receive licences, fees that are proportionate to the cost of administering and enforcing the licensing framework for that activity.

Cummings v Cardiff (https://docs.wixstatic.com/ugd/241720_86a9559ead8b44569ef0153631a1b766.pdf)

Cardiff Council had proposed a significant increase to hackney carriage and private hire vehicle charges in July 2013. Cummings and other claimants then challenged Cardiff City Council by way of judicial review over the manner in which these costs had been calculated. In 2014, Mr Justice Hickinbottom granted the claim for the review on the grounds that:

- the level of fees set failed to have regard to and/or account for any surplus or deficit generated in previous years dating back to 1 May 2009
- the level of fees set failed to account for any surplus or deficit accrued under each of the hackney carriage and private hire licensing regimes within the regime under which they have accrued
- the level of fee set for hackney carriage licences in 2013 included part of the cost of funding taxi marshals for the Council's administrative area.

The Judge also made declarations that:

(1) A local authority when determining hackney carriage and private hire licence fees under ss.53 and 70 of the LG(MP) Act 1976 must take into account any surplus or deficit generated from fees levied in previous years in respect of meeting the reasonable costs of administering the licence fees as provided by ss.53 and 70 above.

(2) A local authority must:

- keep separate accounts for hackney carriage and PHV licence fees under ss.53 and 70 of the LG(MP) Act 1976
- ensure that any surplus or deficit identified under each part of the hackney carriage and private hire licensing regimes is only applied to the part of the system from which it has been raised/lost
- ensure that any surplus from one licensing regime shall not to be used to subsidise a deficit in another.

References

References

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

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.