

DRAFT LGA guidance on locally set fees



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Aim

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 full costs can be recovered by each and every council, rather than relying on subsidy by 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

1.1 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 suggests a standard approach is required for every business. 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

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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.

1.2 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.

1.3 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.

Further guidance about the entirety of the European Services Directive is available on the 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.

1.4 Non-discriminatory; justified; proportionate; clear; objective; made public in advance; transparent and accessible

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 - **non-discriminatory; justified; proportionate; clear; objective; made public in advance; transparent and accessible** - of the Directive 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.

1.5 Administering payment of fees

¹ EU Services Directive - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:en:pdf>

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

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 later element cannot be charged to unsuccessful licence applicants.

In practice, where the number of rejected application 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, 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 that 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.

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

1.6 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.**

1.7 Hemming V Westminster

In 2012/13, a legal challenge was brought against the fee charged by Westminster City Council for licensing sex entertainment venues on the grounds that it could not be considered reasonable. The case established a number of key points about setting fees under the Services Directive.

In the Hemming V Westminster case³, the Court of Appeal ruled that the fees set must be 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.

The judgement found that the annual reviews conducted by an officer of Westminster City Council were no substitute for determinations by the

³ Court of Appeal ruling for Hemming V Westminster – 24th May 2013

<http://cornerstonebarristers.com/wp-content/uploads/2013/05/Hemming-APPROVED-Judgement.pdf>

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 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.

1.8 Keeping fees under review

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. Annual reviews allow for the fine tuning of fees and allow you to take steps to avoid either a surplus or deficit in future years.

Where fees charged result in a surplus, the Hemmings v Westminster case 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 financially harm otherwise viable businesses.

1.9 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 your assumptions and challenge them where necessary.

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

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

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

additional areas of work carried out during the licensing process that were not highlighted during the development of this guidance.

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.
- **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**
- **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 already referenced above.
- **Local democracy costs** – Councils may want to recover any necessary expenditure in arranging committee meetings or hearings to consider applications.
- **On costs**
- **Production of licensing policies**
- **Web material**
- **Advice and guidance**

Further 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**

2.1 Unrecoverable costs and managing surpluses

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 the costs of this within the fees regime could lead to

recovering the costs twice, which would be inconsistent with the Services Directive.

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

3. 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.