

Background to Fee Setting – LGA Guidance

Licensing is an integral part of councils' broader regulatory services. Regulatory services are increasingly recognised as being at the heart of councils' approaches to economic growth, officers working in licensing 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.

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

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 for example has placed an added emphasis on the need for fees to be set in a legally robust and transparent manner.

The Local Government Association (LGA) has produced guidance 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. There is no 'fee calculator' as such because there is no uniformity of service design and associated costs, rather each council should be free to design the service that best serves the needs of their community and recover costs accordingly.

It is an accepted principle that licensed activities should be funded on a cost-recovery basis, 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 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.

The European Services Directive 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 is an objective that all councils can support. However, the legal requirements

in the Directive do have practical implications for local licensing regimes, including fee setting.

The Directive does not apply to licensing of taxis, or gambling activities; however, the principles remain a helpful way of providing a transparent and business-friendly approach to licensing.

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 have the aim of ensuring a fair and transparent approach for local businesses and communities.

The principle of ‘non-discrimination’ applies to 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. This would be discriminatory. The importance of this approach has also been established by case law on taxi and PHV licensing which, as it is not covered by the Services Directive, demonstrates that some core principles are shared between UK and EU legislation. *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 dealers licence.

All councils should therefore ensure that they have individual, discrete cost-calculations for each of the licensing regimes that they operate.

Under the Services Directive 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. This was a key issue in the *Hemming v Westminster* case. In this it was established that licensing authorities need to ensure their fee structures for fees covered by the Services Directive, that application fees relate solely to the cost of authorisation procedures (ie, the costs associated with reviewing an application and granting / refusing a licence). Further more 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 permits councils to separate out elements of the fee in this way. For instance, the Licensing Act 2003 has fees set nationally, which constrains councils' ability to adopt this approach.

It is deemed appropriate that councils should calculate 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 Services Directive, this enables councils to examine the efficiency of their internal processes and make improvements where necessary.

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.

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. 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.

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* state that this surplus must be used to reduce the fees charged in the following year.

Deficits can similarly be recovered⁵, 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.

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.

What can be included in a licence fee?

The following elements may be considered when setting licence fees depending on whether they apply locally, or individual pieces of legislation may have specific items that may or may not be chargeable under the scheme.

Initial application costs could include:

Administration – this may cover basic office administration to process the licence

application, such as resources, photocopying, postage or the cost of handling fees through the finance 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. This may include travel time and ‘on-costs’

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 – these may be included as an average management fee where it is a standard process for the application to be reviewed by a management board or licensing committee or alternatively as an ‘on cost’

Local democracy costs – consideration of the recovery of any necessary expenditure in arranging committee meetings or hearings to consider applications may be considered.

On costs – including any recharges for payroll, accommodation, including heating and lighting, and supplies and services connected with the licensing function.

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 the budget for this work may be included.

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 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

A 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, e.g. sex shops.

However, legal interpretation of taxi and PHV licensing suggests that councils do not have the power to recover the costs of any enforcement against licensed or unlicensed drivers at all, although they may recover the costs of enforcement against vehicles.

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, which councils must have regard to, prevents the recovery of enforcement costs against unlicensed dealers only.

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.

1. PPP fee setting

The current fees for West Berkshire/Wokingham and Bracknell have not been amalgamated as yet but it is the clear wish for the PPP that they are as consistent as is possible. (current fee regimes are shown as Appendices One and Two)

This is a good opportunity to review all of the fees as a fresh start and produce a meaningful robust and transparent fee structure that are well founded.

It has been suggested that the fees should be looked at with the high volume fees as a priority-taxis and PHV licences. The differences in the two fees structures is particularly notable in this area.

It is anticipated that the timescale for this would mean a proposed set of fees could be brought back to the JMB by August.

There currently seems little point in undertaking a review of the animal licence fees as there is a proposed change to this licensing regime due to come into effect later this year which is also thought to include standard fees.

The basic model for setting the fees across the service will be to look at each licence type – taking into account the guidance of the LGA Open for Business publication and the principles it outlines on what can and cannot be charged for and arrive at a time/cost equation for the process and fee based on the hourly fee of £55.

The time element of the fees setting will be informed by time recording which is currently carried out across the service and by some additional 'time and motion' studies for each licence type. It is proposed that this will be an average figure at this stage as currently the work is carried out slightly differently in each authority-work is currently being undertaken to ensure consistency of process across the PPP both in terms of the administrative process and policies.

Once a proposed fee structure is agreed by the PPP JMB it will need to go through the appropriate process in each authority of the PPP. It is a matter for each Council if they agree the figures proposed but as the fees will be set on a cost recovery based model any diversion from this will need to be subsidised by the authority, which is a potential risk for them.