

Guidance on how the EC Services Directive impacts councils setting and administering fees within the service sector

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Guidance on the impact of the EC Services Directive upon local fees charged by councils to service sector businesses

1. Background

1.1 What is the European Services Directive?

The European Services Directive¹ aims to break down barriers for cross border trade in services. It will make it easier for service providers, particularly small and medium sized enterprises, to set up or offer their services anywhere in the EEA.

Most service sectors are covered by the Directive, including accountants, builders, food services and leisure services. Certain core public services, such as education and social services relating to social housing, childcare and the support of families do not fall within the scope of the Directive. There are also exclusions for transport services, including taxi services, healthcare services and gambling activities. The Directive does not apply to requirements such as town and country planning rules because they do not specifically regulate or specifically impact on the service activity, but rather have to be observed by everyone.

The Services Directive does not relate to procurement.

1.2 Why does the Services Directive impact on fees charged by councils?

The Services Directive aims to ensure that any licence applications, authorisations or administrative procedures that must be followed in order to establish a business in a relevant service sector are transparent and keep any burden on the business to a minimum.

This basic concept also applies to the fees charged by local councils for approving licence applications, authorisations or other administrative processes.

1.3 Guidance for councils on setting and administering local fees

This guidance has been produced to help councils ensure the **fees set at a local level** and charged to businesses meet the requirements of the Services Directive. It has been produced by LACORS in consultation with Department for Business, Innovation & Skills (BIS) and the Services Directive Champions' Group. It has also been circulated to councils for their comments. The guidance has been produced in timescales that will ensure the implications of the Directive can be considered by councils during the 2010/11 budget planning cycle.

¹ Directive 2006/123/EC on services in the internal market - http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_376/l_37620061227en00360068.pdf

2. Requirements under the EC Services Directive that impact on fees charged by councils to carry out services

Where local councils charge businesses a fee for granting them permission to carry out a service within their area, then the amount charged and the process for charging fees must comply with the requirements of the EC Services Directive.

The principle behind the EC Services Directive is to ensure that any processes for registrations consents, permits or licences that must be obtained in order to provide a service are **non-discriminatory, justified, proportionate, clear, objective, made public in advance, transparent and accessible**. These principles also apply to the setting and charging of fees for relevant service areas.

The Directive also includes specific requirements that apply to the charging of fees. Regulation 18(4) of the domestic legislation² states, *'Any charges provided for by a competent authority, which the applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the authorisation procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities.'*

The EC Services Directive also includes requirements relating to the online processing of applications, licences and administrative processes. These requirements also apply to the processing of fees and further information is provided in section 7.1 on this specific area.

3. Practical implications of the EC Services Directive on setting and charging fees

3.1 Non-discriminatory, justified, proportionate, clear, objective, made public in advance, transparent and accessible

The general principles of the Services Directive apply to all processes, applications and administrative procedures that are required in order to establish a service, including establishing, charging and processing of fees. Many of the requirements within the Services Directive in relation to setting licence fees are already practiced by a large number of councils with the aim of ensuring a fair and transparent approach for local businesses and communities.

In accordance with the EU Services Directive councils will need to ensure that full details of any fees and payment processes for the fees are easily accessible online for those considering establishing a service in their area. Details of fees need to be made available online, either by utilising the Point of Single Contact (PSC) website established by BIS or on a council's own website. BIS have produced guidance on the PSC.³

3.2 Economic deterrent

The principles of Article 13(2) of EC Directive 123/2006 mean that any fees charged for establishing a service that falls within the scope of the Directive can only be based on cost

² Domestic legislation can be found at <http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/legislation/page51283.html>

³ Guidance from BIS on the Point of Single Contact (PSC) is available at <http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/page9583.html>

recovery and cannot be set at an artificially high level to deter specific service sectors from an area.

In the past some licensing authorities have set fee levels extremely high in order to deter certain service sectors from setting up within their local area. For example, there are cases of councils setting extremely high fees for sex shops licences. Where this has occurred it is likely to be as a result of public opinion and / or aimed at protecting the local community. The Services Directive does mean that councils will have to review such fees and potentially reduce them if they are not reasonable and proportionate to the cost of the procedure.

Although the Services Directive prevents the use of fees as a tool to deter specific service sectors from a local area, it is still possible to apply acceptance criteria for the authorisation schemes provided that they meet the requirements set out by the Directive.

Regulation 15(1) of the domestic legislation states, '*An authorisation scheme (provided for by a competent authority) must be based on criteria which preclude a competent authority from exercising its power of assessment in an arbitrary manner.*' According to regulation 15(2) the criteria referenced in regulation 15(1) must be, among other things, justified by an overriding reason relating to the public interest (ORRPI)⁴, proportionate to that public interest objective and made public in advance. This means that councils can set criteria for authorisation schemes as long as the criteria comply with regulation 15(2). For example, if a council proposed authorisation criteria for sex shops to specify that such services could only be within a set geographic area or further than set distance from schools, it must ensure that these requirements satisfy the test set out by the Directive, which is that they must be non-discriminatory, justified by an ORRPI and proportionate. This could also be used to restrict the number of services operating within an area.

If local councils strict criteria for certain authorisation schemes, it is vital that the decision-making process for such criteria is transparent and clear to the public.

3.3 Setting fees – what can be included

Individual councils may choose to review the fees they charged to the service sector for authorisation schemes in consideration of regulation 18(4) of the Services Directive. This process may be undertaken to check that fees do not exceed the cost of the authorisation process, as highlighted in section 3.2, or to ensure that fees charged do actually cover the costs incurred by the council during the authorisation process, or simply because the fees set have not been reviewed recently.

Councils may want to consider the following elements when setting licence fees for the service sector. 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.

⁴ ORRPI 'overriding reasons relating to the public interest' as defined by Article 4(8) means reasons recognised in the case law of the Court of Justice, including the following grounds: public policy, public security, public safety, public health, preserving the financial equilibrium of the social security system, the protection of consumers, recipients of services and workers; fairness of trade transactions, combating fraud, the protection of the environment, the health of animals, intellectual property, the conservation of the national and historic and artistic heritage, social policy objectives and cultural policy objectives.

Initial application costs could include -

- **Administration** – This could cover basic office administration to process the licence application, such as resource, 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.
- **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.

Councils should understand that it is unlikely that any money will have been provided through the Revenue Support Grant (RSG) to support the enforcement of the licensing regime. As such, some councils choose to include further costs within the licence fee to cover additional visits and / or general enforcement costs for the regime. Where councils choose to include costs for these elements within the licence fee it is important that they read section 3.4 of this guidance in addition to the points below.

Further enforcement costs could include -

- **Additional monitoring and inspection visits** – Councils may wish to include a charge for routine risk based visits to premises in between licensing inspections where this is standard for all premises. As with the initial licensing visit, councils can consider basing this figure on average officer time, travel and management costs as suggested above.
- **Enforcement costs** – Councils may want to consider how enforcement costs associated with complaints and working with non-compliant businesses are funded. The majority of enforcement activity will be aimed at ensuring compliance with the licensing regime to protect both the public from rogue service providers and the trade from unregulated competition and as such can be considered a valid licence fee expense. Enforcement costs can include advice provided to businesses. Any calculations for ongoing enforcement action will need to consider that some cases may result in prosecution as a last result and an element of these costs can be recovered through the court processes. However, this decision ultimately should be taken at a local level in consideration of council policies and financial procedures.

3.4 Administering payment of fees

The Department for Business, Innovation & Skills (BIS) has advised that where a council includes costs for the ongoing regulation of a licensing regime within the licence fee, such as

costs of additional visits or enforcement costs, then these specific elements of the licence fee cannot be charged to unsuccessful licence fee applicants. This may pose practical issues for councils that would normally request payment of the full fee from the outset of the application.

Where councils do include ongoing enforcement costs within the licence fee and require payment of an application fee in advance of the licence being awarded, two possible payment approaches could be as follows -

(i) Councils could charge the full costs as an application fee for all applicants and then refund the elements relating to ongoing enforcement if the applicant is unsuccessful. Councils could consider deducting any administrative charges for the refund process from the amount refunded to the applicant.

(ii) Alternatively councils may choose not to include the charges for ongoing enforcement in the initial application fee and only request these from successful applicants as a further licence fee once their licence has been approved. Councils should consider that charging additional fees at later date may create additional work and costs associated with chasing late payments, which would also have a detrimental impact on relations with businesses. Councils could opt to include payment of the second fee as condition of the licence.

The process adopted should be simple and cost effective for both the council and business.

3.5 Political considerations

The Directive does not prevent councils from choosing not to pass all costs onto the business. Councils may subsidise fees charged to attract businesses to a local area in the current economic climate, encourage certain service sectors to a local area or because licence fees may not have been reviewed for a while and it would not be appropriate to pass a sudden increase in charges onto businesses. Where councils do make such decisions they may want to consider whether / how this information is shared with their local community. Any subsidy of this nature could not however be financed by licence fees levied against other licence holders.

3.6 Ongoing review of fees

Councils should schedule regular reviews of fees charged to the service sector and any overriding reasons relating to the public interest (ORRPI) that are established.

4. Further information

4.1 Guidance on online payment processes

Regulation 32 states, 'A competent authority must ensure that (a) all procedures and formalities relating to access to, or the exercise of, a service activity and to the exercise thereof may easily be completed, at a distance and by electronic means (through the electronic assistance facility referred to in regulation 38 or otherwise), and (b) its website affords access to that electronic assistance facility.'

This means that each council will need to ensure that any fees charged to set up a service within their area can be paid online. Further guidance has been produced by BIS on this area

and is available at <http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/local%20authority/page50021.html>

4.2 Tacit authorisation

All licence applications, authorisations and administrative procedures applicable to service providers must be processed as quickly as possible and, in any event, within a reasonable time period, which is fixed and made public in advance. When a response to an application does not occur within the time period set (or following an extension), the authorisation will be deemed to have been granted tacitly (Regulation 19(5) and (3), unless different arrangements are in place that are justified by an ORRPI).

LACORS and BIS have worked with the Services Directive Champions Group to add a spreadsheet to the Services Directive Community of Practice that aims to share information amongst councils about the timescales they intend to apply for the processing of licences. The spreadsheet lists licences administered by councils and provides the opportunity for members of the Community of Practice to add the timescales they will be publishing for approval under each licensing regime.

4.3 Learning from other councils

Communities of Practice are a tool developed by the IDeA to provide an online facility aimed generating communication across local government and the wider public sector on specific issues. Each individual Community of Practice includes an online discussion forum, a library for sharing documents and guidance, an events planner and an online tool to develop documentation in a collaborative manner.

LACORS and BIS have established the EU Services Directive Community of Practice to support the implementation of the Directive by 28th December 2009. **We already have more than 300 members.**

We hope councils and central competent authorities will use the facility to share their experiences and promote best practice. Our aim is to generate ongoing communication about the practical implementation of the Services Directive through discussion, sharing documents and developing ideas.

By becoming a member of this Community you will be able to review and contribute to all current discussions, tools and guidance supporting implementation of the Directive in the UK.

To join the EU Services Directive Community of Practice you will need to –

- Visit the website at www.communities.idea.gov.uk
- Click on 'register' and agree to the terms and conditions.
- Complete your details with as much information as possible so that others may find you.
- An activation email will have been sent to your inbox.
- Log on by entering your email address and password.
- Search for the community entitled 'EU Services Directive' and register.
- You can also search for other communities and register for these too.

4.4 Best practice

Councils should also consider consulting with appropriate businesses, community groups and individuals when setting licence fees.

Councils could make information available from the outset as to how the licence fee has been calculated and how a business can appeal against the fee that has been set.

Councils may also want to consider discussing licence fees at local liaison / regional groups to share experiences and best practice.

4.5 Further guidance

BIS have produced a range of guidance specifically for local government about the wider implications of the EC Services Directive. The guidance available is regularly being updated and expanded in consideration of feedback from councils.

Further guidance is available at

<http://www.berr.gov.uk/whatwedo/europeandtrade/europe/services-directive/local%20authority/page50021.html>