

Report of Section Head, Entertainment Licensing

Report to Head of Elections, Licensing and Registration

Date: 24 November 2016

Subject: Entertainment Licensing Fees and Charges - Supplementary

Are specific electoral Wards affected?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, name(s) of Ward(s):		
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If relevant, Access to Information Procedure Rule number:		
Appendix number:		

Summary of main issues

1. The Licensing Authority sets the fees for sex establishments (sexual entertainment venues, sex shops and sex cinemas), places of marriage and scrap metal dealers in June 2016, following the decision of the Supreme Court that stated Licensing Authorities could include an element for enforcement when setting fees.
2. The European Court of Justice has now provided a preliminary opinion that this is not the case and that the EU Services Directive precludes the ability for Licensing Authorities to include any element for enforcement.
3. This report provides an updated fee for sex establishments.

Recommendations

4. That the Head of Elections, Licensing and Registration considers the contents of this report and approve the scheme of charges for sex establishments from 24 November 2016 until reviewed again.

1 Purpose of this report

- 1.1 To present to the Head of Elections, Licensing and Registration an amended fee scheme that reflects the cost of processing and determining applications for sex establishment licences commencing from 21st November 2016.

2 Background information

- 2.1 Entertainment Licensing is responsible for:

- Licensing Act 2003
- Gambling Act 2003
- Sex Establishments
- Scrap Metal Dealers
- Places of Marriage
- Film classification
- Hypnotism
- Charitable Collections (street and house to house)

- 2.2 The fees relating to the Licensing Act 2003 and Gambling Act 2005 are set by statute. There is no fee for film classification, hypnotism and charitable collections.

- 2.3 The fees for sex establishments, places of marriage and scrap metal dealers are set by the council. Authority for the setting of fees is delegated through the Officer Delegation scheme to Head of Licensing and Registration.

3 Main issues

- 3.1 The fees for the three regimes of sex establishments, scrap metal and places of marriage are caught under the European Services Directive and Provision of Services Regulations.

European Services Directive

- 3.2 The European Services Directive ensures that the fee is limited to cost recovery. It provides:

“Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures.”

- 3.3 Regulation 18 of the Provision of Services Regulations effectively replicates the provisions of the Directive. Guidance on the provisions was given in the Department for Business Innovation and Skills’ Guidance for Local Authorities on the Provision of Services Regulations. These states:

“Local Authorities must set fees that are proportionate to the effective cost of the procedure dealt with. As costs vary from region to region, central advice on the level of fees will not be appropriate. Local Authorities will need to bear in mind the threat of legal challenge should a service provider feel that the levels of fee are being used as an economic deterrent or to raise funds for Local Authorities. Enforcement costs should not be assimilated with the application fee. This is to forestall the possibility of an unsuccessful applicant seeking legal remedy due to part of his fees having been used to subsidise his successful competitors.”

- 3.4 The Department’s corresponding Guidance for Businesses on the Provision of Service Regulations states:

“Under regulation 18, fees charged in relation to authorisations must be proportionate to the effective cost of the process e.g. to cover the actual cost of the application process. Fees should not be used as an economic deterrent to certain activities or to raise funds. As now, if you believe the fee to be disproportionate you can contest it with the authority concerned.”

Hemmings Case

- 3.5 In 2012 the operators of a number of sex shops in Westminster were successful in their High Court action against Westminster City Council in challenging the level of fees set by them. The basis of the case was that the authority had not taken into account a European Directive and that the fees were in excess of what they should have been. It was argued that prosecuting persons, businesses and companies who operate sex establishments illegally could not be included in the fee structure of the council.

- 3.6 Westminster Council appealed the decision of the High Court to the Court of Appeal, which dismissed the appeal, supporting the High Court. It is clear that the Court of Appeal have determined that where there is an administrative licensing process, there is a need to be particularly careful with how the fee structure is established. This is critical if the fees are not set centrally as standard fees.

- 3.7 On 25th April 2015 the Supreme Court took into consideration the cases in the lower court, and the EU Services Directive, and determined that:

“...But there is no reason why it should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences.”

- 3.8 The Supreme Court referred the matter to the European Court of Justice who published their decision on the 16th November on the matter of how to charge the fee for enforcement. The European Court of Justice determined that:

"Article 13(2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding the competent authority of a Member State from taking into account, when calculating the fee due for the grant or renewal of an authorisation, the cost of managing and enforcing the authorisation scheme, even if the part corresponding to that cost is refundable where the application for the grant or renewal of the authorisation in question is refused."

Sex Establishments

- 3.9 In line with the Supreme Court judgement when the fee for sex establishments was set in June 2016 it included a refundable element for the enforcing of the licensing scheme. Specifically a sum of £137 was included for compliance costs, but that this is to be refundable if the application is refused or withdrawn as follows:

Sex Shop	Grant	Variation	Renewal	Transfer	Change
Process application	£563	£347	£431	£431	£31
Sub Committee Hearing	£1,713	£1,713	£0	£0	£0
Policy Development	£135	£135	£135	£135	£0
General Enquiries	£22	£22	£22	£22	£22
Compliance Costs	£137	£0	£137	£137	£0
Total	£2,570	£2,217	£725	£725	£53

Sexual Entertainment Venue	Grant	Variation	Renewal	Transfer	Change
Process application	£563	£347	£563	£5631	£31
Sub Committee Hearing	£1,713	£1,713	£1,713	£1,713	£0
Policy Development	£135	£135	£135	£135	£0
General Enquiries	£22	£22	£22	£22	£22
Compliance Costs	£137	£0	£137	£137	£0
Total	£2,570	£2,217	£2,570	£2,570	£53

Sex Cinema	Grant	Variation	Renewal	Transfer	Change
Process application	£563	£347	£431	£431	£31
Sub Committee Hearing	£1,713	£1,713	£0	£0	£0
Policy Development	£135	£135	£135	£135	£0
General Enquiries	£22	£22	£22	£22	£22
Compliance Costs	£137	£0	£137	£137	£0
Total	£2,570	£2,217	£725	£725	£53

- 3.10 It is recommended that the element for compliance be removed and the fees set as follows:

	Grant	Variation	Renewal	Transfer	Change
Sex Shop	£2,433	£2,217	£588	£588	£53
Sexual entertainment venue	£2,433	£2,217	£2,433	£2,433	£53
Sex Cinema	£2,433	£2,217	£588	£588	£53

Scrap Metal

- 3.11 The fee for a scrap metal dealer (collector or site) was set at the same time and included an amount of £68 for compliance checks. However, guidance from the Home Office on the setting of fees for scrap metal advises that licensing authorities are able to include this element to the fee.

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 There is no statutory requirement to consult with licence holders before reviewing the fee for sex establishment regimes. As this is a change that benefits sex establishments it is recommended that a formal consultation process would not be good value for money in this instance.
- 4.1.2 Consultation has been undertaken with the Chair of the Licensing Committee and the Executive Member with the licensing portfolio.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 There are no implications for equality and diversity/cohesion and integration in setting a fee structure.

4.3 Council Priorities and Best Council Plan

- 4.3.1 The licensing regime contributes to the following Best Council Plan 2015-20 outcomes:

- Improve the quality of life for our residents, particularly for those who are vulnerable or in poverty;
- Be safe and feel safe
- Make it easier for people to do business with us.

- 4.3.2 The licensing regime is linked to the Best Council Plan objectives:

- Supporting communities and tackling poverty, and
- Becoming a more efficient and enterprising council
- Promoting sustainable and inclusive economic growth
- Building a child friendly city

4.4 Resources and value for money

- 4.4.1 The licensing of sex establishments attracts a fee which can only be used to pay for the costs associated with the licence application and cannot be used to cover the cost of the investigation of unlicensed activity.
- 4.4.2 The cost of enforcement has to be borne by the council as it is not recoverable through the fee schemes for sex establishments or places of marriage. Separate guidance from HM Government advises that an element for compliance checks is allowed within the scrap metal dealers fee. Finance officers have been consulted and have confirmed that the cost of enforcement is covered by the subsidy the council provides in operating this service.

4.5 Legal Implications, Access to Information and Call In

- 4.5.1 The recent case has highlighted the need for councils to ensure that fees only include the costs of processing applications.

4.6 Risk Management

- 4.6.1 Following the result of the Hemmings case there is a risk of the licensees challenging the fees set by the authority, if they consider that the fee is not reasonable or that the council is making a charge for matters that are not relevant to the applications process.

5 Conclusions

- 5.1 Recent advice from the European Court of Justice has necessitated a limited review of sex establishment fees.

6 Recommendations

- 6.1 That the Head of Elections, Licensing and Registration considers the contents of this report and approve the scheme of charges for sex establishments from 24 November 2016 until reviewed again.

7 Background documents¹

- 7.1 There are no unpublished background documents that relate to this matter.

¹ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.