

NATIONAL TRADING STANDARDS

Estate and Letting
Agency Team

Protecting Consumers
Safeguarding Businesses

GUIDANCE FOR ENFORCEMENT AUTHORITIES

Tenant Fees Act 2019

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The contents of this guidance does not constitute legal advice merely the application of the law as interpreted by the National Trading Standards Estate and Lettings Agency Team; only a court of law can provide certainty.



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CHAPTER 1 – Enforcement Generally

Introduction

This guidance is produced to assist enforcement authorities in applying the Tenant Fees Act 2019 (“the TFA”). It is not to be treated as definitive legal advice and enforcement authorities are actively encouraged to liaise with their own internal legal department.

Bristol City Council is the designated “lead enforcement authority” (“LEA”) for the purposes of the TFA and in conjunction with the “lead enforcement authority” for the Estate Agents Act 1979 (“the EAA”), Powys County Council, operate under the title of the National Trading Standards Estate and Lettings Team, NTSELAT.

The scope of the TFA relates to regulating lettings agents, property agents and landlords in England only, whereas the scope of the EEA remains throughout the United Kingdom (England, Scotland, Wales and Northern Ireland)

This guidance is produced by NTSELAT to comply with the statutory duty found in Section 25(2) of the TFA.

Enforcement Authorities and Enforcers

An “enforcement authority” is defined in Sections 6 and 7 of the TFA to be a local weights or measures authority in England or a district council which is not itself a local weights and measures authority. **A weights and measures authority has a duty to enforce the TFA within their area¹** whereas a district council has discretion to enforce². It is the executive of the authority who is designated as the enforcer, not an internal department called “Trading Standards” or “Weights and Measures”.

In order to identify who are enforcers of the enforcement authority it is important to consider the provisions of the Consumer Rights Act 2015 (“the CRA”), specifically Paragraph 7 of Schedule 5 which defines enforcement officers, to be either :-

- (a) an inspector³ appointed by the enforcer to exercise powers under this Schedule, or authorised to do so;
- (b) an officer of the enforcer appointed by the enforcer to exercise powers under this Schedule, or authorised to do so;
- (c) an employee of the enforcer (other than an inspector or officer) appointed by the enforcer to exercise powers under this Schedule, or authorised to do so; or
- (d) a person (other than an inspector, officer or employee of the enforcer) authorised by the enforcer to exercise powers under this Schedule.

¹ Section 6(1)

² Section 7(1)

³ The term “inspector” is defined in Section 72(1) of the Weights and Measures Act 1985 and means a professionally qualified person duly appointed by the weights and measures authority

Subsection (a) relates to an “inspector” – a trading standards officer. Subsections (b) to (d) relate to other officers (not trading standards officers) duly appointed or authorised by the local authority by way of employment, secondment or as a consultant, as examples.

The legislation is specific in that “officers” for the purposes of enforcing the TFA **need not be trading standards officers**. Enforcement authorities are clearly able to utilise the services of officers within other departments, such as officers within Housing or Environmental Health, for the purposes of the TFA subject to proper application of the constitution of their employer local authority or even to subcontract out to external persons or bodies.

Constitutional delegation

Enforcement in local authorities is a mix of non-executive functions and executive functions (the powers being vested in the Chief Executive or Mayor or other statutory officer such as the Chief Inspector of Weights and Measures).

Non-executive functions are the remit of political oversight and would require authorisation to be provided by cabinet or portfolio. Executive functions are vested in the Chief Executive or Mayor or other statutory officer, such as the Chief Inspector of Weights and Measures.

It is crucial that enforcement officers are properly authorised through the correct mechanism to avoid acting ultra vires potentially rendering enforcement action unlawful. In such circumstances it opens up the possibility that is likely the defending legal representatives would argue that evidence obtained by unauthorised officers should be disregarded or even invoke the process of Judicial Review seeking to annul the enforcement action.

It is strongly suggested that enforcement officers’ power to enforce is reviewed to ensure they are properly empowered to undertake enforcement action. Each appointment should be recorded in a scheme of delegation from either the executive or non-executive where the original power was bestowed or from officers who are identified as delegates.

Appointed enforcement officers should also be in possession of a “warrant card” identifying the powers they are using on the ground – as certain legislation requires production upon request – and the warrant card is accordingly endorsed by the persons who are constitutionally empowered to exercise that function, either directly or by delegation.

It is not uncommon to have difficulty in identifying whether certain powers are executive or non-executive (or a combination of both) and in such circumstances it is suggested officers’ authority to act are countersigned by the executive and the non-executive as a belts and braces approach.

Scope of Enforcement Authorities

Enforcement authorities are empowered, under the TFA, to enforce the prohibition of certain payments made to landlords⁴ and letting agents⁵ as well as the treatment of holding deposits⁶ together with, dependent upon the identity of the enforcement authority, enforcement of other associated “letting agency legislation” relating to the publication of fees by lettings agents, redress membership and client money protection⁷.

The lead enforcement authority has the power to enforce the totality of the above “letting agency legislation” and their powers mimic those available to individual enforcement authorities.

Scope of the Lead Enforcement Authority

The LEA acts as a safety net, or backstop, for enforcement authorities and has a statutory duty to oversee the operation of the relevant letting agency legislation in England. Where local weights and measures authorities or district councils in England have a duty to enforce the TFA, the LEA has discretion⁸ to do so. The LEA will only exercise that discretion where enforcement authorities fail in their duty and where it is necessary and expedient to do so.

The LEA has a duty to advise the Secretary of State informed of the social and economic developments concerning tenancies, lettings work, related activities and the operation of the TFA and lettings legislation,⁹ including the necessity of utilising their discretion in enforcing the TFA.

Intelligence Reporting

Enforcement authorities are encouraged to regularly update intelligence systems in respect of any enforcement action or investigation being undertaken. NTSELAT encourages the use of the “IDB” system in order for a complete picture of enforcement within the sector can be appropriately analysed.

It is further suggested any RAST¹⁰ agreement with the Citizens Advice Consumer Helpline is refreshed to include the correct details for notification and referrals within the authority.

⁴ Section 1

⁵ Section 2

⁶ Schedule 2

⁷ Section 24(6)

⁸ Section 26(1)

⁹ Section 25(8)

¹⁰ Referral Agency Search Tool operated by Citizens Advice

CHAPTER 2 – Prohibited and permitted payments

A payment made to a landlord or letting agent in connection with a tenancy must be permitted¹¹. **If a payment is not permitted it is prohibited by default¹².**

Permitted payments are:-

- **Regular payments of rent**, calculated in equal instalments over the duration of the tenancy

Lower amounts of rent will be deemed to be the actual of rent payable and any surplus paid will be deemed to be a prohibited payment.

Supplements to rent, such as a premium for pets, are not permissible and any surplus above the actual rent amount would be classified as a prohibited payment.

- **A tenancy deposit** capped at no more than 5 weeks rent¹³ if the annual rent¹⁴ is below £50000.00, or in the case of annual rent exceeding £50000.00 the tenancy deposit is not to exceed 6 weeks rent

Amounts paid as a deposit in excess of these thresholds will be deemed to be a prohibited payment.

- **A holding deposit**, to secure the tenancy at a later date, capped at no more than 1 weeks rent.

Surplus sums are deemed to be a prohibited payment.

The holding deposit must be refunded to the tenant:-

- within 7 days of the tenancy commencing,
- within 7 days when the landlord decides not to proceed with the tenancy as long as this decision is made at least 15 days before the tenancy is scheduled to commence, or
- if the landlord and the tenant cannot agree the terms of the tenancy agreement the holding deposit is to be refunded no later than 7 days beginning with the date the tenancy was scheduled to commence.

¹¹ Schedule 1

¹² Section 3(1)

¹³ Weekly rent is calculated by multiplying the monthly rent by 12 and dividing by 52

¹⁴ Weekly rent multiplied by 52, or monthly rent multiplied by 12

Tenants can agree to offset the holding deposit towards the first instalment of rent or to offset the holding deposit towards the tenancy deposit but such offset, with other sums paid, cannot exceed the imposed caps. The date of offset is deemed to be the date of payment towards either the rent or the tenancy deposit.

The landlord or the letting agent can retain the holding deposit if the prospective tenant fails reasonable credit reference checks, the prospective tenant is disqualified as a consequence of their immigration status, the prospective tenant unilaterally withdraws from entering into the tenancy agreement or otherwise reasonably fails to enter into the tenancy.

The landlord or the letting agent can also retain the holding deposit if they have evidence the prospective tenant has provided false or misleading information, and that false or misleading information is fundamental in deciding to grant the tenancy.

A landlord or letting agent who has retained the holding deposit must notify the prospective tenant within 7 days. Failure to do so will invalidate the entitlement to retain the holding deposit and it must be repaid as a prohibited payment.

➤ **Default payments**

The landlord or letting agent is entitled to claim the cost of recovery for replacement security devices (keys, alarm fobs, etc.) but only the reasonable costs of replacement and where the costs of replacement have been issued to the tenant.

A landlord or letting agent is entitled to apply interest (calculated at no more than 3% above the Bank of England's base rate, per annum) to unpaid rent if that rent is unpaid for a period in excess of 14 days. Interest is calculated daily¹⁵.

Compensatory amounts for damage, etc. are still permissible subject to contractual terms expressly identifying where deductions can be applied. These deductions can originate from the tenancy deposit should there be sufficient sums or can otherwise be recovered through the usual civil remedies.

A fixed aggregated fee for damage within the property is not permitted.

➤ **The tenant has requested variations to the tenancy agreement**

If the tenant has requested the tenancy agreement be varied, assigned or novated the landlord or letting agent can request payment of no more than £50 to process the change. Any payment in excess of £50 is a prohibited payment.

➤ **Early termination**

If the tenant requests the term of the tenancy is curtailed, the landlord or letting agent is entitled to an amount of rent which would have been paid if the tenancy had continued.

¹⁵ Based on annual rent divided by 365 and applied to the number of days, less 14, rent is unpaid

Should the landlord or letting agent be able to enter into a new tenancy agreement with a new tenant during the void period the amount of any rents received from the new tenant cannot be claimed from the former tenant. In such circumstances the amount of the double recovery is a prohibited payment payable to the original tenant.

- [Inclusive utility bills, broadband, Council tax, TV subscriptions, TV licence, etc.](#)

If a tenancy agreement is inclusive of these items, the landlord or letting agent cannot separately apply liability to the tenant for these sums and such a payment by the tenant would be regarded as a prohibited payment.

The tenant is liable for payment of such services only if the tenancy agreement expressly identifies liability lies with the tenant.

Prohibited payments

Any sums which are a condition on the granting, continuance, assignment, termination or renewal of the tenancy are outright banned which includes payments to third parties.

Supplementary charges for the following items, as examples, are subject to the prohibition:

- Credit referencing or the provision of an exit reference
- Administration fees
- Management service charges
- Cleaning
- Inventory checks
- Fees associated with a guarantor

Applicable timeframes regarding prohibited payments

Pre-existing tenancies (excluding statutory and contractual periodic tenancies) are not initially subject to the provisions of the TFA. They will fall within scope after on 1st June 2020.

For the purposes of prohibited payments any deposit is deemed to have been paid on the date an agreement has been achieved, particularly so when a verbal agreement is reached before 1st June 2019 and the tenancy agreement being signed after this date. Enforcement authorities need to verify no further negotiations took place after 1st June 2019 as ongoing negotiations are indicative no agreement had yet been achieved.

While a deposit may have been paid before 1st June 2019 and the tenancy is agreed after this date (particularly relevant for student lets) any excess of the permitted payment is deemed to be prohibited. Landlords and letting agents must, in such circumstances, refund any excess of the permitted deposit to the tenant within 28 days.

Exemptions

A local housing authority or the Greater London Authority or their respective delegates are exempt from the provisions of guaranteeing rent¹⁶.

Enforcement procedure

NTSELAT has produced a toolkit for Enforcers which supplements this guidance.

Enforcement authorities must be satisfied “beyond a reasonable doubt”, the criminal standard of proof, that a letting agent or landlord has breached Section 1 or 2 or Schedule 2 of the TFA, despite the sanction for an initial breach of the TFA to be a civil penalty. The rationale for the higher burden of proof is that a second breach of the TFA can be subject to a criminal prosecution. Enforcement authorities must notify any other enforcement authorities where the landlord or letting agent operate (which prohibits those separate enforcement authorities from taking action) as well as notifying the LEA.

The first breach

The financial penalty

Enforcement authorities can impose an initial financial penalty not exceeding £5000 though there is a discretion in setting an appropriate scale in accordance with their own enforcement policy. A penalty to be imposed upon a letting agent or landlord must be fair and proportionate and considered on a case by case basis. Consideration must be given to aggravating and mitigating factors and the overall fairness and proportionality of the penalty.

The Notice of Intent

Prior to issuing a financial penalty an enforcement authority must issue a “Notice of Intent” within 6 months of the enforcement authority having sufficient evidence the landlord or letting agent has required a tenant to make a prohibited payment. If the breach is ongoing the 6-month deadline continues until the breach ceases. A Notice of Intent can be served spontaneously.

The Notice must contain the date of the Notice, the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty¹⁷.

Details of the Notice of intent must be relayed to the LEA by the enforcement authority and if that enforcement authority is a district council they must also notify the weights and measures authority.

¹⁶ Section 1(10)

¹⁷ Schedule 3, Paragraph 2(5)

Representations

A recipient of a Notice of Intent can make written representations to the enforcement authority concerning the proposed penalty. Such representations must be made within 29 days of the date of the Notice of Intent having been served.¹⁸

Final Notice

After the time for representations has elapsed the enforcement authority must decide whether, or not, to issue a financial penalty and the amount of the penalty having taken into account any representations made.

Should the enforcement authority proceed to issue a financial penalty a “Final Notice” is to be served requiring payment of the financial penalty within 28 days or repayment of the prohibited payment to the tenant between 7 and 14 days.

Interest can be applied to the repayment of the holding deposit.

The final notice must include:-

- The date the final notice is served
- The amount of the penalty
- The reasons for issuing the penalty
- Information relating to how the penalty can be paid
- The deadline for paying the penalty
- Information concerning how to appeal to the First Tier Tribunal
- Consequences if the penalty is not paid.

Details of the Final Notice must be relayed to the LEA by the enforcement authority and if that enforcement authority is a district council they must also notify the weights and measures authority.

Enforcement authorities are also obligated to notify each affected housing authority outside of their own area of the details of the final notice including amendment or withdrawal.

Withdrawing or Amending the Notice

An enforcement authority can withdraw or amend a Notice of Intent or a Final Notice by writing to the landlord or letting agent. Amendments can include a reduction only (not an increase) of the proposed or actual penalty or to remove a requirement to refund a prohibited payment to the tenant.

Details of the withdrawal or amendment must be relayed to the LEA by the enforcement authority and if that enforcement authority is a district council they must also notify the weights and measures authority.

¹⁸ Schedule 3, Paragraph 3 states the period to be 28 days after the day the Notice of Intent was served.

A second, or subsequent, breach

Should the landlord or letting agent commit a second or subsequent breach within 5 years of the final notice imposing the penalty was served, the enforcement authority can either impose a financial penalty not exceeding £30000 (by following the same procedure required for the first breach) or can alternatively issue criminal proceedings where the landlord or letting agent could receive an unlimited fine.

Irrespective as to whether the enforcement authority imposes an elevated financial penalty or prosecutes the landlord or letting agent the second, or subsequent offence, is a “banning order offence” for the First Tier Tribunal to impose a “banning order”¹⁹ preventing that person from letting houses and/or engaging in lettings agency and/or property management work.

Appeals

A person who has received a Final Notice itemising a financial payment to be paid can appeal to the First Tier Tribunal in respect of the decision to impose the penalty or the amount of the penalty.

An appeal has to be lodged with the First Tier Tribunal within the specified 28 days for a penalty relating to prohibited payments or the specified duration between 7 and 14 days in respect of refunding the tenant.

If an appeal is lodged during these timeframes the Final Notice is suspended until the decision of the First Tier Tribunal, or the appeal is withdrawn or abandoned.

Recovery proceedings

Should a financial penalty remain unpaid after the specified period of payment and an appeal has not been lodged with the First Tier Tribunal (or the Tribunal, after an appeal, has either confirmed the original financial penalty or substituted a different sum or the appeal has been abandoned or withdrawn) the financial penalty can be enforced.

A financial penalty for a prohibited payment is due to the enforcement authority and can be recovered as a civil debt though the penalty itself is classed as an order of the court.²⁰ Usual enforcement action for recovery can then be instigated in the County Court for a judgment which can be recovered using bailiffs or Sheriffs of the High Court²¹.

Prohibited payments themselves are sums due to the tenant and it is the tenant, not the enforcement authority, who has to enforce this debt. Again the payment due is classed as an order of the court and can be recovered using the usual civil recovery process. The enforcement authority may provide assistance to the tenant in recovering their overpayment and can also conduct litigation on their behalf.

Monies received by the enforcement authority

An enforcement authority is entitled to use monies received from financial penalties issued under the TFA towards meeting “the costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement function under this Act or otherwise in relation to the private rented sector.” Any sums not so used are to be paid to the Secretary of State.²²

¹⁹ Section 14 Housing and Planning Act 2016

²⁰ Schedule 3, Paragraph 7(2)

²¹ A certificate needs to be signed by the enforcers Chief Financial Officer stating the amount due had not been paid by the date of the certificate – Schedule 3, Paragraph 7(3)

²² Schedule 3, paragraph 10

CHAPTER 3 – Publication of Fees

Any person engaging in letting agency work²³ (except local authorities)²⁴ or property management work is obligated to display a list of the fees tenants are required to pay at

- (a) each of the agent's premises at which the agent deals face-to-face with persons using or proposing to use services to which the fees relate, and
- (b) at a place in each of those premises at which the list is likely to be seen by such persons²⁵.

Such a person is also required to publish those fees on their own website²⁶ or third party websites²⁷

Fees do not include rent, deposits, monies received by the letting agent from a person other than the tenant as these sums are variable for each property being let.²⁸

The description of the fees must include²⁹

- (a) a description of each fee that is sufficient to enable a person who is liable to pay it to understand the service or cost that is covered by the fee or the purpose for which it is imposed (as the case may be),
- (b) in the case of a fee which tenants are liable to pay, an indication of whether the fee relates to each dwelling-house³⁰ or each tenant under a tenancy of the dwelling-house, and
- (c) the amount of each fee inclusive of any applicable tax or, where the amount of a fee cannot reasonably be determined in advance, a description of how that fee is calculated.

A person engaging in letting agency work or property management work has a duty to additionally publish, with the list of fees, details of membership of the client money protection scheme³¹ which the person is a member as well as details of redress membership³².

²³ Section 86 of the Consumer Rights Act 2015

²⁴ Section 86(3)

²⁵ Section 83(2)

²⁶ Section 83(3)

²⁷ Section 83(3)(C)

²⁸ Section 85(2)

²⁹ Section 83(4)

³⁰ Section 88(1) defines dwelling house to be a house or part of a house

³¹ Section 83(6)

³² Section 83(7)

Enforcement Authorities

A local weights or measures authority (the local authority not necessarily the trading standards department) in England or Wales has a duty to enforce the provisions of this Chapter in its area.³³

Any absence of the prescribed information on the agents' website is deemed to have taken place in each local authority area that agent engages in letting agency work though only one local authority can enforce and that particular local authority must obtain consent from other affected local authorities.³⁴ Multiple sanctions for the same offending is prohibited.³⁵

Exemptions

A private registered provider of social housing, a registered social landlord³⁶, or a fully mutual housing association³⁷ are not subject to these provisions.

Enforcement procedure

Unlike the threshold for prohibited fees the burden for local weights and measures authority is "on the balance of probabilities" the person has failed to display a list of the fees. The sanction is a financial penalty not exceeding £5000³⁸.

The Notice of Intent

Prior to issuing a financial penalty a weights and measures authority must, similar to the procedure for prohibited payments, issue a "Notice of Intent" within 6 months of the weights and measures authority having sufficient evidence the letting agent has failed to properly publish their fees. If the breach is ongoing the 6-month deadline continues until the breach ceases. A Notice of Intent can be served spontaneously.

The Notice must contain the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty³⁹. There is no statutory requirement to date the Notice of Intent though it would be strongly advised to do so.

Representations

³³ Section 87(1)

³⁴ Sections 87(4) and 87(5)

³⁵ Section 87(6)

³⁶ A body registered as a social landlord under Chapter 1 of Part 1 of the Housing Act 1996;

³⁷ Section 1(1) and (2), Part 1 of the Housing Associations Act 1985

³⁸ Section 87(7)

³⁹ Schedule 9, Paragraph 1

A recipient of a Notice of Intent can make written representations to the weights and measures authority concerning the proposed penalty. Such representations must be made within 29 days of the date of the Notice of Intent having been served.⁴⁰

Final Notice

After the time for representations has elapsed the weights and measures authority must decide whether, or not, to issue a financial penalty and the amount of the penalty having taken into account any representations made.

Should the weights and measures authority proceed to issue a financial penalty a “Final Notice” is to be served requiring payment of the financial penalty within 29 days.⁴¹

The final notice must include⁴²:-

- The amount of the penalty
- The reasons for issuing the penalty
- Information relating to how the penalty can be paid
- The deadline for paying the penalty
- Information concerning how to appeal to the First Tier Tribunal
- Consequences if the penalty is not paid.

Again the dating of the notice is not mandated though it is strongly suggested a date is properly applied to the document.

Withdrawing or Amending the Notice

A weights and measures authority can withdraw or amend a Notice of Intent or a Final Notice by writing to the letting agent. Amendments can include a reduction only (not an increase) of the proposed or actual penalty.

Appeals

A person who has received a Final Notice itemising a financial payment to be paid can appeal to the First Tier Tribunal in respect of the decision to impose the penalty or the amount of the penalty if the notice was served by a weights and measures authority in England, though if served by a weights and measures authority in Wales an appeal lies to the residential property tribunal.⁴³

⁴⁰ Schedule 9, Paragraph 2 states the period to be 28 days after the day the Notice of Intent was served.

⁴¹ Schedule 9, Paragraph 3 states the period to be 28 days after the day the Final Notice was served.

⁴² Schedule 9, Paragraph 4

⁴³ Schedule 9, Paragraph 5(1)

An appeal has to be lodged with the appropriate appellant institution within 29 days⁴⁴ during which the Final Notice is suspended until the decision of the First Tier Tribunal or the appeal is withdrawn⁴⁵.

There are four grounds to appeal⁴⁶

- the decision to impose a financial penalty was based on an error of fact,
- the decision was wrong in law,
- the amount of the financial penalty is unreasonable, or
- the decision was unreasonable for any other reason.

Recovery proceedings

Should a financial penalty remain unpaid after the specified period of payment and an appeal has not been lodged with the appellant institution (or the appellant institution, after an appeal, has either confirmed the original financial penalty or substituted a different sum or the appeal has been abandoned or withdrawn) the financial penalty can be enforced.

A financial penalty for a prohibited payment is due to the weights and measures authority and can be recovered as a civil debt as the penalty is classed as an order of the court.⁴⁷ Usual enforcement action for recovery can then be instigated in the County Court for a judgment which can be recovered using bailiffs or Sheriffs of the High Court⁴⁸.

Monies received by the weights and measures authority

A weights and measures authority is entitled to use monies received from financial penalties issued for failure to display fees for the “purposes of any of its functions (whether or not the function is expressed to be a function of a local weights and measures authority).”⁴⁹

⁴⁴ Schedule 9, Paragraph 5(3) states the period to be 28 days after the day the Final Notice was served.

⁴⁵ Schedule 9, Paragraph 5(4)

⁴⁶ Schedule 9, Paragraph 5(2)

⁴⁷ Schedule 9, Paragraph 6(2)

⁴⁸ A certificate needs to be signed by the enforcers Chief Financial Officer stating the amount due had not been paid by the date of the certificate – Schedule 9, Paragraph 6(3)

⁴⁹ Schedule 9, Paragraph 6(5)

CHAPTER 4 – Redress Membership

A person who engages in lettings agency work⁵⁰ (unless exempted if the person is an employee, worker, contractor, etc. of the letting agent)⁵¹ or property management work⁵² (unless an exemption applies⁵³) is required to be a member of a redress scheme. Exemptions apply for employees, workers, contractors, etc. of the letting agent

Enforcement Authorities

A district council, a London borough council, the Common Council of the City of London in its capacity as a local authority, or the Council of Isles of Scilly⁵⁴ in England has a duty to enforce the provisions of this Chapter in its area.

Exemptions

Tenancies related to employment⁵⁵, an educational institution who provides accommodation for student nurses⁵⁶, or activities undertaken by “authorised persons”⁵⁷ engaging in relevant legal activities.

Enforcement procedure

The burden for enforcement authorities is that “on the balance of probabilities” the person is not a member of a redress scheme. The sanction is a financial penalty not exceeding £5000.⁵⁸

The Notice of Intent

Prior to issuing a financial penalty an enforcement authority must issue a “Notice of Intent” within 6 months of that authority having sufficient evidence the person who engages in lettings agency work or property management work is not a member of a redress scheme.

The Notice must contain the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty⁵⁹. There is no statutory requirement to date the Notice of Intent though it would be strongly advised to do so.

⁵⁰ Article 3, The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014

⁵¹ Articles 4

⁵² Article 5

⁵³ Article 6

⁵⁴ Article 2

⁵⁵ Article 4(2)

⁵⁶ Paragraph 5, Schedule 1 the Local Government Finance Act 1992

⁵⁷ Section 18 Legal Services Act 2007

⁵⁸ Article 8(2)

Representations

A recipient of a Notice of Intent can make written representations to the enforcement authority concerning the proposed penalty. Such representations must be made within 28 days of the date of the Notice of Intent having been served.⁶⁰

Final Notice

After the time for representations has elapsed the enforcement authority must decide whether, or not, to issue a financial penalty and the amount of the penalty having taken into account any representations made.

Should the enforcement authority proceed to issue a financial penalty a “Final Notice” is to be served requiring payment of the financial penalty within 28 days.⁶¹

The final notice must include⁶²:-

- The amount of the penalty
- The reasons for issuing the penalty
- Information relating to how the penalty can be paid
- The deadline for paying the penalty, not less than a further 28 days
- Information concerning how to appeal to the First Tier Tribunal
- Consequences if the penalty is not paid.

Again the dating of the notice is not mandated though it is strongly suggested a date is properly applied to the document.

Withdrawing or Amending the Notice

An enforcement authority can withdraw or amend a Notice of Intent or a Final Notice by writing to the letting agent or property management agent. Amendments can include a reduction only (not an increase) of the proposed or actual penalty.

Appeals

A person who has received a Final Notice itemising a financial payment to be paid can appeal to the First Tier Tribunal⁶³ and if an appeal is lodged the Final Notice is suspended until the decision of the First Tier Tribunal or the appeal is withdrawn⁶⁴.

There are four grounds to appeal⁶⁵

⁵⁹ Schedule, Paragraph 1(3)

⁶⁰ Schedule, Paragraph 2

⁶¹ Schedule, Paragraph 3

⁶² Schedule, Paragraph 3(3)

⁶³ Article 9

⁶⁴ Article 9(3)

⁶⁵ Article 9(2)

- the decision to impose a financial penalty was based on an error of fact,
- the decision was wrong in law,
- the amount of the financial penalty is unreasonable, or
- the decision was unreasonable for any other reason.

Recovery proceedings

Should a financial penalty remain unpaid after the specified period of payment and an appeal has not been lodged with the First Tier Tribunal (or the First Tier Tribunal, after an appeal, has either confirmed or varied the original financial penalty or the appeal has been withdrawn) the financial penalty can be enforced.

A financial penalty for a prohibited payment is due to the weights and measures authority and can be recovered as a civil debt as the penalty is classed as an order of the court.⁶⁶ Usual enforcement action for recovery can then be instigated in the County Court for a judgment which can be recovered using bailiffs or Sheriffs of the High Court⁶⁷.

Monies received by the enforcement authority

An enforcement authority is entitled to use monies received from financial penalties issued for lack of redress membership for “of any of its functions”⁶⁸

⁶⁶ Article 10(1)

⁶⁷ A certificate needs to be signed by the enforcers Chief Financial Officer stating the amount due had not been paid by the date of the certificate – Article 10(2)

⁶⁸ Article 10(3)

CHAPTER 5 – Client Money Protection

A “property agent”⁶⁹ who holds client money must be a member of an approved or designated client money protection scheme.⁷⁰ The indemnity must not be less than the maximum amount of client money held by the property agent.⁷¹

A “regulated property agent” is a property agent who has to be registered for client money protection⁷² – that is holding client money. Conversely if a property agent does not hold client money they are not a regulated property agent and need not be registered for client money protection.

Regulated property agent’s must⁷³

- Obtain a certificate confirming the agent’s membership of the approved or designated client money protection scheme
- At each of the agent’s premises in England at which the agent deals face-to-face with persons using or proposing to use the agent’s services as a property agent...in a place here the certificate is likely to be seen by such persons
- Publish a copy of the certificate on the agent’s website (if any); and
- Produce a copy of the certificate to any person who may reasonably require it, free of charge.

A failure of the above requirements could result in a maximum sanction of £30000⁷⁴.

Upon the change in client money protection underwriting the regulated property agent must also, within 14 days⁷⁵ comply with the “transparency requirements”:-

- Notify their client’s (any persons who the client money belongs to) of a change in underwriter; or
- Notify their client that membership the subscription to the client money protection service has been revoked.

The sanction for breaching the transparency requirements is a maximum financial penalty of £5000⁷⁶. A due diligence defence exists in respect of the transparency obligations where a person has taken all reasonable steps to obtain a copy of a certificate confirming membership of client money protection scheme and the scheme administrator has not provided it.

⁶⁹ A letting agent or property manager as defined by Part 2, Chapter 6, Section 56 of the Housing and Planning Act 2016

⁷⁰ Regulation 3(1) Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019.

⁷¹ Regulation 3(2)

⁷² Regulation 2

⁷³ Regulation 4(1)

⁷⁴ Regulation 6(2)

⁷⁵ Regulation 4(2)

⁷⁶ Regulation 7(2)

Enforcement Authorities

It is the duty⁷⁷ of every local authority⁷⁸ in England to enforce the requirements of client money protection within its own area. A local authority can also enforce in another local authority's area where the regulated property agent has also breach the requirements for client money protection subject to notifying the other local authority of its intentions. The other local authority cannot then enforce the same offending⁷⁹.

Exemptions

There are no exemptions to these provisions.

Enforcement procedure

The burden for local authorities is "beyond reasonable doubt"⁸⁰ a property agent is not a member of a designated client money protection scheme or has breached the transparency requirements.

The Notice of Intent

Prior to issuing a financial penalty the local authority must issue a "Notice of Intent" within 6 months of that authority having sufficient evidence the property agent has failed to subscribe to client money protection while holding client money or has failed to comply with the transparency requirements. A Notice of Intent can be issued spontaneously.

The Notice must contain the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty⁸¹. There is no statutory requirement to date the Notice of Intent though it would be strongly advised to do so.

Representations

A recipient of a Notice of Intent can make written representations to the local authority concerning the proposed penalty. Such representations must be made within 28 days of the date of the Notice of Intent having been served.⁸²

⁷⁷ Regulation 5(1)

⁷⁸ A local authority is defined as a local weights and measures authority in England – Section 135(5) Housing and Planning Act 2016

⁷⁹ Regulation 8

⁸⁰ Regulation 6(1)

⁸¹ Schedule, Paragraph 1(4)

⁸² Schedule, Paragraph 2

Final Notice

After the time for representations has elapsed the local authority must decide whether, or not, to issue a financial penalty and the amount of the penalty having taken into account any representations made.

Should the local authority proceed to issue a financial penalty a “Final Notice” is to be served requiring payment of the financial penalty within 28 days.⁸³

The final notice must include⁸⁴:-

- The amount of the penalty
- The reasons for issuing the penalty
- Information relating to how the penalty can be paid
- The deadline for paying the penalty, not less than a further 28 days
- Information concerning how to appeal to the First Tier Tribunal
- Consequences if the penalty is not paid.

Again the dating of the notice is not mandated though it is strongly suggested a date is properly applied to the document.

Withdrawing or Amending the Notice

A local authority can withdraw or amend a Notice of Intent or a Final Notice by writing to the property agent. Amendments can include a reduction only (not an increase) of the proposed or actual penalty⁸⁵.

Appeals

A person who has received a Final Notice itemising a financial payment to be paid can appeal to the First Tier Tribunal⁸⁶ and if an appeal is lodged the Final Notice is suspended until the decision of the First Tier Tribunal or the appeal is withdrawn⁸⁷.

There are two grounds to appeal⁸⁸

- the decision to impose a financial penalty
- the amount of the financial penalty

⁸³ Schedule, Paragraph 3(3)

⁸⁴ Schedule, Paragraph 3(4)

⁸⁵ Schedule, Paragraph 4

⁸⁶ Schedule, Paragraph 5(1)

⁸⁷ Schedule, Paragraph 5(3)

⁸⁸ Schedule, Paragraph 5(1)(a) and 5(1)(b)

Recovery proceedings

Should a financial penalty remain unpaid after the specified period of payment and an appeal has not been lodged with the First Tier Tribunal (or the First Tier Tribunal, after an appeal, has either confirmed or varied the original financial penalty or the appeal has been withdrawn) the financial penalty can be enforced.

A financial penalty for a prohibited payment is due to the local authority and can be recovered as a civil debt as the penalty is classed as an order of the court.⁸⁹ Usual enforcement action for recovery can then be instigated in the County Court for a judgment which can be recovered using bailiffs or Sheriffs of the High Court⁹⁰.

Monies received by the enforcement authority

A local authority is entitled to use monies received from financial penalties relating to client money protection it may apply the proceeds to meet the costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector with any surplus being paid over to the Consolidated Fund.⁹¹

⁸⁹ Schedule, Paragraph 6(2)

⁹⁰ A certificate needs to be signed by the enforcers Chief Financial Officer stating the amount due had not been paid by the date of the certificate – Schedule, Paragraph 6(3)

⁹¹ Schedule, Paragraph 7(1) and 7(2)

CHAPTER 6 – Quick Reference

Enforcement authorities

Topic	Legislation	Enforcer	Duty/Power
Prohibited payments	Section 1 & 2, and Schedule II of the TFA	Local weights and measures District Council (if not W&M) LEA	Duty Power Power
Publication of Fees	Section 83 of the CRA	Local weights and measures LEA	Duty Power
Redress Membership	Article 2 of The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc.) (England) Order 2014	A district council, a London borough council, the Common Council of the City of London in its capacity as a local authority, Council of Isles of Scilly LEA	Duty Power
Client Money Protection	Regulation 3 of the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019	Local authority in England LEA	Duty Power

Notification requirements

Applies to Notices of Intent, Penalties, Withdrawals, Final Notices, Payments, Appeals and Outcomes

Topic	Enforcer	Notify	Notes
Prohibited payments (OWN AREA)	Local weights and measures	LEA Local Housing authority	Relieved of duty if notified by another enforcer
	District Council (if not W&M)	W&M, LEA, and Local Housing authority	
Prohibited payments (ANOTHER AREA)	Local weights and measures	Other area W&M, Local Housing authority, and LEA	Other area W&M relieved of duty if notified by another enforcer
	District Council (if not W&M)	Other area W&M, Local Housing authority and LEA	Other area W&M relieved of duty if notified by another enforcer
	LEA	W&M and Local Housing authority	

Topic	Enforcer	Notify	Notes
Publication of Fees (PREMISES)	Local weights and measures (England & Wales)	LEA	
	LEA	Local W&M	
Publication of Fees (WEBSITE)	Other Local weights and measures (England & Wales) where dwelling house is located	Other W&M and LEA	Consent of other W&M required to impose penalty if within another W&M area
	LEA	Affected W&M areas	Consent required as above

<p>Redress Membership</p>	<p>A district council, a London borough council, the Common Council of the City of London in its capacity as a local authority, Council of Isles of Scilly, OR</p> <p>LEA</p>	<p>Notify each other and LEA</p>	
<p>Client Money Protection (OWN AREA)</p>	<p>Local authority in England</p>	<p>LEA</p>	
<p>Client Money Protection (ANOTHER AREA)</p>	<p>Local authority in England</p> <p>LEA</p>	<p>Other area W&M and LEA</p> <p>W&M</p>	<p>Other area relieved of duty if notified</p>

Legal test and penalties

Topic	Legal Test	Penalty
Prohibited payments	Beyond Reasonable Doubt	Section 1 & 2 and Schedule II First offence – up to £5000 (civil) but not a trigger for a banning order Second, or subsequent with 5 years (a) Up to £30000 (civil), or (b) Unlimited fine (criminal) A trigger for a banning order
Publication of Fees	On the balance of probabilities	Up to £5000
Redress Membership	On the balance of probabilities	Up to £5000
Client Money Protection	Beyond Reasonable Doubt	Up to £30000 for failure to register or inadequate cover; Up to £5000 for transparency breaches

Combined enforcement

An enforcement authority can impose multiple penalties for each topic (For example £5000 penalty for prohibited payments, another £5000 for failure to publish fees, another £5000 for failing to be a redress member and a further £5000 for failing to be a subscriber for CMP). However multiple offending under the same Section, Regulation, or Article can only be penalised as a single offence. Penalties can additionally be issued for successive offending.

Appeals

Topic	Appeal deadline	Grounds of Appeal	Venue and power
Prohibited payments	<p>Within 28 days in respect of financial penalty;</p> <p>Within 7 days in respect of a holding deposit</p> <p>Within 7 – 14 days (as specified in the notice) in respect of any other overpayment to be refunded to the tenant</p>	<p>the decision to impose the penalty, or</p> <p>the amount of the penalty</p>	<p>An appeal can be lodged with the First Tier Tribunal and, pending determination, the financial penalty is suspended.</p> <p>The First Tier Tribunal has power to quash, confirm, or vary downwards only the financial penalty.</p>
Publication of Fees	<p>Within 28 days beginning with the day after that on which the final notice was sent.</p>	<p>the decision to impose a financial penalty was based on an error of fact,</p> <p>the decision was wrong in law,</p> <p>the amount of the financial penalty is unreasonable, or</p> <p>the decision was unreasonable for any other reason</p>	<p>As above*</p>
Redress Membership	<p>Within 28 days beginning with the day after that on which the final notice was sent.</p>	<p>As per Publication of Fees above</p>	<p>As above</p>
Client Money Protection	<p>Within 28 days beginning with the day after that on which the final notice was sent.</p>	<p>the decision to impose the penalty; or</p> <p>the amount of the penalty.</p>	<p>As above</p>

*In respect of financial penalties issued for failing to Publish Fees to persons in Wales the appeal forum is the residential property tribunal

Allocation of receipts

Topic	Purpose of receipts	Surplus
Prohibited payments	The costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement function under this Act or otherwise in relation to the private rented sector.	Surplus funds are to be paid over to the Secretary of State.
Publication of Fees	For any of its functions (whether or not the function is expressed to be a function of a local weights and measures authority).	Funds can be used unilaterally within the authority.
Redress Membership	For any of its functions	As above
Client Money Protection	For meeting the costs and expenses (whether administrative or legal) incurred in, or associated with, carrying out any of its enforcement functions in relation to the private rented sector	Surplus funds are to be paid over to the Consolidated Fund