



infralink

Local Authority Advice Note

Please note that the guidance set out in this document is provided for information only and does not constitute legal advice by Scottish Futures Trust or DWF to any local authority or any other person. In addition, this document is not intended to provide an exhaustive statement of the matters that will require consideration by local authorities in connection with the grant of rights to use land or buildings and/or in connection with the use of the Payment Guidance. Neither Scottish Futures Trust nor DWF takes any responsibility for any decisions made by a local authority or any other person based upon the contents of this document. A local authority should obtain its own advice in relation to any proposed transaction.

February 2021



1. Introduction

- 1.1 This document has been prepared by Scottish Futures Trust in conjunction with DWF to help provide initial guidance to local authorities on how the Infralink Payment Guidance takes account of:
 - 1.1.1 subsidy control law considerations; and
 - 1.1.2 a local authority's "best consideration" duties under the 1973 Act.
- 1.2 The Payment Guidance aims to assist Scottish local authorities to determine a market value for certain types of commonly occurring transactions.
- 1.3 The Payment Guidance forms part of the Infralink toolkit that has been developed in consultation with the public sector and the mobile industry. Used with the Standard Lease, the toolkit will offer a credible option to current practice by establishing a balanced and transparent starting point for discussions between potential landlords and tenants. For both sides this will make negotiations and deployment more efficient and can result in improved connectivity in an area.¹
- 1.4 From 1 January 2021, the "subsidy control rules" replaced the EU state aid laws that applied in the UK prior to Brexit. The content of this document is based on the legal position that applies as at February 2021, taking into account the UK Government's guidance on subsidy control rules². Specific legislation on the matter may be implemented by the UK Government, which could impact upon the guidance provided here.
- 1.5 As there are developments in legislation, case law, or practice, this document will be updated so please check that you are using the most recent version.
- 1.6 A fuller, more detailed note on the background to the subsidy control rules and best consideration duties has been produced by Infralink and is available on request.

2. Subsidy Control Rules and the Payment Guidance

- 2.1 **Why does a local authority need to consider subsidy control rules when negotiating a lease with a mobile operator?**
 - 2.1.1 The new subsidy control rules potentially apply to any use of state "resources" and can apply to leases of or wayleaves over a local authority's land or buildings.
 - 2.1.2 A subsidy by a local authority could occur when a local authority grants a lease or wayleave for free or at a discount to the relevant market rate.
 - 2.1.3 If the local authority can demonstrate that the mobile operator is paying a market rate for the rights granted under the lease, then there is unlikely to be any advantage being

¹ For more information about Infralink and the toolkit please visit <http://infralink.scottishfuturestrust.org.uk/>

² Prior to the implementation of specific UK legislation, the UK Department for Business, Energy and Industrial Strategy has prepared some guidance to assist public authorities in mapping their way through the current rules, which can be found [here](#).



conferred on the mobile operator and, in turn, the subsidy control rules should not apply.

2.2 **Is the Payment Guidance compliant with the subsidy control rules?**

2.2.1 The Payment Guidance has been designed so that the subsidy control rules do not apply.

2.2.2 It assists local authorities to determine a market value by conducting an appropriate economic evaluation on the same basis as a site provider in the private sector would. This is reflected in Stage 1 of the Payment Guidance that:

2.2.2.1 takes into account the "no-network" principle that applies under the Electronic Communications Code³, and the associated case law;

2.2.2.2 reflects relevant market valuation information; and

2.2.2.3 adopts a "rounding-up" approach to the valuation bandings to take account of commonly accepted tenant benefits in relation to the relevant asset type and use.

2.2.3 The Payment Guidance does not remove the need for local authorities to consider leases on a case-by-case basis. The application of Stages 2 and 3 of the Payment Guidance (relating to specific Tenant Benefits and Landlord Burdens) will still require consideration by the local authority. In addition, the Payment Guidance will not apply to all types of sites/transactions and will not be appropriate for unusual or exceptional transactions, or transactions where the "no-network" value of the site is actually greater than the value of its use for installation of digital infrastructure.

2.2.4 The Payment Guidance should provide useful guidance to local authorities and their property teams/advisers, by providing a common framework that allows negotiations to begin from a fair and credible starting point, and with the comfort that it has been designed with the subsidy control rules in mind, thereby reducing the time it takes to agree the terms of a lease. However, the Payment Guidance does not remove the need for local authorities to engage with their property teams/advisers on relevant transactions.

³ The Electronic Communications Code is set out in Schedule 3A to the Communications Act 2003



3. Other Statutory and Internal Governance Rules

3.1 Are there any other rules that a local authority needs to consider when setting the fees payable under a lease?

3.1.1 Local authorities in Scotland are subject to certain statutory duties in relation to the sale or lease of land. The requirements of the relevant legislation are summarised in Non-Statutory Guidance published by the Scottish Government⁴.

3.1.2 One of the key requirements is known as the 'best consideration' requirement under the 1973 Act⁵. It puts a duty on local authorities to dispose of land for the "best consideration that can reasonably be obtained". There are exceptions where the disposal consideration is not the best but considered reasonable and is likely to contribute to the economic development or regeneration, health, social well-being, or environmental well-being of an area or person in the area of the local authority⁶.

3.1.3 The Non-Statutory Guidance also highlights that local authorities should consider *"whether or not it would be prudent, particularly in high value cases, to seek an independent valuation to provide an additional level of assurance"*.

3.1.4 A local authority should also consider whether there are any specific internal policies, standing orders, audit requirements or other governance rules that need to be considered when determining the consideration, including any policies that have been implemented pursuant to the Scottish Ministers' Non-Statutory Guidance⁷ in this area.

3.2 Is the Payment Guidance consistent with a local authority's "best consideration" duties under the 1973 Act?

3.2.1 We believe so. The Payment Guidance has been designed with local authorities' best consideration duties in mind by providing a framework to determine and agree a suitable market rate in an efficient manner. The mobile infrastructure installed on the site will improve connectivity to the wider area helping to support economic development and the provision of public services, education, and health.

⁴ <https://www.gov.scot/publications/disposal-land-local-authorities-scotland-regulations-general-guidance/>

⁵ Section 74 of the Local Government (Scotland) Act 1973

⁶ Disposal of Land by Local Authorities (Scotland) Regulations 2010

⁷ Including general "best value" duties under the Local Government in Scotland Act 2003



4. Summary and Further Reading

- 4.1 The Payment Guidance has been developed by the Infralink programme to assist local authorities in determining a market value for certain types of common and recurring transactions involving the installation of digital infrastructure on their land and buildings.
- 4.2 The Payment Guidance has been designed with the applicable subsidy control rules and relevant "best consideration" statutory duties of local authorities in mind. However, local authorities will appreciate that the suitability and application of the Payment Guidance will need to be considered on a case-by-case basis. In particular, the Payment Guidance is not intended to replace the need for local authorities to engage with its internal or external property specialists (including, where applicable, suitably qualified valuers) in connection with any proposed lease.
- 4.3 The rate of payment due under a lease will, of course, be only one of a number of legal, commercial and practical considerations that a local authority will need to consider in connection with the grant of rights to mobile operators for the purposes of deploying digital infrastructure on the local authority's property.