

Referendum on the UK's membership of the European Union

Guidance note on the process for investigating services rendered by a Regional Counting Officer (RCO) or Counting Officer (CO) which may have been inadequately performed and the approach to deciding whether a RCO or CO fee should be withheld or reduced

May 2016

Purpose

1.1 In order to ensure consistency and fairness, the Commission has developed this note to set out the process we intend to follow when we become aware of a service rendered by a Regional Counting Officer (RCO) or Counting Officer (CO) which may have been inadequately performed. It also establishes the process for deciding the fees that the RCO or CO should be entitled to.

1.2 Throughout this guidance we generally use 'CO' to refer to the CO and RCO. Where we are referring only to the RCO, this will be explicitly stated.

1.3 While each case will be dealt with on its individual facts and circumstances, this guidance provides an indication of what factors and processes the Commission would expect to take into account and follow in determining whether a service has been inadequately performed and in forming a decision as to whether the fee should be withheld or reduced and, if so, by how much.

Background

1.4 COs are legally entitled to recover their charges in respect of services rendered, or expenses incurred, for, or in connection with, a UK referendum if:

- the services were necessarily rendered, or the expenses were necessarily incurred, for the efficient and effective conduct of the election; and
- the total of their charges does not exceed the overall maximum recoverable amount specified in, or determined in accordance with, the European Union Referendum (Counting Officers' and Regional Counting Officers' Charges) Regulations 2016

1.5 The order specifies a maximum recoverable amount for services or expenses of any specified description and, generally, the CO may not recover more than that amount in respect of any such services or expenses.

1.6 The European Union Referendum (Counting Officers' and Regional Counting Officers' Charges) Regulations 2016 was made on 22 March 2016, and the accompanying guidance and resources are available [here](#).

1.7 The Charges Order specifies an overall maximum recoverable amounts for each voting area, which is comprised of two elements:

- A maximum amount **recoverable** by a CO in respect of specified services rendered (provided those services were necessarily rendered for the efficient and effective conduct of the referendum). The Order lists the specified services as:
 - Conducting the referendum;
 - Discharging the CO duties at the referendum; and
 - Making arrangements for the referendum

Additionally it is the COs general duty at a referendum to do all such acts and things as may be necessary for effectually conducting the referendum in the manner provided by the referendum rules.¹

- A maximum amount recoverable by COs in respect of specified expenses incurred in connection with the referendum (provided those expenses were necessarily incurred for the efficient and effective conduct of the referendum).

1.8 This first element is commonly referred to as the CO's 'personal fee' and is the subject of this guidance note.

1.9 Under paragraph 16(2) and (3) of the European Union Referendum Act 2015 the Commission has the power to reduce or withhold the fee of any Counting Officer if they are held not to have performed their services adequately.

Process

1.10 The Commission could become aware of an issue regarding potential inadequate performance by a CO through a variety of routes including, but not limited to, the following:

- monitoring the performance of COs at the referendum, including the collection of management information from COs
- information provided by RCOs on the performance of COs in their voting area
- observations by Commission representatives
- enquiries or complaints made to the Commission
- media reporting

1.11 Where the Commission becomes aware of an issue in the period before the conclusion of the referendum, the priority will be to take steps to ensure the successful delivery of the poll. In these cases, our teams across England, Scotland, Wales and Northern Ireland, working with the RCO, will contact the local authority in question as soon as practicable to discuss the issue and the potential courses of action to remedy the situation. The Commission will seek to provide support where needed to enable the provision of a high-quality service to voters. This does not, however, prevent the Commission subsequently investigating the matter and deciding the fees that the CO should be entitled to. The Commission will record any such discussions and the support provided.

1.12 The Commission could also become aware of an issue in the period after the referendum.

Gateway assessment

1.13 Enquiries, complaints and monitoring information received by the Commission are routinely logged by our teams across England, Scotland, Wales and Northern Ireland and then reviewed by our Guidance team. In reviewing these logs or upon referral from our teams across England, Scotland, Wales and Northern Ireland, the

¹ Paragraph 7 Sch 3 of the European Union Referendum Act 2015.

Guidance team will refer any matter **which appears** to indicate that there may be a **significant** performance issue with regard to a particular CO (having regard to the factors set out in Appendix 1 of this document) to the Head of Performance.

Initial investigation and determination as to whether a formal investigation is required

1.14 In relation to those matters which are referred to the Head of Performance, (s) he will determine whether, **on the face of the matter**, the service rendered by the CO may have been inadequately performed and if so whether a formal investigation is required. To assist the Head of Performance in making this determination an initial investigation co-ordinated by the relevant Head of Devolved Office/Regional Manager and their teams will be carried out.

1.15 The initial investigation will involve the Commission:

- contacting the CO and/or their staff to discuss the matter and seeking an explanation as to what has happened (if contact has not already been made as part of providing support as per paragraph 1.11 or where further information is required). The CO will not be required to make any formal representations at this time
- contacting the relevant RCO to discuss the matter (if contact has not already been made) and to gather any intelligence they may have regarding the issue
- identifying any other available information relating to the performance of the service by the CO

1.16 In reaching a determination as to whether a formal investigation is required the Head of Performance will:

- consider the evidence gathered via the initial investigation
- have regard to the factors set out in Appendix 1 and any other relevant matters

1.17 In particular where a CO has managed to satisfactorily resolve an issue prior to the poll (with the support of the Commission, RCO or otherwise) and where as a result there has been no or negligible impact on the poll, the Head of Performance may decide that a formal investigation is not required.

1.18 If the Head of Performance determines that no formal investigation is required:

- the CO in question should still consider any issues as part of their post-referendum evaluation to identify what, if any, lessons can be learnt and reflected in their arrangements for future polls, and
- the Commission may still provide suggestions as to how similar issues could be avoided in the future. In these circumstances, the CO should address these suggestions as part of their post-referendum evaluation

1.19 The timing of any formal investigation will depend on when the issue arises during the referendum period. As set out in paragraph 1.11, the priority at all times will be to take steps to ensure the successful delivery of the poll and the Commission will seek to provide support to resolve any issues prior to the poll, which may mean that the formal investigation is not initiated until after the referendum.

Formal investigation

1.20 Where the Head of Performance determines that there is on the face of the matter apparent inadequate performance by a CO and that a formal investigation is needed he will notify the Deputy Chief Executive (DCE) who will be responsible for conducting the formal investigation and preparing the preliminary report (see below).

1.21 The DCE will:

- telephone the CO in question to inform them that a formal investigation will be taking place and to discuss with them what this will involve.
- write to the CO:
 - notifying them that a formal investigation will be taking place
 - summarising the process for that formal investigation
 - summarising the issues
 - requesting that the CO provides any information, material or copy documentation that the Commission believes may be relevant to the investigation within 10 working days of receipt of the letter
 - inviting the CO to provide written representations (which may include any explanation or mitigating factors) and to provide any relevant information, material or copy documentation in support of those representations within 10 working days of receipt of the letter
 - offering the CO the opportunity to meet in person with a representative from the Commission to discuss the issues
- write to any other party or parties who may have relevant knowledge relating to the performance of the service by the CO, including the RCO:
 - requesting that they provide any information, material or copy documentation that the DCE believes may be relevant to the investigation within 10 working days of receipt of the letter
 - inviting them to provide written representations and to provide any relevant information, material or copy documentation in support of those representations within 10 working days of receipt of the letter

Preparation of the preliminary report

1.22 Once the DCE considers that she has all the information necessary to fairly and properly proceed, including having sought further clarification and advice where necessary, she will prepare a preliminary report.

1.23 The preliminary report will contain:

- a summary of the issues
- a summary of any representations² and information, material or copy documentation provided by the CO in respect of the performance of the service

² When representation is invited, it will be made clear that a summary of their response will form part of the report

- a summary of any representations and information, material or copy documentation provided by any other parties relating to the performance of the service
- where available, a copy of any assessment that has been made as to the level of performance of the CO in relation to that referendum
- where available, a copy of the relevant extracts of any report prepared on the administration of the referendum concerned
- a preliminary decision as to whether the service rendered by the CO was inadequately performed and the reasons for that decision (with reference to the factors set out in Appendix 1 of this guidance note and anything else that is considered relevant)
- if the conclusion is that the service was inadequately performed, a preliminary decision as to whether the fee should be withheld or reduced and, if so, by how much and the reasons for that decision (with reference to the factors set out in Appendix 2 of this guidance note and anything else that is considered relevant)
- if the conclusion is that the fee should be withheld or reduced, a preliminary decision as to the fee that it is considered appropriate and the reasons for that assessment (with reference to the factors set out in Appendix 3 of this guidance note and anything else that is considered relevant)

1.24 The DCE aims to complete the formal investigation and preparation of the preliminary report within 20 working days of notifying the CO that a formal investigation is to be carried out.

1.25 Once the DCE has prepared the preliminary report, she will provide it to:

- the CO and give the CO the opportunity to make any further representations (including any representations that the Commission have failed to take into account all relevant factors) within 10 working days of receipt of the preliminary report
- any other party the DCE believes appropriate and give that party the opportunity to make any further representations within 10 working days of receipt of the preliminary report

1.26 The DCE will provide a copy of the preliminary report and any further representations received from the CO or other parties to the Chief Executive (CEX) in order that she can prepare a final report.

Final response

1.27 The final report will contain:

- A copy of the preliminary report
- The CEX's decision as to whether the services rendered by the CO were inadequately performed and the reasons for that decision
- The CEX's decision on whether the fee should be withheld or reduced, and the reasons for that decision
- If the CEX has decided that the fee should be withheld or reduced, his/her decision as to the fee that she considers appropriate in all the circumstances, and the reasons for that decision

1.28 The CEx will provide a copy of the final report to the CO.

1.29 The CEx aims to make a final decision within 10 working days following receipt of the preliminary report and further representations.

Reporting on the referendum

1.30 As part of our referendum reporting, we will publish information about the performance of COs. This reporting may also make reference to any instances where the Commission has determined that a CO's performance has been inadequate and has made a decision to withhold or reduce the CO's personal fee.

Putting the process on hold

1.31 At any stage the Commission may put an investigation or the production of a preliminary or final report on hold pending the outcome of any criminal investigation or other legal proceedings, in order to ensure that the criminal investigation / legal proceedings are not prejudiced.

Voluntary reduction in claim

1.32 COs may opt to claim less than the maximum amount in circumstances where they consider that they have performed inadequately. Provided the Commission considers the amount of the voluntary reduction appropriate in all the circumstances and the CO has provided a written statement that a voluntary reduction in fees has been taken, we may decide to take no further action. In all cases, we will continue to work with COs to support them with their evaluation, providing them with feedback and support as appropriate, to ensure that lessons learnt can be identified and taken forward into the planning for future polls.

Challenging the Commission's Assessment

1.33 If a CO believes that the Commission has failed to take into account all relevant factors they can ask the Commission's Legal Counsel & Director of Party and Election Finance to review the decision. Any application for review must be received within ten days of the date of the decision letter.

1.34 Any request for a review should identify the reasons why the review is requested.

1.35 The review will be normally conducted within 20 working days of the request for the review and receipt of reasons for the review.

1.36 The Legal Counsel & Director of Party and Election Finance will then make a written recommendation to the CEx.

1.37 The CEx will consider the recommendation and determine whether her original decision stands or is amended or changed. This outcome will be communicated to the CO.

Appendix 1

Factors for consideration in determining whether a service rendered by an CO was inadequately performed

1.38 Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining whether the service provided by the CO was inadequately performed, the Commission expects to have regard to some or all of the following:

- Has the CO:
 - inadequately performed in making arrangements for the referendum?
 - inadequately performed in conducting the poll?
 - failed to discharge the CO's duties at the referendum?
 - failed to comply with a CCO direction (unless they have made a successful application for an exception)
- Has the CO failed to do such acts and things as may be necessary for effectually conducting the referendum in the manner provided by the referendum rules?
- Was the gravity, extent and impact of any act or omission so great as to suggest that the CO must have performed inadequately? So for example:
 - How many people have been adversely affected by the act or omission?
 - Does the act or omission result in inconvenience to stakeholders or are the consequences more serious e.g. disenfranchising voters?
 - Does the act or omission affect the integrity of the whole referendum?
 - Is the act or omission likely to result in public confidence in the electoral process being undermined?
- Was the service rendered at a standard below that of a reasonably competent CO (the Commission produced guidance, endorsed by the EU Referendum Management Board (EURMB), which reflects what and CO should do to deliver a well-run referendum)?
- Did the CO fail to do what a reasonable CO would have done in the same situation or do something that a reasonable CO would not have done in the same situation?
- Were the consequences of any act or omission foreseeable by a reasonably competent CO?
- Did the CO take steps to remedy the situation such that the impact on the referendum was negligible?

- If the Commission/RCO intervened as a result of performance monitoring what was the response to the advice/guidance given (e.g. was that advice/guidance taken on board)?

Appendix 2

Factors for consideration in determining whether the fee should be withheld or reduced

1.39 Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining whether the fee should be withheld or reduced, the Commission expects to have regard to some or all of the following:

- Has the Commission found that the services rendered by the CO were inadequately performed?
- Was the gravity, extent and impact of the inadequate performance such to suggest that the fee should be withheld or reduced?
- Was the inadequate performance due to wilfulness or recklessness on behalf of the CO, or were there any other aggravating factors?
- What mitigating factors exist (for example, was the CO complying with common practice in rendering their service (unless the common practice is negligent))?

Appendix 3

Factors for consideration in determining what the appropriate fee should be

1.40 Each case will need to be considered on its own merits taking into account the circumstances that existed at the time. However, in determining how much the fee should be reduced by or if it should be withheld altogether, the Commission expects to have regard to some or all of the following:

- What was the gravity, extent and impact of the inadequate performance?
- Were there any aggravating factors, such as wilfulness or recklessness on behalf of the CO?
- What mitigating factors exist?

Appendix 4

Process and timeframe for determining whether the fee should be withheld or reduced

