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HSE Report Part Two

FFI - a system in need of reform?

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Recap

Fee for Intervention is HSE's cost recovery scheme whereby it can recover the costs of regulatory intervention from duty holders who are found to be in 'material breach' of health and safety law.

In the first part of our Insights Report on the HSE Fee For Intervention Cost Recovery Scheme we explored the history of the FFI scheme and the use of FFI by HSE today, 10 years on from its introduction in October 2012.

Our report looked at the previous challenges the FFI scheme has faced and how it improved the system for dealing with appeals as a consequence of Judicial Review proceedings being commenced against it by OCS Group in 2017.

In the second part of our report we specifically look further into the way in which the appeal process has worked in practice and asks whether the system would benefit from further modification to give industry and individual duty holders confidence that their regulator is acting in a fair and measured way and that appeals will be dealt with objectively, independently and fairly.

What is a query and what is a dispute?

If a duty holder receiving an HSE invoice issued pursuant to its Fee for Intervention scheme wishes to challenge all or part of the invoice it must follow HSE's query and dispute process. The first stage is to raise a 'query' which is considered by HSE's fee for intervention team.

If the query is not upheld the second stage of the process it to raise a 'dispute'. This is considered by an independent panel. If the dispute is upheld or partially upheld, the invoice will be a cancelled or reissued in the revised amount, if the dispute is not upheld, the duty holder remains liable for the entire invoice plus the costs incurred by the dispute panel in determining the dispute.

Use of the query and dispute process

In 2018/19 there were 20,015 invoices issued and 14,538 interventions resulting in invoices - an average of 1.4 invoices per intervention. In 2019/20 there were 17,641 invoices issued and 12,352 interventions resulting in invoices – again, that's an average of 1.4 invoices per intervention.

Save for 2020/21 which was impacted by Covid, HSE has recovered on average in excess of £15m per year from industry throught the application of FFI.

We asked HSE for information over and above that which is in the public domain in relation to FFI.

We specifically sought information in relation to the number of queries and disputes lodged by duty holders and for information regarding the success or otherwise of those disputed.

FFI queries

We asked HSE to tell us about the number of first stage FFI invoice 'queries' submitted in the past three years. This is what we learned.

Year	% of invoices queried
2018/19	2.5
2019/20	2.7
2020/21	3.3

We then asked HSE about the total number of FFI invoice queries which were upheld or partially upheld by HSE between 2018/19 and 2020/21.

Year	Upheld	Partially upheld	% of queried invoices upheld or partially upheld
2018/19	263	42	60
2019/20	223	41	55
2020/21	136	53	52

In summary, what this tells us is that over 97% of all HSE FFI invoices were accepted and paid in full by the dutyholder.

In other words, very few duty holders challenged the fees HSE charged them. Only 2.8% of the 48,707 invoices issued between 2018/19 and 2020/21 were challenged at all.

Where a stage 1 FFI query was submitted, over half (56%) resulted in either the challenge being upheld in full and therefore the invoice withdrawn, or partially upheld which would ordinarily result in the invoice being reduced.

We also asked for the average reduction applied to upheld or partially upheld queried invoices in each of the last three years. HSE told us that they were unable to provide us with that data.

FFI disputes

We asked HSE for information about the total number of FFI invoice challenges which proceeded to the second 'dispute' stage of the appeal process between 2018/19 and 2020/21.

We also asked HSE about the total number of FFI invoice disputes which were upheld or partially upheld in each of the last three years.

Year	% of invoices disputed
2018/19	0.3
2019/20	0.2
2020/21	0.4

Year	Upheld	Partially upheld	% of disputed invoices upheld or partially upheld
2018/19	2	1	4.7
2019/20	1	3	9.8
2020/21	-*	-*	-*

* no panel convened due to Covid

It is perhaps unsurprising to note, given that less than 3% of invoices were challenged to the first query appeal stage, that the number of invoices which proceeded to the second dispute were very low indeed.

Our review of this data tells us that only 10.8% of queried invoices went on to be disputed and the number of disputes which were successful were very low indeed.

Disregarding 2020/21 where HSE told us that no disputes were heard due to the covid pandemic, in the two previous years only eight invoices out of a total number of 37,656 issued by HSE were successfully (either in full or partially) disputed.

Interpretation and a future perspective

A common issue for organisations who face regulatory investigations, are served with enforcement notices or who receive a notification of contravention from the HSE is whether the finding of a 'material breach' should be accepted.

Variously clients' views on FFI tends fall somewhere in one of the following categories:

- Accept and move on
- Accept material breach but challenge the invoice amount
- Oppose on all fronts

It is important to consider the factors which influence organisations' decision whether to mount an appeal. In our experience, duty holders who strongly disagree that there has been a material breach and therefore don't agree that they should be the subject of cost recovery will opt to take in on the chin either for fear of upsetting the HSE as regulator, not wanting their 'card marked' or the fear that the system for challenge is either fundamentally unfair, likely to result in them having to pay more, or both.

The data above is unlikely to galvanise industry into considering that there are good prospects of pursuing an appeal to a dispute, where the prospects of success appear slim and additional charges levied where unsuccessful.

A perceived lack of transparency regarding how the dispute process actually works and what the panel take into account which is a particular cause for concern. In circumstances where the disputes panel only convenes a hearing with the applicant present in exceptional circumstances, the vast majority of disputes are determined behind closed doors.

Interpretation and a future perspective (continued)

Furthermore, HSE's own guidance in relation to challenging the trigger fundamental for cost recovery via FFI to take place, the finding of a 'material breach' is less than clear. In the author's experience, where challenges are raised regarding the materiality of a breach, HSE's response is rarely advanced having regard to HSE's Enforcement Policy Statement and Enforcement Management Model.

This is despite HSE's own guidance on FFI setting out that a material breach is "a contravention of health and safety at work law which is sufficiently serious to require notification in writing. 'Seriousness' in this context is assessed by considering the principles and factors set out in the HSE's Enforcement Policy Statement and Enforcement Management Model".

The fear that HSE will hide behind the subjective opinion of an inspector and not explain clearly in the response to any challenge why a breach is 'material' risks undermining public confidence in the fairness of the FFI process.

Practical steps to improve FFI

There are clear practical advantages of having a scheme whereby regulatory interventions can take place without burdening the criminal courts with unnecessary prosecutions and each breach having to be subject to a formal enforcement notice and recorded as a matter of public record.

It follows that a scheme for the recovery of the reasonable costs of such an intervention by the HSE should apply and that industry should pick up the reasonable costs of regulatory intervention. It also follows that such a scheme must be fair and transparent so as to not undermine industry and the public's confidence in the HSE.

FFI was imperfect in its original form and has been modified following the OCS Judicial Review.

We consider there is scope for FFI to be further reformed to ensure that it strikes the right balance between being a sound process for recovery of costs of intervention and giving industry a fair and transparent mechanism to raise a challenge.

Material Breaches – improve FFI guidance and Queries and Disputes guidance to include more detailed explanation of what constitutes a material breaches, together with examples

Further explanation for organisations and guidance for HSE Inspectors that issues identified during an inspector of a duty holder's premises should either not be considered a 'material breach' or should not trigger cost recovery if unrelated to the incident being investigated or the primary purpose of the inspection.

Notifications of Contravention should include an explanation as to why a breach is considered to be 'material', having regard to objective standards/guidance.

Practical steps to improve FFI (continued)

More detailed narratives on FFI invoices so that duty holders are in a better position to consider whether the fees are reasonable for the cost recoverable activities charged for. In many cases these are currently vague and do not allow a duty holder to properly understand the work carried out and whether the time charged for is reasonable for the task undertaken.

A system for asking inspectors to review 'material breach' opinions where new information comes to light, or where the finding has not been set out having regard to HSE's Enforcement Policy Statement and Enforcement Management Model. This should be capable of being raised with the inspector or principal inspector without having to raise it as a 'query' and should not result in further costs being levied.

Further modifications to the dispute process, including:

- Clearer guidance on the information which can be provided to the dispute panel
- Clearer guidance on the way in which the panel approaches and assesses the materiality of any breach
- The opportunity to appear in person to make representations

A review of whether it is right in all the circumstances to charge for the first 'independent' stage of any challenge. Put differently, HSE should consider introducing an additional stage of challenge whereby the first consideration of a dispute by a person independent of HSE should not trigger further cost recovery where unsuccessful. It is noted that the consultation on the process for costs recover of the new Building Safety Regulator contains a three stage query and dispute process whereby an appeal can be escalated without fear of triggering further cost recovery.

Consideration of whether a similar cost recovery scheme should be introduced for sectors where health and safety is enforced by regulators other than HSE.

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