Consultation on revising the process for considering disputes under Fee for Intervention (FFI)

This consultative document is issued by the Health and Safety Executive (HSE).

Comments should be sent to:

Regulatory Policy Unit
Health and Safety Executive, 5.S3 Redgrave Court, Merton Road, Bootle, Merseyside L20 7HS

E-mail: ffidisputeconsultation@hse.gov.uk

To reach there no later than: 2 June 2017

The Executive tries to make its consultation procedure as thorough and open as possible. Responses to this consultation document will be lodged in the Health and Safety Executive’s Knowledge Centre after the close of the consultation period where they can be inspected by members of the public.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004 (EIR)). Statutory Codes of Practice under the FOIA and EIR also deal with confidentiality obligations, among other things.

If you would like us to treat any of the information you provide, including personal information, as confidential, please explain your reasons for this in your response. If we receive a request under FOIA or EIR for the information you have provided, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will be disregarded for these purposes. Requests for confidentiality should be made explicit within the body of the response.

HSE will process all personal data in accordance with the DPA. This means that personal data will not normally be disclosed to third parties and any such disclosures will only be made in accordance with the Act.
Consultation on revising the process for considering disputes under Fee for Intervention (FFI)

HSE has decided to revise the dispute process for those who want to dispute fees charged under Fee for Intervention. It has decided that disputes should be considered by persons who are completely independent of HSE. This consultation is to obtain views on the details of the process to ensure that the process is fair, transparent and proportionate.

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1. Consultation by the Health and Safety Executive

The Health and Safety Executive (HSE) consults stakeholders to seek their views on its proposals. It believes that public consultation provides an open and transparent approach to its decision-making. The responses to this consultation exercise will be considered by HSE before the proposal is finalised.

2. Code of Practice on Consultation

HSE is committed to best practice in consultation and to the Government's Consultation Principles. The Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

Additional guidance can be found at:
www.gov.uk/government/publications/consultation-principles-guidance

3. How to respond

A summary of the proposal and the questionnaire can be found at:
www.hse.gov.uk/consult/condocs/cd284.htm

Our preferred method for receiving comments is via the online questionnaire. This is the most effective way for us to fully consider and analyse responses.

However, you can also respond by:

- Completing the Word questionnaire and sending it by email to ffidisputeconsultation@hse.gov.uk

- Downloading the Word questionnaire and sending a written response to:

Regulatory Policy Unit
Health and Safety Executive, 5.S3 Redgrave Court, Merton Road, Bootle, Merseyside L20 7HS

We would be grateful if you would provide an email address when you send your response. This will enable us to inform you when HSE intends to publish information concerning consultation responses on its websites.

Responses must be received by 2 June 2017
If you require a more accessible format of this document please send details to: creative@hse.gov.uk and your request will be considered.

4. What happens next

We will acknowledge all responses and give full consideration to their substance in the subsequent proposals. We may contact you again if, for example, we have a query in respect of your response.

We will also tell you when we publish information concerning the consultation responses. We will provide a summary of who responded to this consultation and a summary of the views expressed about each question. This information will be placed on the HSE website.

5. Quality assurance and complaints

If you have any complaints about the consultation process (as opposed to comments about the issues, which are the subject of the consultation) please address them to:

    Jason Cole
    HSE Consultation Coordinator
    7th Floor, Caxton House
    6-12 Tothill Street
    London
    SW1H 9NA

    Email: jason.cole@hse.gov.uk

We aim to reply to all complaints within 10 working days. If you are not satisfied with the outcome, you can raise the matter with HSE’s Chief Executive Dr Richard Judge at Health and Safety Executive, Redgrave Court, Merton Road, Bootle, Merseyside L20 7HS or the Information Commissioner’s Office at Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. You can also write and ask your MP to take up your case with us or with Ministers. Your MP may also ask the independent Parliamentary Commissioner for Administration (the Ombudsman) to review your complaint.
6. Introduction

Fee for intervention (FFI) was introduced in October 2012. The law is now set out in the Health and Safety and Nuclear (Fees) Regulations 2016 (“the Fees Regulations”). Under Regulation 22 a fee is payable if:

a) a person is contravening or has contravened health and safety laws and

b) an inspector is of the opinion that that person is or has done so, and notifies that person in writing of that opinion.

When deciding whether to notify the person in writing, an inspector has to have regard to the guidance contained in HSE 471. This guidance states that inspectors should only notify the person in writing where they are satisfied that there has been a material breach of the law. A material breach is something which an inspector considers serious enough that they need to inform the business in writing.

The fee payable is for the costs reasonably incurred by HSE for the performance of its functions because of the breach of the law. This fee includes HSE’s costs in identifying the breach, helping the business put it right, investigation and taking enforcement action.

Under Regulation 24(5) of the Fees Regulations HSE must provide a procedure by which disputes relating to fee for intervention will be considered. Regulation 24(6) provides that if a dispute is not upheld, the fee payable is to include costs reasonably incurred by HSE in handling the dispute.

The outcome of the dispute is not binding on the person who is liable to pay FFI. Even if the dispute is resolved in HSE’s favour, HSE can only compel payment of the fees by bringing a civil action in the courts. This gives the person an opportunity to contest the fees before an independent court of law.

When HSE consulted on the proposal to introduce FFI in October 2011 it proposed an option of a two level process for considering disputes. At Level 1, the dispute would be dealt with by a HSE Principal Inspector with operational experience. If the matter was not resolved to the satisfaction of the duty holder, it would become a Level 2 dispute. Disputes at Level 2 would be handled by a HSE senior manager. HSE invited alternative practical suggestions for resolving disputes.

Respondents suggested that there should be at least some degree of independence to the dispute process. HSE responded by deciding that disputes at Level 2 would be considered by a panel consisting of two HSE senior managers (who were not from the operational division involved) and one independent person.2

1 http://www.hse.gov.uk/pubns/hse47.htm
2 http://www.hse.gov.uk/consult/condocs/cd235.htm
In January 2014 there was a Triennial Review of HSE\(^3\), one of whose recommendations was that there should also be an independent person involved in Level 1 of the dispute process. HSE revised the dispute process in June 2014 to remove the two Levels so that all disputes were considered by a panel consisting of two HSE senior managers and one independent person.

In addition to the Triennial Review, HSE commissioned an independent study into the effectiveness of the FFI regime. In September 2014 the independent review by a panel chaired by Professor Alan Harding reported its findings, recommending that the dispute process be kept under review. \(^4\)

Section 17 of the Small Business, Enterprise and Employment Act 2015 (when brought into force) will require Ministers to appoint a person ("a champion") to review the effectiveness of regulators complaints and appeals processes and report annually on them. Such a review includes the extent to which the procedures are accessible and fair to businesses. HSE will need to ensure that the FFI dispute process meets this requirement.

HSE has over four years’ experience of handling disputes. Details are set out below.

<table>
<thead>
<tr>
<th>FFI Disputes Oct 2012 – April 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Reason for dispute</strong></td>
</tr>
<tr>
<td>Intervention before 1/10/12</td>
</tr>
<tr>
<td>Not a relevant FFI activity</td>
</tr>
<tr>
<td>Dutyholder not correct duty holder</td>
</tr>
<tr>
<td>Proportionality of decision/ dutyholder does not agree they are in material breach</td>
</tr>
<tr>
<td>Time not Reasonable</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>FFI Disputes since 1 April 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Reason for dispute</strong></td>
</tr>
<tr>
<td>Not a relevant FFI activity</td>
</tr>
<tr>
<td>Dutyholder not correctly notified</td>
</tr>
<tr>
<td>Incorrect duty holder</td>
</tr>
<tr>
<td>Proportionality of decision/dutyholder does not agree they are in material breach</td>
</tr>
<tr>
<td>Time not reasonable</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>


7. Proposals to revise the dispute process

HSE has now decided that the time is right to move to a fully independent process for considering disputes in relation to FFI. We wish to consult on the details of how the process should operate. In particular, we recognise the need to ensure that the process is accessible to all types and sizes of business and is proportionate to the issues involved and amount of the fees. We also recognise that businesses need to be able to understand why HSE considers that they are in material breach of the law and why the fees have been reasonably incurred. Businesses need to have sufficient information provided to them to challenge this. They also need to be able to make representations and provide information and evidence as to why they are not in material breach of the law or why the fees have not been reasonably incurred. The existing dispute process already meets many of these principles. However, we have taken the opportunity to revisit all aspects of the process.

As mentioned above, the Fees Regulations provide that where a dispute is not upheld, the fee for intervention payable is to include costs reasonably incurred by HSE in handling the dispute. HSE is not proposing to amend the Fees Regulations and, therefore, is not consulting on this aspect of the dispute process. We do not anticipate that the proposed revisions to the process will materially affect the amount of additional fee payable if a dispute is not upheld.

Provision of information

Depending on the nature of the dispute HSE will provide information, so far as it is relevant, setting out:

a) What relevant provisions have been contravened;
b) Particulars of why HSE is of that opinion;
c) Details/evidence upon which that opinion is based;
d) Why those contraventions are said to be ‘material breaches’;
e) What functions have been performed as a consequence of the contravention;
f) How the performance of those functions is reasonably attributed to the person;
g) How and why the costs claimed under the FFI have been reasonably incurred by the Executive; and
h) HSE’s response to any issue raised by the dutyholder during the query or in requesting the dispute;

Much of this information should already have been provided in the Notification of Contravention, invoices and other correspondence from HSE. However, where it is missing, HSE will provide a written summary. This summary together with any documents which HSE wishes to put before the panel to show that FFI is payable will be provided to the duty holder.

Question 1 – Do you agree that the revised process will provide sufficient information to enable a dutyholder to understand why HSE considers FFI is payable and how the costs have been reasonably incurred?

If No please explain the reason for your answer
Representations from duty holders

On receipt of this information, the dutyholder can make written representations which can include any information, documents or evidence which the dutyholder wishes to be taken into account. The representations should make clear why the FFI is disputed and set out why it is considered that FFI is not payable. In the event that it is accepted that FFI is payable, but not the amount claimed, the representations should make this clear and set out why it is considered that the costs have not been reasonably incurred by HSE.

Question 2 – Do you agree that the revised process will enable a dutyholder to make sufficient representations?

If No please explain the reason for your answer

Consideration of disputes

HSE proposes that future disputes will be considered by a panel independent of HSE consisting of a lawyer as chair together with two other members with practical experience of health and safety management.

The panel will be provided with the written information and/or a summary provided by HSE and the written representations and information provided by the duty holder. In the usual course of events, disputes will be decided on paper. However, the panel will have the discretion to convene a meeting with the duty holder and HSE to address the issues where it is considered necessary and desirable to do so. This is not a “hearing” and there will be no opportunity for witnesses to be called or questioned.

The panel will make recommendations in relation to the determination of the dispute, giving written reasons for its decision, which ordinarily HSE will accept unless it considers the recommendation to be clearly wrong.

Ultimately any fees which remain disputed can only be recovered by HSE taking civil action to recover the debt. It is obviously open to the dutyholder to defend those proceedings if they still consider that the fees were not payable or the costs were not reasonably incurred.

We recognise that introducing a lawyer as chair of the panel could be seen by some as making the process too legalistic and quasi-judicial. We do not want to make the process inaccessible to small businesses. However, many disputes centre on whether there has been a material breach of the law and therefore the skills of a lawyer will be valuable in considering this. The panel will also need to give its reasons and a lawyer is well placed to ensure this is done appropriately. The other panel members will provide important practical experience of health and safety management.

In the event that a dispute is not upheld the duty holder will have to pay the costs reasonably incurred by HSE in handling the dispute. This will include a fee for the lawyer and travelling expenses for the other panel members. Currently, costs of HSE
members of the panel are charged at the FFI hourly rate of £129 per hour. We do not anticipate that the costs incurred by HSE in dealing with disputes under the revised system will be materially different. The amount of time which the panel take to read the relevant information and consider the dispute will vary from case to case. However, our experience to date is that on average they take 2.6 hours per dispute.

Where the fees being disputed under FFI are small, it is possible that the costs of the dispute could be more than the original fees. Therefore, HSE would welcome views on whether there should be a different process where the amount of the fees are small and/or there is no dispute about whether there is a material breach and, if so what that process might be.

**Question 3 – Do you agree that the disputes should be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management?**

**If No please explain the reason for your answer**

**Question 4 – Do you think that there should be a different process where the amount of the fees is small and/or there is no dispute about whether there is a material breach?**

**If Yes what alternative system would you propose in such cases?**

Suspension of dispute process

There will be some cases where an investigation or appeal against an enforcement notice is still pending. In these cases the dispute process will be suspended until the outcome of any enforcement action or appeal is known.

**Question 5 – Do you agree that the dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending?**

**If No please explain the reason for your answer.**

Queries

HSE currently operates a process which allows a duty holder to query an invoice prior to formally disputing it. There is no cost to the duty holder for this process even if the query is not upheld. This process will continue in its present form with most queries being dealt with in writing. However, HSE recognises that in some cases it may be appropriate for the person dealing with the query to speak directly to the duty holder and our guidance will be amended to reflect this.
Question 6. Do you have any other comments on the revised FFI dispute process not covered by the questions above?

If Yes please provide them.
Consultation on Revised Process for Considering Disputes under Fee for Intervention (FFI)

The full text of this and other Consultative Documents can be viewed and downloaded from the Health and Safety Executive web site on the internet: www.hse.gov.uk/consult/index.htm

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