

The background of the slide features a complex geometric pattern of overlapping triangles in various shades of teal, blue, and green. On the right side, there is a photograph of two workers wearing white hard hats and high-visibility yellow safety vests. They are looking at a laptop screen together. The overall aesthetic is professional and industrial.

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HSE Report
Part One
Fee For Intervention
October 2022

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Introduction

This report is for employers, those in organisations who are responsible for Health & Safety and those in the safety advisory industry. It provides an in-depth look at FFI, how the scheme has developed and how it operates today.

Every employer, self-employed person and employee has health and safety duties with the majority of industry sectors regulated by the HSE. Fee For intervention - or FFI, is the way that the Health & Safety Executive recovers the costs of responding to incidents or providing advice on compliance.

The costs are levied against businesses found to be in 'material breach' of their legal duties to manage health & safety risks. Organisations with knowledge of the regulator or sophisticated safety management systems generally have

some knowledge of FFI. But ten years after its introduction, many organisations are surprised to learn that the HSE can recover its costs even if a breach isn't considered serious enough to require the serving of an Improvement or Prohibition Notice or doesn't justify a prosecution.

FFI was created following the introduction of the Health and Safety (Fees) Regulations 2012, which came into Force on 1 October 2012.

10 years on, FFI has recovered some **£127,361,462.70** from industry.

This report explores the existing processes for challenging FFI as well as looking at how the scheme could be improved to ensure it underpins a healthy relationship between industry and the HSE and drives the right behaviour within organisations to managing health & safety issues in the workplace.



FFI created following introduction of the Health and Safety (Fees) Regulations

Oct
2012



Independent review of the function, form and governance of the HSE

Jun
2014



Judicial review brought by OCS Group UK challenged FFI appeal process

Mar
2017



Ashfords publishes HSE report - Fee For Intervention

Oct
2022

How does the Fee For Intervention scheme work?

FFI was created when new Health & Safety rules came into force in October 2012. FFI was described as a new type of fee, applicable to “*most business activities, where a breach is sufficiently serious*”¹.

FFI was introduced to ensure that those businesses found to be in material breach of health & safety laws bore more of the costs incurred by the HSE to put things right.

If the HSE identifies a material breach of health & safety law when responding to an incident or visiting a workplace, it writes to the person responsible for health & safety. This person, known as a duty holder, may be a sole trader, a partner within a partnership business, or a company.

This letter, called a ‘**Notification of Contravention**’, is required to give details of what health and safety laws or regulations are believed to have been contravened and the reasons for that opinion. This known as a ‘material breach’.

After being notified, HSE will then invoice the organisation setting out its charges on a time spent basis. The original hourly rate applicable in 2012 was £124. This has increased steadily and is currently £163.

It’s important to note that FFI only applies if the enforcing authority is the HSE. It won’t apply if the enforcing authority is, for example, a local authority. FFIs also don’t apply where other

fees regulations exists, for example in relation to the Control of Major Accident Hazard sites.

If a duty holder disagrees with the opinion, it can challenge the inspector’s finding through a two stage appeals process. The first stage is a fee free ‘query’ and the second stage is a full ‘dispute’.

¹ Explanatory Memorandum to the Health and Safety (Fees) Regulations 2012 no. 1652



What is a material breach?

FFI only operates where a contravention of health & safety law amounts to a material breach. This is a contravention that is sufficiently serious to require notification.

According to HSE's guidance on the application of fees, to determine whether a contravention is sufficiently serious, an inspector has to consider HSE's Enforcement Policy and Enforcement Management Model.

HSE's Enforcement Policy and Enforcement Management Model

A step-by-step approach including, but not limited to, assessing the risk of serious personal injury and performing a risk gap analysis. Therefore, deciding whether a contravention amounts to a material breach requires careful and detailed consideration of a number of factors.

Challenging FFIs - a brief history

It hasn't all been plain sailing for HSE's FFI scheme.

Shortly after FFI was introduced, an independent review of the function, form and governance of the HSE was carried out in 2014. This sounded an early alarm bell in relation to the use of FFI. While HSE reported that the system had bedded in well, the use of FFI was one of the biggest issues raised by stakeholders during the review.

Triennial Review report author Martin Temple stated that he was *“very concerned at the strength of feeling from stakeholders that FFI damages HSE's reputation for acting impartially and independently. I comment on it here because of the impact it appears to be having on HSE's reputation for independence and its integrity as a regulator”*.

The issue that Mr Temple raised was firstly one of process, whereby in administering the FFI scheme the HSE was acting as *“police, prosecutor, judge and jury”* and secondly the risk that HSE's activities and targeted intervention would be designed in such a way as to maximise fee income.

“I am very concerned at the strength of feeling from stakeholders that FFI has damaged HSE's reputation for acting impartially and independently, and thereby its integrity as a regulator.”

Martin Temple - Triennial Review

Finally, the report highlighted concerns raised by stakeholders that they were now reluctant to reach out to HSE for advice for fear of incurring FFI charges. Finally, the report recommended that there was an urgent need for at least one independent person to be involved in the first formal stage in FFI appeals.

2017 saw a further challenge to FFI. A judicial review brought by OCS Group UK directly challenged the FFI appeal process and in particular the lack of independence if a duty holder proceeded with an appeal to the dispute stage.

This is because disputes were considered by a panel of HSE representatives plus one independent person. HSE then wrote to the duty holder confirming the outcome, with no right for the duty holder to be heard or to make submissions at the appeal panel.

Duty holders whose disputes were not upheld would be liable not only for the original fees but additionally the costs of dealing with the dispute. It was generally felt that the disputes were unlikely to be dealt with fairly and, given the cost risk, while a proportion of invoices were queried (stage 1 of the appeal process), duty holders overwhelmingly avoided proceeding to dispute stage.

Permission to appeal was granted but prior to the case being heard, HSE agreed to consult on changes to its processes and in 2017 the dispute process was revised.

Disputing FFI today

Disputes are now considered by a Disputes Panel independent of HSE. This consists of a lawyer as chair, together with two other members with practical experience of health & safety management.

The process also allows for duty holders to see the information provided to the panel by the HSE and for them to provide representations or information to HSE for the panel to consider.

The panel can ask for additional written information either from HSE or the duty holder. It also has the discretion to convene a meeting with the duty holder and the HSE in exceptional circumstances and when the panel considers that the case cannot be decided on written information alone.

How is the FFI working today?

HSE's use of FFI has continued since 2017 without further significant modification². Notices of Contravention remain one of a number of tools available to the HSE alongside providing informal guidance and HSE's formal enforcement powers, which includes issuing enforcement notices (Improvement Notices and Prohibition Notices) and bringing prosecutions.

Whilst the amount of fees recovered by HSE that go to funding HSE remains capped, the use of FFI has steadily increased.

FFI - facts and figures

- The applicable hourly rate has increased from **£124** in 2012/13 to **£162** in 2022.
- The average invoice in 2012/13 was £472. By April 2021 that figure had risen to £1,152. **An increase of 140%**.
- By May 2022 a grand total of **£127,361,462.20** had been recovered from the issuing of some 167,822 invoices.
- The total recovery currently stands at approximately **£13.6m per year**.
- The number of individual invoices where the duty holder was invoiced over £10,000 in 2013/14 was **41**. By 2021/22 that number had increased to **178**. In excess of a fourfold increase.
- The 'largest' ever single FFI invoice was **£2,327,125.70** issued to a company in the manufacturing sector!
- The average number of invoices issued per material breach was 1.4. Therefore the average cost to the dutyholder stands at **£1,373.40³**.

² HSE47 – the main FFI guidance document, has undergone minor revision in 2019, 2020 and 2022.

³ Based on the average invoice in 2021/22 of £981.14.

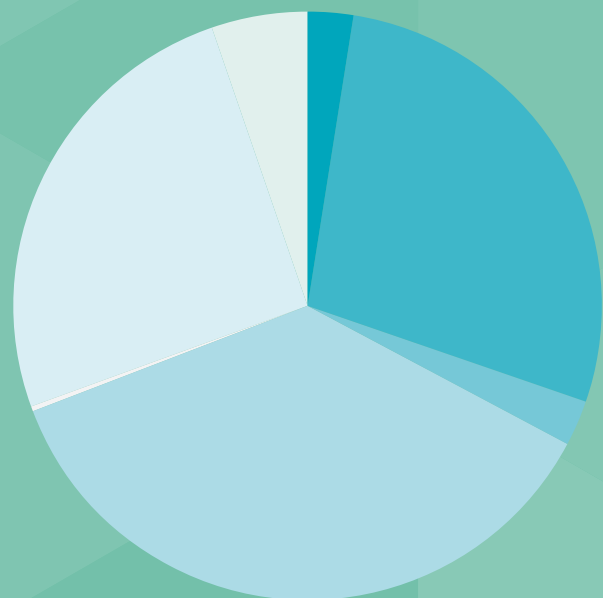
Who is most at risk?

By far the greatest fees have been recovered from the Manufacturing, Construction and Service sectors.

Material breaches in Manufacturing account for in excess of one third of all FFI fees.

Industry Sector	Agriculture	Construction	Extractive Utilities	Manufacturing	Not Specified	Service	Water/Waste Management
Total value of FFI invoices	£3,211,302.28	£35,475,158.26	£3,324,506.83	£46,201,396.26	£284,260.26	£32,456,947.15	£6,405,118.26
Number of invoices	4054	57943	2749	64933	404	34729	7348

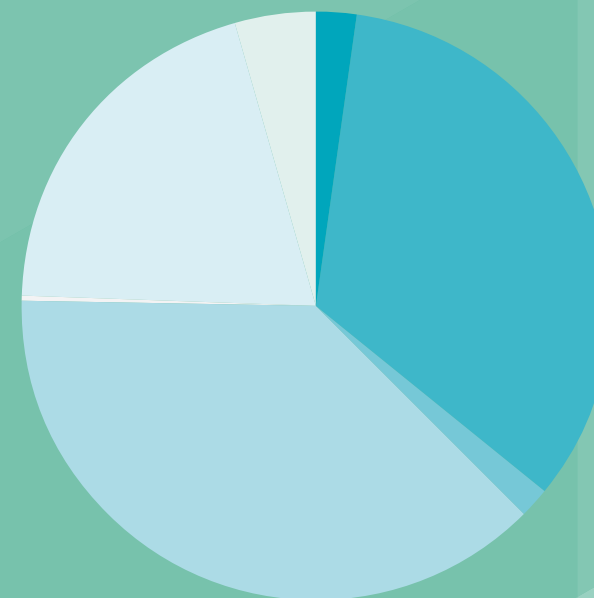
Total value of FFI invoices



Industry sector



Number of invoices



Comparison with HSE enforcement activities

In the ten years that FFI has been operating the number of workplace fatalities has only marginally decreased. In 2012/13 there were 148 workplace fatalities and, with the exception of 2019/20 when there were 111 workplace fatalities and 2021/22 when there were 123, the number has remained consistently between 140 and 145.

In fact, in HSE's most recent report on fatal accidents published in July 2022 it reported that "*in statistical terms the number of fatalities has remained broadly level over most of the last decade*".

In that same time the number of enforcement notices issued by HSE (Improvement Notices and Prohibition Notices) has reduced dramatically from 8,810 in 2012/13 to 2,929 in 2020/21.

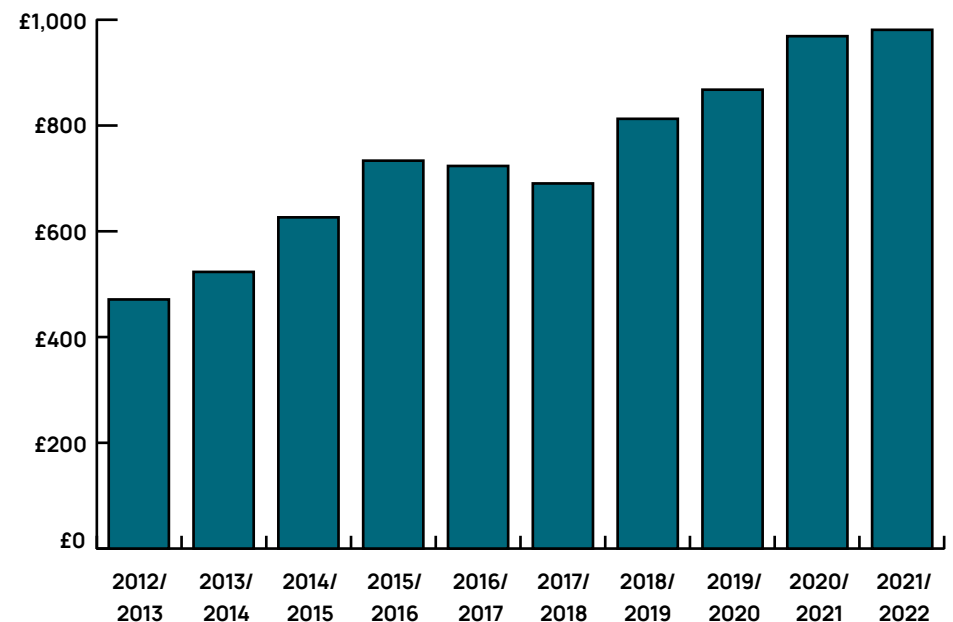
And we see a similarly decreasing trend in HSE prosecutions. In 2012/13 HSE and in Scotland, the Procurator Fiscal brought a combined 601 prosecutions. In 2020/21 the number of HSE and Procurator Fiscal prosecutions had fallen to 199.

Whilst the 2020/21 statistics are likely to be Covid impacted, both in terms of the impact on inspectors' routine activities leading to the issuing of Enforcement Notices and the combined impact of Covid on the HSE and the Courts resulting in fewer prosecutions, the figures in previous years confirm a downward trend prior to the pandemic.

What appears clear is that whilst HSE's activities have resulted in a decline in traditional enforcement activity, the use of FFI continues unabated, with a far less significant covid-related dip. Does this mean that Notifications of Contravention; the finding of a 'material breach' triggering costs recovery under FFI, is now HSE's preferred intervention tool?

What is clear is that the cost burden for organisations who face intervention has increased significantly, with the average invoice having more than doubled in the 10 years that FFI has been operating.

FFI average invoice amount 2012 - 2022



Impact on HSE funding

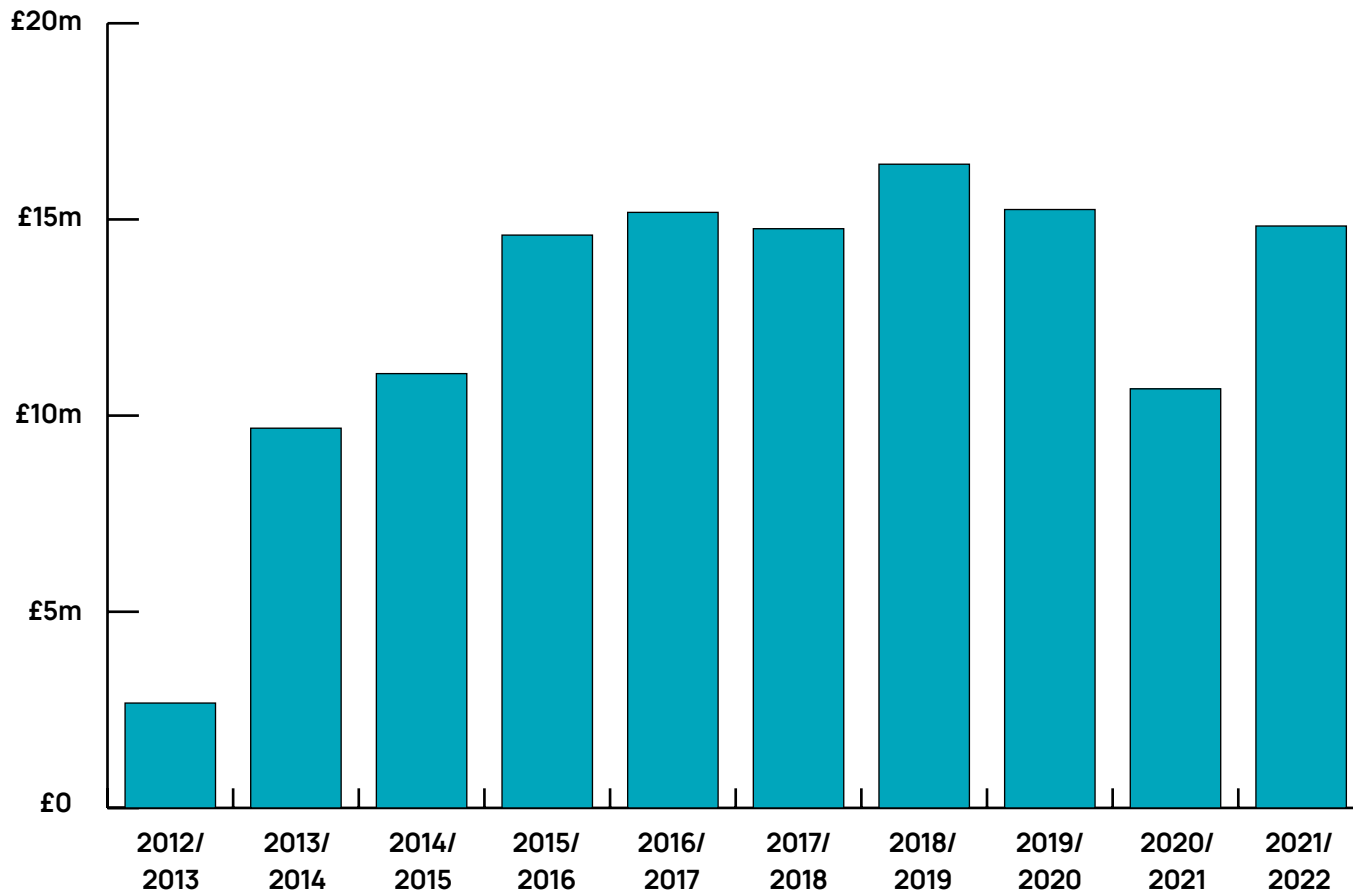
What also appears clear is that cost recovery schemes including FFI have transformed HSE's running costs.

HSE's 2021/22 Annual Report confirmed that "Since 2010, we have delivered more than £100m of savings to government through a combination of reducing our running costs and

generating income through cost-recovery and commercial activity".

Taxpayer funding of HSE in 2010 was **£218.6m** but by 2019 this had reduced to **£129.2m**.

FFI Income 2012 - 2022



Conclusion

FFI heralded a new form of intervention and the shifting of the costs of regulatory intervention from the taxpayer to industry, and in particular those found to be in 'material breach' of health and safety laws and regulations.

What's clear is that after a rocky start, with the 2014 triennial review calling for a review into whether or not the scheme should be completely scrapped, surviving a judicial review challenge in 2017, it appears clearer than ever that FFI is here to stay.

Looking at the trends in the different types of HSE enforcement and intervention activities over the past 10 shows us that whilst formal enforcement action has steadily decreased, the use of FFI has grown and remained strong, even during the covid pandemic.

We have looked under the bonnet of the impact of FFI on industry and in particular those sectors where such intervention has resulted in HSE recovering fees in the tens of millions from duty holders. Our report reveals the increase in the marked costs of this form of intervention such that the average cost of intervention today is to be measured in the thousands.

We have looked at the mechanisms for challenging FFI in circumstances where there is no automatic route to appeal a decision in the courts, and the reforms of the FFI scheme over the years.

Look out for part two of our HSE Fee for Intervention Report where we will focus on the future for FFI, reveal data regarding the success or failure of duty holders who challenged FFI via the appeals process and ask whether further reforms of the system should be introduced to ensure that FFI is fit for purpose for the next 10 years.

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