

To:

**Mr Stuart Galloway**  
**Responsible Officer**  
**Industry Qualifications Ltd (IQ)**  
**Coppice House**  
**Halefield 7**  
**Telford**  
**TF7 4NA**

### **Notice of Costs Recovery**

In accordance with its powers under section 152A(1) of the Apprenticeships, Skills, Children and Learning Act 2009 (the 2009 Act), and pursuant to its obligations under section 152A(4) of the 2009 Act, Ofqual gives notice that having imposed sanctions on IQ it has decided to require IQ to pay Ofqual's costs in relation to imposing those sanctions, in the sum of **£50,000** (fifty thousand pounds).

#### **Background**

1. The Office of Qualifications and Examinations Regulation ('Ofqual') may require a recognised body (an awarding organisation) on which a sanction has been imposed to pay the costs incurred by Ofqual in relation to imposing the sanction.
2. IQ is an awarding organisation regulated by Ofqual. On 26 February 2016 and 23 May 2018 Ofqual imposed sanctions on IQ.
3. Ofqual has incurred total identifiable costs in relation to imposing those sanctions of £84,119, as follows:
  - a. On 26 February 2016, Ofqual gave a direction to IQ in accordance with section 151 of the 2009 Act. Ofqual incurred costs in connection with giving the direction, as follows:
    - i. Investigation costs: £11,783;
    - ii. External legal advice: £3,120;

- iii. Internal legal costs: £17,380.
- b. On 23 May 2018, Ofqual imposed a monetary penalty on IQ in accordance with section 151A of the 2009 Act. Ofqual incurred costs in connection with imposing the monetary penalty, as follows:
  - i. External legal advice: £6,460;
  - ii. Internal legal costs: £45,376.
- 4. Ofqual has excluded from its calculation some additional costs which it has incurred as a result of, or in connection with, interaction with IQ during the course of these enforcement proceedings but which were not directly incurred in connection with the imposition of the sanctions.
- 5. In particular, Ofqual has excluded the costs it incurred in connection with the Notice of Intention to give a direction dated 23 November 2016, and Ofqual's costs in relation to the various complaints made by IQ during the course of these enforcement proceedings (save where IQ has incorporated such complaints in its representations).
- 6. Ofqual has calculated its internal legal costs at prevailing Government Legal Department rates.

### **Considerations**

- 7. Ofqual's policy, Taking Regulatory Action (2012) (the TRA policy), specifies that Ofqual will normally recover its costs in all applicable cases where those costs exceed £10,000.
- 8. The total sum of the costs which Ofqual has incurred in this case substantially exceeds the minimum level indicated in the TRA policy.
- 9. Ofqual has considered whether there are any countervailing factors which indicate that the public purse, rather than IQ, should meet the costs of imposing the sanctions on IQ. In particular, Ofqual has considered the following factors:

- a. That a significant period of time has passed since Ofqual incurred costs in connection with the direction;
- b. That Ofqual's costs exceed the sum of the monetary penalty imposed on IQ;
- c. IQ's ability to pay.

*Passage of time*

10. Ofqual gave the direction on 26 February 2016. Ofqual has considered whether IQ might reasonably have taken the view during the intervening period that its potential liability for costs in respect of the direction had been extinguished by the passage of time.
11. In the covering letter serving the direction on IQ, Ofqual explained that further regulatory action (in addition to the direction) was contemplated in relation to [the incident]. In respect of the question of costs, Ofqual explained:

*In the circumstances, the decision-maker has decided that consideration of whether Ofqual should require IQ to pay its costs associated with giving this direction, in accordance with S152A of the 2009 Act, should be adjourned until a final decision is made in respect of any future enforcement action.*

12. On 6 July 2016, in a letter to IQ concerning the preliminary stages of the process which led to the imposition of a monetary penalty, Ofqual again explained:

*We have set out in previous correspondence that the Standards Team intends at the appropriate time to pursue an order requiring IQ to pay Ofqual's costs associated with investigation and enforcement in connection with [the incident]. We notified you on 26 February 2016 that the costs associated with the direction would be held over until this case was concluded.*

13. On 20 February 2017, in a letter serving the Notice of Intention to impose a monetary penalty, Ofqual explained:

*When Ofqual makes its final decision whether or not to impose a monetary penalty on IQ, it will also consider whether IQ should be required to pay Ofqual's costs in this matter, in accordance with section 152A of the Apprenticeships, Skills, Children and Learning Act 2009.*

*If a monetary penalty is imposed, Ofqual will consider whether IQ should be required to pay Ofqual's costs in respect of:*

- Investigating [the incident];*
- Giving a direction in February 2016; and*
- Imposing that monetary penalty.*

*If no monetary penalty is imposed, Ofqual will consider whether IQ should be required to pay Ofqual's costs in respect of:*

- Investigating [the incident]; and*
- Giving a direction in February 2016.*

14. On 6 October 2017, in a letter enclosing a Statement of Reasons setting out decisions reached by the Enforcement Committee on 18 August 2017, Ofqual confirmed:

*We have advised in previous correspondence that the Enforcement Committee will consider at the conclusion of this case whether IQ should be required to pay Ofqual's costs associated with this case and if so in what amount.*

*In particular, we have advised that those costs might include the costs of Ofqual's investigation and other costs associated with giving a Direction in February 2016, as well as the costs associated with this case since February 2016, if a sanction is imposed.*

15. Ofqual is satisfied from the correspondence that it has made IQ aware at intervals that the issue of costs in respect of the direction remained at large and would be considered at the conclusion of the enforcement proceedings. In those circumstances, Ofqual considers that the passage of time since the direction was given does not amount to a countervailing factor in relation to the recovery of costs associated with imposing that sanction.

#### *The sum of the costs*

16. Ofqual has imposed a monetary penalty on IQ in the sum of £50,000. That sum reflected Ofqual's assessment of the seriousness of IQ's non-compliance and represented the minimum penalty necessary to meet the requirements of deterrence and public confidence in all of the circumstances.

17. A requirement to pay costs of £84,119 would have a greater financial impact on IQ than payment of the monetary penalty. Ofqual has considered whether its decision that £50,000 was the appropriate sum, in terms of penalty, to meet the requirements of deterrence and public confidence is a countervailing factor, suggesting that Ofqual should not recover its costs.
18. However, Ofqual observes that there is no requirement in the 2009 Act that Ofqual should have regard to the aggregate impact of any financial orders. The statute permits Ofqual to impose a monetary penalty of 10% of turnover and a requirement to pay any and all of the costs incurred by Ofqual in connection with imposing the sanction.
19. In addition, Ofqual notes that only part of the costs is attributable to the monetary penalty. Costs of £32,683 (including the investigation costs) were incurred in connection with the direction.
20. Moreover, Ofqual observes that a significant proportion of the costs is attributable to evaluating representations made by IQ which were voluminous and repetitive in nature. In particular:
  - a. Ofqual incurred external legal costs of £1200 and internal legal costs of £5400 in connection with IQ's representations following Notice of Intention to give a direction;
  - b. Although IQ made substantial admissions in August 2016, Ofqual estimates that at least £20,000 of its internal legal costs was incurred in connection with representations and correspondence IQ subsequently made seeking to go behind those admissions, together with £4060 of its external legal costs.
21. IQ was entitled to respond to this enforcement case howsoever it considered appropriate. However, the nature of IQ's approach, particularly after August 2016, significantly inflated Ofqual's costs. Ofqual does not consider it would be fair to the public purse for it to take the view that the costs are too great to recover in

circumstances where, in substantial part, the magnitude of the costs reflects the way in which the awarding organisation chose to make its case.

*IQ's ability to pay*

22. Ofqual has imposed a monetary penalty on IQ in the sum of £50,000. A requirement to pay costs of £84,119 would lead to an aggregate liability of £134,119, which is in excess of [edited] of IQ's turnover.
23. Ofqual has considered IQ's ability to pay that sum. For the purposes of the monetary penalty, Ofqual concluded that IQ had not produced any evidence of the impact of financial orders on the ongoing viability of its business. Ofqual's own analysis of the available financial information in respect of IQ, for the purposes of the monetary penalty, was that IQ had available to it multiple routes, including its own profitability, to meet financial orders totalling £100,000. Ofqual did not consider IQ's ability to meet total liabilities in excess of that sum.
24. In the circumstances, Ofqual considers that IQ is able to pay costs, at least in the sum of £50,000 and, as such, that IQ's ability to pay is not a reason to determine that costs should not be recovered.

*The amount of the costs*

25. Ofqual considers that it has discretion to recover costs in an amount less than £84,119 where it considers that lesser sum to be reasonable. In particular, although section 152A of the 2009 Act does not specifically provide for the exercise of discretion, section 152B (concerning appeals) provides that the tribunal might evaluate whether Ofqual's decision as to the amount of any costs recovery was reasonable.
26. In the circumstances of this case, Ofqual does not consider it would be unreasonable to require IQ to pay costs in the total sum of £84,119. Ofqual has not seen any evidence that IQ would be unable to pay combined financial orders of £134,119.

27. However, Ofqual concluded during the enforcement proceedings that it should not withdraw recognition from IQ as a result of the incident giving rise to the proceedings and that it was desirable that IQ should be able to invest in compliance activity. Ofqual has tested (to the extent that it is able) IQ's ability to pay financial orders totalling £100,000 but has not tested its ability to pay any greater sum. Ofqual considers it is possible that imposing a requirement to pay costs of £84,119 (in addition to the monetary penalty) might put at risk IQ's ability to operate as an awarding organisation, by depriving it of investment funds.
28. In the circumstances, in light of its conclusion that combined financial orders of £100,000 would not put at risk IQ's viability and the possibility that combined financial orders of £134,119 might but that viability at risk, Ofqual has decided to exercise its discretion to require IQ to pay Ofqual's costs in part only.
29. In the circumstances, IQ must pay Ofqual's costs in the sum of £50,000.

### **Impact**

30. Ofqual recognises that costs recovery will impose regulatory burden on IQ. Ofqual has considered its obligations pursuant to section 170 of the 2009 Act, not to impose (or maintain) any unnecessary regulatory burdens. For the reasons given in this Notice, Ofqual considers that the regulatory burden associated with costs recovery in this case is a necessary burden. Ofqual's costs were incurred in connection with imposing sanctions which Ofqual considered necessary in view of its statutory objectives and duties. Ofqual considers it proportionate that the awarding organisation, and not the public purse, should meet those costs.
31. Ofqual has had regard to the desirability of promoting economic growth, in accordance with the Deregulation Act 2015. Imposing costs recovery is likely to have an adverse impact on IQ's economic growth but Ofqual considers that the macro impact of costs recovery is likely to be positive. It is in the interests of the regulated community generally, as well as the interests of users of qualifications, that Ofqual will use its enforcement powers where this is necessary. Ofqual's ability to exercise its powers may be undermined if the public purse does not recover the costs associated with taking enforcement action.

32. Ofqual has not identified any equalities implications arising from costs recovery.

### **Payment**

33. IQ must pay the Costs within 28 days of the date of this Notice, in accordance with the Payment Instructions provided with this Notice.

34. In the event of non-payment, interest may be charged and the outstanding amount may be recovered as a debt, in accordance with Section 152C of the 2009 Act.

### **Appeals**

35. IQ may appeal to the First Tier Tribunal in respect of Ofqual's decision to require it to pay Ofqual's costs and / or in respect of the amount of those Costs, in accordance with Section 152B of the 2009 Act.

36. An appeal may be made on the grounds:

- a. That the decision was based on an error of fact;
- b. That the decision was wrong in law;
- c. That the decision was unreasonable.

37. Any appeal must be made within 28 days of the date of this Notice. Further information is available from HM Courts and Tribunals Service at: <https://www.gov.uk/courts-tribunals/first-tier-tribunal-general-regulatory-chamber>.

Signed:

Anne Heal  
**Chair of the Enforcement Committee**

**Date of this Notice: 23 May 2018**

**Enforcement Committee:**

Anne Heal;  
Thomas Taylor;  
Hywel Jones.



