BIS | Department for Business Innovation & Skills

EU PROPOSAL FOR A POSTING OF WORKERS ENFORCEMENT DIRECTIVE

Summary of responses to BIS call for evidence

OCTOBER 2012

Contents

Introduction

The European Commission published a legislative proposal on the enforcement of the Posting of Workers Directive on 21 March 2012. The Department for Business, Innovation and Skills published a Call for Evidence on this proposal. This document sets out a summary of the responses received.

The existing Posting of Workers Directive (96/71/EC) is a single market measure, to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. The Directive entitles posted workers to certain core employment rights available in the country they are posted to, including minimum rates of pay, maximum work periods and non-discrimination provisions. It applies both to workers posted from the UK to other Member States and to workers posted from other Member States to the UK.

On 21 March 2012, The European Commission published a draft Directive, which seeks to improve the implementation and enforcement of the existing Posting of Workers Directive. Copies of the proposal and accompanying documents can be found on the following website: http://ec.europa.eu/commission_2010-2014/andor/headlines/news/2012/03/20120321_en.htm This was published alongside a proposal for a Regulation on Collective Action ("Monti II"). The draft Regulation on Collective Action has since been withdrawn by the European Commission.

On 14 June 2012 the Department published a Call for Evidence on the Enforcement Directive in order to seek views and information from stakeholders on the impacts of the proposals on the UK. This was to increase understanding of posting of workers and the potential impact of the proposals in a UK context. This document sets out a summary of the responses received for each question.

The responses received have already informed the UK's negotiating position on this proposal and will continue to inform this position as negotiations proceed.

Thank you to all those who took the time to respond to the Call for Evidence, meet with officials or to participate in the roundtable with the construction sector.

The Call For Evidence Process

The Call for Evidence was conducted between 14 June and 26 July 2012. Information about the Call for Evidence, including a link to the document, was sent to a range of representative stakeholders from England, Wales, Scotland and Northern Ireland. It was available in electronic form on the website of the Department for Business, Innovation and Skills.

Responses were received from sixteen stakeholders. The majority of respondents were organisations either representing groups of businesses or representing workers. Responses were also received from legal groups.

Stakeholders were asked to provide responses to ten specific questions on the European legislative proposals. A summary of responses for each question is set out below. These seek to reflect all of the views expressed, although it is not possible to describe all responses in detail. Some stakeholders chose not to answer the questions directly but made general comments. In these cases Government officials have made reasonable assumptions about which questions they were addressing.

A total of 16 responses to the Call for Evidence were received. This included nine responses from business organisations, five from organisations representing workers and two responses legal groups. A full list of all the organisations who responded can be found in Annex A. Alongside the Call for Evidence, the Department held a roundtable with representatives from the construction sector – the list of attendees is included in Annex B and held four bilateral meetings individual organisations to discuss their responses. The points made at the round table have been included in the summary of responses where appropriate.

Overall, respondents agreed on the need to protect vulnerable workers and ensure unscrupulous businesses could not evade their responsibilities. There was broad support for clarifying what constituted a posting (Q1) and ensuring information on applicable working conditions was widely available (Q2) – however, responses differed over the detail of these provisions and how they should be implemented. Respondents were unable to provide quantitative evidence on the extent of problems in the UK but did return a number of individual case studies (Q4, Q9). On a range of issues, responses divided sharply between those representing workers and those representing businesses. In particular, there were significant differences of opinion on control measures (Q3) and joint and several liability (Q5, Q6). Answers on the likely impact of these provisions also reflected these perspectives (Q7, Q8). Finally, respondents raised a number of issues that were not covered by the Commission's proposal (Q10) and were particularly concerned about posted workers being used to undermine collective and working rule agreements.

In accordance with Government transparency policy, please contact the Department for Business, Innovation and Skills for further information or to view any of the responses.

Next steps

The proposed Enforcement Directive is currently being discussed by both the European Council and the European Parliament. We expect these discussions to continue into 2013. The Government intends to remain in contact with many of those organisations who responded to the Call For Evidence, seeking further information if appropriate as the negotiations progress.

Queries

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Summary of Responses

Question 1: Are the criteria in Article 3 (see Annex C) likely to bring more clarity to what classifies as a posting for your organisation / members? Are you able to provide examples of situations where such criteria would have been helpful or unhelpful? Is there anything that should be added to the lists? Are there any criteria which cause you / your members concern?

Overall view of the criteria

Respondents were in broad agreement that further clarity about the definition and rules of posting workers was needed and that the criteria were a step in the right direction. The CBI and TUC saw improved clarity as "vital" and "critical" respectively.

Views differed over *how* the criteria should be used. Responses from unions stressed that the criteria listed should be a mandatory minimum in all Member States and that Member States should also be free to consider other factors when determining whether a posting is legitimate. Business organisations preferred that they remained as indicative lists to be used on a case by case basis, as proposed by the Commission. They were unsure whether businesses would be required to do a formal check against the criteria when posting workers. EEF argued that the criteria are ill-defined and do not add clarity to the existing CJEU rulings.

Specific amendments to the lists

There were a number of areas where some respondents felt the criteria needed to be strengthened if they were to be effective in combating abuse of the postings directive.

To better clamp down on letterbox companies, unions and the Employment Lawyers' Association (ELA) argued for additional criteria (both quantitative and qualitative) to establish whether substantial activity was performed by the business making the posting in the Member State of origin. If these could not be met then it should not be regarded as a posting situation.

To help determine the employment relationship and address bogus self-employment, unions suggested adding criteria on a worker's economic dependency and subordination to their employer based on ILO Recommendation 198.

The TUC also proposed adding a further list of practices that would immediately nullify a posting situation, such as successive postings. The ELA cautioned that repeated posting in itself was not contrary to the original directive.

There was also concern about the use of travel, board and lodging costs as a reliable indicator of a posting situation.

Other issues raised

A number of responses highlighted the continuing uncertainty over what classifies as a "limited period of time" (Art 3, Para 2a) and called for a quantitative definition of "temporary", with

upper and lower time limits. The ELA believed that whilst placing a limit on the length of a posting would create its own problems, it could be beneficial to bring in a two-year cap in line with social security regulations.

Further clarity was sought on how the posting of workers directive interacts with both the equal treatment rights in the Temporary Agency Workers Directive and the Rome I Regulations.

Question 2: What experiences have you / your members had in finding information on the terms and conditions applicable to posted workers in other Member States? Would you welcome making this information more easily accessible? Which languages and what form (online or leaflet) would be most appropriate for your organisation / members?

All respondents agreed there was a need to improve the quality of information available on the employment conditions applicable to posted workers in different Member States. At present it was impracticably difficult for employers to locate information (particularly regarding applicable collective agreements) and posted workers were often unaware of their rights.

Business organisations suggested that each Member State should have an English-language website, linked to a central online portal run by the European Commission. This would address the problem and encourage best practice amongst employers. The ELA agreed but cautioned that more accessible basic information would not preclude the need for legal advice for employers to ensure compliance.

Unions believed this would not be sufficient as posted workers were often isolated and did not speak the language in the host country. They argued that the information should also be available in print form in the mother tongue of the posted workers, and include details of how they can access legal advice. They argued that clients and main contractors should be under an obligation to share the information widely.

Question 3: What experiences have you had of administrative requirements and/or notification systems when posting workers from the UK to other Member States? What impact would this article have on UK businesses looking to post workers to other Member States or on posted workers themselves?

Respondents had limited experience of existing administrative requirements and/or notification systems when posting workers from the UK to other Member States.

Business organisations welcomed the Commission's intention to limit the extent of administrative requirements in other Member States. However, they were concerned that the proposal as drafted would place additional burdens and costs on UK businesses looking to post workers overseas. Elements of the list were impractical for cross-border, multi-site business operations – e.g. it is particularly difficult to demonstrate "proof of payment of wages" and the information supplied might change during the posting period. They also suggested any

information should be stored electronically, rather than in a physical location.

Unions believed that the list of requirements should be a mandatory minimum, not a maximum limit. The list should be strengthened by, amongst other things, requiring a representative of the employer and documents to be situated in the Host Member State and not placing a limit on the translation of documents. GMB also suggested that businesses should have a responsibility to provide updated contact details to the contracting authority for two years following a posting.

The Commission's proposal does not require Member States to introduce a notification system if they do not already have one. However, a number of trade union responses suggested that it would be beneficial for the UK to have such a system for posted workers. Unions believe this would allow the UK to better target its enforcement agencies at vulnerable workers, create greater transparency over working conditions and encourage the early resolution of any disputes.

Question 4: What evidence is available on existing problems for posted workers in the UK construction sector? What evidence is available to demonstrate that a joint and several liability provision would address compliance and enforcement problems?

This summary combines information from a roundtable discussion with the construction sector held at the Department for Business, Innovation and Skills with the responses to the Call For Evidence.

Business representatives and unions disagreed over whether there was a problem with posted workers not being paid the national minimum wage in the UK – the legal minimum decreed by the existing Posting of Workers Directive. Union representatives commented that the lack of evidence did not mean there were no problems. Often the national minimum wage would be paid but not the minimum rate applicable under collective agreements. Posted workers were involved in large projects on isolated sites and were often brought to the UK when a company used a specialist system. When there was a problem they usually cut their losses and went home rather than reporting it. The TUC was becoming aware of an increasing number of incidents of posted workers being exploited.

All respondents agreed that posted workers needed to be protected and that compliance with working rule agreements was a particular issue. Both UK employers and workers experienced the double-edged problem where foreign companies can post workers without honouring working rule agreements. It was anti-competitive when contractors who tendered the right price were undercut by those who do not. The GMB provided a number of case studies from the engineering construction sector (Uskmouth Power Station, Isle of Grain Power Station, Lindsey Oil Refinery) where posted workers were used and working rule agreements were not being honoured. The ECA highlighted this as a particular issue for UK businesses in the electrical contracting sector.

Business representatives noted that according to the Commission's figures, of the 250,000 posted workers in construction across Europe, only a few hundred each year are in the UK. There was a lack of quantitative evidence on the extent of non-compliance or on the likely impact of joint and several liability. Any new proposals should be targeted at Member States

where they are most needed.

Question 5: What are likely to be the practical implications of the introduction of joint and several liability in respect of the rights of posted workers in the UK? What evidence is available to support your conclusions from the UK and other Member States? The proposal focuses on the construction sector but evidence related to other sectors would also be helpful to us in understanding the implications of the proposals.

This summary combines information from a roundtable discussion with the construction sector held at the Department for Business, Innovation and Skills with the responses to the Call For Evidence.

Responses from business organisations and unions divided sharply with regard to the practical implications of introducing joint and several liability (JSL)

Practical implications of the joint and several liability proposal for workers

Unions believed that JSL would give greater protection to workers from abuses, which they argued was particularly important in an increasingly globalised construction market with long sub-contracting chains. However, to be effective the proposal needed to be extended to chain liability, covering the whole chain of contractors, not simply one step up the chain. Union responses also urged for the extension of JSL beyond the construction sector - the agricultural and food processing sectors were singled out for particular focus, whilst others, such as NICICTU, suggested expansion to all posted workers in any sector. They also argued that posted workers should be able to claim for any entitlement under JSL, not just those listed in the proposal.

Other respondents were not convinced that JSL would benefit posted workers in the UK. If the current problem is posted workers being isolated and not reporting problems, this would not be solved by JSL, which would still rely on action being taken to enforce rights. Moving the liability would not solve the problem. It was argued that ensuring posted workers are able to make complaints and raise a grievance in either the sending or receiving Member State, as found elsewhere in the draft directive, would better address this problem.

Practical implications of the joint and several liability proposal for businesses

Business organisations were strongly opposed to the introduction of JSL in the UK construction sector, as "*companies have neither the expertise nor the authority to enforce the rights of another entity's employees*" (CBI). It would blur the lines of accountability between an employer and their employees and force business to take on an enforcement duty that belongs to the state. It would also increase compliance costs for cross-border service, undermining the Single Market by creating a disincentive to use businesses from outside the main contractor's own Member State. Those businesses who continued to use posted workers would look for a way to reduce their liability (insurance, retention payments, recoupment arrangements in contracts), whilst rogue companies would find a way around the rules (eg creation of intermediary companies for this purpose). Although businesses do check on the way sub-contractors operate this is different to becoming liable for any infringements by their sub-contractors.

The Electrical Contractors Association and Recruitment Employers Confederation were concerned that middle-sized contractors and work agencies would be caught in the middle. They would become liable for the actions of their subcontractors but have no protection from what might happen further up the chain (e.g. if the main contractor fails to pay them). The Agency Workers Directive had led to the imposition of onerous contracts on subcontractors.

Unions responded that JSL would force contractors to take a greater interest in the standard of their subcontractors, leading to better working conditions on construction sites and greater transparency. It would not be a burden on good employers and it was right that the contractor was liable for unpaid wages, as they profited from whatever the workers produced. Improved standards across the construction sector would help to level the playing field for law-abiding companies and increase tax revenues for Member States.

Other respondents worried that the proposals could create a perverse incentive for a subcontractor who breaks the rules to flee safe in the knowledge that the contractor would be liable for sorting out the mess. Enforcement agencies would also be more likely to target the domestic contractor rather than an overseas subcontractor. The unintended consequence could be the undermining of posted workers' rights and blurred lines of accountability.

A number of respondents believed that it would be difficult to justify why posted workers would have JSL whilst other UK workers would not. EEF noted that the definition of "construction" in the annex to the original directive is very broad and would most likely mean that JSL spread to other sectors.

The ELA response also suggested that JSL could lead to an increase in legal costs. International litigation is notoriously expensive and they expected lawyers to recommend bringing claims against both the subcontractor and contractor simultaneously, further increasing costs. Ensuring JSL was enforced in the same way in different jurisdictions would also be a challenge.

Many respondents commented on the potential impact of JSL on SMEs – this is covered in question 8.

Question 6: What is your view of the due diligence provisions in Article 12? Are the Commission's suggestions for due diligence appropriate and proportionate for what it aims to achieve?

This summary combines information from a roundtable discussion with the construction sector held at the Department for Business, Innovation and Skills with the responses to the Call For Evidence.

EEG believed that, if Article 12 had to be included, due diligence was an essential part of the JSL proposal. They argued that it should be permissive not obligatory and that the drafting would need to be improved considerably as the Commission's proposal would not work in practice.

Many respondents were concerned that the due diligence provisions would not be effective for a number of reasons. Documents such as contracts and wage slips are easy to fake and contractors were unlikely to understand overseas tax and social security systems or be in a position to judge genuine or bogus self-employment. Inspecting documentation would only

give a clean bill of heath to a subcontractor at a distinct point in time, it did not guarantee compliance a few weeks later. Data protection laws also placed stringent limits on the information which contractors could obtain. Therefore, "if a company is determined to flout the law there is nothing that a principal contractor can do to prevent this" (CBI). Unions opposed the proposal but for different reasons. Due diligence would "render all liability provisions meaningless" (UCATT) by providing an easy escape for contractors from monitoring subcontractors. Contractors needed the power to demand employment documents and investigate subcontractors' finances, neither of which were possible under existing voluntary schemes.

Many respondents were concerned that due diligence could not be defined effectively at an EU level. How could there be consistency between Member States? How would it work in practice (e.g. would there be different rules for SMEs and multi-nationals and/or different sectors)?

A number of respondents outlined the complexity of supply chains in the construction sector – a large contractor may work with 3,000-6,000 companies and work agencies. Large contractors already undertake considerable supply chain due diligence and audit regimes, particularly for big projects such as Heathrow Terminal 5 or the Olympic Park, but this was very different to being legally and financially liable for a subcontractor breaking the law. This was extremely time and resource intensive and the wider industry could not match this standard. The proposed due diligence would cost a lot more than the Commission's estimate and this would add to the cost of doing business. It would be a further burden if repeat checks were required whenever workers changed. Other respondents countered that there is already a huge amount of information that is required before someone is able to go on a construction site – the proposals would not be an additional burden.

Given the complexity, some responses suggested that the due diligence provision could lead to a new industry, much like the burgeoning industry for H&S pre-qualification questionnaires. New "due diligence assessors" would raise the cost for contractors.

Question 7: Overall, how will your organisation / members be affected by the proposal? Please explain and specify the impacts, giving indications of the likely costs/benefits involved and providing as much detail and evidence as possible. If impacts cannot be monetised, please try to quantify in other terms (e.g. the amount of business time spent dealing with administrative requirements).

All respondents commented in detail on the potential impact of joint and several liability and due diligence – this is included in the summary of questions 5 and 6.

Responses from unions argued that the proposal needed to be strengthened across the piece if it were to protect posted workers, domestic workers and reputable companies from unscrupulous businesses. Currently it was simply a "sticking plaster on a gaping wound" (GMB). If it was improved, workers would be better protected and able to challenge instances of non-compliance.

Businesses were concerned that the enforcement requirements could result in more inspections of UK businesses, requiring additional administration. For EEG, the majority of postings by their members were in the services sector with workers receiving well above the minimum conditions. Thus the proposals would have little impact on the conditions for typical UK posted workers.

The REC believed the proposals could place significant new burdens on work agencies, who would effectively have to audit every other agency and construction contractor in their supply chain. This could lead to them resorting to more drastic methods to make money and worsening conditions for their workers.

The ELA expected a mixed impact on employment lawyers. Improved clarity about postings situations and accessibility to information may reduce the need for legal advice. However, the introduction of new notifications systems and/or joint and several liability would have the opposite impact.

Question 8: Do you agree with the European Commission's assertion that the Enforcement Directive will have a "positive impact on the competitiveness of SMEs [small and medium-sized businesses] and micro-SMEs"? Has the Commission adequately taken into account the needs and circumstances of SMEs in the UK?

Respondents differed over the extent to which they thought UK SMEs were currently involved in the posting of workers. The CBI cited Commission figures which stated that 3.7m SMEs (17% of the total in the EU) are engaged as subcontractors and 54% subcontract to others. By contrast, UNITE argued that SMEs are not in the main responsible for the use of posted workers in the UK, with most being brought in to specific sites by large foreign contractors.

On the whole, union responses agreed with the Commission that the proposal would have a positive effect on law-abiding SMEs by creating a more level playing field for them to operate in. The JSL proposals would not distort the market or restrict the ability of SMEs to win contracts. Therefore, there should be no special arrangements or exemptions from the rules for smaller companies.

The majority of respondents believed that the proposals (particularly joint and several liability) would have a disproportionate impact on SMEs. Small businesses would be hit the hardest by any increase in compliance costs as they are likely to have limited HR and legal resource. EEF supported the case for a micro-exemption from JSL, as SMEs could "ill afford to be able to accept such extensive risk". Large contractors may also decide to bring more in house and restrict the use of suppliers from other Member States, running contrary to the UK Government's aims of opening up supply chains to smaller businesses.

Question 9: What is your view of the estimates the European Commission make in their Impact Assessment on the likely impacts on the UK (summarised in Annex D)? Are the estimate of the costs and benefits for the UK accurate?

Business organisations believed that the Commission's estimates were based on insufficient evidence and flawed assumptions. Implementing the proposals would require much greater resources than the €2,502E the Impact Assessment suggests. EEF suggested the European Arrest Warrant as a comparable concept to the cross-border enforcement proposals, whilst UKCG pointed to the "gross underestimate" of 15 minutes of due diligence per worker due to the cost of translation and audit procedures. The ELA believed the cost of implementation for government was likely to be more than indicated given the UK did not have an existing labour inspectorate system.

Unions were disappointed with the Impact Assessment Summary included with the Call For Evidence as it did not mention the impact of the proposals on domestic workers in the UK. They also argued that as drafted, the directive would not solve the problems concerning posted workers and collective agreements meaning a continuation of the existing negative impacts for skilled workers in the UK. If the proposal was strengthened, there would be benefits for both law-abiding businesses and workers. Rather than seeing additional inspections as "costs" to government, they should be considered as "benefits" for workers.

Question 10: Do you / your members have any comments or evidence about posting of workers relevant to the draft Directive, which have not been covered in the questions above?

It is not possible to include all the points made in the responses in this summary – points made in more than one response, or which seemed especially pertinent are included.

Applicability of UK collective agreements to posted workers

A number of respondents, representing both workers and employers, were concerned that posted workers are being used to gain a competitive advantage by undermining industry-level agreements (also raised in responses to question 4). In the electrical contracting sector, domestic contractors are engaging workers under the provisions of the industry norms as set out in the collective agreement but say they are facing unfair competition from those engaging workers who are posted into the UK from other Member States as these workers are entitled to the legal minimums as opposed to industry norms. They highlighted there are also examples of businesses using bogus self-employment to bypass statutory obligations.

As currently implemented, businesses posting workers must honour all UK statutory rights to posted workers but do not legally have to subscribe to sectoral collective and working rule agreements. Union representatives argued that the UK government should declare appropriate collective agreements "generally applicable" under Article 3(8) of the original Postings Directive to ensure foreign companies posting workers also had to comply with the rules. Enforcing collective agreements in this way received support from a number of employer organisations.

Article 11 – representation of employers and employees

A number of respondents expressed concern about the drafting of Article 11, para 3, which sets out who can represent an employer or worker and whether representation requires their direct involvement. There was concern that the provision could be incompatible with national laws in Member States, in particular enabling indefinite liability and/or class action in the UK. Others feared the article could restrict the scope for unions to be able to enforce workers' rights.

Social legal base

Some respondents called for the inclusion of Article 153 as an additional social legal base to be used alongside Articles 53 and 63.

Taking Legal Action in Host Country

The ELA response argued it almost impossible to envisage an effective mechanism for enabling a Court or Tribunal in the Member State of origin to make decisions on most Host employment laws because the systems are too diverse and the scale of legal advice required from multiple jurisdictions would put employees at a disadvantage in that situation. It would be preferred to leave the situation as it is. However, the response did support attempts to improve enforcement in the Member State of origin.

Annex A List of Respondents

Building & Engineering Services Association (BES)

Business Services Association (BSA)

CBI

Construction Industry Joint Council Employers (CIJC)

European Employers' Group (EEG)

Electrical Contractors' Association (ECA)

Employment Lawyers' Association (ELA)

Engineering Employers' Federation (EEF)

GMB

Irish Congress of Trade Unions Northern Ireland Committee

The Law Society of Scotland

Recruitment & Employment Confederation (REC)

UCATT

UNITE

TUC

UK Contractors' Group (UKCG)

Annex B Roundtable Attendees

Thursday 20th July 2012, 10.30-12
BIS Conference Centre, London

Association for Consultancy and Engineering

Building & Engineering Services Association

CBI

Construction Industry Council

Construction Industry Joint Council

Electrical Contractors Association

Federation of Master Builders

Laing O'Rourke

National Federation of Builders

UCATT

UK Contractors Group

Unite

Annex C Text of Article 3 of Commission's Proposal

Article 3 - Preventing abuse and circumvention

1. For the purpose of implementing, applying and enforcing Directive 96/71/EC the competent authorities shall take into account factual elements characterising the activities carried out by an undertaking in the State in which it is established in order to determine whether it genuinely performs substantial activities, other than purely internal management and/or administrative activities. Such elements may include:

(a) the place where the undertaking has its registered office and administration, uses office space, pays taxes, has a professional licence or is registered with the chambers of commerce or professional bodies,

(b) the place where posted workers are recruited,

(c) the law applicable to the contracts concluded by the undertaking with its workers, on the one hand, and with its clients, on the other hand,

(d) the place where the undertaking performs its substantial business activity and where it employs administrative staff,

(e) the abnormally limited number of contracts performed and/or size of turnover realised in the Member State of establishment.

The assessment of these elements shall be adapted to each specific case and take account of the nature of the activities carried out by the undertaking in the Member State in which it is established.

2. In order to assess whether a posted worker temporarily carries out his or her work in a Member State other than the one in which he or she normally works, all factual elements characterising such work and the situation of the worker shall be examined. Such elements may include:

(a) the work is carried out for a limited period of time in another Member State;

(b) the posting takes place to a Member State other than the one in or from which the posted worker habitually carries out his or her work according to Regulation (EC) No 593/2008 and/or the Rome Convention;

(c) the posted worker returns or is expected to resume working to the Member State from which he/she is posted after completion of the work or the provision of services for which he or she was posted;

(d) travel, board and lodging/accommodation is provided or reimbursed by the employer who posts the worker, and if so, how this is done; as well as

(e) any repeated previous periods during which the post was filled by the same or another (posted) worker.

All the factual elements enumerated above are indicative factors in the overall assessment to be made and may not therefore be considered in isolation. The criteria shall be adapted to each specific case and take account of the specificities of the situation.

Annex D: Brief overview of the likely impacts of the proposal on the UK

Problem Definition and Rationale for Intervention:

There is an existing Posted Workers Directive (96/71/EC) which clarifies the rights of workers posted to other EU Member States and aims to ensure the proper functioning of the single market. The proposed additional Directive aims to improve the enforcement of the Posted Workers Directive, with the objective of better protecting the rights of posted workers, whilst facilitating greater cross-border provision of services. The proposed Directive imposes largely administrative requirements on governments and some businesses.

Affected groups:

- The affected groups will be the employers who send posted workers to and from the UK, the workers who are posted, and the UK Government.
- The UK posts around 38,000 workers per year to other EU countries[1]
- The UK receives around 37,000 posted workers per year from other EU countries
- Workers posted to the UK represent approximately 0.13% of all those in employment in the UK.
- Workers posted from the UK are predominantly in the services sector (99% of workers posted from the UK are in services)[2]
- Workers posted to the UK are spread across sectors, but with concentrations in Health and Social Care, the Financial and Business sector, and Manufacturing[3]
- Due to the limited nature of the available data on posted workers, it is difficult to state the number and size of businesses affected by the proposals

Costs and benefits of the proposal

Benefits

- UK businesses will benefit from the co-operation of other Member States e.g. where the UK government queries whether a business posting workers to the UK is actually established in the MS it claims to be. This will help to produce a more level playing field. Improving compliance will help to improve confidence in the use of postings.

- The Directive limits the extent of notification systems, which will make it easier for UK businesses to post workers to a number of MS.

- The European Commission has not attempted to monetise the benefits of this proposal in its Impact Assessment

Business costs

[1] Source: European Commission data on the number of E101 certificates issued per year between 2005 and 2009. This is an imperfect measure of the numbers of posted workers, as not all postings require E101 certificates, and some workers are posted more than once per year.

[2] Source: European Commission Report (2011): Study on the economic and social effects associated with the phenomenon of posting of workers in the EU

[3] Source: BIS analysis using Labour Force Survey Data

- Contractors in the construction sector would be considered liable for the actions of their direct sub-contractors in relation to the treatment of posted workers. This may make it more difficult for UK SMEs and start-ups in the construction sector to win contracts across the EU, as businesses looking to sub-contract may look for firms with an established compliance record, which will favour larger, established businesses. The provision could distort the market to the disadvantage of companies using posted workers because joint and several liability would apply to them but not to a sub-contractor who did not employ posted workers. The Commission suggests that the impact of this joint and several liability measure on the UK construction industry is likely to be relatively small, as fewer than 1% of the workers posted from the UK to other EU states are in the construction sector, and just 3.5% of workers posted to the UK work in the construction sector.[4]

- The enforcement requirements on Member States could result in more regular inspections of posted workers and additional requests for information from employers.

- Cross-border enforceability of administrative fines may impact upon UK firms posting workers abroad, but only to the extent that they do not comply with the existing regulations.

- The European Commission estimates that the impact on business will be approximately €211,000 (£175,953) per year, recurring.

Government costs

- The UK will have to make clearer which terms and conditions apply to posted workers, in different languages and leaflet form as appropriate. This increased information provision will impose costs on the government.

- The UK will incur costs as a result of the administrative co-operation envisioned in the proposal. The UK would be required to co-operate with other EU Member States (MS) to facilitate implementation, application and enforcement practice of the directive. This would involve replying to information requests, and requests to carry out checks, inspections and investigations from competent authorities with respect to the transnational posting or hiring-out of workers within the shortest possible time.

- The UK will be required to provide information to host countries as requested in relation to a business sending posted workers from the UK. Information requested will have to be provided within two weeks, or 24 hours in urgent cases. The Government will have to use a separate and specific module of the Internal Market Information System to exchange information electronically with other Member States.

- The Directive would require the UK to ensure that appropriate checks and monitoring mechanisms are put in place and that effective and adequate inspections are carried out. It may require new checks for posted workers.

The European Commission estimates that the one-off cost of these proposals to the UK Government is €3,000 (£2,502), with an annually recurring cost of €7,000 (£5,837)[5].

[4] Labour Force Survey, Q2 2008

[5] Currency exchange calculated using Cabinet Office recommended exchange rate for April 2012 of €1 = £0.8339

This publication is also available on our website at www.bis.gov.uk

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