

Enforcement of Posted Workers Directive

Department for Business, Innovation and Skills

RPC rating: Fit for purpose

Summary

The impact assessment is fit for purpose. It sets out the expected impacts on business and provides some quantification of their scale. However, the Department should use the consultation period to test key assumptions, notably that only 0.9% of posted workers in the construction sector are paid below the national minimum wage. Failure to justify 0.9% as an appropriate or proportionate assumption could result in a final stage assessment being judged not fit for purpose.

Description of proposal

Posted workers are individuals employed in one EU member state, but sent by their employer on a temporary basis to carry out work in another member state. There already exists an EU Directive concerning the rights and working conditions of posted workers, the Posted Workers Directive 96/71/EC. Some member states raised concerns that the protections outlined in this Directive were not being fully provided, particularly in the construction sector. As a result, the European Commission brought forward an Enforcement Directive, which was adopted in May 2014 and must be implemented by 18 June 2016.

The Department's preferred option for implementing the Enforcement Directive will result in one change that affects business. Workers posted to the UK, who are directly employed by an EU company, but subcontracted to provide labour to a company in the UK construction sector, will now be able to pursue their UK-based contractor for any outstanding pay required to bring their compensation into line with the UK national minimum wage. This contrasts with the current situation where posted workers can only pursue their direct employer. In the context of posted workers in the UK construction sector, firms indirectly employing posted workers by contracting a second company to provide a service will now also be liable for any outstanding payment needed to bring pay into line with the UK national minimum wage.

Impacts of proposal

The UK already meets most of the obligations set out in the Enforcement Directive. As such the Department only identifies two Articles with the potential to impose cost on business, Article 9 and Article 12.

The most significant is Article 12. The Department's preferred option is to introduce the right for posted workers in the construction sector to make claims against their employers' contractor for outstanding payments of the national minimum wage through the use of

employment tribunals. The cost of this change to employers will be any potential wage back-payments, as well as the cost of Acas/Employment Tribunals. Employees may gain wage payments, but will also face some costs in attending Acas/Employment Tribunals.

Quality of submission

Costs and benefits (preferred option): the Department uses data from the PD A1 documents issued to workers who go to work in another European Economic Area country, in conjunction with Labour Force Survey data, to arrive at an estimate of approximately 1,300 posted workers in the UK construction sector. Using an estimate of 0.9% for the total percentage of employees paid below the national minimum wage in the UK, the Department concludes that 12 posted workers in the construction sector are paid less than the national minimum wage. The Department should test, during consultation, whether the use of 0.9% is appropriate, or whether compensation below the national minimum wage is more prevalent in the construction sector and/or among posted workers. In addition the Department should further consider how removing direct employers' sole liability for the payment of the national minimum wage may affect their levels of compliance.

Using recent Acas conciliation and Employment Tribunal statistics, the Department estimates that only three out of the twelve potential cases of under-payment of the national minimum wage are likely to result in wage payments being made. The total cost of these wage payments are estimated to range between £2,000 and £7,400, depending on the average duration of postings, with the Department estimating the costs of the tribunals to employers to be £12,100. The posted workers are expected to benefit, in equal measure, from the wage payments, but are likely also to face costs associated with the tribunals, estimated by the Department to be £4,300 in total.

The net impact of this policy will be to shift some costs from currently non-compliant businesses, based in other member states, to currently compliant UK businesses. The Department should, at the final stage, be clear on the split of costs between compliant and non-compliant businesses.

Scope and possible gold-plating: The proposal is of European origin. The Department states that the preferred option does not go beyond the minimum EU requirements. It has, therefore, classified the proposal as being out of scope of One-in, Two-out.

The Department is planning to consult on a range of options that go beyond its preferred option. These include extending the preferred option to all construction workers, not just posted workers in the construction sector. The Department provides provisional monetised estimates of the impacts for each option.

In addition, should an option other than the currently preferred be chosen, the Department must, at final stage, outline the extent of gold-plating that may be present and prepare a separate estimate for the incremental costs to business that should be scored in the government's regulatory account (formerly One-in, Two-out).

Small and micro-business assessment (SaMBA): For the preferred option, a SaMBA is not required as the proposal is European in origin and does not represent gold-plating. Nevertheless, the Department has provided one.

The IA analyses the impact on small and medium-sized businesses, rather than the SaMBA requirement to consider small and micro businesses. The Department notes that the impact of the implementation of Article 12 is likely to be proportionately greater on “small and medium-sized businesses” but that it is also likely to be small overall. Despite the disproportionate impact, the Department does not consider any exemptions or mitigations.

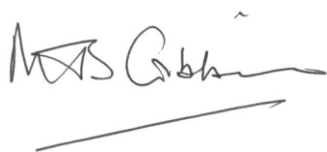
The Department should ensure that should an option be chosen which goes beyond the EU minimum then it addresses the impact on small and micro businesses rather than small and medium sized businesses.

Initial departmental assessment

Classification	Out of scope
EANCB	£0.02 million
Net present value	-£0.17 million
Business net present value	-£0.13 million

RPC assessment

Classification	Out of scope (preferred option only)
Small and micro-business assessment	Not required – European origin (preferred option only)



Michael Gibbons CBE, Chairman