Department for Business Innovation & Skills

THE POSTED WORKERS DIRECTIVE

List of all responses to the consultation on Implementing the Posted Workers Directive

JANUARY 2016

Contents

Birmingham Law Society

Question 1

Please identify your preferred option with reasons why you think it would work best.

The Employment Tribunal would be a sensible avenue for posted workers seeking redress. However, without some form of state-managed sanction or enforcement, the policing of rights of posted workers would fall to the choice that individual posted workers make to seek to enforce their rights.

In some sectors, with a vulnerable or low skilled workforce, there is a risk that unscrupulous employers will take a chance that a claim would not be made (or settled early without an adverse finding on liability) and therefore avoid wholesale compliance.

Moreover, with Tribunal fees, the potential need to incur unrecoverable legal costs, and the fact that a posted worker would be seeking to enforce rights in a foreign jurisdiction (to them), particularly if they are posted only for a short period, may be a considerable disincentive or inhibitor to the bringing of claims, and therefore may encourage non-compliance by employers.

Therefore, it may be that state-enforced sanctions are a necessity to ensure compliance. This could be readily achieved by widening HMRC's remit for enforcement of NMW.

Question 2

a) What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

We do not believe that a prescriptive approach is appropriate as each case would depend on its facts and circumstances. Some sub-contracts for large projects may be subject to formal tender processes, whereas other sub-contracting at the other end of the scale may be through relatively informal processes.

It would be rather cumbersome (and therefore unduly expensive) for a contractor to search out information about a potential sub-contractor as to their employment record and compliance with employment legislation.

The simplest and most cost-effective approach would be for the would-be contractor to raise specific questions on a sub-contractor's employment record in any engagement process (whether it is a formal tender process or some other less formal process), and the responses from the sub-contractor to take the form of warranties, or some other reasonable process depending on the circumstances.

Indemnities can also be negotiated between the contractor and sub-contractor in the event of any negligent or misleading representation/warranty or in the event of a claim.

The benefit to the contractor would be that this process would make it relatively easy to prove the defence of due diligence, and would not be unnecessarily bureaucratic.

The problem with this is that it would make it very difficult for a posted worker to succeed in any claim if the paperwork is in place, as the posted worker would have to establish grounds why this was not reasonable due diligence in that instant case – e.g. the contractor had prior knowledge that the warranties provided were unreliable or misleading.

b) How would they prove this?

The warranties from the subcontractor and any associated indemnities would form part of the contract between contractor and sub-contractor.

Question 3

a) If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

Contractors would do both – insist on warranties from the sub-contractor and indemnities, as well as settle claims without admission of liability if the defence could not be made out. If the due diligence defence could be made out, they would likely seek to defend the claims.

b) Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

See above.

c) Under what circumstance would the contractor choose to contest a claim?

In the event the due diligence defence is likely to be made out, which, for reasons above, could be relatively easy to establish.

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

Within a reasonable period (say 3 months) after contact with the employer of the posted worker has not led to remedy of the complaint.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

Depending on whether there was a proper enforcement regime that actually took action against defaulting employers, there would be a greater incentive for compliance.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

There is no evidence in the UK to suggest that it needs to go beyond the construction sector, given that the UK has a limited number of posted workers compared with other EU Member States.

Question 7

Do you have any other comments on the proposals?

Enforcement in the Employment Tribunal could be made more effective by rules allowing such claims to be determined on paper (either in default of any response by the employer, or if both parties consent).

Publication of a register of offending employers that is capable of being inspected by potential contractors might assist in establishing the due diligence defence.

Question 8

a) Is the estimated number of posted workers in the construction sector right?

No answer.

b) Is there another source of evidence that we should take into account?

No answer.

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as 'subcontracting' or 'joint and several' liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

No answer.

Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

No answer.

Question 10

Is there any evidence on the duration of postings?

No answer.

Question 11

What is the average wage and skill of the posted worker (across all sectors of the economy)?

No answer.

How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

No answer.

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

No answer.

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

No answer.

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

No answer.

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

No answer.

Are they mainly part of multinational firms or are they small firms?

No answer.

Question 15

What are the main organisational characteristics of UK Construction projects using posted workers provided by employers established in the EEA?

No answer.

Question 16

How are employers and posted workers (including the ones established in the EEA) used?

No answer.

How central is this to the organisation's business strategy?

No answer.

Question 17

Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

No answer.

What information is gathered through such checks?

No answer.

Question 18

What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

No answer.

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

No answer.

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

No answer.

Do you have any other comments that might aid the consultation process as a whole?

No answer.

CBI

Question 1

Please identify your preferred option with reasons why you think it would work best.

The creation of an individual right to bring a claim in an Employment Tribunal.

Business welcomes the government's intention to minimise the burden they will face as a result of the implementation of the Posted Workers Enforcement Directive. Article 12 is unnecessary in the UK as posted workers have the same rights as resident workers. Creating sub-contractor liability in UK employment law risks blurring the clear line of accountability between an employer and their employee, and is likely to increase compliance costs for businesses without an equivalent benefit for the employees posted here.

Option 1 is the preferred option of business because it is the smallest deviation from the UK's current, already effective, enforcement mechanism.

To minimise the extent to which the UK's clear line of accountability for employment rights is blurred, employees should first seek to enforce their rights against their direct employer. Only if sums remain unpaid after the enforcement process should posted workers in the construction sector have the right to make a claim against the contractor.

Question 2

a) What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

Subcontracting provides benefits for employers and consumers, improving business efficiency, giving firms access to specialist skills and opening up larger markets in other member states.

In setting a benchmark for due diligence, government should be mindful of the fact that onerous requirements risks unintended consequences. One likely response to a high burden of due diligence is a firm rationalising its supply chain. This will distort the market in favour of larger suppliers and against SMEs, which creates an unnecessary barrier to competition.

b) How would they prove this?

No answer.

Question 3

a) If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

No answer.

b) Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

No answer.

c) Under what circumstance would the contractor choose to contest a claim?

No answer.

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

This is not the preferred option of business.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

This is not the preferred option of business.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

Article 12 introduces a means of enforcement that is both unwelcome and unnecessary in the UK. The government should not gold-plate the directive by extending it beyond the construction sector.

Question 7

Do you have any other comments on the proposals?

No answer.

Question 8

a) Is the estimated number of posted workers in the construction sector right?

Don`t know.

b) Is there another source of evidence that we should take into account?

No answer.

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as 'subcontracting' or 'joint and several' liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

a) Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

No answer.

b) Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

No answer.

Question 10

Is there any evidence on the duration of postings?

No answer.

Question 11

a) What is the average wage and skill of the posted worker (across all sectors of the economy)?

No answer.

b) How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

No answer.

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

There is a lack of credible evidence the sub-contractor liability produces any benefits to the workers covered. It would set a damaging precedent if the tiny minority of unscrupulous employers felt able to renege on their responsibilities in the knowledge that the contractor will have to fulfil their responsibilities.

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

No answer.

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

No answer.

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

No answer.

Are they mainly part of multinational firms or are they small firms?

No answer.

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Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

No answer.

What information is gathered through such checks?

No answer.

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What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

No answer.

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

No answer.

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

No answer.

EEF

Overview

The transposition of the Posted Workers Enforcement Directive, (which we shall refer to as 2014/67/EU), comes after a lengthy period of consideration of all the relevant issues by EU level stakeholders. The fierce debate at EU resulted in a directive which contains a moderate baseline, but with some considerable flexibility for member states to choose how they wish to transpose the directive. Some member states have already completed their own transposition, and shown an eagerness to use the flexibility the directive allows. Overall, we favour an approach which the consultation demonstrates – one where the compulsory elements of the directive are transposed into UK only where UK law, or UK regulation in totality does not already provide the compulsory measures necessary to comply with the directive.

The UK's transposition comes at a sensitive time. The Commission has an open consultation published on possible reviews, or revisions, of the current EU wide rules dealing with social security coordination, and it is widely expected there will be an announcement on the subject around the end of 2015. Added to this, the UK Government appears to be examining methods of restricting the access to benefits for all EU workers, both migrant and posted, and the CJEU has recently considered a number of individual cases of entitlement under current EU law. Whilst these are issues which, to UK employers, are more remote than their EU counterparts, EEF, via its extensive network of sister organisations, is part of the wider EU level debate on both the 96/71 Directive and EU level social security coordination.

It is clear from this wider debate that there remains considerable interest in the original 96/71 Directive, the 2014/67 Directive and social security coordination. For EU employers, the issues of social security rules are inseparable from the two directives, partly because there are, according to official figures, far greater numbers of posted workers in other EU member states, and partly due to the large differences in the levels of employer contributions payable. There is considerable complexity involved in individual national systems, and it is clear that legally binding collective agreements in the manufacturing sector mean that changes to social security systems can have a significant impact upon employers who post workers. With little clarity at present, the only certainty appears to be that the review of the 96/71 Directive which the Commission President instigated will not bring an end to the calls for further regulatory change. A cautious approach now therefore is undoubtedly the correct one.

In outline therefore, many of the provision of the 2014/67 Directive are aimed at member states. Where relevant, we will comment on the issues and provide useful material for Government. On the key articles of 9 and 12, which proved so controversial in the European Parliament, and divisive amongst MEPs, we strongly support the preferred options set out in the consultation, with some additional comment which we have set out below.

Question 1

Please identify your preferred option with reasons why you think it would work best.

We support the default option of enacting a new stand-alone, individual right, for a worker to bring a claim before the Employment Tribunal. There was an intense, sometimes polarised, debate upon Article 12 at EU level. The examples relied upon for the inclusion of Article 12 were not UK based, isolated and extreme. However, the Article was included in the directive and requires some action to transpose.

Whilst we are aware that our interpretation of the article may not be shared by others, Article 12 appears to be optional. Member states "may", after a process, impose additional measures. Article 12(4), also uses the word "may" which is undoubtedly an optional provision for member states. The most relevant recital, recital 36, does not appear to suggest that the article should be read as imposing a requirement upon member states. We therefore believe that the UK can argue with good reason that it does not need to take any action to transpose Article 12.

However, in the event that our view does not prevail, the consultation sets out in reality the only viable option for the UK. The UK does not have, generally, state enforcement of individual employment rights, and any attempts to impose these, or create additional sanctions, will be very complex. It is common legal practice to include a range of indemnity clauses in all commercial agreements. Some of these already have the effect of transferring the financial risk of TUPE from one commercial party to another – and common current legal wording may already cover the additional liabilities which Article 12 creates. It's not then clear what impact Article 12 might have – for example a group of aggrieved employees litigate to recover their remuneration against the direct sub-contractor, who then has a contractual right to sue the main contractor who failed to pay the workers.

Question 2

What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

How would they prove this?

There was considerable debate upon what might amount to due diligence at EU, and very little clarity. What a commercial business does before it enters into a commercial agreement varies considerably. The process will depend upon the size of the organisation, the value of the contract, any past dealings between the businesses and whether there are any guarantors. Therefore, it is very difficult to specify a single framework which could apply to all businesses in all situations.

In general, however, it would be expected that for an arm's length transaction, between businesses who had no prior course of dealing, there would be some verification of the identity of the other business – for example via companies house or the provision of similar documentation, a credit check and potentially a bank reference. Clearly the more complex the transaction and the greater the value of the transaction, the more searching will be the enquiries.

For some who argued that the requirements of due diligence should be expressed in law, there were considerable practical problems in devising any framework who did not, directly or otherwise, discriminate against companies based in some EU member states. For example, not all member states have a robust business registration system, or the ability to provide references for directors which are capable of confirmation from an official government source. Therefore, specifying that due diligence includes these processes may mean that some companies based in some member states could not comply.

Therefore, we suggest that government does not attempt to define in regulation what due diligence consists of but instead provides some guidance on what it can consist of, accepting the huge variations involved in the concept.

Question 3

If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

Under what circumstance would the contractor choose to contest a claim?

It is unlikely that the creation of a new stand-alone right will affect commercial practice. For smaller businesses, their due diligence processes will be limited, and they are unlikely to have the time and resources to invest in extensive additional processes. In reality they could only do so by outsourcing the process which would incur additional cost. Recital 4 of the directive highlights the need to keep burdens on SMEs to a minimum. Ultimately, the decision will depend on the extent of the potential new liability and the risk of it crystalizing. This risk may be objectively assessed, currently, as low.

In terms of wider employer behaviour, this consultation comes at a time when employment tribunal claims are low, and therefore most employers see the risk of a successful Tribunal claim as limited. Settlement behaviour for employer is dependent upon a number of factors. These will include the possibility for further, similar, successful claims, reputational impact and the legal and management costs in defending the litigation. Ultimately, the single most important factor will be the cost of the settlement. In the event that it is low, and the sub-contractor has an indemnity, then they may choose to settle the claim.

Potentially, the anticipated change will result in the greater use of indemnity clauses, or perhaps their rewording to include this liability, or a different ceiling being placed on them. It is frequently the case that an indemnity clause will not be open ended, but will have a maximum ceiling placed upon it, which will be judged by both parties according to the value of the contract and the potential liabilities. However, it is possible that some businesses may seek evidence that workers have been correctly paid if they are potentially liable on a frequent basis as a way of ensuring that they will not subsequently face litigation for unpaid remuneration.

We would be interested in discussing that the proposed limitation period would be on such claims – and in general would favour the current time limit for the bringing of an Employment Tribunal claim.

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

We do not favour the involvement of the state in the collection of unpaid wages and do not believe that HMRC could better enforce the contemplated new provisions better than an individual. We doubt that HMRC do have the skills necessary to investigate sub-contracting chains, particularly where the businesses are not UK based. The process would need to be subject to independent appeal and could result in significant additional work for HMRC and businesses without improved enforcement.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

In a similar way, the imposition of civil penalties would be difficult to structure. There would need to a description in regulations of what amounted to due diligence and an independent appeals process. The penalty would not then reimburse the worker, and experience of civil penalties for immigration law breaches has indicated that on many occasions they are not paid – frequently as their size renders the business insolvent. Establishing evidence therefore that a civil penalty encourages compliance will at best be difficult. It seems unlikely that the existence of a new civil penalty which the sub-contractor would be liable for would encourage the main contractor to meet their obligations. In most cases, it is likely that the main contractor will have ceased to exist, as otherwise the sub-contractor would almost invariably be able to recover their losses from them.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

No. We are aware of no factual evidence that the problems identified in the construction sector relating to long sub-contracting chains and workers being unpaid are prevalent in other industrial sectors. Indeed, the UK has very low levels of claims for unpaid wages.

Question 7

Do you have any other comments on the proposals?

The recitals, (18, 19, and 20), point to the difficulties in accessing information, particularly collective agreements. Whilst this is a particular problem in the EU, there are still UK collective agreements which the UK Government will need to ensure are generally available free of charge to employers. It would be useful if UK employers had a single source of all EU collective agreements to ensure that they comply with the two directives.

Question 8

Is the estimated number of posted workers in the construction sector right?

EEF does not hold any relevant data

Is there another source of evidence that we should take into account?

EEF does not hold any relevant data

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as 'subcontracting' or 'joint and several' liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

EEF does not hold any relevant data

Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

EEF does not hold any relevant data

Question 10

Is there any evidence on the duration of postings?

EEF does not hold any relevant data

Question 11

What is the average wage and skill of the posted worker (across all sectors of the economy)?

EEF does not hold any relevant data

How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

EEF does not hold any relevant data

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

EEF does not hold any relevant data

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

EEF does not hold any relevant data

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

EEF does not hold any relevant data

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

EEF does not hold any relevant data

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

EEF does not hold any relevant data

Are they mainly part of multinational firms or are they small firms?

EEF does not hold any relevant data

Question 15

What are the main organisational characteristics of UK Construction projects using posted workers provided by employers established in the EEA?

EEF does not hold any relevant data

Question 16

How are employers and posted workers (including the ones established in the EEA) used?

EEF does not hold any relevant data

How central is this to the organisation's business strategy?

EEF does not hold any relevant data

Question 17

Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

EEF does not hold any relevant data

What information is gathered through such checks?

EEF does not hold any relevant data

Question 18

What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

EEF does not hold any relevant data

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

EEF does not hold any relevant data

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

EEF does not hold any relevant data

Employment Lawyers Association (ELA)

Introduction (including definitions)

ELA is an apolitical group of specialist employment lawyers and includes those who advise and represent in Courts and Employment Tribunals both employees and employers. ELA has just over 6,000 members. It is not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint.

A Working Party was set up by the International Committee of ELA to consider and comment on the BIS' consultation questions relating to implementing the Enforcement Directive. A list of Working Party members is annexed to this Response. This Response is set out in the order of the consultation questions in BIS' consultation document. Those questions have been re-stated in for convenience. ELA has not responded to BIS' call for evidence questions. We note that this consultation relates to Britain and not to Northern Ireland.

The following terms are used in this Response:

BIS:	Department for Business Innovation & Skills
Contractor:	the contractor engaging the Employer
ELA:	Employment Lawyers Association
Employer:	employer of the posted worker / sub-contractor with a contract for services with the Contractor
Enforcement Directive:	The Posting of Workers Enforcement Directive 2014/67/EU
HMRC:	Her Majesty's Revenue & Customs
Home Country:	the EU jurisdiction from which a worker is posted to Britain
NMW:	National Minimum Wage
Option 1:	creation of an individual right to bring a claim in an Employment Tribunal against the Contractor
Option 2:	state enforcement of unpaid wages
Option 3:	creation of a sanction (financial civil penalty)

Question 1

Please identify your preferred option with reasons why you think it would work best.

ELA'S view is that a combination of Options 1 and 2 would work best. Further explanation is provided below.

As the consultation paper points out at paragraph 6.41, "the underlying aim of Article 12 is to ensure that posted workers get paid." This is reinforced by Recital 36 to the Enforcement Directive which states that "Compliance with the applicable rules in the field of posting in practice and the effective protection of workers' rights in this respect is a matter of particular concern in subcontracting chains and should be ensured through appropriate measures in accordance with national law and/or practice and in compliance with Union law."

We understand that issues have been identified across the European Union in posted workers securing payment of their minimum entitlement in situations involving subcontracting chains. Specific measures via a mechanism of direct subcontracting liability are required to assist them in addressing those problems. We understand that the measures proposed must provide an effective, adequate and proportionate remedy to affected posted workers.

We note that BIS favours the creation of a right on the part of each posted worker (in the construction sector) to bring a claim in an Employment Tribunal against the relevant contractor. We support that proposal. However, we question whether the introduction of such a right in itself would provide a sufficiently effective and adequate remedy. This is because of various procedural difficulties in bringing claims in British Tribunals. Our preference therefore would be to introduce such a right combined with the creation of a new HMRC right of action against the contractor, i.e. a combination of Options 1 and 2.

We agree that on the face of it Option 1 is the closest implementation of the requirement set out in Article 12(2) of the Enforcement Directive. However, we note that existing NMW laws provide all workers employed/engaged in Britain with an option of either bringing a claim against the employer or of making a complaint to HMRC with a view to HMRC taking the necessary action. This no doubt recognises the fact that workers paid at the minimum wage level will generally lack the resources to bring legal claims and may well fear victimisation if they do so. Although trade unions can provide valuable assistance to such workers in bringing their claims there will be many who do not – for whatever reason – belong to a union.

The above issues relating to domestic national minimum wage enforcement are likely to be compounded in the case of workers posted to the UK from other EU jurisdictions. Reasons for this include the following.

Many posted workers will not be familiar with legal systems, will not be dealing with UK legal systems in their first language and will be more dependent on other assistance. They may be less aware of the limited available support (e.g. ACAS or sources of pro bono advice) and may not be able to afford lawyers.

Bringing a claim in the courts of the posted worker's Home Country is unlikely to be practical given the need to apply British law.

Owing to recent changes to UK employment laws there are a number of formidable procedural hurdles to be overcome before a claim can validly be made which, again, could easily turn out to be traps for the unwary. We have in mind the early conciliation procedure, time limits and the incidence of tribunal fees and the complex remission system. (Although we acknowledge that fees could in due course cease to operate in Scotland and that the Government is currently reviewing the operation of the current fees regime.)

Workers may simply not know the legal identity of the relevant Contractor whereas it will be easier for HMRC to secure information and make relevant determinations as part of its investigations.

In a considerable number of cases workers would bring such proceedings after their posting had ceased and when they were no longer physically present in the UK.

It remains to be seen how easy it will actually be to bring such a claim against the Contractor, e.g. can the Contractor be joined to proceedings against the employer from the outset or will certain steps first have to be taken against the employer before such a claim can be made against the Contractor. If the latter, how easy will it be for such workers to demonstrate compliance? See our further comments below in this regard.

Enforcement by workers of any Tribunal award could well be very difficult, particularly for posted workers. A recent survey of over 1,000 successful Employment Tribunal claimants conducted by the Ministry of Justice found that under half (49%) had received payment in full, a further 15% had only received partial payment and 35% had received no payment at all. Again, all necessary steps in this regard would need to be taken by the posted worker in an unfamiliar jurisdiction.

The prospect of enforcement by HMRC is more likely to encourage Contractors and Employers to comply, for example, for the following reasons.

HMRC is likely to take action in relation to a number of affected posted workers rather than in relation to one isolated individual which is likely to mean that potentials costs for non-compliance will be higher.

Action taken on behalf of a number of individuals by HMRC is more likely to come to the attention of prospective future Contractors, i.e. there will be greater commercial incentives to settle claims and to comply for Employers who want more business.

We accept that providing for a combination of Options 1 and 2 at first sight places posted workers in a more favourable position than those of other workers. We consider that this could be justified in order to meet the specific disadvantages that they would otherwise suffer.

Question 2

What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

How would they prove this?

Option 1 envisages that the Contractor will be able to defend claims brought by posted workers in circumstances where the Contractor has carried out due diligence in respect of the Employer.

In a sub-contracting situation, a prudent Contractor will typically seek the following assurances from the Employer, by way of warranties, in order to mitigate the risk that they are joined as a party to a claim against the Employer for non-payment of wages.

Have any claims for non-payment of wages/breach of NMW legislation been brought against the Employer in the preceding 12 months? Note: where workers are posted from another Member State, the reference period would need to be adjusted to take into account local limitation periods (given that a history of breach in another Member State will also be a relevant consideration).

Has the Employer been named as an organisation that has failed to meet its obligations to pay at NMW rates, whether under the UK regime of naming such employers or under a local equivalent?

Is the Employer the subject of an enquiry and/or investigation into compliance with NMW laws, whether in the UK or otherwise?

Have any penalties for breach of NMW laws been imposed on the Employer?

Where an issue is identified, the Contractor will usually insist on robust indemnities in any sub-contracting agreement, having regard to its potential exposure. The practical implications are addressed in greater detail under Question 3 below. Note that current practices of seeking information, warranties and indemnities for the Contractor's protection does not equate to comfort that wages are actually delivered to workers.

We do not consider that it will be practical for Contractors to collect and analyse raw data to demonstrate compliance with NMW laws. NMW laws, e.g. in terms of the remuneration that is included for such purposes and the calculation of working hours for the relevant reference period, is very complex and the costs and practical difficulties entailed in securing the relevant data from the Employer would be demanding.

Simply requiring Contractors to check a public register in relation to an Employer's historical non-compliance with NMW etc. is unlikely to be sufficient to procure compliance, i.e. with delivery of wages due to posted workers, and would effectively leave posted workers without the remedy intended by the Enforcement Directive.

It would be possible to require Employers to provide certain information to Contractors, ie to introduce a regime similar to the regime applied under the Transfer of Undertakings (Protection of Employment) Regulations. We do not recommend this course of action. In

ELA's view it would be more flexible and effective if Contractors and Employers use commercially agreed warranties and indemnities, formulated on the assumption that the Contractor is materially at risk.

It may be helpful to specify that the Contractor should undertake some minimum entity checks, i.e., that the Employer is genuine. Our existing anti-money laundering legislation may provide a model, i.e. a requirement to seek documents demonstrating identity, ownership etc. This aspect of the Enforcement Directive does not appear to have been addressed.

It will be difficult in practice for Contractors to procure Employer compliance or to check that an Employer has complied. The Enforcement Directive would protect posted workers more effectively if there were no due diligence defence at all, or at least if the bar were high. That would encourage Contractors to push the risk on to the Employer commercially and help posted workers more effectively in the event that an Employer has no funds to meet its obligations. The flip side of that is, of course, that Contractors may be obliged to accept financial and reputational responsibility for compliance failings of a third party over which it has no direct control. This may particularly disadvantage smaller Contractors who are less able to secure compliance or comfort from Employers, or insurance at reasonable cost. ELA considers the appropriate balance between Contractors and posted workers' interests to be a political matter.

Question 3

If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

In our view the principal protection Contractors would seek in most cases would be an indemnity from the Employer. Beyond that, the decision whether to undertake due diligence or simply discharge claims will likely depend on the complexity of the steps they are required to take to be sure of succeeding in any such defence, see further below.

Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

Under what circumstance would the contractor choose to contest a claim?

It should not be assumed that contractors will simply settle such claims on the ground that the amount of any claim is likely to be small. The decision whether to contest or settle a claim is likely in each case to depend on a number of factors including for example the following:

- The number of workers making claims and whether they have legal or other assistance;

- The resources available to the Contractor to defend the claims (e.g. some may have annual fixed price retainers with advisers covering such claims in any event);

- Whether the Contractor considers that it has a defence to the claims, whether pursuant to the new due diligence provisions or otherwise (e.g. if the claimants are not posted workers but, say, self-employed);

- the availability, and terms, of any indemnity protection (and the creditworthiness of the indemnifying party).

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

It would be sensible to align HMRC's authority and duties with those that are currently provided for under NMW legislation in relation to workers who are not posted. We would recommend that broad discretion to approach a Contractor (or potential Contractor) be given to HMRC where an Employer is approached.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

Option 3 is not our preferred Option. Sanctions that apply to directors personally can be motivating, particularly for multinationals. However, we do not think this is the best option.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

Not unless there is evidence of a comparable level abuse in other sectors. The requirements for Contractors are potentially quite onerous in terms of diligence, negotiation of contract terms and dealing with any issues arising.

Question 7

Do you have any other comments on the proposals?

It would be helpful if attention could be given to the definition of "posted worker" to enable Contractors and Employers to understand their responsibilities clearly. We recognise that it is difficult for BIS to deal with this in isolation given the term is contained in a European Directive but more formal guidance may be helpful.

ELA notes that BIS does not intend to propose legislation that will allow claims where there is a longer contractor chain. The proposed new enforcement right is currently only against a "first stage" Contractor. It would be helpful if BIS could include a mechanism that will assist in avoiding abuse, for example, the creation of additional group companies to own

the Contractor. The legislation might be more effective if other group companies could be joined where there is a sufficient level of ownership or control and the Contractor has insufficient funds to meet claims.

ELA considers that it would be helpful to offer translation of core information relating to employment rights, not just for posted workers who may not choose to make enquiry of a public authority, but also for other interested parties such as potential inward investors and UK residents. Note that many employees do not expend great energy in make enquiries until things go wrong – translations freely available on the internet would help potential posted workers before they are posted. Translations are more likely to be useful, accurate and be produced more cost efficiently if produced once centrally with due care. Misunderstandings produced by poor translation can be unhelpful to all parties and considerable resource is currently expended on translating on an ad hoc basis (i.e. Britain as a whole is wasting resources in duplication of effort).

In order to improve the potential for risk-based inspection it may be helpful if a requirement to report numbers of posted workers to HMRC were imposed. This could be linked administratively to payroll/social security compliance.

Question 8

Is the estimated number of posted workers in the construction sector right?

No answer.

Is there another source of evidence that we should take into account?

No answer.

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as ‘subcontracting’ or ‘joint and several’ liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

No answer.

Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

No answer.

Question 10

Is there any evidence on the duration of postings?

No answer.

Question 11

What is the average wage and skill of the posted worker (across all sectors of the economy)?

No answer.

How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

No answer.

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

No answer.

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

No answer.

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

No answer.

Are they mainly part of multinational firms or are they small firms?

No answer.

Question 15

What are the main organisational characteristics of UK Construction projects using posted workers provided by employers established in the EEA?

No answer.

Question 16

How are employers and posted workers (including the ones established in the EEA) used?

No answer.

How central is this to the organisation's business strategy?

No answer.

Question 17

Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

No answer.

What information is gathered through such checks?

No answer.

Question 18

What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

No answer.

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

No answer.

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

No answer.

Recruitment and Employment Confederation (REC)

Background on the REC

The Recruitment & Employment Confederation (REC) is the professional body for the UK recruitment sector. We represent just under 3.500 corporate members, which accounts for 82% of the UK market by turnover. We also represent over 8,000 individual members of the Institute of Recruitment Professionals (IRP).

Our membership is broken down into 19 sector groups which brings together specialist recruitment agencies. Some of these groups cover sectors where there is a greater likelihood of workers being posted from other EU countries, including industrial, construction, drivers and hospitality. We also cover high-end sectors like IT, engineering, life sciences and financial services.

At the heart of the REC's mission is our work to raise industry standards and compliance. All REC members must sign up to the industry Code of Professional Practice and must pass a mandatory compliance test to join and remain in membership. A major priority is to ensure that compliant businesses in our sector are not undercut by rogue providers which is why we actively support effective government enforcement of all regulations.

The REC is a member of Eurociett – the representative body for the recruitment industry in Europe. This enables us to regularly exchange views with other national federations on key issues like the posting of workers. Our membership of Eurociett also enables us to present a strong collective voice to the European Commission and other EU institutions.

Overview of our position

The REC supports the free movement of labour across Europe. We also support the underlying aims of the Posting of Workers Directive as a means of not only protecting workers but also of ensuring that compliant businesses are not undercut.

The feedback from the REC's Employment Policy Committee and our wider memberships is that instance of workers being posted into the UK are relatively few. The majority of workers come over independently and look for work once they arrive. However, ongoing staff shortages in key sectors could increase the viability of more workers being posted from other countries. This is something we will continue to monitor closely.

The feedback from Eurociett and from other national federations is that the main challenge is not so much workers not being given their full rights under the Directive, but is linked to agencies being undercut by providers operating across borders in a way that limits their social charges. For example, a provider setting up in Luxembourg and placing workers over the border into France can gain a significant commercial advantage by having to pay less in social security and other taxes.

The REC's major concern with regards to the proposals surround the liability – particularly where umbrella organisations are involved. We have consistently sought to highlight the increasing 'intermediation' of the UK recruitment market and the challenges this presents for policy makers. We are keen to work constructively with BIS officials to develop pragmatic solutions in this area.

The REC supports effective enforcement of all regulations and is keen to feed into the work of the new Director of Labour Market Enforcement. We will continue to do our bit by ensuring that all REC members are accountable to our Code of Professional Practice and by encouraging employers to only use compliant recruitment agencies. On this last point, we believe that the way employers manage their supply chain can play a key role in addressing instances of bad practice and potential breaches to posting of workers regulations. As part of our awareness raising activities, the REC launched its wide-ranging Good Recruitment Campaign last year and we are keen to support any initiatives aimed at employers.

The proposal

Directive 2014/67/EU must be transposed by June 2016. It introduces a requirement for subcontracting liability in the construction sector. The proposal is to make contractors liable for subcontractors' failure to pay the worker. The immediate concern is that employment businesses would be required to pay where a CIS intermediary or other intermediary fails to pay (even after having paid the intermediary in the first place [to check]). There may be a defence of reasonable due diligence. The Directive also permits member states to extend this proposal to other sectors and BIS do ask this question.

Question 1

Please identify your preferred option with reasons why you think it would work best.

Extract from Article 12

… Member States may … take additional measures on a non–discriminatory and proportionate basis … to ensure that in subcontracting chains the contractor of which the employer (service provider) … is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker with respect to any outstanding net remuneration corresponding to the minimum rates of pay and/or contributions ….

… Member States shall provide for measures ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable, in addition to or in place of the employer, for the respect of the posted workers' rights referred to in paragraph 1 of this Article.

The liability referred to in paragraphs 1 and 2 shall be limited to worker's rights acquired under the contractual relationship between the contractor and his or her subcontractor.

Member States may, … provide for more stringent liability rules under national law on a non-discriminatory and proportionate basis with regard to the scope and range of subcontracting liability. Member States may also, in conformity with Union law, provide for such liability in sectors other than those referred to in the … Directive ….

Member States may in the cases referred to in paragraphs 1, 2 and 4 provide that a contractor that has undertaken due diligence obligations as defined by national law shall not be liable.

Employment businesses and how they engage temporary workers

REC members are employment businesses as defined in Section 13 of the Employment Agencies Act 1973. For the purposes of the directive they are "temporary employment undertakings" or "placement agencies" (as defined in Article 1.3(c) of the original Posted Workers Directive). Employment businesses supply temporary workers to work for end user clients. An employment business can engage a temporary worker in a number of ways:

(a) as an employee who will have full employment rights;

(b) on a contract for services, where s/he will have worker rights (such as to national minimum wage (NMW), paid holiday leave) and rights under the Agency Workers Regulations 2010 where s/he is an agency worker;

(c) via an intermediary such as an umbrella company, a personal services company or in construction, a CIS intermediary. CIS is the Construction Industry Scheme, a revenue collection scheme operated purely for the construction industry. Individuals must be genuinely self-employed in order to be able to register as a CIS worker – this will mean that s/he is not an employee and will not be entitled to either worker or employee rights such as NMW.

REC is not aware of how many UK employment business either post workers to overseas clients or how many non-UK employment businesses post their workers to the UK.

The Conduct of Employment Agencies and Employment Businesses Regulations 2003

Employment businesses must comply with the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations). Those regulations apply by default except where an individual works through a limited company and both the limited company and the individual have given an opt-out. When an opt-out is given, none of the Conduct Regulations apply.

Requirement to pay work-seekers:

When the Conduct Regulations apply, the employment business must pay the work-seeker for all work done, even where the employment business has not been paid by the client (in fact the employment business must give a written undertaking to make such payment). It can however delay payment for a reasonable period so that it can confirm that the work was done. This means that where an employment business has engaged a temporary worker, either (a) directly, it must pay the temporary worker or (b) via an intermediary, it must pay the intermediary.

However, where a valid opt out has been given that prohibition does not apply and so the employment business can withhold payment such as by relying on a "pay when paid" clause i.e. it will pay the intermediary when it receives payment from the client.

Irrespective of whether the employment business pays or withholds payment from an intermediary, that intermediary will still be subject to the payment terms it has agreed with the temporary worker. Where the intermediary is an umbrella it will employ the temporary worker and so is still obliged as the employer to pay its employee. Where the intermediary is a CIS intermediary, it will engage the individual as a "self-employed operative".

REC cannot see why, given that an employment business may have already paid the intermediary (where it was prohibited from withholding payment), that it should have to pay twice because the intermediary has failed to pass that payment to the temporary worker whether that temporary is an employee of the intermediary or a self-employed operative.

Question 2

What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

How would they prove this?

REC always recommends that its members do the appropriate due diligence on all intermediaries they engage with. To support members we have produced an intermediary checklist for use by members. This asks a range of questions such as set out below (not all are included):

Section A

1. Intermediary details – including incorporation details, registered details

2. Group companies – whether the intermediary is part of a group of companies

3. Intermediary officers – who are the directors, or if a partnership, the partners

4. Financial matters – including:

    - Please confirm that you hold monies relating to temporary workers' pay in separate client accounts?
    - Please confirm that all payments received from your clients are paid into a UK bank account held in your company name.
    - Please confirm that neither you nor any group company pays temporary workers via an offshore entity.
    - Please confirm that all temporary workers are paid in full via their own bank, building society or post office accounts (and not those of any nominee or third party, whether inside or outside the UK).

5. Insurance

6. FCSA membership

7. GLA licensing – including whether the intermediary holds a GLA licence or been revoked a licence (though not relevant to the construction industry)

8. CIS intermediaries

    - The intermediary's unique tax reference no.
    - Whether the intermediary has gross status for the purposes of the Construction Industry Scheme (CIS)? If not, why not?
    - How the intermediary establishes that the temporary workers engaged by it should be paid under CIS or not? I.e. do they work under the supervision, direction or control of any person?

9. Contractual documentation

10. ID checks

11. Right to work checks

12. Conduct of Employment Agencies and Employment Businesses Regulations 2003

13. Agency Workers Regulations 2010

14. Working Time Regulations 1998

15. National minimum wage – including does the intermediary pay at least the NMW to all temporary workers for all hours worked? If not, why not?

16. Deduction of PAYE and national insurance

    - Does the intermediary treat all income earned by the temporary worker as taxable earnings subject to PAYE tax and NICs in accordance with UK tax law and HMRC guidance?
    - Please provide pay slips showing that (a) full PAYE and NICs have been deducted from the temporary worker's pay and (b) employers' NICs have been paid.

17. Travel and subsistence – including does the intermediary run such a travel and subsistence scheme and if so, how does it operate the scheme.

18. IR35

19. Pensions

20. Internal complaints process

21. External complaints

22. Employment tribunal claims

23. HMRC complaints or investigations – including about NMW, holiday pay, travel and subsistence expenses (members are reliant on honesty here because HMRC will not confirm or deny which businesses it may have investigated). BIS however has a limited naming and shaming power.

24. Services provided to temporary workers

Section B

25. PSC questions

Members can also check filed accounts at Companies House though these can often be 18 months old by the time they have been filed.

We cannot see what additional due diligence an employment business can do over and above those questions set out in the REC intermediary checklist. Assuming the employment business receives appropriate and satisfactory responses from the intermediary, why should it then assume liability for that entity's failure to meet its own payment obligations?

Question 3

If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

Under what circumstance would the contractor choose to contest a claim?

REC recommends that its members always conduct appropriate due diligence.

We would not expect employment businesses to automatically pay out on a claim for a number of reasons:

When considering whether to pay out on any claim a business must always (a) assess whether the claim has any merit, (b) assess its liability and (c) then do a cost benefits analysis as to the merits of defending a claim or paying out. Of course if liability is automatic such as under Article 12 then (b) will have limited value. However we would always expect the employment business to check why the intermediary has not paid the temporary worker.

If the employment business has already paid the intermediary which should have paid the temporary worker we would not expect it to also pay the temporary worker separately.

Individuals must now pay a fee to make a claim at the Employment Tribunal (ET). Statistics show a dramatic decline in claims since fees were introduced in July 2009 so businesses may not have to decide how to respond to a claim because one has not been filed at the ET.

Separately though, from a practical perspective we do wonder how a posted worker, who has returned to his home country following completion of the work can reasonably be expected to pursue an ET claim.

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

On receipt of a complaint HMRC should enquire of the temporary worker what steps s/he has taken to receive payment. Once the temporary worker has exhausted the sub-contractor's complaints process then HMRC can proceed to investigate. Of course if the individual is CIS registered then as a self-employed individual s/he is not entitled to the NMW. If an individual who is CIS registered continues to press for a claim for NMW, HMRC should also investigate the individual's CIS returns. One cannot claim simultaneously to be self-employed for tax reasons but to be employed (or at least a worker) for employment rights purposes.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

Our concern with this option is that the financial penalty goes to the state and not the worker – we do not understand why this would be. We have no further comments.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

No. REC has significant concerns about the applicability of sub-contractor liability in the construction sector. Those concerns are the same for every other industry sector.

Question 7

Do you have any other comments on the proposals?

We note there is no reference as to the reasoning why a sub-contractor/ employer has not paid the individual.

In the recruitment supply chain, the employment business may withhold payment temporarily whilst it is waiting for an authorised time sheet. Alternatively it may withhold payment because it is permitted by statute to do so such as because a valid opt out has been given under the Conduct Regulations. If a client deems a temporary worker's work to be unsuitable and refuses to pay for that work, then under these proposals the employment business may find it has a liability to pay but with no guarantee of payment by the client.

HMRC compliance activity

REC will respond to a consultation on travel and subsistence (closing date 30.09.15). Our members are extremely concerned about the lack of HMRC's compliance activities where they have reported non-compliance with NMW or travel and subsistence expenses relief models. We cannot see why REC members should be liable to pay temporary workers who should have been paid by an employing umbrella company or a CIS intermediary if HMRC was alert to certain activities by those businesses but failed to close them down in time. A prime example is the collapse of the Legitas Group in 2013 supposedly owing HMRC £58 million. Such debts should never be allowed to accrue.

Question 8

Is the estimated number of posted workers in the construction sector right?

No answer.

Is there another source of evidence that we should take into account?

No answer.

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as 'subcontracting' or 'joint and several' liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

No answer.

Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

No answer.

Question 10

Is there any evidence on the duration of postings?

No answer.

Question 11

What is the average wage and skill of the posted worker (across all sectors of the economy)?

No answer.

How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

No answer.

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

No answer.

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

No answer.

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

No answer.

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

No answer.

Are they mainly part of multinational firms or are they small firms?

No answer.

Question 15

What are the main organisational characteristics of UK Construction projects using posted workers provided by employers established in the EEA?

No answer.

Question 16

How are employers and posted workers (including the ones established in the EEA) used?

No answer.

How central is this to the organisation's business strategy?

No answer.

Question 17

Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

No answer.

What information is gathered through such checks?

No answer.

Question 18

What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

No answer.

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

No answer.

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

REC member agencies supply workers into every sector of the UK economy. The REC supports members and drives professionalism in the industry through the provision of free legal services, training and a comprehensive professional qualifications framework.

TUC

Implementing the Posted Workers Enforcement Directive

Introduction

The Trades Union Congress (TUC) welcomes the opportunity to respond to the BIS consultation on the implementation of the Posted Workers Enforcement Directive. The TUC has 52 affiliated trade unions with nearly 6 million members. TUC affiliates organise and represent members in the range of sectors where workers are posted to the UK, including construction, construction engineering, agriculture and fresh food processing. The TUC is also affiliated to the European Trade Union Confederation (ETUC) and is the national trade union social partner for the UK.

The TUC is concerned by the UK government's minimalist approach to implementing the Posted Workers Enforcement Directive. The TUC is particularly concerned that the government has decided not to introduce control measures, specified under Article 9 of the Directive. We believe that the government should introduce a registration scheme for companies planning to post workers to the UK. Such a scheme would enable enforcement agencies to monitor the flow of posted workers into the UK and to target resources more effectively to ensure that swift action is taken against employers who are abusing posted workers' rights set out in Article 3(1) of the Posting of Workers Directive 1996.

The TUC agrees that the government should not create a specific category of posted workers in law. In our opinion, posted workers should be treated the same as other migrant workers and should continue to be entitled to the full range of statutory employment rights. However, the TUC believes that the government should act to ensure that posted workers are not exploited whilst in the UK. In particular, enforcement agencies should be tasked with checking whether posted workers are employed on false self-employment arrangements.

The TUC welcomes the government's recognition that it must introduce legislation to comply with Article 12 of the Directive. However, we are concerned at the minimalist approach proposed by the government. The TUC believes that the government should introduce a joint and several liability scheme which applies throughout the supply chain and across the UK labour market. The TUC believes that such arrangements are the most effective way to ensure that workers posted to the UK benefit from their rights secured by Article 3(1) of the 1996 Directive. The TUC also believes that liability should not be limited to payment of wages, but should apply to all terms and conditions of employment. We also believe that joint and several liability provisions should apply to all workers in the UK and should not be limited to posted workers.

The TUC believes that the Posted Workers Enforcement Directive introduces important measures which if implemented effectively would improve the enforcement of rights for posted workers. However the Directive fails to address trade unions' core concerns arising from the European Court of Justice (ECJ) decisions in the Laval, Ruffert and Luxembourg cases. Following these cases, the TUC believes that the Posting of Workers Directive (Directive 96/71/EC) should be substantially revised to restore the ability of trade unions to negotiate and the ability of national governments to legislate for improved terms

and conditions for posted workers. UK law should also be amended to ensure that companies posting workers to the UK are not able to gain a competitive advantage by undercutting industry level agreements. Such practices create unfair competition for UK businesses; mean that posted workers face discrimination in the UK; and that the pay and conditions of UK workers are undercut.

Question 1

Please identify your preferred option with reasons why you think it would work best.

The TUC welcomes the government's recognition that it must introduce legislation in the UK in order to comply with Article 12 of the Posted Workers Enforcement Directive. Failure to do so could mean that the UK was in breach of the Directive and would be vulnerable to infraction proceedings. However, the TUC does not agree with the limited approach proposed by the government. In our opinion, the government should introduce a full joint and several liability scheme which applies throughout the supply chain. This is the only way to ensure that posted workers will be in a position to enforce their rights which are guaranteed under Article 3(1) of the Posting of Workers Directive 1996 and wider UK employment law. Business structures are becoming increasingly complex in the UK. Long supply chains are increasingly found, particularly within those sectors where the posting of workers is more prevalent.

It is not uncommon for unscrupulous employers to disband companies at short notice in order to avoid tax and employment law liabilities. In such cases posted workers will find it very difficult if not impossible to enforce their rights. Extending the joint and several liability throughout the supply chain would improve the ability of posted workers to enforce their rights against one or more employers.

A joint and several liability scheme would also create an important incentive for principal contractors to audit their supply chains and to check the reliability of their sub-contractors. This would help to improve compliance with tax and employment law obligations and to eradicate the risk of forced labour and human trafficking throughout the supply chain. Most other countries which have implemented joint and several liability arrangements apply them throughout the supply chain.

The TUC also believes that the joint and several liability scheme should apply throughout the UK labour market and not be limited to the construction sector. The scheme should apply to compliance with all contractual and statutory employment rights and not be limited to pay-related rights.

If the government decides against the position advocated by the TUC, we then believe that the government should implement a combination of options 1, 2 and 3. Posted workers' rights should be enforced both via employment tribunals and by statutory enforcement agencies. Statutory enforcement agencies should also be able to impose financial penalties on either the direct employer or the next contractor.

The TUC agrees that posted workers should be able to take a complaint to an employment tribunal against both their employer and other contractor in the supply chain. However, the TUC is not convinced that this option by itself will provide an effective or adequate remedy. Fees for employment tribunals represent a serious barrier for posted workers seeking to

enforce their rights. Workers are required to pay a fee of up to £390 for claims relating to unfair deductions from pay, non-payment of the national minimum wage and holiday pay claims and up to £1,200 to take a claim relating to unfair dismissal or discrimination. Official statistics published quarterly by the Ministry of Justice confirm that many working people have been priced out of justice by the introduction of employment tribunal fees. Senior judges have also expressed concern about the impact of fees.

In a recent speech given in New Zealand, the Lord Chief Justice said "... the scale of court fees, together with the cost of legal assistance, is putting access to justice out of the reach of most, imperilling a core principle of Magna Carta. It is something that the judiciary, working with the executive and legislative branches of the state, needs to address." The introduction of employment tribunal fees means that posted workers will be seriously deterred if not actively prevented from enforcing their EU rights.

Posted workers are also likely to face difficulties navigating the procedural requirements of the employment tribunal system. Posted workers will not be familiar with UK legal processes, including Acas Early Conciliation and the complex rules and procedures which operate in the employment tribunals. They are also less likely to have access to legal advice and representation. Language difficulties may also form a barrier. Many posted workers do not have English as a first language. Many workers are posted to the UK for short periods of time. As a result, they may have left the UK before a claim reaches a hearing.

The TUC therefore believes that alongside the right for posted workers to take a claim to an employment tribunal, statutory enforcement agencies should be tasked with enforcing posted workers' rights against the next contractor in the supply chain. This duel system already applies to the enforcement of the national minimum wage. It is therefore logical to apply it to posted workers' rights. This approach would mean that posted workers who cannot afford fees are not longer barred from enforcing their rights. Statutory enforcement agencies are also better positioned to trace and take action against contractors who have relocated abroad or disbanded a company with a view to avoiding their employment law obligations.

Question 2

What might a contractor reasonably be expected to do to demonstrate due diligence? (note that due diligence might apply in each option)

How would they prove this?

The TUC opposed the inclusion of a due diligence defence for contractors against joint and several liability on the basis that it could undermine the effective enforcement of posted workers' rights.

The TUC believes that future regulations and guidance should make clear that contractors are expected to carry out checks and audits of subcontractors before contracts are awarded and during the course of any contract. These checks should include:

Checking whether the company is genuine. for example, confirming where the headquarters is based and what proportion of the company's turnover arises from the host country.

Checking whether the workers are genuinely posted workers, for example, seeking evidence that they will return to work for the posting company in their home country at the end of the posting.

Checking whether any employment-related court or tribunal claims have been brought against the company in the last five years in the UK or abroad, including for non-payment of the national minimum wage, unfair deductions from wages, discrimination, unfair dismissal and detriment claims relating to trade union membership and activities.

Checking whether UK and non-UK enforcement agencies have taken enforcement action against the company over the last five years.

Checking whether companies supplying labour into a GLA-regulated sector have a valid GLA licence or whether they have any additional licensing conditions (ALCs).

Carrying out audits and spot checks of the subcontractors to test compliance with employment law standards. Contractors should ask to see copies of employment contracts and pay slips and other evidence confirming compliance with UK law.

Consideration should also be given to requiring contractors to provide information similar to that provided under the Transfer of Undertakings (Protection of Employment) Regulations.

Question 3

If the posted worker is given the right to claim unpaid wages from the contractor via the creation of an individual right to bring a claim in an Employment Tribunal, what actions might contractors take – do you think they would invest in due diligence or simply settle any claims for outstanding pay up to the level of the National Minimum Wage?

It is likely that most principal contractors will include warrants and indemnity provisions in contracts with any sub-contractors. They may therefore decide to settle the claim for non-payment of wages or non-compliance with employment standards and then seek to recover compensation from the sub-contractor rather than relying on the due diligence defence. This would avoid the negative publicity associated with employment tribunal claims.

Where they decide to rely on the due diligence defence, future regulations should require contractors to provide evidence that they have undertaken the vast checks listed in the response to question 2.

Irrespective of whether due diligence has been done, do you think the contractor would contest a claim in an Employment Tribunal or simply settle any claim for outstanding pay to the level of National Minimum wage?

As noted above, the TUC anticipates that in many cases, the principal contractor will have agreed indemnity provisions with any sub-contractors and will therefore not resort to relying on the due diligence defence. Instead they will decide to settle the claim for non-payment of wages or non-compliance with employment standards and then seek to recover compensation from the sub-contractor.

Under what circumstance would the contractor choose to contest a claim?

This decision may depend on whether the worker is legally represented, has union support and whether the related case may lead to negative publicity.

Question 4

If the state enforcement of unpaid wages option were chosen, at what point would it be appropriate for HMRC to approach the contractor?

The TUC believes that all statutory enforcement agencies, including the Employment Agencies Standards Inspectorate, the Health and Safety Executive and the HMRC should be given the power to investigate and take enforcement action against the contractor in relation to any employment law obligations which currently fall within their remit. These agencies should be provided with the discretion to determine when it is appropriate to contact the contractor. As a minimum, the enforcement agencies should be mandated to contact the contractor where it is not possible to take action against and to recover wages or other compensation from the workers' direct employer.

Question 5

If state enforcement with civil penalties is your preferred option, how do you think this would influence employer behaviour?

The TUC believes that statutory enforcement agencies should have the power to impose civil penalties on the posted workers' employer or failing this on the contractor where breaches of employment law within their remit are identified. This power should be in addition to the powers to recover unpaid wages from the employer or the contractor.

Question 6

Should the implementation of Article 12 go beyond the construction sector?

Yes. The TUC also believes that the joint and several liability scheme should apply throughout the UK labour market and should not be limited to the construction sector. As the BIS consultation document and the accompanying impact assessment highlight posting is not limited to the construction sector in the UK. There is a clear policy rationale for extending the scheme to other sectors.

Question 7

Do you have any other comments on the proposals?

As noted above, the TUC is concerned by the minimalist approached proposed by the UK government when implementing the Posted Workers Enforcement Directive. The TUC believes the government should implement the following additional measures.

Firstly, the government should introduce a registration scheme for companies planning to post workers to the UK. Such a scheme would enable enforcement agencies to monitor the flow of posted workers into the UK and to target resources more effectively to ensure that swift action is taken against employers who are abusing posted workers' rights set out in Article 3(1) of the Posting of Workers Directive 1996.

As the BIS consultation document acknowledges agencies proposing to post workers to the UK to work in sectors supervised by the Gangmasters' Licensing Authority must first acquire a GLA licence. There is therefore a precedent for requiring posting companies to register with UK authorities. The licensing process is more detailed than the registration scheme proposed by the TUC. We also do not agree with the argument that given that high risk sectors are already overseen by the GLA there is no need to extend a registration scheme to the rest of the UK labour market. In the TUC's experience, the GLA has played an important role in improving employment standards and tax compliance within the sectors it regulates. However, there is some evidence that rogue operators have simply transferred their operations to unregulated sectors. Introducing a registration scheme for all companies, including agencies, which plan to post workers to other parts of the UK labour market could assist in driving up standards and legal compliance.

The TUC agrees that the government should not create a specific category of posted workers in law. In our opinion, posted workers should be treated the same as other migrant workers and should continue to be entitled to the full range of statutory employment rights. However, the TUC believes that the government should take active steps to ensure that posted workers are not exploited whilst in the UK. This should include tasking enforcement agencies with responsibility for checking that employers posting workers to the UK are not using false self-employment arrangements as a tactic for avoiding employment law and tax obligations. To this end, the government should require companies to retain copies of employment contracts in the UK during and for a short period after any posting. This would assist unions and enforcement agencies when seeking to enforce posted workers' basic rights.

The TUC believes that more needs to be done to ensure that posted workers, and indeed all migrant workers, are aware of their rights when working in the UK. The TUC is concerned that the section of the GOV.UK website dealing with posted workers only lists a limited number of statutory employment rights. This is not consistent with current government policy which states that posted workers are to be treated the same as all migrant workers and should therefore be entitled to the full range of statutory rights. The list should therefore be extended.

It would also be helpful if existing employment rights advice on the GOV.UK website and the Acas website were translated into other EU languages. It would be helpful if government websites could also signpost posted and migrant workers to other trusted

sources of advice, including for example, the TUC website on 'Working in the UK - a guide to your rights' which can be found at: https://www.tuc.org.uk/workingintheUK. This website is designed to be accessible for migrant workers and includes advice in a range of languages.

Question 8

Is the estimated number of posted workers in the construction sector right?

Is there another source of evidence that we should take into account?

The TUC expects the impact assessment under-estimates the numbers of posted workers in the UK construction sector.

In the absence of a registration scheme for posted workers, it is not possible for the TUC to identify how many posted workers are working in the UK construction sector at any one time.

Question 9

The Directive introduces a new requirement to enable posted workers in the construction sector to claim unpaid wages up to the national minimum wage from the contractor one up the supply chain from their direct employer (known as 'subcontracting' or 'joint and several' liability). The IA estimates that 0.9% of posted workers in the construction sector are getting paid below the National Minimum Wage. This is based on the proportion of UK workers who get paid below the NMW (across all sectors).

Is the use of 0.9% appropriate, or is the proportion of workers getting compensation below the national minimum wage higher in the construction sector?

Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers?

In the absence of a registration scheme for posted workers, it is not possible for the TUC to identify how many posted workers in the UK may not be paid the national minimum wage.

The TUC notes however that the 0.9 per cent estimate is based on data from the ONS Annual Survey of Hours and Earnings (ASHE). It is generally recognised that ASHE does not take into account pay rates within the informal economy. The TUC therefore believes that the impact assessment may under-estimate the proportion of posted workers not being paid the national minimum wage.

Question 10

Is there any evidence on the duration of postings?

In the absence of a registration scheme for posted workers, it is not possible for the TUC to provide information relating to the duration of postings. We are concerned, however, that some companies seek to abuse regulations relating to posted workers in order to

avoid wider tax and employment law obligations. It is not uncommon for so called posted workers to move from one short-term job to another within the UK. The so-called posting company has no intention of offering the workers future employment in their home company. The TUC believes that this is an abuse of posting arrangements. Such individuals should be treated as migrant workers with full free movement rights.

Question 11

What is the average wage and skill of the posted worker (across all sectors of the economy)?

How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?

In the absence of a registration scheme for posted workers, it is not possible for the TUC to provide information on the wages and skills of posted workers.

The TUC is concerned, however, that some employers decide to employ migrant workers and posted workers on lower rates of pay and conditions as a means of reducing their wages bill. The TUC supports the principle of free movement for working people. However, we believe that all workers should receive the same rate of pay and conditions regardless of their nationality.

Question 12

In your experience, how likely is it for the subcontractor to not pay wages to the posted worker?

During the course of their employment, has there been an instance when the posted worker has not been paid wages by the subcontractor? If so, what is the extent of arrears and over what time period do they accrue?

The TUC is concerned that the mistreatment of posted workers, including the non-payment of wages may be widespread in the UK. During the call for evidence on the Posted Workers Enforcement Directive the TUC provided BIS with examples of mistreatment. Unions have also supplied BIS with detailed examples of abuse and under-cutting during this consultation exercise.

How would removing direct employers' sole liability for the payment of the national minimum wage affect their behaviour and in what way?

How would removing direct employers' sole liability for the payment of the national minimum wage affect the contractor's behaviour and in what way?

The TUC believes that the introduction of joint and several liability provisions would create an important incentive for principal contractors to audit their supply chains and to check the reliability of their sub-contractors. This would help to improve compliance with tax and employment law obligations amongst sub-contractors and would assist in eradicating the risk of forced labour and human trafficking throughout the supply chain. It would also help to remove rogue operators from the supply chain.

Question 13

The impact assessment provides some information on the sectoral distribution of posted workers. Do you have any information on the distribution of posted workers across sectors? If so, can you please provide the details?

In the absence of a registration scheme for posted workers, it is not possible for the TUC to identify how many posted workers are in the UK at any one time and in which sectors they are operating.

However, unions report that workers are regularly posted to work in the construction sector. They are also found in sectors, such as agriculture and fresh food processing, where they are used to cover seasonal work.

Question 14

What type of business tends to post workers into the UK and where are these businesses located?

The TUC has no additional comments or information.

Are they mainly part of multinational firms or are they small firms?

The TUC has no additional comments or information.

Question 15

What are the main organisational characteristics of UK Construction projects using posted workers provided by employers established in the EEA?

The TUC has no additional comments or information.

Question 16

How are employers and posted workers (including the ones established in the EEA) used?

The TUC has no additional comments or information.

How central is this to the organisation's business strategy?

The TUC has no additional comments or information.

Question 17

Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?

The TUC has no additional comments or information.

What information is gathered through such checks?

The TUC has no additional comments or information.

Question 18

What would the costs to contractors be for helping HMRC with investigations (as a proxy you could provide the time it took, if relevant, to aid HMRC on National Minimum wage investigations depending on the length of the case)?

The TUC has no additional comments or information.

How likely is it that the contractor will appeal against a decision taken by HMRC (state enforcement route) or by the prosecuting authority (sanction route)?

The TUC has no additional comments or information.

Question 19

Are there any costs or benefits that the Impact Assessment has not taken into account?

The TUC has no additional comments or information.

Additional responses

Electrical Contractors Association (ECA)

The Electrical Contractors' Association (ECA) is pleased to be able to respond to the Department for Business, Innovation and Skills' consultation on the Posted Workers Enforcement Directive. ECA only seeks to comment on two particular issues in the consultation document, so have responded in letter form, rather than itemising responses to the full consultation.

ECA supports the Government's preferred position, option 1, which gives a posted worker the right to seek redress from the contractor immediately above his or her employer in the supply chain. Given that the relationship between two contractors in the supply chain is, essentially, a relationship between a client and customer, we believe this proposal represents the best balance between regulation and enforcement. It creates an incentive for the direct employer to act in an appropriate way, so as to avoid any reputational or commercial loss that would arise from their client being sanctioned for their own misconduct. It also avoids the need for prescriptive or burdensome legislative change. The threat of sanction higher up the supply chain will, we believe, be sufficient to drive the behavioural change that the directive seeks to effect.

Secondly, where industries already have negotiated pay settlements, we would encourage the Government to reflect these through guidance. While the National Minimum Wage must, of course, always be enforced, we note that industries, such as the electrical contracting industry, have negotiated pay rates above the NMW between employers and trade unions. While these are not mandatory, they reflect the appropriate level of remuneration according to a worker's qualifications and skills.

We believe that any accompanying guidance should note that these settlements be respected, so the universality of collective pay agreements is upheld. This provides an agreed level of pay that industries and trade unions agree is fair, ensuring that workers entering the labour market from other parts of the EU are not exploited, while workers from the domestic workforce remain competitive. Recognising the difficulty in being overly prescriptive in legislation, we believe the Government should make clear through guidance that it recommends posted workers receive pay and rights aligned to such agreements, where they are already in operation.

The ECA would be pleased to provide further details on any of these points if necessary. For further information, please contact ECA.

Northern Ireland Committee of the Irish Congress of Trade Unions

Response from the Irish Congress of Trade Unions to the Department for Business, Innovation & Skills (BIS), Consultation on Implementing the Posted Workers Enforcement Directive

September 2015

Irish Congress of Trade Unions (ICTU or Congress) is the single umbrella organisation for trade unions on the island of Ireland. The organisation is required, through its mission statement, to strive to achieve economic development, social cohesion and justice by upholding the values of solidarity, fairness and equality.

The Northern Ireland Committee (NIC) of the ICTU is the representative body for 34 trade unions with over 215,000 members across Northern Ireland. In membership terms, it is the largest civil society organisation in Northern Ireland. Information on the NIC is available on www.ictuni.org

Congress believes that the original objective of the Posted Workers Directive is more important than ever. Providing a climate of fair competition and guaranteeing equality and respect for the rights of workers is essential. Especially as workers are faced with an economic era in which transnational provision of services is increasingly common and where the economic crisis is intensifying a downward pressure on wages and conditions of employment from organisations seeking competitive advantage on 'price'. The Posting Directive should play a key-role in protecting the workers and labour markets concerned, by ensuring that employers respect the framework of labour law and industrial relations of 'host' Member States.

However, Congress is concerned that the final document of the Enforcement Directive of the Posting of Workers Directive, which was rushed through the EU 'trialogue' process in advance European elections, is a missed opportunity to tackle the underlying structural issues and effectively protect posted workers from abusive practices.

Nevertheless, Congress believes that there is greater scope within the provisions of the Posted Workers Enforcement Directive (PWED) for the UK Government to go further than the proposals contained in the BIS consultation document to protect posted workers, avoid social dumping and prevent the growth of racism and xenophobia.

Congress notes that the BIS consultation states that, 'Whilst we are seeking views on the proposals across Great Britain, the proposals do not represent the settled views of the Northern Ireland Executive or Assembly who will seek views separately.' In responding to this BIS consultation Congress wish to express our support for the position of the British Trades Union Congress (TUC) as contained in their submission. However, Congress wish to fully engage on the implementation of PWED with the relevant authorities in Northern Ireland as employment and health and safety legislation are devolved matters. As Northern Ireland shares a land border with another EU member state we are in a unique position within the UK which may require a different approach to those adopted for other parts of the UK.

However, Congress will make the following comments:

Subcontracting liability

Congress believes that the protection of workers' rights is a matter of particular concern in subcontracting chains, which are becoming widespread in numerous sectors not just the construction sector. There is evidence that, in a number of cases, posted workers are exploited and left without payment of wages or part of the wages they are entitled to under the Directive 96/71/EC.

According to the BIS proposal, a contractor might be held partially or fully liable for its subcontractor, but only if there is a direct contractual arrangement between the two and only in the construction sector. In addition, contractor is only liable for non-payment of the National Minimum Wage (presumably this embraces the proposed new Living Wage) unduly withheld from the posted worker. Contractors can be exempted if they had taken all measures of due diligence. Congress notes that on 25 February 2014, the French parliament endorsed a more restrictive national draft law, which institutes joint and several responsibility in all sectors of economic activity on the French soil.

Congress rejects the minimalist approach in this consultation and calls on the UK Government to introduce a joint and several liability mechanism as this is indispensable to protect workers from abuses. Congress believes that joint and several liability must apply to any sector of activity, not just construction. Congress is of the view that a mandatory chain liability should be introduced, which stipulates that the main contractor(s) is liable for the compliance, by all subcontractors, with the applicable terms and conditions of employment.

Congress is concerned that the inclusion of the concept of "due diligence" could mean that in order to escape liability, it might be sufficient for the contractor to check the identity of the subcontractor and their history. In this regard, the chain liability has two advantages; first, because there is a chain liability, the posted construction worker is always able to receive the wage he is entitled to as all contractors in the subcontracting chain may be held liable, and second, because a chain liability also provides for a certain deterrent effect, all subcontractors will examine carefully with which companies they will do business with.

Genuine Posting

It is the view of Congress that there has been growing evidence of companies developing bogus arrangements to restrict the rights of posted workers, as a means of reducing costs. These include the use of bogus self-employment arrangements, bogus temporary agency work arrangements and of 'letter box companies' in lower wage economies. The Enforcement Directive seeks to define a genuine posting more precisely. However, the criteria listed in the Directive focus only on the contractual terms which could be fictitious. In the opinion of Congress, the UK Government should introduce measures to establish the reality of the employment relationship rather than only focusing on contractual terms which could be fictitious or a 'sham'. Congress also believes that it is essential to add provisions preventing successive assignments to the same post and so-called letter-box companies.

Monitoring and compliance

Congress notes with great concern the statement in the consultation document that the, 'Government does not propose to introduce further monitoring and compliance requirements as it does not believe that there is a need to do so in order to ensure that the Enforcement Directive is being complied with.' Whilst Congress had serious issues with the limited control measures within the PWED and the position that any additional measures member states decide to introduce should be subject to a proportionality test supervised by the Commission, at least the Directive recognised the need to have control measure to protect posted workers and prevent exploitation.

Congress believes that the proposals in the PWED arguably re-affirm the Posted Workers Directive (PWD) as a mechanism for maintaining posted workers at the bottom of the labour market in receiving states. Indeed, the application of posted workers status introduces a basement-level standard into the labour markets of member states. At least the new regulatory approach contained in the PWED is organised around an expectation that this basement-level of labour standards can be 'policed' by member states in the absence of trade union representation or effective collective bargaining. Congress calls on the UK Government to introduce a competent authority to ensure that service providers are genuinely eligible to post workers from a sending state and that postings to receiving states are genuinely temporary in nature and to prevent abuse and circumvention of the PWD.

Unite the Union

Unite response to BIS consultation: Implementing the Posted Workers Enforcement Directive

This note is submitted by Unite the Union. Unite is the UK's largest trade union with over 1.4 million members across all sectors of the economy including construction, manufacturing, financial services, transport, food and agriculture, energy and utilities, information technology, health, local government and the not for profit sectors.

Unite is aware of the extended deadline given to the TUC to respond to this consultation and is writing to indicate support for the TUC submission particularly in respect of the following key points:

Example bullet points:

- Concern at the UK government's minimalist approach to implementing the Posted Workers Enforcement Directive and that the government has decided not to introduce control measures, specified under Article 9 of the Directive. The government should introduce a registration scheme for companies planning to post workers to the UK.

- The government should not create a specific category of posted workers in law. Posted workers should be treated the same as other migrant workers and should continue to be entitled to the full range of statutory employment rights.

- However, the government should act to ensure that posted workers are not exploited whilst in the UK. In particular, enforcement agencies should be tasked with checking whether posted workers are employed on false self-employment arrangements.

- The government should introduce a joint and several liability scheme which applies throughout the supply chain and across the UK labour market. Liability should not be limited to payment of wages, but should apply to all terms and conditions of employment

- Joint and several liability provisions should apply to all workers in the UK and should not be limited to posted workers.

- The Posted Workers Enforcement Directive introduces important measures which if implemented effectively would improve the enforcement of rights for posted workers.

- However the Directive fails to address trade unions' core concerns arising from the European Court of Justice (ECJ) decisions in the Laval, Ruffert and Luxembourg cases.

- The Posting of Workers Directive (Directive 96/71/EC) should be substantially revised to restore the ability of trade unions to negotiate and the ability of national governments to legislate for improved terms and conditions for posted workers.

- UK law should also be amended to ensure that companies posting workers to the UK are not able to gain a competitive advantage by undercutting industry level agreements.

This publication available from www.gov.uk/bis

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