



Department  
for Business  
Innovation & Skills

**THE POSTED WORKERS  
ENFORCEMENT DIRECTIVE**

Government Response to the  
consultation on Implementing  
the Posted Workers  
Enforcement Directive

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# Foreword

Earlier this year I published a consultation seeking views on how we should implement the Posted Workers Enforcement Directive ('the Enforcement Directive'). The Enforcement Directive establishes a framework for a better and more uniform application and enforcement of the rights that posted workers are entitled to under the original Posted Workers Directive (96/71/EC).

In particular, the Enforcement Directive introduces the concept of subcontracting liability – so that where a posted worker in the construction sector is not paid the minimum rates of pay by their direct employer (the subcontractor) the contractor one up the supply chain, can be held responsible either in addition to or in place of the employer. Member States are able to introduce a legal defence of due diligence for contractors.

There has been a limited response to our consultation, but we received replies from a range of organisations including business representative bodies, the legal community and trade unions. I am most grateful to those who did reply.

The consultation revealed that the business representative bodies who responded largely wanted to see limits placed on posted workers' rights so did not favour an expansive interpretation of the Enforcement Directive. However, the trade unions welcomed the Enforcement Directive and wished to see subcontracting liability applied beyond the construction sector. The legal community bodies made a number of suggestions, in particular regarding how posted workers' rights might be protected to best effect.

The Government has listened carefully to those who have responded and we will now implement the Enforcement Directive as set out in this Government response to the consultation. We will do so by 18 June 2016, the date by which it is necessary to comply.

The UK will meet its obligations under the Enforcement Directive by taking a light touch approach that does not go beyond the EU requirements and balances the rights of both workers and the burdens on the businesses that employ them.

By issuing guidance in due course the UK will ensure that employers and employees are aware of the minimum rights for workers and how they can be enforced. Going forward, we will enforce the Enforcement Directive, making sure that UK competent authorities cooperate and collaborate on cross-border issues.

**Nick Boles MP**  
**Minister of State for Skills**

# 1. Introduction

## Background

1. The 1996 Posted Workers Directive (96/71/EC) ('the Framework Directive') defines a worker as 'posted' when, for a limited period of time, the worker carries out their work in the territory of a Member State other than the State in which they normally work. Posted Workers are not the same as migrant workers who, of their own accord, move between Member States to seek work and are employed there.
2. In March 2012 the European Commission brought forward proposals for an Enforcement Directive following concerns raised by some Member States that the protections outlined in the Framework Directive were not being fully complied with. The Framework Directive provides a framework so that both businesses and workers can take full advantage of the opportunities offered by the single market. The Framework Directive supports the freedom to provide services across the EU and ensures fair competition for businesses whilst ensuring respect for the rights of the workers.
3. It entitles posted workers to statutory employment rights in the country they are posted to. These are:
  - maximum work periods and minimum rest periods;
  - minimum paid annual holidays;
  - minimum rates of pay, including overtime rates;
  - the conditions for hiring out workers, in particular the supply of workers by temporary employment firms;
  - health and safety and hygiene at work;
  - protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth;
  - children and young people; and
  - equality of treatment between men and women and other non-discrimination provisions.
4. As a result of the concerns that the Framework Directive was not being fully complied with, the Commission proposed additional legislation to allow for improved monitoring of posting situations and to improve compliance with existing rules on posted workers. The Posted Workers Enforcement Directive (2014/67/EU) ('the Enforcement Directive') was adopted in May 2014. The Enforcement Directive builds on mutual co-operation, information and enforcement requirements in the Framework Directive and also introduces a requirement for subcontracting liability in the construction sector.
5. The Enforcement Directive's purpose is to ensure that posted workers get the rights to which they are entitled, most notably the right to be paid and that Member States operate an effective monitoring and compliance system, providing mutual cooperation such that information is exchanged and inspections are carried out. Payment is assured through the introduction of subcontracting liability which enables posted workers to claim back unpaid wages up to the level of the minimum

rates of pay from the contractor. The requirement for subcontracting liability in the Enforcement Directive is limited to posted workers in the construction sector and to the contractor immediately above the direct employer in the supply chain.

6. There is currently no UK right of action against a contractor where a worker is unpaid – the worker can only claim payment from the direct employer and HMRC can only take action against the direct employer with regard to arrears of national minimum wage (NMW). Subcontracting liability does not sit easily within the UK system.
7. Posted workers already have the same routes of redress to enforce their employment rights as domestic UK workers. The majority of employment rights are self-enforced by the worker taking a claim to an Employment Tribunal and posted workers are entitled to bring claims this way (subject to following early conciliation requirements). However, there are also a number of Competent Authorities in the UK that are responsible for enforcing certain specific employment rights on behalf of individuals, including posted workers. These bodies include HMRC, for example on the NMW, the Employment Agency Standards Inspectorate for agency workers and the Health and Safety Executive for health and safety matters.
8. The majority of measures in the Enforcement Directive apply to Member States and their Competent Authorities – i.e. those bodies responsible for monitoring and enforcing the rules, such as the Health and Safety Executive. The key area where burdens may fall on UK business is via subcontracting liability (Article 12). Member States do not necessarily have to introduce specific measures or legislate in the areas set out in the Enforcement Directive if their existing systems are adequate to ensure compliance with the Framework Directive and the Enforcement Directive. The European Commission has been clear that any new measures introduced by Member States to implement the Enforcement Directive should be justified and proportionate.
9. The Enforcement Directive has to be implemented by 18 June 2016. The Government intends to implement it as effectively as possible, such that the UK does not go further than the EU requirements, and that the burden on business is limited while adequate protection for workers is ensured. Accordingly, the Government has consulted on how the Enforcement Directive should be implemented. The consultation ran from 23 July 2015 to 24 September 2015.
10. Set out below is a summary of the consultation responses and the Government's response.

## 2. Summary of Responses

### Responses submitted

11. A total of nine responses were submitted in answer to the questions put forward in the consultation. A list of the respondents is set out at Annex 1.
12. Where respondents made comments that aligned to specific questions, we have aimed to include these in the quantitative analysis of responses. Otherwise, the responses have been reflected as far as possible in the qualitative analysis of responses.
13. 4 responses were received from business representative groups, 3 responses came from trade unions and 2 responses came from the legal community. During the consultation we offered to meet with any interested stakeholders and as a result this analysis takes account of the views of one further business representative body which did not subsequently provide a formal response.

### Consultation Questions

14. Note: Questions 1 to 6 focused on Article 12 of the Directive and subcontracting liability and, in particular, on the three stand-alone ways to introduce subcontracting liability in Great Britain identified and discussed on pages 18 to 23 of the consultation document. The options were:
  - (i). The creation of an individual right to bring a claim in an Employment Tribunal against the contractor;
  - (ii). State enforcement (by HMRC); and
  - (iii). The creation of a sanction (a financial civil penalty)

#### Question 1

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

15. All 9 respondents answered this question (one of whom reached no conclusion other than to note that contractors should not be penalised for employers' misconduct).
16. The three business representative bodies who gave a full answer to the question fully agreed with the Government's preferred option - option (i). One of the legal community respondents indicated that it was content with option (i) but underlined that without some form of state-managed sanction or enforcement, the policing of rights would depend on the decision of the posted worker to try and enforce their rights. Similarly, the other legal community body that responded opted for a combination of options (i) and (ii) (state enforcement of unpaid wages by HMRC) pointing out the procedural difficulties confronting a posted worker in bringing a claim.

17. The trade union bodies which responded rejected the Government's approach and wished to see joint and several liability introduced for all contractual and statutory employment rights, not merely unpaid wages, and across the UK labour market not just the construction sector. If the Government rejected this, one of the bodies advised adopting a mixture of all the options (i), (ii) and (iii) (option (iii) being state enforcement with civil penalties, where following an HMRC investigation and the failure of the contractor to show it had carried out due diligence, the contractor is fined for abuse). Its rationale for this was that posted workers' rights should be enforceable via Employment Tribunals and statutory enforcement agencies.

### Government response to question 1

18. There is strong support for the Government's preferred option (option (i)) from the business representative bodies who have responded. While commenting that there was no visible issue with unsatisfactory payments to posted workers that it was aware of, the additional business representative body we met during the consultation also preferred option (i). The unions are generally opposed, while one of the legal community bodies preferred a combination of options (i) and (ii). No compelling reasons have been offered for not pursuing option (i). We do not believe there are any overwhelming procedural difficulties. It is worth underlining that under option (i) the posted worker will still be able to make a complaint to HMRC to enforce any complaint for unpaid arrears of NMW against the direct employer.
19. In the light of its assessment of the options and the responses received the Government will pursue option (i) and create an individual right for a posted worker in the construction sector to bring a claim against a contractor in an Employment Tribunal. This is the least burdensome approach from a business perspective and fits with the existing model for enforcing employment rights. It is also in accordance with the Government's stated approach not to gold plate EU legislation. Importantly, the posted worker's rights are protected, and this approach means that the direct employer (the business posting the worker) remains liable for any breaches of employment rights of the posted worker (at least until the point at which the posted worker brings a claim against the contractor). This is in keeping with the Government's view that it is a fundamental to employment law that the direct employer should, as far as possible, be held responsible for any breach of their employee's rights.
20. In pursuing this option the Government has considered whether the claim against the contractor should be in addition to or in place of the employer. The Government has identified three options in this regard:
- (a) the posted worker can sue either one or both of the employer and the contractor for the unpaid wages;
  - (b) there is a choice for the posted worker on who they can sue, either the employer or the contractor (but not both); or
  - (c) the contractor can only be sued after the posted worker has exhausted all avenues against the employer.



21. The Government has decided in favour of option (b). To accommodate the concerns of both the posted worker and the contractor the posted worker will be able to choose whether to pursue the contractor or the employer for unpaid wages up to the level of the NMW in an Employment Tribunal. The posted worker will still be able to make a complaint against their employer for NMW arrears to HMRC, a route which may well be preferable and more cost effective.
22. The Government notes that the contractor would be able to guard against financial liabilities by taking out warranties and indemnities against the possibility of being sued. Further, the contractor's liability will be limited to minimum rates of pay (i.e. NMW) rather than all contractual pay. In recognition of the fact that this will impose a new burden on the contractors, the Government will allow for a due diligence defence, such that a contractor that establishes that they have done sufficient/appropriate due diligence will have no liability for claims of unpaid wages of NMW.

## Question 2

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

23. 8 respondents replied to this question, 3 were business representative bodies, 3 were trade unions and 2 were legal community bodies. One business body warned that onerous requirements risked distorting the market in favour of large suppliers and against SMEs, as the higher the burden of due diligence the greater the likelihood that firms would rationalise their supply chains to the detriment of smaller suppliers. Similarly, another business body underlined the difficulty of specifying a single framework that could apply to all businesses in all situations and noted that if the bar was set too high companies in some Member States might be unable to comply. The same body expected businesses to do some verification checks where there was an arm's length transaction. The more complex and the greater the value of the transaction the more checking they would expect. Another business organisation provided a copy of its intermediary checklist.
24. The two legal community bodies also anticipated that some due diligence would be done. One body believed that it would be simplest for the contractor to raise specific questions on a sub-contractor's employment record. The other body assumed that a prudent contractor would have a range of warranties from the employer. They also thought that contractors should undertake some minimum identity checks, possibly modelled on the existing anti-money laundering legislation.
25. The trade unions were generally against due diligence in this context. One of the trade union respondents rejected the practice of due diligence because in their view it could undermine posted workers' rights. Nevertheless, they also argued that future regulations should ensure that contractors completed checks and audited their sub-contractors. Another trade union body was concerned that in order to escape liability, it might be sufficient for the contractor to check the identity of the subcontractor and their history.

## Government response to question 2a

26. The 3 business representative bodies who responded expected that some due diligence at least would occur. They generally did not want the bar set high and warned about the anti-competitive effects of doing so. Likewise, the additional business representative body we met during the consultation thought that companies tended to have to carry out due diligence anyway, so another layer was unlikely to be material. The Government fully appreciates the degree of risk involved in specifying what due diligence might be required; if the bar is set too high there could be a disproportionate impact, while if it is set too low perverse incentives could be created along with a risk to posted workers' rights.
27. A defence of due diligence will be open to a contractor. However, in view of the likelihood that many businesses will seek warranties and indemnities to call on if the need arises and as specifying what due diligence means could be an unhelpful precedent, given that the respondents point out that it will mean different things in different circumstances, the Government will not provide a definition of due diligence in legislation but will develop guidance on what due diligence might be appropriate.

## Question 2b

### How would they prove this [due diligence]?

28. 4 respondents answered this question, 2 were legal community bodies, one was a business representative body and the other was a trade union body.
29. One of the legal community respondents who responded suggested that warranties from the sub-contractor and any associated indemnities would form part of the contract between contractor and sub-contractor. Another such respondent commented that in practice it would be difficult for contractors to procure employer compliance or to check that an employer had complied with NMW laws etc. A business representative body indicated that a range of questions along the lines of those it suggested to its members for use in checking intermediaries could be used including: incorporation details; whether the intermediary was part of a group; financial matters - including bank account details and confirmation of monies held relating to temporary workers' pay, insurance and contracts.
30. A trade union body offered a range of checks that could be made including: checking companies were genuine; checking workers were genuinely posted workers; checking whether court or tribunal claims had been brought against the company in the last five years in the UK or abroad; audits and spot checks of subcontractors.
31. The same trade union body also suggested that consideration be given to requiring information similar to that provided under the Transfer of Undertakings Protection of Employment Regulations (TUPE). While also suggesting a range of checks by way of warranties that companies make in sub-contracting situations, one of the legal community respondents rejected the idea of mirroring the regime applied under TUPE as they believed it would be more flexible to use warranties and indemnities.

## Government response to question 2b

32. Various helpful suggestions have been made for how due diligence might be conducted and the Government will draw on these in framing guidance.

## Question 3a

**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?**

33. 5 respondents answered this question; these were respectively, 2 legal community bodies, 2 business representative bodies and 1 trade union body. The business representative body we met during the course of the consultation also had a view which is reflected in paragraph 35 below.
34. One legal community respondent believed that contractors would insist on warranties/indemnities from sub-contractors, settle claims without admission of liability if no defence could be made out and seek to defend claims where defence was possible. The other legal body who responded suggested that it should not be assumed that contractors would simply settle claims on the ground that the amount of any claim was likely to be small. The decision was likely to depend on a number of factors, such as: the number of workers making claims; the resources open to the contractor in making a defence; whether it considered it had a defence; and the availability and terms of any indemnity protection.
35. A business representative body argued that it was unlikely that the introduction of a new right would affect commercial practice. Ultimately, in their view, the decision would depend on the extent of the potential new liability. It noted that smaller businesses would generally have less resource for due diligence. Potentially, they argued, the change would result in increased use of indemnity clauses. Another business representative body did not expect employment businesses to automatically pay out on a claim. The business representative body we met during the consultation thought that contractors might pay just to avoid the potential reputational damage of having their name appear in litigation, which they anticipated would develop.
36. One of the trade union respondents said that principal contractors would include warranty and indemnity clauses in their contracts. In their view they might also decide to settle any claims and then seek compensation from sub-contractors.

## Government response to question 3a

37. The Government concludes that business is likely to assess each case on its merits, applying a range of criteria in deciding which ones to defend, e.g. the number of workers involved etc. It appears to the Government that some firms will take out warranties and indemnities in case they are sued. On balance, it seems reasonable to conclude that the likelihood is that in many instances posted workers will get their money. The Government sees no reason to depart from option (i) and allow the defence of due diligence for contractors.

### Question 3b

**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?**

- 38.2 respondents replied to this question, one was a business representative body the other was a trade union body. The business representative body noted that Employment Tribunal claims were low and thought that most employers would therefore see the risk of a successful claim as limited. In their view settlement behaviour would depend on a range of factors including the possibility of further successful claims, reputational impact and the legal and management costs in defending litigation. They felt the single most important factor would be the cost of settlement.
39. The trade union representative considered that in many cases there would be warranty and indemnity clauses in contracts between contractors and sub-contractors and that rather than relying on a due diligence defence contractors would settle claims and then seek compensation.

### Government response to question 3b

40. The Government concludes that firms are likely to assess each case on its merits and where possible will be likely to seek warranties and indemnities. Accordingly, the Government sees no reason to depart from option (i) and allow the defence of due diligence for contractors.

### Question 3c

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

- 41.4 respondents answered this question, 1 was a business representative body, 2 were legal community bodies and the other one was a trade union representative. One of the legal bodies considered that if due diligence could be sustained a contractor might choose to contest a claim. The other legal body argued that it should not be assumed that contractors would settle claims on the ground that the amount of any claim was likely to be small. Settlement would depend on a number of factors.
42. The business representative who responded noted that Employment Tribunal fees might deter individuals from making claims, in which case businesses would not be faced with the decision as to whether or not to defend cases. The trade union representative argued that the decision might depend on whether the worker was legally represented, had union support and whether the related case might lead to negative publicity.

### Government response to question 3c

43. The Government concludes that some cases may be defended while others will not.

## 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?

44. 6 respondents answered this question, 3 business representative bodies, 2 legal community representatives and one trade union body.
45. The first business representative body did not believe that HMRC could better enforce any provisions than an individual and doubted it had the necessary skills where businesses were not UK based. The second business representative body respondent replying to this question considered that it was not businesses' preferred option. The third business representative body believed that once the worker had exhausted the sub-contractor's complaints process HMRC should proceed if the individual was not Construction Industry Scheme registered.
46. One of the legal bodies who replied would have HMRC enforce any claim after a "reasonable period (say, 3 months)" after contact with the employer had not remedied matters. The other legal body who responded said that HMRC's responsibilities should be aligned with existing NMW ones and they advised broad discretion should be given to HMRC as to when to approach contractors and employers. The trade union body believed that all statutory agencies should be given the power to investigate and enforce actions against contractors in relevant cases and the discretion to decide when it was appropriate to decide to approach the contractor.

### Government response to question 4

47. Clearly this is a mixed response. Doubt has been expressed about HMRC's ability to pursue claims, while some respondents wanted them to be given more discretion to act. The trade union body desired to see all relevant statutory authorities empowered to act. The Government remains concerned about the potential for this option to create a false incentive for the direct employer to withhold payment so that the contractor becomes liable. The complexity in answering this question is one of the reasons why the Government rejected this option.

## Question 5

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

48. 6 respondents answered this question, 3 were business representative bodies, 2 were legal community bodies and the last was a trade union body.
49. The first business representative body believed that this was not businesses' preferred option. The second and third business body representatives noted that the penalty would go to the state and not the workers, which was of concern to one of the business respondents in particular. One of the business respondents underlined the difficulties of structuring the imposition of civil penalties.

50. One of the legal community bodies who responded considered that if there was a proper enforcement regime there would be a greater incentive for compliance. The other legal community body noted that state enforcement with civil penalties was not the best option but that sanctions that applied to directors could be motivating. The trade union body considered that statutory enforcement agencies should have the power to impose civil penalties on the posted workers' employer or failing this, the contractor. This, in their view, should be in addition to powers to recover unpaid wages from either party.

### Government response to questions 5

51. There has been little attempt to address this question. Doubts have been expressed about how the penalty system would work. For its part the trade union body would prefer to have state enforcement agencies issuing penalties. Among the reasons why the Government rejected this option were: (a) that it would not result in the worker being paid the money owed to them; and (b) HMRC can already penalise the direct employer and this will not change. Therefore we believe that option (i) will be a more effective option.

### Question 6

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

52. 8 respondents answered this question, being 3 business representative bodies, 2 legal community bodies and 3 trade union representative bodies.

53. 5 Respondents were against implementing Article 12 beyond the construction sector; these were the three business representative bodies and the two legal community organisations, one of whom commented "not unless there is evidence of a comparable level abuse in other sectors". One of the business bodies noted that "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 construction." Another business respondent commented that it was not aware of factual evidence of abuse. All three trade union bodies wished to see Article 12 applied beyond the construction sector and one wanted a joint and several liability scheme throughout the entire UK labour market. The rationale for this being that postings were not limited to the construction sector.

### Government response to question 6

54. This, albeit limited, evidence suggests that business is against extending subcontracting liability beyond the construction sector and that the unions take the opposite view. No compelling reasons or evidence have been offered to alter the Government's earlier inclination to confine subcontracting liability to the construction sector. The Government considers the current enforcement regime appropriate and effective and therefore does not see a need to gold plate matters and introduce subcontracting liability more generally. In order to limit the burdens on business, the Government will not go beyond the construction sector in implementing Article 12.

## Question 7

### Do you have any other comments on the proposals?

#### Court Procedures:

55. One of the legal community bodies argued that 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 consented). They also suggested that publication of a register of offending employers open to inspection by potential contractors might assist in establishing the due diligence defence.

#### Government response

56. The suggestion of allowing claims to be decided on paper may help facilitate cases and in drafting regulations officials will consider it with MOJ/HMCTS. However, we do not think it would be proportionate to create a register as this runs counter to the Government's earlier decision to adopt a proportionate approach to implementation and it seems bureaucratic. The Government will not therefore act on it in implementing the Enforcement Directive.

#### Guidance Issues:

#### Difficulties in accessing information

57. One of the business representative bodies noted that recitals 18, 19 and 20 pointed to the difficulties in accessing information, particularly collective agreements. In the respondent's view this was a particular problem in the EU but in the UK there were still collective agreements which the Government would need to ensure were 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 compliance.

#### Government response

58. The Government considers that compiling a single set of all the EU's collective agreements would be a very considerable undertaking and do not believe it is practical in view of resource constraints. However, the Government will ask the European Commission to undertake this task or to at least list the various agreements in play as part of its proposed review of the Framework Directive on posted workers.

#### Reflecting negotiated pay settlements

59. One of the business representative bodies encouraged the Government to reflect negotiated pay settlements in guidance and to note that these be respected. This body pointed out that industries such as the electrical trade had negotiated pay rates above the NMW reflecting the appropriate levels of qualification and skills.

### Government response

60. The Government will aim to discuss with stakeholders how negotiated pay settlements in the construction sector might be reflected in the guidance it prepares.

### Better definition of “posted workers”

61. One of the legal community bodies who responded argued that 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. The difficulty for Government in dealing with this in isolation was recognised, as the term is contained in a European Directive, but the respondent considered that more formal guidance might help.

### Government response

62. The Government will have to define posted worker in the regulations to create the subcontracting liability, so this suggestion will be reflected in the outcome to the consultation.

### Information provisions

63. One of the legal community respondents and one trade union body suggested that it would be helpful to provide a translation of information relating to employment rights on the gov.uk and the Acas websites. The trade union body also suggested that more needed to be done to ensure posted and migrant workers were aware of their rights and that the Government website should signpost posted and migrant workers to other trusted sources of advice.

### Government response

64. The Government agrees that the guidance on posted workers could be improved. We are currently reviewing how this might be done. This will be considered when the online guidance is drafted. The Government notes that within the UK, some information for posted workers is already provided in a range of languages, for example, the Health and Safety Executive in Great Britain translates advice for workers on its website<sup>1</sup> and the Acas helpline also provides a translation service. The Government does not therefore think it is proportionate to provide additional translation specifically for posted workers. The Government considers that the

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<sup>1</sup> <http://www.hse.gov.uk/migrantworkers/worker.htm>



advice available on these websites should be sufficiently authoritative and in reviewing the guidance and online material will consider how it can be best signposted.

### **Argument for robust transposition/monitoring:**

#### ***Requirement to report on number of posted workers***

65. One of the legal community bodies and one of the trade union bodies argued for a “requirement to report numbers of posted workers to HMRC”. On this point, the trade union body noted that this more robust approach would enable better monitoring and swifter reaction against employers who might abuse posted workers’ rights. Additionally, the trade union body believed that a registration scheme for all companies, including agencies, which planned to post workers to other parts of the UK labour market, could assist in driving up standards and legal compliance.

### **Government response**

66. The Government has committed to keeping Article 9 under review (as regards the information companies posting workers to the UK have to provide to competent authorities) particularly in light of the work to set up the new enforcement body. However, the Government has no intention to introduce a registration scheme at this stage as it considers it disproportionate given the small number of posted workers in the United Kingdom.

### **Creating a specific category of posted workers in UK law**

67. Another suggestion from a trade union body was that the Government should not create a specific category of posted workers in law. Instead 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. The body contended that 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.

### **Government response**

68. The Government will have to define posted workers in the regulations that create the subcontracting liability so that it is clear who the rules apply to. However, the Government does not consider that it is necessary or proportionate to require companies to retain copies of employment contracts (which would have been concluded under the law of the home Member State). In the Government’s view this would be gold plating and unnecessary given the lack of evidence there is for widespread abuse in the UK. Enforcement agencies will already investigate complaints made by posted workers.

## Evidence of companies abusing the system/Lack of further monitoring and compliance arrangements

69. One of the other trade union bodies who responded argued that there was growing evidence of companies abusing the system with bogus arrangements. Their view was that the Enforcement Directive tried to define a genuine posting focusing only on contractual terms which could be fictitious. Accordingly, their opinion was that the Government should introduce measures to establish the reality of the arrangements and not just focus on contractual terms. They felt successive assignments to the same post and 'letter box' companies need to be stopped.
70. The same trade union body that raised the point immediately above was also very concerned that the Government did not propose to introduce further monitoring and compliance arrangements. To prevent abuse of the system, it wanted the Government to create a competent authority to ensure service providers were genuinely eligible to post workers from a sending state and that postings to receiving states were genuinely temporary.

## Government response

71. The judicial route of enforcement means that a court can look at all the facts of the case to establish the reality of the situation and not just contractual terms. The Government has committed to keeping Article 9 under review (as regards the information companies posting workers to the UK have to provide to competent authorities). However, the Government does not intend at this stage to increase monitoring and compliance arrangements as we are not convinced that this would be a proportionate approach to implementation and appears unnecessary given the lack of evidence we have for widespread abuse in the UK. More generally, the Government would underline that it is taking active steps to combat abuse of employment rights. The Immigration Bill will create a new Director of Labour Market Enforcement who will bring better coordination to existing regulators (such as the Employment Agency Standards Inspectorate, HMRC (NMW functions) and the Gangmasters Licensing Authority) and will ensure that the enforcement effort is targeted, based on intelligence about non-compliance and exploitation.

## Other issues:

### *Potential avoidance measures*

72. One of the legal community respondents noted that BIS did not intend to propose legislation that would allow claims where there was a longer contractor chain but suggested it would be helpful if BIS could include a mechanism to 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."

## Government response

73. This suggestion seems to refer to avoidance measures i.e. a convoluted chain of companies to break the contractual link between the employer and subcontractor. The Government believes that by giving rights against both the direct employer and the contractor there will be sufficient opportunities for workers to enforce their rights and to go beyond this would be gold plating.

## Lack of reference to the reasoning of withheld payments

74. One of the business representative body respondents noted the lack of reference in the consultation as to the reasoning why a sub-contractor/employer has not paid the individual. In this body's view, in the recruitment supply chain, the employment business might withhold payment temporarily while waiting for an authorised time sheet or because it was permitted by statute to do so, eg where a valid opt out had 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."

## Government response

75. This point is noted and will be considered during the drafting of regulations. These are the kind of arguments that may surface in cross border data exchange over the internal market information system.

## Question 8a

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

76.3 respondents answered this question; of these two were business representative bodies (one of whom was the body we met during the consultation but who did not send a written response) and a trade union.

77. One of the business bodies who commented said it did not know the answer. The other business body concerned indicated that it thought the number of posted workers involving the UK was "vanishingly small" but conceded that there was potential for danger. One of the trade union bodies indicated that it expected that the Impact Assessment underestimated the number of posted workers.

## Question 8b

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

78. Only 1 of the respondents, a trade union body, answered this question.

79. In the absence of a registration scheme one of the trade union bodies pointed out that it was not possible for it to identify how many posted workers were working in the UK.

### Government response to Questions 8a and 8b

80. There was almost no interest in these questions among the respondents. The trade union body who responded reported instances of abuse but the Government has not seen evidence that this is widespread. The Government believes that the proposals it intends to bring forward will help address incidents of abuse. BIS commissioned research to try and add to what little evidence there is. The research has struggled to identify interviewees, which is perhaps significant. Interviews with a number of stakeholders during the consultation have failed to add any evidence, which inclines the Government to conclude that that the number of postings to and from the UK which it has estimated are not wildly inaccurate.

### 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 estimated 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).**

81. None of the respondents answered this question.
82. Only 1 respondent, a trade union representative body, answered question 9a and only 2 respondents, a business representative body and a trade union body answered questions 10, 11a and 11b.

### Question 9a

**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? If you don’t think 0.9% is correct, can you provide any evidence on what this proportion should be?**

83. The trade union body who responded noted that in the absence of a registration scheme it was not possible to say, but it considered that as the 0.9% estimate was based on the ONS Annual Survey of hours and earnings data it may be an under estimation owing to the survey’s failure to take the informal economy into account.

### Government response

84. The Government has noted this comment and undertaken research to improve the evidence base. The research struggled to identify interviewees, which is perhaps significant. Interviews with a number of stakeholders during the consultation have

also failed to add any evidence. In these circumstances the Government can only use existing evidence and data.

### **Question 9b**

**Is the use of 0.9% appropriate, or are more posted workers getting paid below the national minimum compared to UK workers? If you don't think 0.9% is correct, can you provide any evidence on what this proportion should be?**

85. None of the respondents answered this question.

### **Question 10**

**Is there any evidence on the duration of postings?**

86. 2 responses were received to this question, 1 came from a business representative body, the other was from a trade union body.

87. The business representative body who responded replied that it held no relevant data. The trade union body argued, likewise, that it was unable to answer in the absence of a registration scheme, but was concerned that some companies sought to abuse regulations relating to posted workers to avoid wider tax and employment law obligations. They alleged that it was not uncommon for posted workers to be moved from one short term job to another, that the posting company had no intention of giving the workers future employment in the home company and that such workers were not posted workers but economic migrants.

### **Government response**

88. The Government has no evidence for what the trade union body alleges.

### **Question 11a**

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

89. 2 responses were received to this question, one came from a business representative body, the other was from a trade union body.

90. The business representative body who responded replied that it held no relevant data. The trade union body noted that the absence of a registration scheme meant it could not provide the information needed.

### **Question 11b**

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

91. 2 responses were received to this question, 1 came from a business representative body, the other was from a trade union body.

92. The business representative body who responded replied that it held no relevant data. The trade union body that answered this question was concerned that some employers employed migrant workers and posted workers on lower rates of pay and conditions to reduce wage bills. The body argued for workers to receive the same rate of pay and conditions regardless of nationality.

### Government response

93. The Government has no evidence of widespread abuse to support the trade union body's assertion. Furthermore, there is no difference in the statutory rights enjoyed by posted workers and most other UK workers.

### Question 12 & 12a

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

**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?**

94. 2 trade union bodies answered this question. One of the bodies believed that there was evidence that a number of posted workers were being exploited and left without payment of wages or part of wages. The other trade union body was concerned that the mistreatment of posted workers might be widespread in the UK and referred to having sent BIS examples of abuse and undercutting under this consultation.

### Government response

95. A trade union body reported instances of abuse but the Government has not seen evidence that this is widespread. The Government believes that the proposals it intends to bring forward will help address incidents of abuse.

### Question 12b

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

96. 2 responses were received to this question, 1 came from a business representative body, the other was from a trade union body.

97. The business representative body who responded believed that there was a lack of evidence that sub-contractor liability produced any benefits to the workers covered. They argued that it would be a damaging precedent if the "tiny minority of unscrupulous employers" felt able to avoid their responsibilities because they knew the contractor would satisfy them. The trade union body who replied believed 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. They added that it would also help in removing the risk of forced labour and human trafficking as well as rogue operators.

## Government response

98. This question was asked in order to inform assumptions in the Impact Assessment. There is little the Government can conclude from the two opinions expressed. The Government's EU treaty obligations mean that it must implement the Directive and it can see no reason not to proceed and implement by creating an individual right to bring a claim in an Employment Tribunal against the contractor (option (i)).

### Question 12c

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

99. 1 respondent, a trade union body, responded to this question. It believed 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. They added that it would also help in removing the risk of forced labour and human trafficking as well as rogue operators.

## Government response

100. As with question 12b, this question was asked in order to inform assumptions in the Impact Assessment. There is little the Government can conclude from the single opinion expressed. The Government's EU treaty obligations mean that it must implement the Directive and it can see no reason not to proceed and implement by creating an individual right to bring a claim in an Employment Tribunal against the contractor (option (i)).

### 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?

101. 2 responses were received to this question, 1 came from a business representative body, the other was from a trade union body.

102. The business representative body who responded replied that it held no relevant data. The trade union body who replied noted that in the absence of registration it was not possible to measure, "but Unions report that workers are regularly posted to the construction sector." They added that posted workers were also found in agriculture and fresh food processing.

## Government response

103. The Government notes the comments provided.

104. No answers were received in reply to any of the following questions, other than one which came from a business representative body who said that it held no relevant data.

#### **Question 14a**

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

#### **Question 14b**

**Are the direct employers mainly part of multinational firms or are they small firms usually located in EEA?**

#### **Question 15**

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

#### **Question 16a**

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

#### **Question 16b**

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

#### **Question 17a**

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

#### **Question 17b**

**What information is gathered through such checks?**

#### **Question 18a**

**What would the costs to contractors be for helping HMRC with investigations (as 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)?**

#### **Question 18b**

**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)?**

#### **Question 19**

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

## **3. Impact Assessment**

105. Alongside the consultation document issued on 23 July 2015 the Government published an Impact Assessment and invited comments. Having taken careful note of what answers there were to the evidence related questions in the consultation, the Government has now published the Impact Assessment in association with this document. The Impact Assessment includes an equalities analysis broken down by protected group.



## 4. Conclusion

106 The Government is grateful to all respondents for taking the time to respond to this consultation.

107 As a result of this consultation, stakeholder engagement during it and the responses received, the Government will now bring forward Regulations which transpose the Directive, introducing subcontracting liability in the construction sector so that a posted worker in the construction sector can bring an individual claim for unpaid wages for NMW against a contractor in an Employment Tribunal. A due diligence defence will be available to the contractor. Subcontracting liability will be limited to the construction sector and to the contractor one up the supply chain from the posted worker's direct employer.

108 Due diligence will not be defined in the regulations. Guidance will be developed to indicate what is required of subcontractors and contractors and this will give some indication of what due diligence might conceivably entail, however, given that what is considered sufficient will vary from case to case and to avoid setting the bar so high that only firms of a certain size can engage, the guidance will not make an absolute statement as to what due diligence is.

109 The Government does not intend at this stage to introduce further administrative measures to take account of the Enforcement Directive although we will keep Article 9 under review (as regards the information companies posting workers to the UK have to provide to competent authorities). The Government believes that existing arrangements are sufficient to meet the monitoring and compliance requirements contained in the Enforcement Directive. The Government will ensure that it is able to respond effectively to other Member States' requests for cooperation when alleged breaches of the Framework Directive and Enforcement Directive have occurred. This will be achieved through the European Commission's secure Internal Market Information system. Likewise, where cross border enforcement of financial administrative penalties is required, the Government will ensure that penalties can be notified and recovered.

110 The Government will lay Regulations before Parliament in 2016, which will implement the Enforcement Directive and meet the deadline set out in the Directive.

# Annex 1

## List of respondents to the consultation:

Birmingham Law Society

CBI

Civil Engineering Contractors Association (no written response but individual stakeholder meeting held)

Electrical Contractors Association

EEF

Employment Lawyers Association

Northern Ireland Committee of the Irish Congress of Trade Unions

Recruitment & Employment Confederation

TUC

Unite the Union



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