



Department
for Business
Innovation & Skills

**IMPLEMENTING THE POSTED
WORKERS ENFORCEMENT
DIRECTIVE**

JULY 2015

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Implementing the Posted Workers Enforcement Directive

Posted workers are individuals who are employed in one European Member State but sent by their employer to work temporarily in another Member State before returning home.

The 1996 Posted Workers Directive (96/71/EC) provides a framework so that both businesses and workers can take full advantage of the opportunities offered by the single market. The Directive supports the freedom to provide services across the EU and provides both fair competition for businesses and respect for the rights of the workers.

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, 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.

The 2014 Enforcement Directive (2014/67/EU) builds on mutual co-operation information and enforcement requirements in the 1996 Directive and must be transposed by June 2016. It also introduces a requirement for subcontracting liability in the construction sector.

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Respond by: 24 September 2015

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Email: labourmarket.consultations@bis.gsi.gov.uk

This consultation sets out proposals for how the UK Government will comply with the obligations in the Posted Workers Enforcement Directive and seeks views on proposed new approaches where these are needed. Among those who may wish to respond are business representative bodies and Trade Unions.

1. Executive Summary

1.1 The Government is seeking views on how it proposes to implement the Posting of Workers Enforcement Directive 2014/67/EU ('the Enforcement Directive'). This needs to be done by 18 June 2016.

1.2 A posted worker is a worker who carries out his work for a limited period of time in a Member State other than the State in which he normally works. 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.

1.3 The Enforcement Directive is a single market measure, to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. It establishes a regime for 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 ('the Framework Directive').

1.4 The key provisions of the Enforcement Directive are on: subcontracting liability which is a new requirement that is designed to ensure posted workers in the construction sector can claim back unpaid wages (up to the level of the minimum wage) from the next contractor in the supply chain; monitoring and compliance which sets out what information requirements Member States can impose on companies posting workers to work in their territory and co-operation between Member States on the expectations around information exchange, inspections, mutual assistance and cross-border enforcement of some civil penalties.

1.5 The consultation document sets out options for implementation. The Government's preferred approach is to continue to minimise burdens on business and to work within the existing regime for enforcing employment rights.

Subcontracting liability

1.6 To introduce the new requirement of subcontracting liability, the Government is consulting on three options, all of which would require secondary legislation:

- a) the creation of an individual right to bring a claim in an Employment Tribunal against the contractor (our preferred option);
- b) state enforcement of unpaid wages; and
- c) the creation of a sanction (a financial civil penalty).

Monitoring and compliance

1.7 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. The Government believes that imposing further requirements is likely to impose additional costs on the employer and on the Authority required to hold the information without an immediately identifiable benefit.

1.8 However, the Government will keep this under review in the context of the broader immigration strategy and the forthcoming creation of a new labour market enforcement agency. The Enforcement Directive allows the UK to introduce new legislation (either now or in the

future) to require employers to actively identify workers posted to the UK, consistent with the limitations in the Directive.

Cooperation between Member States

1.9 The Government believes that it can meet the requirements of the Directive under the existing regime and does not, therefore, propose any specific changes to the enforcement regime in order to comply with these obligations.

Access to Information

1.10 The Government proposes to make information available on .gov.uk and nidirect.gov.uk in English only as this is one of the working languages of the European Union and there are free translation tools available online. Posted workers are able to access the free translation service provided by Acas.

Impact Assessment

1.11 An Impact Assessment has been prepared and is published alongside this consultation document. We would welcome any comments on the Impact Assessment or evidence to improve the data available on workers posted to and from the UK.

Territorial Application

1.12 Employment and health and safety law are devolved matters in Northern Ireland, and the Gibraltar authorities are responsible for implementation in Gibraltar. 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. The Department for Business, Innovation and Skills is working closely and consulting with the Department for Employment and Learning in Northern Ireland and the Health and Safety Executive for Northern Ireland on these proposals.

1.13 The Posting of Workers Enforcement Directive 2014/67/EU can be found at the link below:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0067>

2. How to respond

2.1 When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

2.2 You can reply to this consultation online at: <https://bisgovuk.citizenspace.com/lm/posted-workers-consultation-1>

2.3 The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/posted-workers-enforcement-directive> (until the consultation closes).

The form can be submitted online/by email or by letter to:

Name: Leah Noel
Team: Labour Market Directive
Department of Business, Innovation and Skills
Postal address: Level 3, 1 Victoria Street, London, SW1H 0ET
Email: labourmarket.consultations@bis.gsi.gov.uk

2.4 You may make printed copies of this document without seeking permission.

2.5 BIS consultations are digital by default but if required printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845-015 0010
Fax: 0845-015 0020
Minicom: 0845-015 0030
<https://www.gov.uk/government/publications?departments%5B%5D=department-for-business-innovation-skills>

2.6 Other versions of the document in Braille, other languages or audio-cassette are available on request.

3. Confidentiality & Data Protection

3.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

3.2 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality

can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4. Help with queries

4.1 Questions about the policy issues raised in the document can be addressed to:

Name: Leah Noel

Team: Labour Market Directive

Department of Business, Innovation and Skills

Postal address: Level 3, 1 Victoria Street, London, SW1H 0ET

Email: labourmarket.consultations@bis.gsi.gov.uk

4.2 The consultation principles are at Annex D.

6. The proposals

A. INTRODUCTION

6.1 The European Union is a single market for trade in goods and services. In order to be able to take advantage of the opportunities this creates, companies in the EU may occasionally need to send workers to other Member States for periods of time to fulfil contracts. The Posted Workers Directive 96/71/EC¹ (1996 Framework Directive) provides a framework so that businesses and workers can take full advantage of the opportunities offered by the single market. It entitles posted workers to compulsory employment rights in the country they are posted to, for example, national minimum wage rates and maximum work periods.

6.2 The 1996 Framework Directive defines a worker as ‘posted’ when, for a limited period of time, the worker carries out his work in a Member State other than the State in which he normally works. **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.**

6.3 In 2013 there were over 1 million postings around the European Economic Area.² The numbers sent to and from the UK are relatively low. The European Commission estimates that there were around 43,000 postings to the UK and 30,000 posted from the UK in 2013. Posted workers are a more significant issue for some Member States with, for example, Germany and Poland experiencing postings in the hundreds of thousands each year.

The Posted Workers Framework Directive

6.4 There are now two Directives on the posting of workers. The first Directive is the 1996 Framework Directive which aims to balance the freedom to provide services across the European Economic Area with ensuring that the rights and working conditions of posted workers are protected. The Directive entitles posted workers to compulsory employment rights in the country they are posted to rather than the country they are posted from. These rights include, for example, national minimum wage rates (where they exist) and maximum work periods. They are listed in paragraph 6.19 and are referred to in this document as the “compulsory conditions”. Employers may apply the rights of the home Member State (i.e. the Member State where the posted worker normally works) if they are more favourable, or offer enhanced terms and conditions as an incentive for working away from home, but this would be a contractual agreement not a statutory obligation.

The Enforcement Directive

6.5 In March 2012 the European Commission brought forward further proposals for an Enforcement Directive following concerns raised by some Member States that the protections outlined in the 1996 Framework Directive were not being fully complied with in relation to, for

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0071:en:HTML>

² Posting of workers, European Commission report on A1 portable documents issued in 2012 and 2013 (published December 2014). In 2012 and 2013, respectively 1.23 million and 1.34 million A1 portable documents were issued. An A1 Portable Document is issued when a worker or a self-employed person is posted to another EEA country or is employed in more than one EEA country. Under EU regulations on Co-ordination of Social Security Systems a person is subject to the social security system of one country at any one time. See annex C for more information.

example, less-favourable working conditions. The **Enforcement Directive 2014/67/EU** (“the Enforcement Directive”) was adopted in May 2014. The deadline for transposing the Directive is June 2016.

New Measures

6.6 Both Directives put in place a framework for the provision of services by posting workers, and create the conditions to enable those posted workers to enforce their rights. The Enforcement Directive also covers monitoring and compliance and builds on the information exchange requirements in the 1996 Framework Directive to support cross-border enforcement between Member States. Specifically, the key new provisions in the Enforcement Directive are:

- Subcontracting liability in the construction sector – 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 requirement in the Directive is limited to the construction sector and the contractor immediately above the direct employer, although it is open to Member States to go further or introduce penalties instead.
- Monitoring and compliance - the Directive sets out what information requirements Member States can impose on companies posting workers to work there. It also requires Member States to publish information about employment rights and how they can be enforced.
- Cooperation - the Directive sets out requirements for information exchange, inspections and mutual assistance between Member States and their Competent Authorities when identifying breaches and enforcing rights using the Commission’s secure Internal Market Information system.
- Cross-Border enforcement of financial administrative penalties - the Directive creates a system for these penalties to be notified and recovered cross-border.

6.7 The Enforcement Directive is not intended to replace the existing enforcement regimes in Member States but to work within them – all measures introduced by the Enforcement Directive should be justified and proportionate and not put unnecessary burdens on businesses. Member States must transpose the Enforcement Directive by June 2016.

Implementation - What the UK needs to do

6.8 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. However there are some provisions in the Enforcement Directive which impose obligations on business, most notably the introduction of subcontracting liability or a penalty in accordance with Article 12 of the Directive. 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 comply with the 1996 Framework Directive and the Enforcement Directive. The Commission has been clear that any new measures introduced by Member States to implement the Directive should be justified and proportionate, which will allow the Government to implement the Directive in a way which works best within the UK’s existing system.

6.9 The 1996 Framework Directive and the Enforcement Directive both apply to workers posted from the UK to other Member States. Each Member State is responsible for implementing the Directive and we do not consider that any changes are required to meet the Enforcement Directive obligations for this group of workers.

Competent Authorities

6.10 The Enforcement Directive refers to 'Competent Authorities,' which is taken to mean those statutory bodies which are responsible for the monitoring and enforcement of employment rights. Many Member States have a single labour inspectorate which is responsible for the enforcement of all employment rights. The UK however has a number of authorities which have competence for enforcement on discrete employment protections. A list of the UK's Competent Authorities and their responsibilities is set out in **Annex B**. Where Competent Authorities are referred to in this document, it relates to each of the bodies listed and their specific responsibility.

6.11 **This paper sets out proposals for how the UK Government will comply with the obligations in the Enforcement Directive and seeks views on proposed new approaches where these are needed.** It does not seek views on the Directive itself, as these were sought in the call for evidence conducted in 2012³. A table summarising the proposed approach to each Article of the Enforcement Directive is at **Annex A**.

Note on Territorial scope

6.12 Employment and health and safety law are devolved matters in Northern Ireland, and the Gibraltar authorities are responsible for implementation in Gibraltar. 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. The Department for Business, Innovation and Skills is working closely and consulting with The Department for Employment and Learning in Northern Ireland and the Health and Safety Executive for Northern Ireland on these proposals.

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257046/bis-12-1183-eu-posting-of-workers-summary-responses-to-call.pdf

B. WHO IS A POSTED WORKER, WHAT ARE THEIR RIGHTS, AND HOW DO THEY ENFORCE THEM?

6.13 The European Commission describes a posted worker as:

“...a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.”⁴

6.14 There are three scenarios in which the Posting of Workers Directive applies and these are set out in Article 1 (3) of the Framework Directive. In summary:

- When an employer posts a worker to another Member State on his own account and under his direction, under a contract which the employer has concluded with the party in the State for whom the services are intended;
- When an employer posts a worker to an establishment or to an undertaking owned by the group in the territory of a Member State; and
- When the employer, being a temporary employment undertaking or placement agency, hires out a worker to a user undertaking established or operating in another Member State. Workers who are hired out to work in another Member State by a temporary employment undertaking or placement agency but who are not directly employed by them are not posted workers.

For all of these scenarios the employment relationship between the employer and the posted worker must be maintained for the duration of the posting.

6.15 As set out above, posted workers are distinct from economic migrants because they are already employed in the Member State where their direct employer is established and are sent to work in another Member State for a limited period of time by their employer. Economic migrants are those individuals who exercise their right to move freely between Member States to work or seek work, and reside.

Example 1

A company in the UK invites bids for a contract to provide a specific product which also requires expert fitters. An Italian company wins the contract and provides the product and sends its fitters, who it already employs, to the UK for 3 months to carry out the installation. Once the contract is fulfilled, the Italian workers return to their usual place of work in Italy.

In this scenario:

The Italian company is the direct employer;

Italy is the Member State of establishment;

The Italian workers are posted workers;

The UK company is the recipient of the services;

UK employment rights are the compulsory conditions which apply only for the duration of the posting and can be enforced in relation to that posting once the worker has returned home

⁴ European Commission description of a posted worker <http://ec.europa.eu/social/main.jsp?catId=471>

(e.g. if wages are owed which relate to the work done during the posting).

Example 2

A French bank posts one of its workers to its UK subsidiary company in London to work on an IT project. The worker remains directly employed by the French parent company whilst she is in London, and is entitled to the compulsory conditions applicable in the UK for the duration of the posting.

Example 3

A Polish employment agency is contracted to supply cleaning crews for a major sporting event in the UK. The agency posts workers who are on its books and who are its direct employees in Poland. The worker remains directly employed by the agency whilst they are in London, but their agency must ensure they are given the compulsory employment rights applicable in the UK for the duration of the posting, e.g. the UK's National Minimum Wage. Once the contract is completed and the posting ends the worker will no longer be entitled to the compulsory conditions applicable to posted workers in the UK. This worker may subsequently enforce those rights which applied during the posting. So, if the posted worker did not receive the UK National Minimum Wage for the period when they were posted to the UK, they could make a claim against their employer even after they have returned to Poland.

The number of postings to and from the UK

6.16 There is very little information on the sectoral distribution of posted workers. There is some evidence to suggest that the majority of the workers posted from the UK work in the service sector. The Labour Force Survey (LFS) estimates indicate that only a small proportion work in construction in the UK (3%).⁵ By contrast, across the EU the majority of posted workers are in the construction sector.⁶ Please see the impact assessment for further information on characteristics of posted workers and the limitations of the data.

6.17 That said, based on information on the number of PD A1 Portable Documents issued, the volume of workers posted across the EU has gradually been increasing in the last few years. The same data indicates that the volume of posted workers coming to and from the UK is substantially lower than for other EU⁷ countries. Based on the estimates of A1 Portable Document forms, the numbers of posted worker for the UK are as follows:

⁵ We have relied on the 2008 LFS Variable that was used in quarter 2 as a proxy for posted workers. The variable asked - what was your main reason for coming to the UK? (Answer – employment), did you have a job or job offer in the UK before coming to the UK? (Answer – yes), and was this the same company you had been working for before coming to the UK? (Answer – yes). The estimates using this variable only include people who are resident in the country for a year or more, or intend to stay for twelve months or more, therefore seasonal and temporary migrants are excluded. The exclusion of short term posted workers will distort the findings. Also the respondents may have moved to the UK permanently and still have answered the questions as if they were a posted worker. The proportion excludes those who are self-employed.

⁶ Across the EU, on average in 2013 44% of PD A1 Portable Documents were issued to posted workers employed in the construction sector

⁷ European Industrial Relations Observatory On-line, 'Posted workers in the European Unions' Comparative Study <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/posted-workers-in-the-european-union>

	2008	2009	2010	2011	2012	2013
Postings to UK	38,000	35,000	34,000	37,000	40,000	44,000
Postings from UK	36,000	32,000	32,000	35,000	33,000	30,000

Note: The figures are rounded to the nearest thousands

6.18 The main countries that post workers to other Member States are Germany, France and Poland. The data also indicates that Germany, Belgium, the Netherlands and France are the main recipients of posted workers. Compared to Germany and France, the UK only receives and sends a small proportion of posted workers. In 2013, the PD A1 portable documents indicated that the overall number of postings from France was around 124,000 (130,000 in 2012), and from Germany was 227,000 (222,000 in 2012). Postings to France in 2013 totalled 182,000 (156,000 in 2012) and Germany 374,000 in 2013 (336,000 in 2012).⁸

The Rights of Posted Workers

6.19 Everyone who is legitimately posted to work in the UK is protected by a set of basic statutory employment rights as set out in Article 3 (1) of the Framework Directive. All workers are entitled to at least:

- 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, 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.

How a posted worker enforces their rights

6.20 The core provision in Article 11 of the Enforcement Directive says that posted workers must be able to bring a complaint and take legal proceedings in respect of their employment rights during the period when they were posted, particularly in relation to remuneration owed, unfair deductions and unnecessary or excessive expenses. Article 11 also stipulates that, where appropriate and with the permission of the posted worker, representation by a third party such as a trade union is allowed and it places a duty on Member States to ensure that the worker is not subjected to discrimination as a result of making a complaint.

6.21 This Article requires that there is access to redress during the posting and once a posted worker has left the Member State where the work was carried out – i.e. once they have returned home they are able to bring a complaint against their employer for breach of the compulsory conditions which applied during the posting in the Member State where the work was carried out.

⁸ The figures are rounded to the nearest thousands

6.22 In the UK, posted workers are able to access all of the existing informal and formal routes of redress in relation to things that go wrong when they have been working here. The system is designed to provide initial informal action and advocacy to resolve disputes, avoiding conflict wherever possible. These include:

- **Her Majesty's Revenue and Customs (HMRC):** provides advice and will take up complaints on non-payment of the national minimum wage; and
- **The Advisory, Conciliation and Arbitration Service (Acas):** are responsible for preventing and resolving employment disputes. They give advice to workers and employers on rights at work, as well as providing conciliation and arbitration services and are the point of contact for escalation to an Employment Tribunal. Similar functions are carried out by the Labour Relations Agency (LRA) in Northern Ireland.
- **Employment Tribunals:** individuals are able to bring a claim against their employer to an Employment Tribunal once certain conditions, such as early conciliation have been met.

6.23 These measures meet the obligations in Article 11 – for example, if a posted worker felt they had been underpaid they would be able to make an enquiry through the Acas helpline to establish their position rather than putting themselves through a formal process straight away. Either party (the claimant or the respondent) may employ legal representation or be supported by a third party at a tribunal if they wish.

C. MONITORING POSTED WORKERS, CROSS-BORDER COOPERATION AND THE RECOVERY OF FINANCIAL PENALTIES

6.24 As set out above, the majority of measures in the Enforcement Directive are for Member States and their Competent Authorities to consider and comply with. This section sets out the proposed implementation of:

- the measures which a Member State can adopt to monitor postings (Article 9);
- new requirements for cross-border cooperation between Competent Authorities (Articles 6, 7 and 10), including cross-border enforcement of administrative penalties and fines (Chapter 6);
- the requirement to make information easily available about the compulsory conditions which apply during the period when workers are posted to a Member State and translation considerations (Article 5).

Monitoring of posted workers and control measures

6.25 In order to protect the freedom to provide services, Article 9 of the Enforcement Directive specifies a limited list of information which Member States can request from employers posting workers to the UK in order to ensure effective compliance with the Enforcement Directive and the Framework Directive. The information can relate to the parties involved in a posting situation, paperwork that must be maintained, and the details of the posting, including the work being undertaken. Any measures must be justifiable and proportionate in accordance with EU law.

6.26 Currently, there is no general requirement in the UK for posted workers to be registered either before arrival or on entry and nor is there a system to monitor or keep records specifically in relation to postings. There are however, some circumstances where monitoring already exists under UK rules. These include:

- where the posted worker is directly employed by an employment agency; and
- where the posted worker is employed by a licensed gangmaster (although this is covered by the Gangmasters (Licensing) Act 2004).

6.27 The Government does not believe that there is a need to introduce further requirements in order to ensure that the Enforcement Directive is being complied with. At the moment, the situations where monitoring applies are targeted at where the information is required to prevent abuse and fraud. UK Authorities that enforce the compulsory conditions which apply to workers during their posting to the UK are able to request any information they need using their existing statutory powers. We believe that imposing further requirements is likely to impose additional costs on the employer and on the Authority required to hold the information without an immediately identifiable benefit.

6.28 That said, the Government will keep this under review in the context of the broader immigration strategy and forthcoming changes to the enforcement landscape following the Prime Minister's announcement on 21 May 2015 that a new labour market enforcement agency will be created. The Enforcement Directive allows the UK to introduce new legislation (either now or in the future) to require employers to actively identify workers posted to the UK, consistent with the

limitations in the Directive. If the Government were to go down this route, further consultation would be required.

Cross Border Cooperation

6.29 The Enforcement Directive also places requirements on Competent Authorities to work cross-border with their opposite numbers in other Member States to ensure that the Framework Directive and Enforcement Directive are complied with. This already happens on information exchange, which takes place through an Internal Market Information System (IMI). The Enforcement Directive creates clearer obligations on Member States to ensure cross-border enforcement and may therefore result in a higher number of requests from other Member States.

6.30 The obligations imposed on Member States by the Enforcement Directive are more prescriptive than the 1996 Framework Directive regarding the provision of mutual assistance, inspection of terms and conditions and inspections to ensure compliance with the compulsory conditions. The Government is committed to working with the Competent Authorities in other Member States to enforce the rights of posted workers. The Government believes that it can meet the requirements of the Directive under the existing regime and does not therefore propose any specific changes to the enforcement regime in order to comply with these obligations.

How Intelligence is exchanged and Data Protection

6.31 The European Commission already has in place measures to facilitate the secure exchange of information across borders in order to support enforcement through the IMI system. All Member States are obliged to use this system to make requests for information and help with enforcement relating to specific cases where abuse is suspected, and provide a single point of contact to deal with information requests from other Member States.

6.32 Information exchanges will involve personal data. The IMI system is specifically designed for the secure exchange of information. The Enforcement Directive and IMI Regulation are clear that data protection principles must be observed and Member States must ensure that information received through this system is only used for the matter for which it was requested. A cross-government working group comprising of UK Government departments and Competent Authorities has been created to develop and manage joint-working protocols on handling requests from other Member States, the sharing of information and data protection in order to meet the requirements of the Directive.

Cross-Border recovery of financial penalties

6.33 Chapter 6 of the Enforcement Directive (Articles 14-19) supports the recovery of financial administrative penalties and fines imposed in a Member State in relation to non-compliance with the Framework Directive or the Enforcement Directive. As with requests for mutual co-operation, the Government proposes to put in place mechanisms for UK Competent Authorities to respond effectively to allowable requests in line with the criteria set out in Articles 14 – 19. The joint working protocols will assist with this.

Uncovering Non-Compliance

6.34 The Directive assumes that Member States routinely inspect terms and conditions of employment, which is not the case in the UK. The general rule in Article 7 is that the Member State where the service worker is posted has responsibility for checking terms and conditions of

employment. The UK is not required to introduce legislation to meet this obligation as long as it can carry out checks under existing UK law and practice when requested to do so by the Competent Authorities in the Member State where the employer/service provider is based.

6.35 Article 10 allows for Competent Authorities to determine when to carry out an inspection as a result of risk-based assessments, in line with national law and practice, which is the approach taken by the UK Competent Authorities. We believe existing UK legislation complies with these requirements.

6.36 The UK is committed to working with other Member States to share information about irregularities and breaches of employment rights. Where UK Competent Authorities, in carrying out their statutory functions, identify an irregularity and also establish that this relates to a posted worker they will be able to notify the appropriate Competent Authority in the Member State of establishment using the IMI system.

Access to Information

6.37 Article 5 requires Member States to provide information online, in an accessible format and in the most relevant languages, to enable workers who are posted to the UK to understand which rights apply to them and employers and service providers to understand the statutory obligations which they must comply with in the Member State the worker is being posted to.

6.38 Within the UK, some of this information is already provided in a range of languages, for example, the Health and Safety Executive (HSE) in Great Britain translates its advice for workers on its website⁹ and the Acas helpline also provides a telephone translation service. The Government thinks it is disproportionate to provide tailored translation specifically for posted workers given the small number of workers posted to the UK - HSE receives around 350 requests a year for translation services, with the most popular languages requested being Welsh and Polish. The Government proposes to make information available on .gov.uk and nidirect.gov.uk in English only as this is one of the working languages of the European Union and there are free translation tools available online. Posted workers are of course able to access the free translation service provided by Acas.

6.39 The European Commission also facilitates the provision of information about the minimum rights in each Member State through its website:

<http://ec.europa.eu/social/main.jsp?catId=726&langId=en>

⁹ <http://www.hse.gov.uk/migrantworkers/worker.htm>

D. SUBCONTRACTING LIABILITY

6.40 This section sets out the options available for implementing the new subcontracting liability introduced by Article 12 of the Enforcement Directive and gives a brief analysis of the benefits, risks and costs for each option.

What the Directive requires

6.41 The underlying aim of Article 12 is to ensure that posted workers get paid. It does this through the introduction of subcontracting liability which enables posted workers to claim back unpaid wages up to the level of the national minimum wage from the contractor. **The requirement in the Directive is limited to posted workers in the construction sector and to the contractor immediately above the direct employer in the supply chain**, although the Directive does allow Member States to go beyond this (i.e. to broaden the scope to other sectors and/or to extend the liability further up the supply chain). The definition of the construction sector for the purposes of the Enforcement Directive is set out in the Annex to the Framework Directive.

Current position

6.42 Subject to limited exceptions, all individuals working in the UK are entitled to the national minimum wage (NMW) and can complain to HMRC if this is underpaid. HMRC will investigate the employer (whether or not they are based in the UK) and enforce the NMW legislation against the employer if there has been an underpayment. In addition, the worker can also bring a claim in an Employment Tribunal, County Court or Sheriff Court in Scotland to enforce payment of their wages (for the full amount, where the worker is paid more than the NMW). There is currently no right of action against a contractor where a worker is unpaid - the worker can only claim payment from their direct employer and HMRC only take action against the direct employer.

Options for introducing subcontracting liability in Great Britain

6.43 The Government has identified three ways to implement Article 12 in Great Britain:

- i. the creation of an individual right to bring a claim in an Employment Tribunal (**the preferred option**);
- ii. state enforcement; and
- iii. the creation of a sanction.

6.44 All of these options are in addition to the current arrangements set out in paragraph 6.42, so posted workers would still have a right to claim against their direct employer and HMRC will continue to be able to investigate and enforce compliance with the NMW.

QUESTION 1:

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

Option 1: Individual right to bring a claim in an Employment Tribunal

6.45 **This is the preferred option.** Under this option the Government would create a new right for a posted worker in the construction sector to bring a claim in an Employment Tribunal against the contractor. The right would only be available if the worker could show that there had been a period during which his wages had been paid below the level of the NMW and these sums remained unpaid.

6.46 There would be a defence for a contractor that establishes that they have undertaken due diligence, meaning they would have no liability for a claim for unpaid wages. The contractor would need to establish that the direct service provider with whom they contract is legitimate and has a good track record in paying their employees. This approach will, however, also need to take account of what information a contractor might reasonably be able to ascertain before contracting and what evidence they could reasonably be expected to have that they had done so.

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)*
- b. How would they prove this?*

6.47 In practice, where a posted worker brings a claim, the contractor will have two options to remedy the claim: (i) defend the case, arguing due diligence, or (ii) pay the NMW owed and assess whether to take a separate contractual claim against the employer. The contractor will have a contract for services with the employer and may have negotiated an indemnity for this liability.

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

6.48 As this new right is limited to posted workers in construction, we estimate that the quantified cost to contractors per annum of this option would be approximately £2k to £7.4k in wage costs and £12.1k in Employment Tribunal and Acas costs. The quantified cost to Government is estimated to be £2.2k per annum.

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none"> • The direct employer remains responsible for paying the posted worker, contractor liability is a last resort; • This model fits best with the existing system, where the employee enforces their rights; • There is a defence available to contractors who can demonstrate due diligence when entering into a contract for services; • Contractors could seek an indemnity from the subcontractor for wage liability; • The due diligence defence may incentivise contractors to ensure that the service provider is a legitimate business that pays its staff; • This option is the closest to the subcontracting liability required by Article 12; • The posted worker has an additional legal route to recover the wages owed up to the level of NMW if the direct employer fails to pay. 	<ul style="list-style-type: none"> • The cost to business of defending claims is high because although the model could allow for a defence for contractors, proving it creates an administrative burden; • There is a cost to Government in administering Employment Tribunals; • There are costs to the posted workers in using this route. They may have to pay Employment Tribunal fees to bring the claim; they may also incur costs for legal representation. These costs may not be recoverable and so may be a disincentive to the worker enforcing their rights.

Option 2 State enforcement of unpaid wages

6.49 Under this option, the Government would create a new HMRC right of action against the contractor to enforce underpayment of NMW in the event that the direct employer failed to make this payment within the 28 day period stipulated in section 19A of the National Minimum Wage Act (NMWA). The posted worker would, as now, complain to HMRC about not being paid by the direct employer. HMRC would investigate the direct employer and bring enforcement proceedings against them. If they found that the direct employer had failed to pay the NMW, HMRC would issue a notice of underpayment in accordance with the NMWA.

6.50 If the direct employer failed to pay the notice of underpayment, HMRC could enforce the unpaid NMW element (but not the civil penalty set by the notice of underpayment) against the contractor, as well as against the direct employer, in line with the measures described in section 19D of the NMWA. The contractor would still have recourse to the defence of due diligence. The system would be structured so that the underpayment was only paid to the worker by either the contractor or the employer so that there was no possibility of double recovery. This mechanism to prevent double recovery may result in a worker not being able to bring a claim directly against his employer for NMW underpayment where HMRC pursues the contractor for this underpayment.

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?

6.51 There are a number of challenges in making this route work effectively. Although HMRC have the capability to investigate, it would be complicated to ensure that a new HMRC right of action would fit with the existing system of enforcing NMW. This is because the NMW regime takes a collective approach through which HMRC investigates underpayment in relation to the entire workforce, rather than the individual as is required here. The process would also need to be structured so that the employer would not be incentivised to withhold payment because the contractor was liable.

6.52 As this new right is limited to posted workers in construction, we estimate that the quantified cost to contractors per annum of this option would be between £7.6K and £27.8k in wage costs. The quantified costs to Government are estimated to be £37.9k per annum.

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none"> • This would be a cost free route for the posted worker; • This is potentially the route by which a worker would be most likely to receive their NMW as HMRC's officers are trained professionals operating under an established system for recovering monies; • The contractor could negotiate an indemnity into his contract with the employer for the provision of services to mitigate liability; • There is a defence available to a contractor if he has exercised due diligence in entering into his contract for services. 	<ul style="list-style-type: none"> • There is a risk of false incentives being created for the employer to hold out so that the contractor is liable; • In this scenario HMRC would carry out the enforcement and not, as the Directive envisages, the posted worker seeking redress. • Need for a mechanism to prevent double recovery which may impact on a worker's right to bring a claim against his employer.

Option 3 State enforcement with civil penalties

6.53 As an alternative to introducing joint liability for the contractor and direct employer, the Directive allows for Member States to impose a sanction on contractors in the event of fraud or abuse.

6.54 If there is evidence of fraud the Crown Prosecution Service can already prosecute this in the normal way. However this would not be sufficient to meet the obligations in respect of the Directive. It would be necessary to introduce a sanction for behaviour which does not amount to fraud but which results in the abuse of posted workers, which the UK Government takes to mean that they are not paid the NMW. A sanction could be created which would apply where a contractor had failed to carry out what is considered to be due diligence and where the posted worker is not paid (the NMW).

6.55 The new civil penalty would not impact on HMRC's existing powers to require the direct employer to pay the NMW and if a posted worker complained to Acas, HMRC would be able to

take enforcement action against the direct employer for underpayment in the usual way. The posted worker would also be able to bring a claim to the Employment Tribunal against his direct employer for any underpayment of his whole wages. Where there was an HMRC investigation and HMRC were satisfied that there was evidence to suggest that there was abuse (i.e. non-payment of the NMW), there would be further investigation and, if the contractor failed to establish that it had carried out due diligence in relation to the contract, the imposition of a civil penalty. This penalty could be imposed by a court or be automatic and subject to appeal. In the event that a penalty imposed on a contractor by the court was not paid it would be enforceable as a civil debt in the County Court (or the Sherriff Court in Scotland).

6.56 Assuming that the scope of implementation was limited to posted workers in construction, the Government estimates that the quantified cost to business per annum of this option would be £11.7k. The quantified cost to Government is estimated to be £37.9k per annum (the same as the HMRC enforcement route).

<u>Pros</u>	<u>Cons</u>
<ul style="list-style-type: none"> • It would be very clear that the direct employer remained liable; • This option retains the existing enforcement model for the individual to enforce their employment rights, limiting the risk of setting a precedent for wage claims against someone other than the employer. 	<ul style="list-style-type: none"> • Any sanction payment would go to the Exchequer and not the worker (although the worker would still be able to bring a claim against the direct employer for unpaid wages and HMRC powers in relation to NMW underpayment still apply); • If the direct employer had absconded, the posted worker would not get their NMW; • It may be difficult to establish that the introduction of sanctions ensures that posted workers are paid NMW; • This creates an additional investigative and enforcement burden, so adds an expense for the state.

QUESTION 5:

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

Extension to other sectors/other contractors/Extension beyond posted workers

6.57 The Impact Assessment indicates that the costs of extending subcontracting liability to all workers in the construction sector would impose a cost to business of £18.2m per annum for the individual right option, £28.2m per annum for the state enforcement option and £11.8m per annum for the sanction option (costs to Government are estimated to be £38.4m for the state enforcement option and sanction option and £2.9m for the individual right option).

6.58 There is little evidence of practices in the UK that warrant a broad application of the subcontracting liability beyond the construction sector or throughout the subcontracting chain. In particular, the Government assesses that it would be disproportionate to apply the liability beyond the immediate contractor because businesses higher up the contracting chain do not

have the necessary level of contact with the direct employer to control or build in protection to the contract. The Government assesses therefore, that whichever option is chosen the implementation should be limited to posted workers in the construction sector.

QUESTION 6:

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

QUESTION 7:

Do you have any other comments on the proposals?

7. Summary of consultation questions

The government is inviting views on the full set of proposals as set out in Annex A, but has set out specific questions in this consultation on the proposed options for implementation.

QUESTION 1:

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

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)*
- b. *How would they prove this?*

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?*
- 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?*
- c. *Under what circumstance would the contractor choose to contest a 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?

QUESTION 5:

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

QUESTION 6:

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

QUESTION 7:

Do you have any other comments on the proposals?

8. Summary of call for evidence questions

QUESTION 8:

- a. *Is the estimated number of posted workers in the construction sector right?*
- b. *Is there another source of evidence that we should take into account?*

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

QUESTION 10:

Is there any evidence on the duration of postings?

QUESTION 11:

- a. *What is the average wage and skill of the posted worker (across all sectors of the economy)?*
- b. *How does this relate to their rate of pay at home and compared to their fellow workers on-site in the UK?*

QUESTION 12:

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

- a. *During the course of the posted workers 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?*
- b. *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?*
- c. *How would removing direct employers’ sole liability for the payment of the national minimum wage affect the contractor’s behaviour and in what way?*

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.

QUESTION 14:

- a. *What type of business tends to post workers into the UK and where are these businesses located?*
- b. *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 16:

- a. *How are employers and posted workers (including the ones established in the EEA) used?*
- b. *How central is this to the organisation's business strategy?*

QUESTION 17:

- a. *Are there any checks carried out (i.e. due diligence, fitness-for-purpose test, pre-qualification questionnaires) when setting up subcontracting arrangements?*
- b. *What information is gathered through such checks?*

QUESTION 18:

- a. *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)?*
- b. *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?

8. What happens next?

The consultation will be open for 10 weeks and closes on 24 September 2015. A Government response to the consultation will be published before the end of the year.

Annex A: UK proposed implementation of the Enforcement Directive

ARTICLE	UK PROPOSED POSITION
<p>ARTICLE 1 – Scope</p> <p>States Enforcement Directive (ED) aim is to guarantee the correct operation of the Posted Workers Directive (PWD). PWD defines who a posted worker is.</p>	<p>The UK does not intend to create a distinct category of posted worker in law as this would create an administrative burden on employers who would need to differentiate posted workers from all other workers with no clear benefit of doing so.</p>
<p>Article 2 - Definitions</p> <p>Contains definitions of “competent authority”, “requesting authority” and “requested authority”.</p>	<p>No action needed</p>
<p>Article 3 – Competent Authorities and liaison offices</p> <p>Obligation on UK to designate one or more competent authorities for the purposes of the ED and to communicate the details to the Commission and other member states.</p>	<p>The UK will comply with the requirement by designating the competent authorities listed in Annex B and will notify this information to the Commission and other member states.</p>
<p>ARTICLE 4 – Identification of a genuine posting and prevention of abuse and circumvention</p> <p>Sets out the factors (control measures) which a competent authority can take into account to identify a genuine posting and prevention of abuse and circumvention of law.</p>	<p>The UK is not proposing to make any legislative provisions in this area</p>
<p>ARTICLE 5 – Improved access to information</p> <p>Information on terms and conditions of employment which are covered by compulsory conditions and which must be complied with by service providers, must be made available free of charge in a</p>	<p>The UK already provides information on rights and obligations through .gov.uk and nidirect.gov.uk and proposes to improve the navigability of the information available on .gov.uk and nidirect.gov.uk through the single portal.</p>

<p>clear, transparent way in the most appropriate languages and easily accessible electronically.</p> <p>It must be clear which rights are available to posted workers.</p>	<p>Posted workers will be able to access the translation facility as part of the Acas helpline. The UK does not intend to provide any further translation or translation facilities.</p>
<p>ARTICLE 6 – Mutual assistance – general principles</p> <p>Includes replying to requests for information within time limits and service of documents.</p> <p>IMI Regulation applies.</p>	<p>The UK Government and its Competent Authorities will work with the Competent Authorities in other Member States within the framework set out in the Enforcement Directive. The measures referred to in this Article will be handled by the relevant UK Competent Authorities in line with existing enforcement practices as set out in Annex B.</p> <p>Information will be exchanged between Competent Authorities using the Internal Market Information System (IMI).</p>
<p>ARTICLE 7 – Role of the Member States in in the framework of administrative cooperation</p> <p>The inspection of terms and conditions of employment.</p>	<p>The UK is committed to working with other Member States to share information about breaches of employment rights. Where UK Competent Authorities, in carrying out their statutory functions, identify an irregularity and also establish that this relates to a posted worker they will notify the appropriate competent authority in the Member State of establishment. The UK Competent Authorities propose to develop a joint working protocol to ensure this operates effectively.</p>
<p>Article 8 – Accompanying measures</p> <p>The role of the European Commission in supporting Member States to comply with requirements.</p>	<p>No action is needed</p>
<p>ARTICLE 9 – Administrative requirements and control measures</p> <p>Information which Member State may (but is not required to) request from service providers in order to monitor compliance with compulsory conditions.</p>	<p>The UK is not currently proposing to introduce monitoring measures which require employers posting workers to the UK to provide specific information related to the posting. The UK will, in line with existing practice, expect Competent Authorities to use their powers to request information in order to enforce the raft of employment rights as set out in Annex B.</p>

<p>ARTICLE 10 – Inspection</p> <p>Inspection of the obligations in the Framework Directive, to be carried out by competent authorities in the host Member State through random and risk based inspections.</p>	<p>The UK is not proposing to make any adjustments to the inspection regime. Where appropriate, the UK’s Competent Authorities will, however, respond to requests from Competent Authorities in other Member States where they make permissible enquiries about posting situations as part of their inspection regime.</p>
<p>ARTICLE 11 – Defence of rights, facilitation of complaints, back-payments</p> <p>Respecting and supporting a worker to defend their statutory rights.</p>	<p>The UK is not proposing to make any changes to the enforcement landscape in relation to this article. Workers posted to the UK are able to enforce their rights through the routes set out in Annex B.</p>
<p>ARTICLE 12 – Subcontractor liability</p> <p>New right for a posted worker employed in the construction industry to claim against his employer’s contractor for unpaid wages. Alternatively, Member States can impose sanctions to prevent fraud and abuse on the contractor.</p>	<p>The UK is consulting on a range of options to deliver this requirement -</p> <p>(i) the creation of an individual right to bring a claim in an Employment Tribunal (the preferred option); (ii) state enforcement of unpaid wages; and (iii) the creation of a sanction.</p>
<p>Articles 13–19 (Chapter 6) – Cross-Border enforcement of financial administrative penalties and/or fines</p> <p>Requirements on the Competent Authorities, what information must be supplied and the conditions which must be met, including time limits, in order to either accept or reject a request.</p>	<p>The UK Government proposes to put in place mechanisms for the UK’s Competent Authorities to respond effectively to allowable requests in line with the criteria set out in Chapter 6, and will link this to the joint working protocol.</p>
<p>Articles 20 – 24 – Final Provisions</p> <p>Penalties, the internal Market Information System, transposition date and the requirement for review.</p>	<p>No action is needed.</p>

Annex B: UK terms and conditions of employment which must be extended to workers posted to the UK under Article 3 of the Framework Directive

Compulsory condition	UK Legislation in which it is contained	EU legislation on which UK legislation is based	Enforcement	Competent Authority
Maximum work periods and minimum rest periods	<p>Working Time Regulations 1998 (WTR)</p> <p>Working Time Regulations (Northern Ireland) 1998 soon to be (2015) (WTRNI)</p>	Directive 2003/88/EC	<p>Employment Tribunal</p> <p>Health and Safety Executive,</p> <p>Office of the Rail Regulator, Driver and Vehicle Standards Agency,</p> <p>GLA</p> <p>Industrial Tribunal and Fair Employment Tribunal hearings - Northern Ireland (NI) Health and Safety Executive (Northern Ireland)</p> <p>District Councils</p> <p>Civil Aviation Authority</p> <p>Department of the Environment</p>	HSE

<p>Minimum paid annual holidays</p>	<p>WTR (WTRNI)</p>		<p>Employment Tribunal GLA Industrial Tribunal and Fair Employment Tribunal hearings (NI)</p>	<p>BIS</p>
<p>Minimum rates of pay</p>	<p>National Minimum wage Act 1998, Social Security Administration Act 1992(Social Security Administration (Northern Ireland) Act 1992)</p>	<p>Regulation 883/2004 and 987/2009 on the coordination of Social Security systems,</p>	<p>HMRC, Employment Tribunal, or County court GLA Industrial Tribunal and Fair Employment Tribunal (NI)</p>	<p>HMRC</p>
<p>Conditions on hiring out of workers</p>	<p>Employment Agencies Act 1973, The Conduct of Employment Agencies and Employment Businesses Regulations 2003 and the Agency Workers Regulations 2010 Section 27 of the Gangmasters (Licensing) Act 2004 [which disapplied the Employment Agencies Act 1973];</p>		<p>Employment Tribunal HMRC on National Minimum Wage EAS on breaches of the Employment Agencies legislation; EAI on breaches of the</p>	<p>BIS DEL Home Office (GLA)</p>

	<p>Section 12 of the Gangmaster (Licensing Authority Regulations) 2005, and</p> <p>The Gangmasters (Licensing Conditions) Rules 2009</p> <p>Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981</p> <p>Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 (as amended in 2008 and 2010)</p> <p>The Agency Workers Regulations (Northern Ireland) 2011</p>		<p>Employment Agencies legislation; in NI</p> <p>The Gangmasters Licensing Authority for gangmasters operating in the shellfish, agriculture and horticulture sectors</p> <p>HSE for Working Time,</p>	
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<p>Health, safety and hygiene at work</p>	<p>Health and Safety at Work Act 1974</p>		<p>GLA</p>	<p>HSE</p>
<p>Protections for pregnant women, maternity and paternity leave, time off for ante-natal appointments, parental leave, shared parental leave right to request flexible working</p>	<p>Employment Rights Act 1996, (The Employment Rights) (Northern Ireland) Order 1996) Maternity and Parental Leave etc. Act 1999, (Maternity and Parental Leave etc. Regulations (Northern Ireland 1999) Section 205 Public Health Act 1936, (Section 85, Factories Act (Northern Ireland) 1965) Equality Act 2010 protection for pregnancy and maternity Sex Discrimination (Northern Ireland) Order 1976</p>	<p>European Communities Act 1972, Directive 92/85/EC (pregnant workers)</p>	<p>Employment Tribunal GLA Industrial Tribunal and Fair Employment Tribunal (NI)</p>	<p>GEO</p>
<p>Protections for children under 16 and young people under 18 at work</p>	<p>The Children and Young Person's Act 1933 The Children and Young Person's Act 1963</p>	<p>Directive 94/33/EC (for young people)</p>	<p>GLA Industrial Tribunal and Fair Employment Tribunal (NI)</p>	

<p>Protection for Whistleblowers</p>	<p>Public Interest Disclosure Act 1998</p> <p>Public interest Disclosure (Northern Ireland) Order 1998</p>		<p>Employment Tribunal</p> <p>Industrial Tribunal and Fair Employment Tribunal (NI)</p>	
<p>Non-discrimination, equal opportunities, equal treatment of those with protected characteristics in relation to employment</p>	<p>Equality Act 2010 and Equality Act 2006 Disability Discrimination Act 1995</p> <p>Sex Discrimination (Northern Ireland) Order 1976</p> <p>The Race Relations (Northern Ireland) Order 1997</p> <p>The Fair Employment and Treatment (Northern Ireland) Order 1998</p> <p>Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003</p> <p>The Employment Equality (Age) Regulations (Northern Ireland) 2006</p>	<p>Directive 2000/78/EC; 2006/54/EC and 2000/78/EC</p> <p>The Equal treatment Directive 2006/54/EC,</p> <p>The Employment Equality Framework Directive 2000.78.EC, the Racial Equality Directive 2000/43/EC</p>	<p>Employment Tribunal</p> <p>Equalities and Human Rights Commission</p> <p>Industrial Tribunal and Fair Employment Tribunal (NI)</p> <p>Equality Commission (NI)</p>	<p>GEO</p> <p>EHRC (has enforcement powers for the Equality Act 2010)</p>

Annex C: Note on the data used to count posted workers

The main evidence available on the volume of posted workers is based on the Commission's report¹⁰ which uses portable documents A1 (PD A1), previously the EO1 certificate, issued by EU countries as a proxy indicator of a posting situation. PD A1 is issued when a worker or a self-employed person is posted to another EEA country. The PD A1 is also used when a person is employed in more than one EEA country. Under EU regulations on co-ordination of social security systems a person is subject to the social security system of one country at any one time. For example, John is a worker in the UK and already contributes to the UK social security system. If he is posted to France he will request a PD A1 form from the UK Competent Authority that will exempt him from contributing to the social security system in France (as long as he continues to pay social security in UK). Ultimately using PD A1 documents to monitor postings in UK is a proxy for the following reasons:

- PD A1 posting figures represent posted workers that are entitled to and obligated to contribute towards an EU social security system. So by default it does not cover all postings.
- It does not include those who do not get a PD A1 form. However, if their posting is for a long period they will chose to get one retrospectively.
- It does not include posted workers that are not entitled to a PD A1 form.
- A single posted worker can be issued two PD A1 certificates – however, this still helps to capture the number of postings, which is what we are interested in when we look at impacts.
- At a more methodological level, the available data only provides the number of PD A1 certificates issued in each country, but does not contain any information on the duration of postings or the hours worked.

¹⁰ Posting of workers Report on PD A1 portable documents issued in 2012 and 2013, published December 2014

Annex D: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Angela on 020 7215 1661
or e-mail to: angela.rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see section 4).

Annex E: Implementing the Posted Workers Enforcement Directive Consultation response form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 24/09/2015

Name:

Organisation (if applicable):

Address:

Please return completed forms to:

Leah Noel

Labour Market Directorate

Department of Business, Innovation and Skills

Level 3, 1 Victoria Street

London, SW1H 0ET

Email: labourmarket.consultations@bis.gsi.gov.uk

Please tick the box from a list of options that best describes you as a respondent. This allows views to be presented by group type.

<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local Government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

The government is inviting views on the full set of proposals as set out in Annex A, but has set out specific questions in this consultation on the proposed options for implementation:

Question 1

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

Questions 2

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

- b. How would they prove this?

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?

Question 5

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

Question 6

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

Question 7

Do you have any other comments on the proposals?

Summary of Call for evidence questions

Question 8

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

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

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?

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

Question 10

Is there any evidence on the duration of postings?

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

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

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?

Question 14

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

- b. Are they mainly part of multinational firms or are they small firms?

Question 15

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

Question 16

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

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

Question 17

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

- b. What information is gathered through such checks?

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

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for your views on this consultation. However, as part of the BIS wider customer survey plans, we would appreciate your views on the below.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No



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