

Title: Impact Assessment on Enforcement of Posted Workers Directive IA No: BISLM001 Lead department or agency: Department for Business, Innovations and Skills Other departments or agencies:	Impact Assessment (IA)		
	Date: 28 October 2015		
	Stage: Final		
	Source of intervention: EU		
	Type of measure: Secondary legislation		
Contact for enquiries: Kevin Wrake (kevin.wrake@bis.gsi.gov.uk)			
Summary: Intervention and Options			RPC Opinion: GREEN

Cost of Preferred (or more likely) Option					
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as	
-£0.41m	-£0.22m (best estimate)	£0.024m	NO	N/A	

What is the problem under consideration? Why is government intervention necessary?
 In 2014, Member States and the European Parliament adopted the Enforcement Directive 2014/67/EU (the 2014 Enforcement Directive), which was agreed under a single market legal base. The Directive ensures that Member States are applying the existing compulsory conditions where posted workers can enforce their rights, and that the appropriate mechanisms are put in place to support cross-border enforcement between Member States. It was adopted in May 2014 and must be implemented by 18 June 2016.

What are the policy objectives and the intended effects?
 The overall objective of the Directive is to ensure that the rights of posted workers are respected and effectively enforced, that posting businesses are aware of their obligations to posted workers, and that the competent authorities in Member States co-operate to ensure abuse is tackled effectively. The UK's objective in implementing the Directive is to ensure effective and proportionate enforcement that is in line with the existing UK mechanism of enforcing employment protections and limits the burden on business.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Article 9 relates to the information that Member States request from companies posting workers to the UK. For this Article two options were considered: 1) Do nothing (preferred); and 2) Impose measures that help monitor number of posted workers.
 Article 12 introduces a new requirement for Member States to ensure that posted workers in the construction sector can recover unpaid minimum wages from the contractor one up in the supply chain. For this Article four options were considered 1) Do nothing; 2) Introduce an Individual Right for posted workers to take a claim against the contractor for underpayment of National Minimum Wage (NMW) (preferred); 3) Extend existing rules so that HMRC can approach the contractor for underpayment of NMW to a posted worker; and 4) Introduce a sanction against the contractor if the employer does not pay NMW to a posted worker. For Article 12 options two scenarios were considered: i) Posted workers in construction; and ii) All workers in the construction industry.
 Following consultation our preferred option is to do nothing for Article 9 and to introduce an Individual Right within Article 12 for all posted workers in the construction industry.
 In addition under Articles 5, 6, 7 and 10 there will be costs to government from providing more information to posted workers on their rights, cross border enforcement of penalties and co-operation arrangements for information exchange.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 2019

Does implementation go beyond minimum EU requirements?			NO		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: N/A	Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Nick Boles

Date: 25th April 2016

Summary: Analysis & Evidence

Policy Option 1

Description: Implement Article 12 via creation of an individual right (applies to posted workers in construction)

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) -£0.41m		
			Low: -£0.41m	High -£0.41m	Best estimate: -£0.41m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£		£0.047m	£0.44m
High	£		£0.056m	£0.52m
Best Estimate	£		£0.051m	£0.48m

Description and scale of key monetised costs by 'main affected groups'

The directive requires Member States to ensure that, in the construction industry, the contractor one up in the supply chain is liable to the posted worker for unpaid wages amounting to any outstanding net remuneration up to the minimum rates of pay in the event that these are not paid by the employer. These wage payments will be costs to the contractor (£3.2k to £11.6k per annum). In addition there could be administrative costs of tribunal cases for contractors (£16.2k p.a.) and employees (£5.8k p.a.). The total cost to the exchequer is estimated to be £22.1k p.a. (£6.0k tribunal costs + £16.1k costs from other aspects of the directive (Articles 5, 6, 7 and 10)).

Other key non-monetised costs by 'main affected groups'

It has not been possible to estimate the cost to contractors if they carry out additional due diligence. Also we do not estimate familiarisation costs to contractors but explain qualitatively how we expect them to be minimal.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	£		£0.003m	£0.03m
High	£		£0.012m	£0.11m
Best Estimate	£		£0.007m	£0.07m

Description and scale of key monetised benefits by 'main affected groups'

There will be benefits to employees in the form of recouped lost wages. We estimate this to be £3.2k to £11.6k p.a. These benefits are estimated based for both 100 days (average posting duration) and a full years posting period.

Other key non-monetised benefits by 'main affected groups'

The policy will incentivise contractors to carry out due diligence on employers/subcontractors, reducing the incidence of non-payment of wages to the benefit of employees (secondary impacts). However these might be netted off by contractors being less inclined to employ employers/subcontractors using posted workers (secondary impacts). They may also seek to reduce exposure through the use of indemnities and warranties.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
<ul style="list-style-type: none"> Estimates assume that no posted workers will have enforced their NMW by making a complaint to HMRC against their direct employer under the existing enforcement arrangements (the option will not allow for double recovery from the employer and contractor). Estimates represent the maximum costs to business as they assume that no employers will have explored other avenues open to them. We assume that all contractors will contest claims in an Employment Tribunal rather than pay the worker. There is some uncertainty around the published non-compliance rate for the construction sector of 1.3% (taken from ONS data) and so we undertake sensitivity analysis to show a worse-case scenario if all posted workers in construction suffer non-compliance of payment of NMW. Following evidence gathered through consultation our best estimate is 1.3%. The analysis does not take account of any subsequent contractual claim that a contractor may choose to take against the direct employer for recovery of costs. 		

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: £0.024m	Benefits:	Net: -£0.024m	NO	N/A

FULL EVIDENCE BASE

A. BACKGROUND

1. A posted worker is a person who, on behalf of his or her employer, is sent for a limited period of time to carry out his or her work in the territory of an EU Member State other than the state in which he or she normally works. This sending of a worker takes place as a result of the employer exercising the freedom to provide cross-border services. There are two EU Directives on the posting of workers. The first is the Posted Workers Directive 96/71/EC ('the 1996 Framework Directive'), which was agreed under a single market legal base with the aims of giving companies the ability to post workers across the EU in order that they have the freedom to provide services across the EU and guaranteeing that the rights and working conditions of posted workers are protected throughout the European Union. It sets out posted workers' entitlements to a set of compulsory employment rights in the country they are posted to, for example, national minimum wage rates and maximum work periods. A list of the rights which are applicable is at Annex B.
2. In March 2012 the European Commission brought forward proposals for an Enforcement Directive following concerns raised by some Member States that the minimum protections outlined in the 1996 Framework Directive were not being fully complied with in relation to, for example, false self-employment and less-favourable working conditions. To address this, the Commission proposed additional legislation to improve the monitoring of postings and to improve the way existing rules on posted workers were complied with. The Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ('the 2014 Enforcement Directive') was adopted in May 2014 and must be implemented by 18 June 2016¹.

B. PROBLEM AND RATIONALE FOR INTERVENTION

3. In March 2012 the European Commission proposed new rules to increase the protections for workers temporarily posted abroad. Findings suggested that minimum employment and working conditions were often not respected for the one million or so posted workers in the EU². To address the specific issues of abuse identified in the Commission's report, where workers were not able to

¹ The Commission's proposal and its Impact Assessment as well as its Revision of the legislative framework concerning the posting of workers in the context of the provision of services are available from:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF>

<http://ec.europa.eu/social/BlobServlet?docId=7481&langId=en>

<http://ec.europa.eu/social/BlobServlet?docId=7519&langId=en>

² Report for the Commission Services on the Implementation of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

<http://ec.europa.eu/social/BlobServlet?docId=4621&langId=en>

enjoy their full rights in terms of for example, pay or holidays, especially in the construction sector, the Commission put forward proposals as part of an Enforcement Directive to increase monitoring and compliance and to improve the way existing rules on posted workers were applied in practice. The goal of the Commission's proposals was to ensure a level playing field between the businesses involved. The outcome of this was the 2014 Enforcement Directive. The Enforcement Directive does not impose a particular enforcement regime and accommodates the range of existing approaches taken by Member States.

The current UK enforcement regime

4. The rights that posted workers are entitled to under the 1996 Framework Directive 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.

Not all the above are subject to the new Enforcement Directive.

5. Posted workers in the UK are already entitled to these rights and have access to the same routes to redress when things go wrong as any other worker in the UK. The majority of employment rights are self-enforced by the worker taking a claim to Employment Tribunal and posted workers are entitled to bring claims this way (having first gone to early conciliation). Some employment rights are enforced by the State – for example, Her Majesty's Revenue and Customs (HMRC) inspect and enforce the National Minimum Wage; the Employment Agencies Standards inspectorate works with agencies, employers and workers to make sure that employment rights are complied with, particularly for vulnerable workers; and the Health and Safety Executive (HSE) monitor and prosecute in relation to the working time regulations.
6. The key provisions of the Enforcement Directive are on subcontracting liability which will enable posted workers in the construction sector to claim back unpaid wages from the contractor one up the supply chain; monitoring and compliance setting out what information requirements Member States can impose on companies posting workers to work there; and cooperation between Member States on the expectations around information exchange, inspections and

mutual assistance. There are two areas that have particular scope to impose costs on business:

- **Article 9** – this sets limits on the administrative requirements and control measures that a member state can use in relation to posting and enables Member States to request specific information from overseas employers (service providers) in relation to posted workers. The UK does not currently collect this information for all posted workers and any new burden would fall on overseas employers posting workers to the UK rather than UK based employers.
- **Article 12** – Member States must ensure that posted workers employed in the construction industry are able to claim against their employer's immediate contractor (i.e. one up in the sub-contracting chain) for unpaid wages amounting to any outstanding net remuneration equalling the minimum rates of pay and/or contributions due to common funds or institutions of social partners. The Directive allows for the defence of due diligence on the part of the contractor. Alternatively, it is open to Member States to impose sanctions on the contractor to prevent fraud and abuse. One or other option must be adopted. We do not currently have any system of subcontracting liability in the UK for employment rights.

C. OBJECTIVES

7. The overall objective of the Enforcement Directive is to ensure that the rights of posted workers are respected and enforced, and to ensure effective cross-border co-operation to tackle fraud and abuse. One of the main reasons the Enforcement Directive was brought forward was to enable posted workers to enforce their employment rights and to deal with the concerns raised by some Member States that employers have been claiming that a posted worker is self-employed in order to avoid employment rights as well as paying tax and social security contributions.
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 areas where burdens may fall on business are on subcontracting liability in Article 12, and any information employers may be asked to provide were it decided to introduce active monitoring of postings. 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 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 UK to consider implementing the Directive in a way which does not create undue burdens on UK businesses.

D. OPTIONS

9. Under Article 9, overseas employers could be required to provide monitoring information on posted workers. Under Article 12, if a posted worker is not paid by their employer, the contractor (i.e. one up the supply chain) is liable to pay the national minimum wage element of the wages owed. We initially considered a range of options for implementing Articles 9 and 12.

10. For Article 9 two options were considered:

- **Option A₉** - Do nothing
- **Option B₉** - Impose control measures which would require employers in other member states to provide information on workers they post to the UK

Option A₉ was our preferred option as we did not think it appropriate to place any additional burdens on business.

11. For Article 12 four options were considered:

- **Option A₁₂** - Do nothing
- **Option B₁₂** - Introduce an individual right for posted workers to take a claim against the contractor for underpayment of National Minimum Wage (NMW) through an Employment Tribunal (preferred)
- **Option C₁₂** - Extend existing rules so that HMRC can approach the contractor for underpayment of NMW to posted worker
- **Option D₁₂** - Introduce a sanction against the contractor if the employer does not pay NMW to a posted worker

Option A₁₂ (Do nothing) was not an option as it could lead to the UK being infracted if it did not implement the Directive correctly. Option C₁₂ (HMRC enforcement) was felt to possibly create false incentives for the employer to hold out on payment in the knowledge that the contractor would become liable. Option D₁₂ (Sanction) would leave the posted worker reliant on existing HMRC enforcement measures against the direct employer to recover unpaid wages. **Option B₁₂** was our preferred option as by introducing a right for posted workers to bring a claim against the contractor it provided an additional mechanism for recourse whilst providing a due diligence defence for the contractor.

12. There are also other costs imposed on government by the Directive. These relate to Article 5 which requires Member States to make available information (free to posted workers) about the statutory minimum employment rights in the

host state (i.e. the state to which the worker is posted³) and Articles 6, 7 and 10 which impose costs to government from cross border information exchange.

E. ANALYSIS OF OPTIONS

Evidence on posted workers

13. Very little evidence exists on the number of posted workers in the UK. The UK does not collect information on the flow of posted workers to and from the country. The main evidence available on the volume of posted workers is taken from the Commission's report which uses portable document 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 goes to work in another European Economic Area (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 an 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 the UK).
14. Using A1 documents to monitor postings in the UK is a proxy. 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 an A1 form because of the short duration of their posting⁴. It also does not include posted workers that are not entitled to an A1 form because they do not fulfil the qualifying requirements under social security legislation⁵. Lastly, an individual posted worker could be issued with two A1 certificates (a situation where the worker has more than one posting). However, A1 data still helps to capture the number of postings which is what we are interested in when we look at impacts⁶.
15. The flow of postings to and from the UK based on PD A1 documents are presented in the table below.

³ In the UK we understand 'terms and conditions of employment' to mean those terms agreed between an employer and employee to provide services – usually as set out in a contract of employment. This may contain terms which go beyond statutory minimum rights, such as a rate of pay above the national minimum wage. Whilst those terms and conditions which go beyond the statutory minimum are not covered by the Enforcement Directive, they are enforceable through an Employment Tribunal.

⁴ This might include workers who go for a very short posting (days versus months) and might not bother to get a PD A1.

⁵ The presented data are not data on postings according to the "posting" definition of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. The conditions which must be fulfilled in order to qualify as posted worker according to EU rules on the coordination of social security systems are fundamentally different from those under Directive 96/71/EC (e.g. strict time limitation of maximum 24 months applies in the social security field). A posted worker in the framework of the provision of services might not always fulfil the condition for issuing PD A1 confirming that s/he will remain subject to the social security legislation of the state s/he were posted from. Such a worker is a posted worker in accordance with Directive 96/71/EC but without PD A1 and does not therefore appear in the reported data.

⁶ At a more methodological level, the available data only provide the number of PD A1 certificates issued in each country, but do not contain any information on the duration of postings or the hours worked.

TABLE 1 : NUMBER OF POSTINGS BASED ON PD A1 DATA

	2008	2009	2010	2011	2012	2013
Postings to UK	37,733	34,760	34,321	37,247	40,366	43,522
Postings from UK	36,436	36,436	32,109	35,368	33,148	29,935

16. For the purpose of our analysis we have used the latest number of postings into the UK (43,522) from PD A1 data to estimate the impacts of implementing the Directive⁷. Note that these figures show that the volume of postings to and from the UK is substantially lower than some other Member States, for example France and Germany⁸. In 2013 the overall number of postings from France was 123,580 and from Germany was 227,008. Postings to France in 2013 totalled 182,219 and to Germany totalled 373,666. In comparison postings to and from the UK in 2013 were 43,522 and 29,935 respectively.
17. There is some information available on the duration of postings. A European Commission study (2014)⁹ stated that the average duration of a posting was 100 days in 2013. We therefore use 100 days as a lower estimate to indicate that postings can be shorter than a year¹⁰. The Directive is clear that postings are temporary but it sets no upper limit as to the length of time that a posting can last, although PD A1 forms apply for up to 2 years¹¹.
18. Little information on which sectors across the UK posted workers work within is available¹². The Directive only requires the UK to implement Article 12 (subcontracting liability) in the construction sector. There is some evidence to suggest that the majority of the workers *posted from* the UK work in the service sector¹³ yet the same data is not able to tell us which sectors workers who are *posted into* the UK work in.
19. To get some understanding of which sectors posted workers are based in, we refer to the 2008 Labour Force Survey (LFS) quarter 2 data. Using data collected from an ad-hoc Eurostat module on the LFS we are able to estimate

⁷ We test this number by creating the variable using the Labour Force Survey. Using this method the LFS estimates that in 2014 there were roughly 28,000 posted workers which is only slightly lower than PDA1 estimate. We create a proxy for posted workers which assumes a respondent is a posted worker if he or she has moved to the UK more recently than he or she started working for their current employer. Note this estimate includes people who are resident in the country for a year or more, or intend to stay for twelve months or more, so seasonal and temporary migrants are excluded. It may pick up people who have permanently moved to the UK

⁸ Posting of workers in the European Union and EFTA countries: report on A1 portable documents issued in 2012 and 2013, published December 2014. <http://ec.europa.eu/social/BlobServlet?docId=13488&langId=en>

⁹ Posting of workers Report on A1 portable documents issued in 2012 and 2013, December 2014. <http://ec.europa.eu/social/BlobServlet?docId=13488&langId=en>

¹⁰ To estimate the costs we look at annual arrears on contractors – however, to calculate the lower estimate we apportion the arrears such that they reflect the average duration of 100 days (rather than a year).

¹¹ There is very little information on maximum length of duration of a posted worker. LFS 2014 estimates that looked at people who moved to the UK more recently than they started working for their current employer, state the average duration to be 3.6 years..

¹² In 2013 only 18 Member States provided more detailed figures on sectoral breakdown which accounts for some 54% of the total number of PDs A1 issued.

¹³ Commission report based on 2009 E101 (now called A1 portable documents) about 99% of workers posted from UK work in the service sector. The data is missing in the 2010, 2011, 2012 and 2013 assessment

the sectoral distribution of posted workers¹⁴. It helps to give an indication of the distribution of the posted workers across various sectors of the economy. Based on these estimates most workers posted to the UK work in manufacturing, finance, real estate and business activities (which includes accountancy, legal, tax consultancy, management consultancy, advertising, architectural and engineering and recruitment consultancy). These LFS estimates indicate that only a small proportion work in construction (3.2%¹⁵)¹⁶.

20. Similar to the PD A1 data there are limitations to the LFS data. The LFS data are likely to include migrant workers as the survey captures people who intend to stay for twelve months or more. Given the limited evidence in this area, BIS approached its stakeholders¹⁷ to gather information on the number of posted workers (and their characteristics) in the economy. The exercise only re-emphasised the issue of the lack of evidence in this area (see para 21 below). During the consultation period we hoped to test our estimates and improve our evidence base, using the consultation document itself to seek the views of stakeholders (see Annex A).

Consultation Call for Evidence

21. During our public consultation in an attempt to improve our evidence base on workers posted to and from the UK we included a call for evidence. The questions asked covered several areas including data used (clarification on numbers), how businesses use posted workers and what kind of checks are carried out on sub-contracting activity. Full detail of the questions asked can be found at Annex A. We received 9 responses to the consultation¹⁸. Unfortunately there was little information either to substantiate or refute the data assumptions used in this Impact Assessment and we remain reliant primarily on PD A1 data and survey data as our main sources of information for our analysis. The following are a selection of excerpts from respondents:

- ‘... is not aware of how many UK employment businesses either post workers to overseas clients or how many non-UK employment businesses post their workers to the UK.’
- ‘Moreover, with Tribunal fees, the potential need to incur unrecoverable legal costs, and the fact that a posted worker would be seeking to enforce rights in a foreign jurisdiction (to them), particularly if they are posted only for a short

¹⁴ The variable used for the analysis was defined as follows from module questions- what was your main reason for coming to the UK? (Answer – employment), did you have a job or job offer 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 module was not repeated in the subsequent years.

¹⁵ Excluding self-employed workers.

¹⁶ Note we only use this proxy to give us indication of proportion of posted workers working in construction sector and do not use it to give us an indication of number of posted workers. The estimate based on Q2 2008 (pre-recession) has not been used estimate volume of posted workers as Q2 of 2008 is not a representative time period (and dates back by 7 years). In addition, this variable is likely to include migrant workers as it captures people who intend to stay for twelve months or more. Hence we do not use it to understand the volume of posted workers.

¹⁷ We circulated a survey (August 2014) which yielded a low response rate (21) and hence the results could not be used for the purposes of the impact assessment.

¹⁸ In addition we carried out several stakeholder consultation interviews.

period, may be a considerable disincentive or inhibitor to the bringing of claims, and therefore may encourage non-compliance by employers.'

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

BIS Research

22. To supplement our consultation we commissioned some external research to help with our assessment of the Enforcement Directive. The main objectives were as follows:

- To understand the current business context, characteristics and the nature of contractual supply chains in the UK construction sector, the contractors that make use of workers from subcontractors based in other Member States and posted workers;
- To understand the use of subcontractors including the nature of businesses established in other Member States and the level of fitness checks carried out when setting up subcontracting arrangements; what is the cost to the organisation of carrying out these checks;
- To explore the recruitment of posted workers among Construction sector, length of postings, the occupations and highest qualification levels of the posted workers and contractual arrangements including wages;
- To explore the likelihood of an overseas subcontractor failing to pay wages to posted workers they employ; the conditions under which such situations arise (and how frequent are they) and the average size of the arrears; and
- To examine the effect of Article 12 on UK contractors' decisions to use workers posted by subcontractors.

23. The researcher (Institute for Employment Studies) was tasked with conducting pilot interviews with both posted workers and construction businesses that use them. They undertook some initial stakeholder discussions but found it very challenging to obtain positive responses from UK based construction companies. Their key findings were:

- There is a belief within the UK construction industry that the introduction of this directive will have little impact on the sector, with little time apparently being devoted to it in the run-up to implementation.
- Even within the engineering construction sector, where posted workers are more likely to be encountered, this area is not seen as an issue.
- Conversations with businesses suggest that most do not use posted workers, yet where they do they are paid above the National Minimum Wage, so this is not perceived as a major concern.

24. These findings echo those of the consultation responses; in particular the belief that this is not a major issue for UK businesses due primarily to the limited use

of posted workers in the construction industry compared to other member states.

Analysis of options: Article 9 (Administrative requirements and control measures)

25. Article 9 covers the information which Member States may request from employers (service providers) in order to ensure effective monitoring of compliance with obligations in the 1996 Framework Directive and Directive 2014/67/EU (the 'administrative requirements and control measures'). Any new measures under this Article may only be put in place if they are justifiable and proportionate. Paragraph 1 of Article 9 provides a list of measures that Member States may impose, including the provision of information about the parties involved in a posting situation, paperwork that must be maintained, and details of the posting, including about the work being undertaken. The Article also provides for accessible and user-friendly documents to enable employers to provide information electronically and at a distance. Where Member States put in place any of these provisions, they must be notified to the European Commission, who will then evaluate the efficacy of those arrangements.
26. The government does not currently require posted workers to be registered either before arrival or on entry and nor does the government monitor or keep records specifically in relation to posted workers. There are, however, under the current system some exceptions where the relevant enforcement bodies have identified a need for additional, targeted information. These include:
- where the posted worker is directly employed by an agency; and
 - where the posted worker is employed by a licensed gangmaster.
27. Given that the UK already has control measures in place in the areas where it is considered there is the greatest need we do not think it appropriate to place any additional burdens on business. Some consultation respondents suggested government should consider introducing new means to register/monitor posted workers. Our preferred option to implement Article 9 however, remains **Option A₉** (Do nothing) – No additional requirements on business to provide information.

Analysis of options: Article 12 (Subcontracting Liability)

28. This article puts in place new additional protections for posted workers in the construction sector. The protections enable the posted worker to hold the contractor, of which the employer is a direct subcontractor, liable for outstanding minimum rates of pay (i.e. the national minimum wage in the UK) and any other dues such as allowable expenses. This is referred to as 'subcontracting liability'.
29. There are three ways in which a person can be a posted worker. In all cases the employer will always be in another Member State:

- The employer (E) sends the employee to work for an undertaking with which it has a contract to provide services. So the posted worker will work for the contractor during the posting but will be employed by E;
- The employer E sends the posted worker to work for another part of its undertaking in another Member State;
- The employer E is an agency and the posted worker is posted to work for a company in another Member State.

30. Under Article 12, this would mean that where a direct employer failed in its responsibilities to pay the minimum wage owed to a posted worker, that worker could make a claim against the next organisation up in the supply chain (referred to as the 'contractor'). Alternatively, Member States can impose sanctions on the contractor to prevent fraud and abuse. One or the other option must be adopted although it is open to the Member State how to achieve it.

31. Currently in the UK a posted worker has three routes to bring a claim against their employer for underpayment or non-payment of NMW wages:

- HMRC can enforce the NMW through a notice of underpayment and can pursue the underpayment on behalf of the worker through the Employment Tribunal or County Court;
- the posted worker can take their employer to an Employment Tribunal; or
- the posted worker can take their employer through the County Court for all of the wages owed.

32. Where HMRC identifies that an employer owes NMW arrears HMRC will issue a notice of underpayment for those arrears under s19 of the National Minimum Wage Act 1998 ('the Act'). If those arrears remain outstanding HMRC will pursue them on behalf of the worker by commencing civil proceedings for the recovery on a claim in contract, under s19D(1)(c) of the Act. This applies to both UK and non-UK based employers. It will not be possible for HMRC to investigate and enforce NMW if an employer has disappeared. At present there is no scope within NMW legislation to pursue the contractor (organisation one up the supply chain) for NMW arrears - unless they are deemed to be a "superior employer" as described in s48 of the Act (which will be extremely unlikely).

33. Doing nothing is not a feasible option as the UK may be infringed if it does not implement the Directive correctly¹⁹.

34. The consultation sought views as to the preferred option. The majority of respondents agreed that the creation of an individual right was most appropriate. The majority of respondents were also clear that unless there was clear evidence of problems in other sectors, Article 12 should **not** be extended beyond the construction industry. Our preferred option therefore remains that of introducing an individual right.

¹⁹ http://ec.europa.eu/atwork/applying-eu-law/docs/c_2014_6767_en.pdf. . The penalty can be a lump sum or a periodic payment or both. There is a minimum lump sum which for the UK is £9,938,000.

- **Preferred Option (B₁₂)** - change the rules introducing an individual right so that a posted worker in the construction sector can take a claim against the contractor for underpayment of NMW through the Employment Tribunal; the Directive provides that there can be a defence of due diligence for the contractor.

35. With this option, the posted worker would still have access to the existing route of redress, i.e. they would be able to make a complaint to HMRC about the direct employer's non-payment of the national minimum wage. However the worker would only be able to recoup the underpaid wages once.

Option B₁₂ – Individual right

Posted worker isn't paid by employer → takes case to employment tribunal against contractor

- ET accepts contractor's defence of due diligence
- ET rejects contractor's defence of due diligence, contractor liable

36. The Government could implement the Directive by introducing a right for a posted worker in the construction sector to bring a claim for unpaid minimum wages against the contractor through regulations made under section 2(2) European Communities Act ECA 1972. The worker could take a claim to an Employment Tribunal²⁰. The defence that the contractor had undertaken due diligence would also be introduced.

37. This would mean that in addition to their existing ability to pursue the direct employer for unpaid wages either through HMRC (for NMW) or in the court or employment tribunal, the posted worker would now be able to bring a claim against the contractor.

Costs to business

38. To estimate costs under this option we look solely at a scenario where the option is applied **only** to posted workers in the construction sector.

39. Posted workers will retain their ability to make claims against their direct employer for unpaid NMW through HMRC under this option. However it will not allow for double recovery from the employer and contractor, and so whilst the likelihood is that a proportion of posted workers will use the HMRC route and will therefore not bring claims against the contractor through the Employment Tribunal, these estimates assume that **none** of them will have done so.

²⁰ For purposes of the analysis we have only been able to model impacts of cases going to the employment tribunal (not county courts). We will use the consultation process to gather further information on the county court process.

40. The costings show a 'worse-case scenario' by assuming that contractors will contest **all cases** brought against them and also by not taking account of any subsequent contractual claim that a compliant contractor may choose to take against any non-compliant direct employer for recovery of costs. In reality, a contractor may decide to pay the unpaid wages rather than contest the case. This would reduce the costs of this option to the level of the unpaid wages (up to the level of NMW). The public consultation was used to try and gather information on the possible behaviour of the contractor (i.e. whether it will choose to contest or pay or chase the direct employer for recovery of costs). We received some anecdotal evidence that suggested where claims were small some contractors may be more likely to pay the unpaid wages.
41. LFS data shows that 3.2% of posted workers are employed in the construction sector. A combination of views heard from Consultation responses, stakeholder discussions and BIS research have all suggested that there is minimal concern within the construction industry around the introduction of the directive, primarily a result of the very small numbers that could be affected by it. These views justify our use of this proportion for posted workers in the construction industry in the UK. By applying the 3.2% figure to the latest available PD A1 data our pool reduces from 43,522 to 1,393 posted workers.
42. The Office for National Statistics (ONS) produces a statistical bulletin looking specifically at low pay which is derived from the Annual Survey of Hours and Earnings (ASHE). 2014 estimates²¹ show that 236,000 or 0.9% of all employees in the UK labour market are paid below the National Minimum Wage²². For the construction industry the figure is around 12,000 or **1.3%**. If we apply the construction industry proportion to our pool of posted workers in the construction industry then this implies that **18 of 1,393 posted workers are paid below the NMW.**
43. It is possible that removing the sole liability for payment of NMW from the direct employer may result in increased rates of non-compliance. By granting posted workers an additional route to recourse, some unscrupulous employers may change their behaviour. It is possible that they will see this as an opportunity to become non-compliant, withholding payment of NMW in the knowledge that should workers face difficulty trying to seek redress (from their direct employer) they may then switch their attention to the alternative option of bringing a claim against the contractor if they perceive this more likely to be successful.

²¹ <http://www.ons.gov.uk/ons/rel/ashes/low-pay/april-2014/jobs-paid-below-the-nmw-by-category---1998-to-2014.xls>

²² ASHE is a survey of employees completed by employers which we can use to look at workers earning at or below the NMW rate. This is not a complete measure of non-compliance however as there are legitimate reasons to be paid below the NMW, for example those living in accommodation provided by the employer. Results from ASHE are based on a one per cent sample of employee jobs in Pay-As-You-Earn income tax schemes from HMRC and are collected in April. Information on contractual hours and pay is collected and the hourly rate is calculated by ONS. If it is below the NMW, this will show up as non-compliance in the data.

44. The TUC in their consultation response considered that the rate of non-compliance among posted workers is likely to be more prevalent than the 0.9% rate for all employees as ASHE fails to take into account the informal economy. ONS state in their low pay statistical bulletin²³ that 'the estimates cannot be used as a measure of non-compliance with the legislation. This is because it is not always possible to determine from the survey data whether an individual is eligible for the NMW.'
45. Given this uncertainty we carry out additional sensitivity analysis in para 62 around the rate of non-compliance on posted workers to derive an upper bound whereby we assume that **all** posted workers in construction could face non-compliance of NMW. However, given the absence of any empirical data to the contrary and supported by the majority of our research findings and the consultation evidence (see paras 21-24), our best estimate remains a non-compliance rate of 1.3%.
46. It is unlikely that all these 18 posted workers will bring a claim to the employment tribunal against the contractor. They will most likely only bring a claim under this option if HMRC fails to recover their unpaid NMW from the direct employer. However there is little evidence to inform how successful HMRC will be in extracting unpaid wages from the direct employer, especially in a case where the employer is based in another EU member state²⁴. We assume that HMRC is unsuccessful in chasing the direct employers of the posted workers and therefore they **all** take their contractor to court.
47. For tribunal claims lodged on or after 6 May 2014, it is a legal requirement, (unless an exemption applies), for a claimant to have made an Early Conciliation notification to Acas. Once a notification has been made, participation may be refused by either the employee or employer. Early Conciliation encourages a facilitated discussion between employer and employee with the help of Acas staff.
48. Early conciliation is free of charge for the individual²⁵ and we assume all 18 employees will go for early conciliation. However, even if the case is not resolved at this stage, it is unlikely for all remaining cases to proceed on to employment tribunal. The latest Acas statistics on early conciliation²⁶ show that of the 60,814 cases notified between April and December 2014:
- 15% of cases are settled through Acas (equating to **3 of the 18 posted worker cases**); and

²³ http://www.ons.gov.uk/ons/dcp171778_385432.pdf

²⁴ Data suggests that in 2013 HMRC achieved 47% strike rate (found arrears) for 1455 investigations. This is because some of the 1455 cases include mis-reporting of arrears. We cannot use this estimate to say HMRC will be successful in chasing 47% of the employers who are not paying 0.9% of the employees the NMW as a) in this particular case the direct employers will be based abroad pulling down the success rate) and b) we are not comparing like to like – unlike the 1455 cases, there is a high likelihood that the 0.9% of the employees are getting paid below the NMW (pushing up the higher strike rate if we take into account low levels of mis-reporting)

²⁵ However there might be a small time costs to individuals and employers. These have not been quantified for the purpose of the IA.

²⁶ Early Conciliation Update 4: April 2014 to March 2015 <http://www.acas.org.uk/index.aspx?articleid=5352> Data taken from Table 2: Outcome of Cases Notified April - December 2014

- 22% of cases carry on to an Employment Tribunal (equating to **4 cases**).

49. If the dispute is not resolved through early conciliation then the claimant can bring the case to the Employment Tribunal. At the Employment Tribunal the employee will incur a fee and there can be a number of possible outcomes (disposal) of the case. The outcome can be a) conciliated settlement - posted worker and contractor agree settlement following continued Acas conciliation; b) withdrawn - this includes either private settlement or complete withdrawal of claim by the posted worker; c) successful at hearing - tribunal hearing awards in favour of posted worker and awards compensation; or d) other outcomes including unsuccessful at hearing, case struck out and case dismissed. According to the latest Employment Tribunal Statistics²⁷ for the whole of 2014/15²⁸, of the 167 National Minimum Wage complaints that were disposed of²⁹:

- 34% were settled (through conciliation); and
- 13% were successful (following hearing).

50. Applying these percentages to the 4 cases estimated to go to tribunal, we estimate that a maximum of **2 cases** (47% of 4) will be successful through the tribunal process. Hence, *including both claims settled through Acas* (3) and *cases successful at Employment Tribunal* (2) we have a total of **5 cases** that would **result in payment of wages** by the contractor if this option was applied to posted workers in the construction sector.

51. Based on 2014 ASHE data for those employees facing non-compliance of NMW, the mean average hourly arrears were £0.92 which equates to average annual arrears of £2,319³⁰. As previously outlined we know that the duration of a posting can be as short as 100 days. This implies the wage payment range owed by contractors is £3.2K to £11.6k³¹.

52. Note that although these payments represent a cost to the contractor, they benefit the posted workers³² in the form of re-couped wages. We assume the posted worker is resident in the UK during the entire time of employment (covering the period he or she was under paid). Hence these benefits are simply transfer payments from the contractors to the workers.

53. In addition there will be **costs to both contractors and employees of going to an Employment Tribunal**. Figures taken from the published Early Conciliation

²⁷ <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015>

²⁸ Table 2.3 Employment Tribunal - Percentage of disposals by outcome and jurisdiction, 2007/08 to Q1 2015/16.

²⁹ This includes cases that are decided upon, withdrawn and settled. We only look at one year's data to take into account post introduction of fees (fees were introduced in June 2013)

³⁰ BIS analysis of ASHE data. ASHE estimates are annual and are based on a snapshot in April.

³¹ We apportion the annual costs to represent 100 days of arrears i.e. Annual cost x 100/365. Range = £3.2k - £11.6k for 5 Posted Workers.

³² Posted workers are EU workers and might return to their country. However, for the purposes of the IA we assume they are resident in UK when the payment is made.

Impact Assessment document³³ have been updated using 2014 prices to calculate ET costs. These are estimated to be £4,047 per employer and £1,453 per employee³⁴.

54. The quantified costs to contractors and employees are summarised in the table below. Contractor costs are **all** attributable to compliant UK contractors as a result of non-compliance by the direct employers.

TABLE 2: IMPACT ON CONTRACTORS AND EMPLOYEES

Cost / Benefit	Costs to Contractors (per annum)	Benefits/Costs to Employees (per annum)
Wage payments	£3.2k to £11.6k (costs)	£3.2k to £11.6k (benefits)
ET / Acas costs	£16.2k ³⁵	£5.8k ³⁶

Non-monetised costs

55. Our preferred option foresees a due diligence defence for the contractor. However the estimates above do not take into account a scenario where the contractor is able to demonstrate it has carried out a sufficient level of due diligence. In this scenario, the contractor would not be liable for the unpaid NMW. For this reason, and as a result of the assumptions set out previously, it could be argued that these estimates represent a worse-case scenario.

56. It has not been possible to estimate the costs of due diligence as it has been difficult to ascertain the level of due diligence already being carried out under business-as-usual or indeed whether it is the 'right' level of due diligence that is required to satisfy an Employment Tribunal³⁷. Current levels of due diligence vary depending on business and contract size. Good commercial practice would be for all companies to undertake fitness checks on subcontractors prior to contract award. For example, industry guidance recommends a formal contractor pre-qualification process. This may be a short interview or perhaps a pre-qualification questionnaire (PQQ) depending on the size and complexity of the project.

57. Consultation respondents suggested that the level of due diligence undertaken is likely to vary dependent on a number of factors including organisation size,

³³ £3900 for contractors and £1400 for employees.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284042/bis-14-585-early-conciliation-impact-final.pdf

³⁴ These are median costs and include of time spent on the case, travel and communication costs and the costs of representation

³⁵ (4 x £4047)

³⁶ (4 x £1453)

³⁷ The costs of due diligence could be high depending on due diligence requirement defined in legislation or guidance. We will be using the consultation to inform what these requirements will be.

contract value and the business relationship. There were some concerns raised: unions opposed a defence of due diligence as they feel it avoids liability whilst business organisations questioned whether a high burden of due diligence could prompt firms to rationalise their supply chains, with SMEs likely to suffer the most.

58. Whilst the preferred option would likely improve the level of due diligence carried out in the sector overall, it could however have a secondary impact of changing behaviours of contractors. For example, they may be less inclined to use subcontractors employing posted workers or possibly increase “retentions”, the practice of keeping back a percentage of the sub-contractor’s payments to cover unforeseen liabilities or make greater use of indemnity clauses and warranties. Also, there might be financial implications on contractors employing posted workers through an increase in insurance requirements.

59. There would also likely be some **familiarisation costs** to represent the time taken by businesses to understand the policy changes. BIS 2014 business population estimates show that there around 150,000 construction employers in the UK although it is unlikely that many of these would have any involvement with posted workers. There is no information to tell us whereabouts in the supply chain posted workers are used and so it is difficult to produce any estimates based on business size. As we estimate only 3.2% or 1,393 posted workers are found in the construction industry, we would expect the numbers of businesses, and therefore any familiarisation costs of those affected to be negligible.

Costs to government

60. In 2014-15 there were a total of 83,423 early notification cases (April 2014 to March 2015) that went through Acas³⁸. The costs per case are estimated to be £47³⁹. Employment Tribunal costs per case are estimated to be £3,321 where the case goes to an Employment Tribunal hearing and £612 where the case outcome is an Employment Tribunal conciliated settlement⁴⁰.

61. Based on the unit cost estimates above, Acas and Employment Tribunal cost estimates to government are included in Table 3 below. We estimate 18 cases will go through early conciliation of which 4 individual cases will go on to Employment Tribunal. Of cases that go to Tribunal we estimate that 2 will result in wage payments (1 settled with 1 successful⁴¹) and assume the others are withdrawn. To calculate the impact of tribunal cases we apply the cost of £3,321 to successful cases and post conciliation settlement costs of £612 to all other

³⁸ <http://www.acas.org.uk/index.aspx?articleid=5352>

³⁹ The Final Impact Assessment on early conciliation stated the costs to be £2.8m

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284042/bis-14-585-early-conciliation-impact-final.pdf

⁴⁰ The early conciliation consultation IA has the first two figures £3,200 and £590, in table 1 page 6-7. These include judges fees salary and expense. These figures have been updated by the GDP deflator.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/52611/13-539-early-conciliation-a-consultation-on-proposals-for-implementation-impact.pdf

⁴¹ Note that 34% cases were settled (1 of 4) and 13% were successful (1 of 4). Figures are rounded to whole numbers.

cases. This is done to reflect that even the withdrawn cases will still impose some burden on government resources. Table 3 shows a total exchequer cost of £6.0k.

TABLE 3: IMPACT ON EXCHEQUER

Cost / Benefit	Total Exchequer costs (per annum)
ET / Acas costs	£6.0k ⁴²

Sensitivity analysis

62. As outlined in para 45 we look at sensitivity of the cost and benefit estimates to using a non-compliance rate of 100 per cent. This would create an upper bound for our analysis and would assume that **all** posted workers in construction (1,393) could face non-compliance of NMW. By applying the proportions in paras 48 and 49 to these posted workers we estimate that **209** cases would be settled through Acas, with **306** going on to Employment Tribunal. Of the tribunal cases we estimate that **144** would be successful (104 settled and 40 successful). This would mean that in total **353** cases would result in the payment of wages to posted workers in construction. Table 4 below shows the costs and benefits.

TABLE 4: Sensitivity analysis using 100% non-compliance rate

Cost / Benefit	Costs (per annum)	Benefits (per annum)
Wage payments	Contractors: £224k - £819k	Employees: £224k - £819k
ET / Acas costs	Contractors: £1.24m Employees: £445k Exchequer: £361k Total costs: £2.3m - £2.9m	

Costs to government of implementing other aspects of the directive

63. Article 5 of the Posted Workers Enforcement Directive requires Member States to make available information about the compulsory employment rights ('compulsory terms and conditions of employment'⁴³) which employers must comply with whilst an employee is posted there. The information must be provided free of charge, be clear, transparent, in an accessible format and in the

⁴² ((18 x £47) + (3 x £612) + (1 x £3,321))

⁴³ In the UK we understand 'terms and conditions of employment' to mean those terms agreed between an employer and employee to provide services – usually as set out in a contract of employment. This may contain terms which go beyond statutory minimum rights, such as a rate of pay above the national minimum wage. Whilst those terms and conditions which go beyond the statutory minimum are not covered by the Enforcement Directive, they are enforceable through an Employment Tribunal.

most appropriate language. This will involve creating a specific landing page (on www.gov.uk and www.nidirect.gov.uk) for posted workers, which provides clear information on employment rights and assembles the suite of government information webpage links in one place so that all the information is readily available.

64. In addition articles 6, 7 and 10 of the Directive impose costs to government from cross-border information exchange. Co-operation arrangements will be needed between the relevant UK competent authorities to meet the information exchange and inspection requirements in articles 6, 7 and 10 and the cross-border enforcement of civil penalties in Chapter 6. While the pre-existing Internal Market Information (IMI) system used to facilitate information requests between member states can be adapted to serve in this regard there are likely to be administrative costs incurred by competent authorities for responding to requests and possibly in making them. We assume that each posted worker in construction (1,393) could potentially require some level of information exchange.

65. To estimate costs of information exchange for this directive we use information taken from the current BIS single point of contact for the IMI as a proxy. This suggests that requests take on average around half an hour to be processed by an official. At an average hourly pay of £11.55⁴⁴ (£13.83⁴⁵ including non-wage labour costs) according to published ASHE data we estimate total annual administrative costs to be **£16.1k**.

National Living Wage

66. In April 2016 the Government will introduce a new mandatory Premium to the National Minimum Wage (NMW) for workers aged 25 and over. This Premium will raise their wages from the current NMW rate of £6.70 an hour to the new National Living Wage (NLW), initially set at £7.20 an hour. By 2020 2³/₄m workers are expected to benefit directly. We do not expect the introduction of the NLW to alter the behaviour of businesses with regards to their use of posted workers. Our cost estimates will remain unchanged unless the increased number of workers receiving the NLW and the increased level of payment itself result in higher rates of non-compliance of payment (from the current NMW non-compliance rate of 0.9% (1.3% for construction)) and/or an increase in the average hourly arrears (as outlined in para 51). We will monitor the existing evidence to understand the implication of the changes.

Summary of the costs

67. The summary of the quantified costs and benefits of the preferred option are presented in Table 5 below. Our preferred option within this IA does not go beyond the minimum EU requirements. There is no gold-plating. It relies on

⁴⁴ 6-Year mean average (2009-14) hourly pay (excluding overtime) for full-time employees with Standard Occupation Code 411 (Admin Occupations: Government & related Organisations).

⁴⁵ Non-wage labour costs derived by uprating hourly pay by 19.8%.

existing domestic provisions in the UK to implement the Directive except for Article 12. To implement Article 12 we apply it only to posted workers in the construction sector.

68. To calculate the net present value the costs and benefits are discounted over a period of 10 years using a discount rate of 3.5% (as per Green Book guidance)⁴⁶.

⁴⁶ <https://www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-government>

TABLE 5: SUMMARY OF QUANTIFIED COSTS AND BENEFITS

Option – Article 12 applied to posted workers in construction plus information exchange costs from other Articles

<i>Options</i>	<i>Costs</i>	<i>Benefits</i>	<i>Net Present Value (PV Benefits-PV Costs)</i>
<p><u>Preferred Option</u></p> <ul style="list-style-type: none"> • Implement Article 12 via creation of Individual Right • Information exchange from Articles 5, 6, 7 and 10. 	<p>Contractors: £19.4k to £27.8k (p.a.) Exchequer: £22.1k (p.a.) Employees: £5.8k (p.a.) Total costs: £47.3k to £55.7(p.a.) Present Value Costs: £440k to £519k</p>	<p>Employees: £3.2k to £11.6k (p.a.) Present Value Benefits: £30k to £108k</p>	<p>-£411k</p>

F. FUTURE ENFORCEMENT

69. Article 20 requires Member States to set out the penalties and fines which relate to the measures in the Enforcement Directive, and the Commission must be notified of these by 18 June 2015 which is the deadline for transposing the Directive. The UK will set out the applicable penalties as listed in Annex B.

G. MONITORING AND EVALUATION

70. Article 24 sets out the terms under which the Commission will review the implementation of the Enforcement Directive and criteria to measure its effectiveness. The review will take place no later than 18 June 2019.

H. RISK SECTION

71. There is a risk that the EU Commission may bring infraction proceedings against the UK if it decides that the UK has not implemented the Directive correctly or on time. These proceedings can be combined with fine proceedings if the UK fails to implement at all by the 18 June 2016 transposition date.

72. We will also want to ensure that the UK's Competent Authorities are able to meet the requirements for mutual assistance from other Member States and co-operate and take enforcement action where an employer has breached the rights of a posted worker whilst they are working in the UK. We have set up a cross-government working group to ensure that joint working protocols are in place to deal with complex queries and that the right authorities are responsible for handling and co-ordinating responses to requests related to the recovery of financial penalties. This is an administrative measure.

I. SMALL AND MICRO BUSINESS ASSESSMENT

73. As the policy proposal is European in origin, does not go beyond the EU minimum and does not represent gold-plating we have not provided a SaMBA.

J. FAMILY TEST

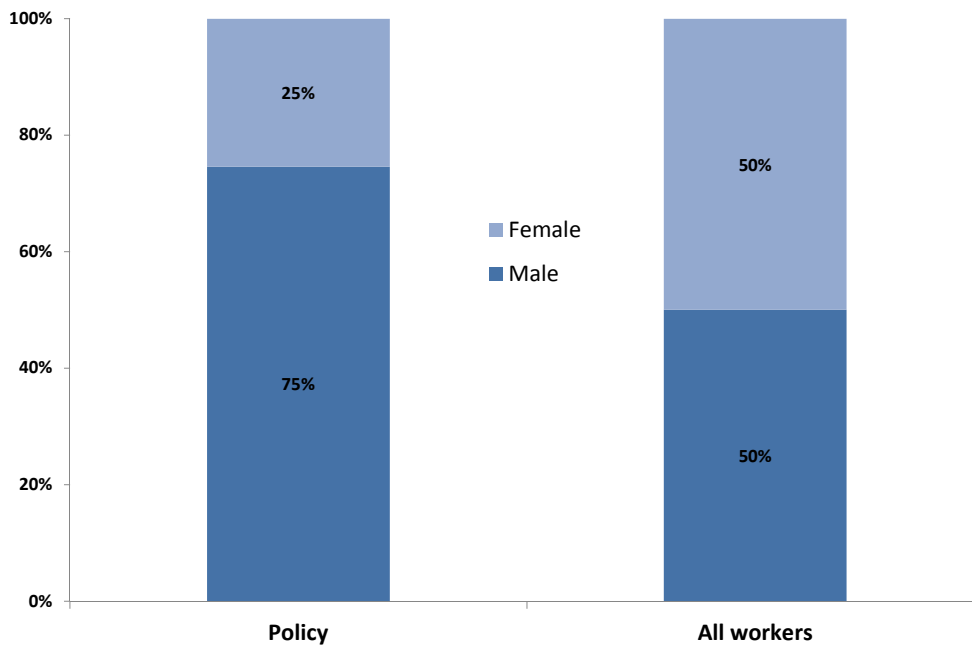
74. Data shows that posted workers are likely to be aged between 25 and 40 and Article 12 will help enforce posted workers' rights through an entitlement to make a claim against a contractor for payment of NMW. This will have a positive impact on families of these workers. Conversely, it could be argued that contractors will be less keen to hire posted workers because of the potential liability, which can have a negative impact on the workers future income. Labour Force Survey (LFS) data is not robust enough due to sample size issues to analyse in more detail at the sector level.

K. EQUALITIES ANALYSIS

75. The analysis in this section looks at the proportion of posted workers broken down by protected group compared against the proportion of workers in each protected group in the labour market. Data limitations impact on our ability to examine the majority of the protected groups with the exception of age and gender. We have used the LFS¹ to look at the protected characteristics, however, attempting to use LFS data to identify those impacted by this measure has limitations. We are unable to reliably analyse the data into sub-categories with the exception of age and gender due to the small sample sizes and so Charts 1 and 2 look at all posted workers and not just those posted workers in construction.

Gender

Chart 1: Proportion of workers impacted by gender

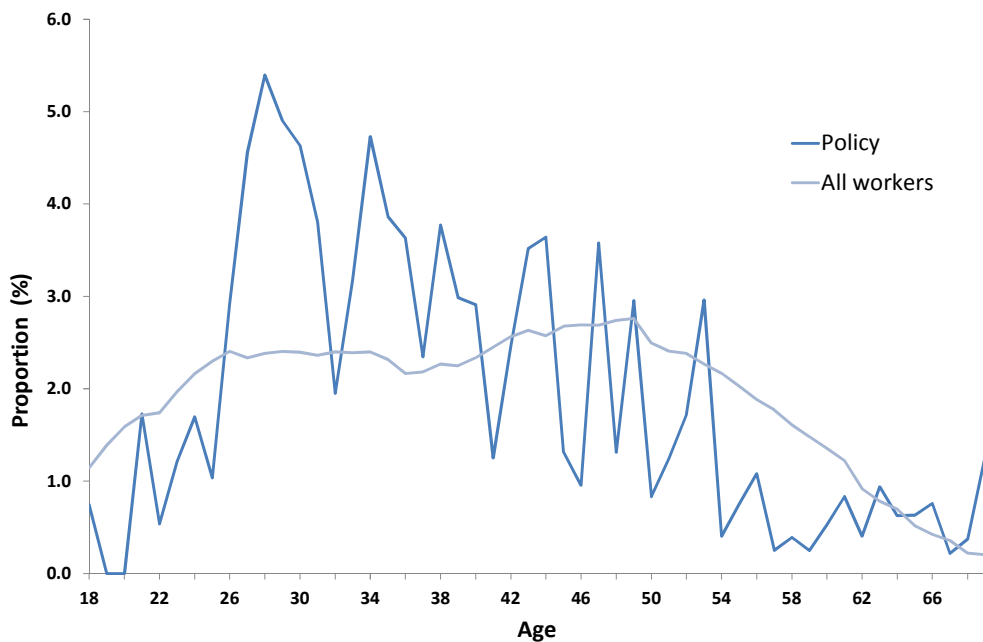


76. Chart 1 illustrates the proportions of posted workers in the UK affected by this policy by gender (using 2008 Labour Force Survey data) compared to all UK workers. It indicates within the UK there were three times as many male posted workers as female posted workers. Note that the chart refers to all posted workers and not just those in construction as the small sample size prevents us from looking at the characteristics of this group.

¹ Using 2008 Apr-Jun LFS data.

Age

Chart 2: Proportion of workers impacted by age



77. Chart 2 illustrates the age distribution of all posted workers relative to all UK workers. Whilst highlighting the data quality issues it appears to show that those aged 25-40 make up a larger proportion of posted workers compared to the distribution for all workers.

Other Data

78. The small sample sizes obtained via the Labour Force Survey data mean that it is not possible to produce any robust information on the following: race, religion, disability and marriage and civil partnership.

Other protected characteristics

79. There is little data published on both gender reassignment or sexual orientation. Separate papers published by the Office for National Statistics (ONS)² acknowledged the information gap and tried to suggest ways forward. On gender reassignment, ONS scoping work suggested the use of a combination of attitude surveys, administrative data and specialist surveys to more adequately fulfil user requirements.

80. Data published in a report by the Gender Identity Research and Education Society (GIREs)³ in 2009 estimated that there may be between 300,000 and 500,000 people who experience some degree of gender variance. By 2010 the number of people estimated to have presented for transition treatment was 12,500 and thought to be growing at a rate of 11% per annum. The median age for treatment was 42.

² <http://www.ons.gov.uk/ons/guide-method/measuring-equality/equality/equality-data-review/trans-data-position-paper.pdf>

³ <http://www.gires.org.uk/assets/Research-Assets/Prevalence2011.pdf>

81. ONS' paper, which considered inclusion of a sexual orientation question for the 2011 Census⁴ used a figure of 5-7% of the population which Stonewall⁵ felt was a reasonable estimate. The absence of robust data for these two characteristics means that we are unable to establish whether there are any disproportionate impacts on these groups.

⁴ <http://www.ons.gov.uk/ons/guide-method/measuring-equality/equality/sexual-identity-project/2011-census-consultation--background-information-on-sexual-identity.pdf>

⁵ <http://www.stonewall.org.uk/> - The lesbian, gay and bisexual charity.

ANNEX A: Questions asked during consultation

QUESTION 1:

- 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 2:

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 3:

Is there any evidence on the duration of postings?

QUESTION 4:

- 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 5:

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

- a. *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?*
- 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 6:

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 7:

- 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 8:

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

QUESTION 9:

- 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 10:

- 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 11:

- 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 12:

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

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	Working Time Regulations 1998 (WTR) Working Time Regulations (Northern Ireland) 1998 soon to be (2015) (WTRNI)	Directive 2003/88/EC	Employment Tribunal Health and Safety Executive, Office of the Rail Regulator, Driver and Vehicle Standards Agency, GLA Industrial Tribunal and Fair Employment Tribunal hearings - Northern Ireland (NI) Health and Safety Executive (Northern Ireland) District Councils Civil Aviation Authority Department of the Environment	HSE
Minimum paid annual holidays	WTR (WTRNI)		Employment Tribunal GLA Industrial Tribunal and Fair Employment Tribunal hearings (NI)	BIS
Minimum rates of pay	National Minimum Wage Act 1998 Social Security Administration Act 1992 Social Security Administration (Northern Ireland) Act 1992	Regulation 883/2004 and 987/2009 on the coordination of Social Security systems,	HMRC, Employment Tribunal, or County court GLA Industrial Tribunal and Fair Employment Tribunal (NI)	HMRC

Compulsory condition	UK Legislation in which it is contained	EU legislation on which UK legislation is based	Enforcement	Competent Authority
Conditions on hiring out of workers	<p>Employment Agencies Act 1973, The Conduct of Employment Agencies and Employment Businesses Regulations 2003 and the Agency Workers Regulations 2010</p> <p>Section 27 of the Gangmasters (Licensing) Act 2004 [which disapplied the Employment Agencies Act 1973];</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</p>		<p>Employment Tribunal</p> <p>HMRC on National Minimum Wage</p> <p>EAS on breaches of the Employment Agencies legislation;</p> <p>EAI on breaches of the 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>	<p>BIS</p> <p>DEL</p> <p>Home Office (GLA)</p>

Compulsory condition	UK Legislation in which it is contained	EU legislation on which UK legislation is based	Enforcement	Competent Authority
	Regulations (Northern Ireland) 2005 (as amended in 2008 and 2010) The Agency Workers Regulations (Northern Ireland) 2011			
Health, safety and hygiene at work	Health and Safety at Work Act 1974		GLA	HSE
Protections for pregnant women, maternity and paternity leave, time off for ante-natal appointments, parental leave, shared parental leave right to request flexible working	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	European Communities Act 1972, Directive 92/85/EC (pregnant workers)	Employment Tribunal GLA Industrial Tribunal and Fair Employment Tribunal (NI)	GEO

Compulsory condition	UK Legislation in which it is contained	EU legislation on which UK legislation is based	Enforcement	Competent Authority
	and maternity Sex Discrimination (Northern Ireland) Order 1976			
Protections for children under 16 and young people under 18 at work	WTR 1998 (for young people) (WTRNI)(for young people)	Directive 94/33/EC (for young people)	GLA Industrial Tribunal and Fair Employment Tribunal (NI)	
Protection for Whistleblowers	Public Interest Disclosure Act 1998 Public interest Disclosure (Northern Ireland) Order 1998		Employment Tribunal Industrial Tribunal and Fair Employment Tribunal (NI)	
Non-discrimination, equal opportunities, equal treatment of those with protected characteristics in relation to employment	Equality Act 2010 and Equality Act 2006 Disability Discrimination Act 1995 Sex Discrimination (Northern Ireland) Order 1976 The Race Relations (Northern Ireland) Order 1997 The Fair Employment and Treatment (Northern Ireland) Order 1998 Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003	Directive 2000/78/EC; and 2006/54/EC and 2000/78/EC The Equal treatment Directive 2006/54/EC, The Employment Equality Framework Directive 2000.78.EC, the Racial Equality Directive 2000/43/EC	Employment Tribunal Equalities and Human Rights Commission Industrial Tribunal and Fair Employment Tribunal (NI) Equality Commission (NI)	GEO EHRC (has enforcement powers for the Equality Act 2010)

Compulsory condition	UK Legislation in which it is contained	EU legislation on which UK legislation is based	Enforcement	Competent Authority
	The Employment Equality (Age) Regulations (Northern Ireland) 2006			