

**AGENCY WORKERS DIRECTIVE
CONSULTATION**

Summary of responses to
consultation

OCTOBER 2009

This document, which complements the Consultation on the draft Regulations, published on 15 October 2009, provides further details on responses to the previous consultation which closed on 31 July 2009. It comprises:

- A. Statistical breakdown of responses
- B. Summary of written responses
- C. Alphabetical list of respondents

We were very grateful to everyone who replied to the previous consultation, which provided many insights on the practical implications of the Directive. Whilst it is clearly not possible to quote from every response, we hope this document provides an informative summary of the many views submitted by a wide cross section of stakeholders. Also, many respondents requested that their replies be treated as confidential, and accordingly have not been directly quoted.

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A. Statistical breakdown of responses received by category of respondent:

Business representative	13
Central Government	12
Charity or social enterprise	3
Individual	32
Large business (over 250 staff)	49
Legal	10
Local government	25
Medium business (50 to 250 staff)	43
Micro business (up to 9 staff)	27
Other	20
Small business (10 to 49 staff)	36
Trade union or staff association	34

B. Summary of written responses

1. Scope of the Directive - who is covered

Proposals that implementation should cover agency workers placed on temporary assignments by “employment businesses” but not those placed by “employment agencies”

Question 1: Do you agree that implementation should cover workers placed on temporary assignments by employment business but not those placed permanently by employment agencies?

71% of respondents agreed and 21% disagreed; 8% did not express a view or were unclear

1.1 There was widespread agreement on the proposal that implementation should cover workers placed on temporary assignments by “employment businesses”, who have a contractual relationship with the hirer, as opposed to “employment agencies”.

1.2 The **TUC** and other unions supported the approach on this point, but wanted the existing statutory definition of an “employment business” revised to ensure any future regulations work effectively where contracts for the supply of workers have been contracted out through a chain of agencies. A small number of respondents, including **UCATT** expressed more general reservations about the proposed approach in this area on the basis that it would be appropriate for people posted by some “employment agencies” to come within the Regulations’ scope. **UNITE** stressed that in order to avoid loopholes being exploited, there should be no exclusions from the scope of the Regulations: those who fall within scope but who are not vulnerable and who do not need their protection will simply not use them.

1.3 The **CBI** and other business organisations tended to support the proposed approach, stressing the need to craft definitions of “agency workers” and “temporary work agency” that remove from coverage the genuinely self-employed and those working under the supervision and direction of other firms . The **Association of Recruitment Consultancies (ARC)** agreed with our proposal, adding that temporary agency workers are defined as work seekers in the Conduct of Employment Agencies and Employment Business Regulations 2003, and that employment businesses are qualified as providing “work finding services “ for work seekers. It is important that a similar qualification limiting scope to those that provide “work finding services” is included within the Agency Workers Directive Regulations if normal employers

not providing work finding services, but who may “second” regular employees, are to be out of scope as the Directive clearly intends.

1.4 The **Association of Professional Staffing Companies (APSCo)** stressed that careful consideration needed to be taken in defining which temporary assignments are covered so as not to damage the flexibility of the temporary workforce, which will be key to helping the UK recover from recession once economic conditions start to improve.

Definition of “worker”

Question 2 asked : Do you consider that using a definition for agency workers based on that of a worker under Regulation 2 of the Working Time Regulations 1988, but amended to reflect the triangular relationship between worker, employment business and hirer, provides the most appropriate approach?

70 % of respondents agreed and 18% disagreed; 12 % did not express a view or were unclear.

1.5 Views differed on our proposal to base the definition of agency workers on that of a “worker” under Regulation 2 of the Working Time Regulations 1988,, adapted to take account of the triangular relationship between worker, employment business and hirer.

1.6 The **TUC**, and other unions generally, said that the existing definition of worker in the Working Time Regulations and the Employment Relations Act 1996 should not be used. They argued that such an approach risked leaving the door open to unscrupulous agencies coercing workers into accepting ‘false’ self-employment or managed service contract terms in order to evade the scope of the regulations. Others, such as **Equality South-West**, particularly highlighted the issue of false self-employment, especially in the construction sector. preferred the definition of a “worker” contained in the Sex Discrimination Act (section 9) to be used as the basis for the definition. Some legal contributors shared this view, but their preferred solution was a novel definition, as wide in scope as possible, based on the definition of worker in the Directive.

1.7 Another group of respondents, including **Resource Solutions Group plc**, argued that a distinction should be made on the basis of income – our implementing Regulations should target only those earning relatively low amounts who were more vulnerable. **Active Solutions Ltd** also thought a novel definitional approach was needed on the basis that the term ‘worker’ had been used in too many different legislative circumstances and has caused confusion for businesses

1.8 **The CBI** and **REC** agreed with the proposed approach. **Small businesses** organisations, the **Institute of Directors** and the **Engineering**

Employers Federation similarly said the definition used in the WTR is familiar to employers and should offer sufficient clarity. Agencies such as **Adecco** and **REED** added that hirers engage people under various contractual arrangements - our regulations should allow for a situation in which some would come within scope and some would not.

1.9 There was similarly general agreement from public sector respondents, such as **Local Government Employers**, and **National Health Service Professionals**.

Proposed inclusion of Umbrella companies

Question 3: should the definition include those agency workers working through an umbrella company, but who find work via an employment business?

54% of respondents agreed and 32% disagreed ; 14% did not express a view or were unclear

1.10 There was general agreement from **Unions** on the inclusion of agency workers working through an “umbrella company”, but who find work via an employment business.

1.11 This view was not shared by business and agency respondents. The **CBI** were opposed to the inclusion of umbrella companies on the grounds that it would deter the use of perfectly legitimate contractual arrangements. **REC** expressed difficulties with the format of umbrella company fitting in with the terms of the Directive as this appears to only deal with the triangular relationship between worker, agency and client. **APSCo** disagreed also, pointing out that whilst a few minority of umbrella companies adverted themselves as “tax avoidance”, the vast majority are compliant operators offering a valued service to their customers; it was **APSCo’s** firm belief that the Directive should not be used as a means for cracking down on such rogue businesses. The **ARC** said that there is no need further define a worker beyond s.230 (3) Employment Rights Act 1996 (ERA 1996) as a person employed by an umbrella company would be such a worker; any further attempt to define could be counter-productive.

1.12 The **IoD** did not believe that those working though an umbrella company should be covered as the presumption should be that those working in such a way are entitled to a conventional employee’s rights as they are employees of the umbrella company.

1.13 This was not the universal employer and agency view, however. An **agency** that asked not to be identified said that the fact that individuals whose services are supplied through umbrella companies are generally engaged by the umbrella company as an employee meant there was no legal or practical reason why they should be excluded from the definition. If individuals who work through umbrella companies were excluded, this respondent argued, it

would encourage a move towards this arrangement as a means to bypass the regulations. Similarly, **PreterLex Ltd** expressed concern that many workers were forced into umbrella company arrangements to save paying extra tax when they would rather be self-employed. And the **London Borough of Camden** indicated that they would support the inclusion of those agency workers who worked through an umbrella company but only if they were treated in the same way as agency temps so as not to give them an advantage over such agency workers.

1.14 There was also some comment from **legal** respondents regarding the need to frame any definition of umbrella company arrangements carefully so as to avoid unintended consequences.

Proposed exclusion of self-employed, Limited Company Contractors and those working on managed service contracts.

Question 4: Should the definition exclude the self-employed, Limited Company Contractors and those working on managed service contracts?

63% of respondents agreed and 25% disagreed; 12% did not express a view or were unclear

1.15 The **TUC** disagreed with this proposal, wanting to see the scope of the regulations drawn as widely as possible. They argued that all the above groups should be included to avoid scope for possible circumvention of the regulations, including where an agency places an agency manager in a workplace to oversee the work of a team of agency workers. **UNITE** added that all these forms of classification are currently being used in the construction sector to get round employment legislation; more generally the implementation of the Directive would be a good opportunity to tackle loopholes and end the practice of bogus self-employment for agency workers.

1.16 Business and agency respondents took the opposite view, supporting the proposed approach. **CBI, REC,** and the **IoD** argued that it would be detrimental to the temporary workforce and to the wider economy to include these categories within scope. They also stressed the need for absolute clarity – blurring of existing lines on these issues could lead to a damaging lack of certainty as to which workers were and were not subject to equal treatment after 12 weeks.

1.17 **Apsco** members supported the exclusion but were concerned that limited company workers contractors and self-employed workers could fall within the definition of “agency worker”(as proposed), or if the exclusion is based on a subjective assessment of self-employment or worker status (such as whether an individual is “controlled” by the end user or whether the individual agrees to provide services personally). In addressing such

uncertainty, **APSCo** proposed criteria for a “payment floor” test: an objective “test” not relying on an assessment of employment status but based on objective criteria used to deem when a worker’s income is treated as employment income (as in the HM Treasury and HMRC consultation on “False self-employment in construction: taxation of workers” ; the Government’s position in this case being consistent with **APSCo’s** concerns regarding avoidance relying on subjective and therefore uncertain tests defining the scope of the Directive. As the rationale behind the Directive is protect vulnerable workers, a “payment floor” approach would provide a useful mechanism for determining whether a temporary worker should be protected by the Directive. The payment floor would be a multiple of three times the National Minimum Wage £17.40 per hour per assignment at 2009 levels (ie £33,930 per annum for working a 37.5 hours a week).

1.18 The **Professional Contractors Group** fully agreed with the proposed exclusion, stressing that the freelancers it represents are Limited Company Contractors; the “in business” test proposed in the definition drawing the correct dividing line between who should or should not be in scope. Ideally freelancers using Umbrella structures should also be exempted in some way, although the PCG recognised that this could be difficult in practice, and that it may be simpler to exempt Limited Company Contractors alone.

1.19 The **ARC** also disagreed, saying there was no need to further define a worker beyond s230 ERA 1996. Workers who are working through their own limited company or through a Managed Service Company should be eligible for exclusion provided their self employed status is conclusive; reference to ss44-47 and s61A-1 of the Income Tax (Earnings and Pensions) Act 2003 would be appropriate in this context.

1.20 A **legal respondent** said that all three groups should be excluded as they have significant practical value for the flexibility of the work force and have clear equality of bargaining power. **REED** added that care would need to be taken to ensure that these groups are clearly excluded from the definition of “temporary agency worker” as there will be circumstances in which they will be working under the control of the hirer. Another **agency** said that individuals whose services are supplied through the vehicle of their own limited company have chosen to run a business. They are not recognised as workers under national law and are not in any sense in need of protection. More fundamentally, because of the nature of their business undertakings, the test of equal treatment as set out in the Directive cannot be applied in any meaningful way – the individual could not have been ‘recruited’ by the hirer to fill the same job as the concept of recruitment to fill a post is not relevant to the engagement of a contractor.

1.21 **Local Government Employers** said **Local Authorities** also generally supported the view that these categories should be excluded. They argued that such people often work in different roles, under different management systems at different levels of pay when compared to temporary agency workers. However, some did say that they could see the case for setting a minimum level of pay, below which there would be a presumption that a

worker was not working on a genuine self-employed basis, unless proven otherwise by the agency and the hirer.

1.22 The **Electrical Industry Association** wanted to see the **construction industry specifically excluded** from the scope of the regulations in the short term due to the issues with false self employment and employment status.

2. Defining “equal treatment”

Working Time and Holiday Entitlements

Proposal that after 12 weeks on a given assignment, an agency worker should be entitled to the same working time and holiday entitlements in excess of statutory minima, but allowing possibility of payment in lieu (of the additional, non-statutory element only).

Question 6: Do you agree with our proposed approach to implementation of the Directive’s requirements in respect of working time and holiday entitlements?

43% of respondents agreed and 39% disagreed; 18 % did not express a view or were unclear

Question 7: In particular, do you see benefit in our suggested approach to simplifying the administration of entitlement to leave entitlements above the statutory minimum?

40% of respondents agreed and 39% disagreed; 21% did not specify a view or were unclear

2.1 All **unions** concurred with the view of the **TUC** that there should be equality of paid holiday entitlement, but opposed the proposal that any payment in lieu be permitted - it should be the ‘right to take holiday’. They also argued that the 12 week qualifying period should be included in the calculation of holiday entitlement, and that regulations should prevent agency workers from being required to work on a bank holiday when directly employed staff are entitled to take leave.

2.2 For businesses, the **CBI** wanted the statutory minimum holiday entitlement to suffice for the Directive’s purposes: varying holiday entitlements would impose significant complexity and administrative burdens. They argued that most firms offer extra leave to recruit and reward long term employees, and that any minimum level of holiday benefit foregone would be more than made up for by that entailed by increased work availability as the workers would be more competitive.

2.3 Other trade and business organisations like **British Chambers of Commerce**, the **British Retail Consortium**, **Engineering Employers Federation**, **Federation of Small Businesses** and the **Institute of Directors** agreed. The **Heating and Ventilation Association** saw a real risk in permanent employees’ holiday entitlement being reduced if the proposals went ahead. The **EEF** felt that if extra holiday pay must be paid, it should be included in the hourly rate.

2.4 Nevertheless, some employers organisations agreed broadly with our approach. The **North East Chamber of Commerce, SE Employers** and **NHS Professionals** were content, but felt it essential that the hirer did not add their percentage fee to any payment in lieu; they also wanted the legislation to make it clear that past agency service with the same employer prior to AWD implementation would not count in terms of comparability on holiday entitlement. The **Partnership of Public Employers** accepted our proposed approach, but said that the cost implications could be significant and that the administration and monitoring of leave entitlements needed to be made clear.

2.5 Some **larger employers** like **Coca Cola** and **BP** agreed with the proposal, but most were not in favour of payment in lieu at the end of an assignment, which would be unfair on permanent employees who did not have this option. Another **multinational company**, which asked not to be identified, agreed in principle, but felt it could create significant administrative burden costs, and wondered, like others, whether leave entitlement would be accrued from week 13 or week 1. **Marks and Spencer** thought that extra holiday entitlement was a retention issue, and therefore a matter only relevant to permanent employees. **IBM** said that holiday not taken by permanent employees was not paid for - so why should temps get this entitlement?

2.6 **REC**, and agencies generally, stated that the cost of administering the additional holiday pay could be more than the actual payment itself. **Reed** also said that extra holiday pay was linked with recruitment and retention policies, and did not agree with the proposal to allow payment in lieu at the end of the assignment. **Another agency** did not feel that the Directive entitled workers to paid holiday above the statutory minimum. If it is necessary to provide equal treatment in respect of paid holidays, this respondent considered it important that the regulations allow the employment business to do so by increasing the % rate at which workers accrue holiday entitlement under the established system. The **ARC** disagreed with the proposals, saying they do beyond the requirements of the Directive .

2.7 **Local Government Employers** generally agreed with our approach, but members were worried about the costs and therefore wished annual leave entitlement to remain at 28 days. Past service with an Authority should not be counted, but they consider that the leave must be taken as leave and not payment in lieu. **East Riding Council** thought payment in lieu would lead to greater administrative burdens, particularly if they had to monitor the holiday entitlement of agency workers.

2.8 **Legal respondents** saw a potential anomaly if pay was rolled up and the agency worker was subsequently recruited permanently by the hirer. One said that there could possibly be a windfall payment for the agency worker who got paid for holiday and then went to work permanently for the hirer. **DLA Piper** thought that agency workers were often paid more than permanent staff anyway and if their pay was further enhanced this could give rise to claims from permanent employees for an uplift

Definition of “Pay”

Question 9: Do you agree with our proposed approach to the definition of pay for the purposes of the Directive?

48% of respondents agreed and 31% disagreed; 21% did not express a view or were unclear

2.9 The **TUC**, like all individual unions, believed that in line with other equal treatment legislation, agency workers should be entitled to the same ‘pay’ as permanent workers. This should be broadly defined to include basic pay, bonuses, performance related pay, overtime and unsocial hours, and redundancy and maternity pay, paternity and adoption pay, especially as some agency workers are engaged for many years at a workplace. The only exceptions that should be permitted were occupational pensions and occupational sick pay, consistent with the CBI-TUC agreement.

2.10 The **CBI**, on the other hand, believed that pay should be defined as the basic hourly wage only. They also stressed that the TUC-CBI agreement excluded occupation and social security schemes from the regulations, and that it should also be made clear that this definition also included personal pension schemes. There must be a simple approach that will be understood and followed by business, which meant that all pay related bonus schemes including piece work bonuses, shift work and overtime must be excluded. Whilst some, like piece work bonuses might appear to be easy to define, it was argued that they have no statutory definition, with legislation in this area thus risking the creation of legal grey areas and, as a result, increased complexity and numbers of ET claims. They argued that most reward schemes are there to foster the long-term employment relationship and therefore should be excluded; any other approach would in practice mean agency workers losing out and gaining less work as the rates would be uncompetitive. Many employers’ organisations agreed with this analysis, including **FSB**, the **Universities and Colleges Employers Association**, **IoD**, and **BCC**.

2.11 Not all employers’ organisations took this view however. One (asking not to be identified) agreed that contractual entitlements directly linked to an assignment such as overtime and unsocial hours premiums should be considered, but were against company bonus schemes being included as they were part of an ongoing employment relationship. **North East Chamber of Commerce** thought short-term bonuses should also be included, and **SE Employers** thought that all contractual allowances should come within scope. **NHS Professionals** and the **Association of Colleges** took a similar line.

2.12 **REC** broadly agreed with CBI view; the definition of pay should be limited to a basic hourly rate. They were against bonus pay being included in pay for agency workers, because it may blur the distinction between an

agency worker and an employee. They also argued it was in practice too difficult to draw a distinction between bonuses based on output and those based on individual performance. Even the inclusion of piece rate bonuses could be complex as they may be calculated retrospectively and vary on a daily basis, depending on the work on the production line. They argued that if the definition of pay was extended too far, or if it was unclear which bonuses were included, there was a danger that this could result in the removal of such bonuses from all staff as they would simply be too difficult to operate for a transient temporary workforce. **APSCO** also called for basic hourly rate only, stressing the consistency of its approach with its “payment floor” proposal (above). **ARC** said that the Government is right to highlight the relevance of the nature of employees’ long-term relationship as being a key distinguishing factor.

2.13 **Reed** employment thought that any unsocial hours payments should be reflected in hourly rate. Another **agency** sought clarification of T&S for lorry drivers; another drew attention to possible problems with any requirement on hirers to divulge commercial information of this kind. Another thought this risked making agency staff unviable financially and reducing the incentive for agency staff to obtain permanent employment.

2.14 Other agencies’ comments included that agency workers should only be entitled to receive a bonus on the same terms and under the same criteria as apply to those in the permanent workforce, i.e. if it is a requirement that a permanent employee has to complete a probationary period and be employed for the whole period over which performance is reviewed then this should be the same for an agency worker. And there was a general desire amongst Agency respondents for a clear, exhaustive list of those elements of pay that would come within scope.

2.15 Comments from **individual employers** generally agreed with the CBI view that variable elements of pay should not be included. There was a widespread preference for basic pay only, though with a fair degree of understanding that shift allowances or unsocial hours payments might come within scope (unless they were already reflected in an enhanced temp rate).

2.16 One company supported the idea of unsocial hours payments and thought that for simplicity BIS should clearly outline the components of basic pay and place a provision that any pay component not mentioned and excluded. Not doing so would, in their opinion lead to vexatious claims. **Marks and Spencer** were also concerned that agency staff, who already get an enhanced hourly rate to reflect short term assignments could be seen to have better pay rates than permanent staff.

2.17 A **large manufacturer** thought that where pay bands were in place legislation should be provided for the hiring company to exercise discretion as to where to place an agency worker on a scale. **Coca Cola** did not wish to see bonus payments included. **Price Waterhouse Coopers** thought that clarification was needed about different types of bonus arrangements and also pointed out that agency workers could be carrying out a number of

different roles in the 12 week period making it difficult to define what the appropriate pay level is for the period. One **multinational company** wanted certainty that individual/team awards were excluded and further guidance on sales and incentive plans and payments that they could in principle accept.

2.18 **Local Authorities** such as the **London Borough of Camden** and **Local Government Employers** agreed that contractual entitlements directly linked to work undertaken should be included. In their opinion this would include shift allowances, holiday etc, but not company car allowances or sick pay. They could not see how agency workers not subject to an annual appraisal could be included in performance pay and they were worried that this could increase the risk of an employment relationship being formed between workers and hirer.

2.19 **Devon County Council** did not think shift pay should be included and said that the Directive needed to be clear whether it is referring to pay band or salary. **Leeds City Council** mentioned salary sacrifice schemes. Local Authorities generally requested a full list of what would be included and what would not.

2.20 The **Law Society** thought that the definition of pay should be made with reference to s27 of the Employment Rights Act 1996 which lists the types of sums payable to a worker in connection with their employment. Deviation could lead to more claims.

2.21 Amongst other **legal respondents**, one law firm thought that the approach taken to distinguish between benefits that reflect the long-term nature of a permanent employment relationship and benefits that relate to the work undertaken could be difficult to distinguish in practice and could lead to litigation. However, Another law firm agreed with our general approach, proposing as a refinement a provision requiring any difference in treatment of an agency worker to be objectively justified and, taken as a whole, to amount to at least as favourable treatment as that provided to a permanent employee.

Defining the 12 week qualifying period

Question 12: do you agree that the 12 week qualifying period should simply be 12 calendar weeks, no matter the number of hours or days worked during that period?

58% of respondents agreed and 20% disagreed; 22% did not express a view or were unclear.

2.23 Almost all respondents agreed with the proposal that 12 weeks should be 12 calendar weeks no matter the number of hours or days worked during that period. **TUC** were concerned that any suggestion that the 12 week period should be differentiated according to the amount of work or hours worked by an agency worker in any given week would mean it would take longer to

qualify for equal treatment rights. They argued this would also be indirectly discriminatory on ground of sex or race, and would also add unnecessary complexity to the administration of equal treatment rights. Although they felt that a 12 week qualifying period was not justified, **UNITE** felt that a 12 week period should include all training and other periods at the workplace, and that equal treatment rights should be backdated to day one of the assignment

2.24 The **CBI** also felt that our proposal was the best way of avoiding administrative complexity, with employers and agencies working to a common standard rather than different qualifying periods for each individual. It would also help prevent disagreements leading to Employment Tribunal claims, and reduce the risk of disadvantage to agency workers who work part time.

Breaks between assignments

Question 13: Do you agree that there should be a minimum break between assignments before the 12 week clock should start again rather than a reference period?

59% of respondents agreed and 20 % disagreed; 21% did not express a view or were unclear.

Question 14: Do you agree with the approach we have outlined to the question of whether a change in responsibilities entails the commencement of a new assignment?

47% of respondents agreed and 25% disagreed; 27% did not express a view or were unclear.

2.25 **Trades Unions** and employees representatives generally preferred a "reference period" approach to this issue; **UNITE** called for this to be six years. The **TUC** said that use of a reference period would offer greater protection for agency workers, who are more likely to qualify for equal treatment under such an approach. They also said this would satisfy the requirement of Article 5(5) of the Directive for sufficient anti-avoidance measures.

2.26 They did not accept arguments that a 'minimum break' approach would place less of an administrative burden on hirers; the effectiveness of the legislation should not be diluted for these reasons and it would not be difficult for agencies and hirers to create necessary monitoring systems to implement a reference period system. The TUC believed that a minimum reference period should be set at **two years**, with all work for a hirer counting towards it, regardless of changes in role. **UNITE** stressed that an "assignment" should relate to the period during which a triangular relationship exists; it does have to be and neither should it be related to activities undertaken, which would provide opportunities for circumvention of claims for equal treatment by moving workers into different roles.

2.27 The **CBI**, in contrast, supported a minimum break approach, arguing that this should be set at four weeks – in line with the trial period and bridges in continuity period on section 138 of the Employment Rights Act 1996. They argued this approach would be strongly based in existing law, and that no business could afford to manage their resources deliberately so as to avoid the regulations by hiring individuals on a “twelve weeks on, four weeks off” model as it would require a high degree of administrative effort, such that any benefits would be more than outweighed by the costs.

2.28 The CBI also called for a “nuanced approach”, with the break period being shorter for very short-term assignments (such as driving or social care), and the qualifying period beginning again if the agency workers moves roles (and is therefore no longer working in “the same job”) or the assignment is terminated by the agency. These views were broadly echoed by employers generally.

2.29 **REC** supported a break period, rather than a reference period, and felt that four weeks, or the length of assignment, whichever is shorter, would be quite sufficient. It would be highly unlikely that a hirer would break a worker’s assignment for as long as four weeks and then re-hire them simply as an avoidance measure. REC believed that four weeks would create the right balance between protecting temporary workers in that it allows them to take some accrued annual leave without losing the protection of the Directive, and protecting agencies and hirers by giving them a practical and workable administrative solution. **Adecco** said that a break between two assignments of a period less than four weeks should not break “continuity”, meaning that the vast majority of breaks occasioned by an agency worker taking annual leave will not trigger a requirement that “qualification” must begin again should the workers return to the assignment. The **ARC** said there should be a defined break, matching the break of continuous employment under ss.210-212 ERA 1996, namely at least one week.

2.30 The **British Chambers of Commerce** said four weeks is long enough to constitute a true break and should be acceptable to all parties; the **IoD** believed their needed to be a minimum break between assignments as an anti-avoidance measure, and proposed four weeks.

2.31 The **EEF**, however, felt that four week period would be too long, and considered that a period of up to two weeks as the most likely reason for an agency workers’ assignment being interrupted for a short period will be to allow the agency worker to take some holiday. This seemed to be reasonable period, as in the **EEF’s** experience, many employers place restrictions on their own employees taking more than two weeks’ consecutive annual leave. **EEF** members also felt that in many circumstances, agency workers are likely to need to get their skills in a particular job back up to speed after a three or four week break. The **EEF** also felt that having a period of as long as four weeks could lead to some strange results with some agency workers being able to qualify for equal treatment even though they only reach the 12 week qualifying period over a year after they first started their assignment.

2.32 **Local Government Employers** said that several local authorities had expressed the view that the minimum period should be one week or two weeks, but on balance considered that a four week period should be the minimum period. Because of the disruption to service delivery caused by a four week break, the period is long enough to prevent parties using the break period to avoid agency workers obtaining protections of the Directive. It is also in some ways comparable with the legislation applicable to employees on redundancy (section 141 Employment Rights Act 1996), where there is no “clean break” until four weeks have passed from the end of employment, because employees lose the right to a redundancy payment if they are re-engaged at four weeks or less after the end of prior employment.

Derogation for agency workers on permanent contracts of employment between assignments

Question 16: Do you agree that it would be helpful to make use of this derogation when implementing the Directive?

44% of respondents agreed and 18% disagreed; 38% did not specify a view or were unclear.

2.34 Generally the response from the **business** community was to support use of the derogation. Whilst the practice of pay between assignments is not currently widely used in the UK, respondents argued that it has a role within a fairly niche market, for example, to retain workers at the “high end” IT sector where skills are particularly sought after or in driving, field engineering and the care sector. Businesses cited benefits for workers who choose to accept slightly reduced earnings in return for a stable income, guaranteed access for hirers to highly skilled workers ‘on the books’ and greater certainty for agencies that they will be able to meet market demand and address shortages. Although most thought it unlikely that there would be a huge uptake of this option, these respondents considered it important to be able to continue with the legitimate arrangements they currently operate and to have access to the flexibility allowed for under the Directive in future.

2.35 **Trade union** respondents, by contrast, did not support use of the derogation. They expressed concern that unscrupulous agencies would see the derogation as an opportunity to avoid the consequences of equal treatment and argued that it undermines the principles of the Directive. They cited particular concerns about how it might work in practice. For example, they argued that an unscrupulous agency might put workers on ‘derogation’ contracts to avoid having to pay them in accordance with equal treatment, but then also avoid any payment between assignments by either simply letting them go at the end of a single posting or only offering them unreasonable assignments (in terms of pay, location, hours of role). The **TUC** also expressed concern about the potential impact of reduced pay between assignments on an agency workers’ ability to benefit from statutory employment rights and other benefits.

2.36 With regard to the minimum level of pay that might be received between assignments, were the option to be implemented, responses varied widely. Some respondents (primarily employers and agencies) argued that the market should be allowed to set the rate, with national minimum wage as a minimum. Others supported our proposal of at least 50% of the previous assignment's pay, still others (generally from an employee perspective) that pay between assignments should be at the same rate as pay on assignment.

2.37 On the retention period post assignment, some responses (primarily from businesses and agencies) argued that existing legal rights relating to termination and the right to minimum notice should be sufficient. Others (Trades Unions, but also some agencies and businesses) accepted that additional safeguards would be needed in this regard for workers employed under a derogation contract in order to avoid abuse, though suggestions of how long this should be have varied.

Use of agreements between workers' and employers' representatives

2.38 Business respondents, including the **CBI**, almost universally argued that provision be made for variation of equal treatment rights on the basis of 'workforce' as well as 'collective' agreements, though without providing significant additional information as to when they would be used. **Agencies** were also generally positive about the proposal as a matter of principle, though highlighting the need to address particular issues around liability and information flows between agency and hirer.

2.39 The **TUC** and **individual unions** were, however, firmly opposed to any use of 'workforce' agreements on the basis they would provide a means for employers to coerce non-unionised workplaces into inferior arrangements. They were nevertheless prepared to accept the regulations' allowing for the option of collective agreements in unionised workplaces.

Protection of pregnant women and new mothers

Question 20: Do you consider the extension of the provisions we have described appropriate for protecting the health and safety of agency workers who are pregnant or new mothers ?

46% of respondents agreed and 15% disagreed; 39% did not express a view or were unclear.

Question 21: Is the length or expected length of the placement the appropriate period during which a woman should continue to be offered alternative work or suspended on full pay as a result of a health and safety risk

28% of respondents agreed and 19% disagreed; 43% did not express a view or were unclear.

2.40 The **TUC** and individual unions welcomed the proposals in the Consultation Paper as making significant progress, but argued that the Government should go further, arguing that EU law requires agency workers to have access to all the rights set out in the Pregnant Workers Directive (Directive 92/85/EEC).

2.41 It was also argued, for example by **Nautilus International**, that the right to be offered alternative work or to be paid if no alternative work is available should cover the period up until childbirth.

2.42 **Employer organisations** generally argued that responsibility for finding alternative work in the event of a health and safety risk or for paying a woman where this is not possible should sit with the agency. They also agreed that the length of the placement would be the appropriate period for these protections to apply.

2.43 The **CBI** set out the extent to which agencies and hirers already take steps to accommodate the needs of pregnant women and new mothers and argued that in most cases the agency would be able to find an appropriate assignment for women where this was needed. The **BCC** supported this view, saying that an agency should have an obligation to find alternative work where that is necessary and that the length of the placement would be the appropriate period. The **EEF** highlighted that for many agency workers the ongoing relationship is with the agency rather than the hirer.

2.44 Individual **local authorities** and **Local Government Employers** supported the extension of these protections to pregnant agency workers and also argued that as the primary relationship is between the worker and the agency, it would be appropriate for the responsibility of providing alternative work or paying the woman if that is not possible to fall to the agency. They agreed that the length or expected length of the assignment would be an appropriate period.

2.45 **Agencies** were also generally supportive, though subject to there being maximum clarity regarding their precise obligations. The **REC** argued that agencies already consider providing alternative work if workers are not satisfied with their current assignment. If an adjustment is not possible, they argued the agency should be able to offer alternative suitable work, although not necessarily at the same level. They also argued that the extension of the right to paid time off for ante-natal appointments should not be seen to imply that an agency worker was an employee of the agency or the hirer.

2.46 The **Association of Labour Providers** also said that an agency should have the option to find alternative work at a different level, with an option to top up pay in these cases.

3. Access to employment, collective facilities and vocational training

Access to employment – notifying agency workers of vacancies

Question 22: Do you consider that these proposals will meet the requirements of Article 6.1?

50% of respondents agreed and 8% disagreed; 43% did not express a view or were unclear

Question 23: Do you think our proposals (in question 22) will properly include the interests of agency workers who are on short-term assignments or who are often away from the hirer's premises, eg drivers or those working in satellite sites ?

40% of respondents agreed and 10% disagreed; 50% did not express a view or were unclear

3.1 The **TUC** and unions generally agreed with the Government's proposals, stressing that the obligation for notifying agency workers of vacancies and liability for not doing so should rest with the hirer, and adding that agency workers are likely to be very reluctant to notify the agency that they are seeking permanent work for fear of being moved on from an assignment or being refused future assignments. The **TUC** also agreed that in redundancy situations hirers should be able to redeploy directly employed staff into vacant posts before offering such posts to agency workers. However, added that at the very least after four years in a job, agency workers should be treated as permanent in the same way as workers on fixed-term contracts.

3.2 The **CBI** agreed that there should be no requirement to advertise vacancies when staff are being redeployed to avoid redundancy. Where vacancies are posted centrally for all employees to see, agency workers should have access to such information. However, a distinction should be drawn where hirers restrict access to a certain group of employees with the appropriate skills (eg for the Head of an HR Department): the regulations should be clear that an internal advertisement need include only those temps who are comparable to employees who also have access to the advertisement. The **CBI** agreed with our proposals regarding redundancy situations, adding that this exclusion must be extended to cover situations where businesses are not looking to add to head count (eg where they are looking for an internal promotion), which would go beyond the equal treatment required by the Directive.

3.3 **REC**, supported the proposals, adding that the Directive does not insist that agency workers should be entitled to an interview or being hired. **REC** stressed a significant concerns amongst its members that vacancies may not

necessarily be advertised to all permanent staff, not least because they may not be qualified for the position(s) available, and felt that this issue needed to be considered very carefully. The **ARC** also supported the proposals. Some **agencies** said that for informing agency workers on short term assignments or in remote locations, the key issue is agency workers being informed of where to look for such vacancies – this should be the only obligation placed on the hirer.

3.4 The **Federation of Small Businesses** and the **British Chambers of Commerce** argued that Directive does not require all agency workers to be told about all vacancies. Any attempt to introduce a one size fits all approach would simply add to the burden for all businesses and ignore existing working practices for one group of workers. They argued that many hirers will not tell employees about all vacancies, particularly if they require a special skills that only a small percentage of the workforce will have. This needed to be taken into account in implementation. The **Institute of Directors** said the proposals were reasonable.

3.5 **Local Government Employers** agreed with the proposals, adding that guidance should indicate that hirers are still able to operate “closed” internal application processes, for example in a redundancy situation. **NHS Professionals** expressed concerns about being able to inform all of its flexible workers all of the time, given the administrative complexity of this in an organisation as large as the NHS. They suggested that this would be addressed were this area made the hirer’s responsibility.

Temporary to permanent status – implications for “temp to perm” fees

Question 24: Do you consider that the existing legislative provisions are consistent with the requirements of the Directive ?

38% of respondents agreed and 14% disagreed; 49% did not express a view or were unclear

3.6 The **TUC** and unions generally took the view that amendment of current legislation was required on this point to ensure compliance with the Directive. The **TUC** believed that implementing regulations should go beyond the question of temp to perm fees, also addressing issues relating to notice periods - agency workers should only be required to give the same period of notice as employees, and a statutory cap of one month should be placed on the notice period agency workers are required to give agencies before transferring to permanent contracts. **Local Government Employers** said that many Local Authorities expressed the view that transfer fees do operate as a barrier to agency workers obtaining permanent employment.

3.7 For **agencies**, **REC** were however, very much against any change to the Conduct Regulations in this respect. They argued that contract law already effectively regulates fees to the extent that the market does not; that it

would be difficult for a court to decide what a reasonable level of recompense” is; and that there is no evidence of a problem, with feedback from REC members actually suggesting that hirers are increasingly using “temp to perm” as a way of taking on new staff. The **ARC** added that Regulation 10 of the Conduct of Employment Agencies and Employment Business Regulations 2003 was drafted with the Directive in mind , there has been no change to the wording of the Directive since 2003, and no evidence that Regulation 10 has failed.

3.8 The **CBI** also did not believe that there was any need to move beyond the current legislation as the fee is clearly determined by the amount of work undertaken by the agency to source the right skills.

Access to collective facilities for Agency Workers

Question 26: Do you agree with the proposed approach regarding implementation of the Directive’s provision on access to on site facilities?

47% of respondents agreed and 9% disagreed; 44% did not express a view or were unclear

3.9 The **TUC** argued for the regulations in this area to be drawn as widely as possible - equal access to “amenities” should include such benefits as gym membership or access to a social club, and “collective facilities” should include canteens, childcare arrangements and transport services, covering not only bus/pickup services but also season ticket loans or car allowances. In all these cases, they argued, responsibility for compliance should rest primarily with the hirer. The **TUC** agreed that a difference in treatment with permanent employees could be justified for “objective reasons” and that consideration should be given to offering these benefits on a pro-rata basis, but that cost and financial considerations on their own would not constitute an objective reason. called for agency workers to have access to all workplace **services**, including for example showers, lockers.

3.10 The **CBI** said that many workplaces already provided access to facilities such as canteens and did not envisage the Directive changing current practice to any great extent. However, access should be on the same basis as employees. For instance, concern had been expressed by members about access to crèche facilities where access is decided on the basis of a queuing system when spaces are limited, meaning that provision is split with agency workers receiving access above employees. In such circumstances it would be important for access rights to be based on the length of service of the agency worker. **CBI** were opposed, however, to any extension of rights in this area to matters they considered as benefits in kind rather than collective facilities, such as access to child care vouchers.

3.11 **REC** took a similar line, supporting a clear, less extensive definition of “amenities or collective facilities” – they argued it should be clear that this

does not extend to facilities such as a subsidised gym or staff shop, nor to benefits such as child care vouchers, which are not a collective facility. **Individual agencies** took a similar line, some emphasising the need for a distinction on the basis of whether access to a facility could be deemed necessary to help the workers meet the demands of the working at the location.

3.12 The **British Chambers of Commerce** stressed the importance of allowing hirers the ability not to comply with equal treatment on “objective reasons” grounds. **Local Government Employers** agreed, stressing the need for guidance to clarify that such reasons could include the fact that they are “long-term” benefits for permanent employees, and that child care vouchers and other salary sacrifice schemes do not fall under the terms of the Directive. **Legal** respondents also said it would be helpful if the Regulations or guidance could make clear what is meant by “collective facilities”, stressing the need for any guidance to reflect existing ECJ and UK case law on the point.

Access to training for agency workers

3.13 The policy consultation document invited views on steps that could be taken to improve agency workers’ access to training, as provided by the Directive.

3.14 The **TUC** said that Government should do more than just encourage employers in this respect, suggesting for instance the possibility of obligations on employers accessing Train to Gain funding. Individual Unions commented that a specific option would be to extend the right to request time off for training to agency workers, and that consideration should be given to introducing greater flexibilities under Train to Gain for employers to help train agency workers.

3.15 **Agency** and **employer** respondents who commented generally agreed with the principle of taking appropriate steps to improve agency workers’ access to training, but did not support a regulatory approach to the issue – there should, for instance, be no requirement for equal treatment in terms of access to in-house training courses. **Agencies** tended to stress the need for any training for agency staff whilst on assignment to be born by the hirer, but one also raised the matter of improving access to Government training support for employment businesses that have the framework in place to provide training such as NVQs and general literacy and numeracy.

3.16 A common concern amongst hirers was the need to distinguish between training necessary to enable the employee to perform the role for which they had been hired and wider developmental training for permanent staff. It was fair to expect hirers to provide – and bear the cost of - the former but not the latter. Other businesses requested better publicity about what Government training support was available and who has access to it. Some highlighted the need for any enhanced access to training not to be taken as evidence of different employment status.

3.17 Local government employers also tended to put emphasis on the possible cost implications of any further requirements on hirers in this area. The **London Borough of Camden** said any initiatives to support the training of agency workers would have to ensure that the increased cost burden did not fall on the Council, while **Stoke on Trent City Council** highlighted the additional cost to an organisation of having to pay for a replacement whilst the original agency worker is undergoing training.

3.18 **Legal** respondents did not tend to identify points law that concerned them in this area. Some commented that many skills are acquired in the workplace and temporary agency working in itself is a good way to develop skills and experience. One law firm said many sectors such as rail and social care are heavily regulated and already involve employment businesses delivering significant amounts of training to very high standards.

4. Thresholds for bodies representing agency workers

Question 28: Have we identified the relevant thresholds under UK law to which Article 7 applies?

40% of respondents agreed and 6% disagreed; 55% did not express a view or were unclear

Question 29: Do you agree that temporary agency workers should count towards the thresholds applicable to the temporary work agency rather than those applicable to the hirer?

38% of respondents agreed and 16% disagreed; 47% did not express a view or were unclear

4.1 Just under a hundred respondents addressed one or more of the three questions which the consultation document posed on this subject.

4.2 As regards the list of relevant thresholds, the **TUC** argued that some, if not all, of the thresholds should be abolished because representational and consultative rights should apply across all organisations regardless of their size. No respondent identified other thresholds which should be included in the list. A minority of respondents expressed concern about the provisions included in the list, apparently on the grounds that agency workers should not be counted at all for these purposes.

4.3 There was support from across the spectrum of respondents for our proposal that temporary agency workers should count towards the thresholds as they apply to the employment business rather than the hirer. This was the view of **CBI, EEF, REC** and **TUC**. Some individual agencies disagreed, virtually all of them considering that they should count to the thresholds which apply to the hirer. One respondent thought agency staff should apply to the thresholds for both types of organisation, and **Battens** solicitors thought they should apply to neither group.

4.4 Those who supported our proposal generally did so on the grounds that the agency was either the employer concerned or had an ongoing employment relationship with the agency worker which the hirer, many of whom engaged the workers for very short periods, did not typically establish. In contrast, the opponents of the proposal considered that temporary workers were part of the hirer's workforce and seldom meet other agency workers on the books of the employment business. They also pointed out that the thresholds would ensure that virtually all employment businesses would be covered by these representational arrangements, even those who employed only a handful of staff on a permanent basis.

4.5 On other matters, **REC** and **Randstad UK Holding Ltd** stressed the need to ensure that the transposing regulations did not change the

employment status of agency workers. **Battens** solicitors and one employment business, proposed a 12 week or other qualifying period of engagement or assignment before a temporary agency worker should qualify towards the thresholds.

5. Provision of information to workers' representatives

Question 31: Does the list identify the relevant regulations which establish a direct or indirect requirement to provide information on the employment situation ?

38% of respondents agreed and 6% disagreed; 56% did not express a view or were unclear.

Question 32: Do you agree with our interpretation of the legal effect of Article 8 of the Directive ?

40% of respondents agreed and 6% disagreed; 55% did not express a view or were unclear.

Question 33: Do you agree that it would be preferable to define the meaning of the term "suitable information" in our implementation ?

46% of respondents agreed and 6% disagreed; 48% did not express a view or were unclear

5.1 There was widespread support for the approach set out in the consultation document on this area.

5.2 Agency and hirer respondents tended to be particularly strong in their support for a clear definition of 'suitable information'. The **CBI** felt that a clear definition of 'suitable information' was essential. They argued that information should not relate to how equal treatment is established, and that the flow of information should be made as simple as possible. The **EEF** believed that definition of suitable information should not relate to equal treatment; there should not be a prescriptive definition put on it

5.3 **REC** also agreed with our proposals, adding that the requirement should not apply to providing information on agency's fees or remuneration to 3rd parties. Limits should also be placed on how far back requests for information can look and on how often requests can be made.

5.4 The majority of trade union respondents also answer 'yes' to the three questions posed. However, the **TUC** felt that information should be provided regularly in order to inform negotiations between unions and management and not just in 'set-piece' consultations such as TUPE or collective redundancy situations.

6. Establishing “equal treatment”

Determining Equal Treatment

Question 34: Do you agree with the approach outlined above to defining the limits of a given job ?

40% of respondents agreed and 15% disagreed; 45% did not express a view or were unclear.

Question 36 : Do you agree with our proposed approach on the question of determining equal treatment within the context of the Directive’s requirements ?

37% of respondents agreed and 16% disagreed; 47% did not express a view or were unclear

6.1 This area was the focus of much comment amongst respondents to the consultation.

6.2 The **TUC** and unions generally said they agreed with the overall approach set out in this area, but argued that the scope for comparison or of evidence that could be brought to bear should be drawn widely. It should, they argued, be possible to consider not just things set out in pay scales or collective agreements but also terms and conditions of permanent staff doing broadly similar work whether in the same or another location or prevailing market conditions more widely - when necessary, they argued regard should be had to a ‘hypothetical comparator’. The **TUC** argued that guidance/regulations on the point of ‘given job’ should not focus purely on the original job description but also take into account the possibility of a worker acquiring additional responsibilities. They also stressed that it should not possible to evade equal treatment legislation by assigning agency workers to undertake specific tasks or piece rate work, as opposed to a specific job: guidance should be clear on this. Finally, they stressed the need to ensure effective avoidance measures were in place

6.3 The **CBI**, on the other hand, opposed any provision for hypothetical comparators in any circumstances. Comparison should rather be required with a ‘flesh and blood’ comparator, which they interpreted as a directly recruited worker doing the same job, with the same skill and/or competency level in the same workplace on the same shift pattern. They argued that the qualifying period should recommence in the event of any change of role and that regulations must clearly set out that the qualifying period is tied to the individual agency worker, not the ‘given job’.

6.4 The **EEF** and other businesses respondents generally agreed, with EEF emphasising the fact that the wider the scope for comparison the more

costly and problematic to the regime would be to implement, especially if regard had to be had to other sites and locations where working practices can be very different.

6.5 **REC** took a similar view – comparison should be required with a ‘real life’ worker in the same organisation doing the same or broadly similar work, taking account of skills and experience. They argued that if the worker’s responsibilities, duties or location changed, then the 12 week qualifying period should begin again. Guidance should make clear which other factors might be relevant in the absence of a comparable worker. Individual agency respondents tended to take a similar view, with a number also proposing that a specific requirement for a comparison to be drawn with a permanent worker’s terms and conditions when he or she was recruited.

6.6 The **IoD** came at the issue from a slightly different perspective. They argued that the Directive’s limitation of equal treatment rights to ‘binding general provisions in force’ in a hirer had the effect of limiting its scope to matters set down in pay scales and relevant collective agreements. In the absence of these they argued, the equal treatment right did not apply. **APSCo** and the **ARC** took a similar line.

6.7 **Local Government Employers** said that Local Authorities would not have problems in finding a comparator as their job profiles are well defined, they did not think other locations should be taken into consideration. Clear guidance was required, however, on how pay scales and collective agreements are to be incorporated into the system. Other public sector employers supported this call for clarity, and tended to oppose the possibility of comparison across different locations

Liability and information flows

Question 39: Do you agree that that approach described is appropriate for ensuring that agency workers have access to information on equal treatment?

44% of respondents agreed and 11% disagreed; 46% did not express a view or were unclear

Question 40: Do you consider that a template for information provision to workers would be of assistance?

56% of respondents agreed and 4% disagreed; 39% did not express a view or were unclear

6.8 The **TUC** and unions generally believed that agencies and hirers should be jointly and severally liable for breaches of agency workers rights; anti-discrimination law already provides for this and should, be replicated for the Directive. This approach would more accurately reflect the reality of

agency sector working and would enable more effective enforcement of the legislation, especially as agency employers are not normally present on the hirer's premises to oversee treatment of agency workers or any breaches of law, and also have limited access to relevant documentation.

6.9 They argued that joint and several liability would enable Employment Tribunals to determine where responsibility for breaches lies and would ensure that agency workers would always be able to enforce their rights, including where an agency or hirer has become insolvent or in situations where the contract for the supply of agency workers has been outsourced through a supply chain. In any event it would be essential for liability provisions to cover effectively such chain arrangements, so that the agency worker still has a remedy if one of links in the chain has become insolvent or no longer exists. A large union respondent agreed, saying also that the role of Master and Neutral Vendors must also be factored-in.

6.10 Another union agreed that liability should rest with the agency but disagreed on there being no specific provision regarding the supply of information by the hirer: there should be a specific provision in terms of pay and basic conditions that the hirer should make available to the agency worker.

6.11 On provision of information, the **TUC** said that the proposals needed to be extended so that agency workers to receive written information about their equal treatment rights prior to an assignment and of any adjustments during the assignment. Agency workers should also have a statutory right to ask for a written statement relating to suspected unequal treatment from both the agency and the hirer; such information should also be admissible as evidence at an Employment Tribunal, who in turn could draw an inference of non-equal treatment where a hirer fails to respond. The **TUC** welcomed the use of a template for providing information, which would also increase transparency and ease comparisons; **UNITE** said that an agency workers' rights to request written statements should work in a similar way to fixed term contract regulations.

6.12 The **CBI**, in contrast, said joint and several liability would be extremely damaging for the agency sector as the blameless party could potentially find themselves called to account for another party's actions, leading to a major reduction in the use of agency work as firms manage their risks of exposure to censure. The **CBI** agreed that if the agency can establish that it has acted in good faith on information provided by the hirer, then the hirer should be liable. The **CBI** also suggested that the decision to join the hirer to a claim in instances where a claim proceeds to a Tribunal should be able to be taken by the agency or the hirer (although the Tribunal should clearly retain this right too). This would enable both parties to be clear about the necessary level of involvement and plan in advance of the Employment Tribunal accordingly, thus helping to streamline the process. It would not be in the agency's commercial interests to join a hirer vexatiously, which should prevent abuse by agencies trying to apportion blame to other parties.

6.13 The **CBI** believed that a reliable defence for agencies claiming to have been provided with incorrect information by the hirer would be the “reasonable steps” defence: the phrase “best endeavours” placing too high a burden on agencies who would respond by imposing excessive information requirements on hirers. The **CBI** supported the Government’s proposals on the provision of information, and welcome the suggestion of using a template.

6.14 The **REC** agreed that it would not be desirable to have joint and several liability, but felt that more onus was needed on the hirer to provide pay information than suggested in the consultation, i.e. the hirer should have a legal obligation in this respect, and for the agency to have an obligation to ask the hirer for information on equal treatment. **REC** supported the “reasonable steps” defence, and the agency having the option of bringing the hirer to a Tribunal at the earliest stage. **REC** also recommended a mechanism for agencies to informally resolve disputes before reaching a Tribunal; the regulations should also forbid hirers from putting indemnity clauses into contracts to circumvent liability. The **British Chambers of Commerce** agreed on this latter point. The **ARC** said the proposal was not acceptable, as knowledge of the conditions are entirely within the control of the hirer. Agencies, may if they wish to accept responsibility, enter into commercial terms with the hirer. **APSCo** took a similar line.

6.15 Others added that the regulations should provide flexibility to allow for circumstances where there is a legitimate, short delay in an assessment of equal treatment, for example where a hirer decides to extend an assignment beyond 12 weeks without a week’s prior notice: the Regulations should not inadvertently disincentivise hirers from using agency workers beyond 12 weeks if the need unexpectedly arises.

6.16 The **Federation of Small Businesses** and the **British Chambers of Commerce** supported the “reasonable steps” approach, but stressed the need for this to represent a reasonably high threshold in practice. This was needed to protect smaller businesses particularly, which may have little knowledge of the law and no knowledge of the agency sector. Currently it is the agency who will be advising the business, and these roles should not be removed or hampered by the Directive. On information flows, they thought much would depend on the interpretation of equal treatment and the use of the comparator: the consultation suggests a broad interpretation which would mean more information having to be provided. Many businesses would not want to give out information about what employees are earning, or may simply find it too time consuming, therefore preferring to recruit directly if at all.

6.17 The **BCC** felt that whilst agency workers needed to be able to request information, a refusal by the agency to give the information cannot infer anything about whether or not their treatment was equal. An agency might not have passed on the request to a hirer and in this case, it would be unreasonable to infer anything about treatment that an agency workers was given

6.18 The **EEF** welcomed the Government's approach, but stressed that it must be made clear to end-users what documentation and information must be provided by them to the agency, in what circumstances and by when; a pro-forma produced by the Government would assist this process. The **EEF** had no strong views on whether the "reasonable steps" or best endeavours" test should apply, as long as whichever is used makes it clear that the agency can only avail itself of the relevant defence where it has complied with two steps. Firstly, that it has requested relevant information from the hirer at the appropriate time, and secondly, that it has made more than one attempt to obtain this information from the hirer. Without these steps, there could potentially be unfair consequences for the hirers, eg liability could pass when the agency has sent a request for information to the hirer but it has not been received because it was lost in the post.

6.19 **Local Government Employers** agreed that the approach to liability was appropriate as it reflected the fact that the primary relationship is between the agency and the agency worker. **NHS Professionals Special Health Authority (NHSP)** supported the Government's overall approach, but said that the definition of "reasonable steps" and "best endeavours" should be clarified for the avoidance of doubt. For organisations, to a high number of hirers (such as NHSP), it may be a considerable administrative burden to cover all areas: as an assignment becomes longer term, consideration should be given to putting back the onus on the hirer rather than the agency. NHSP also sought clarification on shift work considerations from an NHS perspective where shift patterns can vary considerable and workers can be ad hoc .

6.20 A **legal respondent** requested clarity of when the requisite information should be supplied; and suggested that a requirement to supply information before an assignment commences may cause administrative delay and burden.

7. Review of restrictions and prohibitions on the use of temporary agency work

Question 43: Do you agree with our view that there are no restrictions in UK legislation that would need review in the context of Article 4 of the Directive?

35% of respondents agreed and 7% disagreed; 58% did not express a view or were unclear

7.1 The small number of respondents who commented on this point generally agreed with our analysis. The sole exception was the **Consumer Credit Litigation Solicitors'** suggestion that our rules prohibiting employers from using agency staff to provide cover when employees are on strike could come within scope. called for agencies doing business in the UK to be regulated through reinstating the obligation to operate under a license and abide by industry standards; this would prevent exploitation of migrant and vulnerable workers working in sectors that are not currently covered by the Gangmasters legislation.

8. Reducing administrative burdens

8.1 We sought suggestions of areas on which our proposed working group on administrative burdens surrounding the use of agency workers might focus. A number of suggestions were made, but the majority of respondents commenting on this section of the consultation document in fact concentrated on the key principles which the Government should address in its implementation of the Directive.

8.2 The **TUC** and unions generally urged the Government to ensure that the principle of equal treatment that underlies the Directive should not be compromised. They felt that business arguments about administrative burdens should be carefully examined to ensure that the burdens identified are genuinely administrative burdens, and not increased costs associated with equal treatment.

8.3 The **CBI** and businesses, on the other hand, generally said Government must focus on minimising the costs of the regulations as far as possible; there are many requirements imposed by the Directive which, if not addressed correctly, could increase the costs of taking on agency workers significantly. The Government should assist Small and Medium Size Enterprises with genuine administrative costs by providing good clear guidance, and on-line forms for documenting working hours, etc. Also, clear definitions were needed regarding eg 'umbrella companies', pay and working time, in order to avoid increasing complexity and administrative burdens to the extent that firms no longer consider it viable to employ temps'

8.4 Businesses also stressed the need for duplication to be kept to a minimum and simplifications were raised on a number of occasions, particularly by **REC** and **Reed**. Suggested methods were the provision of standardised templates. Several respondents offered to join our proposed Working Group to consider these issues more closely.

9. Entry into force of the Regulations

9.1 We sought views as to when the regulations should enter into force. Employer and employee representatives generally took opposing positions on this point.

9.2 **Agencies** and **hirers** generally argued that implementation should be delayed as long as possible, to reflect the potentially significant changes in practices that will be required. Many drew particular attention to the possible impact of the introduction of the new regime in the current economic climate. It would be wiser to allow as much time as possible for the economy in general and the labour market in particular to recover before bringing implementing regulations into force.

9.3 **Union** respondents tended to the opposite view, however, prioritising the need to give agency workers access to these important new rights. One union wanted implementation to be as soon as possible; and another urged the Government to prioritise the introduction of the new rights and to ensure that the Regulations are on the Statute Book and take effect by early Spring 2010.

C. Alphabetical List of Respondents

Abell Morliss Ltd
Acas
Accelerate Logistics
Accountant in Bankruptcy
Active Solutions UK Ltd
Addleshaw Goddard LLP
Adecco
Ad Lib Recruitment
Advanced Resource Managers Limited

Agricultural Industries Confederation (AIC)
AiB
Animal Health
ASL Recruitment Ltd
Association of Colleges (AoC)
Association of Greater Manchester) (AGMA)
Association of Labour Providers
Association of Professional Staffing Companies Ltd (APSCo)
Association of Recruitment Consultancies
Association of Teachers and Lecturers (ATL)
Association of Train operating Companies (AToC)
ASTEC Group
ATC Ltd
AWE
Aztec Resources Ltd
Battens Solicitors Ltd
Bayside Recruitment
Bedfordshire and Luton Fire and Rescue Service
Beeline International
Berry Recruitment Ltd
Birmingham Law Society
BPE Solicitors
Branston Ltd
British Chambers of Commerce
British Hospitality Association
British Poultry Council
British Retail Consortium
Business Service Association (BSA)
Building Recruitment Company Ltd (BRC)

Brussels European Employee Relations Group (BEERG)
BP International Limited
C Brandauer Ltd
Care@
Cavendish Maine
Cavill Robinson Financial Recruitment
Charles Russell LLP
Chartered Institute of Personnel & Development (CIPD)
Chartered Institute of Personnel & Development (Hertfordshire Branch).
Charterhouse Recruitment
Cheshire East Council
City of London Law Society
City of London Law Society Employment Law Committee
Clearwater Consulting Ltd
Cloud 9 Associates Ltd (Agency)
Coca-Cola Enterprises
Colin F L McGrath
Communication Workers Union (North Anglia)
Communication Workers Union (Sheffield)
Confederation of British Industry (CBI)
Connect Group Consulting
Consumer Credit Litigation Solicitors
Contract Personnel Limited
Contracts Support Services Limited
Communication Workers Union (CWU)
Communication Workers Union (CWU) (Tyne and Wear Clerical Branch)
Communication Workers Union (CWU) (Liverpool Clerical Branch)
Communication Workers Union (CWU) (O&A Members)
Communication Workers Union (CWU) (Research)
Cymru Recruitment Ltd
Dacorum Borough Council
De Poel Consulting Limited
Devon County Council
DHL Services Limited
DLA Piper UK LLP
Diageo - Bushmills Distillery
Direct Marketing Association (DMA)
Drake International
Driver Hirer Group Services Ltd
DWF LLP
Ealing Hospital NHS Trust
Eden Scott Ltd
Electrical Contractors Association
Ellsbury

Employment Agents Movement
Employment Lawyers Association (ELA)
Engineering Employers Federation (EEF)
E-Resourcing Ltd
Equality and Human Rights Commission
Equality South West (ESW)
Excis Networks
1st Option Consulting Services Limited
Fds
Federation of Small Businesses (FSB)
Fenwick Consulting Ltd
Flex recruitment Plus Ltd
Food and Drink Federation (FDF)
Ford Motor Company
Freight Transport Association
Freshfields, Bruckhaws, Deringer
Gangmasters Licensing Authority (GLA)
General Municipal and Boilermakers (GMB)
GlaxoSmithKline
Goyen Controls
Greater Manchester Authorities
Group Risk Development Group (GRiD).
Hart Recruitment
Havering Council
Hays Specialist Recruitment Limited
HC Recruitment Ltd
Heating and Ventilating Contractors' Association (HVCA)
Heritage Care
Herriard Estates
Hickman

HRGO (Crawley) Ltd
Hunters Property Group Ltd
IBM UK Limited
Institute of Directors (IOD)
Institute of Interim Management (IIM)
Imperial workforce
Information Processing Limited
Jaquar Land and Rover
Jenkins Shipping Port Services Ltd
Jobline Staffing
Joint Tax Committee for Construction
Kelly Services

KHS Personnel Ltd
Kodak Limited
Lancashire County Council
Law Society of England and Wales
Lawrence Graham LLP
Lawspeed
Leeds City Council
Lfi
Local Government Association (LGA) and Local Government Employers (LGE)
Local Government Employers Organisation(LGE)
London Borough of Bexley
London Borough of Camden
London Borough of Hounslow
London Law Society
Lovells LLP
LSC
Luton Borough Council
Manpower UK
Maritime and Coastguard Agency
Marks and Spencer
Marshall Aerospace
Matchtech Group UK Limited
MC Personnel Ltd
Meridian Business Support
Michael Page
Michael Page International
Mid Staffordshire NHS Foundation Trust
MidaZ Limited
Midlands Driver Recruitment
Milton Keynes Council
Mind the Gap Consulting Limited
National Association of Schoolmasters Union of Women Teachers (NASUWT)
National Union of Rail Maritime and Transport Workers (RMT)
National Union of Teachers
Nautilus International
Net Temps Limited
NHS Employers
NHS Professionals Special Health Authority
Nifrs
Nord Anglia Recruitment
North West TUC
North East Chambers of Commerce (NECC)
Northern Employment Services Ltd
Northern Foods Plc

NPIA
Offshore Contractors Association
Orangerie
Orange Genie Cover Ltd
Orchard and Heroes Recruitment
Ordnance Survey
Osirian Consulting Limited
Parity Resources Ltd
Partners Employment European Recruitment
Partnership of Public Employers (PPE)
PCS at LSC
PCS Union
Personnel & Care Bank Recruitment Consultants
Pinsent Masons
Pinsent Masons LLP
Plastica Ltd
Premier Placement Services Limited
PreterLex Ltd
PricewaterhouseCoopers
NM Prison Service
Professional Contractors Group
Protocol Education
Prospect
Protocol National
Public and Commercial Services Union
Randstad Employment Bureau Limited
Randstad UK Holding inc all Randstad UK companies
Rapid Personnel Limited
Reccom Ltd t/a CMS
Recruitment and Employment Confederation (REC)
Recruitment Agency
Recruitment Industry
Recruitment Technology and Vendor Neutral Managed Service Company
Reed Executive Limited
Reed Managed Services
Registry Publications Ltd
Resource Solutions Group Plc
Right4Staff
Right4Staff / Draefern Limited T/A Right4Staff
Royal Bank of Scotland
Royal Mail Group Limited
RSD
Ruskin Students' Union
Russam GMS Interim Management

Sammons Group
Service Providers Association
Scattergoods agency Ltd
Scottish Arts Council
Scottish Commission for the Regulation of Care
Scottish Government
Scottish Government - pcs
Service Providers Association (SPA)
Setsquare Recruitment Ltd
Shropshire Council
Simon Jersey Limited
Society of Pension Consultants
South East Employers
Stafflex Limited
Staffordshire County Council
Staffordshire Fire and Rescue Service Fire and Rescue Service
Steve Richardson
Silvercloud Recruitment
Stockton on Tees Borough Council
Stoke-on-Trent City Council
Sussex Enterprise
Telent Staffing Solutions Ltd
Temporary Employment Service, University of Cambridge
Thompson Solicitors
Torbay Council
TPP Not for Profit
Trade Union Congress (TUC)
Travers Smith
TRS
Trust Education
Tube lines
Trades Union Congress
Tulip Ltd
Upgrade Team
UNISON
UNITE the Union
University and College Union
Universities and Colleges Employers Association
Union of Construction, Allied Trades and Technicians (UCATT)
Union of Shop Distributive and Allied Workers (Usdaw)
Volt Europe
VTCT
Walsall Council
Wavenley TUC Industrial Branch Region

Wealden District Council
White Horse Employment
Wincanton Group Ltd
Work Solutions
Worldwide Fruit Ltd
Wote St Employment Bureau
Wragge & Co LLP
YA
Zurich Employment Services Limited

