

**IMPLEMENTATION OF THE
AGENCY WORKERS DIRECTIVE**

Response to consultation on
draft regulations

JANUARY 2010

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Ministerial Foreword

The Government is today laying before Parliament regulations to implement the Agency Workers Directive. They provide all agency workers, for the first time, with a right to equal treatment with their directly recruited counterparts after 12 weeks in a given job. This marks a further important step forward in workers' rights, building on the considerable achievements of this Government in this area such as the introduction of the National Minimum Wage, the development of a ground breaking range of family-friendly policies, and the significant enhancement of anti-discrimination legislation.

But as in all these other cases, the Government is determined to ensure that as well as the benefits the legislation will bring for workers, the UK also maintains labour market flexibility which is important for the creation of jobs. This concern is particularly important in the case of rules affecting the agency sector, which is a key part of the UK labour market. It provides important flexibility for many employers, and is an essential source of employment opportunity for workers, including as an important route into permanent employment.

The last year has seen an intensive process of consultation on our implementation proposals. There were more than 300 respondents to the original consultation on our policy proposals and almost 100 responded to the second on the draft regulations. I am grateful to all those who have taken part and given us the benefit of their experience and expertise.

The overall approach taken by the Regulations is broadly that initially set out, founded on the CBI-TUC agreement of May 2008. The proposals have, however, been shaped by the consultation process in a number of important respects. The final regulations include in particular additional provisions designed to reduce the scope for avoidance.

Laying these regulations today means the UK will be one of the first Member States to legislate for implementation of the Directive. In line with the requirement to implement the Directive within 3 years of agreement, the regulations will come into force on 1 October 2011, giving sectors which use agency workers time to prepare.

My thanks once again to all those who have helped shape the development of this important piece of legislation.

A handwritten signature in black ink, reading "Pat McFadden". The signature is written in a cursive style with a large, stylized initial 'P'.

Pat McFadden

Minister for Business, Innovation and Skills

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1. Introduction

1.1 This document is the response of Department for Business, Innovation and Skills (BIS) to the consultation conducted between 15 October and 11 December 2009 on the draft regulations for the implementation of the EU Directive 2008/104/EC on temporary agency work (the Directive). The Directive was published in the Official Journal of the European Union on 5 December 2008, and Member States have until 5 December 2011 to implement it. Taking into account responses to the previous consultation (8 May - 31 July 2009), views were sought on:

- (a) our proposed response to issues arising from the previous consultation;
- (b) whether the draft regulations effectively reflect our policy intentions;
- (c) whether the details of our proposals, as reflected in the draft Regulations, give rise to any particular issues of concern; and
- (d) what practical advice users would welcome in the guidance which will accompany the Regulations.

1.2 This publication contains a synopsis of responses to the consultation, and outlines the Government's response to the issues raised and the rationale behind the final regulations, as laid before Parliament on 21 January 2010.

The Directive - Objectives

1.3 A copy of the Directive is available on the BIS website ([www.bis.gov.uk/Employment Matters](http://www.bis.gov.uk/Employment_Matters)). Its aim is to ensure the protection of temporary agency workers by applying the principle of equal treatment, as set out in Article 5. This provides that the basic working and employment conditions (duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay) of temporary agency workers should be, for the duration of their assignment at a hirer, at least those that would apply if they had been recruited directly by that hirer to occupy the same job. The Directive allows for a qualifying period before this equal treatment is applicable on the basis of an agreement between social partners at national level, and for other derogations and flexibilities such as for agency workers on permanent contracts of employment who are paid between assignments.

1.4 The Directive also provides other entitlements which aim to improve the situation for agency workers, for example, in terms of improved access to permanent employment and training. In order to liberalise the agency worker sector across the EU, the Directive also looks to address restrictions and prohibitions on agency work which exist in different Member States to see if they are justified.

1.5 The Government has always supported the underlying objectives of the Directive and was pleased that key changes were agreed which enable us to

implement it on the basis of the agreement reached between the CBI and the TUC in May 2008. Implementation on this basis will include provision of a qualifying period of 12 weeks in a given job before equal treatment is applicable. There are, however, a range of issues on which Member States are given discretion under the Directive, or which may require clarification or more specific interpretation in order to ensure effective implementation. It is on these points that we sought comments in the previous consultations.

1.6 Implementation of the Directive will be by means of Regulations chiefly using powers under Section 2(2) of the European Communities Act 1972 although certain aspects are being provided for in the same regulations using powers under the Health and Safety at Work etc Act 1974.

Government policy for implementing EU Directives

1.7 It is a requirement of European Law that EU legislation should be implemented in an effective, timely and proportionate manner. The Government's policy is to transpose Directives so as to implement them on time and in accordance with other policy goals, including minimising the burdens on business. As regards temporary agency workers, the Government has the twin objective of ensuring appropriate protection for agency workers whilst maintaining a flexible labour market. Accordingly, we are seeking to ensure that implementation of the Directive is done in a way which provides a proportionate response to meeting our legal obligations under the Directive.

Executive summary

This document sets out the approach taken to the implementation of the Agency Workers Directive by the Regulations laid before Parliament on 21 January 2010. It summarises the principal issues raised in responses to the consultation on draft Regulations between October and December 2009, provides the Government's response to them, and describes the effect of the final Regulations.

The key elements of the approach taken by the Regulations are as follows:

- (a) Legislation will, as has always been proposed, be on the basis of the **CBI-TUC** agreement of May 2008, providing agency workers with a right to **equal treatment after 12 weeks in a given job**;
- (b) As proposed at the time of the consultation on the draft Regulations, the legislation will **come into force on 1 October 2011**. Some stakeholders have pressed for earlier entry into force of these important new rights, but we remain of the view that all concerned should be given time to prepare for the significant changes that the Regulations will sometimes entail, especially given the important role the agency sector will play in the economic recovery;
- (c) The approach to the **scope** of the equal treatment regime remains much as previously proposed, subject only to minor drafting amendments. Workers who are genuinely in business on their own account (eg self-employed or working through a corporate vehicle) will not be within scope, but those employed via umbrella companies or other intermediaries will be. We will encourage agencies to make it entirely clear to a worker the nature of the contract they are being offered before it is signed and its implications for their rights under the Regulations in subsequent guidance;
- (d) As previously proposed, agency workers qualifying for equal treatment will be entitled to **paid holiday entitlement**, including any entitlement above the statutory minimum requirements. To address practical issues we will, however, make it possible for payment to be made in lieu of entitlement above the statutory minimum;
- (e) The approach to the definition of **pay** continues to be based on the principle of '**equal pay for work done**', i.e. basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. As previously proposed, this will include payment for overtime, shift allowances, and unsocial hours premiums, but exclude other aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing schemes, occupational pension contributions, and occupational sick pay, redundancy pay and maternity pay (and similar benefits). We have, however, concluded that proper implementation of the principle should entail a different approach on the issue of bonuses – the Regulations now include within the scope of equal treatment those bonuses that are directly attributable to the quality or quantity of work done by an agency worker. The

final regulations also include within ‘pay’ vouchers or stamps with a monetary value, such as luncheon vouchers, which may be an important part of remuneration for some low-paid agency workers. Section 4 (paras 4.19 and 4.20) includes an explanation of the circumstances in which these elements of pay may not be payable to agency staff and a discussion of how the practical concerns raised by some hirers may be addressed;

(f) The final Regulations retain the previously proposed approach on the calculation of the **qualifying period**, namely that it should be 12 calendar weeks regardless of working pattern (e.g. part-time or full-time). A new qualifying period will begin only if a new assignment with the same employer is **substantively different**, or if there is a **break of more than six weeks** between assignments in the same role;

(g) To address concerns raised by some stakeholders, the final Regulations contain additional **anti-avoidance provisions**. Agency workers will have grounds for a claim to a Tribunal if a structure of assignments develops, the most likely explanation for which is an intention to deprive them of equal treatment rights – for instance, rotation between a series of 11-week assignments in “substantively different” roles with a hirer. To provide sufficient deterrent effect, this is backed by the possibility of an additional award of up to £5,000. To provide a greater incentive for compliance in low-value cases there is also a general **minimum award of two weeks’ pay**, subject only to Tribunal discretion if that level of award does not seem just and equitable;

(h) The Regulations retain the overall approach previously proposed to **establishing equal treatment**. They therefore:

- require an agency worker to be treated **as if he or she had been recruited directly to do the same job**, whether the direct recruitment would have been as an “employee” or as a “worker”;
- require equal treatment in respect of terms and conditions **ordinarily incorporated into contracts** of those working for the hirer. This will include collective agreements, pay scales and company handbooks or similar, but also extend to terms generally included in employees written employment contracts and other matters of custom and practice in the workplace concerned. But it will not include things that do not fall within these limits, such as individually negotiated contract terms or one-off discretionary payments; and
- provide that **treatment consistent with that given to a true comparable employee will be deemed to mean compliance** with the regulations. This is designed to simplify the operation of the regime in some circumstances, given the key role the comparison with a ‘flesh and blood’ comparator will often entail in establishing equal treatment rights.

The draft guidance on this important point that was included in the previous consultation document (and welcomed by respondents) is attached once again at annex A.

(i) The approach on issues of **liability** remains that proposed in the consultation on that draft regulations. The agency will be responsible for any breach of a right in relation to equal treatment for which they are responsible but will have a defence if they have taken “*reasonable steps*” to obtain the necessary information from the hirer and acted “*reasonably*” in determining the agency worker’s basic working and employment conditions. In such cases the hirer will be liable. The hirer is also liable to the extent that they are responsible for any breach of a right in relation to equal treatment. Any party in the “chain” of relationships can be named at the outset or joined to a claim and is liable to the extent that they are to blame for the infringement. Liability in relation to access to employment and collective facilities will, however, fall solely on the hirer, as the agency has no role in delivery of these rights;

(j) The final Regulations also retain the approach set out previously as regards the **provision of information** about equal treatment. After the 12 weeks have elapsed, an agency worker will be able to request written information from the agency (and subsequently from the hirer) about any aspect of equal treatment which they do not believe they are receiving. The agency and, if necessary, the hirer will each have 28 days to respond, to run from the date of receipt of the request. The regulations do not, however, provide a specific mechanism or timetable for the provision of information between hirer and agency, where we consider flexibility is required to take account of different circumstances – and the liability scheme provides necessary incentives;

(k) There is no change to the proposed approach on **dispute resolution**. Agency workers will be able to bring a claim to an Employment Tribunal, but we would hope that the majority of cases will be capable of resolution either by means of internal grievance procedures or through Acas pre-claim conciliation, which will if necessary be able to consider tripartite cases. **Remedies** will, as previously proposed, generally be a matter of compensation for the worker’s loss, subject to the important qualification of the minimum award provision and the possibility of an additional award when the anti-avoidance provision is breached (see (g) above);

(l) On the **protection of pregnant women and new mothers**, we have responded to concerns expressed by some respondents by providing that the “protected period” for women taking time off following childbirth (during which continuity is maintained for purposes of calculating qualifying and break periods) should be up to 26 weeks. We have also made clear that continuity is retained in the event that a woman has to move between roles for a pregnancy-related reason. Otherwise the approach in this area remains as previously proposed;

(m) The approach to implementation of rights in respect of **equal access to facilities and vacancies** remains as previously proposed, subject only to minor alteration of the scope of the comparator provisions;

(n) We have been persuaded by representations that the introduction of an express ‘reasonableness test’ for ‘**temp to perm fees**’ is not strictly

necessary for the implementation of the Directive, and could have unhelpful consequences for the Agency sector. We will, however, keep the issue under review in the light of evidence;

(o) The Regulations provide, as previously proposed, that agency workers should count towards **thresholds for the establishment of representative bodies in the temporary work agency** (as opposed to the hirer). Their effect as regards the **provision of information on the use of agency workers to workers' representatives** also remains broadly as before, with two exceptions: we are no longer amending two pieces of health and safety legislation, since we consider that existing provisions are sufficient to comply with the Directive's requirements; and we are clarifying that relevant information on the use of temporary agency workers should be provided where it is necessary to allow union representative to engage effectively in collective bargaining processes;

(p) Finally, the Regulations continue to include provision allowing flexibility to enable alternative arrangements in the case of **agency workers on permanent contracts of employment who are paid between assignments**, but we have concluded in the light of the consultation that it is not appropriate or necessary to allow derogation on the basis of either **collective or workplace agreements** given the limited extent to which variations of equal treatment would in practice be possible.

Further guidance will, of course, be provided on all aspects of the regulations to assist those affected prior to their entry into force.

3. Scope of the Directive – who is covered

What does the Directive say?

3. Article 5.1 of the Directive says

“ .This Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction”.

What the draft regulations said

3.1 We proposed that implementation would apply to people finding temporary work through a “temporary work agency” which would be based upon the existing concept of an “employment business. The definition of “agency worker” would be based on that used for “workers” in the Working Time Regulations 1998, adjusted to reflect the distinctive triangular relationship between an agency worker, the employment business and the hirer. This would exclude workers who are genuinely one of the following: the self-employed; those working through their own limited liability company; or those employed on “Managed Service Contracts”.

3.2 We also proposed that the scope of the definition should not, however, exclude agency workers contracted to an “umbrella company”, or who operate a personal service company but who are not genuinely self-employed, or who are supplied through “intermediaries” such as Master/Neutral Vendors and any similar “chain” arrangements. We were concerned that not to include these structures would provide a relatively straightforward way for the unscrupulous to evade the regulations.

What did respondents say?

3.3. Union and employee representatives’ principal concerns were that the definitions should address potential avoidance tactics by unscrupulous hirers and agencies. They said there should therefore be a statutory presumption that any individual supplied by an agency is an “agency worker” for the purposes of the Regulations, and that the onus should be on the hirer and/or agency to prove otherwise. This would include individuals employed on Managed Service Contracts (MSCs), the self-employed (in view of the scope for abuse through bogus self-employment) and Ltd Company Contractors (LCCs). They also argued that groups of linked or associated hirers should be treated as a single hirer, which they maintained would be important to ensure continuity of service for the purposes of the qualifying period in some sectors (e.g supply teachers). There were also calls from these stakeholders for the regulations to make specific provision regarding the coverage of those working on ships trading between EU ports and in the offshore sector.

3.5 Business respondents, on the other hand, supported the objective of excluding the genuinely self-employed, LCCs, and contractors and individuals working through MSC arrangements. There was not, however, universal agreement amongst this group with the way this objective was addressed in the draft Regulations. Some felt that the proposed definition of “agency worker” did not go far enough to clearly exclude these arrangements, and suggested specific criteria to distinguish and exclude such workers, eg reflecting their personal autonomy in carrying out their services. Some said the objective of excluding the genuinely self-employed would most effectively be met by a definition of “agency worker” that would include all but those who work through their own Limited Company. Others (supported in some respects by some Union respondents) proposed a specific definition of “managed service contract” in the regulations to ensure that only appropriate arrangements that might come under this heading were included.

3.6 Some of these respondents also argued that it was inappropriate to include workers supplied by Umbrella Companies (UCs) within scope, challenging the statement in the previous consultation about the “tax-driven” nature of UCs, especially for the “high end” of the contractor market. Several respondents representing professional contractors called for implementation to concentrate on protecting “vulnerable workers” (who should be defined in the Regulations), saying that individuals earning beyond a certain amount should either be excluded or have the option of being able to “opt-out” of their equal treatment entitlements. Professional contractors’ bodies were also concerned that Employment Businesses might not necessarily be equipped to make assessments of whether LCCs and sole traders are genuinely self-employed or not.

Our conclusion – what the regulations provide

3.7 After careful consideration of these views, we have concluded that the underlying policy intention set out in the previous consultations is appropriate and that the Regulations should remain broadly as drafted.

3.8 On the issue of “sham” self-employment or other similar avoidance arrangement we remain of the view that the Courts and Tribunals are capable of determining employment status and identifying such avoidance devices. We have considered the alternative of trying expressly to exclude certain categories of workers or arrangements, but are concerned that this would unnecessarily complicate the Regulations. Furthermore, an attempt to identify in regulations every possible avoidance or “sham” scenario would be very difficult, and could well have the unintended consequence of bringing within coverage business models which we believe should be excluded. In terms of the concerns expressed by Union respondents, we would also be concerned that more specific targeting of “sham” arrangements could have the unfortunate effect of providing greater clarity for the unscrupulous of the kind of contractual arrangements to avoid.

3.9 We have come to a similar conclusion regarding the arguments from some respondents that we should provide a clearer exclusion of limited

company contractors on the face of the regulations. If a very general provision were made to exclude, for example, anyone who has a shareholding or holds office in a limited company, this could make it easier for unscrupulous parties to set up business models – for instance, minimal shareholdings could be used to circumvent the protection of individuals under the Directive. Since a properly legally constituted shareholding could be difficult to challenge and this approach may unwittingly make it harder for Employment Tribunals to police "sham" or other avoidance arrangements. Our conclusion therefore is that the disadvantages of expressly excluding LCCs would outweigh any perceived benefits. The Regulations as drafted do allow the Courts and Tribunals scope to consider, for example, whether an "agency worker" is dealing with a hirer where the latter is a client or customer of the agency worker's business.

3.10 We also remain of the view set out in the previous consultation documents that the inclusion of workers employed by umbrella companies is justified, as it would otherwise provide a relatively easy means for unscrupulous parties to avoid the Regulations. In relation to seafarers, the AWD regulations do not make an express provision to cover them as some union respondents have requested. This is because some aspects of employment protection, in so far as it relates to seafarers, are under discussion with the European Commission. We will therefore keep the position under review.

3.11 In the light of concerns raised by some respondents regarding the proper coverage of "managed service contracts", and the risk of possible abuse, we have reviewed Regulation 3 which sets out the definition of agency workers. One aspect of this relates to the "supervision and direction by hirers" of agency workers. The legislation now describes agency workers as being:

"supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer"

3.12 We believe this more accurately reflects Article 1 of the Directive; and it should also assist in excluding secondees from possible scope. Tribunals will be able to look at the role of alleged MSC staff managing or directing on site, and if in reality they do not supervise and direct such staff, an MSC arrangement would not be upheld. We have also amended draft regulation 3(1)(b) to remove the words "*engaged by*" (the temporary work agency) in order to bring the definition of agency worker more in line with the "worker contract" formulation used in section 230(3) of the Employment Rights Act 1996 and elsewhere. The legislation also deals with situations where an individual is dealing with either a temporary work agency or a hirer where either is a client or customer of the individual, ie during the course of a business. Whether or not such a situation involves a limited company vehicle, it is likely that the individual in that situation involved will fall outside the scope of the regulations.

3.13 Through Guidance we will encourage agencies to make it entirely clear to a worker the nature of the contract they are being offered before it is signed and its implications for their rights under the Regulations.

Exemption for Government Training Programmes

3.14 Article 1(3) of the Directive states:

“Member States may, after consulting the social partners, provide that the Directive does not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme.”

What was proposed

3.15 We proposed that no provision should be made in the draft Regulations on this matter. We did not consider that it would be right to decide as a matter of principle that equal treatment rights should never apply to a worker purely because they have arrived at the agency following a place on a welfare to work programme, but we considered it would be wrong to rule out future use of the exemption should it be relevant.

What did respondents say?

3.16 As with the previous consultation, this was not a major focus of comments. The only comments received reiterated points made previously, with employee representatives in particular objecting to the use of the derogation as a matter of principle.

Our conclusion – what the regulations provide

3.17 Having considered these comments we remain of the view that the proposed approach is appropriate. We do not consider that it would be right to decide as a matter of principle that equal treatment rights should never apply to a worker purely because they have arrived at an agency following a place on welfare to work programme, which could potentially deprive vulnerable workers of valuable protections. It would be wrong to rule out future use of the exemption should it be relevant; use of the exemption will therefore be considered on a case by case basis.

4. Defining “equal treatment under the Directive

What does the Directive say?

4.1 Article 5.1 of the Directive describes the “principle of equal treatment”. It provides that:

“The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly to occupy the same job”.

4.2 Article 5.4 of the Directive allows Member States to establish alternative arrangements derogating from the principle of equal treatment on the basis of an agreement concluded between the social partners (representatives of employees and employers) at national level. The Directive text specifically states that such alternative arrangements may include the provision of a qualifying period for equal treatment. In May 2008 the CBI and the TUC reached an agreement that can provide the basis for our implementation of the equal treatment principle under Article 5.4. Its principal feature was the agreement that there should be a 12-week qualifying period – *“after 12 weeks in a given job there will be an entitlement to equal treatment”*.

4.3 We are implementing the Directive on the basis of the CBI-TUC agreement. After the 12-week qualifying period has elapsed, an agency worker will therefore be entitled to equal treatment in relation to ‘basic working and employment conditions’. These are defined by the Directive (Article 3(1)(f)) as:

“..working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

- (i) duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays*
- (ii) pay”*

Working time and holiday entitlements

What the draft regulations said

4.4 We proposed that agency workers qualifying for equal treatment would be entitled to the same working time and holiday entitlements as they would have received if recruited directly. The draft Regulations provided that equal treatment in these respects should include any entitlement above the statutory

minimum. To address practical issues as regards holidays, particularly where an agency worker works for several hirers with different entitlements, it would be possible for payment to be made in lieu of entitlement above the statutory minimum either as part of the daily/hourly rate or at the end of the assignment.

What did respondents say?

4.5 Unions generally supported the proposal to require equal treatment on these provisions to be the same as in the hirer, including holiday entitlement above statutory minimum, and pressed for clarity that equal treatment would also extend to time off for bank and public holidays. Many also argued for this to be backdated to day 1 of the assignment after the qualifying period has been completed. They generally did not support payment in lieu for holiday entitlement above the statutory minimum, saying that agency workers should be entitled to take the actual leave. Some also argued that this approach would be inconsistent with the principle of equality of treatment since the permanent workforce would usually not be allowed to take payment in lieu. Many also said agencies/employers should be required to keep records of leave taken, to ensure compliance with the statutory minima and said it should be unlawful for agency workers to suffer detriment for requesting or taking holiday.

4.6 On the other hand, those representing agencies and hirers continued to express concerns about inclusion within equal treatment of any entitlements above the statutory minimum. They considered that these were a tool for recruitment, retention and reward of permanent staff, and that it was not therefore appropriate to make them available to agency workers. They argued that this was not required by the Directive, would increase costs, and introduce additional complexity of calculation and administration, particularly where workers accrue multiple qualifying periods with more than one hirer/agency. Some said that record keeping would require substantial new IT investment. While not supporting the approach on annual leave, if the Government decided on this approach most felt it was essential to have the flexibility to make payment in lieu.

4.7 Other respondents did not tend to take issue with the overall approach, but stressed the need for further guidance in this area to aid implementation, particularly in circumstances in which there was a considerable element of contractual leave above the statutory minimum.

Our conclusion - what the regulations provide

4.8 The Regulations provide that after 12 weeks in the same role, an agency worker is entitled to equal treatment in respect of duration of working time, night work, rest periods and rest breaks, and to be paid at the appropriate rate for overtime. The main issue in the responses to the second consultation remained the entitlement to annual leave. Having carefully considered the responses, our conclusion is that the approach we proposed in the draft Regulations is the right one in that agency workers must be entitled

to the same annual leave they would have received if recruited directly, including entitlement above the statutory minimum. We also agree with some respondents that this right should encompass any entitlement to time off for bank and public holidays – this was already the effect of the reference to ‘annual leave’ in the regulations. The agency worker will be entitled to treatment as if they had been recruited directly to occupy the same job (also see section on “Establishing Equal Treatment”).

4.9 However we believe it is permissible to provide payment in lieu of additional holiday entitlement where this is above the statutory minimum. This addresses the very real practical problems that would arise if agencies had to carry forward differing leave entitlements from a variety of hirers. It also gives the agency worker the option of use the money to take additional leave between assignments, but does not cut across the requirement for agencies to pay workers when they take statutory annual leave. Some respondents asked for guidance on how payment in lieu could work in more detail and we will of course provide that in due course.

Pay

What the draft regulations said

4.10 We proposed that “pay” would essentially mean basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. This would include payment for overtime, shift allowances, unsocial hours premiums/bonuses, payments for difficult or dangerous duties, and some commission payments and bonuses. It would, however, exclude bonus payments that were based on organisational performance, or that were linked to a performance appraisal process designed for long-term management, motivation and retention of staff. Such payments would also not come within the definition if they would not be due for payment to the agency worker concerned within his or her time with that hirer had he or she been recruited directly.

4.11 We said that the proposed pay definition would also exclude other aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing and share ownership schemes and, consistent with the CBI-TUC agreement, occupational pension contributions or schemes and occupational sick pay.

What did respondents say?

4.12 This was once again an area that drew significant attention from a wide range of respondents to the consultation. Union and employee representatives continued to argue for a much wider definition of pay to include all contractual entitlements – including all bonus payments, maternity, paternity and adoption pay, luncheon and childcare vouchers, redundancy and notice pay. One respondent argued that the Directive’s statement that it was “without prejudice to national law as regards the definition of pay”

required the Government to use an existing statutory definition of pay without amendment.

4.13 Hirer and agency respondents, in contrast, continued to argue for a narrower definition than that proposed, in most cases wanting to see this limited to basic pay only. As previously, these respondents stressed the need to make the new regime simple to administer, arguing that inclusion of elements other than the basic daily/hourly rate would be inconsistent with this. They also argued that items beyond basic pay were reflective of the difference relationship that exists between an employer and the directly recruited workforce.

4.14 As in responses to the first consultation, the issue of bonus payments was a particular focus of attention. There was general support for the proposal to exclude payments relating to collective rather than individual performance, but some respondents expressed concern as to whether this was sufficiently clear from the draft regulations. These respondents also argued that the draft regulations should go further than they did on the issue of bonuses relating to individual performance and make clear that any bonus requiring performance appraisal was out of scope. They considered that it would interfere in the tripartite relationship between agency, worker and hirer if the hirer had to be responsible for appraising the performance of agency staff, with some respondents questioning whether there could be implications for agency workers' overall employment status. Some also argued that agency staff would, as a result, get better treatment than permanent staff, since they would receive bonuses designed to incentivise loyalty without having to give that loyalty in return. There was a common view that the complexity of including any such bonuses in equal treatment rights would increase the administrative complexity of the new regime.

4.15 Business respondents were, however, generally supportive of the other exclusions from the scope of pay, including occupational pensions, occupational sick pay and financial participation schemes. A new issue was raised in relation to the latter, with the case pressed for the clear exclusion of "phantom" share schemes or payments (where a company may offer their employees a stake in the financial performance of company but not a legal stake in the company).

Our conclusion - what the regulations provide

4.16 After careful consideration of all responses on this issue, we have concluded that the overall approach proposed in the draft regulations remains correct, but with a limited number of modifications.

4.17 The principle behind our approach will therefore remain that an agency worker be entitled to equal treatment in terms of "pay for work done". We remain of the view that this is the right approach in terms of policy, since it entails a full reflection of the contribution of the agency worker whilst in a post, but leaves out those incentives and rewards which rather reflect the different quality of relationship between employer and permanent employee.

4.18 As far as bonuses are concerned, we have concluded that implementation of this principle will be best achieved by stating in the Regulations that bonuses are included in the scope of equal treatment, with the exception of those that are not directly attributable to the amount or quality of work done by the agency worker. The regulations include a provision that bonuses given for another reason such as reflecting the long-term performance or designed to reward loyalty will be out of scope. It will, however, include within scope payments linked to individual performance, be they mechanistic payments linked to output targets or those based on performance appraisal arrangements.

4.19 We are aware that this change will be disappointing for hirers and agencies, who have expressed concern in particular about the implications of undertaking performance appraisal of agency workers. It is important to stress, therefore, that the effect of the Regulations is not to require integration of agency workers into the permanent performance appraisal systems for permanent staff – they require equal treatment in terms of the end, not the means. Hirers will therefore be able if they wish to adopt simpler systems for the tracking of agency workers' performance, including in conjunction with the agency concerned and perhaps making use of the pre-existing performance feedback arrangements that many agencies already have in place. It should also be stressed that the effect of the regulations will be to require equal treatment in terms of pay as a whole, so it will be possible, for instance, to include within the hourly rate an amount to cover, over the term of the assignment, a bonus that is to be paid to all satisfactory performers (with subsequent adjustment, if necessary, for over- or under-performing agency staff). It will also continue to be the case that a bonus will only be payable to an agency worker if it is part of the "basic working and employment conditions" he or she would have received if recruited directly – there will in some instances, for example, be qualifying periods for bonus entitlements (see also Section 8, "Determining Equal Treatment"). And a bonus will only be payable if it would have been paid to the worker concerned during the period of the assignment, had they been recruited directly.

4.20 We have also concluded that although the great majority of benefits in kind need not come within our "pay for work done" approach, a small minority are so close in concept to pay that they should be within scope. The Regulations therefore include within scope vouchers or stamps with a monetary value, which will in practice mean things like luncheon and transport vouchers. Although these items will generally be of a relatively low value, they can be of particular importance to lower paid agency workers. There has been particular comment in this context from hirers and agencies about childcare vouchers, which can of course be of significantly higher value. These could in principle in some instances come within scope of this provision, but they need not if, as we understand will usually be the case, the vouchers are funded on the basis of salary sacrifice arrangements – in which case the vouchers do not entail any overall increase in the amount of pay received.

4.21 Finally, we consider that the definition of pay in the Regulations is sufficient to exclude the “phantom” share schemes mentioned above, as they will fall within the type of bonuses payments based on organisational performance which are excluded. We will provide further assistance on the points discussed in this section in our accompanying guidance to the regulations.

Defining the 12-week qualifying period, including breaks between (or during) assignments

What the draft regulations said

4.22 We proposed that the 12-week qualifying period should be 12 calendar weeks, regardless of working pattern (e.g. part-time as opposed to full-time). We said a new qualifying period would begin only if a new assignment with the same employer was substantively different; with a minimum six week break between assignments in the same job before the 12 week clock should start again. The draft regulations provided that certain absences should not count towards a break period, including absence on leave or when ill. They also provided that a new qualifying period would begin in the event of a move to a “substantively different” role with the same hirer.

What did respondents say

4.23 There was support from almost all respondents for the proposal that the 12-week qualifying period should be 12 calendar weeks regardless of pattern of work. All considered this was the only feasible approach, given the complexity that alternatives would entail.

4.24 Unions and employee representatives did not, however, support a 6 week minimum break, which they said would be easy to circumvent by rotation of agency workers. Their preference remained a reference period of at least 2 years during which any assignment would be counted towards the 12 weeks. If a minimum break approach was to be taken, they argued for this to at least 12 months

4.25 These respondents were also concerned that moves to a “substantively different assignment” could be used to deprive agency workers of their equal treatment rights. They argued that “substantively different” would mean merely factually different, for examples involves different tasks or a different skill set etc, and that the unscrupulous would find it easy to abuse the provision by moving agency workers around within the same workplace or between connected or un-connected hirers. They argued that this provision be dropped and that all work in any role with the same hirer be counted towards a single qualifying period.

4.26 If the ‘break period’ approach were to be retained, these respondents argued, additional provision was required regarding other reasons for absence that should not count towards it. They said this should apply, in addition to the provisions in the draft regulations on this point, to periods in

which work was not available (e.g. supply teachers during school holidays) or in case of a strike or lock-out, and for a protected period of at least 26 weeks for women on maternity leave.

4.27 Agencies and hirers took a very different view. They continued to think a 6 week break was too long, and that a maximum of 4 (or, some argued 2) weeks break should be sufficient. They considered that businesses would not deliberately manage their resources so as to avoid the regulations by hiring individuals on a 12 on, 4 weeks off model as it would require a high degree of administrative effort and that any benefits would be outweighed by costs. They considered a 6 week break would pose significant challenges for agencies and that reducing the break to 4 weeks would remove some of the complexity and record keeping requirements.

4.28 Many business and agency respondents also pointed to the particular issues that might arise regarding short-term assignments, eg a day or two at a time for drivers, hospitality or social care workers. It was argued that it was inappropriate for the regulations to apply to irregular patterns of such assignments, as there was no sense of real continuity comparable to permanent employment in such situations, and keeping track of such postings for qualifying period purposes would add to administrative complexity for agencies and hirers. Various suggestions were put forward to address this issue, generally entailing variation of the length of the break period in relation to the length of the assignment concerned, perhaps with an overall minimum.

4.29 A number of respondents also said steps needed to be taken to address the particular issues that would arise in the event of a worker being posted to the same or similar assignments with the same hirer by different agencies. These respondents argued that it would be a significant burden for hirers to keep records to ensure workers were not deprived of their rights in such circumstances, but also that agencies should not be potentially liable if they placed a worker without knowing that he or she had previously fulfilled all or part of a qualifying period when do the same job via a different agency. It was suggested by some that workers should, as a result, be made responsible for informing agencies of any previous or overlapping roles, foregoing equal treatment rights if they did not.

Our conclusion - what do the regulations provide

4.30 Given the high degree of agreement that 12 weeks qualifying period should be 12 calendar weeks regardless of working pattern, this remains the approach taken in the regulations. The regulations also maintain the 6-week break period, which we continue to consider necessary to address the risk of avoidance by the unscrupulous but not disproportionate to delivery of that objective.

4.31 The regulations also continue to provide that the qualifying period should recommence in the event of a move to a “substantively different” role with the same hirer. We consider this appropriate in the context of implementation based on the CBI-TUC agreement of May 2008, which refers

to equal treatment after 12 weeks in a “given job” – if there is a substantive change in role, there is a new “given job”. We also think this approach consistent with the purpose of a qualifying period provision, which will in part be to provide a ‘trial period’ in a particular role – if the role changes substantively, there is a case for a new trial period in that new function.

4.32 Some powerful arguments have, however, been put to us during the course of the consultation process around the risk of unscrupulous hirers or agencies rotating workers between substantively different roles to ensure they never completed a qualifying period. We have therefore introduced into the Regulations a targeted anti-avoidance provision (Regulation 9) which gives a worker the right to be treated as if they were entitled to equal treatment if a structure of assignments develops (whether within a hirer or between that hirer and connected businesses) which is intended to prevent them acquiring equal treatment rights. We consider that this will be readily demonstrable in cases of clear abuse on the basis of simple facts – for example rotation back and forth between several “substantively different” jobs in the same hirer; or several 11 week assignments broken by periods of over 7 weeks with hirers or connected hirers. To assist workers, agencies and hirers alike, the provision includes a non-exhaustive list of factors that a Tribunal would be asked to consider in deciding whether a structure of assignments amounted to avoidance. To provide a sufficient deterrent effect, Tribunals will be able to make an additional award of up to £5,000 where a hirer and/or the agency is found to be in breach.

4.33 A number of respondents also sought further clarification on the meaning of “substantively different”. We remain of the view that the best place for detailed clarification will be in guidance rather than on the face of the regulations, but a small amendment has been introduced to make clear that the whole or main part of a role must be “substantively different” in order for the provision to apply – it will not be enough for a small proportion of the role to change, however, significant the change of that part of the job may be. This is consistent with the position set out in the previous consultation document that relatively small changes will be insufficient to satisfy the “substantiveness” test. Future guidance on this point will stress that the primary consideration in deciding whether or not changes are substantive is likely to be the degree of difference between the duties or responsibilities of the two roles, with factors such as the difference in skills and attributes required and changes of line management, organisational unit or precise location perhaps relevant but unlikely to be sufficient in isolation. Agencies will be required to provide in writing to agency workers a description of the new work they will be required to undertake.

4.34 As for the particular issues that arise regarding short-term assignments, we have carefully considered the various suggestions put forward by business and agency respondents, but concluded that all of them raise concerns. We would be concerned about the prospect of all agency staff in certain sectors, such as lorry drivers, carers and hospitality workers, effectively being removed from the equal treatment regime, given the

prevalence of short-term assignments. Given the sectors concerned, some of these workers will, after all, be amongst the lowest paid agency staff. We are also concerned that all of the proposed alternative approaches would provide further ways in which the unscrupulous could seek to evade the regulations.

4.35 On the issues raised regarding placements with the same hirer via different agencies, we do not agree that the regulations should place a legal responsibility on the agency worker to declare previous employment as the equal treatment right should not come with conditions attached. We do sympathise with the concerns raised in this area, but consider that most of them will not arise in practice because of standard agency practice and the regulations' provisions on liability and compensation. It is normal practice for an agency to ask an agency worker about their recent employment history, which should alert an agency to the fact that an agency worker might be nearing achievement of the qualifying period with a hirer or number of hirers. Were a Tribunal to be asked subsequently to consider a case concerning a worker who had been asked such questions, the facts of them (and the worker's responses) would clearly be relevant to the conclusions it reached, particularly in terms of remedies. If the agency worker has contributed to action by the hirer or agency to which the complaint relates, the Tribunal will take this into account and reduce compensation accordingly, as provided for in regulation 18(17). Guidance will be developed to assist further in this area.

4.36 Finally, we have concluded that some respondents are correct that we should extend the list of the circumstances in which absence from the workplace should not count towards a break period. In addition to the previous proposals, the regulations provide that the 'clock should pause' on a qualifying or break period when the workplace is effectively closed (eg for agency supply teachers during a summer break) or in the event of industrial action or lock-out. We also agree with representations that the draft regulations did not provide sufficient protection for the agency workers taking time off following childbirth – the final regulations therefore provide that the clock on a qualifying period can 'continue to tick' throughout a protected period of up to 26 weeks after a woman has her child.

Permanent contracts of employment and payment between assignments – possible exemption from the principle of equal treatment on the basis of Article 5(2)

4.37 The option provided for under Article 5.2 of the Directive is as follows:-

“as regards pay, Member States may, after consulting the social partners, provide that an exemption may be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid between assignments ”

What the draft regulations said

4.38 We proposed to make use of this option, but stressed the need to ensure that in doing so we did not open up a route for circumvention of the Directive's provisions.

4.39 The draft regulations therefore outlined the circumstances under which "derogation contracts" should be permissible and set out the detailed conditions that must be met. These were that the agency worker should have a permanent contract with the agency concerned; there should be agreement at the outset between the agency and the worker on the terms and conditions that would apply across assignments; the level of pay between assignments should be at least 50% of on assignment pay and not below the National Minimum Wage; the contract should not be capable of termination without the agency worker having received at least 4 weeks of pay between assignments; and the agency must take reasonable steps to seek a suitable new assignment when one has come to an end. We also confirmed that where an agency worker qualifies for statutory rights relating to unfair dismissal, redundancy etc these will of course still apply.

4.40 However, as we indicated in the first consultation, this proposal is a relatively novel approach so we invited further views on how it might work in practice. We particularly asked for views about any unintended consequences or scope for abuse. We also indicated that we would consider further appropriate remedies for any breach of the requirements set out in the draft regulations.

What respondents said

4.41 Business and agency respondents generally welcomed the proposal to make use of the derogation, though with comments on the detail of our proposals. There was some concern that our approach to safeguards and the pre conditions set out in the draft regulations was too restrictive, in particular, that a 50% rate of pay between assignments was too high and the 'floor' of NMW unnecessary. Agency respondents thought this would have a disproportionate effect on temporary work agencies supplying into industrial and social care sectors and any sectors where the average rates of pay are close to the NMW Others expressed concern that the requirement that an agency worker should receive at least 4 weeks of pay between assignments before their contract can be terminated was too long and proposed instead that it should be shortened to 2 weeks.

4.42 It was suggested that a potential remedy for any breach of these regulations should not attempt to link an award of compensation to any equal treatment rights the employee concerned would have been entitled to other than for their engagement on a 'derogation' contract. The respondent felt that it would in practice be difficult or impossible to determine what those equal treatment rights would have been because the relevant hirer(s) would not be a party to any claim.

Our conclusion - What the regulations provide

4.43 Throughout, our policy approach to this issue has been to balance business needs with appropriate worker protection and a degree of compensation for loss of rights to equal treatment on pay. Overall, it remains our view that the draft regulations set out in the consultation broadly achieves that aim.

4.44 In response to the points made by stakeholders about the level of pay and 4 week requirement, we consider that we have got the balance broadly right. We remain of the view that a level of pay above 50% will render the derogation commercially unviable. Equally, we consider that to retain a floor of NMW is entirely appropriate given our wish to eliminate scope for abuse. We do see merit however in some further strengthening of the requirements in terms of ensuring up front that the agency worker is aware that they are foregoing equal treatment rights because they will be paid between assignments. Consequently we have amended the regulations to require that this be made clear in the agency worker's contract. We have also made other drafting amendments aimed at ensuring clarity and which reflect suggestions made by stakeholders

4.45 If there is a breach of these regulations, in particular where agency worker is not aware that they are signing a "derogation" contract, the default position is that equal treatment in regulation 9 should apply. Agency workers will also be able to make a claim to the employment tribunal that a term of the contract has been breached, or that a duty in relation to the pay between assignments provision has been breached.

4.46 With regard to statutory employment rights and entitlement to other benefits, we have considered these concerns further and we do not believe agency workers who opt for pay between assignments contracts will be disadvantaged in this respect as this arrangement provides remuneration for the agency worker when they are out of work.

4.47 In respect of other basic working and employment conditions, these provisions will continue to be applicable on completion of the 12 week qualifying period, as for other agency workers. We do not agree with union and employee respondents that these must not be subject to the qualifying period, though some agencies using derogation contracts may choose to offer equal treatment in these respects from day 1 for simplicity of administration.

Agreements between workers' and employers' representatives

What the Directive says

4.48 The Directive allows employers and workers to formulate an agreement to vary agency workers treatment through either collective agreements (between management and recognised trades unions) or, via the national social partner agreement derogation, workforce agreements (between management and non-union workforce representatives). Both routes require agency workers to receive protection but allow some flexibility in how equal

treatment is delivered. Such agreements can only cover basic working and employment conditions and not other entitlements such as access to on-site facilities.

What the previous consultation said

4.49 The consultation document sought views on the role of collective or workforce agreements, taking account of the need to provide an appropriate level of protection as set out in the Directive and the CBI - TUC agreement. We proposed that there should be equal scope for agreed local variation of the equal treatment regime affecting agency workers in both unionised and non-unionised workplaces; both workforce and collective agreements would therefore be permitted. We set out the practical considerations which would have to be taken into account.

What did respondents say

4.50 Unions and employee representatives said that consideration should be given to using the derogation under Article 5(3) to promote the role of collective bargaining in determining agency workers' terms and conditions, particularly at a sectoral level. They were however firmly opposed to the use of workforce agreements, as non-union workplace representatives often lack expertise, experience and independence from employers and are therefore not well placed to negotiate terms and conditions on behalf of workers. They were also concerned that the draft regulations would not prevent a hirer from negotiating a workforce agreement which undercut a pre-existing collective agreement with a recognised trade union. They also believed that the use of the derogation required specific agreement on the point at a national level between the Social Partners.

4.51 Business representatives, in contrast, generally supported the proposed approach, stressing the need for parity of approach between workforce and collective agreements. With some exceptions, there was generally not an expectation that use of either kind of agreement would be widespread, however, given the requirement that the effect should be to ensure an overall outcome that was no less favourable to workers than the regulations. Concern was also expressed about whether the benefits of workplace agreements in this area would justify the management investment in ensuring the agreement complied with the conditions proposed.

Conclusions – what do the regulations provide

4.52 We have concluded that there is unlikely to be much to be gained from allowing the possibility of derogation from the regulations by either collective or workplace agreements. We would as a matter of principle not wish to discriminate between the flexibility available in unionised and non-unionised workplaces, and the concern expressed by business respondents about the practicality of workplace agreements suggests these would in fact be little used. In that context, the significant additional complexity that provision for the two kinds of agreement introduced into the draft regulations also seems

disproportionate. The regulations will not therefore allow derogation on either basis.

Protection of pregnant women and new mothers

What does the Directive say?

4.53 The Directive says that the principle of equal treatment should apply to rules about the protection of pregnant women and nursing mothers, in relation to the basic working and employment conditions.

What the draft regulations said

4.54 The draft regulations set out measures which would allow pregnant agency workers reasonable paid time off to attend ante-natal appointments and measures to protect their health and safety and that of their child.

4.55 We proposed that health and safety provisions would flow on from the existing requirements for a hirer to carry out a risk assessment. Where a risk was identified the hirer would have to make adjustments to remove the risk. Where this was not reasonable, or would not remove the risk, it would fall to the agency to offer alternative work or, if this was not possible, pay the agency worker for any period of the assignment when she could not work due to a health and safety risk. A woman would not be eligible to be paid if she unreasonably refused alternative work. We proposed that liability in respect of these provisions should sit primarily with the agency since the agency would be best placed to offer alternative work. These protections would apply for the duration, or likely duration, of the assignment. To be eligible the woman would have to have completed the qualifying service and have told the agency and hirer that she was pregnant.

What did respondents say?

4.56 There was broad agreement with the approach taken in the draft regulations. Union and employee respondents generally supported the health and safety protections, although they argued that the regulations should go further and provide specific protection against dismissal. Unions also raised the question of whether a woman's qualifying service would be maintained in those cases where she is moved to a "substantively different" assignment as a result of a health and safety risk. A number of respondents commented on the use of "reasonable", on the whole they highlighted that there may be uncertainty as to which adjustments it may be "reasonable" for a hirer to make. Some agency respondents commented that there should not be a reasonableness test should a woman refuse an offer of alternative work. A woman should not receive pay in any case where she refuses alternative work. Some groups representing agencies raised concerns that some of the provisions went too far and placed too much liability on agencies, for example in cases where an agency refused to take a pregnant woman for an assignment.

Our conclusion - what the regulations provide

4.57 The regulations maintain the previously proposed approach, subject to a minor amendment to clarify the position if a woman does change assignments as a result of a health and safety. The clock will continue to tick as if she were at the original assignment and she will be entitled to pay and conditions at least equal to those she received at the original assignment. This will apply for the length of the original assignment. In addition to the clock ticking as if she were at the original assignment, she will also be able to accrue weeks in relation to the new hirer where she is working in another role so that she will not be disadvantaged by the move. We are also responding to concerns expressed by some respondents by providing that the clock on a qualifying period can “continue to tick” throughout a protected period of up to 26 weeks after a woman has her child .

4.58 These provisions are based on long-standing protections for pregnant employees and to that extent there is already some understanding of which adjustments are reasonable to address risks. However the Government recognises that their application to agency workers will be novel and will include guidance on reasonable changes in guidance. The Government does not intend to remove the option for a pregnant agency worker to reasonably refuse alternative work.

4.59 The Government believes the balance of liabilities on agencies and hirers as regards these proposals is right. The agency is likely to be in the best position to offer alternative work. These regulations should not hamper a hirer in the decisions they take about accepting agency workers – a hirer should not pick up liability for paying a pregnant agency worker if they have legitimately refused an agency worker for an assignment. Refusing to accept an agency worker on the grounds of pregnancy is discrimination under the Sex Discrimination Act.

5. Access to employment, collective facilities and vocational training

Access to employment vacancies

What does the Directive say?

5.1 Article 6.1 of the Directive Article 6.1 of the Directive describes the “principle of equal treatment”. It provides that:

“Agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment. Such information may be provided by a general announcement in a suitable place in the undertaking for which, and under whose supervision, temporary agency workers are

engaged".

5.2 This right is a "Day One" entitlement and is not subject to the 12-week qualifying period that we intend to implement on the basis of the TUC-CBI agreement in relation to basic working and employment conditions.

What the draft regulations said

5.3 The draft regulations provided that an agency worker must have the right to be informed by the hirer of vacancies in the establishment if they were available to a comparable employee whether by way of an internal or external selection process. We considered that the Directive did not allow us expressly to restrict the right to information about vacancies to those advertised externally. The draft regulations stated that the agency worker should have a reasonable opportunity to read a vacancy announcement in the course of an engagement or must be given reasonable notification of a vacancy in some other way. Consistent with this part of the Directive, they required comparison with a 'flesh and blood' comparator alone. We felt the requirement could generally be addressed by means of established processes – vacancy lists posted on notice boards, intranets etc.

5.4 We also clarified in the last consultation document that we did not consider Article 6.1 of the Directive to be aimed at situations where a hirer needed to redeploy surplus staff, for example as part of a redeployment exercise of permanent staff in order to avoid redundancies. In such circumstances, surplus staff are given the first opportunity to apply for jobs before permanent staff; thus agency workers would not need to be treated differently to permanent (non surplus) employees

5.5 The draft regulations provided that liability for compliance would lie solely with the hirer, as opposed to the agency; we proposed to clarify the practical implications further in Guidance.

What did respondents say?

5.6 Union and employee respondents generally agreed with our proposed approach. Some business respondents, however, were concerned that the establishment of new processes to ensure equal access to vacancies could entail significant cost, particularly if changes to IT systems were required. There was also widespread concern (not only amongst employers) to ensure that equal access need not apply to vacancies advertised in the context of any headcount freeze, and not just during organised redeployment or restructuring exercises.

5.7 Some business and agency respondents were also concerned about the need to compare with workers doing "broadly similar work", and wanted the scope of comparison to people doing the "same" job. Union respondents, on the other hand, wanted the scope to be broadened so that the comparison

could be made with people working on other sites, and with predecessors doing the same or similar work.

Our conclusions – what do the regulations provide

5.8 Our approach on this issue will remain broadly as previously proposed, with a slight adjustment to the provisions regarding the scope for comparison to establish equal access rights. The regulations will now allow comparison with a comparable worker as well as a comparable employee, so as to address concerns that in some workplaces there may not be a comparable employee (but may be comparable workers).

5.9 The regulations continue to provide, however, that the need to inform agency workers of vacancies is limited to where there is a comparable worker currently based at the same establishment. We do not consider that it would be necessary to be compliant with the Directive that a hirer would have to provide information on vacancies which might be geographically remote or on the basis of comparison with a predecessor. Clear practical difficulties could also arise were either an additional point of comparison to be required.

5.10 We also believe it will be possible to address concerns raised by some business respondents in guidance. First, the guidance will make clear that the obligation on the hirer to provide information about vacancies does not constrain any freedom regarding any requirements for qualifications or experience that they have or how they treat applications from agency workers as opposed to permanent employees. And second, it will make clear that the right need not apply in the context of any genuine headcount freeze. This is because the right only applies to “vacancies”, and internal moves in the context of a headcount freeze are in practice more a matter of restructuring and there are not any “vacant” posts in such a situation.

Temporary to permanent status

5.11 Article 6.2 of the Directive requires that

“ Member States shall take any action required to ensure that any clauses prohibiting or having the effect of prohibiting the conclusion of a contract of employment or an employment relationship between the user undertaking and the agency workers after his/her assignment are null and void or may be declared null and void.”

What the draft regulations said

5.12 We proposed to amend the Conduct of Employment Businesses and Employment Agencies regulations to introduce an express ‘reasonableness’ test. Regulation 10 would be amended to limit any “transfer fee” an employment business can charge to a reasonable one and to require any extended period of hire, as an alternative to paying the transfer fee, to be

reasonable. We made the point in the consultation document that we were nevertheless open to further representations from the agency sector regarding the impact of this proposal, and would maintain dialogue on it with REC and other agency representative bodies.

What did respondents say?

5.13 Union respondents were of the view that the regulations should be revised to specify that agencies should only be able to recover genuine costs incurred, for example the cost of training an agency worker for an assignment. They were concerned that the inclusion of a reasonableness test would not be sufficient to prevent agencies from using policy or cost structures which would impede directly or indirectly access to permanent work for agency workers.

5.14 Agencies (and some business respondents) disagreed with our approach. They were strongly of the view that the issue of concern was fully addressed when the Conduct Regulations were last revised in 2003. They commented that Regulation 10 already severely restricts how and when agencies can charge hirers a temp to perm fee and if the hirer does not wish to pay a fee they can opt for a period of extended hire. Their view was that there is no legal requirement to change the Conduct Regulations to implement the Directive since fees are usually negotiable, backed by established principles of contract law, with the result that the market ensures their “reasonableness”. They were concerned that the only effect of adding the term reasonable would be that if agencies had to take hirers to court to recoup the fee the hirer had originally agreed to, courts were more likely to simply rule the fee unreasonable which would make recovery more difficult.

Our conclusions - what do the regulations provide

5.15 We have carefully considered the arguments put to on this issue, and concluded that there is merit in the view that implementation of the Directive does not require the amendment previously proposed. We are also particularly aware of the disadvantages as a matter of principle of interfering in the commercial relationship between agency and hirer more than strictly necessary, and have been persuaded by representations that existing mechanisms in contract law that are able to tackle “unreasonable” fees. We have therefore concluded that we should not amend the Conduct Regulations as proposed at this time. We will, however, wish to keep the position under review, particularly the level of complaints on this point to the Employment Agency Standards Inspectorate, and will consider further steps should this prove necessary at a later date.

Work seeking fees

5.16 Article 6.3 requires

“ *temporary work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking or for*

concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking”

What the draft regulations said

5.17 We proposed that there was no need to change the current regulations, as we believed this issue was already dealt with in the Conduct of Employment Agency and Employment Businesses Regulations 2003 as “temporary work agencies” (“employment businesses”) cannot charge fees. There are currently only two exceptions which apply to entertainers and models but they are supplied through “employment agencies” rather than “temporary work agencies” so were outside the scope of the Directive.

What did respondents say?

5.18 Those respondents who commented agreed that the current legislation is compliant with Article 6.3 of the Directive

Our conclusions - what do the regulations provide

5.19 We intend to maintain the approach outlined in the previous consultation, considering no action to be necessary.

Access to onsite facilities for agency workers

What does the Directive say?

5.20 Article 6.4 of the Directive says:

“ Without prejudice to Article 5(1) temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities, and transport services, under the same conditions as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons”.

As with access to employment vacancies (Article 6.1), this is a “Day one” right

What the draft regulations said

5.21 The draft regulations provided that an agency worker should have during the assignment the right to be treated no less favourably than a comparable employee in the hirer’s establishment in relation to

- canteen or other similar facilities
- access to child care facilities, and
- the provision of transport services

5.22 The draft regulations provided that, consistent with the Directive, less favourable treatment could only be justified on objective grounds, a defence framed along the lines of similar provisions in the Part-Time and Fixed-Term Workers Regulations (allowing, for example, for situations in which a hirer seeks to achieve a genuine business objective, and that treatment is a necessary and appropriate way of achieving that objective). The draft regulations also provided that the “objective grounds” defence would apply where the terms of an agency worker’s contract, as a whole were at least as favourable as the terms of the comparable employee’s contract of employment (the ‘package approach’). Guidance would clarify the limits of the access right, and our view is that transport services should be interpreted to have a restricted meaning (eg local pick-up service, transport between sites) and not extend to eg season ticket loans and company car allowances.

5.23 The draft regulations provided that the hirer would be liable for any breach of these regulations as the agency has no role in providing these rights

What did respondents say?

5.24 Unions generally welcomed new rights to access collective facilities, but were concerned that the definition of facilities was not wide enough. They were also concerned that the proposed “package” approach would disadvantage groups of workers, making it more difficult to enforce their rights and presenting Tribunals with the difficult task of assessing differing values of different benefits. As with access to vacancies, these respondents also tended to argue for wider scope for comparison, including with predecessors or those working at other locations.

5.25 Business and agency respondents were generally supportive of the proposed approach taken by the draft regulations, considering that equal access was in practice often already normal practice. Their primary concerns in this area were that there should be no question of requiring agency staff to be given enhanced access rights to facilities (so equal access to crèche facilities should only mean equal right to join a waiting list if there was one), or of an expansive interpretation of the scope of the rights to encompass wider benefits in kind. Many requested that additional guidance be provided on these practical points in guidance.

Our conclusions - what do the regulations provide

5.26 We have amended our approach in this area slightly in the light of responses and further consideration of the Directive’s requirements. We are persuaded that it is necessary to have a non-exhaustive list of facilities in our implementing legislation, which nevertheless clearly indicates which kind of facilities should be considered, and have also removed the express reference to a package approach. It should be emphasised, however, that neither of these alterations to the draft regulations need significantly affect the practical impact in workplaces, since hirers will still be able to provide less than equal

treatment where this can be objectively justified. We also continue to intend to provide further guidance to indicate the reasonable limits of the facilities to which agency workers can seek equal access.

5.27 In terms of scope for comparison, we have made the same amendment to that discussed in relation to access to vacancies, namely to permit comparison with comparable workers as well as with comparable employees. In this case, we have also concluded that it is necessary to allow comparison to include comparable workers in other establishments - the Directive clearly speaks of “undertakings” in this respect which can clearly be more than one site. Without this extension of the definition, it could also result in those directly recruited being able to access a canteen in another in another part of the business (e.g. the office next door) but an agency worker being denied access because it is in another establishment. We also consider it is necessary to provide that the comparison can be made with a predecessor so as to avoid situations in which an agency worker replacing a permanent employee can be denied access to facilities enjoyed by that predecessor if there is no other available scope for comparison. It should be stressed again, however, that access rights less than equal to those enjoyed by a predecessor or comparator at another location could of course be possible if justified on objective grounds.

Access to training

5.28 Article 6.5 of the Directive requires that:

“Member States take suitable measure or shall promote dialogue between the social partners in accordance with their national traditions and practices in order to

- *Improve temporary agency workers access to training and child care facilities in the temporary-work agencies, even in periods between their assignments in order to enhance their career development and employability*
- *Improve temporary agency workers access to training for user undertakings’ workers”*

What did the draft regulations say

5.29 We proposed that a regulatory approach would clearly go beyond the requirements of the Directive. We would, however, encourage hirers to work with the public skills system, including the Train to Gain service, to invest in training agency workers. Changes had already been made to the LSC funding guidance to providers so that agency workers are eligible for training support. The Government would set out how it would support the development of a high-skill high productivity economy for the long term in the forthcoming National Skills Strategy.

What did respondents say?

5.30 The agency sector raised the concern that the provision of training would need additional government funding. Those respondents from within the business sector who mentioned training agreed that the correct approach was to use existing training providers and asked for greater clarity through guidance.

Our conclusions - what do the regulations provide

5.31 We maintain that a regulatory approach goes beyond the requirements of the Directive. However, we will ensure that guidance makes clear how and where agency workers can access training already available to them through the public skills system

6. Thresholds for bodies representing agency workers

What does the Directive say?

6.1 Article 7 of the Directive says:

" temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed "

6.2 Article 7 provides two options for member states:

- temporary agency workers can count towards the calculation of thresholds applicable to the temporary-work agency (Article 7.1); or

- temporary agency workers can count towards the calculation of thresholds applicable to the hirer (Article 7.2).

What did the draft regulations say

6.3 The draft regulations (at Schedule 3) proposed to amend various pieces of legislation to provide that agency workers should count towards those thresholds relating to the establishment of representative bodies in the agency, as opposed to the hirer. The one exception was the Transnational Information and Consultation of Employees Regulations 1999 (TICE), which we proposed to amend with corresponding effect when implementing the recast of the European Works Council Directive.

What did respondents say?

6.4 Respondents broadly agreed with the approach taken in the regulations towards transposing Article 7 of the Directive. In particular, business, agency and union and employee respondents all favoured the proposal that temporary agency workers should count towards the thresholds applying to the employment business. The union and employee respondents considered that temporary agency workers should be accorded the same entitlements to representation and consultation as other workers and they reiterated views expressed in the first consultation that the thresholds should themselves be lowered or abolished so that workers employed in small organisations should enjoy the same rights.

6.5 Few respondents commented on the precise drafting of this aspect of the regulations. However, some legal commentators pointed out that the proposed amendment to the statutory recognition and derecognition procedure was incomplete, as the amendment dealt solely with the threshold in the recognition procedure, but not the threshold in the derecognition procedure. They also thought that the proposed amendment to the Information and Consultation of Employees Regulations 2004 (ICE) was inconsistent with the amendment to the recognition procedure in so far as the amendment to the ICE Regulations went beyond the definition of the size of organisation which was covered.

6.6 Other commentators made the point that in the first consultation that some collective agreements set thresholds for the representative arrangements within organisations, usually when referring to the membership of joint management/union bodies. As such collective agreements may be legally enforceable via individual contracts, they consider that the regulations should specify how temporary agency workers should be counted towards such thresholds.

Our conclusions – what the regulations provide

6.7 This aspect of the regulations is uncontroversial, and there was a large measure of agreement with the proposed approach.

6.8 We continue to take the view that Article 7 does not require new representational or consultation rights to be assigned to agency workers, or any amendment of the thresholds in existing law. The effect of regulations is limited to clarifying how temporary agency workers should be allocated when calculating whether a threshold for establishing a representative body had been exceeded. The relevant thresholds relate to the size of organisations, as measured by employed workers, above which statutory provisions relating to the establishment of representational bodies apply.

6.9 The Government does, however, see a case to make the same change to paragraph 99 of Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992, which deals with the threshold for union

derecognition, as was made to paragraph 7 of Schedule A1, which deals with union recognition. It also notes the comments on the proposed changes to the ICE Regulations made by some legal commentators, and it proposes to remove the changes to Regulations 5 and 7 of those Regulations, to achieve a consistent approach to implementation since Article 7 does not require new representational or consultation rights for agency workers. The regulations make it clear that in this respect they deal with agency workers subject to “any other contract to perform work or services personally”, ie contracts apart from contracts of employment, with one or more temporary work agencies. This definition excludes those temporary workers who are employed directly as employees of the hirer. Such temporary employees would count towards the threshold of the hirer, and there is no need to amend the regulations to clarify the issue.

6.10 The Government does not accept the view expressed by some respondents that Article 7 requires the regulations to specify how agency workers should be treated for thresholds set by voluntary collective agreements for the establishment of bodies representing workers. Voluntary collective agreements in the UK do not set thresholds for the "establishment" of representative bodies, though some may refer to the composition of those bodies. Nor are such procedural collective agreements directly enforceable in law.

7. Information of workers’ representatives

What does the Directive say?

7.1 Article 8 of the Directive describes the circumstances under which information on the use of agency workers should be provided to employees or their representation. It provides that:

“Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (1), the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers set up in accordance with national and Community legislation.”

What the draft regulations said

7.2 We proposed in the draft regulations to ensure that the relevant information on the use of agency workers was supplied in all the situations where there is a currently an obligation, either explicit or implicit, on employers to provide information on the employment situation. This involved amendments to various pieces of legislation.

7.3 The draft regulations would introduce a requirement that, where information is provided on the employment situation, information should also be provided on the use of agency workers. The draft regulations used a general definition of "suitable information" which applied in most cases. This includes:

- the total number of agency workers employed;
- the areas of the business in which they are employed; and
- the type of work they are contracted to undertake.

7.4 In a small number of cases a slightly different approach was adopted, such as in relation to information for collective bargaining under s181 TULR(C)A where a simpler but potentially more broad –reaching definition, of information relating to use of agency workers, applies

7.5 The draft regulations did not refer to information on the equal treatment of agency workers, which is subject to separate provision under part 2 of the draft regulations. We considered that this general definition of suitable information should apply across the greater part of the jurisdictions involved, because such information would usually be pertinent, whatever the context and maintaining consistency across the amended legislation would aid legal certainty and compliance. As with the amendments relating to thresholds for representation, TICE would be amended as part of the implementation of the recast European Works Council Directive, we proposed that the changes to it relating to information as to use of agency workers are incorporated in that instrument instead.

7.6 The draft regulations contained amendments to both the Safety Representative and Safety Committee Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996, the effect of which is to require employers to provide information about agency workers to safety representatives and to representatives of employee safety. The consultation sought views about whether amendments to these pieces of legislation were still considered necessary, noting that employers already have a legal obligation to provide agency workers with information on risks to their health and safety and the measures taken to manage those risks. Additionally, safety representatives and representatives of employee safety should receive, under existing law, a range of information from their employer about safety arrangements for agency workers.

What did respondents say?

7.7 Unions registered their disappointment that the Government did not consider it appropriate to require information on agency workers' terms and conditions. They believe that this is important to ensure that agency workers' receive equal treatment without recourse to litigation. Unions also called for extension of the occasions when the 'suitable information' must be provided to include collective bargaining.

7.8 Businesses and agencies said that the regulations correctly reflected the narrow scope of the Directive, though some thought that the definition of 'suitable information' still to be too broad. Whilst businesses acknowledged that this requirement would lead to an increased administrative burden, they thought that processes could be put in place to manage this.

7.9 Neither unions nor business pressed strongly for existing Health and Safety Regulations to be amended to include 'suitable information' on the use of agency workers. Two respondents raised this as a particular issue, though one of them felt that it could be addressed through guidance.

Our conclusion – what do the regulations provide

7.10 The regulations will continue to define 'suitable information' in most cases as having to include information on the number of agency workers, where they are used and the work for which they are used. Whilst the Government acknowledges trades unions' arguments that information on agency workers' terms and conditions should be included in this definition, it still considers this to be beyond the scope of the Directive and will therefore not be included. We expect that the disclosure of the information covered by the regulations will be sufficient to stimulate an informed dialogue about the impact of agency working in the various situations. Of course, once that dialogue begins, parties will share views and other information will be exchanged as a result. It would be a mistake for statute to try to specify what that additional information could be, because individual situations and contexts will vary so much.

7.11 Trades unions also requested that the Government reconsider its stance on applying the Directive to collective bargaining situations. We have concluded that this would be a sensible step so as to make it explicit that relevant information on the use of temporary agency workers should be provided where it is necessary to allow the union representative to engage effectively in the collective bargaining process. This entails amendment to sections 178-181 of the Trade Union and Labour Relations (Consolidation) Act 1992. Whilst the Government notes that the existing law arguably can be read in a way that already could allow this to happen, we believe that stating this explicitly would remove doubt and help to clarify the existing law. This will create a firmer legal footing for representatives to request this information.

7.12 The Government also no longer intends to amend Safety Representative and Safety Committee Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996. We believe, following evidence from, amongst others, the Health and Safety Executive, that existing legislation already provides for sufficient information to be made available to health and safety representatives to ensure that temporary agency workers experience the same level of protection as permanent employees, to the extent that this may be required under the Directive. We will ensure that the guidance that will accompany these regulations will make specific reference to these health and safety obligations that presently sit

alongside other disclosure requirements relating more specifically to the employment situation.

8. Establishing Equal Treatment

What does the Directive say?

8.1 Article 5.1 of the Directive describes the “principle of equal treatment”. It provides that

“The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly to occupy the same job”.

‘Basic working and employment conditions’ are defined by the Directive (Article 3(1)(f)) as:

“..working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;

(ii) pay”

8.2 On the basis of Article 5.4 of the Directive, implementation would provide for a right to equal treatment once a 12-week qualifying period had been served, consistent with the CBI -TUC agreement.

What the draft regulations said

8.3 We proposed that the “basic working and employment conditions” to which equal treatment would apply would be those that “applied generally” in the workplace. The draft regulations described this as those terms and conditions ordinarily incorporated into contracts of employment of employees of the hirer, whether by collective agreement or otherwise. This would include collective agreements, pay scales and company handbooks or similar, but also extend to terms generally included in employees written employment contracts and other matters of custom and practice in the workplace concerned.

8.4 In recognition of the fact that deciding equal treatment would in practice often entail comparison with a ‘flesh and blood’ comparator, the draft regulations also expressly provided that treatment consistent with that given

to a true comparable employee would be deemed to mean compliance with the regulations.

What did respondents say?

8.5 Unions and employee representatives welcomed the fact that the approach was not based purely on identification of a ‘flesh and blood’ comparator. They generally argued, however, for the scope for comparison to be broadened to allow for consideration of a hypothetical comparator, as in anti-discrimination law. These respondents also expressed some concerns about the complexity of the regulations in this area.

8.6 Business organisations, by contrast, welcomed the fact that a purely hypothetical comparator had not been proposed, and considered the proposed approach acceptable. There was particular support for the drafting which “deemed” compliance in the event of treatment consistent with that given to a real life comparator, which they felt would provide clarity and legal certainty to businesses. Some of these respondents argued for the deeming provision to be limited to those doing “the same work” rather than “broadly similar work”, but others considered the broader scope for comparison to be useful in this context.

Our conclusions - what do the regulations provide

8.7 The regulations maintain the approach previously proposed, namely that an agency worker should be treated “as if” he or she has been directly recruited to the same job. Consistent with the changes made in relation to access to facilities and vacancies in the hirer, the final regulations allow the “as if” test to be applied to terms and conditions ordinarily incorporated into contracts of “workers” as well as those of “employees”. So an agency worker can bring a claim either on the basis that he or she would have been recruited as an employee or on the basis that he or she would have been recruited as a worker.

8.8 We have also retained the “deeming” provision related to a “flesh and blood” comparator – the regulations expressly provide that if a comparable employee can be identified and the agency worker receives treatment in relevant respects that is consistent with that received by that employee, then the equal treatment provision is deemed to have been complied with. This provision does not allow the comparison to be made with an employee if they no longer work for the hirer. This prevents a comparison being made with someone whose basic working and employment conditions might be less favourable than those currently working for the hirer.

8.9 It is likely in some instances that there will not be a comparable employee doing the same work with whom a comparison could be made but someone doing similar work. Therefore we believe that it is sensible to include reference to those doing “broadly similar work” in the “deeming” provision. The regulations also allow comparisons in this context with those working other establishments, which might be helpful where there is no

comparable employee in the immediate workplace but someone doing the same or similar work in another establishment. We believe this wider definition is helpful to the hirer in using the “deeming” provision and does not undermine the entitlement for the agency worker to receive treatment as if he or she had been recruited directly to the same job.

8.10 As we stated in the previous consultation, we consider that this approach fully implements the Directive’s requirements whilst enabling all concerned to base their consideration of equal treatment questions with confidence on the approach that makes sense for them.

9. Liability (and enforcement) in relation to an equal treatment claim

What does the Directive say?

9.1 Article 10 requires that

“Member States shall provide for appropriate measures in the event of non-compliance of the Directive by temporary work agencies or user undertakings. In particular they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

Member States shall lay down rules on penalties applicable in the event of infringements of national provisions implementing this Directive and shall take all necessary measures to ensure that they are applied. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission by 5 December 2011. Member States shall notify to the Commission any subsequent amendments to those provisions in good time. They shall, in particular, ensure that workers and/or their representatives have adequate means of enforcing the obligations under this Directive.”

What the draft regulations said

9.2 The draft regulations provided that the agency and hirer would each be liable to the extent that they were responsible for any breach of a right in relation to basic working and employment conditions unless the agency could establish a defence. The agency would be able to mount a reliable defence if it had taken “reasonable steps” to obtain the necessary information from the hirer and had acted “reasonably” in determining the agency worker’s basic working and employment conditions. If an agency had done this in good faith but had been provided with inaccurate or incomplete information, liability in the event of any claim would pass to the hirer. In the event of an Employment Tribunal case, the tribunal would be able in such circumstances

to join the hirer to a claim (and potentially release the agency from it entirely). Any party in a “chain” of relationships could be named at the outset or joined to a claim and would be liable to the extent that they were to blame for the infringement.

What did respondents say?

9.3 Unions and employee representatives felt that agencies and user employers should be jointly and severally liable for breaches of an agency worker’s equal treatment rights, as is the case in anti-discrimination law. They argued that this would enable tribunals to make a fairer assessment of which party was responsible for a breach of the regulations, and that such an approach would also better reflect the realities of agency work, where a the hirer has far more contact and control over the agency worker and their conditions.

9.4 Hirers and agencies were more supportive of the draft regulations and general approach on liability. Agency respondents expressed concern about the possibility of hirers seeking indemnities from agencies so that agencies would bear all of the risk of any failure to meet an agency worker’s equal treatment rights. A recurring theme amongst these respondents was the need for clear guidance on what the information requirements were for hirers to supply agencies, so that businesses would be fully aware of their obligations. They requested that guidance should also include templates to assist in this process thus helping to minimise risks for all parties.

Our conclusions - what do the regulations provide

9.5 We have maintained the broad approach set out in the draft regulations. The regulations provide that an agency is liable for any breach for which it is responsible in relation to basic working and employment conditions unless it establishes a defence. The agency will be able to mount a defence if it has taken “reasonable steps” to obtain the necessary information from the hirer and acted “reasonably” in determining the agency worker’s basic working and employment conditions. To rely on the defence the agency will also have to ensure that where it has responsibility for applying those basic working and employment conditions to the agency worker, that agency worker has been treated in accordance with the determination. For example, where the agency has acted reasonably in calculating the agency worker’s pay but then makes a mistake, and pays the agency worker a lower amount, it will not be able to rely on the defence.

9.6 Where the agency can rely on the defence the hirer will be liable to the extent that the agency would have been liable. The hirer would also be liable for any breach for which it is responsible

9.7 In the event of a claim the agency worker may still cite the agency and hirer at the outset – but this does not mean joint and several liability. The regulations ensure that any party in the “chain” of relationships can be named at the outset or joined to a claim and is liable to the extent that they are to

blame for the infringement. Where an equal treatment claim is solely the responsibility of the hirer (eg access to canteens, child-care), the agency will not be held liable because the agency will have had no role in delivering these entitlements.

9.8 Finally, we have carefully considered the representations made by the agency sector in particular regarding the possibility of hirers seeking to indemnify themselves against claims. We have concluded that there is insufficient policy justification for intervening in what would be an unprecedented way in the freedom of commercial parties to conclude contracts in this area. We will, however, monitor the situation and would of course be prepared to consider further representations in the light of developments when the regulations have taken effect.

Information about equal treatment on basic working and employment conditions

What the draft regulations said

9.8 The draft regulations did not specify the nature of the information that should pass from hirer to agency, but rather gave agency workers the ability to ask their agency for information relating to their equal treatment rights. They provided for an approach similar to that used in the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. After the 12 weeks had elapsed, the agency worker would be able to request a written statement from the agency (about any aspect of equal treatment which they did not believe they were receiving. The same request could subsequently be made of the hirer if the worker did not receive a response from the agency. Both agency and hirer would have 28 days in which to respond.

9.9 The Regulations did not provide a separate right of enforcement if any agency worker did not receive these details. This was on the basis that if the agency worker went on to make a claim under the the Employment Tribunal could draw an adverse inference from the fact that the written statement was not provided. We did not propose a specific timescale for the agency to obtain information from the hirer on the basis that flexibility was required to take account of different circumstances.

What did respondents say?

9.10 Unions generally considered that 28 days was too long to await a response to a request for information, whilst businesses thought it too short a deadline. Unions argued that the 28-day time limit for information was not in workers' interests as it could impact on meeting employment tribunal deadlines, whereas the business maintained that 8 weeks would be consistent with the response period permissible under the Data Protection Act and other areas of unlawful discrimination legislation, and better reflected the potential need for the agency to approach the hirer for information.

9.11 Unions also asked that the regulations permit workers to submit questionnaires to their agency and hirer simultaneously, rather than to require a period of 28 days in between requests, with some also arguing that the right to request information should apply before the worker actually became entitled to equal treatment at the end of the qualifying period.

9.12 Confidentiality was a significant key concern amongst recruitment industry groups, due to the potentially commercially sensitive nature of the information requested, eg pay rates, and by extension agency margins, but proposed that issues of confidentiality could be adequately addressed in guidance documentation, backed up by the provisions of the Data Protection Act.

Our conclusions - what do the regulations provide

9.13 We have carefully considered the points made by both sides of the debate regarding the 28 day period for a response to a written request for information. We continue to consider that this period strikes the right balance between the respective interests of worker and hirer/agency, but we have introduced a minor amendment to the regulations to provide that the 28 days starts from “receipt” of the written request -.

9.14 As for whether an agency worker should be able to submit a request for written information to the agency and hirer at the same time, we do not consider this is necessary, and would be concerned that it would be illogical, given that the agency worker’s contractual relationship is with the agency, which should therefore always be the first port of call in such circumstances. In most instances the agency will already be in the process or already have the information to pass on to the agency worker. As in the draft regulations, where an agency does not respond, for whatever reason, the agency worker will be able to go direct to the hirer. In respect of vacancies and collective facilities, however, any request will be direct to the hirer as they are responsible for the delivery of these entitlements and the same provision applies – ie 28 days from receipt of the written request.

9.15 On issues around confidentiality, we are not aware that this has been a problem in similar jurisdictions and we do not propose to take any specific action, but will keep this under review and would of course consider and further representations should difficulties arise once the regulations are in force.

9.16 We will provide guidance and templates to help all parties in this process.

10. Dispute Resolution, Employment Tribunals and Remedies

What the draft regulations said

10.1 We proposed that the regulations implementing the Directive would enable an agency worker to bring a claim to an Employment Tribunal and that they would be added to the jurisdictions covered by the Employment Appeal Tribunal. In the interests of preventing cases coming to tribunal unnecessarily, disputes relating to rights under the regulations would be eligible for Acas pre- and post-claim conciliation. In the event of the worker's complaint being upheld, we proposed a similar approach to remedies as that available under the similar regulations governing equal treatment in the Fixed Term and Part Time regulations, enabling the Tribunal to compensate the worker for infringement of his or her rights or the detriment suffered. We had carefully considered a more punitive remedies regime, but did not believe there were grounds for departing from an approach that provided an effective, proportionate and dissuasive enforcement framework in respect of those other rights.

10.2 The amount of any compensation payable by either the agency or hirer would be required to be "just and equitable", with regard to the extent of the party's responsibility for the infringement; the levels of award would be based on any financial loss of benefit that an agency worker should have received and any expenses reasonably incurred as a result of the infringement. Generally, any award would not include injury to feelings, although it would be possible to include injury to feelings in relation to a claim that the worker has been subjected to a detriment for asserting their rights under the Regulations. There would be no statutory cap on the amount of compensation that could be awarded. The principle of contributory conduct applied so that where the tribunal found the act, or failure to act, to which the complaint related was to any extent caused or contributed to by the action of the claimant, it should reduce the compensation amount by such proportion as it considered just and equitable.

What did respondents say

10.3 As previously, there was overall there was support for the proposal, in particular that Acas should play a role in pre- and post-claim conciliation and that enforcement should be through employment tribunals. Unions and employee representatives thought that compensation levels for breaches of equal treatment rights should be specifically set at a level which deterred future breaches and wanted injury to feelings compensation. Agencies and businesses, as well as unions, stressed the need for agency workers to come to the agency first to try and resolve the matter, rather than going directly to the hirer or bringing a claim, and were generally of the opinion that financial compensation should only be for actual loss of earnings rather than an additional penalty to deter speculative or vexatious claims.

Our conclusion - what do the regulations provide

10.4 The overall approach taken by the regulations to dispute resolution remains as provided by the draft regulations. It remains our hope that many

disputes will be settled through the agencies own dispute resolution procedures or with the involvement of Acas. We welcome the support from all sides in the consultation to for Acas involvement and will work with them to prepare for the introduction of the new rights. We are adding the Agency Workers Regulations 2010 to the jurisdictions that Acas can conciliate, and confirm that Acas is able under existing legislation to carry out tripartite conciliation.

10.5 As far as remedies are concerned, we have concluded that two additional measures should be included to incentivise compliance with the Regulations. First, as discussed above, the regulations contain an “anti-avoidance” provision to deal with structures of assignments designed to circumvent the regulations, which is backed by the possibility of an additional award of up to £5,000.

10.6 Second, we have introduced a minimum award of two weeks pay for equal treatment claims and pay between assignments. This is to address legitimate concerns raised during the consultation process that the financial loss for many agency workers who do not receive the equal treatment rights will be so small that a complaint to a Tribunal (and the stress and impact on employment relationships it brings) is unlikely to be worthwhile. In such circumstances, there would therefore be little deterrent effect on the unscrupulous to ensure they abide by their obligations. Equally, however, we would not wish to encourage agency workers to make unnecessary claims to Tribunals because of the possibility of a disproportionate level of compensation. The regulations therefore give the Tribunal the discretion not to apply the minimum in all cases where to do so would not be just and equitable – for example where there has been an honest mistake and the agency or hirer has already rectified the mistake. Guidance will also make clear the implications of this to deter unnecessary Tribunal cases.

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

What does the Directive say?

11.1 Article 4.1 and 4.2 of the Directive says

“ Prohibitions or restrictions and on the use of temporary agency work shall be justified only on the grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented

By 5 December 2011, Member States shall, after consulting the Social Partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds

mentioned in paragraph 1.”

What was proposed ?

11.2 We proposed to maintain our view that there are no restrictions on the use of agency workers in the UK, but welcomed further comment on this in order to comply with the requirement to report to the Commission on this matter by December 2011. We would also take a close interest in the notification process as regards possible restrictions in other Member States and welcomed information from respondents, whether in the context of responses to the consultation or separately, on potential restrictions in other Member States

What did respondents say?

11.3 There were no substantive comments on this.

Our conclusion

11.4 We will report to the Commission that there are no restrictions on the use of agency workers in the UK; and bring to the Commission's attention any representations we receive about alleged restrictions in other Member States.

12. Reducing Administrative Burdens

What was said in the previous Consultation?

12.1 We proposed to set up a Working Group, in early 2010, comprising a representative sample of stakeholders to closely examine the practical implications of the proposed regulations, especially for small and medium size businesses. This would include suggestions made previously, such as keeping duplication to a minimum, and the development of standardised templates, and more generally the issues on which stakeholders have requested additional guidance.

What did respondents say?

12.2 There were few specific comments on this, although many comments by hirers and agencies on individual aspects of implementation (eg re the definition of pay, holiday entitlement, liability and information flows) stressed the significant changes in practice which hirers and agencies would be required to make, and called for administrative costs to be minimised as much as possible. There was support for the Working Group (and several volunteers to be in it).

Our conclusion

12.3 We will proceed with setting up the Working Group described above: a further announcement will be made in due course

13. Entry into force

13.1 The Directive requires all Member States to adopt the necessary laws to implement the Directive by 5 December 2011.

What was proposed

13.2 The implementing regulations would be brought into effect on 1 October 2011. We felt that it was necessary to give due time for the agencies and hirers to adjust to what will be a significant change in the regulatory framework. We were also acutely conscious of the additional difficulty that some businesses concerned might face in making the adaptation necessary in the context of difficult economic times, particularly given the valuable role that agency staff are likely to play in the recovery. We therefore concluded that the regulations should come into effect on the common commencement date preceding the implementation deadline provided in the Directive.

What did respondents say?

13.3 Unions and employee representatives were concerned that the regulations were not coming into force earlier, whilst businesses welcomed the decision, stressing that they needed the maximum time available to make the significant changes that would be required (as described above regarding administrative burdens).

Our conclusion - what do the regulations say?

13.4 Having carefully considered responses on this issue, and recognising in particular the significant changes that businesses will have to make, we remain of the view that the regulations should come into force on 1 October 2011. This will also be consistent with normal Government practice to implement Directives on or close to their required implementation date.

AWD COMPARATOR: POSSIBLE GUIDANCE

What does 'equal treatment' mean?

1. An agency worker is entitled to equal treatment after 12 weeks on an assignment. Deciding what "equal treatment" means will usually be a matter of common sense – the requirement is simply to treat the worker as if he or she had been recruited directly to the same job. You can take into account the agency worker's qualifications, experience or expertise (or lack of them) – you simply need to provide the treatment you would have given that person if recruiting them directly to that job.

2. Equal treatment is not necessarily required in respect of all the terms and conditions that the person would have received had they been recruited directly. It only covers 'basic working and employment conditions' (see separate section of this guidance). The equal treatment right also only extends to these conditions if they apply generally in the workplace concerned. This means terms and conditions formally set out in:

- (a) a pay scale or pay structure;
- (b) a relevant collective agreement; or
- (c) a company handbook or similar.

4. It also means conditions included in permanent employees' written contracts as a matter of course, or other things that have not formally been written down but have clearly become established as a matter of 'custom and practice'. The general rule here is that the longer and more consistently a term or condition is followed, the clearer and more comprehensive its communication to employees and the greater the impression amongst employees that they have agreed to it or that it applies automatically, the more likely it is to have become a matter of 'custom and practice'.

5. So to recap, the equal treatment right concerns basic working and employment conditions that apply generally because they have been either formally set out or have become a matter of custom and practice. It does not apply to terms and conditions that do not come within this, or in workplaces in which no 'basic working and employment conditions' can be said to apply generally.

How to decide what 'equal treatment' needs to be in practice

6. As noted earlier, in many cases deciding what 'equal treatment' means will be a matter of common sense. For instance, in organisations with pay scales or pay policies it will often be clear at what level the person concerned

would have been paid if recruited directly, taking account of skills, qualifications, expertise and experience. In other organisations there will be a clear 'going rate' for a given job. And other rights such as holiday entitlements and overtime rates will also usually be clearly set out or well understood.

7. In many cases, the simplest approach will be to compare the position of the agency worker with that of permanent employees doing the same or broadly similar work. Where this comparison can be made, providing an agency worker with treatment in respect of 'basic working and employment conditions' that is consistent with that given to a 'comparable employee' will ensure compliance with the requirements of the regulations – the regulations make specific provision for this. And in making such a comparison, regard can of course be had for the agency worker's qualifications, skills, experience and expertise.

Illustrative Examples

Example 1 (Where a hirer has pay scales or pay structures)

Question: A hirer has various pay scales to cover its permanent workforce, including its production line. An agency worker is recruited on the production line and has several years' relevant experience. However the agency worker is paid at the bottom of the pay scale. Is this equal treatment?

Answer: Yes if the hirer would have started that worker at the bottom of the pay scale if recruiting him or her directly. But if the worker's experience would mean starting further up the pay scale if recruited directly, then the agency worker would be entitled to the same treatment.

Example 2 (Where no pay structures but a 'going rate')

Question: A hirer has decided to increase its workforce on a particular shift with agency workers. There are 10 permanent staff and 3 agency workers, doing the same work. The permanent staff are paid between £8-10 per hour– those recruited most recently being paid £8 per hour and the higher rate reflecting on the job experience). The work involves no specialist skills and only minimal on-job training. The agency workers are recruited at a rate of £6 per hour and continue to be paid at that rate after 12 weeks. Is this allowed?

Answer: No. There is clearly a 'going rate' of at least £8 for the job and the agency workers would be entitled to at least this after 12 weeks on the assignment.

Example 3 (Where there are no pay scales or structures or comparable permanent employees)

Question: A small company engages an agency worker as a receptionist for the first time. The company does not have anyone doing the same or a similar job and does not have pay scales or collective agreements. The agency worker is paid at the same rate before and after the 12 week qualifying period. Is this allowed?

Answer: Yes. There are no pay scales or collective agreements, or a 'going rate', so in relation to pay, there are no relevant terms and conditions ordinarily included in the contracts of employment of employees in the hirer. However if, say, the company gives all its permanent employees 6 weeks paid annual leave and paid time off for bank and public holidays, the agency worker should be entitled to the same treatment on these points.

Example 4 (All directly recruited terms individually negotiated)

Question: A small sales company pays its 10-person sales force at different rates. The rates vary considerably and all depend on individual negotiation. There is no going rate. An agency worker is paid at the same rate before and after the qualifying period. Is this equal treatment?

Answer: Yes, if all rates really are individually negotiated and there is no established custom and practice as regards pay – which the hirer and agency would need to be very clear was the case. But, as in the previous example, if there is a clear company policy on, for instance, annual leave, the agency worker would be entitled to equal treatment in that respect.

ANNEX B

ALPHABETICAL LIST OF RESPONDENTS TO CONSULTATION ON DRAFT REGULATIONS

1st Option Consulting Services Limited
Advanced Resources Managers Limited
Adecco Group
Agricultural Industries Confederation (AIC)
Andrew Waldron
Association of Labour Providers (ALP)
Association of Professional Staffing Companies Ltd (APSCo)

Association of Recruitment Consultancies (ARC)
Association of Teachers and Lecturers (ATL)
Bryony Paice
British Chambers of Commerce (BCC)
British Medical Association (BMA)
British Retail Consortium (BRC)
CMS
Communication Workers Union (CWU)
Competex Ltd
Confederation of British Industry (CBI)
DHL GBS (UK) Limited
Driver Hire Group
Employment Lawyers Association (ELA)
Engineering Employers Federation (EEF)
Equality and Human Right Commission
Food and Drink Federation (FDF)
Ford Motor Company Limited
Forum of Private Business (FPB)
The Freight Transport Association
General Municipal Boilermakers (GMB)
Greenvale AP
Gwenda Osbourne
Hammonds LLP
Hays PLC
Healthcare Locums Plc
Hertfordshire Country Council (confidential)
Heating and Ventilating Contractors' Association (HVCA)
Impellam Group Plc
Institute of Directors (IoD)
Institute of Interim Management (IIM)
Jaguar Land Rover
JSA Services
Law Society
Local Government Employers (LGE)
London Borough of Camden
London School of Economics (LSE)
Lovells LLP
Luton Borough Council
Manchester City Council
Magnox North Limited
Manpower
Maritime and Coastguard Agency
Marks and Spencer Plc
Ministry of Defence (MoD)
Michael Page International

Mishcon de Reya Solicitor
National Union of Rail, Maritime & Transport Workers (RMT)
National Union of Teachers (NUT)
Nautilus International
NASUWT
NHS Employers
Orange Genie
Pertemps Recruitment Partnership
PGC
Pinsent Masons
Plastic Logic Limited
Professional Passport
Prospect
Protocol National Limited
Public and Commercial Services (PCS)
Randstad
RBS Mentor Services
Reed Executive Limited
Recruitment and Employment Confederation (REC)
Resource Solutions Group Plc
Royal Mail Group
Scottish Engineering
Service Provider Association (SPA)
Shakespear Putsman
Teresa Corr
Thompsons
Trade Union Congress (TUC)
Travers Smith LLP
Truckersworld
UCATT
UNISON
Unite the Union
Universities and Colleges Employers Association (UCEA)
University of Cambridge
University of Oxford
University and College Union
Volt Europe
Usdaw
Wragge & Co LLP

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