



HM Revenue
& Customs

Onshore Employment Intermediaries:

False Self-Employment

Summary of Responses

13 March 2014

Contents

1	Executive Summary	3
2	Introduction	6
3	Responses:	8
	General Views	8
	Timing	9
	Reporting Requirements	10
	Definition – practical and commercial issues	11
	Control Test (Supervision and Direction)	13
	Interaction with intermediaries legislation	15
	Preventing Avoidance	16
	Compliance Response	18
4	Next Steps	19
5	Glossary	20
6	Annex A: List of stakeholders consulted	21
7	Annex B: IR35 Technical Note	24

1. Executive Summary

Background

- 1.1 The Government announced at Autumn Statement 13 that they would tackle the use of employment intermediaries facilitating false self-employment to avoid employment taxes. The Government stated that it would consult on strengthening existing legislation with effect from 6 April 2014 to ensure the correct amount of tax and NICs are paid where the worker is, in effect, employed.
- 1.2 The Government has been clear in its commitment to reduce tax avoidance and support enterprise and those who choose to work for themselves. The Government believes that the tax system should continue to recognise the additional risk taken on by someone who is genuinely self-employed. However, there is increasing evidence that some companies and Employment Businesses are using employment intermediaries to disguise the employment of their workers by treating them as self-employed; primarily to avoid employer National Insurance and reduce the other costs and responsibilities associated with employment.

Consultation Responses and the Government's response

- 1.3 HMRC received over 100 responses from a wide spectrum of stakeholders. The Government is very grateful to the many businesses, representative and professional bodies and other organisations who engaged with the consultation process. The feedback has been invaluable to the Government.
- 1.4 The majority of respondents were supportive of the Government's objective to stop tax avoidance in this area. In fact, some thought the legislation did not go far enough in terms of addressing future issues. However others had some concerns about the detail of the proposals. A brief summary of these and the Government's proposed response are set out below.
- 1.5 **Timing**
Almost half of stakeholders raised concerns both over the shorter consultation period and that the legislation was being introduced too quickly, suggesting that the measure should take effect from April 2015 instead. Having considered these arguments the Government believes delaying implementation would provide the opportunity for new avoidance arrangements to be put in place and therefore implementation will not be delayed.
- 1.6 **Reporting requirements**
A number of respondents stated that the new reporting requirements create uncertainty and would have considerable costs for the parties involved. In order to address some of these concerns the Government will delay the first return until the first quarter of 2015/16 to allow HMRC to develop and test the new system with stakeholders. HMRC is also currently reviewing a reduced return requirement in relation to PSCs following responses to the consultation.

1.7 **Definitions – practical and commercial issues**

Other stakeholders were concerned about the definitions included in the draft legislation, namely the specificity of ‘intermediary’ and suggested instances where arrangements would be inadvertently caught. The Government therefore intends to amend S44 (1)(a) of the proposed draft legislation to prevent these arrangements being caught but ensure that the legislation still has a wider remit than currently exists to capture those currently stepping outside the legislation.

1.8 **Control test (supervision and direction)**

The majority of respondents thought the control test would be difficult to operate in practice. Some accountancy firms, accountancy bodies and recruitment representative bodies were concerned about a company’s ability to prove a negative i.e. that there is no control over the worker. In response to these issues HMRC is developing extensive guidance to illustrate the control test.

Stakeholders were particularly concerned that they may be provided with fraudulent documents purporting either no control or right of control or that the worker had had income tax and NICs deducted through PAYE by a business further down the contractual chain. The Government recognises the concerns which have been raised about the level of due diligence required in order to try and ascertain supervision, direction or control. The Government has therefore amended its proposal such that where the company has been provided with fraudulent documents PAYE liability will sit with the body providing these documents.

1.9 **Interaction with IR35 legislation**

A number of respondents thought there would be practical problems in relation to Personal Service Companies (PSCs) and confusion with the existing IR35 legislation. The Government recognises that there was concern about the perceived interaction with the proposed changes to the agency legislation and the intermediaries legislation (IR35). HMRC has discussed this issue extensively with stakeholders, including professional accountancy bodies and the IR35 Forum, and they agree with HMRC’s analysis. HMRC published a technical note alongside the consultation document which sets out HMRC’s view of the interaction between the agency legislation and IR35.

1.10 **Preventing avoidance**

Responses indicated that stakeholders have concerns that intermediaries involved in the facilitation of false self-employment may find other avoidance vehicles and set up structures to circumvent the legislation including PSCs. The Government therefore intends to introduce a Targeted Anti Avoidance Rule (TAAR) in the legislation to deter such avoidance.

1.11 **Impacts of the proposal**

Particularly with regard to labour market flexibility there was a range of views about the effect this measure would have, particularly on the construction industry. However, many of the stakeholders at the roundtable events were reassured that the strengthened legislation would not stop people from being engaged on a self-employed basis. The extensive guidance HMRC has committed to producing about who will be within or outside of the legislation will also help to allay these concerns.

Next steps

1.12 The Government intends to legislate for the revised proposal in forthcoming Bills.

- The tax legislation, together with powers to make regulations for record keeping, returns and penalties will be included in Finance Bill 2014.
- The equivalent National Insurance legislation will be made using existing vires and regulations will be made on 13 March.
- Subject to approval by Parliament, all the legislation, except the record keeping, returns and penalties regulations, will come into force on 6 April 2014.
- The regulations for record keeping, returns and penalties, subject to Parliamentary approval will come into force from 6 April 2015.

2. Introduction

Overview

- 2.1 Following consultation, the Government has decided to proceed with strengthening of the agency legislation (Chapter 7, Part 2 Income Tax (Earnings and Pensions) Act 2003) as set out in the consultation document published on 10 December 2013. A number of small changes will be incorporated to address some of the concerns raised in the responses.
- 2.2 The consultation document: 'Onshore Employment Intermediaries: False Self-Employment', was published on 10 December 2013 and the consultation closed 4 February 2014.

The Consultation

- 2.3 The Government's technical consultation set out the intended changes to the legislation to tackle false self-employment and how these will interact with existing legislation.
- 2.4 The proposal is to make the long-standing agency legislation work in the way it was originally intended. By making changes to the agency legislation the Government's intention is that someone who is engaged by or through an intermediary will be deemed to be in receipt of employment income where they are subject to (or subject to the right of) supervision, direction or control.
- 2.5 The consultation document and the associated roundtable events primarily sought views on:
- i. **The legislation as drafted and whether it would achieve the stated policy objectives.**
 - ii. **Whether the interaction with IR35 was likely to cause any issues.**
 - iii. **Whether strengthening the intent of this legislation, such as through a TAAR, would be helpful in preventing attempts to avoid the legislation.**
- 2.6 106 written responses were received to the consultation, including:
- 1 from academic / think tanks
 - 12 from accountancy firms
 - 8 from construction businesses
 - 10 from individuals
 - 7 from law firms / legal advisors
 - 5 from professional bodies
 - 35 from recruitment and employment businesses
 - 18 from representative bodies
 - 2 from specialist agents
 - 8 from trade unions

- 2.7 HMRC held over 16 roundtable events and meetings with a variety of stakeholders, including accountants, agents, employment businesses, representative bodies, trade unions and members of the public, and responded to numerous informal requests for further information.
- 2.8 This document summarises the responses received during this consultation. It presents the Government's amended approach to reducing tax avoidance through the use of onshore employment intermediaries facilitating false self-employment.

3. Responses

- 3.1 The consultation document asked for responses to five questions. Some respondents chose to provide answers to each question, but many provided combined comments on the proposal as a whole, addressing the issues raised in composite answers. This summary of responses therefore deals with the issues raised by the original consultation questions by thematically drawing on the responses.
- 3.2 The majority of respondents expressed support for the Government's aim of addressing the problem of false self-employment with most recognising that changes to legislation were needed in this area. Respondents' concerns were overwhelmingly centred on the various practical issues around implementation and operation. These are discussed in greater detail below.
- 3.3 The majority of respondents supported the Government's overall aim to address the problem of false self-employment. Representative and trade bodies, trade unions, accountants, and individuals all expressed positive views about the proposal overall, and measures which would offer greater protections to potentially vulnerable workers. It was stated that many such workers have often had self-employed status forced upon them.
- 3.4 The Government is grateful for all comments made and views expressed concerning its original proposals. The Government has carefully evaluated all issues raised in responses to the consultation and in roundtable discussions and subsequently revised its approach.

General views

- 3.5 Representative and trade bodies, trade unions, accountants and individuals all expressed positive views about the proposal overall and measures which would offer greater protections to potentially vulnerable workers. It was stated that many such workers have often had self-employed status forced upon them.
- 3.6 One construction contractors' representative body welcomed the measure. They thought that the benefits of ensuring a level playing field for contractors' labour costs would outweigh the downward pressure on contract prices currently being seen in the industry which, it was argued, is due in large measure to the savings made by those operating false self-employment models.
- 3.7 One small employment contractor strongly welcomed the measure, saying that larger competitors were operating schemes in an attempt to classify workers as self-employed and this led to an unequal playing field. This was uniformly supported by trade unions whose responses welcomed the Government's approach.
- 3.8 Concern was expressed by some respondents from the construction industry and also some intermediaries, that the proposed legislation would require genuine commercial contractors to operate PAYE for the genuinely self-employed. It was argued that this would have a significant effect on the industry, with increased costs for employers. Respondents argued that this would inevitably impact the

overall projected cost for projects, including contracts which had been commissioned by HM Government.

- 3.9 This reinforced, in some respondents' view, the fact that implementation of the new legislation from 6th April 2014 was too soon to allow the costs already factored into contracts to be examined in detail - implementation should, they argued, be delayed by twelve months. Views on this are discussed in more detail below.
- 3.10 A small number of construction respondents thought that not all employers would be able to afford the costs of putting all their workers on the payroll. They thought that it was possible that some workers would leave the construction industry rather than become employees. The resultant loss of jobs they thought could also have the result of subcontractors moving into the informal economy with a consequent loss of tax and National Insurance Contributions (NICs) to the Exchequer.
- 3.11 One respondent suggested that the Construction Industry Scheme (CIS) itself inherently encourages false self-employment because workers are registered in CIS and therefore have a Unique Taxpayer Reference (UTR). This gives many construction workers the impression that they are automatically self-employed irrespective of the circumstances of their engagement. Respondents argued that HMRC needs to combine the current onshore intermediaries' proposals with a full-scale review of the CIS itself.
- 3.12 Following on from this, a number of respondents argued that HMRC needed to look comprehensively at all aspects of labour-provision, employment and status, including the mismatch between employment status for the purpose of employment rights and employment status for the purposes of tax.

Specific Issues

Timing

- 3.13 Almost half of the respondents expressed serious concerns regarding timing, including some of the respondents who were broadly sympathetic to the overall aim of the policy. Respondents raised concerns over the short period allowed for responses, with the Christmas break coming in the middle of the response periods, but a wider concern was that introducing the legislation from 6 April 2014 was too soon. Many respondents contended that 6 April 2015 would be a more realistic target date.
- 3.14 One respondent felt that, if implementation is at 6th April 2014, any compliance activity should initially concentrate on educating affected parties until the proposed penalty regime begins to operate from 2015. This was reinforced by another respondent who thought there might be a practical difficulty educating industry in time for them to operate the legislation properly, arguing that it is not simply firms who describe themselves as agencies who will be affected by the changes.

- 3.15 Whilst many urged delayed implementation, this view was not universal. Some respondents argued that there is a good case for implementing this legislation quickly and then having a 'soft touch' approach for the first year as firms adjust.

The Government's response

- 3.15 The Government has considered the arguments for and against delaying the implementation of the legislation. The Government has decided that the legislation will be brought in from 6 April 2014 as previously signalled. This legislative change is to address mass-marketed avoidance of the existing legislation and delays in bringing it in would provide a window for those trying to circumvent the legislative intention, in which for them to devise new avoidance arrangements.

Reporting Requirements

- 3.16 A number of respondents were concerned about the reporting requirements. They felt that there were considerable costs associated with such a requirement and one respondent stated that:

"while we will take every step to comply with our legal requirements, to do so by 6 April is hugely unreasonable if not impossible."

- 3.17 Another response received concentrated on the uncertainty of who would be required to make a return and the need for information on individuals/entities where there is no PAYE/NICs liability;

"we are unsure then on whether there is a reporting requirement on the intermediary even when the income concerned is not caught by these proposals. It would appear that there is still a requirement to report details of any payments made to umbrella employees and PSCs even though there is no requirement to account for PAYE/NIC. If so, this seems an unnecessary process that duplicates existing submissions by the umbrella/PSC."

- 3.18 Another respondent was keen to highlight the consequential costs of the quarterly return, stating that

"there will also be a cost for the additional administration associated with the quarterly reporting requirement."

- 3.19 One particular professional membership organisation representing chartered accountants worldwide was focussed not so much of the cost implications, but on the data security issues involved in the transfer of data in order to compile the returns stating;

"We are concerned about the identity security implications of requiring agencies to make returns..."

The requirement to pass on national insurance numbers is a particular concern as they are frequently the last pieces of information to be obtained by criminals when cloning identities.

The passing across of such data between businesses should take place in a secure document exchange environment similar to that used when submitting returns to HMRC”

- 3.20 During the numerous round table events held by HMRC over the consultation period there was significant support for the reporting requirements and the final objective of producing a targeted compliance response from HMRC to police the legislation effectively. The aim of using the reporting requirements to create a level playing field was widely supported.

The Government’s response

- 3.21 The Government recognises the concerns a number of respondents have expressed regarding the timing of the introduction, associated costs and data security implications with the new intermediaries’ reporting requirements, which supports not only legislation designed to tackle false self-employment but also the off-shoring of payrolls. The Government recognises that some of these concerns are valid. Under the original proposal the first return is due for the second quarter of 2014 and would need to be filed by 5 November 2014. In response to these concerns the Government intends to delay the first return until the first quarter of 2015/16 (first return due by 5 August 2015). This will allow HMRC to develop and test the new system with a sample of employment businesses/agencies of different sizes to ensure the system works for customers and allow for any IT issues to be resolved prior to going live.
- 3.22 The Government is mindful of the cost implications and is aware that HMRC has restricted the information required to the minimum. This is to enable HMRC to monitor compliance with legislation to address both false self-employment and the off-shoring of payrolls and to support an effective response to non-compliance. HMRC is reviewing currently a reduced return requirement in relation to PSCs following a number of roundtable events.
- 3.23 Although concerns have been raised by a few respondents regarding data security, it is the responsibility of the Data Controller to ensure that appropriate security is maintained in relation to personal data (seventh data protection principle of the Data Protection Act (DPA)). HMRC has reviewed the fields required for the return and do not consider that they create additional data security risks for data controllers. At the same time HMRC recognises that delaying the introduction of the return until 2015/16 will provide a significant period of time for business to review their data sharing practices and create secure document exchanges that meet with the requirements set out in the DPA.

Definition – practical and commercial issues

- 3.24 Some respondents thought that the problems of definition were crucial. They thought the definition of the intermediary in the draft legislation appended to the consultation document was not specific enough, leaving it unclear as to exactly which organisation in the contractual chain would be subject to the definition.
- 3.25 Respondents were particularly concerned the definition was unclear where genuine commercial multi-tier business arrangements are in place. One

respondent felt that the broad nature of the definition could be read as including both agencies and businesses that currently describe themselves as specialist subcontractors.

- 3.26 A number of respondents thought there would be definitional problems in relation to PSCs and confusion with the existing IR35 legislation.
- 3.27 An alternative definition of intermediary was proposed by one respondent – namely that an intermediary should be defined as any structure imposed between the engager and the worker including employment businesses, but not including arrangements caught under the IR35 provisions.
- 3.28 Respondents highlighted what they thought would be the potential unintended consequences of a loose definition in terms of the workers it might possibly affect. One respondent suggested partners in firms who are remunerated – even partially – by reference to turnover of a department or division, may come within the proposed definition where supervision, direction or control are present.
- 3.29 However, there were contrasting views. The response from one trade union stated that over recent years businesses had developed increasingly complex contractual arrangements, often very sophisticated in nature, with the specific aim of disguising employment. They felt therefore that any definition of intermediary should intentionally be very broad, covering payroll companies, umbrella companies, employment businesses and sub-contractors. Future-proofing and anticipating future developments in the labour-supply sector designed to circumvent the legislation, should be a priority.
- 3.30 The major employers' organisation thought that the definition of an intermediary as proposed in the draft legislation would not cause any practical difficulties to genuine commercial arrangements:

“Given a correct definition of “agency” then it is unlikely that genuine commercial (self-employment) arrangements would fall within scope”

The Government's response

- 3.31 A number of respondents were concerned about the scope of the draft legislation and definitions. To prevent intermediaries from trying to claim that what is really the supply of workers is the supply of a service, the proposed legislation included those personally involved in the provision of services to ensure composite services are caught. As a result, anyone buying a composite service where there are a number of companies in the supply chain could potentially be within the strengthened agency legislation. If the worker is engaged on a self-employed basis. It is not the intention to capture such arrangements and as such it is the Government's intention to amend S44 (1)(a) of the proposed draft legislation to prevent such arrangements being caught but ensure that the legislation still has a wider remit than currently exists to capture those currently stepping outside the legislation.

Control Test (Supervision and Direction)

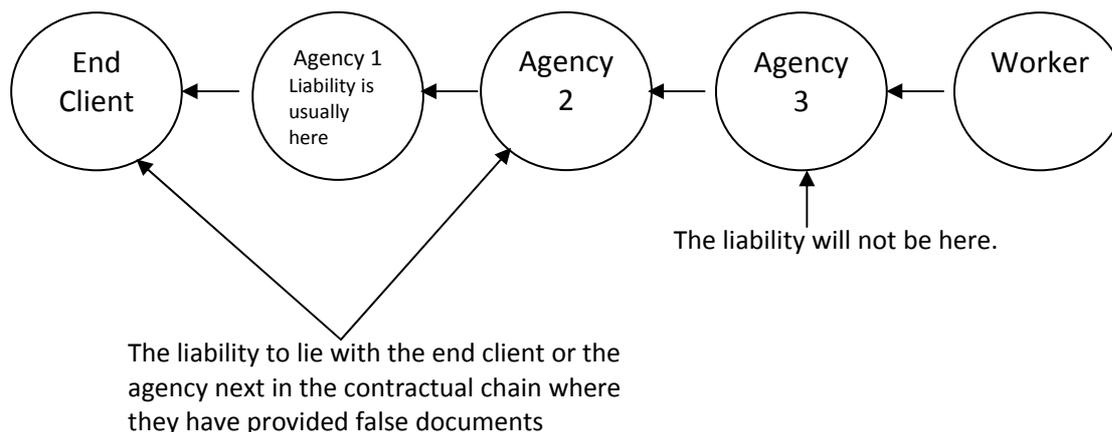
- 3.32 The majority of respondents who commented thought that the question of control and the test proposed would prove problematic to operate in practice. Comments centred on the practicalities of operation rather than on principle.
- 3.33 However, other respondents saw the control test in a positive light, welcoming it as the key test as to whether worker is subject to supervision, direction or control as to the manner. One trade union response argued that such a test more accurately reflects the distinction between employment and genuine self-employment.
- 3.34 Another respondent also supported the importance of the principle that individuals who are provided via an intermediary should always be deemed to be in employment. In terms of responsibility in this area, it was argued that there should be a burden of proof on the employment business to demonstrate that an individual is genuinely self-employed and not subject to supervision, direction or control.
- 3.35 One respondent, supporting the general approach of the measure, thought that the proposals did not go far enough. They thought that there was an opportunity to simplify and clarify complex legislation and add certainty, arguing that it had been Parliament's intention that, in general, agency workers were not self-employed and therefore should be taxed through PAYE. Although the development of case law has cast some doubt on whether the use of supervision, direction or control is the correct test for self-employment, the overall intent of Parliament should prevail.
- 3.36 One large accountancy firm, supportive of the Government's overall aim, echoed other correspondents who thought that the tests of supervision, direction or control were very widely drawn, arguing that the legislation requires only that there is control, direction or supervision by any person to trigger a deemed employment, but that there are wider factors to be considered. They thought a specific 'carve out' for cases of true self-employment would improve the practical operation of the measure.
- 3.37 Respondents pointed out that the legislation presumed that, where a worker is engaged through an intermediary, control exists over that worker. This means that it is the responsibility of the agency that contracts with the end-user client to whom the worker provides their services to operate PAYE and act as the secondary contributor for NICs.
- 3.38 One of the broad difficulties that some respondents saw was that of 'proving a negative' and proposed that the legislation should apply, as now, where the manner in which the services are provided is subject to (or subject to the right of) supervision, control or direction of another.
- 3.39 Another respondent also argued that the proposal requires genuinely self-employed and freelancers to prove a negative. Currently the burden of proof lies with HMRC and the current proposals would transfer that onus to the worker or the agency which would be intrinsically difficult.

- 3.40 A small number of respondents thought that the measure might bring about a move in some cases from false self-employment to false employment. They argued agencies would not wish to take any risks in applying the control test rules and spend time and effort in keeping supporting evidence to produce to HMRC when requested.
- 3.41 There was concern expressed about genuine agencies having sufficient information to determine correctly whether control exists. Determining this they thought was 'notoriously difficult' being reliant on a number of quite subjective factors. It was claimed that agencies could not be expected to know the intricate details of every engagement that they are involved with, and are unlikely to have access to all the information required to make such a complex judgment.
- 3.42 During a number of roundtable events a number of agencies stated that they had in the past been presented with 'fraudulent' documents. They were concerned that in such instances the liability would still sit with them even after carrying out extensive due diligence. Respondents requested to have the inclusion of a reasonableness test in the legislation to ensure that such circumstances were dealt with appropriately and level of comfort could be reached.

The Government's response

- 3.43 Intermediaries will be required to operate the new agency legislation and deduct income tax and NICs through PAYE where the manner in which the worker provides their services is subject to (or subject to the right of) supervision, direction or control of anyone in the contractual chain. A common concern of stakeholders was their ability to be able to determine whether the worker is under supervision, direction or control and the concern about proving a negative.
- 3.44 As a result of these concerns, and to provide clarity for stakeholders, HMRC is developing extensive guidance to illustrate the control test. This will include examples of where HMRC would consider the manner in which the worker provides their services is and is not subject to supervision, direction or control. HMRC's compliance officers will also help customers to make considered decisions in relation to the new legislation.
- 3.45 The Government recognises the concerns which have been raised about the level of due diligence required. Stakeholders were particularly concerned that they may be provided with fraudulent documents purporting either that there is no control (or right of control) or that the worker has had income tax and NICs deducted through PAYE by a business further down the contractual chain and which HMRC may challenge leaving them with the liability after carry out considerable due diligence.
- 3.46 To address such concerns, the Government is introducing a provision that, where fraudulent documents have been provided to the Agency 1 (see the diagram below) the company which has provided the fraudulent documents would be liable to operate PAYE and payment of NICs (where this company is

in the UK) rather than Agency 1. The liability will only lie with the business with a direct contractual relationship with “Agency 1”.



- 3.47 Such a provision recognises that where fraudulent documents have been provided and Agency 1 has acted in good faith, the liability should have always sat with the entity providing such documents. This change will ensure that those who act responsibly are recognised and protected from those who provide false documents with the aim of avoiding the liability.

Interaction with intermediaries legislation

- 3.48 Almost all respondents mentioned interaction with the intermediaries legislation (IR35) and its requirements. In many cases they drew attention to the definitional problems outlined earlier in this document and the practical problems that may occur in relation to PSCs.
- 3.49 A number of respondents thought there would be practical problems in relation to PSCs and confusion with the existing IR35 legislation.
- 3.50 One employment business which responded thought that putting PSCs out of scope of the legislation should be more certain. They suggested establishing a due diligence standard that could be applied by the intermediary to allow them to identify whether the PSC is in scope and also to be able to provide a defence should it later be identified that the worker should have been in scope.
- 3.51 Questions were raised about how the substitution clause would operate in practice and whether, indeed, substitution, or the right to substitution, now has real practical relevance.
- 3.52 One respondent supported the legislation as a whole, but argued that the interaction with IR35 legislation needed to be fully bottomed out and also the order of the chain of recovery. Otherwise the Targeted Anti-Avoidance Rule (TAAR) or any other mechanism is ‘doomed to fail’.
- 3.53 It was argued that the tests for IR35 were considerably more complex than the tests which have been set under the new deeming legislation. Therefore, a contractor engaged through a limited company may have PAYE and NICs deducted at source which would not ordinarily have been considered as a

deemed payment under a relevant engagement. In order to avoid confusion, it should be made clear that payments to limited companies will not fall within the scope of this new legislation.

- 3.54 One contractors' association, again supportive of the aims of the measure as a whole, encapsulated points raised by others in terms of the interaction with IR35 when they said:

"..we believe it must be made explicitly clear that PSCs are not in scope. Agencies, clients, and those who operate PSCs need to know where they stand with respect to this legislation"

The Government's response

- 3.55 The Government recognises that there was concern about the perceived interaction with the proposed changes to the agency legislation and the intermediaries' legislation (IR35). It is not the policy intention that the interaction between the amended agency legislation and IR35 will change from the existing interaction. In most cases the agency legislation has never applied, and will continue not to apply, to PSCs because the agency legislation does not apply where:

- i. the remuneration is already taxed as employment income because of other provisions within the Taxes Acts; or
- ii. the remuneration is not in consequence of the worker providing their services under the contract.

- 3.56 This means that where a worker withdraws profits from their limited company as salary (employment income), the agency legislation would not apply because income tax and NICs will already have been deducted. It will also not apply in most cases where profits are withdrawn as dividends as this is a return on capital distribution, not remuneration in consequence of the worker providing their services.

- 3.57 HMRC has discussed this issue extensively with stakeholders, including professional accountancy bodies and the IR35 Forum, and they agree with HMRC's analysis. HMRC published a technical note (annex B) alongside the consultation document which sets out HMRC's view of the interaction between the agency legislation and IR35.

Preventing Avoidance

- 3.58 The consultation asked whether respondents felt that there was need for attempts to avoid the legislation to be addressed by specific measures such as a Targeted Anti Abuse Rule (TAAR.)

- 3.59 Most respondents who commented acknowledged that there are widespread and obvious avoidance risks in the area of false self-employment. They expressed general support for some form of measure (supported by increased HMRC compliance enforcement) to combat this. Only a small number specifically mentioned the need for a TAAR.

- 3.60 There were a number of respondents who were strongly in favour of a TAAR. One respondent saw this as essential to address unfairness and ensure a level

playing field. They thought the greatest risk of unfairness would be if the legislation was only partially successful. For example genuine and compliant specialist labour subcontractors being forced to account for PAYE whilst at the same time wholly artificial intermediaries adapt their structures to escape the impact of the legislation.

- 3.61 One representative body supported the need for some form of anti-avoidance approach. They echoed other respondents in highlighting the position of the General Anti Abuse Rule ("GAAR"), arguing that this should possibly be looked at as a first line of anti-avoidance defence. This would, it was argued, avoid the complication of introducing further measures, given the relative simplicity of the agency legislation.
- 3.62 A point frequently made by respondents who were critical of the detail of the main measure (again largely related to the issue of timing of the legislation) was that a TAAR may not be necessary; if the legislation itself could be improved during the time period that would be available were implementation to be deferred.
- 3.63 Similarly, one respondent, a member of the IR35 Forum, thought that there was a prior question – namely what would a TAAR aim to achieve? The answer would necessarily be dependent on the effect of the main proposals. As currently proposed, the respondent thought that the legislation would be ineffective and therefore a TAAR would serve little purpose other than plugging gaps.
- 3.64 A number of respondents stated in their responses and at roundtable events that they had major concerns about PSCs being set up in large numbers in an attempt to circumvent the legislation and would do so in a manner which takes it out of the MSC legislation. With one respondent stating:
- "Cost of labour in the affected sectors will increase and take home pay will decrease will stifle growth, or lead to exponential growth of PSCs. (A proliferation of managed service companies masquerading as legitimate high street accountancy firms providing sham PSC solutions to individuals.)"*
- 3.65 In terms of specific anti-avoidance protection, one respondent, an advisor, asked whether the Government had considered whether the safeguard against abuse should apply some form of debt transfer provision. It was acknowledged that this had sensitivities, but that it would prevent genuine employment businesses being by-passed in the supply chain by intermediaries contracting directly with end-user clients.
- 3.66 One large representative body which welcomed the overall aims of the measure noted that avoidance opportunities would exist for unscrupulous businesses if there was no financial liability or reporting requirement for end-user clients, thus allowing them to engage with rogue traders at the expense of compliant agencies.

The Government's response

- 3.67 The Government is aware that certain elements in the temporary labour market are quick to react to any legislative changes and to find new vehicles to reduce income tax and NICs.
- 3.68 The Government therefore intend to introduce a TAAR in the legislation to deter such avoidance. It is designed to enable HMRC to consider both:
- i. the motive for setting up the arrangements – whether it is set up with the motive of avoiding income tax ; and
 - ii. what it achieves – whether it results in less income tax being paid.
- 3.69 This means that people who set up PSCs for a reason other than reducing tax – such as the limited liability protections incorporation provides – would not be within the TAAR. However, HMRC would be able to use the TAAR in the most egregious cases where, for instance, an agency requires all of their workers to set up PSCs to avoid the new legislation. HMRC will continue to monitor activity in these areas.

Compliance Response

- 3.70 A number of responses received focussed on HMRC's compliance plans, questioning what they were; "we are aware that HMRC has committed to undertake a compliance campaign alongside the launch of the new legislation. It is not yet clear what this would entail or how it will be undertaken."
- 3.71 Other respondents recommended that HMRC focus on an enabling culture with customers who are trying to get it right; with one respondent stating that the compliance activity should (except in relation to cases of clear abuse) have an educational focus until the introduction of the penalty regime from April 2015.
- 3.72 One large trade union stated "we are concerned that rogue operators will seek to devise new contractual provisions to circumvent the control test" while another respondent stated that it was "highly unlikely HMRC will be able to meet the £500 million revenue target as it is unable to effectively enforce against businesses that refuse to engage with the reporting requirements, and is unable to transfer any liability onto end-user clients that engage with such businesses."

The Government's response

- 3.73 HMRC has been consistent in its messaging throughout the roundtable events and in discussions with stakeholders. It is HMRC's intention that targeted compliance action will be taken against those who continue to try and side-step the new legislation and resources are already being put in place to police the measure.
- 3.74 The Government has decided to delay the introduction of the reporting requirements and associated penalties to assist customers. The Government has not delayed the introduction of the legislation which will take effect from 6 April 2014. HMRC's compliance strategy will help those trying genuinely to get things right but target and take action against those wilfully attempting to avoid the legislation.

4. Next steps

Publications

4.1 The following publications will provide further background to the summary of responses document for onshore employment intermediaries: false self-employment:

- i. Onshore Employment Intermediaries: False Self-Employment; published 10 December 2013.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264649/Onshore_employment_intermediaries_-_false_self_employment.pdf

- ii. Offshore Employment Intermediaries; published 30 May 2013.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203981/130530_Offshore_consultation_FINAL.pdf

- iii. Offshore Employment Intermediaries, summary of responses document, published 14 October 2013.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249786/Summary_of_Responses_Offshore_Employment_Intermediaries.pdf

Guidance

4.2 Draft guidance on Supervision, Direction and Control has been published alongside the responses document and will be updated in the Employment Status Manual accordingly.

Implementation

4.3 The Government intends to legislate for the revised proposal in forthcoming Bills. The tax legislation, together with powers to make regulations for record keeping, returns and penalties will be included. The equivalent National Insurance legislation will be made using existing vires and regulations will be made on 13 March. Subject to approval by Parliament, all the legislation, except the record keeping, returns and penalties regulations, will come into force on 6 April 2014. The regulations for record keeping, returns and penalties, subject to Parliamentary approval will come into force from 6 April 2015.

5. Glossary

End-user or end client

An end client is the entity which uses the labour or services provided by the worker. The end client may be the employer of the worker or may be the entity that the Intermediary ultimately supplies the worker to.

Employment Business

An Employment Business provides staffs who do not become employed by the Hirer but who are seconded or supplied to a 'client employer'. (Employment Agency Act 1973 (amended in 2004))

False self-employment

False self-employment is where someone whose engagement terms would dictate should be treated as an employee falsely presents their terms and conditions as though they would be self-employed.

Intermediary

An intermediary is an entity which interposes itself between a worker and the engager. This includes personal service companies and Employment Businesses

Personal Service Company

A personal service company (PSC) is a small limited company through which a owner/director provides their own personal services.

6. Annex A: List of stakeholders consulted

The Government is grateful to the following organisations and individuals who participated in this consultation

Academic/think tanks

Cranfield School of Management

Accountancy firms

David Kirk and Co

Deloitte LLP

Ernst and Young LLP

KPMG LLP

Lloyd Dawson Chartered Accountants

Mazars LLP

PwC LLP

Sam Corcoran

SJD Group Ltd t/a SJD Accountancy

Sumit Agarwal

Whale and Co

Whitefield Tax Ltd

Construction businesses

Advance Contracting Solutions Ltd

GloWarm Central Heating

Headcrown Group Plc

Homes For Scotland

John Carey

Ken Taylor

SJD Associates

V & G Construction Services Ltd

10 Individuals

Law firms/legal advisors

BDO LLP

Brookson Legal Services Ltd

CRS Solicitors

FrancisClark LLP

Lewis Silkin LLP

Osborne Clarke

Peninsular Business Services Ltd

Professional bodies

Association of Taxation Technicians (ATT)

Chartered Institute of Taxation (CIOT),

CIMA Members in Practice Panel (MiPP)

Institute of Chartered Accountants in England and Wales (ICAEW)

London Society of Chartered Accountants (LSCA)

Recruitment and employment businesses

1st Option Consulting Services Limited
Alexander Mann Solutions
Associated Sub-Contractors Business Services for the Self-Employed
ATA Recruitment Ltd and Ganymede Solutions Ltd - part of RTC Group Plc
Back Office
Bauer and Cottrell Ltd
Blue Baring Recruitment Ltd
Borne Resourcing Ltd
Bryant Engineering Services Ltd
Crest Plus Operations Ltd
CWC Solutions
EEBS Ltd
Empresaria Plc
Hays
HEADS Recruitment Ltd
ID Medical Group Ltd and Recruitment Express Ltd, t/a TLC and Locum 24 Ltd
InTouch Contractor Accounting
Jigsaw Staff Recruitment
Kapla Ltd
Matchtech Group Plc
Meridian Business Support
NRL Group Ltd
PCS UK Ltd
Prisma Recruitment Ltd
Randstad
Red Queen Ltd
Reed Specialist Recruitment Ltd
Rullion Group
Simon Noakes - Director of Bespoke Recruitment (Construction) Ltd & Chair of the Construction Sector REC
SimplyCo Ltd
Steria Recruitment Ltd
The Placement Group (TPG)
Thorn Baker Ltd
Workmates

Representative bodies

Association of Professional Staffing Companies (APSCo)
Association of Recruitment Consultants (ARC)
Building and Engineering Services Association
Confederation of British Industry (CBI)
Construction Industry Joint Taxation Committee
Contract Scotland
Contractor Calculator
Employment Lawyers' Association
Freelancer and Contractor Services Association (FCSA)

Joint Industry Board
Low Incomes Tax Reform Group (LITRG)
Professional Contractors Group (PCG)
Professional Interpreters Alliance (PIA)
Professional Passport Ltd
Recruitment and Employment Confederation (REC)
Scottish Council for Development & Industry (SCDI)
SELECT (formerly The Electrical Contractors' Association)
UK Contractors Group (UKCG)

Specialist agents

Alan Nolan - Aspire Business Partnership LLP
Assured Tax Consulting

Trade unions

British Airline Pilots' Association (BALPA)
Broadcasting, Entertainment, Cinematograph, and Theatre Union (BECTU)
National Union of Professional Interpreters (NUPIT)
Trade Unions Congress (TUC)
Union of Construction, Allied Trades and Technicians (UCCATT)
Union of Shop, Distribution, & Allied Workers (USDAW)
UNISON
UNITE

7. Annex B:

Interaction of Personal Service Companies with the Proposed Changes to Chapter 7 S44-47 ITEPA 2003 (The Agency Legislation)

This note sets out HMRC's view on the way the proposed changes to the agency rules interact with the intermediaries legislation (commonly known as IR35). We are publishing this note in response to concerns that have been raised during the consultation on Onshore Employment Intermediaries: False Self-Employment. We hope it will provide useful clarification alongside the consultation.

The proposed new legislation will apply, as the current Agency legislation does, where a worker is supplied by or through a third party. The third party (described in the legislation as the 'agency') is any structure interposed between the person in receipt of the worker's services (the engager) and the worker. The third party therefore includes employment businesses and personal service companies (PSC). Those working through PSCs will need to consider the Agency legislation in the same way as they do now, both where the PSC engages directly with an engager and where the PSC is engaged through other parties such as employment businesses.

For the proposed new Agency legislation to apply to a worker providing their services through a PSC, all of the following qualifying conditions need to be met:

- the worker personally provides, or is personally involved in the provision of, services to another person as a consequence of a contract between that person and a third person;
- the manner in which the worker provides the services is subject to (or to the right of) supervision, direction or control by any person.
- remuneration is received by the worker in consequence of providing the services; and
- that remuneration does not constitute employment income apart from under the Agency legislation.

As is currently the case, the proposed Agency legislation will not generally apply where a worker is engaged via a PSC, as all the above criteria will not normally be met. This is because:

a) As set out above, the legislation will only apply when remuneration is received by the worker as a consequence of providing the services. Therefore dividends paid to the worker as a genuine consequence of their shareholding in the PSC will not normally fall within the new Agency legislation.¹

b) Similarly, the Agency legislation only applies when the worker receives remuneration which is not employment income before the provisions of that legislation are applied. Any salary paid to the worker by the PSC is already employment income so the new Agency legislation would not apply to that remuneration.

c) Loans are made by reason of the employment with the PSC. Beneficial or written off loans are chargeable to tax/NICs as earnings but do not normally arise as a consequence of the worker providing the services. As such, they would not fall within the scope of the Agency legislation.

If neither the Agency legislation nor the Managed Service Company legislation applies then anyone working through a PSC needs to consider the Intermediaries legislation, more commonly known as IR35. This will continue to be the case under the proposed new legislation. IR35 applies where the relationship between the worker and the engager would be one of employment if the PSC and any other party in the contractual chain did not exist.

¹

Genuine dividends from the PSC would not normally be considered to be remuneration for the purposes of the Agency legislation. However in cases of avoidance there may be instances where HMRC argue that these payments are remuneration either as general earnings or as remuneration for the purposes of the Agency legislation.