GMB TRADE UNION RESPONSE

Department for Business Innovation & Skills (BIS)

Call for Evidence:
EU Proposals for a Posting of Workers Enforcement Directive

JULY 2012

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Introduction and Background

GMB is the UK’s third largest trade union with 620,000 members across a wide range of sectors. We organize in a number of sectors which are increasingly using posted workers, particularly, but not exclusively, in the construction and construction engineering sector, where we have significant membership.

GMB has been centrally involved in dealing with several major disputes and exploitation of workers on construction engineering sites across the UK over a period of several years, where protections of the Posting of Workers Directive have been undermined and abused. These rights have been further undermined by the European court rulings in the cases of Laval, Viking etc.

GMB therefore welcomes the opportunity to provide evidence on the issue of the EU proposals for a Posting of Workers Enforcement Directive under this BIS consultation. We are responding on behalf of GMB members, and our evidence in response has been developed as a result of representational experiences, briefings, policy discussions at CEC level, and motions to successive GMB congresses on these issues. We agree to our response being publically available.

However, given the level of our involvement in sectors relevant to this issue, GMB is concerned to note that our trade union was not listed in the Annex D of the consultation document – under the list of employee organisations formally approached. In our view, this list is very limited, when compared to the business organisations and sectoral employer organisations listed, which is over three times higher and risks seriously distorting the outcome and conclusions of the consultation, thus drawing its credibility in to question.

GMB would like an explanation in the report on the consultation as to what criteria were used to determine the list of organisations approached.

GMB has been actively involved over a long period of time at European and national level in campaigning for a much needed extensive revision of the Posting of Workers Directive. In our view the proposals for a limited Enforcement Directive do not go far enough to remedy the problems that both the EU Commission and Member State governments know are rife in relation to this issue area. It is effectively trying to put a sticking plaster on a gaping wound.

As a starting point, we believe that the existing legal basis for the proposals does not reflect the issues at hand, and should be extended from a purely internal market instrument to dual legal basis reflecting the crucial and central social dimension of the proposals by including the joint basis with Art.153 TFEU (social policy).

GMB and our European trade union colleagues regret that the EU Commission and Member State governments have lacked the courage to address the abuses in this area effectively and comprehensively. Unless the proposals are significantly strengthened, the problems will continue to escalate.

Below is the GMB evidence in response to the questions raised in the BIS Consultation. We would be happy to provide further information, or discuss further any of the points made in this submission.

GMB members urge the Government to give serious consideration to the issues of concern raised and the case examples given in this response, and hopes that the UK government will use its influence to strengthen and improve the proposals in line with our advice.
GMB Responses to questions in the BIS Call for Evidence on the EU Proposals for a posting of workers enforcement Directive

Question 1: Are the criteria in Article 3 (see Annex B) likely to bring more clarity to what classifies as a posting for your organisation / members? Are you able to provide examples of situations where such criteria would have been either helpful or unhelpful? Is there anything that should be added to the lists? Are there any criteria which cause you / your members concern?

In GMB’s view the provisions proposed in Article 3 do not go far enough to prevent abuse and circumvention. The Directive must make clear that the list of criteria in this article are not “pick and mix” options to find the least cumbersome classification criteria, but that it constitutes a common list, which should be implemented and applied across all Member States, whilst accepting it is not exhaustive, allowing Member States to assess all factors relevant to cases in a coherent manner, and add further criteria according to national practices.

GMB believes the limited period of time should be more specific and the limit quantified.

The proposals also need to make clear at which point Member States should examine that the criteria are fulfilled. Logically this should be part of a process of pre-contract audit.

The provisions should require confirmation of where social security contributions and liability insurance are registered and paid as well as taxes. GMB and other European Unions have uncovered unacceptable practices of workers, for example, being recruited in Poland via agencies who claim to have registered them through a questionable office address in Cyprus for social security, when the workers have never set foot in that country and have no connection with it whatsoever. Avoidance practices in social security coverage not only leaves workers vulnerable in relation to health and welfare, but means that governments across Europe are losing millions in lost revenue to fund health and welfare services by such actions.

Clear criteria need to be put in place to prevent agencies or posting companies from passing on the responsibility for tax and social security down to workers through bogus self-employment arrangements in an attempt to bury/avoid their obligations. The growing problems of avoidance of protections under the Posting of Workers provisions by false self-employment should be addressed by including criteria based on ILO Recommendation No. 198 on the employment relationship.

Provisions relating to temporary agency workers in the case of posting need to be addressed and clarified in the criteria. It must be emphasized that equal treatment rights under the TAW Directive also apply to posted workers, whilst allowing scope for them to benefit from more favourable treatment regarding their terms and conditions of employment through another instrument or agreement.

Question 2: What experiences have you / your members had in finding information on the terms and conditions applicable to posted workers in other Member States? Would you welcome making this information more easily accessible? Which languages and what form (online or leaflet) would be most appropriate for your organisation / members?
GMB believes that such information should be made as accessible as possible through a variety of forms both online and in hard copy. Information technology now makes accessibility and exchange of information so much easier, and sensible co-ordination in the preparatory phases of implementation by Member State Governments and the EU Commission can help to minimize the cost and maximize the coverage of access to this information. It should be widely held by a number of agencies including government authorities, public authorities, employers’ associations, trade unions, and should be made available in a wide variety of languages corresponding to those of the workers/companies involved. Again, modern technology makes this much easier and cheaper to deliver.

Clients and main contractors should also be obliged to highlight this information throughout the various levels of contracting when contracts are being negotiated, and evidence of adherence to the obligations under the terms and conditions should be required when bids are considered. Similar provisions relating more generally to employment and social protections and terms and conditions in force already exist in EU Public Procurement law applied across Member States. Governments should not over-exaggerate the costs and effort of providing this information effectively.

**Question 3:** What experiences have you had of administrative requirements and/or notification systems when posting workers from the UK to other Member States? What impact would this article have on UK businesses looking to post workers to other Member States or on posted workers themselves?

N/A

**Question 4:** What evidence is available on existing problems for posted workers in the UK construction sector? What evidence is available to demonstrate that a joint and several liability provisions would address compliance and enforcement problems?

Both the Construction and Construction engineering sector in the UK are increasingly characterized by long and complex chains of subcontracting. GMB accepts that genuine and justifiable reasons for subcontracting exist – for example a company may lack the expertise, machinery/equipment, skilled staff or capacity to carry out a certain element of a contract on their own.

However, too often the complex layers of subcontracting, and the recruitment of posted workers either directly or via agencies are introduced with the aim of undercutting pay, conditions, collective agreements and standards in the place where the works or services are carried out. This race to the bottom is effectively social dumping. It compromises the quality of the works or service as well as, all too often, the health, safety and well-being of those working on the sites. This cannot be accepted. It is a double-edged problem involving the exploitation of vulnerable posted workers on the one hand, whilst at the same time undermining the skills base and access to work opportunities of domestic workers in the UK or elsewhere in Europe to the benefit of no-one except greedy and unscrupulous employers.

GMB was the lead trade union involved in organising workers on the Uskmouth Combined Cycle Gas Turbine Power Station site. The case example outlined below shows these bad practices in operation.

**Case example 1: Uskmouth Power station**

Severn Power awarded the main construction contract to Siemens to build the Uskmouth Combined Cycle Gas Turbine Power Station and work started on the site in early 2009. The site was covered by the Engineering Construction National Agreement.
Siemens sub-contracted the thermal insulation work on site to an Austrian company called Isochore who further sub-contracted that work to the Polish company Darmar. By Autumn 2010, Darmar had been on the Uskmouth site for approximately eleven months. Darmar, who had an office in the UK at Harrow, Middlesex employed about 40 laggers on site all of whom were Polish posted workers.

GMB Officers saw the pay slips given to a number of the Darmar employees who were GMB members. We also saw the payment details sent by Darmar to the Auditor on site in respect of those workers. In addition, we were provided with details of the monies actually paid into the bank accounts of the workers affected over a seven month period to October 2010. None of these sets of paperwork tallied.

The paperwork was examined by site Auditor Baker Mallet who was the independent auditor employed by Siemens under the terms of the National Agreement for Engineering Construction. GMB submitted documentation to the Auditor which showed that:-

* The Polish workers were not paid correct overtime payments which amounted to 19 hours pay per week.
* They were deducted one day’s lodging allowance every week.
* They had not had any periodic leave payments for seven months.
* They had not been paid the correct Incentive Bonus Arrangement payments for seven months.
* The five points above are to a value of approximately £1,200 per month.
* They were paid one month in arrears. Payment for work in February was paid in March. The payment that went into their bank account did not tally with the overall amount shown as take home pay on their slips. Just taking March 2010 payment for example the bank account statement for one Polish worker showed 7040 PLN (the exchange on that date was 1PLN = 0.2329) which equates to £1,639 went into his account on 17th of March but his February slips showed he earned £2,800. This was a £1,161 deficit.

GMB met with a Representative of Darmar on site at Uskmouth, but were unable to resolve the issues. The GMB subsequently lodged a successful claim at an Employment Tribunal in Cardiff which was completed in January 2012 and resulted in compensation for the unlawful deductions of wages and injury to feelings which totalled £251,204.81 in respect of the 14 workers who were GMB members.

GMB wrote to Darmar’s offices in Harrow, Middlesex only to have the correspondence returned as Darmar had closed their office in the UK. Further investigations led GMB to believe that Darmar had offices based in Hamburg with which we corresponded in relation to the Tribunal Order.

Darmar’s reply attempted to claim that they are a different company - yet still under the name of Darmar. Coincidentally, it is signed by someone of the same name as the representative we had met on the site....

When GMB became aware of the exploitation of Polish posted workers on the site, we notified Siemens, the main contractor. GMB understands that Siemens raised this with Darmar in a meeting, yet Darmar remained on site. Siemens would not have allowed this if joint and several liability had applied. This is one of many similar cases highlighting that it is vital that joint and several liability provisions are enforced to prevent such abuses being ignored in the future.

**Case Example 2 – Isle of Grain Power station**

The trade unions at the Isle of Grain engineering construction site, where Alstom were building a gas fired power station for EON, received a copy of a contract for a Polish worker employed by sub-contractor Remak paying the worker £4 per hour below the UK nationally agreed rate of pay. Under the UK Engineering Construction Industry National Agreement the national rate of pay for an advanced craftsman was £14.00 an hour in 2009. The contract stated that this Polish worker, on the same grade, would receive £10.01 an hour working for Remak at the Isle of Grain site.
Alstom was using sub-contractors Remak and Zre Katowice at the Isle of Grain. This evidence regarding Remak was backed up by statements for Zre Katowice that they too were paying lower rates of pay than the national agreement.

Case Example 3 – Lindsey Oil Refinery Lincolnshire

Trade unions received documentary evidence that contractors on Total’s Lindsey oil refinery site were also undercutting terms of the NAECI agreement in 2009. The lack of equal treatment in access to work on the basis of unfair wage competition sparked a chain of demonstrations and actions across a large number of power station sites in the UK.

GMB regrets that the ACAS report on the dispute at the time failed to investigate properly what rates Italian contractor IREM was paying to the Portuguese and Italian posted workers it brought in. Questions GMB raised with the company to establish in which country they were paying social security and tax obligations for the workers involved also remained unanswered. The inquiry also failed to assess and confirm the status of these workers. IREM claimed all 600 were permanent employees of the company.

Joint and several liability would ensure greater transparency on terms and conditions and employment status.

GMB has encountered similar practices to those outlined in the case boxes above at Staythorpe Power Station (also Alstom) in Nottinghamshire, and a number of other sites across the UK. It is currently just too easy for contractors and subcontractors to exploit workers, and undermine terms and conditions of established collective agreements at will. The more complex the chains of subcontracting, the easier it is to avoid compliance and enforcement requirements, operate abusive pay and conditions practices, bury the fact that taxes and social security payments are not being made. The trails get lost in the complexity and there are insufficient checks and inspections to investigate possible avoidance and breaches.

GMB believes these cases reinforce the need for the proposals to ensure the principle of joint and several liability established throughout ALL the levels of subcontracting, not just the first layer as suggested in the current proposals, which do not go far enough.

Establishing joint and several liability reinforces responsibilities and obligations, and will encourage the contractor to select their subcontractors with more scrutiny and care. It should also help co-operation and support with monitoring and auditing, where the various levels of contractors will want information and transparency on practices. It will hopefully help to re-establish the integrity to the sector where respectable compliant companies are rewarded for investing in good quality works and services, working conditions, skills development and innovation.

As well as reinforcing the need to have joint and several liability introduced into the Enforcement Directive, the Uskmouth case example highlights the need for provisions to pursue companies cross border who fail to comply with their obligations, and attempt to abscond, fleeing from responsibilities and penalties for non-payment or non-compliance with their obligations.

GMB believes there should be an obligation for the company or agency posting workers to provide updated forwarding contact details to the client/contracting authority for a period of two years following the contract should there be outstanding issues/complaints/obligations to
comply with. This information should be made available to trade unions involved in bringing cases or claims. The necessity for such a provision is very clear from the Uskmouth case. It will help clamp down on letter box companies, and will assist workers, companies and authorities to pursue non-compliant companies cross border.

Common supporting provisions need to be adopted at EU level to enable authorities and contractors to pursue offending companies cross border, and ensure contractors fulfill their obligations in these cross border situations. There need to be effective measures to ensure such companies have no place to hide, and that workers receive all of their remuneration and all entitlements together with any awards or compensation granted by legal proceedings in their favour.

The Government should also assess the impact this race to the bottom of multi-layered subcontracting fuelled by abusive practices has had on reputable British based companies where we have reasonable industrial relations, which are being driven out of business by the unfair and unscrupulous practices of rogue operators. It is difficult to conceive that any government would seek to defend or leave open a door such operations.

**Question 5:** What are likely to be the practical implications of the introduction of joint and several liability in respect of the rights of posted workers in the UK? What evidence is available to support your conclusions from the UK and other Member States? The proposal focuses on the construction sector but evidence related to other sectors would also be helpful to us in understanding the implications of the proposals.

As stated above, GMB believes that introducing joint and several liability will improve transparency and responsibility of companies, and help prevent undercutting of terms and conditions of posted workers, because it will restrict the scope to bury avoidance, responsibilities and breaches in compliance. Posted workers would be less likely to be exploited, and their pay and working conditions would be more effectively audited and checked. GMB believes this would also encourage better communication and co-operation on sites among contractors and subcontractors to the benefit of better health and safety, quality of provision or service, motivation of workers, and scope for training and skills development during projects.

There should be a mandatory chain of liability and this should cover all entitlements of workers.

GMB does not believe the principle of joint and several liability should be restricted to the construction sector and should be applied across other service and works sectors including food processing, where similar abuse and exploitation has been identified. We are also seeing unfair competition in the energy sector on contracting for maintenance work on overhead electricity supply cables. (See Q 10 below)

**Question 6:** What is your view of the due diligence provisions in Article 12? Are the Commission’s suggestions for due diligence appropriate and proportionate for what it aims to achieve?

No. GMB believes that the due diligence provisions as worded in the proposals are a loophole to undermine the principle of what the proposals should be trying to achieve, and discredits the process. There is no clear definition of the concept and it would therefore vary from one Member State to another. Furthermore, the term is too vague and will encourage
abuse and avoidance on this basis. Such nebulous terms also present a legal minefield and should be avoided. GMB believes that Art 12.2 on this issue should be deleted.

**Question 7:** Overall, how will your organisation /members be affected by the proposal? Please explain and specify the impacts, giving indications of the likely costs/benefits involved and providing as much detail and evidence as possible. If impacts cannot be monetised, please try to quantify in other terms. (e.g. the amount of business time spent dealing with administrative requirements).

GMB, along with our European trade union colleagues, had wanted to see a far more extensive revision of the Posting of Workers Directive, so this limited enforcement proposal in itself falls short of what we know needs to be done to remedy the abuse and exploitation that is rife and growing. It is further disappointing that the limited proposals which have been put on the table fail to properly nail down some of the major problems that the EU Commission has recognized and acknowledged need attention. GMB therefore believes that these proposals need to be greatly improved and strengthened if they are to be effective and workable for our members.

The figures in the case examples given above show the costs incurred if these proposals fail to ensure the necessary level of protection of posted workers. Vulnerable workers will continue to be exploited, skilled and committed domestic workers will be forced out of the labour market by undercutting and unfair wage competition, and reputable companies in the UK and across the EU will fall victim to unscrupulous firms who are driving down quality, standards and safety in the sectors where they are allowed to carry out these practices with impunity.

**Question 8:** Do you agree with the European Commission's assertion that the Enforcement Directive will have a “positive impact on the competitiveness of SMEs [small and medium-sized businesses] and micro-SMEs”? Has the Commission adequately taken into account the needs and circumstances of SMEs in the UK?

As GMB highlighted above in earlier answers, the proposals, if strengthened, could have a positive impact on reputable SMEs by chasing out of the market unscrupulous operators who are competing unfairly by undermining quality, standards, breaching enforcement and compliance responsibilities. It should create a more level playing field and encourage competition on quality, ability and skills rather than lowest prices, undercutting and illegal practices. However, there should be no special arrangements, or exemptions on compliance for SMEs on any of the provisions, and no quarter should be given to any SME who thinks they might benefit from seeking to undermine or circumvent the provisions of the proposals.

**Question 9:** What are your views of the estimates the European Commission make in their Impact Assessment on the likely impacts on the UK (summarised in Annex A)? Are the estimates of the costs and benefits for the UK accurate?

Remarkably the assessment in Annex A has completely failed to mention the impact of these policy proposals on domestic workers in the UK. Weaknesses in the current Posting of Workers Directive have allowed widespread exploitation and abuse of vulnerable posted workers. The Uskmouth/Darmar case shows the sorts of figures regularly involved in undercutting.

As a result, unscrupulous employers/subcontractors have often restricted or denied access to work for domestic workers because they prefer to undercut wages and conditions than pay the rate for the job as established in the NAECI and equivalent agreements. Equal treatment has been compromised, and skilled workers risk losing income, maintaining and developing
their skills and keeping home and family together. This also needs to be recognized, and remedied.

The proposals in their current form will not tackle these abuses, so these have to be assessed as potential costs and impacts to the UK labour market and economy, as well as the impact of eroding our skills base in key sectors. However, if these weaknesses are properly addressed then the current negative impact on domestic workers will be alleviated.

**Question 10:** Do you / your members have any comments or evidence about posting of workers relevant to the draft Directive, which have not been covered in the questions above?

**Establishing equal treatment principles in relation to the free movement of workers across the EU** – The EU proposals on posting of workers need to be extended to establish a firm base of equal treatment for workers in the EU, both in access to work and in terms and conditions. It is the only effective way to combat undercutting and social dumping. The economies of EU Member States will not grow or develop on the basis of unfair wage competition – it will be a race to the bottom.

**Unreasonable language requirements** - GMB has encountered cases where a level playing field in access to employment is being undermined by contractors and subcontractors putting unacceptable language requirements, for example Portuguese, for work being carried out in the UK or Ireland. The contractor or subcontractor awarded the contract aims to ring fence the workforce to bring in posted workers on lower wages, terms and conditions. Clearly, this has to be seen as a form of discrimination, and must be tackled to ensure equal treatment in access to work opportunities.

**Controls and Monitoring compliance** – the proposals must establish very clearly that the onus for control and monitoring rests with the host country where the posted workers are working. It must be understood that national control measures means those of the host country. They should be mandatory and should be extended beyond those listed in Article 9.

The translation of documents should not be restricted with exemptions on “excessively long and standardized forms” – this wording should be deleted. Workers and contractors should have access to documents and information in their own language.

Contractors and subcontractors should declare their intention to use posted workers prior to posting commences.

The role of the contact person should not be restricted to negotiations, and the contact should be resident in the host Member State during the period of the contract/service provision and until related post contract paper work and obligations are completed.

**Inspections – Article 10** – GMB does not agree with the proposals in point 1 of this article which suggest companies could challenge enforcement actions where there was no risk assessment carried out. Effective labour inspection should not be based on risk assessment, and needs to be more broadly drawn.

**Effective Enforcement and Sanctions** – GMB believes that the current proposals are not sufficient in terms of providing effective and dissuasive sanctions to deter companies from avoidance and abuse, and this needs to be more clearly specified and strengthened considerably.

The provisions for a worker to take judicial and administrative proceedings should not be restricted to outstanding remuneration and refund of excessive costs, but should include all other entitlements. Furthermore, the means for a worker to take these proceedings should be
more clearly specified in Member State obligations to make this clear in implementing regulations.

GMB believes that there should be a non-regression clause in the proposals to ensure Member States can maintain and improve on national provisions which may go beyond the provisions of the proposals.

GMB recognizes that non-posted migrant workers are also vulnerable to exploitation in similar forms to those suffered by posted workers. We believe they should also be assured equivalent access to enforcement of their rights, whilst recognizing that posted workers are generally more temporarily based, more prone to moving around and therefore present a higher risk which requires vigilance by enforcement agencies.