

# PROFESSIONAL CONTRACTORS GROUP POSITION PAPER



## RESPONSE TO CONSULTATION ON PROPOSED EU DIRECTIVE ON WORKING CONDITIONS FOR TEMPORARY WORKERS

### 1. Background

As the department will be aware the Professional Contractors Group is a trade organisation representing twelve thousand independent contractors working in a number of sectors but particularly in the IT, engineering and off shore oil and gas industries. PCG has responded and met the DTI on a number of issues relating to its proposed new regulations on employment agencies, and the issues raised by the proposed EU Directive are similar to, and mirror, the issues already raised by PCG with the department on the employment agency regulations.

### 2. PCG members and possible implications of the proposed EU Directive

Article 1 of the proposed draft Directive provides that it will apply *"to the Contract of Employment or employment relationship between a temporary agency, which is the employer, and the worker, who is posted to a user undertaking under its supervision"*. PCG members trade in two ways: either as small limited companies or as sole traders without corporate status. The proposed Directive could perhaps apply in certain circumstances to the "three way relationship" of sole trader, agency and end user. However, it is unclear whether the directive could ever apply in a situation where the PCG member trades through a limited company. PCG would wish to argue that it can not, since in these circumstances there is no "contract of employment or employment relationship" between the "worker" (if the individual is indeed a "worker" for this purpose) and the temporary agency. PCG would argue that regardless of which vehicle is chosen its members are very clearly "in business on their own account" and that application of the directive would not be appropriate.

There is also question whether or not in situations where there is no employment agency but there is a "three way relationship" namely that of client, limited company (owned by the PCG member) and the PCG worker, the limited company could be classified as a temporary agency within the Directive. Again, PCG would wish to argue that it should not.

### 3. The present wording of the Directive

Questions raised in paragraph 2 above arise because there is no definition of "a temporary agency" in the draft Directive. That does leave open the issue of whether or not in the "three way relationship" explained above, a contractor's own limited company could be "a temporary agency" within the meaning of the Directive. If it were possible for that position to be held then as a PCG member is likely to be an employee of his own company then the relationship might well be covered by the Directive, with

obligations under the directive placed on the contractor's company. However it does not seem likely that this is the intention of the directive.

Similarly in situations where a PCG member is not contracting through a limited company but as a sole trader the issue of whether or not he/she is a "worker" within the meaning of the Directive is raised. The Directive does contain a definition of "worker" and that definition makes it clear that a person is a worker if under national employment law they are so classified. Following the Employment Appeals Tribunal decision in *Burn Brothers (form work) Limited -v- Baird*, which looked in detail at the meaning of the word "worker" and the "business undertaking exception included within that definition" that is now more difficult to know.

#### **4. PCG's position**

PCG repeats the concerns that it raised with the DTI in connection with the proposed regulations governing employment agencies. PCG members, and all who are in business on their own account, should not be given the benefit or burdens of this Directive which is clearly intended to protect those who are not in business on their own account. While it seems clear to PCG that the Directive is not intended to apply to such relationships, and on the most straightforward reading would not do so, we are concerned that the lack of definition of "a temporary agency", and the national law issues around the definition of "worker" (and the distinct possibility that the law in this area will be further clarified by the Courts over the next few years), means that this protection/burden might accidentally or on purpose be conferred on people who are in business on their own account and do not require such protection or any burdens being placed on them.

More importantly they do not want in place any restriction which prevents them using an intermediary (who may be classified as a temporary agency) as an opportunity to find them contracts with end users.

In the circumstances therefore, although PCG have no issues with the Directive itself, we do have grave concerns that it may be another example of regulation creeping into a business to business relationship unnecessarily.

PCG would therefore seek assurances from the UK Government that it will ensure either that the Directive is passed only if it specifically excludes such relationships, or that when the Directive is put into force in the UK it will not affect business to business relationships of the type described in this document.