Jobs transform lives

Off payroll working in the private sector

22 May 2019

Recruitment & Employment Confederation

Introduction

The REC (Recruitment Employment Confederation) is the professional body for the recruitment industry, we represent over 3,300 recruitment businesses– 80 per cent of the UK's £35.7 billion industry by turnover – and over 11,000 individual recruiters through our Institute of Recruitment Professionals. The Interim Management Association, also part of the REC, provide interim managers for high level projects across government and the private sector. Through our Code of Professional Practice and complaints procedures we promote industry standards and compliance.

Our members support the government's efforts to tackle non-compliance with IR35 and ensure everyone pays the right amount of tax. Non-compliance creates an un-level playing field to the detriment of compliant recruiters, private sector businesses and off-payroll workers.

Our members operate in both the public and private sectors so we have seen at close hand the implementation of the 2017 reforms in the public sector. As members of the IR35 Forum, the REC has been dealing with the IR35 legislation since its introduction in 2000. This experience as well as two surveys of our members (October 2017 and July 2018), webinars, and sectoral and regional member meetings have informed our response to this consultation. We welcome HMRC and HM Treasury's willingness to engage with us and our members as part of the consultation process.

NOTE: Throughout this response document we use the term 'off-payroll worker' as this is the term used in the consultation document. However this does not mean that the individuals concerned meet the statutory definition of worker for employment rights purposes.

Executive summary

REC agrees that all individuals should pay the right amount of tax. We understand the Government's position that delayed implementation of well-designed reforms would undercut compliant businesses by allowing non-compliant businesses to continue to operate. However our concern is that the reforms proposed in the consultation document are confusing (in particular the proposals around liability) and unnecessarily convoluted and, if rushed through, will lead to further non-compliance.

Government has committed to looking at the alignment of tax status and employment rights but in the meantime agencies will have to explain to off-payroll workers that being employed for tax purposes is not the same as being engaged/ employed for employment rights purposes. We understand that already agencies are facing more claims from individuals for various employment rights on the basis that they are taxed as employees so why shouldn't they have employee rights too? It is very difficult for agencies to explain that tax and employment status are not the same. This is why the Government has agreed to look at the alignment of tax and employment status in the Good Work Plan.

Furthermore with Brexit approaching and ongoing uncertainty impacting business confidence, the government cannot afford to introduce badly designed reforms which risk damaging the flexibility of the labour market.

We recommend:

1. **The reforms should be delayed at least to April 2021.** When the reforms were announced at the end of October 2018 we were told that the delay until April 2020 was to allow for detailed consultation and proper planning for implementation. However we know that many clients lack understanding of the existing rules (because they do not need to apply them) and are still unaware of the proposed changes. Furthermore we will not have draft legislation to work with at least until July 2019 (even then the legislation will be subject to further consultation and potential change). There are also other legislative changes which will require significant planning and process changes by recruitment businesses, all of which come into effect in April 2020 (and for which legislation has already been published) (see section 19).

2. **Government should conduct a comprehensive impact assessment of the public sector reform and analyse the potential impact the changes could have on the private sector**. This impact assessment must cover the full tax compliance cycle which only concluded in January 2019. To date, the evidence presented on the impact of the public sector changes has been limited in scope. IFF Research, which conducted the 2017 research on behalf of HMRC, did not consult with REC, our members or the contractor community as part of that research – they consulted only with public sector end clients and so have only one perspective on how the 2017 reforms were implemented.

3. **There should not be a small companies exemption.** Different tax rules should not apply depending on the size of the client company. Quite simply this exemption would undermine the off-payroll reforms by exempting up to 95% of businesses (HMRC's own figures) and cause greater complications to an already complicated tax system.

4. If the Government persists with a small companies exemption, **those clients wishing to rely on the exemption must be obliged to declare their status to their agency suppliers.** Neither agencies nor off-payroll workers should be expected to guess which tax rules apply based on the silence of the end user client. If a client wrongly claims to be exempt because it wrongly claims to be a small company (whether by genuine mistake, negligence or fraud), then it must bear liability for any unpaid tax and NICs (and not the feepayer or any agency in the supply chain). This must be clearly stated in the legislation.

5. **Clients must give their reasons for their status decision at the same time as the status decision.**

6. **HMRC should provide a template for all clients to use to make their IR35 determination.** This will become easily recognisable amongst clients, agencies and off-payroll workers and will ensure consistency in information provided through the supply chain. The template must include:

   (a) the client's name, address and registered company no.;
   (b) the client's status determination;
   (c) the reasons for the determination. Whatever tool the client used, a date stamped copy of the status decision for the relevant assessment should be attached to that template;
   (d) a reminder to the client to update the status decision if the relevant circumstances change; and

(e) if the small companies exemption proceeds (see Recommendation 3) that template must also include a statement that the exemption applies and why. It should also include a reminder to make an annual declaration in particular if the client's small company status does not change.

7. **Clients must bear liability for their supply chains.** Under the current proposals, the client makes the IR35 decision but bears no liability for that decision. In contrast, agencies have little or no influence on the tax status decision or employment status of the off-payroll worker but carry a disproportionate compliance burden and liability. Responsibility and liability go hand in hand and should sit in the same place in the supply chain.

8. **All parties should be able to rely on a statutory process managed by HMRC** and not a client led process – disagreements about a decision should not be managed by the client who made the decision in the first place. This HMRC led process must be in place before the reforms come into effect.

Section 2 – Defining the scope of the reform

Q1. Do you agree with taking a simplified approach for bringing non-corporate entities in to scope of the reform? If so, which of the two simplified options would be preferable? If not, are there alternative tests for non-corporates that the government should consider? Could either of the two simplified approaches bring in to scope entities which should otherwise be excluded from the reform? Is it likely to apply consistently to the full range of entities and structures operating in the private sector? Please explain your answer.

1. The REC **do not agree with the proposed small companies exemption**:

1.1. In its response to the 2018 consultation the Government stated that " … *[a]s a result [of the small companies exemption], over 95% of businesses will not need to apply the reform*". [1] Yet separately Government also states that only 10% of intermediaries correctly apply the IR35 rules. [2] Furthermore in the consultation document the Government states that non-compliance with the off-payroll rules in the private sector is growing and will reach £1.3 billion a year by 2023/24. [3] So if there is a 90% non-compliance rate amongst PSCs, and non-compliance is growing, why allow that to continue by exempting 95% of end user clients?

1.2. We understand that it is extremely labour intensive for HMRC to investigate individual PSCs – nevertheless, we are concerned that HMRC will not investigate avoidance by PSCs supplying their services to small businesses, but rather place all focus on other businesses. By exempting some but not all end user clients, the Government will create an unlevel playing field and allow non-compliance in the exempted sector to continue to distort the labour market.

1.3. **The proposed small companies exemption creates uncertainty for agencies and off-payroll workers alike**.

1.3.1. Off-payroll workers will not know what tax rules apply to their assignments unless they know the status of the end user client they will provide their services to. As a basic principle, that cannot be right. It also undermines plans to improve transparency set out in separate legislation (see para 6.3 on the key information document).

1.3.2. If this exemption proceeds, recruitment businesses will have to know the nature of their client in order to establish what rules apply. They will need to know (a) whether the client is a public authority or a private company and (b) if a private company whether it is a small company or a medium/ large company. On point (b) it is not appropriate to expect a recruitment business to rely on a client <u>not</u> giving it a determination of its own status. The consultation suggests that if a client does not tell an agency if it is a small company the agency need not

[1] Page 11 of Off-payroll working in the private sector – a summary of responses (29 October 2018)
[2] Para 1.2 of Off payroll working in the private sector – consultation document (18 May 2018)
[3] Page 6 of Off-payroll working rules from April 2020 – consultation document (5 March 2019)

consider the off-payroll rules. The recruitment sector is a fast paced industry - recruitment businesses need certainty in order to provide the appropriate contract and the key information document (see para 6.3) and so any company wishing to rely on the small company exemption must be obliged to declare to its agency suppliers that they are exempt. They must do so promptly. There must be appropriate sanctions for falsely declaring a company is a small company. See Flowchart 1 on page 7 to see how complex the proposed exemption will be for agencies.

1.4. We note that in a separate recent consultation the Government decided against a small company exemption. Specifically in its response to the consultation on "VAT: reverse charge for building and construction services" question 6 asked about an exemption for small businesses. The response states that it was "*not possible to narrow the CIS definition to exclude small business. If a threshold was introduced, all businesses would have to monitor and assess the risk of passing the threshold, which could lead to confusion, error and manipulation".* [4]

1.5. In that same consultation, questions 7, 8 and 9 asked about financial thresholds which might apply to exempt small businesses. The Government response stated "*Respondents were strongly against the application of a threshold. They thought that it would be complicated, cause confusion, not be practical and would be open to manipulation and abuse. There were also concerns about the practicalities of programming IT to deliver this*". [5]

1.6. We note that the decision to exempt small businesses from the off-payroll reforms has been made without any relevant questions being asked in the first consultation. [6] It has been presented as a fait accompli – we are only asked about how unincorporated businesses might be exempted. We do not understand how small businesses can be exempted for the purposes of the off-payroll changes but not, for example, for the VAT reverse charge. If there is no small companies exemption there will be less need for relevant anti-avoidance provisions.

1.7. Finally, we note that the proposed exemption applies only to end user clients, not to agency feepayers which may also be small companies. This is odd given that the reason for the exemption in the first place is to protect small companies from a disproportionate admin burden. We do not understand why it would be appropriate to relieve small companies which are end user clients from an admin burden but not to relieve agencies which are also small companies from the same or even greater admin burden.

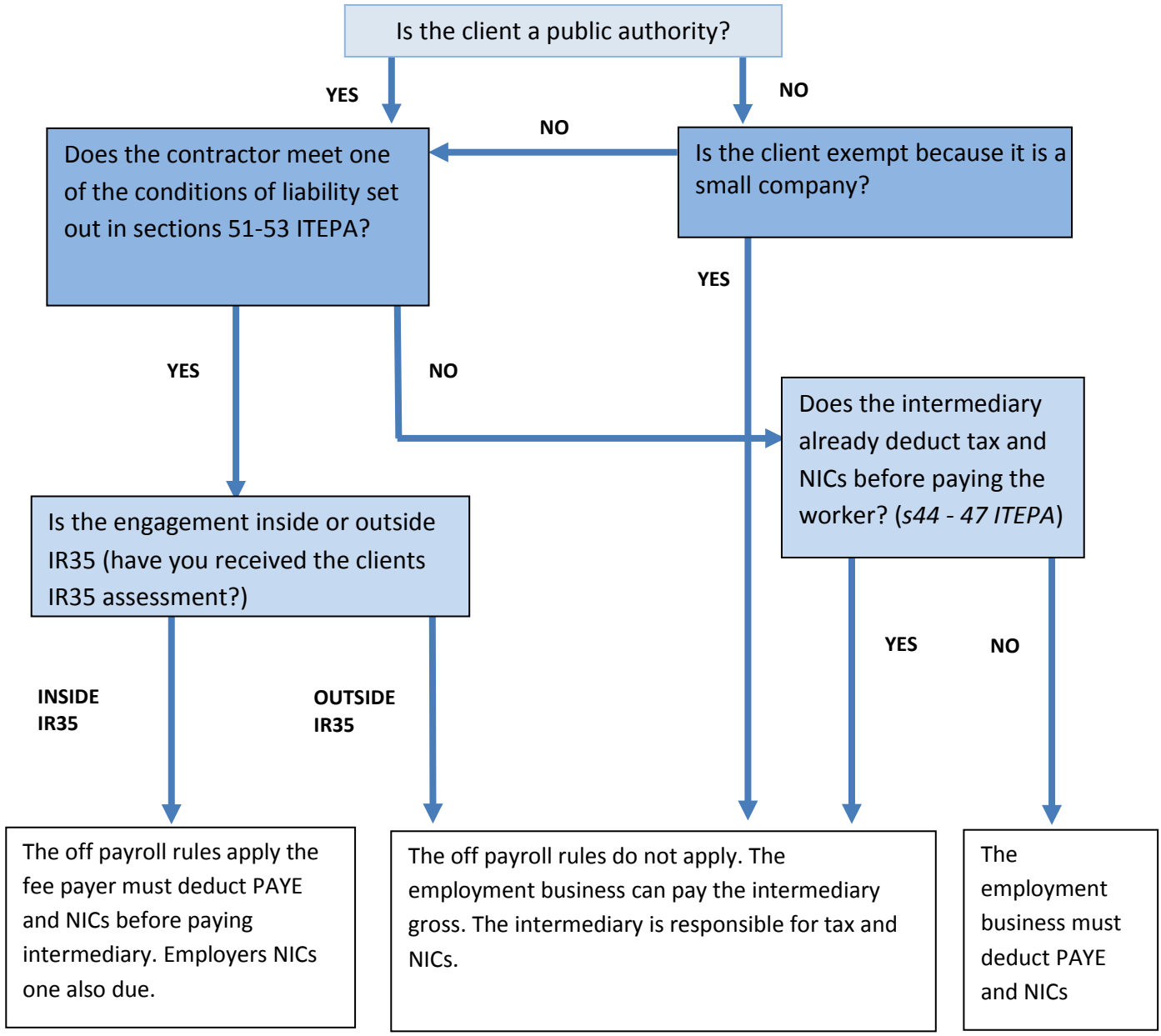
Given our comments above we have no comments on either of the options proposed for unincorporated organisations.

[4] Para 2.24 of Fraud on provision of labour in construction sector: consultation on VAT and other policy options

[5] Para 2.26 of Fraud on provision of labour in construction sector: consultation on VAT and other policy options

[6] Off-payroll working in the private sector, Consultation document Publication date: 18 May 2018

Flowchart 1: Which rules apply – IR35 or off-payroll?



Section 3 – information requirements (responsibilities of each party in the supply chain)

Ensuring information is shared appropriately.

Q2. Would a requirement for clients to provide a status determination directly to off-payroll workers they engage, as well as the party they contract with, give off-payroll workers sufficient certainty over their tax position and their obligations under the off-payroll reform? Please explain your answer.

2. There seems to be a contradiction on page 11 of the consultation document. The 3rd paragraph states that "… *this could be achieved by requiring clients to provide the determination – and on request, the reasons for the determination – to the off-payroll worker directly*". However in Illustration A the client passes both the status decision and the reasons for doing so to the off-payroll worker, without a request to do so. We would like clarity on which of these proposals is correct.

2.1. In answer to Q2, **no**.

2.2. **We do not consider that off-payroll workers will have more certainty over their tax status simply by receiving this directly from the client**. Whilst it would give them the client's view, it would do nothing to reduce disagreements over status. Typically clients using a recruitment agency will not be in direct contact with workers prior to the start of an assignment. Making the communication between the client and the off-payroll worker a statutory requirement would do little to discourage blanket decision.

2.3. Such a requirement would be administratively burdensome for the client. They would have to maintain a database that includes all the contact details for all potential off-payroll workers (and/or all agencies in the chain if there are obligations to pass the determination to the fee-payer as well as / instead of the worker him/herself). It makes much more sense to oblige each of the parties in the supply chain to pass the status determination and reasons to the next party as they already maintain contact details for those suppliers.

2.4. Clients and recruitment businesses will not want clients to be able to contact off-payroll workers directly. It will undermine and confuse the contractual arrangements and responsibilities between the various parties.

Q3. Would a requirement on parties in the labour supply chain to pass on the client's determination (and reasons where provided) until it reaches the fee-payer give the fee-payer sufficient certainty over its tax position and its obligations under the off-payroll reform? Please explain your answer.

3. It is essential that all parties understand the reasons for the status determination, and not just the determination itself. **Recommendation: clients should pass the decisions for their determination to the party they engage with and then this should cascade down the supply chain.** If the reasons are provided from the outset this might ensure that a client took proper care in making its decision. Assuming such proper care was taken and the correct result reached, this might weed out a number of disagreements on status. The corollary of course is that it might demonstrate that the client simply does not have enough information to make an accurate status decision in the first place.

3.1. **Recommendation: HMRC should produce a template for all clients to use to make their IR35 determination.** Such a template would become easily recognisable amongst clients, agencies and off-payroll workers alike. A standard document would ensure consistency in information provided and would be easy to pass through the supply chain. It should include:

(a) the client's name, address and registered company no.;
(b) the client's status determination;
(c) the reasons for the determination. Whatever tool the client uses to assess status, a date stamped copy of the results of the relevant assessment should be attached to that template;
(d) a reminder to the client to update the status decision if the relevant circumstances change; and
(e) if the small companies exemption proceeds (see Recommendation 3) that template must also include a statement that the exemption applies and why. It should also include a reminder to make an annual declaration in particular if the client's small company status does not change.

Q4. What circumstances may result in a breakdown in the information being cascaded to the fee-payer? What circumstances might result in a party in the contractual chain making a payment for the off-payroll worker's services but prevent them from passing on a status determination?

4. This could be down to a number of issues:

4.1. **Human error/ lack of knowledge** – a party may not be aware of its obligations. Organisations do not tend to have internal staff whose job it is to assess the IR35 status of a contractor they use. Even if they do, they may simply make a mistake in the decision they make.

4.2. **IT** - it is unlikely that software currently exists which ensures that the decision passes through the supply chain. So there will be further cost and design implications to ensure that this happens. Note our comments at section 19 re delaying implementation to April 2021.

4.3. **Speed** - the length of time an agency has to source the right person for a role varies enormously. Clients may give significant notice which would then allow sufficient time to gather the information required to make an assessment. Alternatively, the client may give limited notice (e.g. a couple of days or 24 hours) to a recruitment business – in that time the agency would be expected to (a) establish whether the client is a small company (or not) and which rules might therefore apply to the assignment, (b) obtain a status decision from the client, (c) negotiate charge and pay rates with the client and the off-payroll worker/ their intermediary, (d) comply with all of the requirements of the Conduct Regulations [7] (see also para 6.3 regarding the new key information document) and (d) issue contracts.

4.4. A party might make a payment but not pass on a status determination because it knows it is the feepayer and has to make the payment but it may not be aware of an obligation to pass on the status determination.

[7] The Conduct of Employment Agencies and Employment Businesses Regulations 2003

Q5. What circumstances would benefit from a simplified information flow? Are there commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the client? Does the contact between the fee-payer and the client present any issues for those or other parties in the labour supply chain? Please explain your answer.

Q6. How might the client be able to easily identify the fee-payer? Would that approach impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

Simplified information flow

5. Yes, recruitment supply chains can be lengthy (see Annex 1 for examples). This is for a number of reasons. A client may have engaged a managed service provider or vendor to manage a number of 2nd tier supplier agencies. Additional agencies may be required to source individuals with niche skills.

    5.1. The question is whether the client should be required to provide the status decision directly to the feepayer. We understand the reason behind the proposal but as we have already stated, the client may not have a contractual arrangement with the feepayer, and in examples 3, 4 and 5 will not. So we do not agree with this suggestion.

Q7. Are there any potential unintended consequences or impacts of placing a requirement for the worker's PSC to consider whether Chapter 8, Part 2 ITEPA 2003 should be applied to an engagement where they have not received a determination from a public sector or medium/large-sized client organisation taking such an approach? Please explain your answer.

Working for a small organisation

6. No, **this would not create an additional burden on PSCs**. They should already be considering the IR35 rules.

    6.1. However, we believe this is the wrong question. Assuming the small companies exemption is introduced, the correct question to ask is **what are the consequences for the agency/ fee payer which does not receive a determination from a client as to whether it is a small company, and therefore exempt?** There are two possible default positions from this:

    (a) the agency should treat the client as a small company and therefore exempt – this seems to be the position stated in the consultation document but this undermines the purpose of the off-payroll changes; or

(b) the agency should treat the client as a medium or large business and therefore within the scope of the off-payroll rules. If this were the default position it would incentivise end user clients to assure themselves and their suppliers of their status and therefore which rules apply from the outset.

6.2. **Just like off-payroll workers, agencies need legal certainty as to what rules apply** so that they can engage the intermediary on the appropriate contract. It is wholly inappropriate to expect off-payroll workers and agencies to determine which tax rules apply based on the silence of the client. If a client has determined that the off-payroll rules do not apply to it because it is exempt (because it is a small company) it would be very easy for that client to declare that to the agency/ feepayer.

6.3. From 6 April 2020 agencies will also have to provide a key information document to all workers prior to engaging them (this is being introduced as part of the Government's Good Work Plan). This document is being introduced to increase transparency - the information required is quite prescriptive and includes information on how much the individual will be paid.[8] This will vary significantly depending on which rules apply and then whether an assignment is inside or outside IR35. So **the client should give a preliminary status decision and the reasons for that decision at the time that it first instructs an agency to find an off-payroll worker**. The agency will then be able to meet its separate statutory obligations regarding the key information document.

6.4. We have already said that there should not be a small companies exemption. However if the small company exemption proceeds **any company wishing to rely on that exemption must be required to declare that to the agency/ feepayer together with the reasons why** – see para 3.1 for our recommendation for a standard HMRC template. That is a very small ask in light of the consequences for all other parties concerned in the supply chain.

6.5. A company wishing to rely on the small companies exemption should be obliged to issue a new declaration each tax year to its agencies to ensure that it is still exempt.

[8] The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019

Q8. On average, how many parties are in a typical labour supply chain that you use or are a part of? What role do each of the parties in the chain fulfil? In which sectors do you typically operate? Are there specific types of roles or industries that you would typically require off-payroll workers for? If so, what are they?

Addressing non-compliance

7. Our members operate across the whole labour market - the REC has 18 different sector groups. The length of supply chains varies across sectors, for example in construction, there will be multiple contractors and sub-contractors, each delivering a different part of the build.

    7.1. In many sectors it is still the case that the client contracts with an agency (which would be the feepayer) which is turn contracts with the intermediary. See Example 2 in Annex 1.

    7.2. However increasingly, including in particular in the public sector, more contracts are subject to vendor/ managed service arrangements where at least one other entity sits between the client and the feepayer. See Example 3 in Annex 1.

    7.3. We also understand that as a result of the off-payroll changes in the public sector there was a proliferation of umbrella companies who interposed themselves between agencies and personal service companies, thus becoming the feepayer and increasing the length of the supply chain. We are aware of significant marketing activity by some umbrellas and payment intermediaries in preparation for the extension of the off-payroll changes so anticipate that this behaviour will increase substantially in response to these changes. We are aware that BEIS is looking at ways to define umbrella companies in legislation as part of the Good Work Plan but there is no draft legislation as yet.

Q9. We expect that agencies at the top of the supply chain will assure the compliance of other parties, further down the chain, if they are ultimately liable for the tax loss to HMRC that arises as a result of non-compliance. Does this approach achieve that result?

8. Any organisation which is potentially liable for parties further down the supply chain will do greater due diligence on the party it engages with and may prescribe what types of entities may exist further down the chain and in what circumstances. However the REC is particularly alarmed at the following statement:

> *If HMRC were unable to collect the outstanding liability from that party, for example, because it ceased to exist, the government proposes that the liability should transfer back to the first party or agency in the chain*

    8.1. We have a number of comments on this:

8.1.1. The statement above suggests liability transfers to the first party or the first agency – but these are very different parties. We do not know who the first party is – is it the client or the agency?

8.1.2. There are a range of circumstances in which HMRC might not be able to collect an outstanding tax liability. This might be because the party pursued does not have the funds to pay the liability. Alternatively they may simply refuse to pay or they may cease to exist. It cannot be right to transfer liability to an agency which has complied with its own obligations simply because a party further down the supply chain ceases to exist or does not have the funds to pay its own outstanding liability. We recognise that HMRC have already taken this approach with the 2014 Onshore/ Offshore intermediaries legislation. Feedback from small agencies is that they have been removed from the supply chain by larger managed service providers/ vendors/ recruitment process outsourcers because the larger organisations do not trust them to properly manage their obligations. In the public sector this has undermined the Government's plans to improve access to public sector procurement for SMEs.

8.1.3. A party should be liable where it fails to comply with its own statutory duty. There is no reason to transfer liability to an agency merely because another party further down the supply chain and which is liable, ceases to exist or refuses to pay. It would be very easy for a party to dissolve itself simply to avoid a financial liability. Given that there is no proposal to make directors personally liable, where is the deterrent for those individuals not to dissolve their companies? There is nothing to deter phoenixing and indeed, this proposal would seriously disadvantage those businesses that comply with their legal obligations. If a party has complied with its obligations then it should not be liable simply because a party further down the supply chain does not comply with its obligations.

8.1.4. That said, we are clear that **clients should bear ultimate liability for their supply chains**. They receive the service from the off-payroll worker. It is in their interest that appropriate due diligence be done throughout the supply chain. This highlights the need for the client to be required to take reasonable care when making their status decisions and to provide the reasons for their decisions. If the Government does not make the client liable for its supply chain because it would be too difficult or unfair then we must ask why it would not be equally difficult or unfair for the first agency in the chain to manage the supply chain. See also para 10.2.

Q10. Are there any potential unintended consequences or impacts of collecting the tax and NICs liability from the first agency in the chain in this way taking such an approach? Please explain your answer.

9. What is the point of transferring the obligation to make the deduction from the PSC to the fee payer if ultimately the first agency in the chain becomes responsible for those deductions? We consider this proposal to be unfair. It would also significantly impact on the recruitment sector, particularly smaller agencies, who could be prevented from supplying because larger agencies do not trust that they could meet their compliance obligations.

Q11. Would liability for any unpaid income tax and NICs due falling to the client (if it could not be recovered from the first agency in the chain), encourage clients to take steps to assure the compliance of other parties in the labour supply chain?
Q12. Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

10. Yes. **End client must be liable for the compliance of other parties further down the supply chain**.

    10.1. End clients receive the services of the individual supplied by the intermediary. End clients that bear liability for their IR35 determinations will be incentivised to do more due diligence on their supply chains. They will be careful not to do business with those organisations that do not comply with their required standards, leading to a reduction in noncompliant intermediaries and contractors.

    10.2. There is **already legal precedent for making end clients responsible for their supply chains**. End clients are responsible for maintaining compliant supply chains when it comes to tackling slavery and labour exploitation (as per the Modern Slavery Act 2015 (Transparency in the Supply Chains) Regulations 2015). The Criminal Finance Act 2017 introduced new criminal offences for organisations which fail to prevent the facilitation of tax evasion. More recently, the Director of Labour Market Enforcement has stressed the role of the end hirer (brand) in his work so far. Increasingly, the strategic enforcement of labour standards recognises the power of leverage within the supply chain. That is, by linking the actions of suppliers down the supply chain to the end client at the top, improvements in compliance can be achieved throughout the chain. Inherent in this approach is that the end client must bear some responsibility for ensuring compliance among its suppliers. [9]

    10.3. We would expect that if clients were liable for their supply chain, they would also take proper care in making their status decision. We would hope that would lead to less blanket decisions. However there is a difference in making a client liable for unpaid tax and NICs when it has made a wrong status decision and when another party in the

[9] United Kingdom Director of Labour Market Enforcement Strategy, 2018/2019

supply chain becomes insolvent or simply refuses to pay (and again we note the proposal that there be no personal liability for directors).

Section 4. Addressing status determination disagreements between the client and the off-payroll worker and/ or feepayer.

Q13. Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

11. There are two parts to this question.

11.1. Firstly the question is whether the client should send their status decision to the feepayer or off payroll worker at all. Clearly yes to the feepayer if they have a contractual relationship with them. But if the client does not have a contractual relationship with the feepayer (and they won't have a contractual relationship with the off-payroll worker), an obligation to send the status decision to the feepayer and the off-payroll worker directly, **would undermine the other contractual relationships in the supply chain**. It also increases the risk of **duplication** and added admin burden on all parties.

11.2. However**, if the client were to give their status decision directly to the feepayer it would not impose a significant burden on the client to provide their reasons for their status decision at the same time.** In fact we suggest it would be easier to do this at the time of passing the status decision down, rather than waiting for a request and having to do it later. The client should provide their reasons for their status decision at the time they pass the decision to the party they contract with. It should not be down to a feepayer or individual to request those reasons.

11.3. **Recommendation:** We recommend that **HMRC should produce a template for all clients to use to make their IR35 determination.** A standard document will become easily recognisable by clients, agencies and off-payroll workers alike and will ensure consistency in information provided through the supply chain. See para 3.1 for our suggestion of the information the HMRC template should request. However as above, we take issue with the client passing their determination to the off-payroll worker directly.

Q14. Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer.

12. **No. It should not be up to a client which makes a status decision to design a process for dealing with queries or disagreements about those status decisions.**

    12.1. It is highly unlikely that a client would change its mind on a status decision that it has already made, merely because there is a disagreement (even less so if the client is satisfied that it has taken reasonable care in making its decision). This is all the more reason why the reasons for the status decision should be given at the same time as the decision itself so that the off-payroll worker can decide whether to take the assignment or not. HMRC must provide clear guidance to explain what constitutes as reasonable care. **Recommendation: All parties should be able to rely on a statutory process managed by HMRC**. HMRC would have to be properly resourced to ensure that this process provides prompt responses. It would be inappropriate and unfair to have off-payroll workers working under the wrong status, and similarly for feepayers wrongly managing deductions, for any length of time.

    12.2. HMRC cannot push its statutory obligation to enforce tax legislation onto business, nor can it place the responsibility for compliance with increasingly complex tax law to those who are not tax experts. **Recommendation: Government must commit to fully resourcing HMRC** so it can tackle non-compliance and manage a process for status disagreements. We have repeatedly expressed concern that systematic under-resourcing of HMRC has led to a number of tax and NICs compliance issues and we feel this would be exacerbated with a client led status disagreement process.

Q15. Would setting up and administering such a process impose significant burdens on clients? Please explain and evidence your answer.

13. See our answer at question 14.

Q16. Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

14. We will break this question down into two parts.

    14.1. As explained at question 13, the client must be required to give the reasons for its status decision at the same time as the decision. This would incentivise clients to get the decision right in the first place. It also means that any disagreements should be resolved before the individual first provides their services (time permitting) and therefore before any payments for those services become due. This would mean that payments would be subject to the correct tax treatment from the outset.

    14.2. However the client should not be required to pass the decision to the off-payroll worker. They will not have a contractual relationship with the off-payroll worker and there are commercial reasons why the feepayer would not want the client to be able to engage directly with the individual.

Section 5. Other matters – accounting for tax, NICs and the apprenticeship levy when payments are made to the worker's PSC

Q17. How likely is an off-payroll worker to make pension contributions through their fee-payer in this way? How likely is a fee-payer to offer an option to make pension contributions in this way? What administrative burdens might fee-payers face which would reduce the likelihood of them making contributions to the off-payroll worker's pension?

15. We understand that prior to the off-payroll reforms in the public sector many off-payroll workers would have made pensions contributions through the intermediary. We also understand that they have lost this ability as a result of those reforms. Whilst an agency could benefit from reduced employers' NICs payments if they were to deduct pensions contributions we have the following concerns:

    15.1. When an individual is payrolled directly by an agency then they are entitled to pensions auto-enrolment subject to meeting the relevant criteria. Agencies will have selected their own pensions provider to meet their auto-enrolment obligations. We understand the argument about equity in treatment between workers on contracts for services and off-payroll workers working through intermediaries but who are subject to PAYE and NICs. However if an individual chooses to continue to work through their intermediary then they should not expect the agency to make pensions contributions (whether through salary sacrifice or other) on their behalf to another pensions provider with whom the agency does not have an existing relationship.

15.2. We would also be concerned that if agencies were required to do this it could expose them to questionable arrangements designed to avoid the off-payroll rules by artificially decreasing the remuneration due to the intermediary/ off-payroll worker

Q18. Are there any other issues that you believe the government needs to consider when implementing the reform? Please provide details.

16. **Outsourced services**

16.1. Detailed guidance is needed on how and when outsourced services are subject to the off payroll rules.

17. **CEST**

17.1. We are aware that HMRC are reviewing CEST and our IR35 Working Group met with them during the consultation period. We note there are no questions in the consultation document about CEST but take the opportunity in Table 1 to add some comments on that – they feed into comments elsewhere in this response.

17.2. HMRC need to make it clear, once the upgrades to the tool have taken place, **whether previous determinations made using the CEST tool before the upgrade are still valid** and whether HMRC will still stand by the result(s). If not, then the upgrade needs to be completed and the tool re-launched preferably before draft legislation is issued and certainly before final legislation is issued.

17.3. **HMRC have lost a number of high-profile IR35 cases recently**. Though these cases pre-date CEST, presumably the rationale for challenging the intermediary in those cases was used in the design of CEST. If this is the case, then **having lost those cases, the rationale for CEST must be wrong** so how can parties be confident in CEST results?

Table 1: Suggestions regarding improvements to CEST

	Issue	Suggestion
1.	Simplified v in-depth test	• We would like a simple test but recognise the difficulty in digesting 20 years of case law into an algorithm. Still, if the test comes up with an indeterminate answer, members would like to be able to do a more in depth test to get greater certainty. • Members have received feedback that it is not clear what is meant by office holder duties, or what is meant by a "different task" (job roles can be formed of many different tasks). Also, the right of substitution question is currently articulated as either the client would always accept, or they have the right to reject for <u>any reason</u> – the reality may be neither.

	Issue	Suggestion
2.	There is still no plan for the tool to store data nor even user IP addresses but members (and clients and contractors alike) would want to keep an audit trail of decisions made. At the moment they must PDF an anonymous document and attach to a particular job.	• We would like to see a function whereby job details are stored on the test taken, possibly also contractor name. Any data protection issues would be for the data controller (i.e. client, agency or contractor) to manage. A saved version which it is possible to re-upload would assist clients in carrying out multiple determinations where only 1 or 2 factors might change and would allow quick "re-tests" in the event that aspects of the requirements change. • Would it be possible to offer both anonymous and role populated, whereby a client can add their company name, when the assessment was run, who ran the assessment, what the specific role is- linking it to a role title and an extra field for client specific unique role indicator, etc. • Could there be room in some questions to allow a percentage as not all answers may be binary. • Results should be date-stamped to show when the test was taken.
3.	Who is the client?	• Could the tool identify whether the client is "small" and therefore exempt from the off-payroll rules?
4.	There is currently no function to attach documents or add free text. These would be helpful as supporting evidence if a decision is challenged (though they will not impact on the decision itself) – these would also help with a "reasonable care" defence.	• A free text function to add an explanation as to why a particular answer was given and an option to upload attachments - to use as evidence if required to explain decision. Could also be helpful given proposal to require clients to give their reasons for a decision to the individual as well as the party they have a contract with.
5.	The person taking the test currently has no idea how long a test might take. A progress line would be helpful but we appreciate that a particular answer may lead to more questions so the progress line might not be accurate.	• Ideally we'd like to see the full list of questions we might be asked, but if not, at least the categories of questions we will be asked. or a decision matrix/tree to understand the impact of specific questions and answers. This would help the client to collect the information required in advance of making the decision. • An option to save and come back later. It is unlikely that the individual completing the test will have all the information they need when first completing the test. This will save them time by not have to re-input data.

	Issue	Suggestion
6.	Where members fill significant volumes of assignments.	• An ability to do bulk uploads e.g. populate the same answers across relevant questions, only amending those they need to amend. Again, this could save significant time. However there would need to be a warning about blanket assessments where there has not even been an attempt to categorise job roles.
7.	Consider if all the questions asked are required e.g. we specifically mentioned the question regarding benefits from the client – not sure what purpose this serves?	

18. **Refunding overpaid sums**

18.1. If an assignment has been wrongly designated as inside IR35 then too much tax, national insurance (including employers' national insurance), VAT and apprenticeship levy will be paid. Whilst a tax refund may be relatively straightforward it is still not clear how organisations can recoup overpaid sums (with interest). Agencies, feepayers and off-payroll workers alike need quick and simplified processes to recoup overpaid sums. Two years after the introduction of the off-payroll rules in the public sector we still do not know how these monies can be recouped.

19. **Delay implementation until April 2021**

19.1. Off-payroll working legislation is complex. In fact many businesses, including our members and their clients, and not just small businesses find off-payroll working legislation the most difficult tax legislation to understand. The Chancellor's announcement in the Autumn Budget to delay implementing IR35 until 2020 was welcomed but due to delays in publishing the consultation document and the lack of draft legislation, it now leaves business with just 10 months to prepare. Feedback from members is that many clients are still unaware of the proposed changes and so have not yet started their preparation so we do have to question what education activities HMRC has already done – it is easy to continue to engage with those stakeholders HMRC meets at various forums but what about those harder to reach?

19.2. **Government has seriously underestimated the preparatory activities that businesses will have to undertake in order to be compliant by April 2020.** Businesses will need to replace or upgrade their finance, accounting and payroll systems to accommodate the deduction of PAYE and NICs from limited companies. Even if some activities can be automated, applying payroll to an Accounts Payable (supplier) invoice cannot be reconciled in a company's accounting ledgers and will require manual intervention. Members tell us that this has been extremely complicated for the off payroll rules in the public sector. Some of our members have indicated that such changes could cost them

in excess of £100,000 - however, the final cost depends on what the final changes are. Many businesses plan and budget for systems changes at least 1 to 3 years in advance. The IFF research commissioned by HMRC acknowledges that public authorities would have benefited from more time to prepare for the public sector changes something recruitment businesses working in the public sector have strongly reinforced.

19.3. **Government has yet to produce a detailed impact assessment on the extension of the off-payroll rules into the private sector.** HMRC conducted limited research on the impact of the reforms in the public sector. We do not yet know how many off-payroll workers challenged their status decisions, and therefore their tax and NICs bills as a result of incorrect status determinations. HMRC should be required to produce such information before the reforms are rolled out into the private sector.

19.4. The research carried out by IFF Research for HMRC in 2017 only contained preliminary figures for off-payroll anti-avoidance in the private sector and the cost for business. There was also no transparency as to how these figures had been calculated, however these figures have driven much of the debate on off-payroll working in the private sector. The research was also limited in that IFF only consulted with public sector clients - they did not consult with the REC, agencies or off-payroll workers. With such drastic changes proposed to the IR35 rules in the private sector, HMRC must conduct a thorough evaluation of (a) the real costs of implementation and (b) the true level of anti-avoidance before introducing any further reforms.

19.5. **Other legislative changes will also take effect on 6 April 2020 which will significantly impact on recruitment businesses and clients** alike from both a costs and a process perspective. These include the requirement on recruitment businesses to issue a key information document prior to agreeing terms with an individual [10] (see para 6.3), the abolition of pay between assignments contracts [11] and the extension of the period for calculating holiday pay from 12 to 52 weeks [12]. We note that, notwithstanding the costs and processes issues, the legislation introducing these changes has already been published allowing businesses to prepare, unlike the legislation required for these changes.

19.6. The Government has already said that it will consider the alignment of tax status with employment status. This is welcome and would certainly clarify a number of discrepancies between the two statuses. Meanwhile by rolling out these changes before any realignment is complete, the Government risks exacerbating those problems for clients, agencies and individuals alike. REC, together with many other stakeholders has repeatedly said that Government should refrain from making piecemeal changes to already complicated tax legislation.

19.7. If the reforms are not delayed the Government must publish the final legislation by 30 September 2019 – though even then, that does not leave sufficient time to properly implement the necessary process changes.

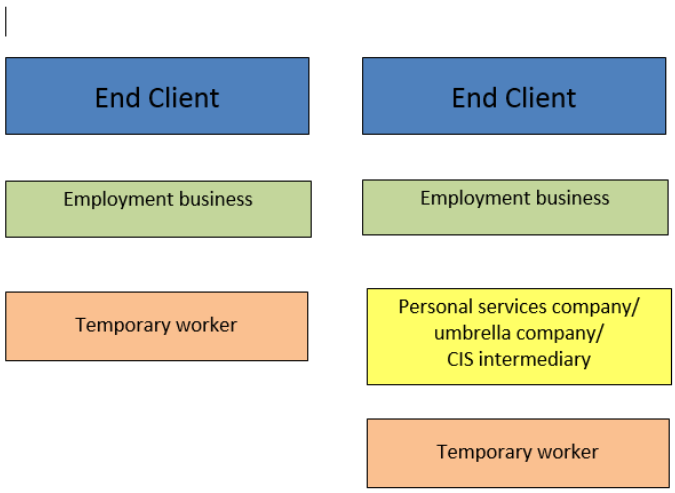
[10] The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019
[11] The Agency Workers (Amendment) Regulations 2019
[12] The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018

20. **HMRC needs more resource to tackle non-compliance**

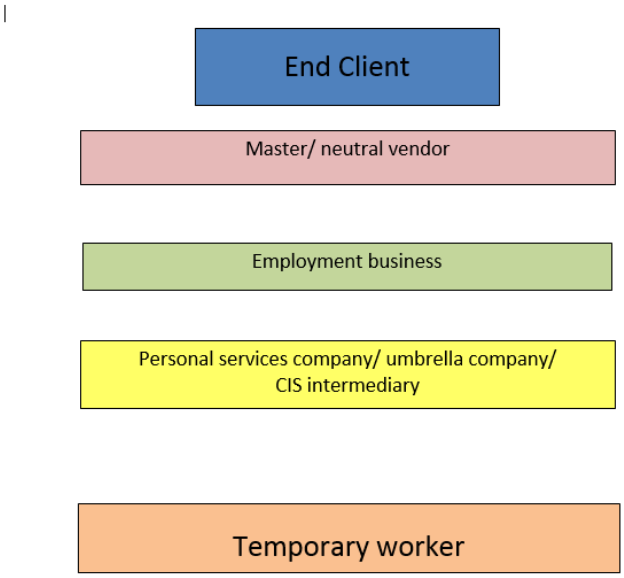
20.1. Cutting staff numbers at HMRC is a false economy. HMRC must be afforded the appropriate resources to work more quickly and visibly to tackle non-compliance. We and our members pass on concerns and/ or intelligence to HMRC but their response appears to be frequently slow and is rarely visible. We understand that client confidentiality is important but **HMRC's compliance activity must be visible and speedy** as this can act as an important deterrent. HMRC's "Spotlights" are useful but may only attract a limited audience. More needs to be done to highlight these to the wider public.

Annex 1 - flowchart of supply chains

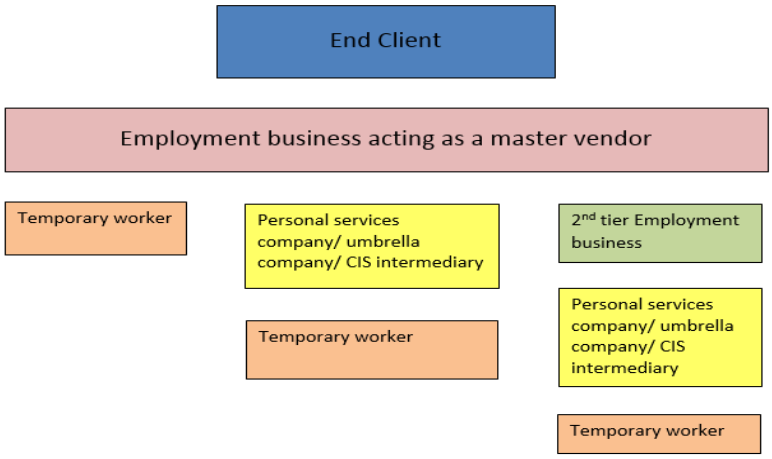
Examples 1 and 2



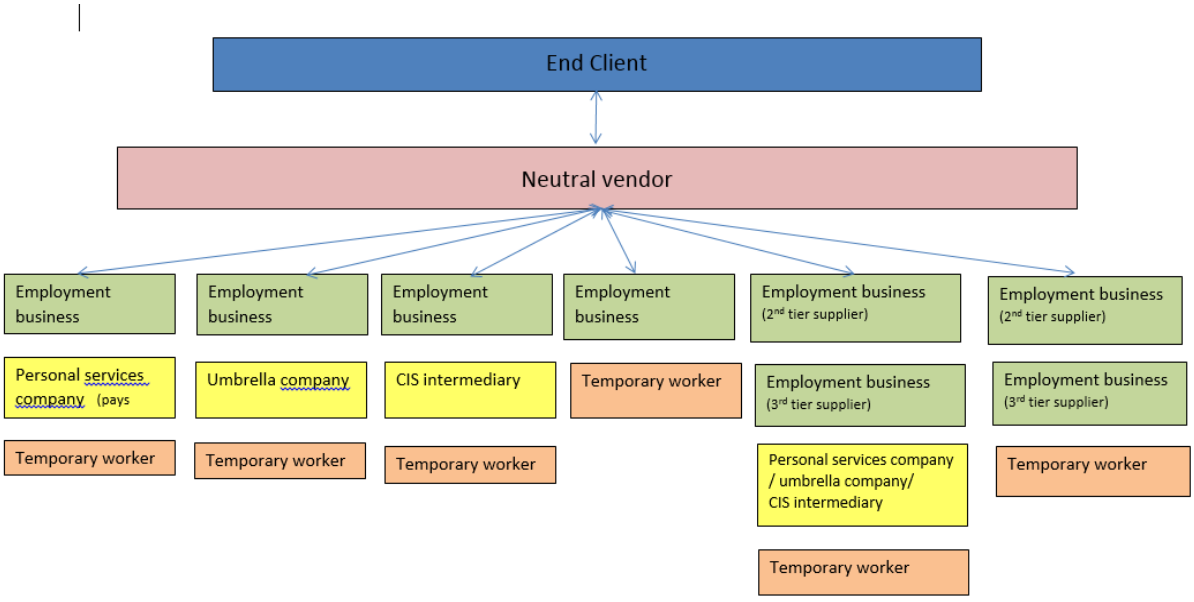
Example 3



Example 4



Example 5



Background information on the REC

The REC represents over 3,300 recruitment businesses – 80 per cent of the UK's £31.5 billion industry by turnover – and 10,000 individual recruiters through its Institute of Recruitment Professionals. REC member agencies supply workers into every sector of the UK economy. All members must abide by a code of professional practice and must take a compliance test to enter and stay in membership. The REC is committed to raising standards and highlighting excellence throughout the recruitment industry.

For more information, please contact:

Lewina Farrell
Solicitor and Head of Legal Services
DDI: 020 7009 2143
Email: lewina.farrell@rec.uk.com

Bunmi Adefuye
Senior Solicitor
DDI: 020 7009 2137
Email: Bunmi.adefuye@rec.uk.com

Ornella Nsio
Stakeholder Engagement Manager
DDI: 020 7009 2137
Email: Ornella.Nsio@rec.uk.com

- Recruitment's biggest lobbying voice
- The source of recruitment knowledge
- Raising recruitment standards
- Developing successful careers in recruitment
- Exceeding members' expectations through business support.

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Find out more about the Recruitment & Employment Confederation at www.rec.uk.com
Recruitment & Employment Confederation
Dorset House
First Floor
27–45 Stamford Street
London SE1 9NT

Tel: 020 7009 2100
Fax: 020 7935 4112
Email: info@rec.uk.com
Twitter: @RECpress
Web: www.rec.uk.com

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