

Employment Status and Intermediaries Policy,
3C/15,
100 Parliament Street,
London.
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14th. May 2019

**Submission from the Institute of Interim Management
in Response to the Consultation on
Off-payroll Working Rules from April 2020**

Introduction

1. This submission is from the Institute of Interim Management (“the Institute”, “the IIM”, “we”, or “us”), a professional membership organisation for independent Interim Practitioners, Managers and Executives (“IMs”), in response to the consultation on off-payroll working rules.
2. Background information on the Institute and on the Interim Management profession is given in the Appendix attached.

The Issues

Applicable Scope and Considerations

3. As noted in the executive summary of this consultation, off-payroll working rules have been in place with some variation of application since 2000. This is considerably after the advent of interim management as a professional tool available to clients to apply. Where substantive change was required within the organisation, often little or no relevant skills have been retained ‘in-house’ just in case they were needed for such eventualities. This position became increasingly common across British industry after the ‘de-layering’ that occurred in the early 1980s, late 1980s and early 1990s.
4. Over time and various Chancellors of the Exchequer, HMRC has expressed concern over the lower amount of NICs being collected, deemed largely to be due to increasing numbers of people working through their own legal entity to supply their services; or to take control of their own working destiny by becoming entrepreneurs and being in business on their own account. Confidence in the ‘old’ private sector employment model had reduced considerably as a result of the large historic job losses amongst other things and in more recent times, new working models such as those seen as part of the ‘gig economy’ have accelerated the change in the working environment. This has also been mirrored in the public sector but largely by public body acceptance of existing workers who have chosen this model instead of remaining employees.
5. HMRC has remained an advocate throughout this period of continuing with the application of the off-payroll working regulations and has made several attempts to make the rules work – as judged by recovering the ‘lost’ NICs it believes have resulted in an overall lower tax take to the Exchequer. The IIM notes that the proposed changes outlined in this consultation “*seek to increase compliance in the private sector with rules that have been in place since 2000, to make sure they operate as intended*”. The IIM supports the view recorded elsewhere ⁽¹⁾ that this is disingenuous. Over time,

(1) IR35 Extension is a New Tax and the Consultation is Misleading: Adriana Joseph 02.05.19: <https://www.arc-org.net/news/>

HMRC have moved from a position of catching tax evaders (illegal) to people paying “the right amount’ of tax’ and from there to ‘clamping down’ on tax avoidance (or paying what is legally correct), using media tactics to support those adopting ‘aggressive’ tax planning (still legal) as morally questionable. Today, little of this is spoken. The application of the current rules are driven by achieving the maximum tax take possible, to the point of being seen as misleading the tax payer and adopting potentially questionable tactics as might be viewed in a court of law.

6. The IIM is responding to this consultation on behalf of the interim profession and this continues previous submissions called for in conjunction with various proposed legislative changes.
 7. It is noted that the 2017 off-payroll regulations adopted for the public sector gave the right to determine the end service provider’s tax position to the end client. This right is being extended as stated into the private (and third) sectors, but only for larger organisations. The IIM, on behalf of its membership and professional interim practitioners once again wishes to register its concern that the rights of its members have been removed or reduced in this arbitrary way. We see no objective reason for treating members’ legal entities any differently from larger concerns who adopt the same legal structures.
 8. The IIM notes the continued desire of HMRC to ensure that the UK flexible labour market continues to operate efficiently and fairly. For HMRC, this fairness seems to take a very narrow view of everyone should pay the same amount of tax if they do the same work. In this narrow view of the circumstances, there appears to be some face-value logic to this position.
 9. In situations where the client organisation simply wants one or more people to undertake a particular type of work that exists at an increased volume for a limited period, there already exists a mechanism to deal with this need. It is a temporary employment contract and resolves the tax issue as seen from HMRC’s point of view. Problems only occur using the current off-payroll rules approach when a person in business on their own account undertakes a sequence of work which fits into this approach but does not want to be an employee.
 10. HMRC has endeavoured to identify differences between legal entities designed to offer the ‘same as’ service and those set up to provide skills and experience that are rare or do not exist within a client organisation, so cannot be compared appropriately with any existing employee. Currently, the tool supplied to differentiate such matters is the on-line CEST tool. The IIM wishes to register that, in spite of HMRC’s public position of “the tool is fine”, it notes the very controversial nature of this tool in its current form. The Institute regards CEST as a gross oversimplification of the picture that needs to be captured and tested for often complex interim agreements, so that the output can far more reasonably and accurately reflect the much broader landscape delivered through all tribunal and court rulings.
 11. The IIM also notes that senior interim executives have operated since the 1980s effectively on a contracted-out basis. That is, companies by virtue of their de-layering in the 1980s and 1990s have removed skill sets from their workforce deemed not to be required for the majority of the time. When it becomes necessary to utilise such (high end) skill sets, this is done through the purchase of such skills from the market. The approach is the same as for the use of management consultancies or advisory firms.
 12. The IIM views the flexible workforce in the UK to operate along a continuum or spectrum, where at one end there are many low skilled workers who either operate in seasonal work areas or undertake activities where relatively large numbers of workers are required to undertake similar tasks. At the other end of the same spectrum are IMs. These are relatively few in number⁽²⁾ across the whole profession, are highly experienced executives who are in business on their own account and are
- (2) The UK workforce is 33.4M, of which c.1.5M are ‘freelance’, with not greater than 10,000 IMs.

perfectly capable of negotiating their own contractual terms with any potential client. Any employment status testing tool worthy of the name must be able to distinguish comfortably between the work undertaken by such high end professionals and anyone undertaking work that is being repeated and run in a manner to be found reproduced elsewhere in the client organisation.

13. The IIM also finds the notion that a so-called 'PSC' is unable to handle PAYE as demeaning and does not take into account that the legal entity (usually a limited company) needs to provide a PAYE approach for its own needs already, plus deal with the compulsory pensions legislation, which requires in virtually all cases, PAYE/salary activity to operate. This will largely be done via an outsourced activity previously put in place. We comment on the concept of pension payments via the 'fee-payer' later.
14. On a broader front where the work being undertaken is performed by many workers already, operating from a contract of service (employees), the implication is that the client has a temporary increase in the volume of work to be done and wishes to engage external help to overcome this short term lack of resource. The comparison of internal and external people is straightforward. However; there is a key difference: the employees have employment rights and benefits and pay PAYE and the client pays NIC (and employees receive unemployment benefits for example if they lose their jobs). The temporary hired help works from a contract for service and has no access to employee rights and benefits (if working through a legal entity) or unemployment benefits if they have no work to go to at the end of the contract. HMRC seems to have mislaid this part of the equation when looking for a balanced and fair approach.
15. IM contracts for service terms and conditions are very clear about who pays, when, how much and what for. Negotiations can be robust, but the final agreement is a business to business transaction and the parties will not sign this if they are not comfortable with the outcome. This will include the on/off-payroll determination now being required. Additional regulatory enforcement for the IM is largely unnecessary, notwithstanding occasional late invoice payment but this issue exists across the whole UK SME community. In extremis, for off-payroll disputes, an independent, time efficient, free, dispute resolution process should be available.
16. The IIM maintains that there is clear water between the senior interim contract and 'disguised employees' that HMRC refers to throughout the related literature. For the professional interim, off-payroll working regulations should be of academic interest but the complex and costly compliance regime being applied means that it is not. Having to write this response is an obvious and immediate example of time being spent that really should not have to be.
17. The HMRC argument that it is losing NICs and therefore the overall tax take from professional interims has fallen (inferred by our inclusion in the way that the current regulations are trying to be operated) is a false starting point. The main tax benefit for people in business on their own account was the differential between income tax and dividend tax. This issue was creatively dealt with by the previous (at time of writing) Chancellor of the Exchequer, through his 'largesse' in offering everyone a £5,000 zero tax levied window on company dividends. For dividends above this, a graduated tax level was introduced, aligned to income tax structures but with a small favoured percentage, that managed to recognise dividends were earned against the application of risk by the 'investor'. The current Chancellor has felt that even this was too generous and the gaps have been closed further. So, the decades long recognition in the taxation system that being in business on your own account was risky and you received far fewer government granted employment rights and benefits has been forgotten.
18. The IIM also wishes to point out on behalf of the profession that the taxation picture is more complicated than a simple concern over NICs. 100% of senior interim practitioners operate at a day rate that requires VAT registration. If we take into account VAT collection at 20% of all fees, dividend

tax at a level not far short of income tax percentages currently; PAYE, including employers NIC on all salary taken, plus corporation tax on profits, IMs feel that they are contributing a very 'fair' tax level to Her Majesty's Government without having to continually deal with the complexities of the off-payroll regulations on top.

19. Whilst recognising that this is not a core part of this consultation, it has not escaped the IIM or its members that a much simpler approach to ensuring the overall tax take is maintained, can be through the application of VAT by reducing the registration threshold. Such an approach would remove the need for the off-payroll regulations and free the HMRC resource currently devoted to off-payroll compliance. It would also have the advantage of keeping the identification of the correct amount of tax to be paid with the relevant legal entity. An alternative approach, bearing in mind the main gap in NIC collection is driven by the 'loss' of employer's NI from the end client, would be to charge based on the sum of invoiced fees. Perhaps done annually from a return provided by the end client company, based upon all 'inside IR35' agreements.
20. Whilst the IIM recognises the general labour market has changed significantly which has changed the balance of which taxes are paid and by whom, we believe that there are better ways of achieving HMRC's goals than continuing to try to 'force-fit' the whole 'freelancer' spectrum through taxation at the operating cost level. We therefore urge HMRC to take a step back and consider simpler and much less controversial and resource intensive methodologies as indicated above. This would allow IMs to be able to focus on delivering the best possible service to their clients and remove the worry over potential fallout from varying interpretations of the off-payroll regulations.
21. It is with the approach outlined above that the IIM has responded to the consultation questions, set out below.

Consultation on Off-payroll Working Rules from April 2020 Questions

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.

IMs are career professionals and are in business on their own account. As a result, the IIM is of the opinion that its members and IMs working at this level operate outside IR35 and therefore should not be taxed as if they were employees.

Given the likely fees attracted for services rendered, senior IMs are unlikely to work for very small clients due to affordability issues. The IIM remains positive about any change that removes organisations from needing to consider applying the regulations.

Having said this, using the mentioned (section 382) test to determine size, irrespective of the nature of the entity seems logical. Financial submissions to Companies House require the production of a balance sheet, so the information will be available already. Option 1 seems to us to have the benefit of a more balanced approach.

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.

For senior IMs, there are primarily two routes to a client contract: directly with the client (model 1) with no other intermediary present and an arrangement via one intermediary (an interim 'provider') between the end client and their own company. The latter model can have two contractual options: largely an 'upper' contract between end client and provider with a subsequent contract between provider and the IM; or both the provider and the IM having direct contracts with the end client.

The contract negotiation using model 1 (direct link to the end client) involves discussion regarding the nature of the contract and an agreement about how the contract will be conducted in practice. Although the end client may have an initial view of the status of the work prior to this discussion, a joint understanding and agreement will be necessary as a basis for the contract to be acceptable to both parties.

Under model 2, the provider will discuss the nature of the contract with the end client first, so that they have clarity about the type of interim that they will introduce to the end client. However, the nature of the contract and how this will be undertaken will still be an integral part of the contractual discussion so that all parties can agree the status of the IM for the assignment.

Given the way that HMRC have laid out who is responsible for the final determination, the end client will need to confirm what all the parties have agreed for the assignment. This will normally be written into the formal agreement(s) between the involved parties.

Given the HMRC process, the IIM advocates that the determination, plus reasoning, should be made compulsorily available to the end service provider (IM). There should be a right of receipt of this information as opposed to a right to ask, bearing in mind the arrangement is a business to business transaction and not an employment relationship, irrespective of what the tax treatment might be. This is a logical position as there is no 'master-servant' relationship as in an employment contract and as HMRC have been keen to point out, they do not wish to imply any form of employment benefits should accrue to the end service provider (IM).

We believe that in adopting this clear open approach, the end result is everyone is operating from the same 'hymn sheet'. For IMs, it also means that the current negotiation process is not prejudiced in any way. We see no reason to treat any other free-lance contracting differently.

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.

As explained in the previous answer, we believe the final determination, plus the reasoning, should be shared in an open manner from the end client to all parties in the chain. This is simple for nearly all arrangements involving senior IMs. We regard the fee payer as an integral part of the overall contracting process which now needs to involve the HMRC driven need.

The information is required by all parties involved in the contracting process. This should be shared at the earliest possible point in the contracting arrangement as the service provider may choose to walk away if they do not accept the determination (assuming no process for independent dispute resolution).

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?

The process, as envisaged above, removes the possibility of any information breakdown as the determination is included in the contractual form finally agreed. (and signed).

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.

As explained, the service supply chain for IMs remains simple. Where a provider acts as an intermediary and the fee payer, the finally agreed determination should be written into all agreements. This should remain the case even when dealing with slightly more complex international work, where the end client, the provider/fee payer, the IM and where the work is undertaken may each be in a separate country.

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.

Given the circumstances that operates within senior IM service agreements, it is difficult to envisage a situation where the end client does not know who the fee payer is. It appears to us a simple matter of this being confirmed in writing at the time of the arrangement being discussed with the intermediary provider where one exists.

Where more complex contracting arrangements exist for other freelance activity, we see the solution of clarification through inserting an appropriate clause or appendix into the formal contracting documentation as a solution. This would certainly make any subsequent HMRC investigation easier to ensure compliance has been consistently applied along the supply chain. It is minimal additional administration for all parties and maintains best open practice.

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.

Senior IMs work in business on their own account and historically operated the IR35 regulations. Our experience indicates that this process worked effectively and appropriately in the vast majority of cases for this part of the overall freelance working spectrum.

The 2017 changes in the public sector resulted in a great deal of disruption for all concerned and the loss of the right to self determination of tax status for senior IMs operating therein. Given this is being spread to the rest of the economy, senior IMs need to ensure that the involved parties in the determination can now all agree on their tax status.

In the situation where an IM is negotiating with a 'small' organisation, we see no issue for the IM to be able to continue to determine their own tax status as it is a continuation of what we feel should still be the case in all circumstances. This would be the case for model 1 and 2 options.

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?

As a member organisation, the IIM undertakes no assignment work itself, nor does it act as an intermediary/provider. However, its members do and they operate across all sectors, public, private and charity/not for profit, both in the UK and internationally.

IIM market data indicates that there are approximately 10,000 senior IMs in the UK. The assignment operating models (1 and 2 described above) represent virtually 100% of all agreement structures and are split roughly 60-65% direct negotiation with the end client and the remaining 35-40% involve a single intermediary/provider as well. Model 1 requires only one agreement and model 2 requires two agreements, typically in a 'back to back' arrangement.

Model 1 is a straightforward agreement between client and supplier.

Model 2 operates with two stages in the process:

- **initial discussion between end client and provider to determine the overall client need and to enable the provider to identify IMs who would be most likely to meet that need for that client**
- **discussion between a small number of introduced IMs by the provider to the end client to understand the detail of the need, the nature of assignment delivery and now to agree the determination of tax status.**

The HMRC tax determination process is likely to mean that the status discussion will also be needed between the provider and the IM as clearly all parties will need to be aligned for final assignment contracts to be put in place.

All IIM members are senior interim practitioners in business on their own behalf, accepting the commercial risks and deliberately not wanting to operate as employees. Members are independent, legal entities with high end business and technical skill sets which clients wish to engage, largely for reasons of:

- **taking organisations through significant change or transformation**
- **little or no skill being available within the client organisation for the issues at hand**
- **the situation being complex, with difficult decisions and actions required, so the permanent successor is not directly associated with these elements**
- **getting the organisation to a point where a conventional permanent employee(s) is/are able to successfully handle matters once the organisation is handed back**
- **providing rare subject matter expertise for a period, where the level of expertise is not required within the client organisation on a permanent basis.**

For senior interim practitioners, it is helpful to consider that an organisation (or part thereof) is effectively contracted out to the IM for the period of the assignment. This is reflected in the level of supervision, direction and control required by the IM in order to deliver the contract goals. The end client recognises this in the way that the contract is agreed and operated.

Q9: The intention of this approach is to encourage agencies at the top of the supply chain to assure the compliance of other parties, further down the chain, through which they provide labour to clients. Does this approach achieve that result?

We believe that any supply chain should be transparent to all parties within it and each party should be able to demonstrate its value added to the overall process. Information flows, and in particular the agreed tax status determination plus reasoning should be shared throughout. We see the best way for this to be secured is by it being compulsory and this agreement to be available prior to contract signing.

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.

In the example given, we understand the point being made about HMRC's ability to collect outstanding tax.

Our view is that the primary responsibility to assure contractual and legal compliance should rest with the end client. After all, they have initiated the need and have a responsibility to ensure the quality of their supply chain. International quality standards rest on this.

It would seem reasonable to chase the tax (employers NI and any payroll tax from an 'inside IR35' determination)) outstanding from the fee payer. However, unless the fee payer can be shown to be under control of the higher 'agency' in the chain, should it fail commercially, moving HMRC's demand to another, separate organisation seems unreasonable. It seems to us that HMRC should act like any other creditor in this situation.

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?

End clients should have primary responsibility for ensuring the efficacy of their supply chains. This is good commercial practice.

In the same way, all creditors should recognise that there is an element of commercial risk attached to receiving their payments. It is how things work in private industry, world-wide.

HMRC already has an element of preferred creditor status in law when businesses become insolvent or fall into administration. Companies have the opportunity to look at credit ratings which are readily available.

Given the tax in question is taken at source, the implication is that the agency does not have the money to pay the service provider which will bring the whole supply chain into question. HMRC needs to recognise in this circumstance, there are a lot of issues, people's livelihoods at stake and so on. Trying to jump the queue seems unreasonable, unfair and not proportionate.

Q12: Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

Nothing to add.

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.

As described earlier, the IIM strongly believes that the determination is a shared process under the HMRC regime to come to a final agreement. We believe that from this base, building the result into the contracting process, with reasoning, will resolve potential downstream problems.

We see no further burdens on the end client. Having this clarity throughout the supply chain removes doubt and the potential for confusion.

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.

For IMs, it is difficult to see the need for such a process for model 1 contracting as the discussion has taken place. Agreement enables the contract to progress.

In model 2, there is the potential for a change of view as the IM is introduced later in the negotiation. The determination could well change as the full nature of the (complex) work is fully

discussed and the full implications of 'what' and 'how' are thrashed out. Clearly this model could result in more problems as a result of re-visiting the original view.

A client led resolution process will not work due to its very nature and owner.

An independent resolution process could be helpful under these circumstances. How practical this is, is uncertain. It will need access to subject matter experts (possibly lawyers), or perhaps one or more professional institutes. The cost would need to be zero, or very close to it, and the process would need to be very rapid due to the nature of the service provision process and need.

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

See Q14 response.

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?

No. As described previously, we believe the right to being given the determination plus the reasoning, along the whole supply chain, should be a requirement within the regulations. We have described the process as being an initial end client view, then discussed with the IM prior to a final agreed determination which becomes contractually included.

An openly communicated position as a requirement gives the correct incentive for all.

For IMs, it is an integral part of the negotiation process as described.

We note that under the model 2 process, it is only once the detailed contract negotiation has been concluded that a final reasoned determination can be made as it is only then that the way the contract will operate in practice can be seen. We need to keep in mind that senior IM contracts often cover complex practical considerations.

An interim practitioner generally provides services in complex circumstances. Although the CEST tool endeavours to provide simple navigation to an in/out decision (emphasis on 'in'), we find it not fit for purpose when dealing with complex contracting. This is one reason why detailed discussion between end client, IM and provider when in the chain will occur for any assignment.

It is the IIM's view that the CEST tool suffers from, amongst other things, an over-simplification for use with this complexity of contracting. We have developed a process involving 100 questions that need to be answered to be able to arrive at a balanced view for any given assignment. These questions are weighted to reflect court and tribunal case law and they cover the whole range of elements including supervision, direction and control for example.

We are also concerned that there are stresses within the whole process that are already pulling clients in different directions to the detriment of the profession. For example, HMRC are keen to have clients use the CEST tool and rely upon its outcomes. All literature issued by HMRC has an emphasis on the assumption that all freelance work is 'inside'. HMRC emphasise the penalties for non-compliance at the end client level and certainly in the public sector, there has been evidence of blanket determinations.

The end client can also be exposed to court action for following the HMRC path blindly due to insufficient care in the determination, resulting in wrongful tax deductions (tantamount to stealing). We have seen internal company communications already discussing private sector blanket determinations or even not engaging interims but only taking people on through

employment contracts. Both options are unhelpful and demonstrate what happens when a situation is less than totally clear.

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?

We have mentioned that all professional IMs are in business on their own account and take on the commercial and personal risk associated with this. Part of this is providing for their, and their families' future. This includes pensions provision.

The IIM views it as highly unlikely that any IM will consider operating pensions provision through a provider, even if the service was offered. They already have in place arrangements that they deem affordable under the circumstances of the business they run. The requirement to make this provision already exists. The regulations being consulted on here do not change any of this and provide no useful alternative.

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

Yes.

1. Reputational damage

HMRC have suffered a significant and disproportionate loss of reputation in the sector, moving from 'firm but fair' to a much less well perceived 'give me the money', 'max-tax', 'bullying/ignore case law if it gets in our way' approach, as expressed across a range of media. Additionally, the right to self-determine tax status has been arbitrarily removed for the department's convenience, which creates a distinction between limited companies simply on the basis of size and type of service offered.

How HMRC implements the regulations in the private sector will be viewed from this reputational base and offers an opportunity to mend the many bridges that it has broken in recent years.

2. The CEST Tool

It appears that much will hang on the effectiveness of the CEST tool as the only mechanism that HMRC have made available to guide interested parties towards an IR35 determination. For complex contracting situations, we have expressed our position that the tool is not fit for purpose in its current form. Amongst other things, it takes no account of supervision, direction and control and the HMRC stated view regarding mutuality of obligation clearly takes no account of the case law and comments made by courts or tribunals.

We see no benefit in over-simplification such as the current CEST tool. It causes confusion, doubt and reinforces the negative view referred to above.

For complex contracting situations that represent the norm at the IM end of the freelance spectrum, we believe that a separate approach should be used, consistent with the previous example provided by the IIM in its last consultation response. ⁽³⁾

The IIM is concerned that the impact of getting this wrong will be great for all parties involved and puts the industry at risk. We remain willing to be involved in discussion to tease out a better and practical approach should HMRC wish to work for an optimal result, which includes consistency with tribunal rulings, case law and body of opinion laid down.

3. Performance in Front of Tribunals and Courts: Use of Tax Payers' Money

We appreciate that this is just the tip of the iceberg but it gives a clear picture about the way that tax payers' money is being regarded when it comes to expenditure by the department. There are now many examples of high profile results where HMRC have lost, and lost badly, taking cases to tribunal that should not have gone.

We see this as linked closely to point 1 in this answer and reflect on the implications for the mindset and culture within the department regarding its client base.

(3) Submission from the Institute of Interim Management in Response to the Consultation on Off-payroll Working in the Private Sector: 10.08.18

If you have any queries on the foregoing, please do not hesitate to contact us. We would be very pleased to meet with you as necessary. Could you please ensure our contact details are on your mailing list for any future related consultations?

We should be grateful if you would please acknowledge this reply.

Yours sincerely,

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APPENDIX 1

Background to the Institute of Interim Management

The Institute of Interim Management (“the Institute” or “IIM”) is a membership organisation for Interim Managers and Executives (“IMs”). It was established in 2001 with the principal aims of championing quality standards and best practice for its members.

The membership is drawn mainly from IMs resident in the UK, although their assignments can take them world-wide. There are also overseas members drawn principally from other EU Member States. The IIM has ongoing relationships with similar organisations internationally, including Italy, Germany, Netherlands, Poland, USA, Canada, Singapore, Czech Republic, Slovakia and Balkan states.

In addition to its website (www.iim.org.uk), the Institute has a significant web presence through its on-line LinkedIn group, Interim Management IIM (www.linkedin.com/groups/Interim-Management-IIM-2339933/about). The group is open to all-comers with an involvement or interest in Interim management, and therefore comprises a cross-section of all participants in the industry.

The on-line group currently has just under 16,000 members, comprising principally IMs (76%) and niche agencies (known in the industry as “Providers”) that specialise in ‘matching’ IMs with clients (11%). The remaining 13% consists of clients, management consultants and others. The on-line group remains the largest group globally dedicated to the Interim management industry.

The Institute conducts annual surveys of the Interim industry, and the 2019 IIM interim management survey is currently ‘live’ (<https://www.surveymonkey.com/r/IIMSurvey2019>). The conduct of the survey is overseen by independent external scrutineers. This annual survey benefits from several thousand responses each year and has become the UK industry standard for ‘Provider’ service performance assessment.

About Interim Management

Interim management is a proven and highly effective way for organisations to utilise the high end expertise and skills of independent senior and experienced professional managers and subject matter experts.

IMs come from a variety of backgrounds but are mainly highly experienced business executives and are frequently professionally qualified. They deliberately choose to work as independent freelance suppliers of their specific management skills, knowledge and experience to fee paying clients, either for a period of time or for defined scopes of work.

IMs are not temporary employees, but are professionals running businesses on their own account, accepting the associated risks and rewards which being in business implies.

IMs are different from management consultants, who limit themselves to gathering information, giving advice and guidance, and recommending action. Whilst IMs can and usually do provide advice and develop solutions, and, indeed, often play a key role in mentoring and coaching the client’s staff, their strength and benefit lies in their independent decision making freed from office politics, plus skill in delivering results-driven implementation. Interim executives contract with the client such that the client surrenders line authority for the period of the assignment and within that contracted brief. Contractually and in practice, interims do not come under any form of supervision, direction or control. In practice, the client accepts that the IM carries the power to deliver the contracted assignment objectives.

IMs are a key part of the UK’s flexible economy, particularly adding value to organisations in both public and private sectors which require temporary, but high impact, interventions, without involving on-going and unnecessary ‘employment’ costs for the client such as pensions, or ‘disengagement’ issues such as wrongful dismissal claims. They are a resource that can be turned on and off like a tap, to the mutual benefit of the client and the IM.

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At one time, the UK's use of IMs matched that of all the other EU Member States in aggregate. Interim management has long been an established feature in The Netherlands and Belgium, but recently, given changes in employment legislation across the EU, the Interim management market in other EU countries is considered to be growing rapidly, particularly in Germany, Poland and France.

Overseas working is common amongst IMs. According to earlier research (*The International Interim Market 2012*) published in March 2012 by Russam GMS (a leading UK Provider) international assignments made up around 11% of the overall activity of UK-based IMs. Out of the 460 IMs who responded to Russam's survey, 80% had completed assignments overseas, and 67% of them had clocked up between five to 10 years of international Interim experience. This proportion has remained fairly stable with time.

The 80% also said that demand for UK Interims overseas is strong because international firms need specialist skills on a temporary basis when they can't resource projects locally. Half of them also said that UK qualifications and the 'British' Interim manager 'brand' was prized highly abroad.

How do IMs operate, and why?

IMs find their assignments in a variety of ways. There are no hard and fast figures, but it is thought that, as a rule of thumb, about 60% of assignments are found by the IMs themselves through contacts in their own personal networks. The remaining 40% of assignments are sourced through Providers, and through introductions from other intermediaries such as banks, venture capitalists, law firms, and accountants.

However, there is anecdotal evidence to suggest that corporate governance requirements dictate that assignments at the most senior levels are more likely to be placed through Providers. This is likely to be true particularly in the public sector, where procurement procedures are more constrained than in either of the other sectors.

Contractual Basis

IMs operate through contracts for services (commercial contracts), rather than contracts of service (employment). IMs form part of (or possibly even lead) the client's management team, and expect to have delegated and to exercise the appropriate line authority required to fulfil their role (including at 'C' level in the private sector). Depending on the circumstances of the client and the assignment, this can include becoming an officer of the company through formal appointment as director and/or company secretary for the duration of the assignment. It can be useful to think of the relationship as one where the client contracts out the organisation to the IM and then contracts back in at assignment end.

It is nevertheless important to understand that IMs are not employees of the client. IMs are typically operating in circumstances which are not 'business-as-usual'. They are usually providing specialist skills and knowledge on an outsourced basis. It is essential that they stand apart from the client's staff, and are perceived by the staff as 'different'. If this is not possible, their ability to provide independent advice and voice controversial opinions is jeopardised, and the growth and development of the organisation will be hindered.

Where the IM finds his/her assignment through their own network or through an intermediary which is not a provider, the IM will negotiate the contract for services direct with the client. Where a provider acts as the intermediary, there are two models:

- Usually there will be an 'upper' contract between client and Provider, and a 'lower' contract between provider and the IM's legal entity. The terms of the two contracts should mirror one another in all material respects (save as to the day-rate fee level), but do not necessarily do so.
- Less frequently, there will be no contract of any sort between the Provider and the IM's company or other legal entity. The client will contract directly with the IM's company or other legal entity

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and will pay the IM's day-rate fees direct. The client will have a separate contract with the provider for its 'introducer's' fees.

Business and Financial Risks

From a legal standpoint, IMs operate through a variety of legal structures. The Institute's 2013 survey data suggest that the vast majority (88%) of IMs work through their own limited company. About 7% of IMs operate as sole traders or in partnership, including limited liability partnership ("LLP"), but these tend to be IMs drawn from the accounting and similar professions, where such legal structures are commonplace for all practitioners, not just IMs. The remainder operate through umbrella companies.

IMs are not employees of the organisations to which they provide their services. If an employee makes an error which causes loss to their employer, the employer bears the loss and any cost of rectification. By contrast, if an IM makes an error, the loss and cost of rectification is their responsibility, increasing their financial risk compared with an employee.

Typically IMs have to determine what needs to be done, in the same way and with the same risks as a management consultancy firm if they get the advice wrong to the detriment of the organisation. Having decided what needs to be done, they are responsible for implementation with further financial risks involved, both as to negligence and breach of contract.

IMs therefore understandably protect themselves by operating through the corporate structures mentioned above. In addition, they usually seek further protection through professional indemnity insurance ("PII"). Most clients in both the public, private and not-for-profit sectors insist on such cover as a term of the contract for services, but senior IMs carry it anyway, even if not contractually required.

IMs are also not employees because they do not approach work in the same way. IMs are paid by day rate to their PSC, reflecting the fact that they do not enjoy the benefits and protections of employment. Furthermore, they have no interest in becoming permanent employees – indeed, their business model requires the delivery of outcomes, so that, in effect, an IM's *raison d'être* is to achieve their own 'redundancy' – not the behaviour of a typical employee seeking permanency of employment.

In addition, having made her or himself 'redundant', the IM must then bear the sales and marketing costs of finding their next assignment, and face the real financial risk that this may take some time. It is rare for an IM to move from one assignment to another without a gap between each client. However, keeping this to a minimum is an indication of effective marketing, not a clue to someone being 'employed'.

The Institute's 2018 survey shows that the average IM worked 157 billable days in the year with over 90% indicating that this consisted of no more than 2 assignments in the period. Typically, assignments last just over 7 months and average down time between assignment is c.3months.

In other words, the typical IM's life is one of relatively short term assignments, interspersed with significant periods of 'down time'.

The use of a limited company or similar legal entity enables IMs to manage the financial risk of these periods of 'down time'. The receipts from its invoiced sales will be used by the company to meet the expenses of running the IM's business, which will normally include payment of a salary to the IM on which PAYE and NI is accounted for. The level of salary will be such that reserves are built up, so that, should a period of down time occur, the expenses of the business, including the sales and marketing cost of obtaining the next assignment, can continue to be met. The retention of profits in this way enables the IM to continue in business and means that they do not claim state benefits.

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Institute of Interim Management Interim Executive IR35 Tax Status Assessment

1. Basic Legal Operation	Score	Pref. Answer
1.1 Do you operate as a limited company?		
1.2 Are you a UK tax payer?		
1.3 Are you registered for VAT?		
1.4 What is your VAT registration number?		
1.5 Are you up to date with company filings?		
1.6 Do you have any outstanding court judgements for you or your company?		
Total		

2. In Business on Own Account Evidence	Score	Pref Answer
2.1 Is the work % found directly through your own company >35%?		
2.2 Is the current/new contract found directly?		
2.3 Are your services independently marketed via a range of channels?		
2.4 Can you show evidence of a business brand?		
2.5 Do you actively operate the Agency Workers Directive 'Opt out' Clause?		
2.6 Are you/your company registered under the Money Laundering Regulations?		
2.7 Do you have company assets that allow you to choose your work?		
2.8 Are your fees charged as a day rate?		
2.9 Is your day rate over £500?		
2.10 If the current/new contract is via a provider, do you invoice the end client?		
2.11 As in 2.10, is your contract with the end client directly?		
2.12 Are you a member of a professional institute, e.g. IIM, ICAEW, CIPD etc?		
2.13 Have you agreed to a formal code of professional conduct?		
2.14 Do you provide the form of contract for use with the assignment?		
2.15 Can you show IP owned by your company?		
2.16 Do you operate more than one revenue stream or client in parallel?		
2.17 Do you carry professional indemnity insurance?		
2.18 Does your own company provide a pension scheme?		
2.19 Does your company engage accountants, IT, legal support, web services, etc?		
2.20 Can you demonstrate the financial risk of running your own business?		
2.21 Can you demonstrate what determines contract length?		
2.22 Can you show how you remain independently up to date in your field?		
2.23 Is there a distinction between the assignment & a routine job in the client?		
2.24 Is the contract based on your Ts & Cs?		
2.25 Can you describe your 'USP'?		
2.26 Can you show periods of no revenue and changes of client?		
2.27 Have you provided a fixed price quotation for any work?		
2.28 Have your invoiced payments ever been delayed?		

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2.29 Has legal action ever been required for debt recovery?		
2.30 Have you ever had to write off payments due as bad debt?		
2.31 Can fees be withheld for any reason?		
2.32 Have you incurred additional expense for kit or training to deliver the work?		
2.33 Does your company have logo, letterhead business cards and stationary?		
2.34 Does the company have a phone line(s), email addresses, bank accounts?		
2.35 Do you have dedicated office space?		
2.36 Are you paid only on job completion or specific milestones?		
2.37 Do you have tax investigation insurance?		
Total		

3. Tools Required for Client Delivery

**Score Pref
Answer**

3.1 Do you provide all the tools necessary to perform your assignment?		
3.2 If the client provides tools, is this clearly for security or overriding reasons?		
3.3 If acting as a director, is this required to deliver the assignment objectives?		
3.4 Is line authority required to deliver assignment objectives?		
3.5 Is the client clear about handing over authority & control to you?		
Total		

4. The Written Contract

**Score Pref
Answer**

4.1 Does the contract preclude you from paid work elsewhere whilst 'live'?		
4.2 Is there any obligation for the client to provide work?		
4.3 Is there a specific clause stating the intention for a supplier/client contract?		
4.4 Is there a clause enabling the right of substitution?		
4.5 In the event of substitution, is it clear you are the supplier & payer?		
4.6 Is there a specific clause(s) that state autonomy to decide what work is done?		
4.7 Is there a specific clause(s) that state autonomy to decide how work is done?		
4.8 Is there a specific clause(s) that state autonomy to decide when work is done?		
4.9 Is there a specific clause(s) that state autonomy to decide where work is done?		
4.10 Is there a notice period in the contract on either side?		
4.11 Has the client the right to require further work outside the contract remit?		
4.12 Is there a right to terminate the contract early?		
4.13 Did you negotiate the contract directly?		
4.14 Is there a clause that enables you to engage 3 rd parties to work alongside you?		
4.15 Is there any reference to hours worked in the contract?		

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4.16 Do you need to seek permission to take time off?		
4.17 Is that time paid for by the client?		
4.18 If contracted work is paused, can the client redirect you to other work?		
4.19 If you are unable to work due to illness, can you invoice for this time?		
4.20 Is there a clause(s) handing over control for the assignment to be executed?		
4.21 If a bonus is contracted, is it specific to the assignment brief?		
4.22 Is there a clause stating you comply with employee policies, beyond H.&S.?		
4.23 Is there a clause(s) stating liability for correcting faulty work?		
4.24 Is there a clause(s) for invoicing legitimate expenses incurred for the client?		
4.25 Is there a clause(s) stating you have sole responsibility for your tax affairs?		
4.26 Is the contract length defined?		
4.27 If a 'top level' provider contract exists, does it recognise your IR35 status?		
4.28 If 4.27 is not shared, is a side letter stating no conflict with your IR35 status?		
4.29 If a public-sector contract, have you provided an IR35 status letter?		
Total		

5. Assignment Practice ("Hypothetical Contract"), "Part & Parcel"	Score	Pref Answer
5.1 Does the way the assignment operates accurately reflect the contract?		
5.2 Can you demonstrate an example of substitution in practice?		
5.3 Do you represent yourself during the assignment?		
5.4 Is representing the client's interests to third parties essential for the contract?		
5.5 Can you demonstrate economic independence from the client?		
5.6 Can you show no client employee benefits accrue or are part of the contract?		
5.7 If appearing in client structures and lists, is it clearly as a supplier?		
5.8 Do you obtain client site access as a supplier/contractor?		
5.9 If you are a director or form of 'office holder', or have line authority to deliver the assignment, can you show the difference from a permanent job holder?		
5.10 Is any specialist equipment to be bought for you by the client?		
5.11 Has anyone undertaken an appraisal or similar with you as per employees?		
5.12 Does the client have employees who could do the assignment?		
5.13 Have you refused to do work as it was outside the contract remit?		
5.14 Do you require client permission to take time off?		
5.15 Are you limited to service delivery from the client site only?		
5.16 If 'yes' to 5.15, is this due to overriding client need e.g. security?		
5.17 Is there an expectation that the client will provide more work, post contract?		
5.18 Has there been a succession of contracts with the same client?		
5.19 Is the client your last employer?		

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5.20 Is your training self-funded?		
5.21 Are you expected to attend functions paid for by the client?		
5.22 Do you operate with an internal job title?		
5.23 Do you have to attend staff meetings where the focus is employee issues?		
Total		

	Score	Pref. Answer
Overall Assessment Total		

Assessment Methodology

1. Questions to be answered in line with the 'preferred' answer indicator to achieve the points allocated.
2. The points awarded are designed to reflect existing case law and the weight of practical evidence you can provide to demonstrate the high level business services interim executives are in business to supply.
3. All questions highlighted green need to be answered to obtain the points. Failure to answer any of those questions positively indicates you are working inside IR35.
4. All questions highlighted red must be answered so that the negative total is not accrued to avoid falling inside IR35.
5. Question 3.3 must be answered positively if you need to operate as a director for the assignment. If this is not required, then the score is neutral.
6. Assuming you are able to answer points 2, 3 (and 4 if required), then a net score over 80 points indicates that you operate outside IR35, based upon clearly being in business on your own account; lack of mutuality of obligation, supervision, direction & control; taking financial risk; plus alignment of the written contract with working practice.

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IIM Survey May 2018:

Q. 'what would you want HMRC to do to recognise senior professional interims' situation for tax purposes?'

A. These are some of the more than 1,000 replies.

- *Accept and mitigate the fact that interims within IR35 pay significantly more in terms of NI/umbrella co fees than their directly employed counterparts.*
- *Acknowledge absence of paid holiday, paid sick, paid training etc. are legitimate reasons for being outside IR35.*
- *Acknowledge the significant financial risk taken between assignments to find new work, acknowledge the lack of security, holiday and sick pay, pension contributions, medical care etc which would be a normal part of the package if we went back to a permanent role. Make umbrella companies who manage you if inside IR35 be much more transparent about what is being taken from pay particularly basis re tax, so refunds can be claimed if only found work for a part of year and provide a way of consolidating pay/deductions for the individual who has worked with 2 or more such companies during a financial year.*
- *Allow people obviously undertaking short term, project related work - often using unique skill sets - to be outside the rules of IR35 and for clients to freely advertise and hire to these roles accordingly. The 'rules' need to be clearly stated so that client companies dont err on the side of caution and hire everyone as inside IR35 or as FTC's - increasingly common and very underpaid !!*
- *Any form of additional administrative or taxation overhead will ultimately push the rates higher - so more costs for government bodies as well as other businesses to achieve the same results.*
- *Be flexible and pragmatic. If IR35 is introduced for private sector as well, rates will increase.*
- *Clarify the guidance on applicability of MOO in IR35 in light of the recent court case re Ian Wells vs HMRC.*
- *Clear differentiating guidelines between standard temps & contractors and 'genuine interim exec' roles (ie the former are very often 'ordinary employment' 'dressed up as interim to avoid fiscal obligations).*
- *Consistency in application of the CEST/ESS test.*
- *Create clear rules and guidance that recognised the nature of the relationship, drawing the distinction between roles that are simply another way to resource what is effectively a permanent position and those where the interim is contracted to deliver specific outcomes for the client, drawing on specific expertise and experience*
- *Focus on areas where there is clear employment happening, stop trying to strangle the entire flexible contractor market for the sake of a very few who have exploited this historically.*
- *Get real. Busy interims on a high day rate pay huge amounts of VAT, Corporation Tax, income tax and dividend tax. Do they really want to lose that?*
- *Having to pay for our own training, memberships, software, equipment, holidays, expenses, subscriptions... gaps in employment (not working full years), not receiving employment benefits, being disposable,*
- *HMRC should understand that senior professional interims provide a service to keep private sector organisations running smoothly and ensure there are no management governance gaps.*

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- *I can't do the mix of work I do currently so would drop Public work. I have already refused work because of it. xx I would expect a complete overhaul of HMRC CEST tool to take account of all employment law especially MOO.*
- *If we are to be taxed as a perm employee of our clients, HMRC should provide all interims with Sick Pay, Holiday Pay and others. Either that or watch the country grind to a halt as interims/contractors hike their rates and less gets done because everything is more expensive and clients then scrimp on what they can afford, risking their change initiatives.*
- *Look at the project and programme management industry. My clients employ me for the short term benefit and work that they have. It is simply unfeasible for them to employ people like me permanently*
- *Need to deal with the real problem ie public sector abuse not genuine interims*
- *Provide clear details about how an assignment should be worked/operated for it to be judged to be outside IR35. Unlikely in my opinion but it would be helpful if they did.*
- *Recognise in the tax regime the level of personal/ professional risk taken by interims. A clear definition, in consultation with IIM/ Interims, of what an interim is for tax purposes.*
- *senior professionals appoint accountants who also regulate taxation. If this was recognised, IR 35 would be obsolete - We are not operating in a profession where tax evasion is the norm*
- *stop making blanket assumptions and allow engagement evidence to support overall tax treatment. Also recognise that PSCs combined with personal tax now mean there is no need to persecute us further - we do contribute to the tax take xx Understand what genuine interim work is as opposed to contracting, which I regard as longer term, akin to employment and not so 'impactful' and value-adding (as a real interim)*
- *We are not 'employees' (disguised or otherwise). We are not 'workers'. We are also not 'bums on seats' We are business people selling services to other businesses that produce measurable outcomes and business performance.*