Response to

Tackling on Non-Compliance in the Umbrella Company Market

20th July 2023

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About FCSA

The Freelancer & Contractor Services Association (FCSA) is the UK's leading professional membership body dedicated to raising standards and promoting supply chain compliance for the temporary labour market. Our members provide umbrella employment, self-employed services, accountancy, and business support solutions to the contingent workforce.

At time of writing FCSA has more than 70 Accredited Members who collectively represent c210,000 workers engaged as employees, making them, collectively, one of the largest employers in the UK. FCSA members alone collect c£6bn in taxes and NICs which are timeously remitted to HMRC.

FCSA has worked extensively with government and other stakeholders to promote the highest possible standards in the industry, most recently working with HMRC across a number of areas including the off-Payroll Working Forum, providing labour market intelligence and umbrella regulation advice to DBT departments such as Labour Market Enforcement and Employment Agency Standards.

It has also assisted Parliament, giving evidence to the All-Party Parliamentary Loan Charge and Taxpayer Fairness Group and the House of Lords Finance Sub-Committee as well as being an expert advisor to the DBT-supported JobsAware initiative, the Better Hiring Institute

FCSA continues to promote compliance within the sector for the benefit of individual workers, HM Government, and the supply chain. It welcomes the opportunity to support DBT, HMRC and HMT in this consultation.

Executive Summary

Introduction

FCSA is pleased to respond to the government's consultation on Tackling on Non-Compliance in the Umbrella Company Market. We recognise and appreciate the government's position that it wishes to "support a level playing field in the umbrella company market." We are pleased to note that government wishes to preserve and promote "the compliant majority of market participants."

We are in full accord with the government's intent stated in paragraph 1.28 of the consultation document,

> In putting forward these options, the government has three main objectives. First, to deliver improved outcomes for workers, by reducing the number of illegitimate operators in the umbrella company market. Secondly, to increase compliance across the market so that businesses can operate on a level playing field, supporting the government's wider growth objectives. Thirdly, to protect the Exchequer from the significant revenue losses that currently arise from umbrella company non-compliance.

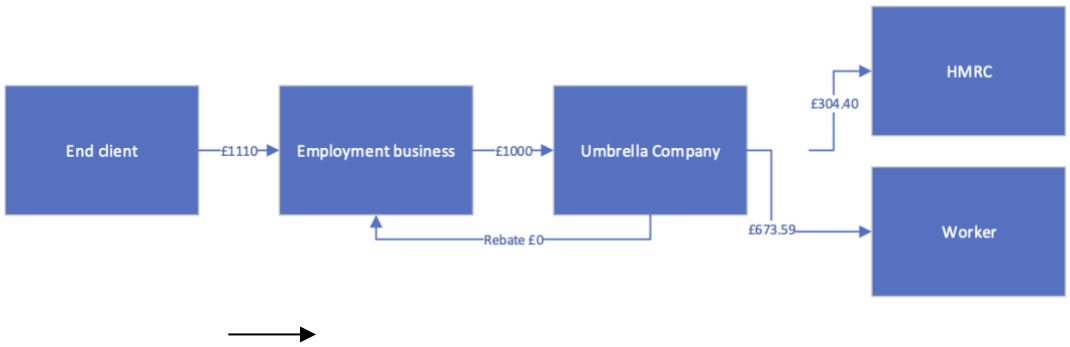
and we believe that FCSA's response and our resulting recommendations will help government achieve these aims.

Background

The emergence and rapid growth of the well-functioning umbrella market has been a positive contributor to UK growth, productivity and wealth. Compliant *bona fide* umbrellas provide certainty and security to the workers engaged by them, ensuring that they receive the full protections required by employment law, that their tax affairs are simplified, and all required taxes are remitted to HMRC.

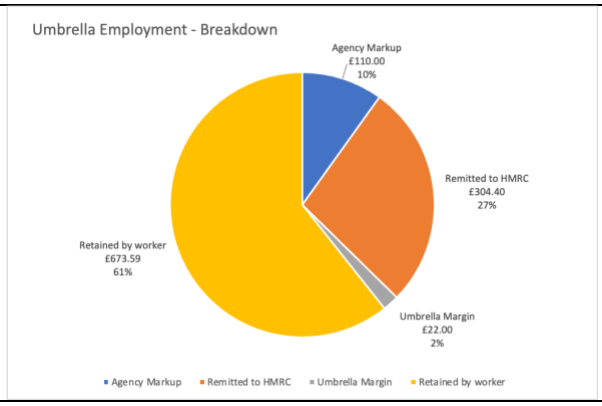
Understanding the transaction

It is crucial to recognise that the "assignment rate" advertised to workers by employment businesses is **not** the gross pay which the worker will receive and to help explain this, we show below a simplified breakdown of the transaction flow from end-user to worker a based on an assignment rate of £1000, an agency markup of 11%, an umbrella margin of £22, using a standard 1257L tax code and assuming that the worker has opted out of auto-enrolment and no rebate is made from the umbrella company to the employment business:-



In real terms the umbrella company provides its services to the employment business and the worker for only a small margin. Using the same assumptions as above, the actual transaction breakdown is:-

Paid to agency by end client	£1,110.00
Agency markup	£110.00
Assignment rate	**£1,000.00**
Umbrella Margin	£22.00
ErNICs	£96.84
Apprenticehsip Levy	£4.38
Advanced Holiday Pay	£94.84
Pay	£781.93
Gross Pay	**£876.77**
EeNICs	£76.17
Income Tax	£127.01
Take hiome pay	£673.59



*All figures net of VAT

Compliant Umbrellas

FCSA has played a major role in promoting ethical and fully compliant standards to the sector and has, by engaging with third-party legal and taxation experts and liaising widely with other stakeholders including government, produced and documented the *de facto* standard for compliance, which every FCSA member is rigorously held to. These are continuously reviewed and revised as legislation/regulation changes and have been made publicly available so that non-members may also ensure their businesses are compliant.

When a fully compliant and lawful umbrella company operates in the marketplace, they do so in a way which **protects** the worker. This should be contrasted with firms or schemes which fail to pay workers correctly, fail to pay the correct taxes and National Insurance Contributions (NICs)

to HMRC and often directly disadvantage the worker in that, ultimately, it is the worker who HMRC will hold responsible for unpaid tax. Such unethical or unlawful firms directly contribute to the tax gap. We refer to these organisations as Non-Compliant Organisations (NCOs) throughout this submission.

FCSA believes that regulation should be introduced, however it could be beneficial for it to be preceded by a detailed analysis by government of the scope of the problem it seeks to resolve.

We have concerns that although data is available to HMRC from both the Employment Intermediaries Reporting requirements in force since 2015 and RTI returns introduced in 2013, there appears to be no attempt by HMRC to reconcile the two datasets. With exceptions for salary sacrifice, an analysis of the data already available to government would at least enable identification of trends and quickly spot serious anomalies between the amounts paid to umbrella companies and the deductions for income tax and NICs reported to HMRC. This analysis would assist government in properly assessing the extent of the overall problem.

The foundation for good regulation

FCSA strongly recommends that any proposed regulation should focus on the protection of worker employees and the integrity of the supply chain, including compliant umbrella service providers.

FCSA therefore calls for any proposed regulations to achieve four key aims:

1. Recognise that compliant and ethical providers in the supply chain are beneficial services which ultimately protect workers

2. Have a "light touch" and have regard to enforcement of existing legislation such as

    - Tax and Employment Law
    - Conduct of Employment Agencies and Employment Businesses Regulations
    - Agency Workers Regulations
    - Bribery Act
    - Criminal Finances Act

3. Create a greater focus on identifying rogue and unlawful operators and schemes

4. Allow for the prosecution of the operators of those rogue companies, with deterrent fines for unremitted income tax and NICs and, in clear cases of fraud or extortion, criminal prosecutions

FCSA's key recommendations arising from the consultation document

General comments

FCSA sees well-formed regulation as a progressive step in protecting employment rights and helping to safeguard workers as well as employment businesses and end users from NCOs and outright criminal activities. We would stress that the vast majority of umbrellas act in a compliant fashion and that, in the round, the current well-formed market works well for all parties and, in particular, workers.

We have received suggestions that one way forward is for government to establish a licensing or registration scheme. While such a scheme, if carefully implemented, may be of benefit we'd caution that unless government can commit substantial resources to police this, it might afford an opportunity for NCOs to gain registration and thus be able to advertise this as being a badge of compliance. We note that, in the past, NCOs in similar fields promoted what were blatantly unlawful schemes by use of a DOTAS[1] number – we therefore would urge government to consider this carefully and consult fully with the industry prior to designing and implementing a registration regime.

Similarly, we would strongly caution government against the consideration of simply banning umbrella companies. This would have several negative effects:-

- Workers would lose the ability to have continuous employment
- Smaller employment businesses do not have the skills or capacity to run payroll effectively and this may drive them out of the market
- It merely shifts the compliance issues government seeks to address to another operator in the chain
- It will deprive workers of choice
- It could result in a "closed loop" – almost monopolistic – where employment business hold all roles:- filling the vacancy, providing the candidate and also payrolling the worker, enabling them to charge workers fees for payroll services which may well substantially increase over time due to the closed loop

[1] Sir Amyas Morse - Independent Loan Charge Review report, December 2019, Para 3.2

Chapter 3: Definition of an umbrella company

FCSA recommends that government avoids an overly narrow definition and avoids prescribing operating models and therefore adopts the following definition:-

> Being the provider of payment services, by means of a contract between them and the worker or between the paying company and an employment business, to an individual temporary worker engaged or employed by the paying company who performs work for an entity *other than the paying company itself*
>
> and
>
> The worker falls within the Off-payroll Working Rules ("IR35 caught") or the worker does not fall within the Off-payroll Working Rules but chooses to work under an umbrella arrangement

FCSA also has concerns regarding the suggestions in 3.34 of the consultation document in that the umbrella may not in the normal course of business have knowledge (other than the right to work and identity of the worker) of the on-going "suitability" of a worker as they are not usually in a position to assess this. However, some agencies may offer this as an extension to the commercial arrangements they have with an employment business or end-hirer.

Chapter 4: Option 1 Mandating Due Diligence

FCSA recommends that a well-designed due diligence requirement be placed on an employment business immediately above the umbrella on the supply chain except in instances where there is a second or subsequent employment business in the chain or a Master Service Provider which dictates to the lower entities the umbrella company (or list of umbrella companies) to be used.

FCSA has further detailed recommendations as to the scope and operation of that requirement which is set out below.

Chapter 4: Option 2 Transfer of Debt

FCSA does not believe that Transfer of Debt taken on its own would achieve the desired outcome, but recommends that, if required at all, it should be used only in conjunction with Option 1 to encourage best practice and be applied only to the entity immediately above the umbrella company in the supply chain except in instances where there is a second or subsequent employment business in the chain or a Master Service Provider which dictates to the lower entities the umbrella company (or list of umbrella companies) to be used.

In any event, we recommend that government reflects on the success of initial regulation under option 1 (due diligence) before proceeding with any transfer of debt mechanism.

Chapter 4: Option 3 Deeming the employment business as the employer for tax purposes

It is FCSA's view that this option would fail to deliver any of the governments intended outcomes as stated in paragraph 1.28 of the consultation document and quoted above.

Our general response to this option is that it is an artificial and unnecessary construct which would disadvantage workers, undermine the value of the current model to the UK economy, reduce competition and negatively affect the government's growth agenda by constricting the use by business of a flexible and agile temporary workforce.

This option would result in a fundamental and deleterious change to a broadly well-performing market which efficiently delivers Employment Rights, continuity of employment and extended benefits (e.g., the ability to contribute to a SIPP, employee benefits platforms) to workers whilst at the same time remitting considerable revenues to HMT.

The overall approach

FCSA recommends that prescribed due diligence under Chapter 4: Option 1 be introduced only following detailed consultation with the industry and especially those organisations with expertise in compliance for the sector and that any regime introduced be allowed to operate for a period of time – we suggest two years – before a Transfer of Debt (ToD) under Chapter 4: Option 2 is introduced and that the use of ToD is limited to those organisations who fail to adequately perform due diligence.

FCSA's Response to the Consultation Questions

Chapter 3 – defining umbrella companies

Question 1: Which of the options would be the most effective way to define umbrella companies to ensure only they are brought in scope now and ensure future regulations/standards can be targeted to the right business in the supply chain? Please explain your answer.

FCSA has serious concerns that any overly narrow definition may result in enabling non-compliant operators (NCOs) to simply operate a business model which excludes their operations from the scope of any proposed regulation and also may exclude different compliant models of engagement such as contracts for service, fixed term employment and professional employment organisations.

In addition, the proposed options could result in currently in use models such as Professional Employment Organisations or payments under different regimes such as Contracts for Service or the Construction Industry Scheme are excluded from regulation – it is unclear whether that is government's intention.

FCSA have considered the proposed definitions contained in the consultation document and of the two proposed definitions **Option 1** is the more complex and prescriptive and this gives rise the risk of NCOs simply operating a business model which excludes their operations from the scope of any proposed regulation. Additionally, the wording "engaged as a corporate work-seeker by the employment business" is troublesome as it in turn requires a definition of "corporate work-seeker".

Whilst umbrella companies do engage with employment businesses as that is where the bulk of temporary placements arise, they often also seek to provide employer-of-record and payrolling services to individual workers who are themselves work seekers and find work directly from end-users with no involvement of employment businesses.

Option 2, unlike Option 1, has the benefit of not requiring the prescription of engagement models thus nullifying the risk mentioned above. However, all three conditions proposed at paragraph 3.26 of the consultation document have some difficulties, in particular the assumption that an employment business is necessarily involved in the chain, which may not always be the case.

One crucial note on Condition 3 – the payment from the employment business (or direct end-hirer) to the umbrella should <u>not</u> be termed "gross pay" but rather the term "assignment rate" should be used. This will help alleviate any confusion on the part of individual workers.

Question 2: Which of the definitions would be the most future proof? Please explain your answer.

With the serious caveat mentioned in our response to question 1, FCSA believes that the definition contained in Option 2 is more future proof than Option 1 as it is not prescriptive or proscriptive of specific business models and therefore would be more effective at bringing providers into scope of any proposed regulation.

However, our view is that option 2 is not adequate and we recommend that government considers the alternative definition we propose.

Question 3: Are there any unintended consequences of either option and/or are there alternative ways of defining umbrella companies the government should consider? Please explain your answer.

FCSA would recommend that government considers a simpler and broader definition of an umbrella company as meeting two conditions:

1 Being the provider of payment services, by means of a contract between them and the worker or between the paying company and an employment business, to an individual temporary worker engaged or employed by the paying company who performs work for an entity *other than the paying company itself*

and

2 The worker falls within the Off-payroll Working Rules ("IR35 caught") or the worker does not fall within the Off-payroll Working Rules but chooses to work under an umbrella arrangement

Using this definition would bring in scope all operators of an umbrella-like business regardless of the engagement model used and obviate the requirement for implementation and monitoring of the proposed permitted models in paragraph 3.20 of the consultation document.

In any event FCSA finds the proposed Model 3 at paragraph 3.20 of the consultation document has language which limits the scope of any proposed regulation to an arrangement necessarily involving an employment business and excludes arrangements whereby individual workers who engage directly with end-hirers but use umbrella companies.

FCSA also considers that Model 4 may give rise to a legal definition of an otherwise undefined in law meaning of Personal Service Company (PSC). It is our view that this matter should be reserved for another wider consultation on the definitions of incorporated entities.

Question 4: What aspects of the umbrella company's role in the supply chain should the regulations cover?

In FCSA's view the scope proposed in paragraph 3.32 of the consultation document would address common concerns. Our specific responses are as follows:-

Handling of pay and holiday pay

FCSA notes that a consultation on Working Time Regulations would address the issue of advanced or "rolled-up" holiday pay and government's intention to make this method lawful. It is arguably the easiest method to operate and fairest for the worker.

Most umbrella companies already provide for payments processes with liquidity reserves, offering credit terms and credit insurance. However, the proposal that umbrella companies should pay workers even if they themselves have not been paid by the end-hirer or employment business (debtor) is troublesome.

This requirement could result in a scenario where an umbrella company having 1000 workers in total becomes insolvent due having to pay in full workers for an insolvent or non-paying client responsible for only 100 workers on the umbrella company's books. Therefore 900 extra workers – from the umbrella company's other clients - are caught in the crossfire, whereas a requirement to pay the affected 100 workers at NMW rates *pro tem* would enable the remaining 900 workers to receive payment in full and afford the umbrella company time to recoup funds from the debtor in order to make good the reduced payments to the 100 workers placed by that debtor.

Furthermore, at paragraph 3.32 of the consultation the suggestion that employment businesses are obligated to pay workers regardless of them receiving funds from the end-client,

> *"This mirrors the obligation on employment business to pay work-seekers irrespective of payment by the hirer. It seeks to create a chain of obligations that flows from the employment business down to the individual."*

is only the case when the worker has **not** opted out of the Conduct Regulations.

Use of additional services

It is important to note that the umbrella company's margin is not something which the worker "pays" but rather is a deduction from the assignment rate paid to the umbrella company, alongside employer's NICs and apprenticeship levy before arriving at the worker's gross pay.

It should be recognised that many umbrella companies provide added-value benefits to their workers such as employee reward schemes, fuel cards, and personal tax advisory services. These are of significant benefit to umbrella workers and FCSA believes that umbrella companies should remain free to offer additional services which workers may

voluntarily decide to pay for. There must, however, be complete transparency and openness about what each service provides and its cost.

Nevertheless, FCSA wholly support this proposal. No worker should be **required** to pay for any extra services as a condition of contract.

Key Information Document (KID)

FCSA broadly agrees with this proposal, however as a recent Employment Tribunal[2] judgement has demonstrated the responsibility for clarity in communication and contract often ultimately falls on the employer – the umbrella. This judgment could potentially be viewed as somewhat perverse, given that the legal obligation is on the Employment Business to provide the document to the worker.

Therefore, FCSA recommends the following;

1. The *minimum* content of a KID must be prescribed
2. The employment business must be held responsible and accountable for providing it (*unaltered if it is obtained from an umbrella)* to the worker
3. The use of an unaltered KID meeting the required criteria provided by an umbrella company must be a "statutory defence" against relevant claims against the umbrella company at ET.
4. Industry standardisation of terms and definitions

Question 5: Is there a rationale for starting with limited regulations and reviewing them before potentially expanding them to cover other areas of umbrella company involvement? Please explain your answer and illustrate with examples.

FCSA believes that compliant umbrella companies – especially those which use the traditional contract of employment model – already follow regulatory requirements incumbent upon them as employers. As such regulation should only be brought forward to address specific areas of umbrella operations not already dealt with by existing requirements or where it can assist in the reduction of uncertainty or confusion to individual workers.

Chapter 3 – enforcement of umbrella company standards

Question 6: Are there reasons that the Employment Agency Standards Inspectorate should not enforce umbrella company regulations? And if so, are there other bodies or approaches the government should consider? Please explain your answer.

FCSA concurs that, due to the common working relationships between employment businesses and umbrellas, EAS remit could properly be expanded to include umbrella companies.

However, FCSA recommends the government give proper consideration to the forming of the previously mooted Single Enforcement Body. Furthermore, FCSA's view is that other aspects of deliberate and even criminal non-compliance could be addressed by the formation of a special task force as outlined later in our submission.

[2] Pajpani before Employment Judge S Connolly

Question 7: Does the Employment Agency Standards Inspectorate have sufficient enforcement powers to regulate umbrella companies or would changes need to be made? Please explain your answer.

FCSA understands that EAS has the necessary powers, but if necessary these should be extended.

We also recommend the introduction of civil penalties for systemic non-compliance or deliberate flouting of the regulations which, in themselves, are not in breach of current legislation with its own penalty regimes. These penalties should be imposed both on the legal entity and the directors of delinquent organisations.

Question 8: Should EAS mirror its current enforcement approach for employment agencies and employment businesses if it enforces umbrella company requirements? Please explain your answer.

FCSA recommends a compliance-based approach as outlined at paragraph 3.47 of the consultation document.

Chapter 4 – Option 1: Mandating due diligence

Question 9: Do you agree that a requirement to undertake due diligence upon any umbrella companies which form part of a labour supply chain would reduce tax non-compliance in the umbrella company market, and to what extent?

FCSA believes that a reasonable level of due diligence required of employment businesses will help reduce non-compliant behaviour and help limit the activities of NCOs, but this is difficult to quantify given that most respondents, including FCSA, have no hard data as to the likely tax gap caused by non-compliance.

It should however be noted that whilst some employment businesses already perform due diligence checks, many employment business may not have the necessary expertise to perform due diligence; they may not know the right areas to examine or may not be able to correctly interpret responses.

Question 10: Would a mandatory due diligence requirement focused on tax non-compliance also improve outcomes for workers engaged via umbrella companies?

FCSA believes that if the criteria applied for due diligence is carefully designed in close collaboration with Industry stakeholders and updated as regulations change, the impact on individual workers will be positive. However, attention must be paid to the cost of overly prescriptive or complex due diligence processes as, ultimately, this will met by the individual workers.

Question 11: Which parties in a labour supply chain should be required to comply with a due diligence requirement?

It is FCSA's view that only the entity (end client or employment business) closest to the umbrella engaging and paying the worker should be responsible for carrying out due diligence except in instances where there is a second or subsequent employment business in the chain or a Master Service Provider which dictates to the lower entities the umbrella company (or list of umbrella companies) to be used.

Question 12: Which due diligence checks are most effective for identifying potential tax non-compliance in labour supply chains?

FCSA has an extensive lists of areas we require to be checked for potential tax non-compliance purposes and the high-level summary points of these are set out below.

It is crucial to note that the recent rise in "payslip validation" services which reverse engineer payslips and check that calculations are correct , whilst being a useful tool (indeed FCSA uses these tools to spot check behaviours) do **not** provide a silver bullet to tax non-compliance. These tools cannot uncover non-compliant behaviours such as under payment of holiday pay, dual payment methodologies, under-the-counter payments, EBT payments or otherwise hidden payments.

FCSA recommends that any regulation with regard to due diligence requirements are carefully designed to minimise any additional cost and resource burdens on employment businesses or umbrella companies as, inevitably, any cost increase will be reflected in a reduction of the rates offered to workers.

Question 13: What due diligence checks could end clients or employment businesses be reasonably expected to carry out upon umbrella companies within their labour supply chains? Which tax heads should the checks cover (e.g. employer duties, VAT, Corporation Tax, etc.)?

FCSA is actively working with APSCo, the REC and TEAM to create a universal due diligence format for universal use. Using a standard format each time will allow umbrellas to standardise what can be a resource heavy process and for employment businesses to receive the same information in a secure and reliable fashion. This will reduce duplication of effort, confusion as to what is required and minimise overall costs.

Whilst our accreditation processes encompass some 700 different points, as a broad overview FCSA carries out the following checks.

Companies House registration details	Fit and proper persons check on directors	Accounts/financial liquidity
PAYE reference, HMRC accounts, P32 returns all properly registered to the company	Checks on overdue filings and tax payments	Compliant payslips and reconciliation statements – cross checked with RTI data
Lawful and complete contracts (e.g. contracts of employment) and "employer of record" status	Transparent and clear assignment schedules	Transparent and clear KIDs
Transparent and clear illustrations	Processes for rebates and incentives (including declarations to HMRC)	Compliance with AWR, AML, RTW checks, CFA, Anti-bribery
Correct and lawfully applied processes for:- Expenses H&S Policies Grievances Whistleblowing	Correct and lawfully applied handling of VAT	Correct and lawfully applied pension provisions

This is an in-depth time consuming and expensive process carried out by external professional services firms on behalf of FCSA, and we therefore recommend below a subset of these checks as an acceptable level of due diligence requirements.

Question 14: What evidence would you expect would need to be retained, and for how long, to demonstrate that a due diligence requirement has been met?

In line with corporate financial records, FCSA recommends that an agreed due diligence pack be retained for six years beyond the end of the contract with the umbrella company.

Question 15: How could a mandatory due diligence requirement be designed to ensure that compliance burdens remain proportionate?

FCSA's view is that it is unrealistic to expect employment businesses, especially smaller firms, to carry out in-depth due diligence processes on potential suppliers on a regular basis as they are unlikely to have the necessary skills or expertise in-house and it would be extremely burdensome on all parties for multiple employment business to carry out due diligence checks on multiple umbrella companies on a regular basis.

FCSA recommends that the government takes an approach which recognises independent third-party due diligence/certification carried out on umbrella companies and provided to employment businesses, with commensurate regard to accuracy, confidentiality, and security, to be the preferred operating model for satisfying a due diligence regime.

FCSA's own certification process is extremely rigorous, extensive and time-consuming for both umbrella companies seeking certification and for the independent professional service firms we commission to carry out regular inspections. This level of due diligence would be virtually impossible for smaller umbrellas to undertake and the expense to employment businesses would be prohibitive.

Our view is that a minimum standardised due diligence pack based on what we describe below could be settled upon by government collaborating closely with industry stakeholders, maintained by FCSA and supplied securely and directly by FCSA to employment businesses on a as-required as-permitted basis. These packs could then be passed directly to the end-hirer as part of the end-hirer's overall due diligence on their supply chain.

Companies House registration details and up-to-date filings	Fit and proper persons check persons of significant control	Fit and proper persons check on directors	GLAA and similar registrations
VAT and PAYE references, HMRC accounts, P32 &etc all properly registered to the company	Compliant payslips and reconciliation statements	Satisfactory credit check	Employment and grievance policies, contracts &etc

Such a methodology would also be a substantial aid in preventing clone fraud as described later in this document.

Furthermore, FCSA recommends that by carrying out the mandated due diligence, that the end client or employment business should benefit from a statutory defence should it subsequently be shown that the umbrella provided false or misleading information.

Question 16: What would be the appropriate level of penalty to ensure that the requirement is complied with and how should it be calculated?

If government proceeds with a penalty regime, FCSA recommends that penalties should be both proportionate to the level of non-compliance with the requirement and take account of the result – particularly in respect of financial losses or other disadvantage to the individual workers affected. Any penalty regime should follow HMRC's points-based system, with no prior imposition of penalties.

FCSA therefore recommends that government introduces the following penalty regime for employment businesses which fail to carry out reasonable due diligence checks on their umbrella suppliers:-

Action	Penalty
Failure to carry out reasonable prescribed due diligence, umbrella company fully compliant	Education, warnings &etc given.
Failure to carry out reasonable prescribed due diligence, umbrella company non-compliant, but which results in no tax loss or worker disadvantage	£1,000 penalty and education, warnings &etc given.
Failure to carry out reasonable prescribed due diligence, umbrella company non-compliant, which results in tax loss or worker disadvantage	10% of ex-VAT transaction values carried out between the employment business and the umbrella company or £10,000, whichever is the lesser. plus 10% of the tax loss, losses by individual workers made whole or disadvantages compensated at a level set by an Employment Judge
Acting in concert with an NCO to provide, promote, prolong, or enable non-compliance which results in tax loss or worker disadvantage	20% of ex-VAT transaction values carried out between the employment business and the umbrella company or £20,000, whichever is the lesser. plus 100% of the tax loss, losses by individual workers made whole or disadvantages compensated at a level set by an Employment Judge – directors to also be included as personally liable
Acting in concert with an NCO to provide, promote, prolong, or enable operation of unlawful schemes	100% of ex-VAT transaction values carried out between the employment business and the umbrella company or £50,000, whichever is the lesser. plus 100% of the tax loss, losses by individual workers made whole or disadvantages compensated at a level set by and Employment Judge – directors to also be included as personally liable. Prosecutions under the Criminal Finances Act should be considered for egregious schemes or those where losses are substantial.

Question 17: What safeguards, if any, do you think would be required were a due diligence requirement to be introduced?

FCSA recommends that required due diligence checks should be well-designed in conjunction with industry stakeholders, explicit, and proportionate. Furthermore, FCSA recommends that by carrying out the mandated due diligence, that the end client or employment business should benefit from a statutory defence should it subsequently be shown that the umbrella provided false or misleading information.

Question 18: What impacts would this option have on the labour market and on the umbrella company market specifically?

FCSA believe that supply chain due diligence requirements will reassure individual workers that the umbrella company has been subjected to at least some checks. This will assist compliant umbrella companies to lift the reputation of the market and make it more difficult for NCOs to operate.

As this process becomes more widely known by individual workers, it will increase their awareness of the need for due diligence on the part of employment business and, indeed, umbrella companies and will help with their understanding that if something seems to be too good to be true, it probably is.

Question 19: Would this measure lead users and suppliers of temporary labour to move away from the umbrella company model of engagement? If so, how would end clients and employment businesses engage workers instead?

Properly mandated and prescribed due diligence which is reasonable and proportionate will ease the process for end clients or employment businesses.

However, an overly complicate regime will reduce market competition. Such a regime could completely exclude smaller organisations from competing for temporary labour provision and also encourage larger organisations to bring processes in-house, requiring extra resource and expertise and taking on the responsibilities for employment rights. This in turn will be detrimental to the workers so engaged as it will limit their ability to have continuous employment and lead to an increase in processing fees deducted from the assignment rate.

Furthermore, employment businesses may be encouraged to offer engagement types which do not afford full employment rights to workers, such as contracts for services.

Question 20: Do you have any other comments on the proposal to require a mandatory minimum level of due diligence checks upon umbrella company engagements? In particular, are there any further risks that the government should consider before deciding whether to take this option forward?

FCSA recommends that the industry itself plays a substantial role in the regulatory process, and offers itself as an instrument for providing reasonable due diligence checks.

However, there are a number of risks which could arise if EAS/HMRC do not work collaboratively with existing industry stakeholders and certification bodies or allow unmonitored certification bodies.

This could encourage the growth of quasi-certification services coming to market. FCSA has already seen such "services" many of which have marketed "certification" to a limited number of connected umbrella companies. When examined certain attributes appear:-

- The "certification" platforms share common directors and/or ownership with the umbrellas they "certify"
- They are often based at the same registered address as the umbrellas they "certify"
- Some are based in or have connections to known tax havens (such as Isle of Man, Cyprus and Malta)
- Some are operated by individuals with previous strong links to or involvement with unlawful or inappropriate scheme operations such as EBTs, loan schemes, mini-umbrellas
- Some clearly carry out due diligence on a for-profit basis
    - In some cases this can lead to poor methodology in favour of income

FCSA therefore recommends that whilst EAS should be responsible for enforcing regulatory compliance, they should also work closely with a limited number of private certification bodies which in turn perform due diligence and thereby proactively assist the enforcement of regulatory compliance. This would have the effect of minimising government expenditure and maximising the effective deployment of EAS personnel and expertise.

Chapter 4 – Option 2: Transfer of tax debt that cannot be collected from an umbrella company to another party in the supply chain

FCSA strongly recommends that government only consider the introduction and use of Transfer of Debt as a secondary measure following option 1.

Question 21: Do you agree that, were this option to be pursued, it would address tax non-compliance in the umbrella company market, and to what extent?

FCSA has serious concerns with this approach as follows:-

- It may encourage umbrella organisations to act in non-compliant way either deliberately or in error, knowing that debt transfer will simply push the liabilities up the chain
- It may encourage larger employment businesses to provide payroll services themselves, pushing smaller competitors out of the market
- It may encourage a market in insured indemnities
- It discourages a free market which in turn hampers market agility and growth prospects
- It may lead to "blanket bans" of umbrella company usage, leading workers away from well-known and fully compliant umbrellas which already remit billions to HMRC

Question 22: Would this option improve outcomes for workers engaged via umbrella companies?

FCSA's view is that outcomes for workers could be negatively affected by this measure, as:-

- If an employment business becomes insolvent due to Transfer of Debt (through no fault of its own) workers would have to be transferred to another employment business and may have their income disrupted
    - It is unlikely that a new employment business in the chain would offer TUPE to workers so affected

- Some workers will be encouraged into "too good to be true" schemes knowing that if their umbrella is non-compliant, the agency or end-client will be held liable and step in i.e., unlawful schemes will be even more appealing to workers and indeed bad actors

Question 23: In what circumstances do you think HMRC should be able to transfer an umbrella company's tax debt?

FCSA's view is that transfer of tax debt should **only** be possible if the umbrella has acted in a non-compliant manner such as would be obvious following reasonable due diligence.

Furthermore, FCSA recommends that by carrying out the mandated due diligence, that the end client or employment business should benefit from a statutory defence should it subsequently be shown that the umbrella provided false or misleading information.

In any event, we recommend that government reflects on the success of initial regulation under option 1 (due diligence) before proceeding with any transfer of debt mechanism.

Question 24: Do you agree that the tax debt should be transferred to the employment business which supplies workers to the end client, with transfer also possible to the end client in certain circumstances?

> It is FCSA's view that only the entity (end client or employment business) closest to the umbrella engaging and paying the worker should be subject to transfer of debt except in instances where there is a second or subsequent employment business in the chain or a Master Service Provider or an end-client which dictates to the lower entities the umbrella company (or list of umbrella companies) to be used.

Question 25: What processes would employment businesses and end clients use to identify tax risks within their labour supply chains?

> FCSA believes that the due diligence checks as outlined in above should include checks which ordinarily would detect tax non-compliance.

Question 26: Do you agree that this option should apply to employment taxes as set out above? Which other taxes could or should it apply to?

> FCSA believes that this should be restricted to employment taxes, as the upper parts of the supply chain should not be responsible for a supplier's VAT, corporation tax or other tax liabilities.

Question 27: How should the government define the engagements to which this option would apply?

> Please see our response to question three above.

Question 28: What steps should businesses using umbrella companies take to assure themselves that they are engaging with a compliant umbrella company? How could the government support businesses to minimise the impact of these actions?

> Please see our response to question 15 above.

Question 29: Would businesses stop using umbrella companies as a result of the introduction of a transfer of debt? How many businesses would do this and what wider impacts would there be?

FCSA believes that a simple stand-alone Transfer of Debt approach would encourage larger employment businesses to provide payroll services themselves, pushing smaller competitors and umbrella companies out of the market which is anti-competitive and moves towards a monopolistic model. Arising from this is:-

- A substantial risk of increased costs levied to individual workers as larger employment business effectively have a captive market and would be enabled to charge workers much higher fees for payroll processing as well as their mark-up already charged to the end-hirer
- The loss of smaller, or specialist, employment businesses
- The loss of knowledge and expertise which currently resides within umbrella companies
- A diminishment of the checks and balances which naturally arise within the current model and would be further enhanced under the proposed due diligence regime
- A negating of the continuity of employment rights and benefits across various engagements allowed for by the worker remaining with a single umbrella across engagements offered by different employment businesses
    - This also has the effect of making access to financial products even more difficult for individual workers.
    - The ability of workers to choose and contribute to private pensions or SIPPs would be diminished.

Furthermore, FCSA believes that the sheer preponderance of employment businesses would place an undue burden on HMRC and EAS in policing compliance.

Question 30: What safeguards, if any, do you think should be included if this option is taken forward?

Although we are not supportive of Transfer of Debt as per our comments above, it is FCSA's view that any Transfer of Debt should only be applicable if reasonable due diligence is not carried out, and/or the employment business has knowingly or deliberately been complicit with an NCO and this has resulted in tax loss.

Question 31: Would this option change behaviour of businesses using umbrella companies in the way that the government expects?

FCSA's view is that a standalone Transfer of Debt regime could encourage negative behaviours in some umbrella companies and positively encourage NCOs and would further encourage outright criminal activity in the umbrella sector.

Question 32: How likely is it that the temporary labour market would move away from using umbrella companies entirely, were this option taken forward?

Please see our response to question 29 above

Question 33: Are there any further risks that the government should consider before deciding whether to take this option forward?

Please see our response to question 29 above

Chapter 4 – Option 3: Deeming the employment business which supplies the worker to the end client to be the employer for tax purposes where the worker is employed by an umbrella company, moving the responsibility to operate PAYE

The current business model of the temporary labour market has been shaped by many years of practical experience of all parties involved and this option is liable to substantially impede that efficient and working market.

FCSA's general response to this option is that it is an artificial and unnecessary construct which would fundamentally undermine the value of the current well-formed model to the UK economy and negatively affect the government's growth agenda by constricting the flexible and agile access of business to temporary workers.

Question 34: Do you agree that, were this option to be pursued, it would address tax non-compliance in the umbrella company market, and to what extent?

FCSA's disagrees that this option would address tax non-compliance, indeed there is a risk it would **encourage** tax non-compliance as business models will be developed which deprive Treasury of VAT revenue from the current market practice.

Furthermore, where there is an existing risk of tax non-compliance this measure merely moves it further up the chain and likely makes it more difficult to detect as non-compliance, accidental or otherwise, in operating PAYE may be obscured by normal and compliant employment business activities.

Where the payroll function is outsourced the risk of tax non-compliance remains the same and this option provides no benefit to Treasury, HMRC or individual taxpayers.

Question 35: Were this option to be taken forward, which entity in the labour supply chain would be best placed to be the deemed employer, and why?

FCSA does not regard this option as viable and therefore recommends that the responsibilities of employer of record for employment rights **and** tax purposes should remain with the employer of record - the umbrella company.

Question 36: How would businesses manage their obligations as deemed employers following this change? What could the government do to support them with these new obligations?

Shifting the responsibility of the making and remitting of PAYE deductions from the umbrella company to the employment business presents numerous practical issues which government may be called on to assist with:

- Many, if not most, employment businesses do not currently have the capability of operating the common business requirements of a compliant umbrella company
    - An up-to-date knowledge of regulation and law and the ability to quickly and compliantly react to changes
    - The specialist knowledge of payment regimes as applied to umbrella workers
        - The calculations themselves are not as straightforward as payroll for "normal" employees
    - The ability of umbrella companies in providing options and value-added benefits to workers such as
        - Continuity of employment (and its concomitant benefits)
        - Salary sacrifice schemes
        - Employee benefits
- The requirement on employment business to acquire this expertise or administer the outsourcing of these services will add expense – ultimately borne by the individual workers - and potentially exclude smaller employment businesses from competing in this market
- If an umbrella company is required to pre-calculate the **net** amount in order for the employment business to then remit liabilities to HMRC and net pay to the umbrella company for onward distribution to the worker

  OR

- If an employment business is required to pre-calculate the net amount in order to then remit deductions to HMRC and net pay to the umbrella company for onward distribution to the worker; this option adds
    - Potential areas for errors
    - Complexity
    - Delay
    - Cost
    - A requirement for reconciliation which in itself
        - Adds complexity
        - Adds delay
        - Adds cost
        - Adds potential area for dispute

- Responsibility and accountability – who would be held liable for errors in the calculation such as
    - Overpayments
    - Incorrect deductions (e.g. miscalculated apprenticeship levy)
    - Holiday pay
- Which entity would the worker approach for pay-related queries/demands such as
    - Advances against wages
    - Holiday pay calculations
    - Overtime payments
    - Sickness benefots
    - Other statutory benefits (e.g. SMP)
- Which entity would be held responsible for non-payment of wages if the employment business failed to remit funds to the umbrella?

Furthermore, FCSA has very serious concerns that this option would further confuse individual workers – who are their true employers? Who is liable for their employment rights? The company which pays them and with whom they have an employment contract, or the company which is deemed for tax purposes to be their employer? Which entity is responsible for providing employer's liability insurance or professional indemnity insurance?

Question 37: Would businesses stop using umbrella companies as a result of this change? How many businesses would do this and what wider impacts would there be?

FCSA believes that this option will encourage larger employment businesses to provide payroll services themselves, pushing smaller competitors and umbrella companies out of the market which is anti-competitive and moves towards a monopolistic model. Arising from this is:-

- A substantial risk of increased costs levied to individual workers as larger employment business would be encouraged to take one of the following actions:
    - Bring payroll in-house (with the concomitant risks as outlined above)
    - Outsource to or create "captive" umbrella companies, which in turn would lead to
        - Charging workers ever higher fees for payroll processing as well as their mark-up already charged to the end-hirer
- The loss of smaller, or specialist, employment businesses
- The loss of knowledge and expertise which currently resides within umbrella companies
- A diminishment of the checks and balances which naturally arise within the current model

Question 38: How would the temporary labour market respond to this option being taken forward?

Please see our response to question 37.

Question 39: Would this option improve outcomes for workers engaged via umbrella companies?

The employment business industry is already, perhaps unfairly, regarded as suspect and prone to malpractice by many workers and has itself a chequered history which has prompted government legislation in the past.

FCSA strongly believes that this option would be to the substantial detriment of individual workers as:-

- It will lead to much diminished competition resulting in
    - A "captive audience", where the employment business forces workers to use a single supplier for payroll - either themselves or a "captive" umbrella company. This, in turn is likely lead to
        - Higher and increasing margins deducted from assignment rates
- It may foment further, perhaps unwarranted, distrust and suspicion of employment businesses amongst individual workers
- It will reduce or eradicate the choice of umbrella companies currently available to individual workers
- It may hamper workers' ability to contribute to SIPPs
- It likely result in reduced ability for the UK flexible workforce to work as flexibly as it can today due to
    - the administrative burden of a new employment each time they change role
- A reduction of the benefits of continuity of employment afforded to workers under the umbrella model

Question 40: Are there any further risks that the government should consider before deciding whether to take this option forward?

FCSA is of the view that this option creates an artificial circumstance which would raise substantially more problems than it is intended to solve, would negatively skew an existing market and would ultimately be of detriment to workers.

It would impose an unnecessary and potentially costly complexity in the supply chain and will engender confusion and the potential for mismanagement and/or misunderstanding at all levels.

Question 41: Are there any other options that have not been covered in this chapter that you think could reduce non-compliance in the umbrella company market?

> FCSA believes that existing regulations could be better enforced, but our overall conclusion is that government adopt option 1 and that government reflects on the success of initial regulation under option 1 before proceeding with any transfer of debt mechanism.

Chapter 5 – Questions about the VAT flat rate scheme and MUC abuse

Question 42: What more could HMRC do to prevent abuse of the scheme? Are there any specific options that you believe the government should consider?

> In seeking solutions to the problem of mini-umbrella fraud, HMRC need to balance the value which the FRS provides to compliant small business in terms of simplification and administrative savings. Efforts have already been made by the Government to restrict abuse by its introduction of the limited-cost trader legislation. HMRC has the power to de-register businesses and deny input tax relief as affirmed by the Kittel[3] case. It should look to maximise these powerful tools to best advantage and give maximum publicity to the prosecution of serial offenders within the umbrella marketplace. What is a valuable scheme for many small businesses should not be diluted or abolished because of the actions of the unscrupulous.

Question 43: What benefits does the scheme currently provide when compared to other accounting simplification measures (e.g. the annual accounting or cash accounting schemes) and, in particular, what additional (if any) benefits are there to those enabled by Making Tax Digital for VAT?

> Using this simple scheme reduces the likelihood of VAT errors and it is easy for businesses to calculate what percentage of turnover needs to be paid to HMRC. In our view MTD it is not a replacement for FRS which has definable advantages to users.

Questions 44: What effect, if any, has the 'limited cost' test had on your VAT accounting obligations?

> FCSA does not use the FRS, however limited-cost trader entities could be adversely affected if their purchases include little spending on goods and with the restriction of spending on services.

Question 45: Do you have any other thoughts you would like to share on the VAT flat rate scheme?

> None.

[3] VATF53110

Chapter 5 – Questions about the employment allowance option

Question 46: Do stakeholders agree, that if this option were implemented, it would help address abuse of the employment allowance?

FCSA broadly agrees that the requirement for a UK based director to be (and remain) in place to achieve eligibility for the employment allowance would help in addressing abuse.

Question 47: Are there any ways in which mini umbrella companies could sidestep these changes, and if so, how could this proposal be strengthened to reduce or prevent this risk?

The issues raised in paragraph 5.7 are problematic and FCSA recommends that the government requires that in addition to a UK director there must **also** be a UK-based person of significant control and that government should gather and cross-check information such as UTR on these individuals. This latter recommendation might help in addressing the risk of genuine UK-based persons unknowingly being used as "shill" directors by unscrupulous operators.

Other checks that can be used to identify possibly suspect arrangements:-

- Commonality of registered addresses (although the "brass plate" model is accepted and widely used)
- Tens or even hundreds of companies registered with almost identical names (e.g. SmithJones1 Ltd, SmithJones2 Ltd, SmithJones3 Ltd and so on)
- Individuals with many 100s of directorships (although some will be for genuine business purposes such as company formation agents, secretarial services)

Furthermore – and perhaps outside the scope of this consultation – we would recommend reform of the requirements for the formation of limited companies in the UK to include AML, Right to Work and ID checks on appointed officers and persons of significant control.

Please see our further recommendations with respect to anti corporate cloning measures.

Question 48: For limited companies, how would your business be impacted if eligibility requirements were brought in that required your business to have at least one UK director in order to claim or continue claiming the employment allowance?

FCSA's business would not be affected and those of our members would be protected.

Question 49: Would there be any barriers to appointing a UK director for those legitimate businesses who do not currently have one in place but who are eligible to claim the employment allowance?

FCSA's view is that businesses which operate compliantly and are eligible for the employment allowance would find this requirement to be a low barrier. Those which do not are clearly a legitimate target for this measure.

Question 50: Are there any wider benefits, impacts or risks involved with this proposal that have not been identified above?

> MUCs are often set up and closed quickly. For them to be "effective" they will sometimes rely on employment businesses to use them for a substantial number of candidates and therefore offer incentives. In some cases it will be clear to those employment businesses what is going on, however the practice persists.
>
> Having UK-based directors in post may not necessarily ensure tax recovery from that person if they are not also a person exercising significant control of the company and with material means or assets to meet outstanding employment tax liabilities.

Question 51: Do stakeholders consider it would be beneficial to amend payroll software to make explicit that a UK director is required at the point of claiming the employment allowance?

> FCSA has no comment on this question, however we would point out that ultimately vendors will often configure their software to meet their paying clients demands – mandating software configuration may not be broadly accepted or effective.

Question 52: Aside from the proposed option and wider options discussed throughout this consultation, what more could HMRC do to reduce the abuse of employment allowance?

> HMRC may wish to consider making EA claims retrospective and dependent upon filing of business accounts etc. Credit could be given against employment tax liabilities of the following tax year, or where there are no longer any employment tax liabilities credit could be given against Corporation Tax.

The UK Umbrella Market

The UK umbrella market began in earnest circa 20 years ago as a result of legislative changes beginning with the introduction of intermediaries' legislation, commonly known as IR35. The sector has grown for a variety of reasons but most notably the Managed Service Company legislation introduced in 2007 and, more recently, off-payroll reforms in the public sector closely followed by application of the reforms to the private sector.

In 2015 there were around 400,000 workers engaged through umbrella employment with circa 250 umbrella companies in operation. This accounted for over £11 billion being collected in taxes on behalf of HM Treasury.

By 2023 this has grown to between 600,000 and 800,000 umbrella employees operating through around 800 umbrella companies. FCSA estimates that these employees contribute over £23 billion to HM Treasury.

This growth must also be seen in the light of an ever-increasing corporate pattern to adopt outsourced skills to enable end hirers to remain flexible, competitive and to operate with decreasing fixed costs. This contributes greatly in economic terms to both the UK's competitive ability compared with other states and to the government's growth agenda.

As a result, there is little doubt that there will be a growing demand from both UK businesses and individual workers to operate in an agile outsourced environment and FCSA is committed to promoting and encouraging compliance, transparency, and integrity in the entire supply chain.

The Compliant Umbrella Model

A compliant umbrella company is a company that employs an outsourced worker (an agency worker or contractor) allowing that worker to work across multiple contracts and sectors whilst retaining full employment rights under an overarching contract of employment.

Umbrella companies do not find work for the workers they employ but instead offer the services of that worker via an employment business which finds the work.

The advantages of umbrella employment include:

- Ensuring full employment rights as set out by UK legislation
- This includes holiday pay and statutory sickness/maternity/paternity and adoption pay.
- Access to a company/auto-enrol pension scheme
- The workers PAYE deductions (tax and NI) are correctly calculated by the umbrella company and remitted to HMRC
- The ability to build a continuous record of employment thus giving the worker greater access to mortgages and other financial products.
- Provision of relevant insurance covers such as public, employers liability and professional indemnity.
- The ability to move across a number of contracts without any of the accompanying administrative burden. This is taken care of by the umbrella employer.

A compliant umbrella firm will also to provide its employees with a properly informative payslip and/or reconciliation statement[4] and under FCSA compliance codes to show all deductions out of the assignment rate paid by the employment agency. This should include (as a minimum):

- Assignment rate – the fee paid by the employment business to the umbrella company (an uplifted rate to allow for employment costs, and to ensure parity under AWR)
- Umbrella margin – the amount of money retained from the assignment fee to cover both the costs and profit of the umbrella company
- Employment costs
    - Employer's national insurance (ErNICs)
    - Apprenticeship Levy (where applicable)
    - Employer's pension contribution
    - Accrual of holiday pay
- Other agreed deductions from the assignment rate (e.g. salary sacrifice, SIPP contributions, expenses where permitted)

Compliant umbrella companies will include these items on the payslip and/or reconciliation statement to transparently show the contractor employee what employment costs are deducted before the gross rate of pay is arrived at.

- Gross rate of pay – the derived amount when the deductions above are made
- Employee pension contributions
- Holiday pay (if advanced)
- Income tax – this is the correctly calculated amount the umbrella employee pays from their gross rate of pay

[4] See Appendix A for an example of a fully FCSA compliant payslip and reconciliation statement.

- Employee's National Insurance (EeNICs) – all employees, including umbrella employees, must pay National insurance.
- Other post-PAYE deductions such as
    - Student loan repayments
    - Court ordered deductions e.g. child support
    - Voluntary subscriptions for services

FCSA has a rigorous set of compliance standards to ensure that the contractor and supply chain that they are dealing with are the most independently tested umbrella companies and directors in the industry.

The Benefits of Compliant Umbrellas

Benefits to workers

- HR Provision
- Reduction of administrative burden
- One employer for multiple concurrent or consecutive assignments
- Simple management of tax affairs
- Access to pensions
- Provision of holiday pay
- Transparency of pay (illustrations and payslip reconciliation)[5]
- NMW guarantee even where an employment business does not pay
- Managing debt collection as necessary (usually from agencies)
- Continuous employment over number of assignments
- Accuracy of pay (reduced likelihood of errors due to expertise)
- Statutory protections
- Provision of necessary insurances
- Provision of optional benefits or employee benefit programmes

Benefits to Recruitment/Employment Agencies

- Payroll expertise agencies are not payroll experts (umbrellas are),
- Core business activities (placing talent, not payrolling)
- One invoice v multiple returns,
- Guidance and expertise on policy changes
    i. Umbrellas are often the first to react to and advise on changes e.g. NMW, NI changes, apprenticeship levy, furlough, HSC Levy

Benefits to Government

- Collection of Income Tax and National Insurance
    - FCSA members alone collect c£6bn in taxes and NICs which are timeously remitted to HMRC
- Ease of enforcement
    - Umbrellas have a large number of employees
        - FCSA members alone employ c210,000 workers
        - Providing RTI data to HMRC
    - HMRC has over time carried out compliance audits on most FCSA Members to ensure there is no tax leakage
- Simpler classification of workers
- Efficiency of process for HMRC
    - Umbrellas hold required information in easily accessible formats
- Specialist professional operation of payroll reduces likelihood of errors
- A compliant umbrella sector allows effective and rapid deployment of policy
    - e.g. introduction of Travel & Subsistence rules in 2008
- Compliant umbrellas ensure compliance with tax and employment legislation
    - Easing enforcement burden and reducing costs

[5] Illustrations of a compliant payslip and a compliant reconciliation statement are at Appendix A

Additional benefits to government in relation to FCSA members

- A communication channel to the largest group of operators employing c25% of the entire UK temporary workforce
- The ability to address compliance issues by
    - Highlighting current hot-spots
    - The invitation to comment on and contribute to FCSA's Codes of Compliance at review stage

FCSA Accreditation

1. Due diligence process

Every company within FCSA membership is subject to detailed due diligence checks which include an independent data company performing in depth credit and financial checks on each company and its directors, social media searches, Companies House checks and similar checks on any companies that have common directors. Compliance is reviewed annually and spot-checks are carried out throughout the year.

Ownership and director appointment changes must be notified to FCSA, and we also use external monitoring services to track changes.

1. FCSA Codes of Compliance

The umbrella sector currently lacks both legal definition and regulation which this consultation serves to address and so in this absence FCSA has developed the most detailed test of compliance in the industry.

For FCSA umbrella companies this involves sets of detailed and publicly published compliance codes that cover every aspect of tax and employment legislation which FCSA companies are tested against. These tests are carried out during the initial onboarding period as an FCSA member and, importantly, annually thereafter, with spot checks and payslip sampling being carried out regularly throughout the membership year.

FCSA's compliance codes are detailed within the Mandatory Codes[6] and various codes covering permitted engagement types[7]. Some engagement types are not currently permitted by FCSA as, whilst they may be lawful, they are, in practice, too open to abuse or too difficult to operate correctly (e.g., joint employment) These codes are revised on a regular basis to ensure full compliance with both UK laws and regulations and industry best practice.

FCSA does not carry out assessments on these standards in-house, but instead engages independent tax specialists and employment lawyers who have vast experience within the contingent worker sector.

In addition, FCSA Codes are also used as a base for constant mystery shopping throughout the year.

[6] FCSA's Mandatory Codes are available via this link

[7] FCSA's Umbrella Employment Codes are available via this link.

2. FCSA Charter

As well as being continually tested against the FCSA Codes of Compliance, all members are required to abide by and promote the contents of the FCSA Charter[8]. It is this independent rigour and testing that gives FCSA confidence to play a pivotal role in safeguarding the long-term future of the freelance sector for the benefit of the UK economy by:

- Setting and raising standards for service providers who support contingent workers
- Promoting compliance in order to protect contingent workers
- Influencing and lobbying to ensure that members' needs are represented to policymakers
- Collaborating through partnerships with like-minded organisations

Against these definitions and standards, FCSA has seen substantial growth within the umbrella sector.

Targeting problems effectively

FCSA emphasises again that it is **not** the sector as a whole which requires regulation, indeed we believe that the vast majority of providers intend and strive to be wholly compliant.

However, FCSA acknowledges that there are bad actors in the sector. These are both individuals and organisations, sometimes large and complex, and are often based offshore or in tax-haven territories. These bad actors are responsible for increases in the tax gap and are at the base of problems in the sector. FCSA believes it is they who should be the focus of any proposed legislation or regulation.

Individual workers are subject to fraudulent and misleading offers designed to lure them on to the books of these operators who then fail to properly take account of UK tax or employment laws and regulations or pretend to do so and then fail to remit deductions to HMRC, instead pocketing the monies for themselves. It is known these schemes have sometimes even proffered a DOTAS number as evidence of "HMRC compliance"[9]

FCSA believes that a substantial increase in economic turnover in the sector coupled with an underinvestment in policing and regulating it has caused a concerning increase in unlawful activity. This has taken several forms and is documented on the FCSA website

As a result, it is important that protective and preventative measures are brought into place that addresses this unlawful behaviour on behalf of workers and the compliant supply chain.

The perception that bad actors are unlikely to be investigated if or even discovered by the authorities, encourages well-organised criminal elements to be attracted to this type of activity.

This has led to an increase in negative publicity for the umbrella market as a whole, whereas in fact, there are many highly ethical and compliant operators who have a passion for delivering a fair and transparent service to all. FCSA and others represent this part of the market.

[8] FCSA's Charter is available via this link

[9] Sir Amyas Morse - Independent Loan Charge Review report, December 2019, Para 3.2

FCSA has noted an element of 'group thinking' being introduced at press, political and market levels which encourages the public and supply chains to believe, incorrectly, that the whole umbrella market is corrupt. It is therefore vital to recognise and encourage the essential role that compliant umbrella firms make in ensuring that workers are protected from exploitation and also remain compliant in their tax affairs.

FCSA is aware that there is a very small number of those who call for umbrella firms to be banned, and we reject this as a viable or desirable option especially in the light of the many positive benefits compliant umbrellas bring to the market as explained above.

Furthermore, we would point out that if umbrellas were to be banned, the market itself will simply design a new model. It is broadly accepted that tax regulations have driven an expansion of this market and it equally accepted that there is a commercial need for specialist payment service providers. A simple ban would not obviate this need.

Current progress in protecting the supply chain

FCSA exists to promote compliant and ethical standards within the temporary labour market. However, it is not a regulator, legislator, or policing authority.

FCSA has campaigned for several years for greater Government protection of the sector, and it recognises major progress in recent months, namely:

- The announcement of a Single Enforcement Body (SEB) of key departments joining forces to further protect workers. Although currently placed on hold by government, this body will cover enforcement of agency workers' rights, acting on exploitation, trafficking and modern slavery, poor working conditions, and non-payment of the National Minimum Wage

- FCSA has been encouraged to see that HMRC has created a greater focus on providing guidance for contingent workers, especially those who work within the umbrella sector. FCSA and its members will always strive to communicate this so that as large an audience as possible can be provided with information that will encourage and assist workers in making compliant choices

- We are further encouraged that HMRC now publishes details of fraudulent or unlawful schemes and their operators, however we would recommend that the limit on such publication be extend from one year to five, and rigorous enforcement activity be taken against the perpetrators.

Further recommendations

We have responded directly to the options contained in the consultation document with key recommendations, however there are a number of other measures which may further protect the sector and those who work within it.

1. Protection of both workers and ethical service providers

Whilst government has not announced further reviews of employment law but is now consulting on possible regulation of the sector, FCSA would encourage government that any proposed regulation should be "light touch" to ensure that contingent workers are well-informed and have the best access to compliant providers. We further recommend compliant providers are themselves protected by regulation, speedy clone strike-off processes, cyber closedowns &etc, from criminal or unlawful activities targeting the sector.

2. Clarity of intent around required remuneration

Exploitation of holiday pay is a matter of great concern to FCSA and as a result the FCSA Umbrella Codes of Compliance referenced within this response ensure complete transparency for the contractor in terms of entitlement and full reimbursement by means of either paid time off or holiday pay paid in advance. The Codes by which FCSA members operate to also ensure that holiday is paid on gross income which represents the employee's full legal entitlement.

FCSA would encourage Government to explore how these standards can be further enshrined in law to fully protect the worker and to be explicit in terms of responsibility as to who is tasked with enforcing current and future holiday pay legislation.

3. Clarity as to the establishment, role and powers of the SEB

FCSA welcomed the announcement of the SEB, albeit this is now on hold, but it is clear that unlawful and ever more sophisticated exploitative activity is increasing and so FCSA would welcome a further government announcement that clearly indicates when the SEB will come into existence and what further funding it will be given in order to take action against these activities and the perpetrators.

4. Framing any legislation to avoid excluding other models

Government should avoid regulation of a narrowly defined umbrella model. In the view of FCSA this excludes other forms of service provision to outsourced workers and indeed, the marketplace is continually evolving into other forms of engagement methods.

5. Clarity on the priority of enforcement by HMRC

FCSA believe that HMRC is juxtaposed between prosecuting providers of disguised remuneration schemes and maximizing tax revenue. Historically this has resulted in compromise agreements where the directors responsible for these schemes have been subject to minimal intervention whilst the duped or misled individuals have been pursued for the resulting unpaid taxes.

FCSA recommends a different approach where unlawful providers should be the primary focus and that those who promote such schemes should be held wholly liable for any unpaid taxes as well as having more appropriate sanctions, including criminal proceedings, applied to them.

6. Formation of a task force to pursue cyber attackers and cloning activity

The emergence of cloning and cyber-attack activity has become a major concern to FCSA and its members. We cannot underestimate the threat this activity poses to the workers, the sector, and to tax and NICs income properly due to HMRC.

FCSA recommends that a joint task group is formed as soon as is practicable formed of EAS, Companies House, HMRC, NCA, National Cyber Security Centre, Nominet and FCSA (which now has extensive data and experience in this area) to begin to create unified rapid response protocols to deal with what is a serious threat to both service providers and individual workers.

This is possibly one of the biggest emerging threats to the sector, being exploitative of workers, damaging to UK businesses and depriving Government of legitimate tax revenues.

7. Investment in cyber expertise

It is vital that this body and HMRC also receives adequate funding to retain and deploy cyber expertise, as this is an arena in which criminal activity is expanding. FCSA remains ready to fully support the SEB and HMRC with its market expertise and intelligence[10].

[10] FCSA holds information on this type of attack. This is not disclosed in this submission due to commercial confidentiality and/or pending litigation and/or pending criminal enquiries

Appendices

Appendix A – Example of a compliant payslip and reconciliation statement.

[redacted]

Exact Payroll Limited | Tax Period: 12 - Week Ending: 18.06.2023

Comments

Employee Ref.	Employee Name	Process Date	National Insurance Number
25768	[redacted]	23.06.2023	[redacted]

Payments	Units	Rate	Amount
Basic Pay	66.00	10.42	687.72
Holiday Pay	1.00	215.66	215.66
Additional Pay	1.00	1099.02	1099.02

Deductions	Amount
Tax	343.60
National Insurance	107.71
Pension Contributions	42.35

[redacted]

This Period	
Gross Pay	1960.05
Earnings For NI	2002.40
Total Deductions	493.66
Ees NI	107.71
Tax Code	1257L
Payment Method	Bacs

Gross For Tax TD	8507.71
Tax Paid TD	1120.80
NI Earnings TD	8507.71
Ees NI TD	602.71

Net Pay 1508.74

FCSA

[redacted]

Reconciliation Statement

Employee No	Employee Name	Process Date	National Insurance Number
25768	[redacted]	23.06.2023	[redacted]

Company	Start Dat	End Date
[redacted]	12/06/23	18/06/23

Company Receipts:

	Units	Rate	(£)	
Basic Pay	66.00	35.00	2310.00	
Total			**2310.00**	**(A)**

Less: Company Costs:

	(£)		
Margin	20.00		
Expenses	0.00		
Employer's NIC	252.18		
Pension Costs	25.41		
Holiday provision	215.66		
Apprentice Levy	10.01		
Total		**523.26**	**(B)**

Receipts less Costs:	**1786.74**	**(A) - (B)**
Gross For Tax	**1786.74**	

Holiday Pay Entitlement

	(£)
Brought Forward	0.00
Accrued this period	215.66
Taken this period	215.66
Carried Forward	0.00

Appendix B - Example of overstated take home pay marketing

Umbrella-Paye (https://umbrella-paye.com)

Appendix C – Example of non-compliant payslip

This payslip shows signs of a loan arrangement which is potentially unlawful.

Payslip - [redacted] Samantha

Pay Date	Frequency	Tax Code	NI Table	NI Number	Department	Employee	Method
30/06/2023	Week	1257L	A	[redacted]		[redacted]	Bank

Income						Deductions					
Description	Rate	Units	Amount	Tax	NI	Description	Rate	Units	Amount	Tax	NI
Basic Salary			364.70	Y	Y	National Insurance			20.01		
Holiday Pay			44.02	Y	Y	PAYE			33.40		

Total Income	**408.72**	**Total Deductions**	**53.41**
		Net Pay	**355.31**
		Net Pay (Period)	**355.31**

	Taxable Pay	Tax	Niable Pay	NI	ER NI
Current Week	408.72	33.40	408.72	20.01	32.25

Bank: [redacted] **Sort Code:** [redacted] **Account Number:** [redacted]