

## 10 ways HMRC can win back trust in CEST



HMRC has little time left to meet its promise to fix its Check Employment Status for Tax (CEST) tool and make it a viable compliance solution for the private sector.

Industry has roundly rejected CEST in its current format due to the tool's many fundamental flaws and its contentious history, rightly dismissing it as unfit-for-purpose. Use of the tool in assessing status currently fails to meet the new Off-Payroll legislative draft requirements. As a result, CEST looks far from being the straightforward compliance solution that HMRC hoped for.

There is a clear consensus when it comes to CEST. Following a Freedom of Information (FOI) request from ContractorCalculator in March 2019, [HMRC disclosed user feedback for the tool](#) that had been gathered since its launch. Overall, 50% of respondents described CEST as 'bad' or 'very bad', while only 29% shared any form of positive feedback.

### Industry criticism places CEST flaws under the spotlight

Industry leading bodies have been similarly critical in recent Off-Payroll consultation responses. Acknowledging [HMRC's poor decade long run in IR35 tribunal cases](#), the [Recruitment and Employment Confederation](#) noted: "Having lost those cases, the rationale for CEST must be wrong, so how can parties be confident in CEST?"

Ernst & Young commented: "We consider that relying on the CEST tool, as it currently stands, cannot be justified under law, based on a variety of issues that have not been resolved yet."

The Chartered Institute of Taxation (CIOT), in [their response](#), noted: "Modifying and developing CEST so that it is better able to address a wider breadth of scenarios will be an important precursor to the implementation of new off-payroll working rules in April 2020," adding: "In our view, an improved CEST tool needs to be available by October 2019 at the latest."

Unfortunately, this doesn't look to be a realistic prospect, as the Institute of Chartered Accountants in England and Wales (ICAEW), in [their response](#), highlighted: "We understand that the updated version of the tool is due to be released in March 2020. This is too close to the start date and does not give businesses adequate time to review the employment status of the individuals they engage."

### The problems with CEST

The overwhelmingly negative sentiment stems from CEST's widely acknowledged shortcomings. But, despite pledging to fix the tool in preparation for the private sector, HMRC has failed to remedy these issues, and has misled the public in the process.

As recently as March 2019, [HMRC revealed to the Public Accounts Committee \(PAC\)](#) that CEST had undergone no notable development,

commenting: "There have been no significant changes to the CEST rules in this period." In doing so, the taxman acknowledged that prior claims that CEST had been continually updated based on user feedback were largely untrue.

As a result, the same issues with CEST remain:

- It doesn't align with full case law, omitting key areas while making decisions based on isolated areas of law
- It fails to consider mutuality of obligation (MOO), a key test of employment
- It makes assessments based on answers provided to a mere 16 questions
- It wasn't assessed under Government Digital Services (GDS) standards
- Industry stakeholders and employment status specialists have slammed the tool
- It does not provide reasons for the determination - required by the Status Determination Statement (SDS) provision
- It fails to meet the standard for reasonable care - a legislative requirement

HMRC also has no demonstrable evidence that CEST was tested, as it recently acknowledged to the PAC, stating: "We have not retained the scripts or other material from testing, including workshop attendee lists as this was not a project requirement."

Meanwhile, the taxman's assertions of CEST's accuracy have been disproven by ContractorCalculator, which re-tested the tool against the 24 employment status cases HMRC claimed were used to ascertain its accuracy. The re-testing found CEST to return a flawed outcome 42% of the time, while a testing of CEST against the recent Lorraine Kelly case also found the tool to return the wrong outcome.

With all of CEST's flaws, the taxman clearly has a steep uphill battle to make the necessary fixes and also to prove that they have resolved all of the known issues. So, how can HMRC instil public trust in the next version of CEST? ContractorCalculator asked IR35 experts and contractors what efforts they would like to see HMRC make and has compiled a number of recommendations.

## How can HMRC amend the CEST assessment?

### 1. Include all employment case law factors holistically:

CEST's failure to consider all the facts when determining the IR35 status of an engagement is an obvious issue and key point of contention. Currently, due to CEST's process of assessing employment status factors in isolation, a user could receive a status determination having answered just a handful of questions on substitution.

### 2. Expand questions to match actual HMRC enquiries

Many have questioned why CEST doesn't apply the same level of rigour as HMRC does when conducting an IR35 enquiry. An HMRC inspector will ask in excess of 100 questions when investigating an engagement for IR35. Logically, the same questions should be posed by CEST, which currently only asks a meagre 16 questions. More questions across all relevant areas of case law will ensure that the tool meets the legislative standard for reasonable care.

### 3. Include all parties in the assessment

Completing CEST should require input from all parties to the contract, to ensure that the correct answers are provided. For example, the contractor will be the only person qualified to answer questions pertaining to their company's other engagements, details of which they may wish to protect from the client.

## How can HMRC demonstrate CEST's accuracy and suitability?

### 4. Test CEST against historical IR35 tribunal cases and publish documentation:

Further contention with CEST stems from the taxman's failure to document or publish any evidence of testing. For a tool that is used to determine how tens of thousands of individuals are taxed, this seems like a basic and mandatory requirement. A useful litmus test would be to test the tool against the existing IR35 tribunal cases and fully publish the detailed test data and results, providing the public with the necessary assurances over the tool's accuracy.

### 5. Demonstrate adherence with Government Digital Services standards:

Adherence with GDS standards would also seem like a necessary requirement, particularly considering that GDS standards are used “to check whether a service is good enough for public use”, according to the Government website.

## **6. Verification from an independent body of experts:**

The recent acknowledgement by HMRC second permanent secretary Jim Harra that the [‘experts’ involved in CEST’s development were HMRC staff](#) has reaffirmed the need for independent verification of CEST. Contractors have called for input from recognised industry bodies, barristers and specialist law firms.

## **How can HMRC instil confidence in CEST status determinations?**

### **7. Require HMRC to justify challenges to CEST:**

Further mistrust in CEST has resulted from the taxman’s apparent willingness to challenge status determinations issued by the tool. Recently, [HMRC branded the tool “irrelevant”](#) in an attempt to have evidence from using CEST omitted from consideration in an ongoing IR35 tribunal case. HMRC’s pledge to stand by CEST’s decisions also includes the caveat that it will challenge an assessment where it believes the information provided isn’t accurate. To prevent HMRC from abusing this caveat, the taxman should be required to provide detailed evidence demonstrating that a challenge is warranted.

### **8. Oblige HMRC in statute to stand by CEST’s determinations:**

Providing the necessary steps have been taken to fix CEST, making it a statutory obligation for HMRC to stand by its results would negate concerns regarding tax liability risk amongst users, who could use evidence of an assessment in court, providing the answers given are accurate.

### **9. CEST needs to provide reasons for its determinations**

Currently, CEST provides no detailed reasons substantiating its status determinations. This does not satisfy the draft legislation, which requires that clients provide a Status Determination Statement (SDS) at the beginning of each engagement, detailing the reasons for the contractor’s deemed IR35 status. Consequently, use of CEST in its current form won’t be deemed compliant with the Off-Payroll rules.

### **10. Save CEST decisions online for future recall**

CEST does not currently save the status determinations at all, let alone against a taxpayers record. This is an essential requirement to help ensure traceability of decisions and ease the administration burden for firms who have to conduct assessments.

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