



Department
for Business
Innovation & Skills

**Transfer of Undertakings
(Protection of Employment)
Regulations 2006**

**Consultation on Proposed
Changes to the Regulations**

JANUARY 2013

Contents

Contents	2
Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes	5
1. Foreword from the Minister.....	6
2. Executive Summary.....	7
Service provision changes.....	7
Employee Liability Information.....	7
Restrictions on changes to terms and conditions and protection against dismissal	7
Economic, Technical or Organisational reasons for dismissal (which can allow employers to dismiss, or agree changes to contracts).....	7
Duty to inform and consult representatives	7
Micro businesses	8
Background.....	8
Northern Ireland	8
3. How to respond.....	10
4. Confidentiality & Data Protection	11
5. Help with queries	12
6. Introduction	13
Simplifying Employment Law	13
TUPE – An Overview.....	13
TUPE – The Legislative Framework	14
History.....	15
The Case for Change	15
Responses to the Government's Call for Evidence	16
Reforming TUPE.....	18
Insolvency.....	19

Experience in other EU Member States	19
Agency Workers	19
Awareness of liabilities	20
Joint and Several Liability for Pre-Transfer Obligations.....	20
Application of TUPE to different managerial levels.....	21
7. Proposals.....	22
Service provision changes.....	22
Employee Liability Information.....	22
Restriction on changes to terms and conditions and protection against dismissal.....	22
Economic, Technical or Organisational reasons for dismissal (which can allow employers to dismiss, or agree changes to contracts).....	22
Duty to inform and consult representatives	23
Micro businesses	23
Service provision changes.....	23
Alternatives to repealing the service provision changes.....	25
Timing of changes	26
The provision of Employee Liability Information	27
Restrictions on changes to terms and conditions	30
TUPE and Collective Agreements	33
Protection against dismissal (regulation 7)	34
Regulation 4(9) & (10): a substantial change in working conditions to the material detriment of an employee	35
Economic, Technical or Organisational Reason Entailing Changes in the Workforce ('ETO's')	37
Dismissals arising from a change of location.....	37
Dismissals based on future conduct of the transferee	39
TUPE and other areas of employment law	41
Collective redundancy rules and interaction with TUPE information and consultation requirements (regulation 13).....	41

Duty to inform and consult employee representatives	43
Consultation requirements for micro businesses.....	44
Better online guidance	45
Pensions	45
Exemption for micro businesses.....	46
Transitional arrangements and coming into force of amendments.....	46
Other issues.....	47
Evidence	47
8. Consultation questions	48
9. What happens next?.....	54
Annex A: Consultation principles	55
Annex B: List of Individuals/Organisations consulted	56
Annex C: Northern Ireland Legislation.....	63
Annex D: Response form	65

Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes

The Government has reviewed the current Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE or 'the regulations') as part of the wider review of employment law. The review has also been conducted under the Red Tape Challenge. Some businesses believe the regulations are 'gold-plated' and overly bureaucratic. The Government has examined these concerns and the effectiveness of the regulations to see whether they should be changed.

Following a Call for Evidence which concluded in 2012, the Government is now proposing changes to TUPE which we believe will improve and simplify the regulations for all parties involved. This consultation is seeking views on these changes.

The Government has prepared an Impact Assessment, and an Equalities Impact Assessment covering the proposals: <https://www.gov.uk/government/publications>

Employment law is a devolved matter in Northern Ireland. The regulations apply on a UK-wide basis, with the exception of the service provision change elements, which apply to Great Britain only. Separate Service Provision Change regulations apply in Northern Ireland¹. The responses to this consultation will help to inform the TUPE policy position in Northern Ireland. However, the proposals within the consultation do not represent the settled view of the Northern Ireland Executive or Assembly.

Issued: **17 January 2013**
Respond by: **11 April 2013**

Enquiries to:

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3rd Floor Abbey 1
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 1850
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This consultation is relevant to employers and employees; voluntary sector; and trade unions and civil society.

¹ The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006

1. Foreword from the Minister

- 1.1 I am very pleased to publish this consultation on the Government's proposals to reform TUPE.
- 1.2 The Coalition Agreement commitment to review employment laws to ensure they provide the flexibility that employers need to grow and compete effectively is well underway. We are on course to deliver some important changes to enable employers and employees to resolve workplace disputes earlier, and facilitate ending employment relationships in a mutually beneficial way. I have also recently announced some significant proposals on Flexible Parental leave.
- 1.3 In September 2012, I published the Government response to our call for evidence on TUPE. I was very grateful for the many responses we received to the call for evidence.
- 1.4 We are now issuing a consultation on the Government's proposals to reform TUPE. We believe that our proposed changes will improve and simplify the regulations for all parties involved. They will help deliver growth for business, while providing continued protection for employees involved in business transfers.
- 1.5 I would like to encourage you to respond to this consultation. Your responses will be very important to us as we develop the proposals further.



A handwritten signature in blue ink that reads "Jo Swinson".

Jo Swinson MP, Parliamentary Under Secretary of State for Employment, Department for Business, Innovation and Skills

2. Executive Summary

2.1 The Government proposes to simplify the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') so that business transfers are easier for all concerned. This consultation seeks views on the following proposals:

Service provision changes

- Repealing the provision which includes most service provision changes within the scope of the regulations;

Employee Liability Information

- Repealing the specific requirements regarding the notification of Employee Liability Information, but making it clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties regarding information and consultation;

Restrictions on changes to terms and conditions and protection against dismissal

- Changing the wording of the provisions restricting changes to contracts so that they more closely reflect the wording of the Acquired Rights Directive and case law of the Court of Justice of the EU;
- Changing the wording of the provisions giving protection against dismissal so that they more closely reflect the wording of the Directive and the case law of the Court of Justice of the EU;
- Changing the wording of the provisions concerning a substantial change in working conditions to the material detriment of the employee, to reflect more closely the wording of the Directive;

Economic, Technical or Organisational reasons for dismissal (which can allow employers to dismiss, or agree changes to contracts)

- Amending the meaning of 'entailing changes in the workforce' so that it can cover changes in the location of the workforce. This would align the meaning of 'economic, technical or organisational reason entailing changes in the workforce' with the definition of redundancy under the Employment Rights Act 1996, so that some dismissals involving a place of work redundancy are capable of being fair for unfair dismissal purposes;

Duty to inform and consult representatives

- An amendment to ensure consultations by the transferee on collective redundancies with staff who are due to transfer count for the purpose of the

obligation to consult on collective redundancies, thus easing the burdens on business;

Micro businesses

- Allowing micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives;
- Including micro businesses within the scope of the proposed amendments.

2.2 We also ask about:

- Whether it would be desirable to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer; and
- Whether a transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals.

2.3 We also provide better guidance on a range of issues

Background

- 2.4 The Government's call for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE or 'the regulations') began on 23 November 2011 and ended on 31 January 2012.
- 2.5 The Department for Employment and Learning carried out the call for evidence in Northern Ireland, where employment law is a devolved matter. See Annex C for additional information on the relevant Northern Ireland legislation. For the purposes of this document all references to TUPE 2006 will also refer to the separate service provision regulations in Northern Ireland. It should be noted that whilst we are seeking views on the proposals across the UK, including Northern Ireland, the proposals do not represent the settled view of the Northern Ireland Executive or Assembly.

- 2.6 The Government's response to the call for evidence, reflecting the responses from business, business organisations, trade unions and others was published on 14 September 2012 and was subsequently published by the Department for Employment and Learning in Northern Ireland on 8 October 2012. The Government's response is at:

<https://www.gov.uk/government/publications/effectiveness-of-transfer-of-undertakings-protection-of-employment-regulations-2006-government-response-to-call-for-evidence>

Northern Ireland

- 2.7 This UK-wide consultation will seek views on the proposals detailed in this consultation document, including from stakeholders in Northern Ireland. However whilst they represent the position of the UK Government as it relates to employment law in Great Britain, the Northern Ireland Executive and Assembly have yet to finalise a position. Therefore the responses to the proposals will help to inform TUPE policy in Northern Ireland, but do not represent the established policy position of the Northern Ireland Executive or Assembly.

-
- 2.8 Stakeholders should note that, whilst the non-service provision change elements of the TUPE regulations apply on a UK-wide basis, the proposed changes detailed in this consultation may not apply to Northern Ireland.

3. How to respond

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

For your ease, you can reply to this Consultation online at www.surveymonkey.com/s/7GSJ7ST

A copy of the Consultation Response form is enclosed at Annex D. If you decide to respond this way, the form can be submitted by letter, fax or email to:

Ian Young
Labour Market Directorate
Department for Business, Innovation and Skills
3rd Floor Abbey 1
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 1850
Fax: 020 7215 6414
Email: tupe.regulations@bis.gsi.gov.uk

Responses from Northern Ireland stakeholders should be submitted to:

Andrew Dawson
Employment Relations Policy and Legislation Branch
Department for Employment and Learning
Adelaide House
39-49 Adelaide Street
BELFAST
BT2 8FD

Tel: 028 9025 7545
Fax: 028 9025 7555
Email: employment.rights@delni.gov.uk

A list of those organisations and individuals consulted is in Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

4. Confidentiality & Data Protection

- 4.1 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 4.2 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

5. Help with queries

Questions, comments or complaints about the policy issues raised in the document can be addressed to:

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Labour Market Directorate
Department for Business, Innovation and Skills
3rd Floor Abbey 1
1 Victoria Street
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Tel: 020 7215 1850
Fax: 020 7215 6414
Email: tupe.regulations@bis.gsi.gov.uk

A copy of the Consultation Principles is in Annex A.

6. Introduction

Simplifying Employment Law

- 6.1 In May 2010, the Government committed to review employment laws for "employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive". An Employment Law Review has been underway since, with a separate review taking place in Northern Ireland.
- 6.2 The Government is currently implementing a series of reforms to improve the current employment law framework. We have already increased the qualifying period for bringing an unfair dismissal claim (from one to two years) and are bringing forward measures in the Enterprise and Regulatory Reform Bill to encourage employers and employees to resolve disputes before they get to a tribunal. We are also making it easier for employers or employees to offer settlement as a means of ending the employment relationship when things are not working out. In addition, we are considering changes to the employment tribunals system so that those cases that do need to proceed to tribunal are processed efficiently and smoothly.
- 6.3 As part of the Employment Law Review, we also committed to consider the rules around TUPE, and this consultation document sets out a series of proposals on potential areas for change.

TUPE – An Overview

- 6.4 TUPE's purpose is to protect employees' employment rights when the business or undertaking for which they work transfers to a new employer. The legislation sets out how the employees and the liabilities connected with them will move from one employer to the other.
- 6.5 TUPE may apply in a number of circumstances, for example when a business is sold, when a service is outsourced for the first time, when the service changes hands again (a 'second generation' transfer) and when the service is bought back in house ('in sourced'). In these situations, where TUPE applies, the legislation means employees' employment and their rights associated with that employment legally transfer from their old employer to the new one.
- 6.6 TUPE is generally considered complex and its requirements can come as an unwelcome surprise to the unwary employer. If TUPE applies, the legislation means that the old employer (the transferor) has a number of duties to comply with, including the need to inform and consult staff about the transfer and any redundancy measures it gives rise to, and giving information to the new employer about employee liabilities. Some businesses believe that the information and consultation provisions are particularly burdensome if small firms or small groupings of employees are involved.
- 6.7 Business has identified a number of practical difficulties regarding the regulations. These include:
 - It can be very hard when outsourcing a service for a transferee to introduce efficiencies and operate more cheaply than the transferor because the regulations

act as a barrier to reducing the size of the workforce or the transferred workers' pay levels.

- It can be difficult to harmonise the terms and conditions of the newly acquired workforce with the transferee's existing workforce.
- Whilst employers can dismiss employees and they can vary contracts in a transfer situation where there is an Economic, Technical or Organisational reason entailing changes in the workforce (ETO), the rules around this are unclear and in practice, court decisions have given the term a narrow meaning. Therefore employers have been reluctant to use the provision in case of challenge in an employment tribunal.

6.8 Some business representative organisations have seen an increase in the number of queries they receive from members regarding TUPE. The practice of fragmentation (ie dividing service contracts among different service providers) which raises questions about the application of TUPE has been a particular concern. Another problem is determining when an employer is 'assigned' to (or is included in) a specific undertaking or organised grouping and should or should not transfer.

6.9 TUPE applies in a large number of business transfers each year and that number will increase as the Government's programme to open public services develops and public services are opened to competition. The regulations are valuable in setting the framework for business transfers. But it is imperative that the labour market is strong and efficient. The TUPE regulations must not give rise to unnecessary burdens, create barriers to growth, or give avoidable scope for anti-competitive behaviours. The regulations need to contribute to the Government's aim to achieve strong, sustainable and balanced growth, while retaining significant protections for employees.

TUPE – The Legislative Framework

6.10 Subject to certain qualifying conditions the current regulations apply:

- when a business or undertaking, or part of one, is transferred to a new employer; or
- when a 'service provision change' takes place (for example, where a contractor takes on a contract to provide a service for a client from another contractor).

These two circumstances are jointly categorised as 'relevant transfers'.

6.11 Broadly speaking, the effect of the TUPE regulations is to preserve the employment and terms and conditions of those employees who are transferred to a new employer when a relevant transfer takes place. So, for example, if Business A is sold to Business B, staff employed by Business A (the transferor) immediately before the transfer will usually automatically become employees of Business B (the transferee) and would retain the terms and conditions (other than certain occupational pension rights) they had when they worked for Business A. Continuity of service is preserved so that it is as if their contracts of employment had originally been made with the transferee employer.

6.12 There is also protection for employees against variations to their terms and conditions where the reason for the variation is related to the transfer. However, the regulations provide some limited opportunity for the transferee or transferor to vary, with the agreement

of the employees concerned, the terms and conditions of employment contracts for a range of stipulated reasons connected with the transfer.

- 6.13 The regulations contain specific provisions to protect employees from dismissal before or after a relevant transfer where the reason for the dismissal is related to the transfer. There is some scope for dismissals to take place fairly.
- 6.14 Representatives of affected employees have a right to be informed about a prospective transfer. They must also be consulted about any measures which their employer (whether transferor or transferee) envisages taking concerning the affected employees.
- 6.15 The regulations also place a duty on the transferor employer to provide information about the transferring workforce to the new employer before the transfer occurs.
- 6.16 The regulations make specific provision for cases where the transferor employer is insolvent by increasing, for example, the ability of the parties in such difficult situations to vary the contracts of employment, thereby ensuring that jobs can be preserved because a relevant transfer can go ahead. In some insolvencies the main provisions of TUPE do not apply at all (i.e. staff do not automatically transfer, and the protection against unfair dismissal does not apply).
- 6.17 The regulations can apply regardless of the size of the transferred businesses: so the regulations equally apply to the transfer of a large business with thousands of employees or a very small one (such as a shop, pub or garage). The regulations also apply equally to public or private sector undertakings engaged in economic activities – and whether or not the business operates for gain².

History

- 6.18 Regulations on the transfer of undertakings were originally introduced in 1981 in order to implement the 1977 EC Acquired Rights Directive (also known as the Business Transfers Directive). The Directive was revised in 1998, and a consolidated version was adopted in 2001³.
- 6.19 The 1981 regulations were replaced in 2006 by the current regulations⁴, (see Annex C for Northern Ireland legislation), which made a number of changes to the position under the 1981 regulations. They sought to provide greater certainty over whether or not they applied to particular situations, in particular, by extending the scope to most service provision changes (contracting out, re-tendering etc).

The Case for Change

- 6.20 The 2006 regulations extended the scope of the TUPE protections and aimed to provide greater clarity and certainty by:

² The regulations do not apply to an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities.

³ 2001/23/EC

⁴ The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246. Please note that these regulations have been subsequently amended.

- ensuring that new employers (transferees) are given proper notification by transfer or employers about the employment rights and obligations that are to be transferred with the workforce;
- clarifying the extent of the protection that the regulations give employees against transfer related dismissal or changes to terms and conditions;
- making it clear that the regulations apply to service provision changes (eg contracting out), thereby providing a ‘level playing field’ for contractors bidding for service contracts and reducing transaction risks and costs; and
- allowing more flexibility when insolvent businesses are transferred, to increase the likelihood that businesses will be rescued and their employees’ jobs saved.

6.21 However, there are concerns about how well the regulations achieve what they were designed to do. Business argues that the regulations unhelpfully ‘gold-plate’ the implementation of the Directive and are overly bureaucratic.

6.22 The Government is determined that unnecessary gold-plating and over regulation should be removed. It is essential that the regulations are fit for purpose and, in particular that they are clear and work as effectively as possible. The Impact Assessment regarding this consultation indicates that there are currently between 26,500 and 48,000 TUPE transfers taking place each year, with the number of employees affected likely to be between 1.42 million and 2.11 million per year. The number of transfers is unlikely to reduce in the future; indeed the Government’s plans to reform the public sector and open public services will mean TUPE being applied in a growing number of situations. However, in considering any potential reforms the Government has made clear that it will ensure that fairness to individuals is not compromised, recognising that the regulations provide important protections.

Responses to the Government’s Call for Evidence

6.23 Business responses to the Government’s call for evidence on TUPE reflected concerns that:

- The regulations gold-plate the Acquired Rights Directive by including service provision changes in the scope;
- Employee liability information should be provided earlier than 14 days before transfer;
- There is no provision for the post-transfer harmonisation of terms and conditions of employment with existing employees of the transferee employer;
- The approach to economic, technical or organisational (ETO) reasons allowing changes in the workforce needs attention. Some respondents say guidance would help as there is no statutory definition of the phrase, and instead there is a list of what is likely to be included as an ETO reason, and how entailing changes in the workplace has been interpreted by the courts. Others find the rules themselves (as interpreted by the courts) unduly restrictive.

- Greater clarity on pensions liability is required (for example, there is uncertainty as to how TUPE applies to occupational pensions and some respondents would welcome guidance on the benefits that do transfer under TUPE);
- Greater clarity is required on insolvency and TUPE. The regulations do not specify which insolvency proceedings (where the transferor is subject to them) give rise to regulations 4 and 7 of TUPE applying, in which case employment contracts transfer to new employers and there is protection against dismissal.

6.24 However, the trade unions were generally positive about the 2006 regulations, especially the inclusion of most service provision changes within TUPE. Common views of the unions included:

- The 2006 changes provide more certainty about whether or not the TUPE regulations apply to a particular business transaction;
- The 2006 regulations had provided benefits for employees involved in a business transfer or outsourcing process by giving greater clarity for workers about whether they will benefit from TUPE protection, more transparency about the transfer process and greater security post-transfer;
- The regulations had provided workers with more information about the transfer process and more rights to consultation before the transfer takes place;
- The regulations had led to unions receiving fewer requests for advice about the application of TUPE. In the unions' view the changes have resulted in fewer workplace disputes and fewer TUPE related tribunal cases.

6.25 Twenty-one individuals (some of whom may be employees or former employees) responded to the Call for Evidence. They based their responses on their own experience of TUPE, which was very varied and included involvement through large businesses, small businesses and trade unions. Their views therefore varied greatly, but some common themes emerged:

- The 2006 amendments provided some extra clarity and transparency but TUPE is still a very complex set of regulations, which are particularly burdensome on small businesses;
- The Employment Liability Information should be provided (from the transferor to the transferee) earlier than the current deadline of 14 days before the transfer. It was suggested that guidance should be provided on exactly what information should be provided;
- Concerns about the interactions between TUPE and pensions law, and TUPE and the Agency Workers Regulations;
- Some respondents thought that a system of 'joint and several' liability for pre-transfer obligations would be the most effective method of encouraging employers to take their commitment to employees seriously, whereas others would prefer the system to remain as it is;
- The definition of 'ETO reasons' was unclear and guidance was needed.

Reforming TUPE

6.26 When deciding whether to reform TUPE the Government has taken into account the need to ensure that the resulting framework properly implements the Acquired Rights Directive in the UK but without unnecessary gold-plating, and the need to balance the interests of small and large businesses. There is evidence that larger businesses can generally work within the TUPE framework, whereas it can be assumed that, given its complexity, smaller firms will often struggle.

6.27 The questions the Government has considered include:

- Whether to repeal the regulations covering service provision changes (generally outsourcing or insourcing) beyond that required by the Directive. Whilst some businesses complain that this is gold-plating, others say they remove uncertainty (some service provision changes are covered by the Directive anyway) and provide transparency and a level playing field when bidding for contracts. A Regulatory Impact Assessment conducted in 2006 concluded that the costs to business of the extended coverage would be minimal (£9.5 to £24.3 million per year) and were offset by the benefits of certainty. We have considered carefully the costs and benefits to business in deciding what to propose.
- Whether the employee liability information provisions should be repealed or tightened so that information is provided earlier to the transferee;
- Whether to introduce joint and several liability for pre-transfer employment obligations;
- Whether to increase the scope for post-transfer changes to terms and conditions to improve the position for employers whilst still protecting employees and implementing the Directive. The current TUPE restrictions in this area are seen by many businesses as a barrier to employee relations and effective management;
- Whether the meaning of 'economic, technical or organisational reason entailing changes in the workforce' ('ETO') (which can allow employers to dismiss, or agree changes to contracts) should be extended to ensure that a change of location of the workplace following a transfer is not automatically an unfair dismissal;
- Whether the changes made to TUPE in 2006 in order to help rescue some failing businesses and to try and protect jobs, has led to lack of clarity over which category some domestic proceedings fall under and whether it would be helpful to amend TUPE to give certainty;
- Whether to rationalize the regulations so that transferors can rely upon transferees' ETO reasons and so dismiss employees prior to the transfer without it amounting to automatic unfair dismissal, rather than transferring employees to a new employer only for them to be made redundant on day one.

6.28 There are a number of issues concerning which, having reviewed the evidence and after consideration, the Government does not believe action is required. These are set out at paragraphs 6.29-6.38.

Insolvency

6.29 The Government believes that the 2006 provisions on insolvency are helpful. In order to help rescue some failing businesses and to try and protect jobs, the Directive, and then subsequently the regulations were amended to relax TUPE rules in some insolvency cases (broadly speaking, where the insolvency procedure is not opened with a view to liquidation of the assets, (for example company voluntary arrangement)) and in other types of insolvency (for example, insolvent liquidations) to disapply the main TUPE provisions entirely. Those changes remain appropriate in that they regulate the ability of the employer to vary contracts in former insolvency situations and establish some safeguards for employees without imposing unnecessary burdens/impediments or overly impacting on the public purse.

6.30 The 2006 regulations ‘copied out’ the Directive’s generic description of the different categories of insolvency proceedings, rather than specifying which types of proceeding fall under which description. There has been some criticism that this has led to lack of clarity. However, the Government’s view is that the Court of Appeal’s decision in *Key2law (Surrey) Ltd v De’Antiquis*⁵ has provided sufficient clarity and that it is not necessary to amend TUPE to give certainty.

Experience in other EU Member States

6.31 In the Call for Evidence, the Government asked whether those with experience of the implementation of the Directive in other Member States had encountered problems in that context, or conversely, whether there might be any lessons that the UK could learn from implementation elsewhere. We received some very useful comments from respondents, which has increased our understanding of the approach adopted by other Member States. However, the Government notes that the considerable difference between the UK’s labour market and that of other EU Member States means that, in general, the approach taken in these countries is often inappropriate or unworkable in the context of the UK’s employment law. Some useful intelligence was gathered regarding issues encountered in other EU countries.

Agency Workers

6.32 In its Call for Evidence the Government asked whether there were any problems in relation to how TUPE interacted with other areas of employment law. Regulation 13(2A) of TUPE (inserted by the Agency Workers Regulations 2010) requires that an employer, when informing and consulting their staff about a proposed transfer under Regulation 13, include suitable information relating to the use of agency workers (if any) by that employer. Regulation 13(2A) (b) sets out what ‘suitable information relating to the use of agency workers’ means. Some respondents have observed that this should not be required. However, the Government is not minded to make any change as it has used

⁵ [2011] EWCA Civ 1567.

the same definition of suitable information in relation to almost all the amendments made to existing requirements to inform and consult employees⁶.

Awareness of liabilities

6.33 In the Call for Evidence the Government asked whether the 2006 amendments meant that transferees have a greater awareness of potential liabilities and had this helped to reduce transition costs and risks. The response appears to indicate that there is awareness of potential liabilities among transferees, with 30% of respondents agreeing with the question and 24% disagreeing.

Joint and Several Liability for Pre-Transfer Obligations

6.34 The Government asked whether all liability for pre-transfer employment obligations (such as arrears of wages, sick pay, workplace disputes etc) should pass to the transferee at the point of transfer or whether both parties should be jointly liable. Currently almost all pre-transfer employment obligations pass to the transferee who can then be pursued in an employment tribunal by any employee who wishes to bring a complaint which relates to the actions of the transferor before the transfer. If joint and several liability were introduced both the transferor and the transferee could be held liable; i.e. an employee could bring a claim against the new employer for the full amount or against the old employer for the full amount or both.

6.35 In many cases indemnities will be negotiated between the transferor and transferee in respect of pre-transfer obligations.

6.36 The response to this question was mixed, with 24% of respondents agreeing with the introduction of joint and several liability for pre-transfer employment obligations and 27% of respondents disagreeing. It has been argued that there is scope for injustice in the present arrangements, whereby a transferee can be presented with a liability it did not create. Joint and several liability might encourage transferors to take responsibility for any liabilities that take place while they are the employer. Joint and several liability might also reduce transaction costs (as legal advice would not necessarily be needed in every case) and the level of risk.

6.37 Against the idea is the fact that it is not as simple as the current rule. The current arrangement provides clarity for employees and employers (both transferors and transferees) regarding any ongoing costs and legal risks – all parties know where they stand. Joint and several liability might simply lead to employers trying to shift any blame between each other, possibly giving rise to increased litigation. The Government believes the current position is appropriate, owing to the scope for use of indemnities in respect of pre-transfer employment obligations, which allow employers to make provision appropriate to their circumstances. Where these are not applied the risks will be reflected in prices agreed.

⁶ It was pointed out in paragraph 7.5 of the Government's January 2010 Response to the Consultation on draft regulations Implementing the Agency Workers Directive: 'We consider that this general definition of suitable information should apply across the greater part of the [provisions] involved because such information would usually be pertinent, whatever the context and maintaining consistency across the amended legislation would aid legal certainty and compliance.'

Application of TUPE to different managerial levels

6.38 The Call for Evidence asked whether there were particular concerns about the application of TUPE to different managerial levels of employees within the same organisation. Only 15% of respondents pointed to any issues in this regard, around 43% of respondents answered in the negative, more than 41% of respondents made no response. Accordingly, the Government is not persuaded that there is any need for action.

7. Proposals

7.1 This chapter sets out the proposals for consultation.

7.2 The Government proposes making the following changes to TUPE which it believes will remove unnecessary gold-plating, making TUPE earlier to understand and business transfers easier and less burdensome for employees:

Service provision changes

- Repealing the provision which includes most service provision changes within the scope of the regulations;

Employee Liability Information

- Repealing the specific requirements regarding the notification of Employee Liability Information, but making it clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties regarding information and consultation;

Restriction on changes to terms and conditions and protection against dismissal

- Changing the wording of the provisions restricting changes to contracts so that they more closely reflect the wording of the Acquired Rights Directive and case law of the Court of Justice of the EU;
- Changing the wording of the provisions giving protection against dismissal so that they more closely reflect the wording of the Directive and the case law of the Court of Justice of the EU;
- Changing the wording of the provisions concerning a substantial change in working conditions to the material detriment of the employee, to reflect more closely the wording of the Directive;

Economic, Technical or Organisational reasons for dismissal (which can allow employers to dismiss, or agree changes to contracts)

- Amending the meaning of 'entailing changes in the workforce' so that it can cover changes in the location of the workforce. This would align the meaning of 'economic, technical or organisational reason entailing changes in the workforce' with the definition of redundancy under the Employment Rights Act 1996, so that some dismissals involving a place of work redundancy are capable of being fair for unfair dismissal purposes;

Duty to inform and consult representatives

- An amendment to ensure consultations by the transferee on collective redundancies with staff who are due to transfer count for the purpose of the obligation to consult on collective redundancies, thus easing the burdens on business;

Micro businesses

- Allowing micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives;
- Including micro businesses within the scope of the proposed amendments.

7.3 We also ask about:

- Whether it would be desirable to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer; and
- Whether a transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals.

7.4 We will also provide better guidance on a range of issues.

7.5 The Government believes these changes can be delivered whilst striking the right balance between creating employment opportunities and providing employment protection.

7.6 (The position in Northern Ireland is yet to be finalised but the view of Northern Ireland stakeholders on these proposals would be welcomed).

Service provision changes

7.7 A service provision change (SPC) occurs when a client:

- out-sources activities for a contractor to perform them on its behalf ('first generation outsourcing'); or
- re-tenders for such activities ('second generation outsourcing'); or
- brings the activities back in-house ('insourcing').

In each case, immediately before the change, there must be an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the

activities concerned on behalf of the client⁷. Also, it is necessary that the activities performed for the client before and after the alleged transfer are fundamentally or essentially the same⁸.

- 7.8 Under the EU Acquired Rights Directive (and the 1981 TUPE regulations) only some service provision changes fell within the formal definition of a transfer and were therefore covered by the regulations. It depended upon all the circumstances, creating uncertainty as to the legal position in individual cases. The uncertainty was added to by decisions of the Court of Justice of the European Union which in the 1990s seemed to point in different directions. There was also some uncertainty stemming from domestic case law in this area.
- 7.9 The 2006 amendments brought more service provision changes within the ambit of TUPE. The intention was that TUPE would apply to most service provision changes, thereby giving greater legal certainty, ending any exposure to fluctuating case law, creating a more level playing field in the tendering process and reducing costs. However, these changes go further than the provisions of the Directive and are thus considered 'gold-plating'.
- 7.10 For an SPC to be caught by the Directive, there must be 'a transfer of an economic entity which retains its identity', meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary⁹. Essentially, for an SPC to be covered by the Directive there must be an organised group of staff assigned to a common task which is to be carried out by another employer, and either a transfer of significant tangible or intangible assets¹⁰, or a taking over by the new employer of a major part of the workforce in terms of numbers and skills.¹¹ For labour-intensive services (e.g. cleaning) the crucial test is whether the new employer takes over a major part of the workforce. The Government notes that the position under the Directive is more settled since the judgment on service provision changes in Süzen¹² in 1997 which sets out the principles for determining whether an SPC is covered¹³.
- 7.11 Approximately 38% of respondents to the Call for Evidence thought that the inclusion of service provision changes within the 2006 regulations provided benefits in terms of increased transparency and reduced burdens on business. Many respondents requested further guidance on the SPC provisions because of continued uncertainty in their application. Only 24% of respondents said the 2006 amendments had reduced the need to take legal advice before bidding for contracts.

⁷ Regulation 3(3), which contains further conditions, effectively that the client does not intend the activities to be carried out in connection with a single specific event or task of short-term duration, and the activities must not consist wholly or mainly in the supply of goods for the client's use.

⁸ *Metropolitan Resources Ltd v Churchill Dulwich in liquidation* UKEAT/0286/08.

⁹ Article 1, which contains further conditions: that there is a transfer of an undertaking, business or part of either to another employer as a result of a legal transfer or merger, but it does not cover an administrative re-organisation of public administrative authorities or the transfer of administrative functions between public administrative authorities).

¹⁰ This is a key factor where the service involves reliance upon assets.

¹¹ The leading case on whether there is a transfer of an organised grouping under the Directive (for any situation, not just an SPC) is *Spijkers v Gebroeders* 1986, C-24/85. The Court of Justice of the EU ruled that it is necessary to consider all the circumstances, including various factors which it listed (and these included whether there was a transfer of tangible assets and whether or not a majority of its employees are taken over). It is an overall assessment. This test is relevant to an SPC situation, but as indicated in the text, in such a case, it will usually come down to whether the assets transfer, or whether the new employer takes over a major part of the workforce in terms of numbers and skills.

¹² *Ayse Süzen v Zehnacker Gebäudereinigung* C-13/95

¹³ For example, see the case of *CLECE SA v Martin Valor* C-463/09. which applied the Suzen approach.

- 7.12 The Government suggests that the 2006 service provision changes may have actually imposed unnecessary burdens on business, and questions whether they have delivered the benefits originally anticipated. In theory the service provision changes work in favour of small and medium sized businesses who do not have large staff resources, as they can bid for work against incumbents in the knowledge that if they are successful they will inherit the staff to carry out the work. However, this also means they necessarily take on employment liabilities too, which can be a disincentive to bid.
- 7.13 From the client's perspective the service provision changes can also be problematic in that often the reason for wanting to re-tender a contract is that the client is unhappy with those working on it and knowing that if the contract changes hands, the same personnel as were working on the contract before may well be employed on it again post-transfer is a reason not to bother re-tendering. Some respondents pointed out that anti-competitive behaviour on the part of the transferor (particularly if it is a service provider) can occur as staff whom the transferor wishes to retain but should transfer are moved and, likewise, staff with whom the transferor wishes to part but who should not transfer may be moved into jobs which will transfer. Removing the service provision changes should act as a spur to competition within the outsourcing market. Moreover, some respondents to the call for evidence have indicated that, while the service provision changes brought a greater degree of certainty in terms of coverage by TUPE, this is outweighed by new uncertainties, for example which employees are 'assigned' to the service and so transfer, along with scope for litigation and disputes as to whether TUPE applies at all where there is fragmentation of the activity (i.e. where activities are divided between several providers) and/or the way in which it is performed¹⁴.
- 7.14 Some respondents observed that the need for legal advice had not gone away concerning service provision changes. Prior to the 2006 amendments, it was necessary to establish whether TUPE applied, whereas now advice is often needed to see how TUPE might be avoided, or concerning how its effects might be mitigated. Given that it is not clear that the intended benefits are being realised, the anti-competitive effects of efforts to avoid TUPE in this context, and its wish to remove unnecessary gold-plating, the Government proposes to reverse the 2006 amendments relating to service provision changes in Great Britain.
- 7.15 In making this change the Government intends to align the definition of a transfer with that in the Directive. The Government therefore seeks views on whether any provisions of the earlier case law on TUPE 1981 should be reversed if the repeal of the SPC provisions proceeds.
- 7.16 Separate service provision change regulations apply in Northern Ireland. The Northern Ireland Executive has not agreed a position on whether to amend or revoke these regulations in Northern Ireland, and would welcome comments from stakeholders on this point.

Alternatives to repealing the service provision changes

- 7.17 It has been suggested that, rather than simply repealing the 2006 service provision changes, there could be a case for doing them differently. Suggestions include restricting the scope of service provision changes to types of work considered to be more 'vulnerable'

¹⁴ For example, in *Enterprise Management Services Ltd v Connect-Up* [2012] IRLR 190 EAT, the omission of 15% of the work led to a conclusion that the activities were different and the division of the work between five contractors also led to a conclusion that the activities were not the same due to fragmentation.

(for example, cleaning, security), where the need for employee protection may be greater or to restrict it to changes where the service will continue to be provided at the client's offices. There are difficulties with these approaches, such as in drawing the line between what should be included and what should not, and that they could give scope for deliberate avoidance of TUPE.

- 7.18 It has also been suggested that the SPC provision (i.e. regulation 3 (1) (b)) be re-modelled so that it only covers first generation outsourcing situations (i.e. where an activity or contract is outsourced for the first time – so goes from being in-house to contracted out – regulation 3(1)(b)(i)). The argument here is that there is a stronger reason for enhanced employee protection and TUPE applying for first generation outsourcings, but in second generation outsourcings and insourcings such automatic protection is more likely to conflict with other commercial objectives (e.g. a desire to change the staff on the contract). However, any second generation SPC might still be caught by the usual test for a transfer. The Government considers that, rather than introducing a variation, it will be much simpler and less confusing for employers and employees to return to the position prior to the 2006 TUPE amendments.
- 7.19 Another alternative to repealing the service provision changes is to exclude the professions from their coverage. Arguably, the application of TUPE to professional services means increased costs and job losses (especially due to geographic changes between new and former service providers). Prior to 2006 the former provider was more likely to retain employees and use them on the next client account. Respondents have commented that in other Member States, changes in the provision of professional services are rarely subject to the legislation implementing the Directive. In the context of service provision changes, the identity of the professional team providing the service is often the reason for changing provider, however TUPE presently frustrates this because, post transfer, the new provider will be required to deploy the very same team. The anti-competitive effect of this has been pointed out.
- 7.20 With these points in mind, the Call for Evidence asked whether professional services should be excluded from the definition of service provisions changes. This would mean that certain professional services (e.g. accountants, IT providers and advertisers) would be excluded from TUPE unless transfers involving them were caught under the main test for a transfer. Opinion was divided with 28% of respondents believing that professional services should continue to be included, while 25% thought they should be excluded.
- 7.21 Many respondents (including business, lawyers and trade unions) pointed to the practical difficulty of agreeing a workable definition of 'professional services' that drew the line in the right place. The Government agrees and, as above, notes that some service provision changes would still be caught in any event under the Directive, so that complete certainty on the matter could never be guaranteed. If the Government's proposal to remove service provision changes (regulation 3(i)(b)) from TUPE is implemented, there would be no need for a professional services exclusion. Even if service provision changes are not repealed in their entirety, the Government does not see merit in attempting to exclude professional services, which could produce arbitrary results between different employees or would be uncertain.

Timing of changes

- 7.22 The Government acknowledges that service providers may have entered into existing contracts on the assumption that it may be quite likely that TUPE will apply at the end of the contract, with the result that they may be less likely to have redundancy costs if the contract is lost. Whether TUPE would currently apply at the end of a service provision contract is

likely to depend upon all the circumstances at that point in time, including whether the service is to be continued and if so, the client's plans for how the service is to be performed in future. The Government also notes that the outsourcing process, from planning for a tender until eventual transfer, can be a long period, and for larger and more complex services could take a year or longer. In light of these factors, the Government recognises that a lead-in period prior to any repeal or other change taking effect would be important to allow those providing services and the recipients of them, to plan for the change in the law.

7.23 The position in Northern Ireland has yet to be agreed by the Northern Ireland Executive and Northern Ireland stakeholders' views would be welcome on the Great Britain proposals.

Question 1:

Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No.

a) Please explain your reasons.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2:

If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii) 1- 2 years; or (iii) 3-5 years? (iv) 5 years or more?

a) Do you believe that removing the provisions may cause potential problems? Yes / No

b) If yes, please explain your reasons.

The provision of Employee Liability Information

7.24 The information which must currently be provided by the transferor to the transferee is set out in regulation 11(2) and essentially covers:

- The identity and age of the employee; the particulars of employment that an employer is obliged to give an employee (under section 1 of the Employment Rights Act 1996 / Article 33 of the Employment Rights (Northern Ireland) Order 1996)¹⁵; information about any disciplinary action, grievances, claims or possibly claims in relation to an employee within the last two years; and
- Information of any collective agreement which will transfer over under regulation 5(a).

¹⁵ Section 1 of the Employment Rights Act 1996 covers the statement of initial employment particulars an employer is required to give an employee and covers information such as the identities of the employer and employee, the date employment began, scale of remuneration, and the intervals at which remuneration will be paid, terms and conditions relating to hours of work, entitlement to holidays, length of notice needed, particulars of any relevant collective agreements etc.

- Regulation 11 requires that this information is provided at least 14 days before the relevant transfer, unless there are special circumstances which make this not reasonably practicable. If there are special circumstances, the information must be provided as soon as reasonably practicable. The transferee can complain to an employment tribunal about the transferor's failure to provide the information, and may receive compensation if the failure is established.

7.25 Responses to the Call for Evidence highlighted that the current requirements under employee liability information (ELI) are not working properly in some instances. Relevant information is too often supplied at the last minute (i.e. 14 days before the transfer), with the result that key arrangements affecting employees are made in a hurry. This includes setting up benefits and payroll, organising inductions and other procedures, and is particularly problematic for businesses with a large number of employees. Practical difficulties are also presented where a transferee has to formulate its costs for a service and communicate the 'measures' (generally this is deliberate action by the employer which affects the employees, such as redundancies, or organisational changes) it may take in respect of the transferring workforce but does not know what workforce it is inheriting and on what terms. And this could adversely impact employees, with the result that the opportunity for information and consultation about the transfer and any measures is reduced. The relatively limited categories of information covered by ELI can also mean that information such as redundancy entitlements is not provided in advance of transfer.

7.26 In instances of service provision change it was anticipated that providing information at an earlier stage would improve the quality of the bidding process and assist the new contractor in their workforce planning prior to taking over the service. However, some responses have indicated that the level playing field that the information requirement was intended to help introduce has not appeared. The Employment Lawyers Association (ELA) observed that this was especially the case for second generation contractors who, can be left with insufficient time to communicate to the transferor what measures (if any) they propose to take as part of the transferor's obligations under regulation 13 of TUPE.

7.27 Some respondents have referred to instances of transferors citing the Data Protection Act 1998 as a reason for not providing the transferee with information about the transferring employees until the last moment. However, the disclosure of all information is not prohibited and information can be disclosed even when the regulation 11 requirement does not apply. The Information Commissioner has issued relevant guidance on the Data Protection Act in relation to TUPE. This is available at www.ico.gov.uk/upload/documents/library/data_protection/practical_application/gpn_disclosure_employee_info_tupe_v1.0.pdf

7.28 The Government appreciates that the provision of ELI helps make TUPE work. It is in the interests of transferees to receive the information in good time, to help with their business planning, and it can serve the interests of employees in that it facilitates the early provision of information and consultation about the transfer. The way in which it ought to work is as follows:

- (i) the transferor provides information at an early stage to the transferee. This may not necessarily be all of the ELI listed in regulation 11(2) and it may be on an anonymised basis, or with other appropriate data protection safeguards (see the Information Commissioner's Guidance).
- (ii) the transferee considers that information. If it is provided at the tender stage it can inform the costing of the bid. At any stage, it enables the transferee in its consideration

of whether there could be any measures, and it may assist in practical preparations for the transfer.

- (iii) the transferee then gives information to the transferor to enable the transferor to comply with the duties in regulation 13 in good time, so that there could be consultation about the transfer¹⁶.
- (iv) the transferor informs, and may consult the affected staff about the transfer¹⁷.
- (v) the final ELI is provided (to the extent that it has not already been provided) and any information already provided may need to be updated, by the deadline set out in the regulations (currently 14 days before the transfer).

7.29 The responses to the Call for Evidence indicate that the 14 day period is not appropriate in the majority of cases and it may even have a negative effect in delaying the provision of information (i.e. in instances where people work to the bare minimum requirement), perhaps because of concerns about breaching data protection rules, or just because TUPE does not expressly require the provision of the information earlier. The Government considers that any specified period is likely to be arbitrary in that it would not be the most appropriate period for all cases. Similarly, the current list of ELI may deter the provision of other information which would be particularly relevant in some cases. Therefore, rather than regulating, the Government has examined de-regulatory alternatives and believes there is a case for leaving the exchange of information to be resolved by the parties to transfers, combined with guidance and model terms for contracts. This could be supported by an amendment to regulation 13 of TUPE to make clear that the transferor should give information to the transferee as is necessary to assist the transferee and transferor in complying with their duties under that regulation (i.e. stage (i) above). Any failure to co-operate would be likely to affect the apportionment between the employers of any liability to employees for a failure to comply with regulation 13.

7.30 In most business transfers there is usually co-operation between the parties, so the Government questions the need for prescriptive ELI provisions. The response to the Call for Evidence indicates that the difficulties in practice with the provision of ELI occur largely in the case of service provision changes, particularly second generation outsourcing. If the service provisions were to be repealed, then there are likely to be fewer cases where problems occur.

7.31 The Government is therefore inclined to repeal the ELI requirements in Great Britain and provide guidance (and possibly model terms for contracts on the provision of the information to the client at the time that the contract is due for renewal) instead. The position in Northern Ireland has yet to be agreed by the Northern Ireland Executive.

7.32 A range of business respondents and respondents from the professions have asked that the transferee is provided with ELI further in advance of the transfer, and that better quality information (eg details of terms and conditions relating to redundancy pay or agreed payments on termination of employment etc) is provided. Some specific suggestions were made regarding how this might be done. However, the Government is not persuaded that it

¹⁶ The transferee is obligated to do this under regulation 13(4).

¹⁷ Regulation 13 contains the duty to inform and consult. Even where there may be no duty to consult, the information must usually be given early enough before a transfer so that there could be consultation. It would be good practice for there to be consultation.

is necessary to add to the burdens on business in this regard nor that any other action on ELI is needed beyond its preferred option set out above.

7.33 The Government has considered whether it could introduce an obligation to provide ELI at the tender stage with a requirement that transferors update the information where there is any material change to it within a specified period. As has been observed, a mechanism to prevent frequent and unnecessary requests may be needed. However any model mechanism is likely to be overly complicated and problematic.

7.34 In an outsourcing situation, the transferee would not be identified at this stage. So in a first generation outsourcing, any obligation would have to be on the client (the transferor) to provide information to bidders and in a second generation outsourcing the transferor (a service provider) would need to provide it to the client and the client would then need to provide it to bidders. At this stage, it may not even be clear whether or not TUPE applies, which might add to the confusion and difficulties. There could be a further issue as to whether the provision of all the information currently required to be disclosed would be necessary at this stage and it may not be in keeping with the interests of employees to have their personal data protected.

7.35 The Government considers that any mechanism to require the provision of information at tender stage would unduly interfere with the procurement process (the client could make appropriate provision in contracts), would be quite complicated, overly prescriptive and may not be appropriate. However, we will consider providing model terms for contracts in guidance.

Question 3:

Do you agree that the employee liability information requirements should be repealed?
Yes/No

- a) If yes, please explain your reasons.
- b) Would your answer be different if the service provision changes were not repealed?
- c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Restrictions on changes to terms and conditions

7.36 TUPE contains restrictions on changes to terms and conditions. Under Regulation 4(4) an employee's terms and conditions cannot be varied – even if both parties agree to the change – if the variations are connected with the transfer. The only exception is where the changes are due to an economic, technical or organisational reason entailing changes in the workforce ('ETO')¹⁸. Changes which are not connected to the transfer are permitted to the extent that they are permitted generally under the law.

¹⁸ The same language is used in regulation 7 (dismissal of an employee because of relevant transfer) and this is discussed further below.

- 7.37 On the basis of current case law, to establish an ETO there must be a 'change in the workforce' which means a change in the numbers employed in the workforce, or a change in the functions. This means that in practice the exception is of only limited use where an employer may wish to agree changes to terms and conditions.
- 7.38 The Call for Evidence asked whether the lack of provision for post-transfer harmonisation of terms and conditions was a significant burden. 57% of respondents confirmed that it was. Most of these respondents were in the business sector, with the trade unions tending to disagree. The tendency for transfers to lead to 'two tier' workforces in transferees (i.e. existing workers on one set of terms and conditions and transferred in workers on another) was often alluded to. A number of respondents underlined that the inability to harmonise the workforce's terms and conditions posed serious administrative problems for incoming employers, for example difficulties with payrolls arising from having to run different pay rates sometimes, and acute HR burdens from having to manage multiple terms and conditions. Employers were often unable to make even relatively minor changes, such as the day of the month salaries were paid. Respondents said that employing staff on the same jobs or roles on different terms and conditions was not conducive to harmony in the workplace. The CBI commented that employers and employees should be able to negotiate terms that are agreeable to both parties and that the Government should enable renegotiation of contracts provided that treatment is no less favourable at the point of transfer.
- 7.39 The Government appreciates that this is a significant problem. It has considered at length the legal position and Court of Justice of the European Union (CJEU) rulings in this area. However, it has concluded that, on the basis of the existing case law interpreting the Acquired Rights Directive, there is a very high risk that any provision allowing parties to agree to variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the Directive. Nonetheless, the Government considers it should be easier to vary contracts to achieve greater harmonisation of terms and conditions after a transfer and will keep this issue under review, should the opportunity arise to tackle it we will do so.
- 7.40 However, the Government has considered whether there are other amendments which could be made. It was suggested by respondents to the Call for Evidence that the restriction in regulation 4(4) and (5) is broader than the requirements of the Directive. TUPE restricts changes where the sole or principal reason for the change is not only the transfer itself, but also a reason 'connected with' the transfer. This is argued to be too broad and carry the risk that the reason for any change to terms and conditions could be 'connected' to the transfer, given that the terms and conditions which might be changed are pre-transfer terms and conditions.
- 7.41 There is no express provision in the Directive prohibiting changes to terms and conditions, although there is an equivalent restriction on dismissal, prohibiting dismissals where the ground for dismissal is the 'transfer itself' (article 4(1)). The CJEU case law on this provision also refers to dismissals being 'by reason of the transfer'. The restrictions on changes to terms and conditions result from the CJEU's interpretation of the Directive. However, the leading case in this area, *Daddy's Dance Hall*¹⁹, uses the language, 'by

¹⁹ C 324/86

'reason of the transfer' and the 'transfer itself' being the reason for the amendment. Other cases also use this language²⁰.

7.42 The Government sees potential merit in amending the wording of regulation 4(4) and 4(5) in order to replicate more closely the language in the Directive and the main language used in the case law. The exact drafting of such a provision would be considered in depth following the consultation, but the following is intended to give a general idea of how it might be done (with the following provisions replacing the current paragraphs (4) and (5) of regulation 4):

(4) Subject to regulation 9 and the following provisions of this regulation, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), shall be void if the reason for the variation is the transfer itself.

(5) Paragraph (4) shall not prevent the employer and employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if they could have agreed such a variation had there not been a transfer.

(5A) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is or will be transferred by paragraph (1), from agreeing a variation of that contract if the reason for the change is an economic, technical or organisational reason entailing changes in the workforce.

7.43 Alternatively, the provision might refer to any changes being 'by reason of the transfer'. Further thought would be given to the exact drafting of such provisions if it is decided to proceed with them following this consultation.

7.44 The Government would propose to retain the ETO exception to the general prohibition. The Government recognises that it may not be used much in practice, but considers that there could be some cases where the reason for the change is regarded as the transfer itself, but that there might be an ETO. Therefore the Government considers it appropriate to retain this additional flexibility.

7.45 If this proposal were to be implemented, the new provisions of regulation 4 would have to be interpreted in line with the case law of the CJEU. This would mean that an agreed change to terms and conditions for the purpose of harmonising those terms and conditions would not be permissible on the basis of the existing case law (specifically the CJEU case of *Martin*²¹). However, this proposal could reduce the risk that the current provisions in TUPE are interpreted in a way which is more restrictive than the Directive.

7.46 The potential disadvantage of this proposal is that it might introduce additional uncertainty in this area and result either in litigation to ascertain the meaning of the provision, or result in employers conducting their business in a way which increases costs because of the underlying legal uncertainty. However, the Government notes that the existing provisions also involve uncertainty as to the boundary between what is prohibited and what is permitted, and ultimately, the answer is always likely to be highly dependent upon the particular facts. The Government would also produce guidance on the subject to help aid its understanding. The Government considers that the balance currently lies in

²⁰ Although 'connected' has also been used within the CJEU's reasoning: *Martin* C-4/01

²¹ C-4/01

favour of making such an amendment. This is consistent with the Government's approach of applying a 'copy-out' policy when implementing EU Directives, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts.

7.47 The Northern Ireland Executive has yet to agree on a position and would welcome the views of stakeholders.

Question 4:

Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes / No

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

TUPE and Collective Agreements

7.48 In the Call for Evidence, the Government asked whether it should limit the length of time that a transferee must honour the terms and conditions agreed as part of a collective agreement prior to the transfer. A number of respondents were in favour of this. Some respondents observed that employers being bound without limitation by collective agreements which they had not negotiated and may have been unaware of was untenable.

7.49 Article 3(3) of the Directive limits the requirement on the transferor to continue to observe terms and conditions agreed in any collective agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The Directive also gives Member States scope to limit the period for observing terms and conditions agreed in a collective agreement, provided that the period is not less than one year (the second part of article 3(3)). TUPE does not contain any such limit.

7.50 The position with regard to collective bargaining and collective agreements is different in the UK from that in many other Member States. Many workforces do not bargain collectively. Even where there is collective bargaining, collective agreements are not usually legally binding themselves. Provisions in collective agreements are capable of being a source of terms for individual contracts. But they only are a source of terms if they are incorporated into an individual employee's contract and are apt for incorporation. Where provisions of collective agreements are incorporated, their continued effect does not necessarily depend upon whether or not the underlying collective agreement has expired or not.

7.51 The Government is considering whether to limit the period during which terms and conditions derived from collective agreements must be observed to one year following transfer. At the end of that year, they could be varied even if the transfer is itself the reason for the variation (for example, because the employer wants to harmonise between existing staff and those transferred in). This would mean that after one year, the terms and conditions would still continue to apply unless or until varied. The way in which the terms could be varied would depend upon the circumstances and whether or not there is collective bargaining between the transferor and the employees. There could be a

condition that if any change to terms and conditions which takes place after the end of the one year period, is by reason of the transfer, it must not be less favourable overall than the terms applicable before the transfer. This would provide a measure of protection for employees against adverse changes.

7.52 The judgment of the CJEU in the case of *Parkwood Leisure v Alemo-Herron*, which is due to be given during 2013, may consider the meaning of article 3(3) and so could affect this potential option. That case will establish whether the Directive allows (or even requires) Member States to provide that employees are entitled to the benefit of future collective agreements relating to their original employer (a 'dynamic' approach), or whether employees can only be entitled to the terms of collective agreements applicable at the time of the transfer (a 'static' approach). The Government considers that a static approach should apply. The Government will keep the case under review, and may, depending upon the outcome, consider whether amendments should be made to TUPE. We may defer this option until the outcome of the case is known.

Question 5:

The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Yes / No

- a) Please explain your answer
- b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes / No
- c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.
- d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? Yes / No

Protection against dismissal (regulation 7)

7.53 Some respondents to the Call for Evidence also commented that the wording of regulation 7 (dismissal of employee because of a relevant transfer) is wider than the Directive. Article 4(1) of the Directive provides:

'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce....'

The CJEU case law in referring to this provision also refers to dismissals being 'by reason of the transfer'.

7.54 By contrast, regulation 7 of TUPE treats a dismissal as unfair (for the purposes of unfair dismissal law) if the 'sole or principal reason' for that dismissal is 'the transfer itself' or 'a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.' The complaint is that covering cases where the sole or principal reason for the dismissal is 'connected' to a transfer has wider application than the Directive's prohibition.

7.55 This is the same point as that which has been made in relation to the wording of the restriction on changes to terms and conditions in regulation 4 (see question 4 and the preceding text). The potential advantages (that it may reduce risks of more dismissals being automatically unfair than the Directive requires to be) and disadvantages (uncertainty as to the meaning of a new provision, and potential litigation as a result) are generally the same as those for the proposal in relation to regulation 4.

7.56 The Government proposes to amend the wording of regulation 7 to make it more closely reflect that of the Directive and case law on the Directive's provision. This should reduce any risks of regulation 7 being construed more widely than the Directive, and would be in line with the proposal in relation to the wording of regulation 4(4) and (5).

7.57 The position of the Northern Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcome.

Question 6:

Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes / No

- a) If you disagree, please explain your reasons.
- b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? Yes/No

Regulation 4(9) & (10): a substantial change in working conditions to the material detriment of an employee

7.58 Regulation 4(9) provides that where a relevant transfer involves (or would involve) a substantial change in working conditions to the material detriment of the employee whose contract is (or would be) transferred, the employee may treat the contract as having been terminated and is treated as having been dismissed by the employer. Because the provision makes the ending of the employment a dismissal, the protection against automatic unfair dismissal under regulation 7 applies. This means that unless the sole or principal reason for the change in working conditions is an ETO, the 'dismissal' is likely to be automatically unfair due to regulation 7²².

7.59 Regulation 4(10) provides that, where there is such a dismissal, damages are not payable by an employer in respect of the employer failing to pay wages to the employee for any notice period which is not worked by the employee.

²² The qualifying period for unfair dismissal applies to unfair dismissal under regulation 7.

7.60 It has been suggested that regulation 4(9) is problematic:

- the substantial change in working conditions need not even amount to a breach of contract, nor a repudiatory breach of contract (this is an actual or threatened breach of contract by the employer which is sufficiently serious to justify the employee resigning in response to it and if the employee does resign, it is a constructive dismissal). This means that unfair dismissal claims can be founded upon changes which would not otherwise give rise to a constructive dismissal claim. It can also be problematic because the change may be beyond the control of the transferee employer (for example, a change to the location of the work may be inevitable in some service provision changes).
- The provision goes further than article 4(2) of the Directive. It is worded slightly differently from article 4(2), most notably article 4(2) refers to the employer being responsible for the 'termination' rather than 'dismissal'. The CJEU has ruled²³ that consequences of such a termination are a matter for national law and Member States are not required to guarantee the same rights as are available for unlawful termination. The requirement under the Directive is to apply the consequences under national law of termination of employment by the employer so – often this would mean payment in respect of the notice period or payment in lieu of notice and possibly other contractual benefits that would have become due during the notice period.

7.61 A further difficulty with the regulations is that transferors can sometimes be liable for any automatic unfair dismissal claim where the employee treats the contract as terminated in anticipation of a substantial change in their working conditions after the transfer and at the same time, relies upon their right to object to the transfer (under regulation 4(7)²⁴). This may be unfair to transferors who could face unfair dismissal claims depending upon what the employee does and the arrangements of the transferee (over which it may have no control).

7.62 The proposal to bring location changes within the scope of an 'economic, technical or organisational reason entailing changes in the workforce', may go some way to reducing these problems, because that change of location would no longer give rise to an automatic unfair dismissal claim under regulation 7. However, this would not improve the situation in other cases.

7.63 The Government therefore proposes to replace regulations 4(9) and (10) with a provision which essentially copies out article 4(2) of the Directive.²⁵ This would align the regulations with the minimum requirement of the Directive, reducing some of the difficulties currently caused by the regulations going beyond these requirements. The position of the Northern

²³ *Juuri v Fazer Amica Oy C-396/07.*

²⁴ An employee can object to becoming employed by the transferee and where this happens, the employee's contract does not transfer to the transferee, but instead the transfer operates to terminate the contract, but it does not count as a dismissal. However, it does count as a dismissal if it is a constructive dismissal (regulation 4(11)) or involves a substantial change in working conditions to the material detriment of the employee (regulation 4(9)).

²⁵ It is unlikely that in copying-out article 4(2), there would be a reference to 'employment relationship'. This would be consistent with the other provisions of TUPE, where there is no such express reference.

Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcome.

7.64 If the provisions were amended in this way, it would mean that if an employee relied upon it to end their employment, it would count as a termination by the employer. This would be likely to remove the scope for unfair dismissal claims where the change in working conditions is either not a breach of contract, or a more minor one (ie not one that would give rise to a constructive dismissal claim if the employee accepted the breach). Instead, the likely effect would be that the employer would usually be responsible for payment of salary (and possibly some other benefits) in respect of the notice period. It would be like the situation of a wrongful dismissal. The amount due in any case would depend upon factors such as salary, other contractual terms and the length of notice period.

Question 7:

Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes /No

a) Please explain your reasoning.

Economic, Technical or Organisational Reason Entailing Changes in the Workforce ('ETOs')

7.65 The aim of the Directive is to avoid workers being placed, solely by reason of a transfer of the part of a business in which they work to another employer, in an unfavourable position to that which they previously enjoyed with the original employer. To this end, the Directive provides protection against dismissal where the ground for the dismissal is the transfer. However, the Directive also states that this protection does not prevent dismissals for 'economic, technical, or organisational reasons entailing changes in the workforce' ('ETOs').

7.66 Under TUPE, where the sole or principal reason for a dismissal is the transfer itself or it is connected with the transfer, the dismissal is treated as automatically unfair for the purposes of unfair dismissal law, unless the reason is an ETO²⁶. Similarly, any change to terms and conditions is void if the sole or principal reason for the change is connected to a transfer, unless the reason is an ETO²⁷.

7.67 There is extensive domestic case law in this area. Some respondents to the Call for Evidence wanted guidance on this provision given that there is no statutory definition of it, but a considerable number of cases on it. Others considered that the provision itself, as it has been interpreted by the courts, is unduly restrictive.

Dismissals arising from a change of location

7.68 Two particular substantive points emerged from the Call for Evidence. The first concerns the meaning of 'entailing changes in the workforce'. Interpretation by the courts has

²⁶ Regulation 7

²⁷ Regulation 4

confined this to changes in the numbers employed or to changes in the functions performed by employees. This does not align with the definition of redundancy under the Employment Rights Act 1996²⁸, (in Northern Ireland the Employment Rights (Northern Ireland) Order 1996) and therefore does not cover situations where there is a redundancy situation in relation to the place of work which does not change the overall numbers of the workforce. This means that if, because of the transfer, the transferee employer intends to carry on the business in a different location, but with the same number of staff overall, then any dismissals as a result of the change of location will be automatically unfair (in respect of staff who have the applicable qualifying period for unfair dismissal purposes). This is narrower than the meaning of redundancy under the Employment Rights Act 1996 (and in Northern Ireland the Employment Rights (Northern Ireland) Order 1996) and a dismissal which could be fair on the basis of redundancy under that Act, could be automatically unfair under TUPE because it does not entail a change in the workforce so is not classed as an ETO. Had there not been a transfer and the employer had sought to make the location change, then the dismissal would have been capable of being fair for unfair dismissal purposes.

7.69 The Government agrees that this appears to be an anomaly which gives rise to potential unfairness for transferee employers, in that they could face claims for automatic unfair dismissal in genuine redundancy situations. It may be a particular problem for outsourcing, where changes to the location of the workforce may be more likely to occur and may be necessary in some cases, due to the new service provider being located in a different area from the incumbent provider.

7.70 The Government is considering amending TUPE so that a change in the location of the workplace is within the meaning of 'entailing changes in the workforce' and therefore can be classed as an ETO. This will align the ETO under TUPE with the definition of redundancy for the purposes of the unfair dismissal law. The Government considers that the intention of the Directive, and in particular the ETO provision, is to allow dismissals for genuine business reasons which would otherwise be allowed, and that such a change to the meaning of 'entailing changes in the workforce' is consistent with that intention.

7.71 For employees dismissed by the employer in this situation, the proposed change would mean that although they would be unlikely to have a claim for automatic unfair dismissal, the usual protection against unfair dismissal, and in respect of redundancy, in the Employment Rights Act 1996 would still apply. The Northern Ireland Executive has yet to agree on a position and would welcome the views of stakeholders.

Question 8:

Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? Yes / No

- a) If you disagree, please explain your reasons.

²⁸ Section 139

Dismissals based on future conduct of the transferee

7.72 The effect of this principle is that a dismissal prior to transfer, which is connected with the transfer, is automatically unfair even if there is an ETO, but that ETO relates to the transferee's future conduct of the business (for example, that the transferee needs fewer employees to continue the work). If the transferor does dismiss employees who would have transferred in anticipation of the transfer, the liability for automatic unfair dismissal transfers over to the transferee (under regulation 4). The way to avoid this liability for automatic unfair dismissal (where there is an ETO) is for the employees to remain employed by the transferor and then be dismissed following the transfer by the transferee.

7.73 A number of respondents to the Call for Evidence raised concerns that this is unduly restrictive. It means that in some cases, employment is continued for longer than the business requires even though there is an ETO. It can mean that a transferee may have to employ the employees very briefly in a location where it has no premises (i.e. where the transferor was located) only to make them redundant. It has been suggested by some respondents that the transferor should be able to rely upon the transferee's ETO to dismiss prior to transfer and the question should be whether the dismissal is fair in all the circumstances, rather than that it is automatically unfair. This is said to benefit employers with business planning, organisation and decreasing costs (e.g. it would spare employers the cost of keeping open redundant buildings).

7.74 In situations where the transferor is subject to a relevant insolvency proceeding (i.e. one within regulation 8(6)), such as administration²⁹) or company voluntary arrangement there are concerns that this rule may deter rescue. This is because the administrator may not be able to dismiss in some situations without running high risks that the dismissal would be unfair in the event that a transfer subsequently takes place. If a purchaser is found, liability for automatic unfair dismissal for any dismissals by the administrator, where the sole or principal reason for them was connected to the transfer³⁰, transfers to the purchaser. This in turn may deter purchasers from purchasing any part of the business at all, or, if they do purchase it, it may affect the price (reducing it) that they pay for the transferring part of the business.

7.75 Allowing the transferor to dismiss on the basis of a transferee's ETO might be welcome to some employees, who might prefer to be made redundant by their employer before any transfer, as this would enable them to proceed with seeking alternative employment. It would also mean them being dismissed by the employer that they know, which may be considered to be preferable. However, other employees might be more concerned, as it could mean that they are made redundant more quickly and would lose out on the wages that might otherwise be earned had their employment continued until the transfer. Where the transferor is in financial difficulties, employees may also prefer the current approach, as their remedies in respect of any employment matters would then lie against the transferee.

7.76 The current position is based upon domestic case law, rather than that of the CJEU. The CJEU has said that both the transferor and the transferee can dismiss for ETO reasons³¹,

²⁹ *Key2law (Surrey) LLP v De'Antquis* [2011] EWCA Civ 1567.

³⁰ *Spaceright Europe Ltd v Baillavoine* [2011] EWCA Civ 1565, which is being appealed to the Supreme Court. The Court of Appeal upheld the decision that the reason for the dismissal by the administrator was connected to the transfer where it was to make the business more saleable even though there was not an identified transferee at that stage.

³¹ *Iles Dethier v Jules Dassy* C-319/94

although the CJEU was not specifically asked in that case about the nature of the ETO and whether it must relate to the ongoing business of the dismissing employer.

7.77 In *Hynd v Armstrong*³², the Court of Session identified two particular factors which led them to conclude that their approach (that a transferor cannot dismiss employees in reliance upon the transferee's ETO) was required by the Directive. The first is that in the case of insolvent transferors, there would be every incentive to dismiss, with the result that liability for the dismissal would not transfer to the transferee and hence the liabilities to the employee may in practice be avoided. However, it can equally be argued that the *Hynd v Armstrong* approach may deter rescues, in which case there may never be a transferor, and all the employees may be redundant. Furthermore, if the approach did not apply and the employee could be dismissed by the transferor in respect of an ETO relating to the transferee, the dismissed employee would be able to claim a statutory redundancy payment³³.

7.78 The second reason behind the Court of Session's approach was a concern that allowing pre-transfer dismissals would enable selection solely from the transferor's workforce in cases where the combined workforce of the transferor and transferee exceeds the requirements of the transferee. The Government considers that this is a valid concern, but notes that not every case will involve an overlap between the two workforces. The Government considers that this issue might be better dealt with under ordinary unfair dismissal law, where in redundancy cases, there must be consideration of an appropriate pool for redundancy and selection, as well as consultation. Such an approach might be beneficial to the employee in opening up the possibility of alternatives to redundancy within the workforce of the transferor, as well as the transferee. However, it might also mean that the trigger for a collective redundancy consultation (where an employer proposes 20 or more redundancies at one establishment within a period of 90 days or less)³⁴ is not reached, whereas it would be if the employees were transferred over to the transferee before being made redundant. Conversely, there could be situations where the threshold may be reached in respect of the transferor if dismissals take place before transfer.

7.79 The Government recognises that this is a difficult issue and that there are arguments both ways. Views are invited on whether provision enabling a transferor to rely upon a transferee's ETO would be helpful. This could possibly be by an amendment expressly stating this, or by a provision to the effect that the ETO must relate to the ongoing business by either the transferor or the transferee. This would mean that the ETO should still relate to some part of the ongoing business so that where the reason is solely to get an enhanced sale price, this would not normally qualify as an ETO.

7.80 If there were such a provision, it may be that a transferor would not want to dismiss employees in situations where there is an ETO based upon the ongoing business in the hands of the transferor. Although the risks associated with the dismissal are likely to be reduced (because it would not be automatically unfair), any liability in respect of the employment and dismissal would not transfer to the transferee under regulation 4. The transferor's risks could be covered by an indemnity from the transferee, but this may not be

³² [2007] IRLR 338

³³ Under the Employment Rights Act 1996, Part 11, Chapter 6, and Part 12

³⁴ Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992

a sufficient incentive for the transferor. On the other hand, if the transferor does dismiss employees, the fact that they will retain liability to the employee in respect of it, might encourage better compliance with unfair dismissal law.

7.81 The position of the Northern Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcomed.

Question 9:

Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes / No

a) Please explain your reasons.

TUPE and other areas of employment law

7.82 There can be uncertainty regarding the position of agency workers when transfers take place. Regulation 4(1) only transfers employment contracts between the transferor and an employee (as defined in regulation 2(1)³⁵) and even then, it only does so if the employee is assigned to the organised grouping of resources or employees that is subject to the transfer. It does not cover staff assigned to that group on a temporary basis. This will usually exclude all agency workers working within the transferring group³⁶. Respondents have said that in the context of service provision changes, temporary agency workers working on the service (because the transferor has hired them from the agency), have claimed that TUPE applies to transfer them either to the new service provider, or to the new provider's agency, or to the client itself. The Government will provide guidance on this issue.

7.83 The position of the Northern Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcome.

Collective redundancy rules and interaction with TUPE information and consultation requirements (regulation 13)

7.84 Whilst a TUPE transfer cannot itself constitute grounds for dismissal, redundancies connected to the transfer can occur (where there is an ETO reason). The new employer who is taking on the function may already have employees to carry out some or all of that function; they may wish the function to be carried out somewhere else, or they may feel that they can carry out the function with fewer employees. Where the potential for redundancies is likely to exceed 20 at one establishment, the duty to consult employee representatives in

³⁵ This can cover employment relationships where there is not an actual contract of service between the transferor and employee: see the definition of 'employee' in regulation 2(1) and the case of Albron Catering C-242/09 (an employee of a service company which supplies staff to an operating company in the same group is transferred under the Directive in the event of a transfer of the part of the operating company for which the employee works to an undertaking outside the group).

³⁶ See regulation 4(1) and regulation 2(1) defining employee and 'assigned'. There are some circumstances in which an employee assigned to the group other than on a temporary basis would not transfer: see regulation 4.

respect of the redundancies is likely to apply³⁷. This means that two separate duties of information and consultation could apply: that under TUPE in respect of affected employees prior to the transfer, and that in respect of the collective redundancies. However, as the transferee employer is not actually the 'employer' before the transfer takes place, there is some doubt as to whether any consultation with transferring staff prior to transfer by or on behalf of the transferee for collective redundancy purposes can count towards satisfying that obligation. If it cannot count, then the process is delayed: the consultation could not start until after the transfer and any redundancies could not take effect until the end of the applicable period. A number of respondents to the Call for Evidence (including the ELA, the Local Government Association and the Federation of Small Business) highlighted this as a problem.

7.85 There are a number of issues:

- the combined need to consult under both the TUPE regulations and the collective redundancy rules can cause confusion about the processes to be followed;
- there is an effect on business efficiency, including the ability to restructure effectively because of the time it can take to effect redundancies;
- there is an impact on employees, who can be subjected to two consultations in quick succession and long periods of uncertainty;
- there is an impact on the ability for employee representatives to suggest alternatives to redundancy.

7.86 The Government sees advantage in allowing collective redundancy consultation by the transferee with the employees who are likely to transfer to take place before the transfer. This may be beneficial for the transferee, for example, it might make the restructure process more effective with the result that the impact on employees is more limited. It may also enable their representatives to reach agreement with the transferee at an earlier stage and the period of uncertainty caused by the prospect of redundancies may be reduced.

7.87 This approach could currently occur. However, the transferee would face a risk that this would be insufficient to comply with its obligations in respect of the collective redundancy consultation because it was not the employer at the time of the consultation. The Government therefore proposes a legislative amendment to ensure that consultation by the transferee with representatives of the transferring employees who may be affected by the proposed redundancies, counts for the purposes of the requirements to consult on collective redundancies.

7.88 A potential obstacle to the transferee consulting the transferring staff in advance of the transfer is obtaining the co-operation of the transferor, either to conduct the consultation jointly with the transferee or to give access to the transferee to the relevant staff. This may be particularly the case if the transferor and transferee are competitors (which may be likely in respect of service provision changes). However, transferors may be prepared to co-operate on the basis that it would be in their employees' interests for consultation to take place and it entails industrial relations benefits. Also if there were to be an amendment to enable a transferor to rely upon a transferee's ETO (so that it could dismiss pre-transfer in

³⁷ Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 or in Northern Ireland Article 216 of the Employment Rights (Northern Ireland) Order 1996

reliance upon that ETO), then there could be an added incentive for the transferor and transferee to co-operate to reduce the risks of such a dismissal being unfair.

7.89 Whilst the Government proposes to legislate to enable pre-transfer consultation to count towards collective redundancy requirements, it does not intend requiring consultation by the transferee with the transferring staff prior to the transfer under either the collective redundancy consultation rules, or under TUPE. This approach would be too prescriptive and might detract from what is most appropriate in all the circumstances. It is noted that the TUPE regulations are designed to allow time for consultation, and such engagement will usually be advantageous from an employee relations perspective.

7.90 The position in Northern Ireland with regard to the equivalent Employment Rights (Northern Ireland) Order 1996 has yet to be established and stakeholders' views on this point are welcome.

7.91 In parallel with the review of TUPE the Government has been consulting on the rules affecting collective redundancies in Great Britain. The government has now published its response to the consultation announcing that it will reduce from 90 to 45 days the minimum period before which redundancies of more than 100 can take place as well as introducing ACAS guidance to improve the quality of the consultation process. The Government's response can be found at: www.gov.uk/government/consultations/collective-redundancies-consultation-on-changes-to-the-rules.

Question 10:

Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes / No

a) If you disagree, please explain your reasons.

Duty to inform and consult employee representatives

7.92 The Government has considered calls to amend the requirement to consult employees regarding transfers by clarifying what constitutes a 'reasonable' time to allow for employees to elect representatives. Rather than legislating, the Government intends providing guidance on this issue. It is impracticable to define in legislation what is 'reasonable' as this will depend upon the circumstances of each case. Factors could include the number of affected employees, the timing of and reason for the transfer, and even the sort of work that the affected employees do. The risks of a set timescale are that, although it might give certainty, it is unlikely to be appropriate for all circumstances and as a result may in some cases be unduly restrictive for employers whilst in other cases it may be too short to sufficiently protect employees. Therefore, the Government believes that guidance drawing attention to the sort of factors which are likely to influence the question of what is appropriate in a particular case would be more beneficial.

7.93 The position of the Northern Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcomed.

Question 11:

Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? Yes / No

- a) Please explain your reasons.
- b) If you disagree, what would you propose is a reasonable time period?

Consultation requirements for micro businesses

- 7.94 It has been argued that Regulation 13 does not work well for smaller non-unionised workforces and that transferors in smaller transfer exercises do not understand why they are unable to simply provide information on the transfer to and consult directly with, all the transferring staff without having to wait for representatives to be elected. In view of the penalties for failure to inform and consult, it has been argued that an amendment to the law in order to prevent breaches by small employers who have taken a proportionate approach would be sensible.
- 7.95 The Government sees merit in a proportionate approach whereby small employers could inform and consult directly with employees. Holding an election would be a disproportionate burden on such employers, both in terms of the cost and potential delay, yet the benefit to employees of such an election would be limited due to the small size of the workforce. Employees can also be protected by the direct provision of information and consultation and would have the opportunity to have their voices heard more clearly.
- 7.96 The Government proposes to amend TUPE to permit some small employers (whether transferor or transferee) to inform their employees directly of the matters related to the transfer (which are set down in regulation 13(2)), and to consult them individually (though not with a view to agreement) if measures are envisaged. However, if there is a recognised independent trade union, then there would still have to be consultation with its representatives and, likewise, if there are existing employee representatives, who would have authority to receive information and be consulted, they too would need to be consulted. The existing protections for employee representatives against dismissal and detriment would not be available to the individual employees, though there would be remedies for failure to inform and consult on an individual basis.
- 7.97 A threshold of 20 employees has been suggested based on the position for collective redundancies. However, this is not an exact analogy as that threshold is based upon the number of proposed redundancies, not the number of employees. Article 7.5 of the Directive allows Member States to limit the obligation to inform and consult but this is based on the number of employees. It seems sensible to the Government to make the threshold for this measure the same as that by which the UK defines a micro enterprise, meaning businesses with 10 or fewer employees.
- 7.98 The position of the Northern Ireland Executive and Assembly has yet to be agreed and the views of Northern Ireland stakeholders are welcome.

Question 12:

Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? Yes / No

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? Yes / No

Better online guidance

7.99 A number of respondents to the Call for Evidence commented that some of the wording in the regulations was unclear. The Government and the Department for Employment and Learning in NI will review their guidance and improve it where appropriate.

7.100 For example, there could be greater clarity concerning 'assignment'. Regulation 4 provides for the transfer of rights and liabilities etc in relation to those employed by the transferor who are 'assigned' to the organised grouping of resources that is transferring. Regulation 2(1) defines assigned to exclude 'assignment' to that group on a temporary basis. Respondents have indicated that the question of whether a particular employee is assigned to the transferring part of the business is frequently a difficult issue to resolve, and can lead to disputes between transferor and transferee as to the position of individuals.

7.101 The question of assignment depends upon a range of factors and not just the amount of time spent by an individual on the activities which are transferring. Providing for a test in the regulations could lead to inappropriate results in some cases. The Government therefore intends to provide improved guidance on this subject.

Pensions

7.102 TUPE does not generally cover pensions but many respondents to the Call for Evidence voiced concerns about the way pensions are treated where there is a TUPE transfer. Occupational pensions do not generally transfer under TUPE (although some aspects of them do), but there are requirements regarding pension provision following a TUPE transfer under the Pensions Act 2004 and regulations under that Act. Where pensions are concerned, BIS will continue working with DWP to identify ways to improve the information available to employers and scheme members.

7.103 Fair Deal, which was introduced in 1999, provides protection for public sector workers' pension provision when transferring out of the public sector. The rules around Fair Deal were set out in Treasury guidance in 1999 and were updated in 2004. The Government announced in the 2010 Spending Review that it accepted the suggestion made in the Independent Public Service Pensions Commission Interim Report to review the Fair Deal policy. The Commission's interim report found that current pension structures, combined with Fair Deal requirements, are a barrier to plurality of public service provision.

7.104 The Government launched a consultation on a review of the Fair Deal policy in 2011, but concluded that no final decision should be taken until the structures of the new public service pension schemes were known. During the scheme specific discussions on pension reform, the Government set out its preferred approach to reforming the Fair Deal policy in Heads of Agreement for the main public service schemes in December 2011, subject to the outcome of these discussions.

7.105 The Government has since agreed to maintain the overall approach to Fair Deal, and deliver this by offering access to public service pension schemes for newly transferred staff. HM Treasury has published a response to the consultation (www.hm-treasury.gov.uk/d/consult_summary_of_responses_on_the_fair_deal_policy.pdf), along with further consultation questions and draft guidance. The consultation explores the options for those already transferred out under the existing Fair Deal policy. Further details will be set out in due course.

Exemption for micro businesses

7.106 The Government introduced a regulatory moratorium on 1 April 2011 which exempts existing micro businesses (those with fewer than 10 employees) and new businesses from new domestic regulation for three years. However the Government believes that it would not be advantageous to exempt micro businesses from the changes proposed in this consultation. These proposals are generally deregulatory and favourable to micro businesses, transitional costs are thought to be low (especially amongst micro businesses that are unlikely to be familiar with the current legislation, as TUPE transfers are relatively individualised events), and creating a two tier system would be legally complex. The Government is keen to minimise the costs of TUPE for businesses of all sizes.

Question 13:

Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

- a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
- b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes / No
- c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Transitional arrangements and coming into force of amendments

7.107 The proposal which would potentially require a significant lead-in period before it takes effect is that to repeal the services provision changes and a specific question has been asked about the appropriate lead-in period. The Government does not consider that the same issues arise in relation to the other proposals, although there will have to be transitional provision and savings as there was in relation to TUPE 2006 (for example, to ensure that the current regulations continue to apply in respect of transfers which take place before a certain date and that amendments which relate to the period prior to transfer are appropriately dealt with). The Government will give specific thought to the appropriate transitional arrangements in light of the final proposals following the consultation.

Question 14:

Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes / No

Other issues

7.108 The Government considers that it has addressed above the main issues of concern with TUPE which have been identified in the Call for Evidence. A few other points have been made (such as complications in an off-shoring situation). It is not clear at this stage that there are other significant problems in practice warranting further action. The Government and the Department for Employment and Learning in Northern Ireland would welcome further comments on the issues raised in the consultation document.

Question 15:

Have you any further comments on the issues in this consultation?

Question 16:

Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No

Please explain your reasons.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17:

Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Evidence

7.109 The Government's Response to the Call for Evidence on the Effectiveness of TUPE can be found at www.gov.uk/government/publications/effectiveness-of-transfer-of-undertakings-protection-of-employment-regulations-2006-government-response-to-call-for-evidence

8.Consultation questions

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
Question 1	<p>Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) Please explain your reasons:</p> <p>b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?</p>
Question 2	<p>If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?</p> <p>(i) less than one year <input type="checkbox"/> (ii) 1- 2 years <input type="checkbox"/> (iii) 3-5 years <input type="checkbox"/> (iv) 5 years or more <input type="checkbox"/></p> <p>a) Do you believe that removing the provisions may cause potential problems ?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>c) If yes, please explain your reasons.</p>

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
Question 3	<p>Do you agree that the employee liability information requirements should be repealed?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If yes, please explain your reasons.</p> <p>b) Would your answer be different if the service provision changes were not repealed?</p> <p>c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?</p>
Question 4	<p>Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If you disagree, please explain your reasons.</p> <p>b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?</p>
Question 5	<p>The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?</p>

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions

Yes **No**

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes **No**

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes **No**

Question 6

Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes **No**

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes **No**

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
Question 7	<p>Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) Please explain your reasoning.</p>
Question 8	<p>Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If you disagree, please explain your reasons.</p>
Question 9	<p>Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) Please explain your reasons.</p>
Question 10	<p>Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If you disagree, please explain your reasons.</p>

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
Question 11	<p>Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) Please explain your reasons.</p> <p>b) If you disagree, what would you propose is a reasonable time period?</p>
Question 12	<p>Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p>
Question 13	<p>Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?</p> <p>Yes <input type="checkbox"/> No <input type="checkbox"/></p> <p>a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.</p> <p>b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?</p>

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
	Yes <input type="checkbox"/> No <input type="checkbox"/>
	c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.
Question 14	Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes <input type="checkbox"/> No <input type="checkbox"/>
Question 15	Have you any further comments on the issues in this consultation?
Question 16	Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes <input type="checkbox"/> No <input type="checkbox"/> a) Please explain your reasons. b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
Question 17	Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

9.What happens next?

This consultation will close on 11 April 2013. The Government will publish its response as soon as possible thereafter and within 12 weeks of the consultation closing. The Department for Employment and Learning in Northern Ireland will consider whether a separate response is required for Northern Ireland. If the consultation supports change to the current regulations, we will seek to introduce these changes in October 2013. The decision on whether the changes apply to Northern Ireland belongs to the Northern Ireland Executive and the Northern Ireland Assembly. The Government's response will be made available on the Department for Business, Innovation and Skills and the Department for Employment and Learning's websites.

Annex A: Consultation principles

This Government has set out guidance on the principles that Government Departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation. The principles can be found at:

www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

Annex B: List of Individuals/Organisations consulted

Acas

Accenture

Aitken Law

Allen, Carl (individual)

Amey plc

Antrim Borough Council

ASLEF

Asset Based Finance Association

Association of Business Recovery Professionals ('R3')

Association of Colleges

Association of School and College Leaders

Assura Medical

AstraZeneca UK Limited

B.I.G Business Services

Baker and McKenzie LLP

Barking & Dagenham College

BBH Partners LLP

Best Limited

Birmingham Law Society

Blue Triangle (Glasgow) Housing Association

Bournemouth Transport Limited

BPE Solicitors LLP

British Hospitality Association

British Private Equity and Venture Capital Association ('BVCA')

British Red Cross

British Retail Consortium

Britton, Jan (individual)

Broadcasting Entertainment Cinematograph and Theatre Union

Broadway Homelessness & Support

Busby, Mark (individual)

Business Services Association

Capita plc

Carewest Ltd

CBI

Chartered Institute of Personnel and Development (CIPD)

Choice Support

Chores

City and County Healthcare

Clarkslegal LLP

Cleaning and Support Services Association

Clements, Alison (individual)

Clif Arrow (individual)

Conrad, John (individual)

Cordant Group plc

Cusack, Barry (individual)

DHL Services Ltd t/a DHL Supply Chain

Dorset County Council

Dundas & Wilson LLP

Economic Solutions Ltd

EEF, the manufacturers' organisation

EEFNI, the employers' organisation

ELGAR (Employment Law Group Applicants' Representatives - Birmingham)

Employment Lawyers Association

Employment Related Services Association (ERSA)

Engineering Construction Industry Association

Enterprise Rent-A-Car

Ernst & Young LLP

Facilities Management Company

Federation of Small Businesses

Fitzpatrick Wilkes & Co.

Food and Drink Federation

Foresight Coaching and Consultancy

Forum of Private Business

Freshfields Bruckhaus Deringer LLP

Fujitsu

GMB

Go-Ahead London

Halifax Opportunities Trust

Harmony Home Care Ltd

Health Protection Agency

Heapley, Kim (individual)

Hestia Housing and Support

Hewlett Packard

Hill, Linda (individual)

Hogan Lovells International LLP

Housing 21

HRXchange

ICAS

Igen Ltd

Impax Asset Management Group plc

Insolvency Lawyers' Association

Irenicon

Irish Congress of Trade Unions

J Short Development Limited

John Lewis plc

Johnson, Tania (individual)

Kent County Council

KIDS

Labour Relations Agency (Belfast)

Laverton, Nicola (individual)

Law Centre (NI)

Lawrence Graham LLP

Lewis Silkin LLP

Liberata UK Limited

Link Group Limited

Linklaters LLP

Liverpool Law Society

Living Ambitions

Local Government Association

Lupton Fawcett

Making Space

Marks & Spencer PLC

McCann Erickson Advertising Limited and associated McCann Worldgroup agencies, part of the Interpublic Group network

Metrobus Ltd

NASUWT

National Association of Head teachers.

National Council for Voluntary Organisations (NCVO)

National Union of Teachers

Nationwide Building Society

Nicholas, Alex (individual)

Northumberland County Council

Norton Rose LLP

Nottinghamshire County Council

NUJ

Outward Housing

Papworth Trust

Peninsula Business Services Ltd

PinSENT Masons LLP

ProjectHR Limited

Propsects

Prospect

RM plc

Road Haulage Association

Rowbotham, Lynda (individual)

Rowles, Jon (individual)

Royal College of Midwives

Royal College of Nursing

Rushcliffe Borough Council

Sanders, Jo (individual)

Saunders, Adam (individual)

Scholastic Ltd

SCOTTISH TRADES UNION CONGRESS

Simmons & Simmons LLP

Simple HR Ltd

Solicitor of the Senior Courts of England and Wales; Visiting Professor of Law and the Universities of Durham and Leeds

Somerset Care Ltd

Southern Housing Group

Squire Sanders (UK) LLP

St Mungo's Community Housing Association

Tata Steel UK Ltd

The Business Services Association

The Chamber of Shipping

The Institute of Chartered Accountants in England and Wales (ICAEW)

The Institute of Practitioners in Advertising (IPA)

The Law Centres Federation

The Law Society

The Law Society of Scotland

The National Trust

The Salvation Army

The Society of Labour Lawyers

The University of Sheffield

Thompsons McClure Solicitors

Thompsons Solicitors

Transport for London

Transport Salaried Staffs' Association (TSSA)

Travers Smith LLP

Trowers & Hamlins LLP

TUC

UNISON

Unison Dartford Local Government

UNITE

United Kingdom Homecare Association

University and College Union

USDAW

Voluntary Organisations Disability Group

Welsh Government

Willow, Nadine (individual)

Wragge & Co LLP

Zurich Financial Services

Annex C: Northern Ireland Legislation

The Transfer of Undertakings (Protection of Employment) Regulations 2006 made UK-wide provision for the treatment of employees, and related matters, on the transfer of a business or undertaking, so that when all or part of a business is bought or sold, the terms and conditions of the employees who transfer in the sale are preserved.

The 2006 regulations also implemented certain service provision change elements, but within those regulations, these elements apply to GB only. Separate regulations, namely the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, were required for Northern Ireland, as GB did not have the necessary powers to legislate on this matter for Northern Ireland.

Annex D: Response form



Department for Business, Innovation & Skills

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006: CONSULTATION ON PROPOSED CHANGES TO THE REGULATIONS – response form

You can complete your response online through SurveyMonkey :

www.surveymonkey.com/s/7GSJ7ST

Alternatively, you can email, post or fax this completed response form to:

Email:

tupe-regulations@bis.gsi.gov.uk

Postal address:

Ian Young
Labour Market Directorate
Department for Business, Innovation and Skills (BIS)
3 Floor Abbey 1
1 Victoria Street
London
SW1H 0ET

Tel: 0207-215 1850

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **11 April 2013**

Your details

Name:

Organisation (if applicable):

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business (over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes No

a) Please explain your reasons:

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year (ii) 1- 2 years (iii) 3-5 years (iv) 5 years or more

a) Do you believe that removing the provisions may cause potential problems ?

Yes No

b) If yes, please explain your reasons.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes No

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on

the subject?

Yes **No**

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes **No**

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes **No**

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes **No**

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes **No**

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes **No**

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes **No**

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes **No**

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes **No**

a) Please explain your reasons.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes **No**

a) If you disagree, please explain your reasons.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes No

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes No

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes No

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes No

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes No

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes No

a) Please explain your reasons.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

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