



Department
for Business
Innovation & Skills

**TRANSFER OF
UNDERTAKINGS
(PROTECTION OF
EMPLOYMENT) REGULATIONS
2006**

Government Response to
Consultation

SEPTEMBER 2013

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GOVERNMENT RESPONSE TO THE CONSULTATION ON THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 (TUPE)

1. Foreword from the Minister



Earlier this year I published a consultation seeking views on how we should reform the TUPE Regulations. This consultation was part of the Government's Parliament-long Employment Law Review which is reforming employment laws so that they support the flexibility and effectiveness in our labour market. Our review is also ensuring that our employment laws firmly establish fairness for workers and employers.

In this Government Response we set out a reforming package of amendments to the TUPE Regulations. Our reforms to these Regulations will remove unfair legal risks that businesses currently face when carrying out a transfer.

The changes also remove excessive parts of the TUPE Regulations and reduce the bureaucracy of a transfer. In addition, our reforms establish where the current TUPE Regulations provide sensible clarification of the Acquired Rights Directive and the Government has committed to retaining these parts.

These improvements to the TUPE Regulations form part of a broader package of reforms that are improving the laws around taking people on, managing staff and letting people go. In delivering these reforms we will further enhance the performance of our labour market, benefiting businesses and creating jobs.

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. In 2011 the Government announced its intention to improve how the TUPE Regulations work. Since then, the Government has run a Call for Evidence and a consultation, in which the Government made proposals with a view to improving the rules.
- 2.2. We want to improve the TUPE Regulations so they do not reduce the flexibility, effectiveness or fairness of the labour market. It was clear at the start of this process that there were indeed problems with the TUPE Regulations. The package of actions detailed in this document addresses these problems.
- 2.3. This Government Response outlines a package of improvements that will improve how the TUPE Regulations work. The improvements are:
 - **The Government will amend the TUPE Regulations to allow renegotiation of terms derived from collective agreements one year after the transfer, even though the reason for seeking to change them is the transfer, provided that overall the change is no less favourable to the employee.**
 - **The Government will amend TUPE to provide expressly for a static approach to the transfer of terms derived from collective agreements.**
 - **The Government will amend TUPE so that changes in the location of the workforce following a transfer can be within the scope of economic, technical or organisational reasons entailing changes in the workforce, thereby preventing genuine place of work redundancies from being automatically unfair.**
 - **The Government will amend Regulation 4 and Regulation 7 to bring them closer to the language of the Acquired Rights Directive.**
 - **The Government will make an amendment to reflect the approach set out in the case law, namely that for there to be a TUPE service provision change, the activities carried on after the change in service provision must be “fundamentally or essentially the same” as those carried on before it.**
 - **The Government will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to make it clear in statute that consultation which begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee can agree and where the transferee has carried out meaningful consultation.**
 - **The Government will improve the TUPE process for micro businesses by allowing such businesses to inform and consult directly affected**

employees when there is no recognised independent union, nor any existing appropriate representatives.

- **The Government will retain the rules about employee liability information and extend the time before the transfer when it must be given to the transferee to 28 days.**
- **The Government will work to improve TUPE Guidance.**

2.4. The Government recognises that the absence of clear rules that enable individuals and businesses to agree to mutually beneficial changes to terms and conditions is a barrier to effective transfers. The Government believes that the UK economy would benefit from a framework that allows individuals and businesses to agree such changes, which may lead to harmonisation of terms and conditions. **The Government will engage with European partners to demonstrate the potential benefits of a harmonisation framework for individuals and the economy.**

2.5. The consultation has clearly established where the current TUPE Regulations work well and provide a framework for businesses and employees to interact during a transfer. This Government Response also outlines where the Government was persuaded by the strength of the submissions not to change the TUPE Regulations following the consultation:

- The Government will not repeal the service provision change rules.
- The Government will not allow a transferor to rely on a transferee's economic, technical or organisational reasons to dismiss an employee prior to a transfer.
- The Government will not amend Regulation 4(9) to copy out the Directive.

2.6. The changes we have outlined remove unnecessary gold-plating to the TUPE Regulations and remove unfair legal risks to companies carrying out transfers. The changes overall will increase the effectiveness of our labour market and will establish fairness for both employers and individuals during a transfer process. It is the Government's intention that the new Regulations will be laid before Parliament in December 2013. There will be transitional and savings provisions.

3. Introduction

- 3.1. The Government has committed to reforming the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The TUPE Regulations implemented the EU Acquired Rights Directive. TUPE Regulations are important because they provide a legal framework for transfers of staff. The rules help facilitate outsourcing, insourcing and changing managed service contracts. It is important that TUPE is not so burdensome to stop mergers, acquisitions or service changes but maintains fairness for employees involved in transfers and a level playing field for businesses.
- 3.2. The UK has one of the most lightly regulated labour markets in the world, which has contributed to positive employment trends in the UK, despite challenging economic conditions. However, gradual piecemeal changes to employment law over the last decade have seen UK employment law become complex, contributing to negative perceptions of UK employment law and consequently undermining some of the benefits of our light regulatory environment.
- 3.3. From the outset, this Government committed to reforming employment laws in the Employment Law Review (ELR). Our reforms have made significant improvements¹: improving unfair dismissal rules; removing the default retirement age; and establishing better immigration checks. This TUPE consultation response is part of the package of ELR reforms which will continue through the remainder of this Parliament².
- 3.4. In reforming employment laws the Government is guided by our vision of ensuring that the labour market continues to be flexible, effective and fair. We want to make sure employment laws do not undermine these principles.
- 3.5. The consultation received 178 responses through the online survey and individual submissions. The respondents represented a wide range of interested parties, including individual businesses, employee representatives, business representatives, service providers and employment law specialists. This document summarises the consultation responses and presents the Government's formal response and vision to reform the TUPE Regulations.
- 3.6. The TUPE Regulations, with the exception of the service provision change elements, apply on a UK-wide basis. There are separate Service Provision Change Regulations in Northern Ireland. The Department for Employment and Learning issued the consultation in Northern Ireland and is considering the responses made before putting final recommendations to the Northern Ireland Executive and the Northern Ireland Assembly. A separate Northern Ireland consultation response document will follow in the next couple of months, with any amending legislation to follow as soon as possible thereafter.

¹ BIS, Employment Law 2013: Progress on Reform Report March 2013. (Government strategy document which outlines the work developed by Labour Market Directorate).

² Page 18 Progress of Reform

- 3.7. We will publish individual consultation responses, where we have permission to do so from respondents, by 5th October 2013.

4. Service Provision Changes

- 4.1. Many businesses contract out services such as cleaning, catering or IT support to specialist providers. Changes to the provision of these services can occur frequently. Currently, changing a service by re-tendering, insourcing or outsourcing is likely to amount to a transfer under the TUPE Regulations following changes made in 2006. These changes are called service provision changes (SPCs).
- 4.2. Prior to 2006 only those SPCs that met the requirements of the first test in TUPE for a transfer³ were within scope. That test is based upon the test in the Directive. The changes to the TUPE Regulations in 2006 added a second test to capture most SPCs.
- 4.3. The consultation indicated the Government's willingness to test parts of the TUPE Regulations that go above and beyond the requirements of the Acquired Rights Directive. In the consultation, the Government proposed repealing the SPC test added in 2006 (principally set out in Regulation 3(1)(b)) because it was not clear that the intended benefits of introducing the SPC test were being realised.
- 4.4. Furthermore, the Government has been clear throughout this Parliament that it wishes to remove any Regulations that go above and beyond what is required by European directives unless there is a clear economic rationale. The inclusion of SPCs in the TUPE Regulations is one such area which goes beyond the minimum requirements of the Directive. There was also concern that the current Regulations might place small and medium sized businesses at a disadvantage when they bid for new contracts, as they will have to take on the employment liabilities of the incumbent contractor. The consultation sought views about repealing the SPC provisions added in 2006 and if such a repeal would help the UK economy by making it easier for businesses to change the provider of a service.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q1. Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No

³This test is "a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity": Regulation 3(1)(a), although there are further provisions in Regulation 3 which are relevant to the question of whether there is a transfer.

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)?

The majority of responses to question 1 did not support the repeal of SPCs. 67% of respondents were against repealing, 28% supported repealing and 5% gave no comment.

For the respondents who did not support the repeal of SPCs there was a consensus that the current Regulations brought clarity for employers and employees and reduced the number of TUPE claims to Employment Tribunals. They also provided a level playing field for contractors. Some respondents suggested that employers and unions had become used to the SPC provisions and had put processes in place to deal with them. Respondents pointed to other benefits arising from the 2006 Regulations, such as continuity of staffing (particularly important in the voluntary sector) and increased security for service sector workers. There was also a consensus amongst the responses that repealing SPCs would increase uncertainty for businesses which could lead to more disputes. Respondents also felt that commercial transactions would become more time consuming and costly and were concerned that removing SPCs could have a detrimental impact on terms and conditions for employees. Many stakeholders supported the Government's view that the current Regulations go beyond the requirements of the EU Acquired Rights Directive, although it was also suggested that this 'gold-plating' was not unnecessarily burdensome for those involved in TUPE.

Several stakeholders suggested that repealing SPCs would have an impact on some employees with protected characteristics. This is discussed more fully in the Equality Impact Assessment.

Many submissions, particularly from business organisations, noted some positives that could arise from repealing the SPC requirements. These include potential increased appetite to be involved in transfers as staff would not be inherited, possibly giving scope for more innovative bids. Some stakeholders suggested that the 2006 amendments had not accomplished their aim of achieving greater transparency or certainty. Also, there was a belief among some professional groups that professional services should be exempt from TUPE.

There were mixed views among respondents about whether the 2006 provisions 'gold-plated' the Acquired Rights Directive.

However, many respondents felt that the benefits, in particular the legal certainty brought by specifically including SPCs in TUPE, outweighed

potential benefits that may arise from their removal. There was support for improved guidance concerning SPCs, whether or not the current provisions were repealed.

A number of respondents suggested that by repealing the 2006 amendments, the Government would risk recreating the uncertainty caused by aspects of pre-2006 domestic case law. In particular, multiple stakeholders made reference to the *ECM v Cox* and *Suzen* cases. The original intention of the 2006 amendments had been to address this uncertainty.

Q2. 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.

	Less than 1 year	1 - 2 years	3 – 5 years	5 years or more
Number of Respondents	18	34	27	42

Table 1: Number of Respondents per Lead-in period

There was general agreement that introducing change suddenly with no lead-in time would not be appropriate. Incumbents will not have expected to be responsible for staff redundancies at contracts' end.

Around 70% of respondents said that there would be potential problems. The most common theme being concern about increased uncertainty for all regarding the application of TUPE. Other concerns included potential added costs for business and problems for employees. A particular problem was that if SPCs were removed from TUPE, the incumbent contractor may be liable for making staff redundant and may not have been expecting this from the outset of the contract. Some respondents pointed out that this could well cause the closure of some firms who would be unable to deal with the costs involved.

It was felt that other costs for business triggered by repeal of the SPCs would be in the shape of substantially increased legal advice which would be required to:

- overcome the uncertainty which could be introduced.

- resolve potential claims for breach of the Regulations.

It was also argued that TUPE transactions would become more protracted, adding to business expense. It was pointed out that smaller firms would especially be exposed to the risks entailed. Some respondents argued for a lengthy lead-in time to mitigate the disruption the repeal would cause.

Government Response

4.5. Following the Call for Evidence, the Government's presumption was that the SPC provisions should be repealed as they went further than the Acquired Rights Directive. The Government has been mindful of the arguments in favour of repeal, including some reflected in the responses to the consultation such as:

- Repeal would give businesses more scope to provide innovative contract bids as they would not have to inherit the existing contract's staff and their terms and conditions;
- The SPCs put small businesses off bidding for contracts by the potential size of the liabilities that would be inherited – in particular, the transferring staff's existing terms and conditions;
- The fact that where an existing contractor had failed to deliver a satisfactory service, the employees who had been found wanting were often transferred to the incoming business, so that the client who had re-tendered with the aim of getting a better service was no better off post transfer. In some circumstances burdensome public sector terms and conditions could be inherited by those successfully bidding for contracts.

A number of respondents' support for SPC repeal was heavily caveated, for example there were calls for 3 and 5 year lead-in times.

The Government notes the arguments made in support of repealing the SPCs, meaning that TUPE would apply in fewer situations. However, the Government has listened carefully to the counter arguments to repeal from respondents, including:

- The SPCs removed much of the uncertainty as to whether the TUPE Regulations would apply which existed before 2006 when the sole test (presently set out in Regulation 3(1)(a)) was that derived from the Directive and European case law. That test depends upon an assessment of the circumstances against a range of factors and is uncertain;
- Repeal would mean returning to the pre 2006 situation and would mean great uncertainty as to whether a transfer was caught by TUPE or not. Many respondents considered that this uncertainty would make commercial transactions involving change of service provider more time consuming and costly. They also felt that employees' terms and conditions would suffer;

- Repeal would increase contract price/bids - as potential contractors would include the potential cost of having to make staff redundant at the end of the contract;
- Service providers would have to take out long term indemnities against potential redundancy costs, which are high risk and expensive and this could make it difficult for small businesses to enter the market;
- Repeal would mean significant unexpected, and potentially ruinous, liabilities for some existing incumbent contractors who would not have been expecting to make employees redundant at the end of their contracts;
- The present situation whereby TUPE applies to most service provision changes means that everyone knows where they stand. Repeal will lead to an increase in litigation as test cases are brought to determine whether TUPE applies;
- The existing Regulations are 'necessary' gold plating which is not burdensome for business.

- 4.6. The responses to the consultation have presented a clear rationale for retaining the current SPC rules. If the Government removed the 2006 SPC rules, the respondents believe that such a change would create significant uncertainty in the economy. Repeal would mean that employers carrying out a SPC would not be certain if the change was within the scope of the TUPE Regulations. This could mean that they either avoid the change – not realising the economic benefits of changing the provider of a service; or they might carry out the change in a manner that is not compliant with the TUPE rules, opening themselves to potentially costly litigation or even dissuading some businesses from bidding for a contract.
- 4.7. Retaining the SPC rules means that we avoid the potentially significant downsides presented to the Government in responses to the consultation. The Government believes that it is not desirable to increase uncertainty about which transfers are within scope of the TUPE Regulations. It is clear from the responses to the consultation that removal of the SPC rules could create significant additional uncertainty for businesses and individuals. Such uncertainty may hinder commercial agreements which would damage both the labour market and the wider economy.
- 4.8. The Government agrees with the rationale presented in many of the consultation responses. It is clear from the evidence that repealing the SPC rules may not lead to significant benefit to either the labour market or the economy. Therefore, the Government has decided that the SPC rules added in 2006 should remain un-amended. Our decision means that businesses and individuals have greater certainty that a SPC is covered by TUPE and should be carried out in a way that complies with the TUPE Regulations.
- 4.9. The Government notes calls for professional services to be excluded from TUPE and the view in some quarters that TUPE deters some clients from changing service providers, thus impacting adversely on competition. The Government has considered whether it would be possible to provide an exception from SPCs for professional businesses based on a generic description of such services or

by listing excluded services. The Government has concluded that it would not be possible to draft an exception precisely enough, while any list would be arbitrary and likely to lead to long running disagreement. There is also an argument as to whether it would be fair to those employed in professional services to exclude them from TUPE.

- 4.10. The Government has also considered calls from some respondents to exempt second generation contract changes from the SPC rules and whether to exempt micro businesses or SMEs from the SPC requirements, but it is not possible to exempt them from TUPE altogether, as the test for a transfer derived from the Directive will still apply, so there will always be some inherent uncertainty. Further, to exempt micro businesses would lead to confusion in the market place as some businesses could be exempt and some might not be – within the same transfer – leading to greater need for legal advice and potentially legal challenge than currently exists. The Government has therefore rejected these calls.
- 4.11. The SPC rules are an example of where good Regulation, that is additional to that required by a European Directive, can deliver benefits for both business and individuals. These benefits are principally about providing greater certainty for the labour market.
- 4.12. The Government has noted that some respondents would like improved guidance on SPCs. We will review the guidance to ensure that it is as simple as possible so that businesses and individuals can understand what the rules mean for them.

Outcome: The Government will not repeal the SPC rules in the TUPE Regulations.

- 4.13. While the Government has decided that the SPC provisions should not be repealed, it is mindful of the disadvantages that they cause for some businesses. However, the Government considers that it may not be generally appreciated that case law⁴ has established that part of the test of whether a TUPE service provision change occurs is whether the activities carried on after the alleged transfer are "fundamentally or essentially the same" as those carried on before it. The greater the difference, the less likely it will be that the change is caught by the SPC provisions. The application of this test means that differences in the service after a change in provider, compared to the service before that change, could mean that the change is not within the SPC provisions. It will depend upon the circumstances and the degree of difference, but providing a service in a novel or innovative way could result in the change not being caught by the SPC provision. It would still be necessary to consider whether the change was caught by the other test for a transfer, but differences in the activities is also a relevant factor under that test.

⁴ *Metropolitan Resources Ltd v Churchill Dulwich UKEAT/0286/08*, and the test set out in it has been referred to and applied in many other cases.

- 4.14. Accordingly, the Government intends to amend TUPE to set out expressly this test on the degree of similarity of the activities. The exact drafting is still to be worked out, and it may not necessarily refer to both “fundamentally” and “essentially”, but the intention is to capture the existing approach. No lead in time will be required for this amendment as it will be simply be reflecting the law on the face of the Regulations.
- 4.15. This change is in line with the general thrust of the amendments the Government intends to make and will signal the flexibility that business has in some TUPE situations (that not every change in service provider will trigger the application of TUPE) thereby reducing the disincentive to undertake the extra economic activity associated with taking over the production of a service.
- 4.16. However, this amendment will not mean that any new or innovative service offering is exempt from TUPE. Ultimately, it would be a question of fact and degree for an Employment Tribunal as to whether the difference in the service took it outside the SPC provisions. Further, as is currently the case, it might amount to a relevant transfer under the test derived from the Acquired Rights Directive and EU law (Regulation 3(1)(a)).

OUTCOME: The Government will make an amendment to reflect the approach set out in the case law, namely that for there to be a TUPE service provision change, the activities carried on after the change in service provision must be “fundamentally or essentially the same” as those carried on before it.

5. Employee liability information

- 5.1. When employees transfer between two employers (moving from the transferor to the transferee) information needs to be given to the transferee so that it can understand its obligations towards potential new employees.
- 5.2. TUPE Regulations require a transferor to provide specific information relating to the individuals involved in the transfer, usually no later than 14 days before the transfer. The information includes details about each person, including their age, some particulars of their employment, information about claims, grievances, disciplinary action, potential claims against the new employer arising out of the employment with the transferor which the transferor believes might be brought, and information about collective agreements which will have effect after the transfer in its application in relation to the employees.
- 5.3. The call for evidence highlighted problems with how the requirement to provide information works in practice. In the consultation, the Government proposed repealing the specific duty under Regulation 11 to provide information and instead leaving the businesses involved in the transfer to agree among themselves how they provide the information needed to make a successful transfer. The Government also proposed providing additional guidance which could include model terms for contracts to facilitate information transfer.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q3. 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?

The majority of respondents to question 3 did not support repealing the employee liability information requirements. 75% were against the repeal, 16% supported repealing and 9% did not respond. Repeal of service provision changes did not affect responses significantly, with 66% of respondents still disagreeing with repeal of the requirements to provide employee liability information. 3% of respondents replied positively and 30% did not respond.

Business representatives did acknowledge that the proposed measure was intended to be deregulatory, but they did not support the removal of the

provisions that required information to be shared. This is because they considered that the information provided under these provisions is a significant part of the TUPE process and is commercially important.

Many of those who responded to this question suggested improvements to the existing provisions. These suggested improvements mainly related to timescale and content of the information provided. Some respondents also referred to the difficulty of obtaining information needed for the transfer.

There are particular problems in SPC situations, where the relationships between transferor and transferee may be difficult, especially if the two companies are competitors. Respondents in these situations believe that our proposal to remove the legal requirements to supply information will make things worse. Some respondents also suggested we needed to make the information requirements stricter, and that the categories of information should be expanded.

Some respondents believe that the information should be provided at the time of tendering. There is almost unanimous agreement that a period of 14 days is too short a deadline, with 28 days being the time period most requested in responses. Suggestions varied from 21 days to 2 months. Only one response stated that 14 days was satisfactory (and this respondent did not specifically address the issue of whether the deadline should be increased or not).

A common response to question 3c) was that employee liability information should be retained but that the Government's proposal would be better than nothing. Some respondents felt the proposal needed to be re-written to make it clearer what the duty of the transferor and transferee is and when and what information should be provided and by whom. Others felt the phrase "where necessary" was too vague and suggested that specific measures (e.g. changes affecting proposed redundancies, relocation etc) should be disclosed. Some respondents felt the proposal should complement rather than replace the existing provisions on employee liability information.

Government Response

- 5.4. The Government has taken careful note of the views expressed about the information that must be shared during a TUPE transfer. The Government has concluded that, while optional under the Acquired Rights Directive, the current requirements are generally appropriate because they provide business with greater certainty of their obligations towards transferring employees, and should remain part of the TUPE Regulations.
- 5.5. The responses reflect a sense of dissatisfaction with the current rules. The current rules require information to be provided to the transferee usually 14 days prior to the transfer. Respondents felt that this time frame was not long enough and should be extended.

- 5.6. The Government has noted the strength of feeling expressed on the subject. The Government understands that extending the requirement to provide information about employees sooner will help businesses and employees, for example transferees will receive information earlier in the process and, accordingly can plan earlier. Employees will benefit because the new employer will be better placed to meet their obligations. Transferors would have had to provide the information anyway, but the Government recognises that they might have to update the information more often than now (if it has to be provided earlier) but this is justified by the overall gains involved. The Government has therefore decided to bring forward the deadline by which information has to be provided from 14 days to 28 days before the transfer. The Government considers that 28 days strikes an appropriate balance between employees' and transferees' interests in information being provided earlier and avoiding too much burden on transferors in having to update it.
- 5.7. This change to 28 days will not of course be practical in all situations, so in amending the Regulations the Government will retain the current exception in Regulation 11(6), namely that if special circumstances make it not reasonably practical to comply with the (new 28 day) deadline, the information must be given as soon as reasonably practical thereafter. The obligation in Regulation 11(5) that the transferor notify the transferee of any change in the information will also continue to apply. The current enforcement mechanism in Regulation 12, whereby the transferee can complain to an Employment Tribunal of a failure to comply will also continue to apply. In the Government's view, a 28 day deadline, combined with these existing provisions, is appropriate to ensure the notification of the main rights and obligations that will be transferred to the transferee.
- 5.8. Some respondents did argue for increasing the categories of information that employees should provide. The Government believes that the information currently required is sufficient and that it would be unnecessarily burdensome in some cases for business to increase the burden of Employee Liability Information requirements and therefore will not do so. However, the disclosure of all information is not prohibited and information can be disclosed even when the Regulation 11 requirement does not apply⁵. The Government considers that it is for the parties to consider what appropriate arrangements can be made in cases where more information might be desirable.
- 5.9. The Government remains of the view that there should be no requirement to oblige information to be provided at the tender stage in out-sourcing situations. However, as the Government examines the TUPE guidance, it will consider improvements such as the inclusion of model terms for contracts.
- 5.10. As the Government will not now repeal the ELI provisions, in its view it is unnecessary to amend Regulation 13 of TUPE to clarify the transferor's duty to

⁵ The Information Commissioner has issued relevant guidance on the Data Protection Act 1998 in relation to TUPE. This is available at:
http://www.ico.org.uk/upload/documents/library/data_protection/practical_application/gpn_disclosure_employee_info_tupe_v1.0.pdf.

provide some information to the transferee. The case for this was stronger when repeal of ELI was a possibility.

OUTCOME: The Government will retain the current requirements to provide information about transferring employees (Regulation 11) and the enforcement mechanism (in Regulation 12) but will change the usual deadline for providing it, so that it must usually be provided not less than 28 days before the transfer takes place, rather than the current 14 days.

6. Restriction on changes to terms and conditions

- 6.1. The aim of the TUPE Regulations is to ensure that employees are not disadvantaged if the business they work for, or part of it, transfers to another employer. This generally means that their terms and conditions should not be changed because of a transfer from one employer to another, even if the employee and the new employer agree (or even if both parties want) to change the employment contract.
- 6.2. TUPE provides that purported changes to contracts are void where the sole or principal reason for the change is the transfer itself, or connected to the transfer. The TUPE Regulations do however provide an exception: changes are allowed if the sole or principal reason for them is connected to the transfer and there is an economic, technical or organisational reason entailing changes in the workforce.
- 6.3. In the Government's Call For Evidence it was clear that businesses found that their inability generally to harmonise employment contracts was a burden. The Government recognises this problem but, on the basis of the existing case law of the Court of Justice of the European Union (CJEU), there is a very high risk that any provision allowing parties to agree variations to terms and conditions for the purpose of harmonising those terms would be incompatible with the Directive.
- 6.4. The Government considered whether there were any other amendments which could be made to improve the current regulations on changes to terms and conditions. The consultation highlighted that the language of Regulation 4 is different from that in the case law interpreting the Directive and argued for it to be broader. The Government proposed to amend Regulation 4 so that its language more closely reflects the language of the Directive and case law of the CJEU.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q4. 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?

147 respondents to the consultation answered question 4. Of these, 117 (66%) supported the Government’s proposal while 40 (23%) opposed it, and 20 (11%) respondents did not respond.

Those in favour were generally of the view that the current TUPE Regulation went further than the Acquired Rights Directive. Many thought that the proposed change may reduce legal risks of altering terms and conditions – to the benefit of both employees and the business performance. Some respondents did note that the approach outlined in the consultation document would be more in line with a more relaxed approach that is seen in other EU Member States.

However, some did consider that the change in wording in the Regulations might not, by itself, lead to a practical difference: this would depend on whether the Court interpretation enabled more flexibility. There was a strong feeling that guidance was necessary to mitigate any legal uncertainty that the change in wording might cause. Respondents felt that clarification should be provided on:

- The practical meaning of ‘changes by reason of the transfer’ and how it differs from ‘changes due to reasons connected with the transfer’; and
- How transferee employers can change transferring employees’ terms and conditions.

While a number of respondents agreed that varying terms and conditions post-transfer was difficult, even if employees were in favour, some said that transferees had been able to vary terms and conditions of transferring staff post-transfer. There were differing views about how straightforward this was, ranging from costly and challenging to minimal risk, especially where employees were no worse off overall.

Respondents raised concerns that in existing situations transferring employees were able to select the best options from their existing terms and

any alternatives offered. Some respondents noted that transferring employees would like more flexibility than allowed under the current Regulations to discuss changes to terms and conditions, as the transferee's terms may offer more flexible working or other benefits lacking in their existing terms. Many thought that the revised legislation should make clear that consensual changes should be allowed. Some also suggested that the legislation should specify that changes that otherwise could have been made under national law are permitted.

Some legal representatives thought that the draft new provisions proposed in the consultation document may have gone further than allowed by the Directive and CJEU case law, as they may allow any agreed change that could have been made if the transfer had not taken place, even if the terms were varied by reason of the transfer.

It was pointed out that the amendment should ensure that unilateral variations to contracts are permissible where they are pursuant to a contractual provision (for example, a mobility clause) and where such a change would be permitted if there had not been a transfer.

Some supporters of the proposal thought there should be some limit in the amount of time post-transfer that variation in terms and conditions were void if they were by reason of the transfer.

Those respondents opposed to the Government's proposed change considered that the Directive prohibited provisions that allowed for the harmonisation of terms and conditions. This, in their view, was backed up by CJEU case law (the *Daddy's Dance Hall* case) which precluded transferees from varying contracts. Most opponents argued that CJEU case law (e.g. the *Martin* case) did not distinguish between 'by reason of the transfer' and 'connected to the transfer'. It was also noted that the draft proposed provisions went further than the Directive by not prohibiting variations made 'by reason of the transfer itself'. It was considered that the change in wording would result in increased litigation.

Many of those opposed thought that the current Regulations were flexible enough to allow variation to terms and conditions that transferring employees benefited from, or if there is an economic, technical or organisational reason, or if the reason for the variation is not connected to the transfer (as was the finding in recent cases). Therefore, they argued that there were already some limits to employee protection. Some respondents pointed to experience of negotiating variations to terms and conditions within a properly negotiated collective agreement, arguing that this is generally not problematic, as a collective agreement can add certainty for the employer and employee.

Opponents of the proposal were concerned about a change to create more legal certainty in how terms and conditions might be varied for transferring employees. They thought it would likely result in a worsening of pay and conditions, which might increase low pay and in-work poverty. One employer

noted that the current Regulations provided certainty and enabled competition on a level playing field. Amending this to make it easier for employers to vary terms and conditions could provide less scrupulous employers (who might exploit their employees to reduce costs) a competitive advantage.

Question 4b) on retaining the exception for economic, technical or organisational reasons entailing changes in the workforce (“ETO”) was answered by 138 respondents. Of these, 114 (83%) supported its retention, while 24 (17%) opposed it.

Those in favour regarded the exception as providing some flexibility to employers, though in practice it was of limited benefit. It was important when the outcome of the transfer was restructuring. It was thought that the revised legislation should make clear that the exception was only required for variations that were ‘by reason of the transfer itself’.

Respondents noted that including location change within the definition of ‘entailing changes to the workforce’ (another change proposed in the consultation) would increase the usefulness of the ETO exception. Respondents also thought that this definition could be loosened further, so that an ETO reason could apply without requiring workforce reductions (some employers may be tempted by an unnecessary reduction in workforce numbers to enable them to change terms and conditions). It would also be beneficial, respondents argued, if ETO reasons could be applied when a transferor was insolvent.

Respondents supporting the exception thought there was a strong need for clear guidance on what constituted an ETO reason, as it was felt that a lack of clarity may inhibit employers from utilising the exception.

Those opposed to retaining the exception argued that it contravened Article 4 of the Directive, saying there was no basis for linking variation of terms and conditions with the ETO exception. It was also felt that, as it was linked to changes in the workforce, it did not offer employers practical assistance when it came to varying terms and conditions, and employers might be misled into believing there was an option for change in circumstances where it was not allowed.

Government Response

- 6.5. Arguably the present wording of the Regulations goes further than the Directive. In order to reduce any risks that the Regulations are interpreted more widely than what is required by the Directive, the Government will amend Regulation 4 to reflect the wording used in the Directive and CJEU case law. The exact drafting of the provision has yet to be finalised, but it is likely to refer to the “transfer itself” being the “reason” for the variation. The Government considers that the new provision will provide employee protection and reflect the case law of the CJEU in this area and will not open the door to wholesale reductions of

terms and conditions. It will be a new test so that a reason under the existing test which might be considered 'connected with' the transfer might still make changes void. The Government also acknowledges that the provision will need to prevent changes which could have been made if there had not been a transfer, but the reason for the change is the transfer itself.

- 6.6. The amendment will also seek to provide that unilateral variations to contracts are permissible where they are pursuant to a contractual provision (for example, a mobility clause) and where such a change would be permitted had there not been a transfer. This is to deal with any doubt as to whether such changes would be permitted. The Government considers this is compatible with the Directive.
- 6.7. The Government will retain the exception for economic, technical or organisational reasons entailing changes in the workforce (ETO) because there may be some instances where the reason for the change is regarded as the transfer itself but there may be an ETO. The Government acknowledges that the Directive does not explicitly allow for agreed variations in situations where agreed variation is prohibited, even if there is an ETO, and case law also does not mention such an exception. However, the Directive does allow dismissals made for such a reason (article 4(1)). It would not be logical for the Directive to permit dismissals for such a reason, which is a greater interference with employee rights, but not the lesser interference of agreeing changes to terms and conditions where there is such a reason.
- 6.8. Retaining the exception may be of limited use in practice. However, the Government intends to amend 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 capable of being an ETO. This might be helpful where there is a change in the location of the work and the employee actually wants to move to the new location rather than be made redundant: the contract could be varied by agreement to provide for the new location to be the place of work. The provision might also be used where there might be changes to terms associated with a change in job function (which could amount to an ETO), rather than a dismissal. The Government will give guidance which will indicate to employers that there could be situations both at the time of, and after, transfer when any agreed changes made to terms and conditions will be void.

Outcome: The Government will amend Regulation 4 so it more closely reflects the wording from the Directive and CJEU case law. The provision will also set out that unilateral changes pursuant to a contractual provision will be allowed if such changes could otherwise have been made, and there will continue to be an ETO provision.

7. TUPE and Collective Agreements

- 7.1. Collective agreements are an important way some employers and workforces use to agree terms and conditions, but not all undertakings use them. The Consultation raised the possibility of changes to TUPE about the effect of a transfer on terms and conditions derived from collective agreements. It suggested limiting the period during which terms and conditions derived from collective agreements must be observed to one year, so that after that, the terms and conditions can be varied in the usual way even if the transfer itself was the reason.
- 7.2. The Consultation document also highlighted the Government's view that only collective agreements agreed at the date of the transfer should bind the transferee, and not ones entered into after the transfer i.e. that the collective terms incorporated should be 'static', rather than 'dynamic', and so should not be affected by any subsequent variations or new collective agreements relating to the transferor following the transfer.
- 7.3. The Court of Justice of the European Union (CJEU) judgment in the *Parkwood Leisure v Alemo-Herron* (C-426/11) about the requirements of the Directive on this point was issued on 18 July 2013. The CJEU decided that the Directive precludes Member States from providing for the dynamic approach where the transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer. The reference to the CJEU was made in litigation before the UK's Supreme Court about the meaning of TUPE 1981 (although the equivalent provisions of TUPE 2006 are not materially different) and the Supreme Court has yet to give judgment in those proceedings.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q5. 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 are 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

140 respondents answered question 5. Of these respondents, 109 (61%) were in favour of a one year post-transfer limit, while 46 (26%) were opposed. Responses from businesses, business representative organisations, individuals, charities or social enterprises, legal representatives and local government were generally in favour. Those from trade unions or staff associations were generally opposed.

136 respondents answered question 5b), with 67 (49%) supporting and 63 (46%) opposing the inclusion of a condition that any change by reason of the transfer after the one-year deadline should be no less favourable overall for employees. In most groups, the majority of responses were supportive, especially among trade union and staff association responses. One exception was among legal representatives, where there were slightly higher numbers opposing.

Most respondents agreed that the UK Regulations should limit the period for observing terms and conditions agreed in a collective agreement to one year post transfer.

Many in favour of a one year limit were concerned that, where transferring employees had their terms and conditions set by collective agreements as agreed from time to time (i.e. incorporating changes after the date of the transfer – the dynamic approach), the transferee would continue to be bound by those later changes, even though it was not a party to the negotiations. This could mean that changes in terms and conditions could take effect after the transfer, which may have no applicability or relevance to the transferee's business operation or financial situation, making it difficult for them to manage the employment relationship. It was also their view that this may impact on forward planning. This could particularly affect small businesses, who might inherit onerous terms and conditions over the long term, if there is no limit. Respondents also claimed that transferees could find it difficult to track changes in collective agreements which they were not involved in negotiating.

Respondents supporting the one year limit also thought that it could help in enabling variations in terms and conditions for transferring staff, with potential

benefits such as:

- Fewer sets of terms and conditions, reducing employers' administrative and operational costs;
- Better integrated workforce; and
- More potential for efficiencies and introducing innovation.

Many respondents raised the issue that, in the UK, terms and conditions derived from collective agreements were often incorporated into individuals' employment contracts. These were subject to contract law and would remain effective even if the collective agreement had ended. It was not clear how the one year limit would operate in these circumstances, where the terms in an individual's contract enabled the terms to be varied 'from time to time' in line with collective agreements, for instance those produced by local or national negotiating bodies. Some legal representatives thought there may be an anomaly if terms in individual contracts derived from collective agreements could be subject to unilateral variation one year after the transfer, while those arrived at individually would not be subject to such variation.

Respondents also wanted assurances that not-incorporated terms derived from collective agreements (which were not usually legally enforceable) would continue to be subject to immediate variation post-transfer. Similarly, they expected that immediate post-transfer variation could continue to be allowed where there was an ETO.

Some respondents thought that it would be preferable for transferring employees to become part of the transferee's collective bargaining process, where it had one, as having an alternative bargaining process for some of its workforce (where the transferee was not involved) was disruptive to its own bargaining processes.

Among those opposed to the one year limit, a key argument was that collectively agreed terms were often part of, and enforceable via the contract of employment. It was therefore argued that the one year limit appeared inconsistent with UK law because:

- A term derived from a collective agreement, when incorporated into an employment contract, has the same status as any other incorporated term; and
- Restriction of these terms may be contrary to UK common law: it may conflict with the implied term of trust and confidence.

It was argued that, if individuals with incorporated terms derived from collective agreements faced variation of these terms while individuals with terms not derived from collective agreements did not, this may be in breach of

Article 11 of the European Convention on Human Rights.

Employee representative bodies were concerned that the one year limit would “limit the ability of unions to protect their members’ interests through collective bargaining”. This could lead to downward pressure of transferring employees’ terms and conditions, worsening staff morale and retention – impacting on the quality of service delivery.

Many respondents were in favour of including a condition that if changed after the one year limit, terms and conditions should be ‘no less favourable overall’ for transferring employees. They believed the condition would provide necessary protection for transferring employees, preventing the erosion in terms and conditions and staff morale that unions were concerned could happen. Unions considered that the condition would be a necessary safeguard.

The difficulty in defining ‘no less favourable overall’ was problematic for many respondents. They felt that individuals would not all place the same value on different contractual aspects, so some objective definition may be required. It was felt that clear guidance would be required, to limit the potential for dispute.

Some respondents thought that the Directive did not require such a condition, and it would hinder employers’ flexibility to take account of current economic and business conditions. Some considered that other UK legislation prescribing how employers could vary employees’ terms and conditions would provide sufficient protection.

While responses to question 5c tended to vary in how the question was interpreted, most respondents supported a static approach. Stakeholders suggested this would provide transferees with certainty, as they would not be bound by ongoing variations to terms and conditions resulting from collective agreements they were not involved in negotiating. Some respondents argued that this approach would encourage negotiation between the transferee and transferring employees. It was suggested this could increase the potential to vary terms and conditions to provide the benefits to business (and according to some respondents, to employees), that are referred to above. Employees would be protected to the extent that they would retain the terms and conditions they had at the point of transfer.

Those opposed to the static approach took the view that the dynamic approach was consistent with the common law of contract, and employees would expect the terms of the collective agreement to be honoured. As above, it was argued that the static approach may constitute a restraint on the use by employees of union membership to protect their interests and therefore be in contravention of Article 11 of the European Convention on Human Rights.

Some respondents made additional points in response to question 5d. These included suggestions around encouraging early negotiation on variations in

terms and conditions for transferring employees, and legal changes to increase the employer's flexibility to offer individuals alternative terms and conditions. It was also suggested that unions involved in negotiating transferring employees' terms pre-transfer should be involved in their post-transfer re-negotiation.

Government Response

- 7.4. The Government notes the strong feelings expressed in the responses to the consultation concerning the burdens and hardships for employers arising from the present position and considers that these are particularly harsh, especially for smaller employers.
- 7.5. The Government will amend the TUPE Regulations so that after one year, the restriction in Regulation 4 on variations to contracts will no longer apply in respect of changes to terms derived from, or incorporating, provisions of collective agreements, provided that any change (which is by reason of the transfer) is no less favourable overall. The restriction in Regulation 4 will remain in respect of other terms and conditions (i.e. those not derived from collective agreements, nor the individual term incorporating them).
- 7.6. After one year, the terms and conditions derived from collective agreements would still apply unless or until varied. This change enables employers and employees to consider changes that are mutually beneficial to both parties even though the reason for the change is the transfer itself. It is important to recognise that the amendment will not give employers any power to unilaterally change such terms. Any variation of the terms and conditions would still be subject to the general law relevant to varying terms and conditions of employment. In addition, the condition that any change (which is by reason) of the transfer must be no less favourable overall, would provide important additional protection for employees. If a change were by reason of the transfer but did not meet that condition, then it would be void.
- 7.7. The Government notes the strong views of many respondents that a static approach should apply in respect of the transfer of terms contained in collective agreements and the calls from some bodies for the Government to take the lead and make an early amendment. The consultation document noted that the Government would keep the *Alemo-Herron v Parkwood Leisure* case under review, and may consider whether amendments should be made to TUPE, depending upon the outcome of the case. The Government welcomes the outcome of the Court of Justice's judgment in *Alemo-Herron*, which is that a static approach is required where the transferee does not have the possibility of participating in the negotiation process of collective agreements concluded after the date of the transfer. The Government will amend the legislation to provide expressly for a static approach where the transferee is not a party to the collective agreement or bargaining process. This will give certainty, from the date the change comes into force ahead of the eventual outcome of the proceedings in

the Supreme Court and it will also give clarity on the face of the Regulations as to the position.

Outcome: The Government intends to amend the TUPE Regulations so that one year after the transfer, the restriction on variations to contract (in Regulation 4) will no longer apply in respect of changes to terms derived from, or incorporating, collective agreements, provided that any change (which is by reason of the transfer) is no less favourable overall. The Government will also amend the Regulations to expressly provide for a static approach to the transfer of terms derived from collective agreements (i.e. only those in existence at the date of the transfer will be binding on the transferee and not subsequent ones where the transferee is neither a party to those subsequent collective agreements nor to the bargaining process for them).

8. Protection against dismissal (Regulation 7)

- 8.1. The Acquired Rights Directive aims to protect employees who are transferring from one business to another. The Government proposed amending Regulation 7(1) and (2) so that the language in it more closely reflects that of the Directive (as interpreted by the CJEU).
- 8.2. The aim of amending Regulation 7 is to reduce the likelihood that the current Regulation is interpreted more widely than the restriction in the Directive, reducing legal risk, and giving some enhancement of clarity in relation to dismissals. This proposal also aligns with the proposal in question 4 (the existing language of “connected with” is used in both Regulations 4 and 7).

SUMMARY OF RESPONSES TO THE CONSULTATION.

Q6. 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 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?

144 respondents answered this question, with 110 (76%) supporting the Government's proposal, and 34 (24%) opposing it. Respondents from businesses, local government, legal representatives and individuals were generally in favour, along with most business representative organisations. Respondents from employee representative organisations predominantly registered opposition.

Generally, those respondents supporting the proposal thought that the current UK Regulations were more restrictive than required by the Directive and CJEU case law. It was felt that the current Regulations provided enhanced protection for transferring employees relative to employees not going through a transfer.

It was generally felt by respondents that guidance would be necessary to make clear what 'by reason of the transfer' would cover. This should be aligned with guidance on how the ETO reason can be applied, as respondents identified that in many cases of redundancy where dispute arose, the relevant issue was whether there was an ETO reason.

Some respondents considered that the proposed change might be of some benefit when dealing with insolvent businesses, particularly those in

administration. Stakeholders have suggested it could reduce the cost of redundancies prior to a transfer, increasing the possibility of the business remaining afloat. Currently, redundancies in these circumstances can mean unfair dismissal liabilities would be passed on to the transferee business, which operates as a barrier to transfers in these circumstances.

Those opposing the Government's proposal contended that the current Regulations accurately reflected the Directive and CJEU case law, which do not distinguish between 'by reason of the transfer' and 'reasons connected with the transfer'. It was also felt that weakening the protection for employees would encourage some businesses, currently deterred by the existing Regulations, to dismiss staff to the extent that they could "*circumvent TUPE rules and avoid employee liabilities*". There were also concerns that the proposed change in wording would increase uncertainty and could lead to an increase in legal disputes. It was also argued that the proposed change, by reducing employee protection, would raise employee insecurity and stress.

128 respondents answered question 6b with 98 (77%) in favour and 29 (23%) opposed.

Some respondents considered that there was a need for consistency between the provisions containing the protection against dismissal because of a transfer and those concerning changes to terms and conditions by reason of the transfer, as it would help with certainty and therefore reduced litigation. Some believed that the greater clarity may reduce the risks involved in a transfer, while not fundamentally damaging employee protection. Others thought that alignment would provide employers with more flexibility to dismiss staff and change terms and conditions in connection with a TUPE transfer.

Those opposed considered that the provisions related to varying terms and conditions were conceptually separate from those related to dismissal. They argued that while the ETO reason entailing changes in the workforce could apply to dismissals occurring by reason of the transfer, this exception did not apply for the terms and conditions provisions.

Government Response

- 8.3. Fairness is an important part of the Government's strategy for regulating the labour market. The TUPE Regulations ensure that individuals are treated fairly during a transfer of employer, a time which can be unsettling for all involved.
- 8.4. The Government must ensure that the labour market works well for both individuals and employers. For the market to work well, employers need to be able to effectively manage their organisation so that it remains a commercial success and has every opportunity to grow. To this end, the Government is

seeking to ensure that the TUPE regulations do not regulate more than they need to.

- 8.5. The Government identified that Regulation 7 could be improved; this assertion was supported by many responses to the consultation. The Government considers that the present wording of the Regulations ('connected with') is too wide. The Government will amend Regulation 7 to bring the wording closer to that in the Directive, thereby reducing this risk. As with the proposal to amend Regulation 4, the new provision is likely to refer to the "transfer itself" being the "reason" for the dismissal. These changes will reduce the risk that the existing Regulation can be interpreted more widely than is required by the Directive and in some cases may result in fewer automatically unfair dismissals.
- 8.6. It is important to recognise that although these amendments might lead to a few cases where the dismissal of an employee may not be automatically unfair, dismissals where the reason is the transfer itself will remain automatically unfair. This will not mean that any dismissal, which might have been considered as being a reason "connected with" the transfer under the current provisions would not be automatically unfair under the new provision; rather it will be a new test. The Government will provide guidance on this. The Government acknowledges that there might be some short term uncertainty in adjusting to the changes, but over time it believes this will be more certain and currently there is, in any case, uncertainty as to the breadth of the words "connected with".

Outcome: The Government will amend Regulation 7 so that it more closely reflects the wording of the Acquired Rights Directive (and CJEU case law).

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

- 9.1. The existing regulations provide 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. The provision makes the ending of the employment a dismissal so 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. The substantial change in working conditions need not even amount to a breach of contract or it could be based upon a breach of contract which is not a repudiatory one, which means that unfair dismissal claims can be founded upon changes which would otherwise not give rise to a constructive dismissal claim. In addition the circumstances (such as a change in work location) may be beyond the control of the transferee.
- 9.2. Additionally, transferors can sometimes be liable for automatic dismissal claims where the employee treats the contract as terminated in anticipation of substantial changes in their working conditions after the transfer and relies on their right to object to the transfer (under Regulation 4(7)). It is possible for transferors to face constructive unfair dismissal claims because of arrangements the transferee is proposing (whether or not they are permitted under TUPE) which the transferor may not be able to control.
- 9.3. Therefore the consultation proposed replacing Regulations 4(9) and (10) with a provision which would essentially copy out article 4(2) of the Directive with the aim of reducing some of the difficulties in circumstances where there is a substantial change in working conditions.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q7. 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?

a) Please explain your reasoning.

134 respondents answered this question. Of these 90 (67%) agreed with the Government's proposal, while 45 (34%) disagreed. Responses from business, legal representatives, local government, business representative organisations and individuals were generally in favour, while those from trade unions or staff associations were generally opposed.

Respondents in favour of the proposal to align Regulations 4(9) and (10) with the ARD and CJEU case law agreed that this change should remove the enhanced protection that transferring employees have of being able to claim unfair dismissal where there had not

been repudiatory breaches of contract. However, employees would still be protected in genuine constructive dismissal cases. Some thought that this condition, requiring a repudiatory breach in contract to enable a constructive dismissal claim, should be specified in the Regulations. There was some concern that using the wording of Article 4(2) may be interpreted as allowing an unfair dismissal claim and a claim for notice pay, worsening the situation from the employer's perspective. The need for clear guidance was stressed by some respondents.

Some respondents agreed that it was unfair that transferors could suffer an unfair dismissal claim when they were not responsible for post-transfer working conditions. Some respondents thought the legislation should make transferees liable for any unfair dismissal claims arising out of post transfer changes to working conditions. However, it was also noted some changes to working conditions would be outside the transferee's control. Many respondents in favour argued that the threshold for an unfair dismissal claim should be in line with other UK employment law, such as section 95 of the Employment Rights Act 1996. This approach would make it easier for employment to be retained on transfer (one of the purposes of the Directive).

Those opposed to the Government's proposal thought that the current TUPE Regulations fully met the Directive's aims of preserving employees' terms and conditions when a transfer takes place. Therefore, these stakeholders claim that Member States have limited ability to determine the remedies applied in these circumstances. They believe that national law must ensure that the directive is fully effective in achieving its objectives. Respondents noted that the current Regulations allow an unfair dismissal claim where employees consider that changes to working conditions will be to their material detriment. These respondents believe that this is the level of deterrent required to ensure employers do not try and avoid their TUPE obligations. They note that indemnity arrangements between businesses involved in the transfer should offer the transferor protection. Some respondents maintained that the protection offered to employees by the Directive was wider than that for constructive dismissal in UK law. Stakeholders suggested that to limit the EU protection to that in UK law would open the Regulations to challenge in the CJEU.

Government Response

- 9.4. The Government notes the strong support among those who answered for the proposed amendment of Regulations 4(9) and (10). On further reflection, the Government considers that a copy out approach would not achieve the intended result because referring to termination would not necessarily prevent the termination being treated as a dismissal. Instead, specific provisions would be necessary to achieve the aim. The proposal was aimed at limiting the remedy to one equivalent to a wrongful dismissal claim, rather than the remedy being unfair dismissal, in cases where the substantial change in working conditions did not amount to a serious breach of contract (which would entitle the employee to resign and claim constructive dismissal). This would mean that in cases involving a more minor breach of contract, or no breach of contract, the remedy would be equivalent to a wrongful dismissal claim.
- 9.5. Based upon the consultation responses and the case law in this area, the situation which seems to be of most concern with Regulation 4(9) is a change in the employee's place of work. In many cases, this may amount to a constructive

dismissal anyway. Also, as is reflected in this response, the Government intends to include change of workplace location as being capable of amounting to an economic, technical or organisational reason entailing changes in the workforce, so that an automatic unfair dismissal claim would not necessarily arise in relation to a dismissal arising out of workplace relocation. Therefore, on further reflection, the Government considers that changing the remedy for the situations covered by Regulation 4(9) would be adding unnecessarily to the regulatory burden on business, and adding complexity to TUPE.

- 9.6. The Government notes some respondents' concerns that in some circumstances the transferor is liable for dismissals brought about by the employee relying on Regulation 4(9) or claiming constructive dismissal based upon expected changes in conditions following the transfer. An alternative approach would be to transfer the employment liabilities to the transferee in such situations. However, it is open to a transferor to protect itself through warranties or indemnities either directly from the transferee, or through any client (where a service provision is re-tendered). Given that we have little evidence of a clear problem in practice, the Government has decided not to amend TUPE to transfer liabilities to the transferee in Regulation 4(9) and anticipatory constructive dismissal cases.

Outcome: The Government will not amend Regulations 4(9) and (10) .

10. Dismissals arising from a change of location

- 10.1. The Government highlighted in the consultation that the courts have interpreted the meaning of 'entailing changes in the workforce', to confine it to changes in the numbers employed or to changes in the functions performed by employees. The Government observed that this interpretation does not align with the definition of redundancy under the Employment Rights Act 1996 (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.
- 10.2. The effect of this discrepancy is that if, because of the transfer, the transferee employer intends to carry on the business in a different place, 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 section 139 of the Employment Rights Act 1996 (and in Northern Ireland the Employment Rights (Northern Ireland) Order 1996) where an employer can cease to carry on business in a particular place, and dismiss employees, without the dismissal being automatically unfair, even if it carries on the business in another place instead.
- 10.3. To address the discrepancy where a dismissal which could be capable of being fair on the basis of redundancy under the 1996 Act, but would be automatically unfair under TUPE, the Government proposed amending the TUPE Regulations so that "entailing changes in the workforce" should extend to change in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" ("ETO") covers all the different types of redundancy for the purposes of the 1996 Act. Such an amendment would result in ensuring that redundancies due simply to a change in the place that the employer carries on its business (where dismissals would be redundancy) are not automatically unfair.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q8. 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?

a) If you disagree, please explain your reasons.

What was the response to the consultation?

160 respondents answered this question, of which 79% were in favour of the proposed change, while around 21% opposed it. In general, respondents from businesses, business representative organisations, legal representatives, charities or social enterprises and local government tended to support the proposal. Respondents from trade unions or staff associations tended to oppose the proposal. Those in favour suggested that the proposed change would “reflect business reality”, identifying that many transferee businesses may be required to change the location of the undertaking. Business representative organisations and legal representatives considered that across all types of TUPE transfer, location change was common. They also reported that in many service provision changes, transferees had no control over the location of the contract.

The proposed change would provide fair protection to employees without penalising transferees, in these respondents’ views. Currently, transferees face potential unfair dismissal claims if a location change on transfer is required. A potential consequence of the current regulations is that a transferee, having to relocate the undertaking, may consider a headcount reduction it does not require in order to qualify for an ETO reason entailing changes in the workforce.

A number of respondents supported the view that the current TUPE Regulations offered greater protection to employees than the Employment Rights Act 1996, and that the proposed change would remove this anomaly. One respondent suggested aligning the TUPE Regulations to the wider definition of redundancy in section 195 of the Trade Union and Labour Relations (Consolidation) Act 1992 - “any dismissal for a reason not related to the individual concerned”.

Some respondents noted that geographic mobility clauses can be enforced contractually, and it was important that the proposed change to TUPE did not undermine this contractual flexibility. Those opposed to the proposal argued that the transferee’s ability to require a transferring employee to re-locate should depend on the individual’s employment contract, and any relevant mobility clauses. Stakeholders considered that on this basis there is no need for additional legislative changes.

Among the supporters of the proposal, a number expressed a need for some test of reasonableness of the relocation. For some, there was a concern that a mechanism was required to distinguish between genuine relocations and relocations designed to avoid TUPE obligations by using the ETO exception.

Opponents of the proposed change argued that the UK courts have not defined “workforce” as including the location at which the work is carried out, and they did not think that the CJEU would have a different interpretation. In addition, these respondents considered that the proposal could contravene Article 4(1) of ARD where the condition ‘entailing changes to the workforce’ operates as a qualifier for ETO reasons. Stakeholders argued that if adding terms such as location to the definition of workforce was acceptable then the

qualification could potentially be widened to include any contractual terms. It was also considered that a location change may constitute a “substantial change in working conditions to the detriment of the employee”, which would enable an employee to claim unfair dismissal.

A further concern for those opposed to the proposed change was that it could disproportionately affect some employees sharing protected characteristics under the Equality Act 2010 (in particular those with disabilities and women). If employees were required to relocate or travel further to and from work, it could make it difficult to accommodate both work and caring responsibilities. Individuals with caring responsibilities may be less able to relocate.

Respondents opposed to the proposal also identified a risk that employees required to relocate may, if other proposed changes to TUPE are enacted (such as those on collective agreements), 12 months later face a pay cut or a variation in contract making their employment untenable (e.g. a loss of flexible working). It was thought that this reduced protection and certainty for employees could increase opposition to transfers among workers.

Government Response

- 10.4. The purpose of the Acquired Rights Directive is to ensure that employees’ rights are not reduced during a transfer from one employer to another. The very nature of transfers reflects the fact that the economy is dynamic, companies change size, acquire and lose divisions or move locations. The Directive recognises that organisational change may have to happen following a transfer and provides a framework to allow change to take place.
- 10.5. The Government consulted on changing how location changes to a work place following a transfer are affected by the TUPE Regulations. Article 4(1) of the Acquired Rights Directive recognises that redundancies may take place for economic, technical or organisational reasons entailing changes in the workforce (ETO). The Government considers that the reference in article 4(1) to dismissals for ETO reasons can include redundancies which would be possible under national law in the absence of a transfer.
- 10.6. The Government proposed that the TUPE Regulations be amended so that the ETO reasons for dismissal include a change in the place of work, so that TUPE becomes aligned with the position under UK redundancy rules (in the Employment Rights Act 1996). If such redundancies are not capable of amounting to an ETO, then any dismissals arising out of the change in location (at least where there is no reduction in the overall numbers of the workforce nor change in functions of it) would be automatically unfair in a TUPE situation, even though they would otherwise have been capable of being fair (by reason of redundancy).
- 10.7. The consultation responses generally supported the Government’s proposal of including location change within ETO reasons. But the responses to the

consultation did note some concerns, particularly about employees being forced to move locations. However, the proposal will not enable employers to force employees to change the location where they work. Normal contract law will continue to apply with respect to workplace location and employers have obligations under the Equality Act 2010 not to discriminate against their employees, which in the case of employees who have a disability, includes a duty to make reasonable adjustments. In practice, were the new employer to force a change in location in the absence of a mobility clause which the law allowed him to exercise, this might amount to a serious breach of contract, and so could give rise to constructive unfair dismissal. Of course, the position will depend on the situation and the contractual provisions (whether express or implied). An employee may also have protection under Regulation 4(9) of TUPE, if the transfer involved a change in the place of work. The Government considers that these other legal protections provide important and sufficient protection for employees.

- 10.8. By allowing ETO reasons to include place of work redundancies we will bring the TUPE Regulations closer to what happens in businesses now, removing risks of automatic unfair dismissal claims (which could mean lower bids for work because the cost might be factored into the bid) and some additional flexibility in cases where the transferee has a business choice over whether to change the location. This change would not affect the operation of mobility clauses.
- 10.9. The Government will amend the TUPE Regulations so that changes in location of the workforce, following a transfer, can be within scope of ETOs, in order to prevent place of work redundancies from being automatically unfair and allowing valid changes to contracts when an employee's work place changes. In future, for employees dismissed by the employer where there is a change in the location of the workplace this will 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, the Employment Rights Act 1996 would still apply.

Outcome: The Government will amend the TUPE Regulations to extend the scope of economic, technical or organisational reasons entailing changes in the workforce to include changes to workplace location.

11. Dismissals based on future conduct of the transferee

- 11.1. In the consultation the Government sought views on whether the TUPE Regulations should be amended to enable a transferor to be able to rely on the transferee's ETO reason for pre-transfer dismissals. In this scenario the transferor would not be compelled to dismiss; participation would be voluntary.
- 11.2. The Government observed this was a challenging issue and did not present a proposal, instead the consultation sought views.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q9. 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

The majority of respondents 57% (102) supported the concept of allowing transferee's economic, technical or organisational reasons to be used to dismiss employees prior to the transfer with the result that the dismissal would not be automatically unfair; 26% (46) did not support this and there were 16% nil or neutral responses (30).

Businesses and legal professionals were mainly in favour of allowing a transferor to use a transferee's ETO reasons to dismiss employees prior to a transfer, so that it would not be automatically unfair. Bodies representing employees were opposed.

Many businesses thought that allowing transferees' ETO reasons to be used before a transfer would give businesses more flexibility, reduce costs, and remove uncertainty. Respondents stressed that, if the regulations were amended, they would not want it to be mandatory to use a transferee's ETO prior to a transfer to dismiss employees. It was argued that the current rules can deter business rescues and that allowing pre-transfer redundancies would lead to more businesses being sold as a 'going concern'. However, other respondents suggested that allowing pre-transfer dismissals would encourage transferors to dismiss employees in order to make the undertaking more attractive to potential purchasers.

There were differing views about whether our proposals would benefit employees. Some felt that employees would benefit as any redundancies would be made sooner rather than later and that this would give people more

certainty about their future so they could plan properly.

Many responses thought that employees would welcome the greater speed and certainty, and the ability to start a new stage of their careers more quickly. Some felt that they would prefer to be made redundant by their current employer rather than new employers they did not know. It was also noted by some respondents that such a change could give employees a choice of two employers in which to search for jobs. Some respondents felt that dismissing prior to a transfer would remove vital protection for employees and could lead to employees being selected from a small redundancy pool of the transferor's employees, rather than a larger pool consisting of employees from both transferor and transferee.

Several respondents considered that this change would not be compatible with Article 4(1) of the Acquired Rights Directive, nor consistent with the outcome of the *Hynd v Armstrong* case.

A few respondents mentioned that the definition of 'redundancy' needs to be aligned with that in the Employment Rights Acts 1996 so that employees do not lose out on redundancy pay.

Concerns raised by respondents included:

- In the case of agreed business transfers or mergers and acquisitions, there is less likely to be a problem, but it is unclear what might happen if there is a dispute;
- Should the transferee be asked to help affected employees e.g. by helping them find vacancies within their own organisation?
- Changes to the collective redundancy rules (in the Trade Union and Labour Relations (Consolidation) Act 1992 need be introduced in parallel with these changes (see question 10);
- What impact would delays to the transfer date have on the ability to claim for unfair dismissal if it subsequently turned out an employee did not need to be dismissed?

Transferors may be reluctant to implement dismissals in anticipation of transfer as the 'costs', e.g. severance payments, will fall to them unless agreement can be reached with the transferee.

Respondents felt that if the Government did decide to allow pre-transfer dismissals based on a transferee's reasons that there would have to be clear guidance.

Government Response

- 11.3. The Government included a question about allowing pre-transfer dismissals as it believes it would be relatively rare for the transferor to dismiss for the transferee's reason but considered it important that the potential benefits and downsides of enabling pre-transfer dismissals should be explored.
- 11.4. The consultation responses showed a general appetite by businesses to be allowed to use a transferee's reasons to dismiss employees prior to a transfer. However, although there was a majority of responses supporting such a change, several submissions to the consultation highlighted downsides to amending the TUPE Regulations in this way.
- 11.5. First, it was argued that allowing pre-transfer dismissals would potentially be unfair for those individuals being dismissed, especially if there was a redundancy situation. This is because the potential pool of redundancies might be restricted to only those employees being transferred and would not necessarily include the related workforce in the transferee. Even if it were extended to both workforces, it might be more likely in practice that the dismissals were made from the transferor's workforce. A number of respondents felt that this would make TUPE transfers significantly unfair.
- 11.6. Second, although some respondents argued that pre-transfer dismissals could benefit businesses in financial difficulty, this rule change could be exploited by unscrupulous employers to dismiss staff prior to a transfer to achieve an inflated price for their business.
- 11.7. Finally, it was argued that allowing pre-transfer dismissal would be contrary to CJEU judgements, and may also be contrary to the spirit of Article 4 of the Acquired Rights Directive.
- 11.8. The Government was clear in the consultation that it was not putting forward a proposal to change the Regulations; instead it was asking an open question seeking views about the likely consequences. When considering changes to Regulation or new Regulation it is important that we recognise that the Government is working to achieve a flexible labour market, a market where businesses can manage their workforce effectively and a fair labour market where employers compete on a level playing field and workers benefit from core protections.
- 11.9. Based on the responses received, if the Government made the change, the change could benefit some businesses, but it is clear in the responses that the cost of such a change could be an increase in general unfairness in the labour market. Such a change may also be challenged in the courts, reducing certainty for businesses and employees. Therefore, after considering the responses to the consultation, the Government has decided not to amend the TUPE Regulations to allow pre-transfer dismissals.

Outcome: No Change to the TUPE regulations enabling the transferor to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees.

12. Collective redundancy rules and interactions with TUPE information and consultation requirements (Regulation 13)

- 12.1. The Government consulted on proposals to legislate to enable pre-transfer consultation to count towards collective redundancy requirements – i.e. the transferee in a TUPE situation can start consulting transferring staff in the transferor's employ about likely dismissals (20 or more) before those staff become employees of the transferee's company.
- 12.2. The consultation document was clear that the Government did not propose requiring consultation by the transferee with 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.
- 12.3. The position in Northern Ireland with regard to the equivalent Employment Rights (Northern Ireland) Order 1996 has yet to be established, though stakeholders' views on the point were welcomed.
- 12.4. The main aim of the proposal was to enable pre-transfer consultation to count in appropriate cases. This would potentially:
- increase business efficiency, including the ability to restructure effectively and reduce the time it can take to effect redundancies;
 - reduce the impact on employees, who can be subjected to two consultations in quick succession and long periods of uncertainty;
 - improve the ability for employee representatives to suggest alternatives to redundancy; and
 - remove confusion caused by successive consultations.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q10. Should there be an amendment to provide that consultation carried out by the transferee before the transfer takes place counts for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992)?

The majority of respondents (66%, 118) supported the Government's proposed change. 35 (20%) respondents did not support the proposal and 24

respondents (14%) did not provide a response. There was 1 neutral response. Businesses and legal firms were generally in favour of the Government's proposal, but with a small number of exceptions. Many respondents commented that the legitimacy of pre-transfer consultation about redundancy has not been tested by the courts. One trade union agreed with the proposals, but only if non-recognised trade unions were recognised for consultation purposes in the case of a fragmented workforce.

Those who are in favour believe that it will:

- increase flexibility for employers;
- remove duplication;
- increase the efficiency and speed of the restructuring processes;
- reduce uncertainty for employees and provide clarity;
- improve employee relations and encourage openness and honesty about changes to the workforce; and
- reduce administrative costs for transferee organisations, in particular where there is to be a change of workplace on transfer.

Some respondents stated that the measure would be little used in practice, and that there may be difficulties created by transferors refusing to allow transferees access to their employees prior to a transfer. Others suggested that pre-transfer consultation already happens in practice but without the legal back-up of knowing it would count for the purposes of collective redundancies rules.

A number of respondents requested guidance, including on liability of the transferee. Several legal respondents suggested that Government guidance would be needed to:

- clarify issues arising from case law;
- make it clear that transferees have a choice about whether they begin consultation early; and
- state how the parties will assess the point at which the obligation to carry out a collective redundancy consultation has been triggered.

The proposals were, however, opposed by the majority of trade unions. Trade unions and associated organisations were also strongly opposed to any dismissals occurring pre-transfer.

Those who are not in favour believe that the change would mean 'fast track' redundancies consultation at the cost of employees' rights, and undermine the employees' position during a TUPE situation. They felt that pre-transfer consultation artificially limits the pool for the selection of redundancies to those employed by the transferor, rather than also including those already employed by the transferee.

Additional opposing points which were made by respondents include:

- the information requirements under the Trade Union and Labour Relations (Consolidation) Act 1992 are different from those under TUPE and there are other differences which make pre-transfer consultation impractical;
- workers will lose out on wages, notice periods and possibly redundancy pay;
- a longer period will result in more people meeting the qualifying period for redundancy payments, especially in sectors with high turnover;
- there might be a “conflict of interest between the transferor and transferee regarding which staff transfer”; and
- proposals conflict with the EU Collective Redundancies Directive as the Directive requires the employer of the affected staff to initiate consultation about proposed redundancies.

Government Response

- 12.5. A majority of respondents (66% mostly legal representatives and employers) favoured the collective redundancies proposal but most agreed this would need to be on a voluntary basis, not an obligation to consult pre-transfer. We agree that any measure should be permissive as for pre-transfer consultation to take place the transferee will need to communicate directly with the transferor’s employees and some transferors will be unable to agree to this, for example to protect their own commercial interests.
- 12.6. Several respondents highlighted that post-transfer consultation can impose additional costs on some transferees, particularly if the transfer involves a relocation of part of the business. The current rules also impact on employees, who can be subjected to two similar information and consultation processes in succession and long periods of uncertainty about likely dismissals.
- 12.7. Pre-transfer consultations can in some cases enable employee representatives to reach agreement with the transferee at an earlier stage, exploring more options and reducing the period of uncertainty for all employees.
- 12.8. Whilst it is unclear how many businesses will decide to use this measure, on balance the Government has decided to implement this proposal as we believe it will have significant benefits for those businesses which do use it, and this may also benefit some employees.
- 12.9. We also note comments from respondents that there are currently several ways that employers can and do consult pre-transfer. Some businesses also take a co-operative approach to transfer situations, making use of pre-transfer voluntary redundancies and settlement agreements where appropriate. Implementing the measure will provide certainty for these businesses, as to

- when consultation pre-transfer will count for the purposes of the collective redundancy rules.
- 12.10. We intend to make it clear in statute that consultation which begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee can agree and where the transferee has carried out meaningful consultation.
- 12.11. As is the case currently, under the legislation the transferee will continue to be liable for consultation (and subsequent costs of redundancy), but there will be no 'obligation' on the transferee to consult pre-transfer, as the parties will need to agree to co-operate.
- 12.12. There are however, several issues which we will need to consider more fully before this change can be implemented. For example, at what point pre-transfer consultation can begin with transferring staff.
- 12.13. We note in particular the concerns expressed by employee representatives that the proposal would mean that notices of dismissal could be given sooner – so potentially immediately after the transfer. During a TUPE transfer there may also be several unresolved issues relating to the transfer, that mean it is not always possible to begin meaningful discussions with the employee representatives until these are resolved. That may not be until after the transfer is completed.
- 12.14. We would always expect employers to continue consultation as long as is necessary to ensure that it is meaningful. This means consultation if it begins pre-transfer, could still continue beyond the point of transfer. In addition, statutory notice periods which ensure employees are entitled to a period of time for job searching must also run before employees are actually made redundant. Even if meaningful redundancy consultation could be completed before the transfer, it is likely that in many cases notices of dismissal could only be issued after the transfer has taken place. Such factors would prevent dismissal immediately after the transfer.
- 12.15. We also recognise the importance of enabling affected employees to be considered for alternative roles, where suitable opportunities exist. Meaningful consultation should help to identify any such opportunities.
- 12.16. Some respondents commented that guidance would be needed to implement changes effectively. We intend that the accompanying guidance to the TUPE changes will cover this measure.

Outcome: The Government will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to make it clear in the statute that consultation by the transferee which begins pre-transfer can count for the purposes of complying with the collective redundancy rules, provided that the transferor and transferee can agree and where the transferee has carried out meaningful consultation.

13. Duty to inform and consult employee representatives

- 13.1. The Government proposed using guidance to give greater clarity on what “reasonable” time means when an employer is allowing employees to elect employee representatives.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q11. 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? Yes/No

a) Please explain your reasons.

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

57% (102) of those who responded agreed with the proposal to provide guidance rather than amend Regulation 13 (11). 19% (33) of those who responded disagreed. 24% (43) did not respond.

From stakeholders who responded to Question 11, the majority agreed with the proposal to provide guidance. The general view expressed is that defining ‘reasonable’ for the purpose of legislation is impossible as there are too many factors to capture adequately in legislation, so guidance is more appropriate. What is reasonable in one transfer may not be reasonable in another. Further, an amendment to Regulation 13(11) setting a fixed time period would not be appropriate because of the differing timescales of business transfers and it would work against flexibility. There was a suggestion for ACAS to produce a code of practice on TUPE which would be admissible in any subsequent proceedings (similar to the current codes of practice on Disciplinary and Grievance Matters, and Redundancies).

Of those who responded who did not agree with the proposal, there were mixed views. Some respondents felt that Regulation 13 should be extended to include a requirement that consultation should take place between the transferee and recognised trade unions prior to the transfer, because the current regulations on this point are too weak and are over reliant on the employer. Others expressed the views that guidance may cause more confusion because what is “reasonable” will always depend on the particular circumstances of the case. Further provisions contained in guidance are less likely to be legally enforceable than if they appear in the regulations themselves. There were some suggestions of minimum time periods, however, it was generally accepted that a fixed time period would not be appropriate in all cases.

Government Response

- 13.2. The Government is not persuaded that an ACAS code of practice on TUPE is required (a suggestion from one respondent) but that the regulations simply need to be clear enough for employers and employees to follow with sufficient guidance in support where further explanation is justified. The Government agrees generally with the reasons given by the respondents in favour of the proposal. The Government accepts that it will be difficult to be definitive but guidance is justified. Accordingly, the Government will develop guidance which will help businesses decide what is 'reasonable' for their circumstances by helping businesses understand the factors that are likely to be appropriate.

Outcome: The Government will provide guidance to give clarity on what a 'reasonable time' is for the election of employee representatives.

14. Consultation requirements for micro businesses

- 14.1. The consultation proposed that micro businesses (those with 10 or fewer employees) should, in some cases, be able to consult with their employees directly about the impact of a TUPE transfer rather than having to invite staff to elect representatives.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q12. 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

Of the responses to question 12, 103 (58%) were positive, 25 (14%) were negative and 1 response was neutral. There were 48 (27%) nil responses. Of the responses to question 12a) 48 (27%) were positive, 59 (33%) were negative and there were 71 (40%) nil responses.

There was a positive response from business to the proposed change of the rules on information and consultation. One business did wish to see the proposal extended to other organisations without elected bodies and not limited to micro businesses.

In general, business representative bodies would also welcome a change to the information and consultation rules, with very few answering No to question 12. However, there were divergent views as to what the threshold should be, with some bodies suggesting it should be less than 10 and some saying it should be 50 or fewer employees. Other stakeholders believed SMEs should be able to benefit.

A number of bodies pointed out that the problem is not confined to micro businesses but it extends to micro transfers, i.e. transfers where the employer might have a large workforce but only a small group of employees is transferred. In this scenario, there was a call for the threshold to be set at 5 employees or fewer. Another body called for firms with less than 20 employees to qualify for any provision.

Those who disagreed with the Government's proposal felt that individual consultation was no substitute for the benefits of indirect consultation through workplace representatives. It is felt that consultation is most effective where it

involves independent trade union representatives who are experienced in negotiating with employers. One view was that the proposal was likely to conflict with the Government's obligations under Article 11 of the European Convention on Human Rights.

A number of legal bodies indicated that it made sense to introduce a measure to ease the unnecessarily burdensome nature of the information and consultation process but thought that both micro businesses and larger employers should be able to benefit. There was a suggestion that a way should be found to allow undertakings employing at least 50 employees to take advantage of any new Regulations. Other legal representatives commented that the Government should focus on allowing transferors to inform and consult directly with affected employees rather than representatives, when the number of transferring employees in the transferring undertaking (not the size of the transferor) is small. This could be done through a rule that mirrored section 188 Trade Union and Labour Relations (Consolidation) Act 1992 (because the trigger point is widely known), in the sense that where there are 20 plus employees transferring the requirement to consult with representatives is triggered. However, it was felt that employers should not be prevented from voluntarily inviting representatives to nominate representatives if they wished.

There was some concern that the proposal did not meet requirements under article 7(5) derogation. It was suggested that article 7(5) derogation would only correctly transpose the derogation into national law if the undertaking or business that is the subject of the transfer has fewer than 50 employees, and that the solution was to use a 50 employee/size of undertaking (not size of transferor) derogation.

An alternative suggestion was that the Government achieve its aim via Article 7(6) of the Acquired Rights Directive.

Government Response

- 14.2. Article 7(5) of the Acquired Rights Directive allows Member States to limit the obligation to inform and consult but this is based on the number of employees of the undertaking or business. The Government considers that it is entirely sensible to ease the burden on small employers (whether transferor or transferee) by removing the need to provide for an election, in cases where there are no existing appropriate representatives. Instead, such employers should be able to comply with the information and consultation duties in Regulation 13 by dealing directly with all the affected employees. Although in such cases, article 7(6) only requires that the employees be informed, the Government considers that they should also be consulted directly, where the obligation to consult would otherwise apply.
- 14.3. The Government notes the view that such an exception should be available either by reference to the number of affected employees or the size of the

transferring unit. However, the Government considers that article 7(5) of the Acquired Rights Directive is concerned with the size of the employer, not the number of affected employees, nor size of transferring entity. The Government considers that this approach is only appropriate for cases involving small employers, because the nature of employee relations is much more likely to be more personal, whereas that is less likely to be the case where an employer is larger, even if the number of affected employees is small. The Government notes the view that 10 employees is not a known trigger point but disagrees given that 10 employees is used as part of the micro-business exemption⁶. While a threshold of 50 employees was raised the Government considers that this would be too large. The Government considers that it is only in respect of very small businesses that electing representatives is a disproportionate burden for the employer. In these cases the benefit to the employees of elected representatives is also reduced. The Government considers that 10 employees is the most appropriate threshold. Accordingly, the Government will amend the TUPE Regulations to allow the employer to directly inform and consult affected employees when there is no recognised independent union, nor existing appropriate representatives. This exemption will cover micro businesses with 10 or fewer employees.

- 14.4. The Government notes the views that information and consultation is best done through a union, and concerns about the right to freedom of association under article 11. However, the proposal is only that there need not be an election where there are no existing appropriate representatives, and even then, only in respect of the smallest of businesses. It would not relieve an employer of their obligation to inform and consult with appropriate representatives where there is an independent recognised trade union in respect of the affected employees, or existing employee representatives appointed or elected by the affected employees for another purpose, but which have authority to receive information and be consulted on behalf of the affected employees (having regard to the purposes for which and method by which, they were appointed). In working through the exact amendments, the Government will be mindful of the need for the rules to operate fairly within the existing provisions.

Outcome: The Government will amend the TUPE Regulation 13 to allow micro employers to directly inform and consult affected employees when there is no recognised independent union or existing employee representatives.

⁶ 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 legislation for three years.

15. Exemption for micro businesses

- 15.1. The Government introduced a regulatory moratorium on 1 April 2011 exempting existing micro businesses (those with fewer than 10 employees) and new businesses from new domestic Regulation for three years. However, the Government underlined its view in the TUPE consultation document that it would not be advantageous to exclude micro businesses from the proposed amendments to the TUPE Regulations and so it was proposed that micro businesses should not be exempt (from the changes).

SUMMARY OF RESPONSES TO THE CONSULTATION

Q13. 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.**

Around 56% of respondents agree that micro businesses should be included under all the proposed amendments, while 8% of respondents were against the proposal. Three respondents who answered No did so on the basis that they oppose all amendments proposed by the Government. 64 out of 178 (36%) stakeholders did not have a view on this matter.

The majority of respondents who agreed with the proposal did not cite further reasons explaining their decision. A small minority of respondents disagreed with the proposal. The most consistent support was expressed by trade unions and representative organisations. The reasons behind their support were generally either based on the premise that the Acquired Rights Directive should be applied consistently across all business, or that it was not fair to exclude a particular group where there was no legal rationale. Some respondents developed this argument, suggesting that it could lead to imbalance and anti-competitiveness in the labour market. A trade union commented that there is 'no reason why the rights of those workers should be diminished if their employment is transferred to another business just because they work for a small company.'

Law firms agreed with the proposal on the basis that an attempt to exclude micro businesses would result in confusion and would be impractical.

The small proportion of respondents who disagreed with the proposal generally did so from a belief that micro businesses should be exempt from

TUPE altogether, while others felt that the Regulation was burdensome and did not allow for pro-growth choices to be made.

About a third of all respondents believe that the proposed changes will not impose additional costs on micro businesses. This is twice the number of those who thought that changes *will* impose additional costs. Overall, the majority of respondents did not provide further explanation of their views.

The reasons for disagreeing with this question were generally focused around two themes: either that the proposed amendments are deregulatory, as propounded by a number of trade unions; or that the proposed changes will impose uniform costs on all business, including micro businesses.

The respondents who thought that additional costs on micro businesses would result from the proposed amendment suggested they would arise from obtaining legal advice and increased risks of litigation, or transitional costs.

The Government sought views on how it could reduce costs for micro businesses. The responses overall re-affirmed points raised in questions 13a and 13b, for example, stating that the amendments may lead to increased litigation or need for legal consultation. Several respondents linked these factors to the proposed removal of SPCs and the additional redundancy payments which may occur as a result. The implication was that not removing SPCs would be beneficial in terms of costs to micro businesses.

There were some concrete suggestions about how costs could be decreased, such as that the Government should reverse the recent removal of legal aid for employment rights advice. Respondents also suggested that the Government should provide ACAS with adequate resources to fund advice and training for small firms. Particularly important is early access to advice as it would minimise compliance costs.

- 15.2. The Government considers that its proposed revisions to the TUPE Regulations are reducing the burdens on business and so micro businesses should be able to benefit from the revisions, along with other businesses. The Government believes that a two tier system would be both very confusing for everyone involved in transfers and impractical (particularly in situations involving a micro-business and non-micro business). If micro businesses were exempted from the changes, they might have a greater need to seek legal advice if they were involved in a transfer, or risk applying the wrong provisions. The Government will not exclude micro businesses from the amendments to the TUPE Regulations.
- 15.3. The Government rejects any suggestion that it should reverse its recent legal aid changes and believes that ACAS is adequately funded to carry out its remit.

16. Transitional arrangements and coming into force of amendments

- 16.1. In the consultation the Government said that it believed that aside from in relation to its proposed repeal of the service provisions it did not consider that a significant lead-in period was needed for any of its other proposals. However, the Government noted that there would be transitional and saving provisions as there was in relation to TUPE 2006 (e.g. to ensure that the current Regulations continue to apply in respect of transfers which take place before a certain date and that amendments relating to the period prior to transfer are appropriately dealt with).

SUMMARY OF RESPONSES TO THE CONSULTATION

Q14. 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

For question 14, of the 178 respondents, 50% (89) answered Yes, 15% (27) answered No and 35% (62) did not respond.

Within the respondents who argued for the need for lead-in periods in other proposals, a large proportion referred to the proposed repeal of the ELI requirements. A large proportion of those who did not respond were trade unions or staff associations who did not provide comments on a lead-in period on the basis that they do not agree with changes in SPC provisions.

One suggestion was that a minimum of six month lead-in period would be required for all the changes. Another view was that October 2013 was too soon to be bringing in amendments and that the date for changes other than SPC proposals should be 6 April 2014. It was also suggested that if there was a move to a dynamic approach to terms and conditions derived from collective agreements post-transfer, a lead-in period of one year would be needed.

- 16.2. The Government notes the support for the suggestion that a significant lead-in period is not required for any proposals other than those regarding service provision changes. The Government expects that there will be transitional and saving provision in relation to each amendment (where appropriate), rather than a general delay to all the changes taking effect, so that the benefits of amendments can be realised earlier and are not delayed.

17. Other issues

- 17.1. The Government made clear that it believed that it had addressed the main issues of concern about TUPE which had been identified in the Call for Evidence. This remains the case. We asked further questions seeking any further comments on the issues raised in the consultation. In the consultation document the Government also sought views about the potential impact on equality and diversity within the workforce and on its Impact Assessment.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q15: Have you any further comments on the issues in this consultation?

Respondents commented on a number of themes in this question. Some flagged issues that had not been raised within the consultation questions. One point raised was in relation to agency workers. It was suggested that the Government might give guidance around whether agency worker fees should transfer to the transferee in a TUPE transfer. An anomaly in relation to holiday pay for agency workers was raised by the same respondent. (Accrued holiday pay (that is part of the fee that the agency charges to allow the agency worker to take paid time off) does not transfer automatically under TUPE and as such, the agency can choose to withhold the accrued holiday pay from the transferee). There was also a suggestion that recent changes to Regulation 13(2)(a) TUPE 2006 to provide information on agency workers were unnecessary.

There was a general concern noted by a number of respondents that the scale of public sector pensions is preventing smaller companies from competing for public sector contracts. There was also a suggestion that pensions should have been considered within the changes to SPCs that are proposed in Question 1 of the consultation document due to overlaps in the two areas. It was suggested however, that reform of the Regulations in relation to pensions may be too large an issue at this stage (and given the Fair Deal).

Some respondents noted that there can be difficulty if a transfer occurs that takes the business within a new jurisdiction, particularly if that jurisdiction is outside the EU where the law may be quite different. It was suggested that the Government may wish to provide guidance on this issue.

Some respondents suggested that the professional services industry should be excluded from TUPE.

There was a general feeling that more guidance would be useful on a number of topics, including:

- pensions;

- exactly which staff transfer;
- potential defence to equal pay claims;
- the application of the public administration exemption (Regulation 3(5));
- whether employees are assigned to the transferring undertaking in atypical situations such as secondments;
- fixed term contracts expiring on the transfer date;
- best practice on information and consultation obligations;
- what 'changes by reason of the transfer' as opposed to 'transfer connected changes' means in practice;
- collective redundancy and TUPE consultations running concurrently.

Government Response

- 17.2. A range of individual points were flagged by different respondents, the most common theme being pensions. As was stated in the consultation, while occupational pensions do not generally transfer under TUPE (although some aspects of them do) there are requirements regarding pension provision following a TUPE transfer under the Pensions Act 2004 and Regulations under that Act. BIS will work with DWP to find ways of improving the information available to employers and scheme members.
- 17.3. In the consultation document the Government noted developments in relation to Fair Deal which provides for public sector workers' pension provision when transferring out of the public sector. The Chief Secretary to the Treasury confirmed in July 2012 that the overall approach to Fair Deal would be maintained, but in future this would be delivered by offering access to public service pension schemes for compulsorily transferred staff. Following a period of consultation which ended in February 2013 the Government will announce the detail of the new policy and publish updated guidance later this year.
- 17.4. The Government notes the comments made in relation to Agency Workers but does not propose to make any changes to the legislation. As was stated in the consultation document, the Government has used the same definition of suitable information in relation to almost all the amendments made to existing requirements to inform and consult employees.
- 17.5. The Government will revise the guidance on TUPE to take account of the amendments it will introduce.

18. Equality and Diversity Impact

18.1. The Government asked whether its proposals would have a positive or negative impact on equality and diversity within the workforce.

SUMMARY OF RESPONSES

Q16. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Of the 83 respondents who answered the question, 48 answered that our proposals would have a noticeable impact on equality and diversity. Of these: 34 said that they would have a positive effect; 10 said that they would have a negative effect and 4 answered that our proposals would have a neutral effect or no effect at all.

Some respondents thought that the Government's proposals would have a positive effect on equality in the workforce, with some citing the moves towards harmonisation in particular. These were mainly business respondents.

One organisation stated that moves towards flexibility about changes to terms and conditions, at a time when commissioners were seeking cost savings, would assist service providers to maintain the quality of the services they provided for disabled people.

Within respondents who suggest the proposals will have a negative impact, particular concerns are raised about the effects of 'privatisation' or outsourcing of public services, and the possibility that workers might lose entitlements that they received in the public sector. Also, specific concerns were raised about proposals to limit the applicability of collective agreements and those entailing changes in the workforce to cover changes in location. A few stakeholders raised particular concerns about the effect SPC repeal would have on staff in low-wage sectors which experience a high number of TUPE transfers, including catering, cleaning services and security services. Across all cases, the most prevalent argument in relation to SPC repeal relates to impact on women, disabled staff and black and other ethnic minorities, as well as workers with mobility challenges and those with caring responsibilities. One trade union representative body suggested that while the Government's proposals may encourage more outsourcing and privatisation, they may also negatively impact on the gender pay gap (differences in weekly earnings) across organisations. The stakeholder also adds that this issue is more evident within private sector organisations. A smaller proportion of respondents believe that TUPE proposals will have a positive impact on workforces, particularly focusing on the ability for transferees to change terms and conditions post-transfer. Lastly, a few stakeholders suggested that the TUPE proposals will have a neutral or no impact on UK workforces and the business environment.

There were particular points made about the potentially negative consequences of the Government's proposals regarding service provision repeal (Question 1), Collective Agreements (Question 5), dismissals arising from location change (Question 8) and exemption for micro businesses (Question 13). Some respondents believed that the effect of the proposal regarding restrictions on changes to terms and conditions (Question 4) would be positive.

Government Response

- 18.2. The Government has noted carefully the responses it has received. Alongside this document the Government has published an Impact Assessment containing an Equality and Diversity Impact Assessment (based on the evidence we have received), focusing on the amendments to TUPE which it intends to make. This sets out our best estimate on what the impact of these proposals will be.

19. Impact Assessment

- 19.1. The Government asked for evidence on the likely economic effects of its proposals on parties involved in TUPE transfers and asked for views on its Impact Assessment.

SUMMARY OF RESPONSES TO THE CONSULTATION

Q17. 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.

35 respondents expressed a clear view about whether they agreed or not with the Impact Assessment, with 12 (34%) agreeing and 23 (66%) disagreeing. Others provided further information to add insight.

Some criticised the lack of a reliable evidence base on TUPE, which made it difficult to monetise any potential impacts of the proposed changes. Trade unions and staff association respondents considered that the assessment indicated that businesses would be the main beneficiaries of the proposed changes, with the costs borne by employees. These respondents felt this was inconsistent with the aim to not compromise on fairness to individuals. Particular concerns were raised about the equality implications, where it was claimed that a number of the proposals would affect women, ethnic minority workers, those with disabilities and those with caring responsibilities. These respondents also raised the issue that partial information on Employment Tribunal claims was used to suggest that there had been an increase in TUPE related claims since 2006.

Specific concerns were raised about the proposed repeal of Service Provision Changes. It was argued by a number of respondents that this proposed change would not have the benefits to business initially indicated by the Impact Assessment, due to the lack of extensive evidence. There were further concerns that the proposed removal of the requirement to provide ELI would not benefit transferees – respondents considered it more likely that this would increase transferee costs, as they would have issues with setting up payroll and in formal communication with transferring staff.

Some respondents also questioned whether the proposed changes to enable variation in terms and conditions of transferring staff may create uncertainty – potentially increasing transferee legal costs, and the number of Employment Tribunal claims. Some also noted

the absence of a costing of the loss to employees resulting from the proposed changes to the Regulations relating to changes in terms and conditions.

Government Response

- 19.2. Alongside this document the Government has published an Impact Assessment focusing on the reforms to TUPE which the Government intends to make. This sets out our best estimate on what the impact of these proposals will be.

20. Next Steps: Summary of actions and process for implementation

- 20.1. In 2011 the Government announced its intention to improve how the TUPE Regulations work. Since then, the Government has run a Call for Evidence and a consultation, in which the Government made proposals with a view to improving the rules. We want to improve the rules so that TUPE does not reduce the flexibility, effectiveness or fairness of the labour market. It was clear at the start of this process that there were indeed problems with the TUPE Regulations, the package of actions detailed in this document address these problems. There are some details to be worked through in relation to the amendments and we are still working on the drafting of the regulations.
- 20.2. The consultation received many responses from individuals, employee representatives and businesses. Following the consultation the Government recognises that some aspects of the existing TUPE Regulations provide a good framework for businesses to agree transfers. These aspects are the provisions on SPCs and employee liability information. However, there are other aspects of the existing Regulations that can be improved.
- 20.3. This Government Response outlines a package of improvements that will improve how the TUPE Regulations work.
- **The Government will amend the TUPE Regulations to allow the renegotiation of terms derived from collective agreements one year after the transfer even though the reason for seeking to change them is the transfer, provided that overall the change is no less favourable to the employee.** This change empowers both the employer and the employee, after one year of working together, to agree mutually beneficial improvements to terms and conditions.
 - **The Government will amend TUPE to provide expressly for a static approach to the transfer of terms derived from collective agreements.** This amendment will mean that only those collective agreements agreed at the date of the transfer and not subsequent ones will bind the transferee where the transferee is neither a party to those subsequent collective agreements nor to the bargaining process for them.

- **The Government will amend TUPE so that changes in the location of the workforce following a transfer can be within the scope of ETOs, thereby preventing genuine place of work redundancies from being automatically unfair.** This change will also allow some changes to contracts to be valid when a work place location changes. The Government wants to ensure that the TUPE Regulations do not cause unfair risks to employers. The amendment will give businesses certainty that changes to the place of work following a TUPE transfer can be capable of amounting to “a change in the workforce” and as a result, redundancies which satisfy the definition of redundancy for the purposes of the Employment Rights Act 1996 would not be automatically unfair under TUPE.
- **The Government will amend Regulation 4 and Regulation 7 to bring them closer to the language of the Acquired Rights Directive.** These amendments will alter the Regulations so they more closely reflect the wording used in the Directive and CJEU case law.
- **The Government will make an amendment to reflect the approach set out in the case law, namely that for there to be a TUPE service provision change, the activities carried on after the change in service provision must be “fundamentally or essentially the same” as those carried on before it.** If this is more widely known it may mean that the SPC provisions are not perceived as the barrier for doing business which they can, on occasions, be considered to represent, with more contracts changing hands as a result.
- **The Government will improve the TUPE process for micro businesses.** The Government will amend the TUPE Regulations to allow micro businesses to inform and consult directly affected employees when there is no recognised independent union, nor any existing appropriate representatives.
- **The Government will retain the rules about employee liability information and extend the time before the transfer when it must be given to the transferee to 28 days.** This change ensures that transferees will usually get information about liabilities and obligations earlier before a transfer takes place so they can prepare properly for their new employees.
- **The Government will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to make it clear in the statute that consultation by the transferee which begins pre-transfer can count for the purposes of complying with the collective redundancy rules,** provided that the transferor and transferee can agree and where the transferee has carried out meaningful consultation.
- **The Government will work to improve TUPE guidance.** TUPE guidance will be improved so that businesses understand how to conduct a transfer fairly and in the most effective way.

- 20.4. Throughout the process of improving the TUPE Regulations, from the Call for Evidence to the consultation, it has been clear that businesses find the absence of clear rules that expressly facilitate post transfer harmonisation of terms and conditions a barrier to effective transfers. This could well dissuade some businesses from agreeing to transfers. But more importantly the current situation can cause resentment within businesses and inefficiencies in their operation which can ultimately harm their competitiveness and undermine long term job security.
- 20.5. The Government understands why businesses are rightly concerned about the issue of harmonisation. Improvements to UK employment law throughout this Parliament are focused on enhancing the regulatory framework that enables individuals (or their representatives) and employers to agree mutually beneficial terms (e.g. right to request flexible working or agreeing patterns of leave under the new shared parental leave arrangements). The Government believes that the UK economy would benefit from a similar framework to allow individuals and businesses to agree mutually beneficial changes to terms and conditions which may lead to harmonisation following a transfer. Such a process must also be fair to both the employee and employer, and will provide a boost to businesses seeking to enter into transfers and will improve fairness for workers within businesses. **The Government will engage with European partners to demonstrate the potential benefits of a harmonisation framework for individuals and the economy.**
- 20.6. This Government Response also outlines where the Government was persuaded by the strength of the submissions not to change the TUPE Regulations following the consultation. As follows:
- The Government will not repeal the SPC rules;
 - The Government will not allow a transferor to rely on a transferee's economic, technical or organisational reasons to dismiss an employee prior to a transfer;
 - The Government will not amend Regulation 4(9) to copy out the Directive.
- 20.7. The consultation has clearly established where the current TUPE Regulations work well and provide a framework for businesses and employees to agree the process of a transfer. The changes we have outlined remove unnecessary gold-plating to the TUPE Regulations and remove unfair legal risks to companies carrying out transfers. The changes overall will increase the effectiveness of our labour market and will establish fairness for both employers and individuals during a transfer process.
- 20.8. The Government intends to afford employers a lead-in period so they can plan future transfers so they are in line with the new rules. It is the Government's intention that the new Regulations will be laid before Parliament in December 2013. There will be transitional and savings provisions.

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