



Department
for Business
Innovation & Skills

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

Impact Assessment

NOVEMBER 2013

Title: Transfer of Undertakings (Protection of Employment) Regulations 2013 IA No: BIS 04/15 Lead department or agency: BIS Other departments or agencies:	Impact Assessment (IA)		
	Date: September 2013		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries: Ivan Bishop ivan.bishop@bis.gsi.gov.uk Abbey 1, Floor 3, 1 Victoria Street, London, SW1H 0ET			

Summary: Intervention and Options	RPC Opinion: Green (EANCB)
--	-----------------------------------

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?	
£124.6m	£81.5m	£-8.7m	Yes	Out

What is the problem under consideration? Why is government intervention necessary?
The Government agrees with the objectives of the Acquired Rights Directive (ARD) which is translated in UK law through the Transfer of Undertakings (protection of employment) regulations (TUPE). It provides important protections against existing workers suffering disadvantage because the business that the work in has been sold. However, the way that TUPE is currently formulated is both complex and it restricts the ability of workers and employers to reach agreements that are mutually beneficial.

What are the policy objectives and the intended effects?
These reforms aim to simplify the TUPE framework in a way that maintains the protection of the worker but also maximises the opportunities of workers and employers to reach agreements within the framework which they consider to be mutually beneficial. Where possible they also aim to reduce administrative burdens and improve the guidance about how the framework works.

What policy options have been considered, including any alternatives to regulation?
Options considered:-

- No Change
- Repeal the Service Provision Change provisions from TUPE regulations
- Preferred Option: Reform the 2006 TUPE Regulations

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 2019

Does implementation go beyond minimum EU requirements?			Moves regulations more in line		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? NA			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:  Date: 2 September 2013

Summary sheets of Costs and Benefits

Summary: Analysis & Evidence

Preferred Policy Option

Description: Reform the 2006 TUPE Regulations

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2009	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 124.6

COSTS (£m)	Total Transition (Constant Price) Year	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0.1	0.2	1.5

Description and scale of key monetised costs by 'main affected groups'

Employers' additional redundancy payments due to the inclusion of workplace relocation as an economic, technical or organisational reason entailing changes in the workforce is estimated at around £0.2m a year. The Exchequer's estimated transition costs for training of Employment Tribunal judges are £0.1m.

Other key non-monetised costs by 'main affected groups'

There may be some transitional costs resulting from test litigation due to the regulatory changes. As legal cases tend to reflect the specifics of individual transfers, and there is existing uncertainty in the regulations and case law, we would expect this to be low. We estimate that business may face a cost to mitigate against the slight extra risk (due to regulation of case law test) of SPCs being innovative and outside TUPE.

BENEFITS (£m)	Total Transition (Constant Price) Year	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate		14.7	126.0

Description and scale of key monetised benefits by 'main affected groups'

The benefit from reduced costs in making, defending and administering employment tribunal claims are expected to benefit employees and the Exchequer by £2.3m and £2.7m respectively each year, and employers by £ 6.6m each year, at 2012 prices. Employers will benefit by £1.2 m in year 0 rising to £3.6m in year 4 (2012 prices) from reduced labour costs from 50 employees made redundant and not replaced at undertakings transferred and relocated (reflecting the regulatory change on workplace location change). Micro employers without an existing suitable employee representative will benefit by an annual average £0.1m from being able to inform and consult with their employees directly pre-transfer.

Other key non-monetised benefits by 'main affected groups'

Benefits from being able to agree variations to contract terms haven't been monetised, but these are potentially significant, due to greater operational flexibility and business innovation and increased employee engagement. Potentially the reduced costs and increased certainty may increase competition. Also not monetised are the smaller benefits expected from including the case law test on SPC provision applicability

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

All the monetised costs and benefits are illustrative, as they are underpinned by arbitrary assumptions about the extent of the cost/benefit, as data are not available to enable precise estimates. There is a high risk that the net benefit may be higher or lower, however we expect that the revised regulations will provide benefits to business and other parties affected.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0.2	Benefits: 8.8	Net: 8.7	Yes	OUT

Specific Impact Tests: Checklist

Set out in the table below where information on any specific impact tests undertaken as part of the analysis of the policy proposal can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have a negative impact on...?	Impact	Page ref within IA
Statutory equality duties ¹ Statutory Equality Duties Impact Test guidance	No	49
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	60
Small firms Small Firms Impact Test	No	59
Environmental impacts		
Wider environmental issues	No	61
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	No	61
Human rights Human Rights Impact Test guidance	No	61
Justice system Justice Impact Test guidance	No	61
Rural proofing Rural Proofing Impact Test guidance	No	61
Sustainable development impacts		
Sustainable development Sustainable development Impact Test	No	61

¹ Public bodies including Whitehall departments are required to consider the impact of their policies and measures on 'protected characteristics' under the Equality Act 2010. The protected characteristics are: age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership along with pregnancy and maternity.

Evidence Base (for summary sheets) – Notes

References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No. Legislation or publication

- 1 The Transfer of Undertakings (Protection of Employment) Regulations 2006
http://www.legislation.gov.uk/ukxi/2006/246/pdfs/ukxi_20060246_en.pdf
- 2 Acquired Rights Directive 2001
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0023:EN:HTML>
- 3 Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006: Government response to call for evidence September 2012
<http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/E/12-1141-effectiveness-transfer-of-undertakings-response.pdf>
- 4 Transfer of Undertakings (Protection of Employment) Regulations 2006 Consultation on proposed changes to the regulations January 2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184947/13-533-tupe-regulations-2006-consultation-on-proposed-changes-to-the-regulations3.pdf
- 5 Transfer of Undertakings (Protection of Employment) Regulation 2006: Consultation on proposed changes to the regulations, impact assessment, January 2013
http://www.legislation.gov.uk/ukxi/2010/93/pdfs/ukxi_20100093_en.pdf

Option 2a – annual profile of monetised costs and benefits (£m) constant (2012) prices to nearest £0.1m

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	0.0	0.0	0.0	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Annual recurring costs	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Total annual costs	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Transition benefits	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Annual recurring benefits	12.8	13.7	14.5	14.9	15.2	15.2	15.2	15.2	15.2	15.2
Total annual benefits	12.8	13.7	14.5	14.9	15.2	15.2	15.2	15.2	15.2	15.2

Contents

- Summary: Intervention and Options..... 2**
- Summary: Analysis & Evidence 3**
- Preferred Policy Option..... 3**
- Specific Impact Tests: Checklist..... 4**
- Evidence Base (for summary sheets) – Notes 5**
- Contents 6**
- 1 Evidence Base..... 9**
 - 1.1 Background..... 9
 - 1.2 Purpose and intended effect of the 2013 revisions..... 10
 - 1.3 Rationale for government interventions 11
 - 1.4 The 2006 TUPE Regulations 11
 - 1.5 Consultation 12
 - 1.5.1 Within government 12
 - 1.5.2 Public call for evidence 12
 - 1.5.3 Public consultation 12
- 2 Impact Assessment 13**
 - 2.1 Options considered 13
 - 2.1.1 Option: No Change 13
 - 2.1.2 Option: Repeal the Service Provision Change (SPC) provisions from TUPE Regulations 14
 - 2.1.3 Preferred Option: Reforming the 2006 TUPE Regulations 16
 - 2.2 Interaction between the regulatory changes 18
 - 2.3 A note on transitional costs 19

2.4 The costs and benefits associated with the main elements of the revised TUPE framework	20
2.4.1 Estimated number of TUPE related Employment Tribunal claims	20
2.4.2 The scale of potential reductions in TUPE related Employment Tribunal claims.....	21
2.5 The costs and benefits associated with the inclusion of change of location within the definition of an economic, technical or organisational reason entailing changes in the workforce – and, therefore, outside the automatic dismissal protection	25
2.5.1 Estimated benefit to transferees resulting from the regulatory reform on change of workplace location.....	26
2.5.2 Estimated cost to transferees resulting from the regulatory reform on change of workplace location.....	27
2.6 Costs and benefits associated with the reduced requirements on micro businesses	28
2.7 The costs and benefits of changing the provisions restricting changes to contracts	29
2.8 The cost and benefits of expressly setting out the test for the SPC provisions of the necessary degree of similarity in the activities after a change in service provision	32
2.8.1 Estimated costs and benefits to employers arising from the express setting out in the regulations the test for the SPC provisions	33
2.8.2 Estimated costs and benefits to employees arising from the express setting out in the regulations the test for the SPC provisions	33
2.9 The costs and benefits of amending the Trade Union and Labour Relations (Consultation) Act 1992 (TULRCA) to expressly state that consultations which begin pre-transfer can, in certain circumstances, count for the purposes of complying with the collective redundancy rules.	34
2.9.1 Benefits to employers from the amendment to TULRCA to expressly allow consultation which begins prior to the transfer to count under the collective redundancy rules in certain circumstances.....	34
2.9.2 costs and benefits to employees from the amendment to TULRCA to expressly allow consultation started prior to the transfer to count under the collective redundancy rules if certain conditions apply.....	35
2.10 Effect of revised TUPE framework on the number of transfers.....	36
3.0 Risks to cost/benefit analysis	36
3.1 One in Two Out Rule.....	37
Annex A	39

A.1 Available Data Sources forming the Evidence Base	39
A.1.1 Workplace and Employment Relations Survey 2011.....	39
A.1.2 Employment Tribunal data.....	42
Annex B	44
B.1 Approach to estimating costs of employment tribunal cases.....	44
B.1.1 Cost of Running the ET	44
B.1.2 Estimated costs to claimant when making an ET claim.....	45
B.1.3 Estimated costs to an employer when responding to an ET claim	48
Annex C	49
C.1 Specific Impact Tests	49
Specific Impact Test (1) - Equality Impact Assessment	49
Specific Impact Test (2) - Small Firms	59
Specific Impact Test (3) - Competition	60
Specific Impact Test (4) - Wider Environmental Issues	61
Specific Impact Test (5) - Health & Wellbeing.....	61
Specific Impact Test (6) - Human Rights	61
Specific Impact Test (7) - Justice System	61
Specific Impact Test (8) - Rural Proofing	61
Specific Impact Test (9) - Sustainable Development	61

1 Evidence Base

The Transfer of Undertakings (Protection of Employment) Regulations 2006, commonly known as the TUPE Regulations, implement the EU Acquired Rights Directive and safeguard employees' rights when the business in which they work changes hands between employers.

The impact assessment uses all of the quantitative information available in assessing the effect of revising the TUPE Regulations. IN particular, it considers evidence from the Workforce Employment Relations Study (as discussed in more detail in the Annex). In addition, the Consultation on the revision of the regulations specifically asked if respondents have any quantitative information that could inform our assessment but none were able to provide any comprehensive quantitative data.

Part of the reason why respondents were unable to provide any quantitative data is that the situations where undertakings are transferred all tend to have unique features. This both means that information drawn from the past may not be very applicable to the future and also that any quantitative information is unlikely to be representative of the range of situations that would be affected by the TUPE regulations.

We, therefore, concluded that it would be disproportionate to arrange for the collection of representative quantitative information in TUPE – particularly since it would be difficult to draw a sample that includes enough workplaces that are affected by TUPE (which only affect around 4% of workplaces a year).

Consequently, the impact assessment is predominantly based on qualitative information received in response to the call for evidence and the consultation as well as other sources on specific aspects of TUPE. This qualitative information provides clear evidence on the direction of change. However, it does not give specific quantitative estimates and so some arbitrary assumptions are necessary to enable monetisation of costs and benefits. And, we have used the qualitative evidence in order to make sensible judgements which limit the assumptions made. These estimates were used in the development of the policy as well as for the purposes of the Impact Assessment because we judged that they were the best available.

1.1 Background

The TUPE regulations were originally introduced in 1981, to implement the EU Acquired Rights Directive. They were replaced by amended regulations in 2006² and are being updated now in 2013.

² The aim of the amended regulations was to provide greater certainty over whether or not the Regulations apply to particular situations

TUPE regulations aim to implement the EU acquired rights directive by:

- safeguarding employees' rights where a business, part of a business or a service provision in which they are engaged changes hands;
- assisting the smooth management of necessary business restructuring and public sector modernisation by securing the interests and commitment of the employees affected;
- promoting a co-operative, partnership approach toward change; and
- helping create a level playing field and reducing transaction risks and costs in business acquisitions and in contracting operations in the business services sector.

The TUPE Regulations assert that when an undertaking or business, or part of one, is transferred from one employer to another:

- The employment contracts of the employees, along with most of the rights, powers, duties and liabilities of the old employer (transferor) pass automatically to the transferee.
- Employees of the transferor or of the new employers (transferee) may not be fairly dismissed by reason of, or for a reason connected with the transfer (it is unfair dismissal if they are). However, the Regulations provide that that dismissals for reasons connected with the transfer where there is an economic, technical or organisational reason entailing a change in the workforce are not automatically unfair; however, unfair dismissal law (and other obligations, such as those under the Equality Act 2010) continues to apply, so a dismissal may still be unfair depending on the circumstances.
- Both the old and the new employer must inform employee representatives about the legal, economic and social implications of the transfer and consult them on any measures envisaged in relation to any of the employees affected by the transfer.

1.2 Purpose and intended effect of the 2013 revisions.

In May 2010 the Government committed to review employment laws for employers and employees to ensure that they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive. This Employment Law Review included the TUPE regulations.

The review has identified clear concerns amongst stakeholders that the TUPE Regulations:

- 'gold plate' the implementation of the Acquired Rights Directive unnecessarily; and
- overly inhibit flexibility for all parties involved in TUPE transfers.

The review is intended to ensure that the regulations are fit for purpose, to see whether there is scope to make the legislation easier to understand, to improve flexibility for all those involved in transfers and also to reduce complexity.

In considering any potential reforms the Government has made clear that it will ensure that fairness to individuals is not compromised, recognising that the Regulations provide important protections.

1.3 Rationale for government interventions

As the Government accepts the objective of the Acquired Rights Directive that existing workers should not suffer disadvantage if their business is sold, the rationale is to achieve this objective whilst minimising the cost to business and government. The government also aims to frame the legislation in ways that maximise the opportunity of workers and employers to reach agreements without recourse to legislation.

A specific issue is the uncertainty caused by both the scope and the period of time that the worker is covered by the legislation. It has not always been clear whether **service provision changes** are covered under the TUPE framework. Also, although it is clear at the time of the transfer how workers are affected it is unclear how future changes in terms and conditions in both the transferor and transferee firms affect the workers covered by the TUPE framework. This legislative uncertainty reduces the possibility of mutually beneficial agreements being agreed because such agreements may not be legally compatible with the TUPE framework.

A few respondents have argued that the SPC provisions have restricted some service providers and commissioners from pursuing more innovative approaches to service delivery, because staff and liabilities are inherited under TUPE.

In addition, there is legislative uncertainty about the boundary between the situations where the worker is dismissed for reasons (solely or principally) associated with the transfer and other **economic, technical or organisational (ETO) reasons** or for reasons unconnected with the transfer. Under the current framework dismissal where the sole or principal reason is the transfer itself or it is a reason connected with the transfer that is not an ETO reason entailing changes in the workforce is automatically unfair for the purposes of the law on unfair dismissal. Similarly, variations of contract are considered void.

Some respondents to the consultation say that guidance on what is included, or not, as an ETO reason is unclear. Others find the rules, as interpreted by the courts, unduly restrictive.

Failure to introduce revised Regulations would mean that all these shortcomings would remain unaddressed, contrary to the Government's commitment in the Employment Law Review.

1.4 The 2006 TUPE Regulations

The revisions in 2006 to the TUPE Regulations aimed to reduce the uncertainty around transfers which was a significant problem before 2006. These changes to the regulations primarily involved the inclusion of **service provision changes** (SPC) within the scope of what was considered to be a transfer for TUPE purposes.

An SPC occurs when a client either: outsources activities for a contractor to perform on its behalf; re-tenders for such activities; or brings the activities back in house.

1.5 Consultation

1.5.1 Within government

In developing these proposals we have discussed the options with interested government departments including HM Treasury, The Department for Education, The Department for Work and Pensions and Cabinet Office.

1.5.2 Public call for evidence

In November 2011, the Government issued a Call for Evidence on the effectiveness of the 2006 regulations. A total of 175 responses were received, representing a wide range of interests. Some key points emerged from the responses:

- Many businesses find that the limit for the provision of employee liability information (ELI) of 14 days before transfer does not meet their needs;
- There is no provision for the post-transfer harmonisation of terms and conditions of employment with existing employees;
- Some responses identified that the Regulations, by specifically including service provision changes (SPC) in the scope of TUPE, went further than required in the Acquired Rights Directive;
- Further guidance is needed on the application of TUPE in cases of insolvency.
- Further guidance is needed on whether a dismissal or a change to an employment contract is due to the transfer and whether the change is due to an economic, technical or organisational (ETO) reason.
- Further guidance is needed on public sector pension arrangements.

This analysis was published in the Government Response to the Call for Evidence in September 2012³.

1.5.3 Public consultation

In January 2013 the Government launched a public consultation on proposed changes to TUPE regulations. 178 responses to the consultation were received. These responses have helped shape the development of the proposed changes to TUPE regulations, as set out in the accompanying Response to the consultation, and in the text below.

³ <http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/E/12-1141-effectiveness-transfer-of-undertakings-response.pdf>

The key points are as follows:

- Most respondents were opposed to removing the service provision change provisions from the Regulations, being concerned that the change would increase the uncertainty around transfers, a significant problem before 2006, impacting negatively on business costs. Some of those in favour offered only qualified support, though a number thought that a repeal might benefit those developing innovative approaches to service provision
- Respondents considered that the Regulations should specify a minimum deadline pre-transfer for provision of employee liability information
- There was support for revising the UK regulations on varying terms and conditions and protection from dismissal so that they reflected the Directive and CJEU case law.
- There was support for limiting the applicability of the transferor's collective agreements on transferring employees' terms post-transfer, as many argued it was unfair for transferees to be bound by agreements made after the transfer, in which they were not involved.

2 Impact Assessment

2.1 Options considered

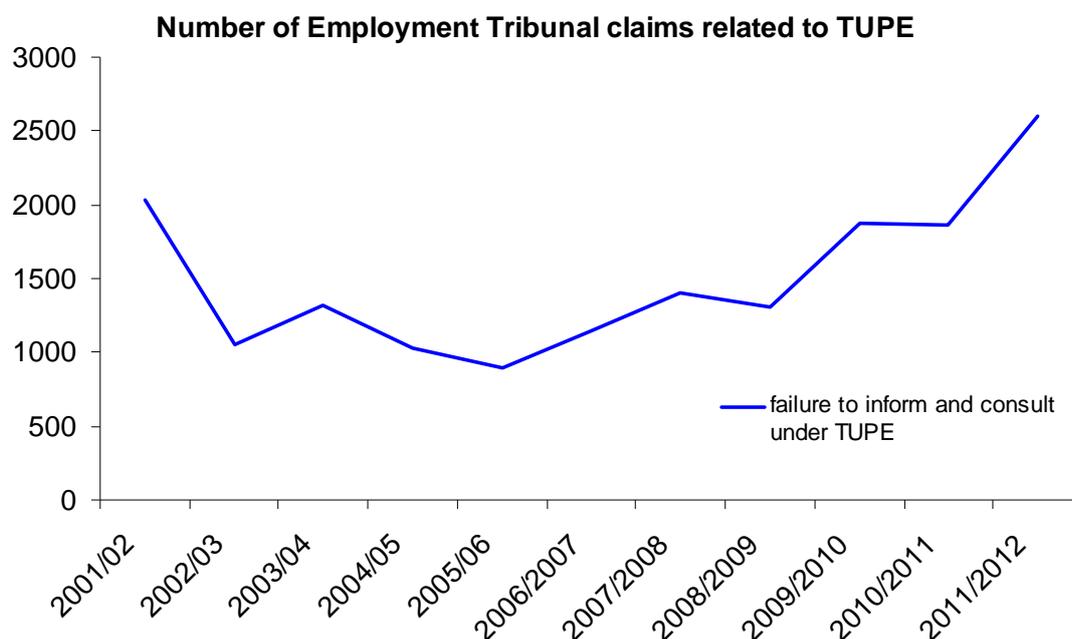
- No Change.
- Exempt some Service Provision Changes for TUPE coverage.
- Reform the 2006 TUPE Regulations.

2.1.1 Option: No Change

Making no change to the regulations or the guidance would maintain the complexities of the 2006 Regulations. The greater complexities included in those regulations and the attendant uncertainty compared to the requirements of the Directive and related case law, in relation to dismissals and also varying terms and conditions would also remain. This would be true even if the changes in terms and conditions were mutually beneficial to both workers and the business.

In addition, there are some indications that the problems associated with the complexity and uncertainty may be increasing. For example, the graph below which is based on breakdowns of tribunal numbers provided to BIS by Her Majesty's Courts and Tribunal Service shows that the number of tribunals relating to employers failing to inform and consult employees during a transfer has risen sharply since 2006.

Figure: 1 Number of Employment Tribunal claims related to TUPE, 2001/02 – 2011/12



This increase may not be the result of the complexity and uncertainty associated with the TUPE regulations. Yet, in the last year, the number of these TUPE based tribunals has continued to increase whereas most other jurisdictions have seen a fall in tribunal numbers.

2.1.2 Option: Repeal the Service Provision Change (SPC) provisions from TUPE Regulations

The 2006 changes to the TUPE Regulations included SPCs partly because it seemed at odds with the objective of the Acquired Rights Directive to exclude certain types of transfer of undertakings. In addition, at the time, one argument for specifically including SPCs in the 2006 TUPE Regulations was to avoid confusion for the transferring parties themselves.

As part of the Employment Law Review it was appropriate to ask the question again. However, based on the response to this TUPE consultation, **the Government has decided that the application of the TUPE regulations to Service Provision Changes should generally remain unamended.**

Those in favour of retaining the SPCs within TUPE see the existing regulations as 'necessary' gold-plating which is not burdensome for businesses. They agree that the inclusion of SPCs removed much of the uncertainty as to whether TUPE regulations would apply and, as a result reduced the burden on the Tribunal Service and litigations costs, while providing those service providers involved with a 'level playing field' as all transfers – SPCs or not – would be treated the same.

Removing the SPC provisions from TUPE would not exclude all service provision changes from TUPE, with many of these changes still likely to be covered under the first test for a transfer under TUPE, which reflects the test in the Directive. And, what is more, this test leaves it more open to dispute over whether the Directive would apply in certain cases.

This uncertainty is particularly evident where the economic resource is primarily the undertaking's workforce.

Consequently, a number of respondents considered that the uncertainty that would result would make commercial transactions involving transfer or change of service provider more time consuming and costly. They also felt that the employees' terms and conditions would suffer.

Many respondents opposed to the repeal of the SPC provisions identified that among the benefits in the TUPE process being applied were:-

- The employees providing the service transferring and remaining in work (which after all is the purpose of the Acquired Rights Directive).
- The transferor not having to face the financial burden of accommodating or making redundant those employees providing the service

Repealing the SPC provisions – which would increase the possibility that the incumbent provider would not be able to transfer the staff with the contract - would, in respondent's views:-

- Increase contract price/bids – as potential contractors would include the potential cost of having to make staff redundant at the end of the contract.
- Require service providers 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.
- Potentially lose continuity if staff are not transferred. Continuity was considered important, particularly by the voluntary sector or caring services as well as in technical and skilled services.

Those who supported the repeal of the SPC provision identified that:-

- It 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.
- There were some concerns that small businesses would be put off from bidding by the potential size of the liabilities that would be inherited – the transferring staff's existing terms and conditions.
- There were also arguments against having to transfer the existing employees where a contract provider had failed to deliver a satisfactory service. Particular concerns about inheriting public sector terms and conditions were raised by those involved in this type of contracting out.

In summary, the weight of evidence from the consultation response identified that the increased certainty provided by the SPC provisions was an important benefit. Even some of those favouring repeal stressed that the worst scenario of reform would be a situation of greater uncertainty about whether TUPE applied to an SPC.

There is a small further change to legislation based on the subsequent interpretation of the 2006 TUPE regulations in case law. This case law requires that the activities after the change in service provision are fundamentally or essentially the same as those before the change, in order for it to be caught by the SPC provisions. As a result, where the nature of the service *fundamentally* changes with a change in service provider it is not a transfer under the SPC provisions⁴.

The Government proposes to legislate to include expressly the case law test concerning the degree of similarity in the activities necessary for a change in service provision to come under the SPC provisions in the 2006 Regulations. This test is whether the activities carried out after the transfer are “fundamentally or essentially the same” as those carried out before it⁵. The greater the difference, the more likely it is that the change in service provision will not be captured by the SPC provisions in the TUPE Regulations.

Including this existing legal interpretation within the revised Regulations will, hopefully, increase awareness among businesses of how the regulations operate in relation to innovations and so may reduce their concerns about the application of TUPE and the consequent inheritance of employees and liabilities. This may increase the likelihood that businesses will consider innovative proposals.

It should be noted that this revision involves incorporating existing case law explicitly in the regulations. Therefore, it is not expected that this regulatory revision would substantially reduce the risk of being subject to TUPE even if the Government is able to increase awareness of the revision still further.

It should also be noted that the risk to business is not removed completely. The main test for a transfer (in regulation 3(1)(a)) which is derived from the Acquired Rights Directive, would still be relevant and might capture a particular innovative change and/or it might still be caught by the SPC test if the degree of difference is only minor. The revised regulations would signal the flexibility that business has in some TUPE situations (that not every change in service provider will be subject to TUPE).

Other proposed changes in the preferred option should also help to mitigate some of the concerns of those in favour of a repeal of the SPC provisions. They aim to provide greater opportunities for businesses to reach agreement with existing workers and vary contract terms post transfer.

2.1.3 Preferred Option: Reforming the 2006 TUPE Regulations

As noted above, the revised regulations will continue to include the Service Provider Changes provisions. They will also explicitly reflect the test under existing case law where changes in service provision such that the activity is not fundamentally the same will not be subjected to TUPE under the SPC provisions. This will largely maintain the certainty brought by the inclusion of the provisions in the 2006 revisions, which is judged to be beneficial to businesses.

⁴ Examples include OCS Group v Jones, EAT – the move from the provision of hot food to dry goods kiosks at a workplace was not covered by the SPC provisions. Nottinghamshire Healthcare NHS v Hamshaw EAT – not a TUPE SPC where healthcare provision moved from being in a residential home to being carried out in the recipients’ own domestic premises.

⁵ Set out in Metropolitan Resources v Churchill Dulwich Ltd (2009), EAT and applied in other cases

In addition to maintaining the overall certainty associated with the 2006 legislative revisions there will also be a small reduction in the disincentive some innovative businesses face when taking over the provision of a service.

The reform package will also bring the regulations more in line with the wording of the Acquired Rights Directive, as interpreted subsequently by the EU Court of Justice. This is designed to remove potential gold-plating by taking full advantage of these interpretations while still providing protection to employees involved in the TUPE transfer in accordance with the Directive's objective.

In addition, the Government's reforms aim to provide the maximum flexibility within the TUPE framework for the parties involved in such transfers to reach mutually beneficial agreements.

Other aspects of the reforms include achieving a more appropriate balance between the requirements placed on transferors and transferees; improved guidance; the removal of a potential burden on micro businesses.

As a consequence of these reforms the main elements of the revised TUPE framework will be:-

- The service provision change provisions will continue to be included in the TUPE framework, along with the explicit inclusion of the case law test about the necessary degree of similarity of the activities before and after a change in service provider.
- The transferor will provide Employee Liability Information (ELI) at least 28 days before the transfer (except in exceptional cases).
- At the time of the transfer:-
 - All transferring employees would be able to retain their existing terms and conditions and any purported variation where the reason for it is the transfer itself, would be void.
 - this rule making variations to existing contracts void would not apply if the employer has an economic, technical or organisational reason entailing changes in the workforce for varying terms and conditions, or if the employer makes a unilateral change pursuant to a contractual power, which the law allows it to rely upon.
- At the time of transfer, employees transfer across with any terms and conditions derived from collective agreements but:-
 - the revised framework will provide that only terms derived from collective agreements existing at the time of transfer bind the transferee employer and not any updated or new agreements entered into subsequently in relation to the transferor (this accords with the judgment of the Court of Justice of the European Union in *Alemo-Herron v Parkwood Leisure*⁶); and
 - one year after transfer, the rule making changes void (where the reason for the change is the transfer) will cease to apply in respect of terms derived

⁶ C-426/11, 18 July 2013. This was a reference to the Court of Justice of the EU by the UK's Supreme Court about the requirements of the Directive on this point. The litigation concerns the meaning of TUPE 1981 and whether the transferee is bound by collective agreements entered into after the transfer, which relate to the transferor and in which the transferee plays no part in the negotiations. The wording of TUPE 2006 is not materially different from TUPE 1981 on this point. The Supreme Court has not yet given its final judgment in this case.

from collective agreements, although any change must be overall no less favourable for the employee. This will enable employers and employees to consider changes that are mutually beneficial to both parties. It may be in their interest to do so because otherwise the terms and conditions in place at transfer will remain in place (unless there is some other reason to seek to change them) – and not be improved through, for example, pay rises or bonuses.

- TUPE Regulation 7 on protection against dismissal will be amended so that it more closely reflects the wording of the Acquired Rights Directive (and CJEU case law). This will ensure that employees affected by a TUPE transfer will still provide protection against dismissal in accordance with the Directive's objective, while reducing the risk that the regulations can be interpreted more widely than is required by the Directive.
- The Trade Union and Labour Relations (Consultation) Act 1992 (TULRCA) will be amended to expressly state that consultation which begins pre-transfer can count for the purposes of compliance with the collective redundancy rules, provided that the transferor and transferee can agree and that the transferee has carried out meaningful consultation. Some consultation responses indicate that in some TUPE transfers the transferee does conduct pre-transfer consultation on collective redundancies. This legislative change is aimed at providing certainty to the parties involved that pre-transfer consultation can count for the purposes of compliance with the collective redundancy rules.

In addition, there are a number of other changes to the framework:

- change of workplace location is to be included within “entailing changes in the workforce”, so that it is capable of being an Economic, Technical or Organisational reason entailing changes in the workforce, and so dismissals for such reasons would not be automatically unfair and changes to contracts for such reasons would not be void.
- micro businesses involved in a transfer will be enabled to inform and consult directly with employees if there are no existing appropriate employee representatives, to avoid the bureaucracy of an election

And BIS will devise and improve a set of guidance that is appropriate to the new framework.

2.2 Interaction between the regulatory changes

Some of the regulatory changes will impact on others. For instance, including change of workplace location in the definition of “entailing changes in the workforce” will impact on those regulations that include an ETO exception. These include the provisions relating to varying contract terms and protection from dismissal. Potential benefits arising from the revisions to regulations on varying contract terms could be enhanced by those limiting the future applicability of terms derived from collective agreements.

2.3 A note on transitional costs

It is expected that the transitional costs directly incurred by the transferor or transferee to do with this legislation will be low. The basis for this expectation is that:

a) A low proportion⁷ of employers experience a TUPE process each year, and most of those that do so will experience it relatively infrequently. Therefore, each time a business goes through a such a process they will need to familiarise themselves with the regulations. Therefore, for most businesses affected, there will be no transition costs from the reform package.

b) Transfers are generally complex, and parties will mostly receive comprehensive legal advice throughout the process. Therefore legal professionals will need to familiarise themselves with the changes to the regulations. However, as noted in the consultation document⁸, the existing provisions involve uncertainty as to the boundary of what is and what isn't permitted. This is partly because there are not binding authorities on the range of issues that can arise, but also because the application of some of the tests means that the outcome in individual cases is highly dependent upon the particular facts. Therefore, to an extent, where TUPE is concerned there has been a need for specialists in the legal profession, and those relatively small number of businesses regularly involved in transfers (eg through service provision changes) to remain up-to-date with case law. As set out in section 2.1.3 above, a number of the regulatory changes made have been informed by CJEU and UK case law on TUPE and the Acquired Rights Directive. Therefore it is expected that the additional burden imposed on those regularly involved in transfers by the reform package will be minimal, due to the requirement for them to remain up-to-date with the legal interpretation of these regulations.

c) The regulatory changes may result in litigation to test the Courts' interpretation of the revised regulations. However, as part of the reform package, the Government will provide new guidance on TUPE which should help clarify how the regulations have been interpreted by the courts. Also, the uncertainty in the existing provisions (identified in b) above) means that litigation related to TUPE currently arises. As the specifics of individual cases drive such litigation, it is therefore not possible to estimate to what extent the changes to the wording of the regulations will generate additional employment tribunal cases, though we would expect the number to be relatively small. Data is not available on the number of employment tribunal cases that specifically relate to TUPE, except in the case of those on informing and consulting employees. We have not attempted to monetise the transitional costs arising out of litigation to test the meaning of the regulatory revisions.

The public consultation launched in January 2013, including meetings with stakeholders, resulted in few concerns being raised that the proposals carried forward into the final reform package would cause a problem in terms of transition costs to business.

⁷ Around 4% of employers with 5 or more employees may be involved in a TUPE transfer each year, based on the estimate of 31,000 TUPE transfers each year based on data from WERS (discussed in more detail in Annex A of this document).

⁸ Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013, p32

HM Courts and Tribunals Service will need to train their judges on the revised regulations, so there will be a transitional cost to the Exchequer for training. The Ministry of Justice estimate that this would be around £0.1m at 2012 prices.

2.4 The costs and benefits associated with the main elements of the revised TUPE framework

The key driver to most changes associated with the revised TUPE framework is the certainty provided by the continued inclusion of SPCs under the framework and additional flexibility, for instance from enabling changes to terms and conditions derived from collective agreements associated with the pre-transfer arrangements even if by reason of the transfer, as long as the variations are no less favourable overall for employees, one year after the transfer. The new framework will also provide expressly for the approach required by the Directive⁹ in relation to situations where collective agreements as agreed from time to time are incorporated into employment contracts. Such collective agreements agreed after the date of the transfer in relation to the transferor will not bind the transferee where it is not part of that negotiating process. In addition, the increase in the minimum time prior to the transfer that the transferor must provide the transferee with ELI to 28 days from 14 days will provide greater certainty for transferees and affected employees (as transferees will have more time to update their systems to reflect transferring employees' terms and conditions). More flexibility and certainty is also expected to come from the new framework's amended regulations on varying terms and conditions and dismissals that will more closely reflect the Acquired Rights Directive (and CJEU case law).

The simplicity and the clarity of the revised framework should make it easier for all of the parties involved in the transfer to be clear about their roles, rights and responsibilities. It is, therefore, likely that the number of Employment Tribunal Claims associated with errors due to the legislative uncertainty will fall. There may also be a benefit from specific changes (as discussed in section 2.4.2) There is no precise information on the scale of these errors, as the Employment Tribunal does not record for most jurisdictions whether the claim related to a transfer of an undertaking. However, it is hoped that the revised framework along with improved guidance will lead to a sharp fall in TUPE related Tribunal claims.

As an indication of the likely benefits to all parties of the reduction in Employment Tribunal claims we consider the current level of TUPE related claims and explore the scale of possible reductions.

2.4.1 Estimated number of TUPE related Employment Tribunal claims

The average number of TUPE related Employment Tribunal claims is estimated at around 4,300 per year.

This figure is calculated as the sum of three types of claims: failure to inform and consult under TUPE as well as unfair dismissal and breach of contract related to TUPE.

⁹ This is clear from the judgment of the Court of Justice of the EU in *Alemo-Herron v Parkwood Leisure* C-426/11.

Since 2004 published data on the number of tribunal claims related to TUPE is only available for the first category: failure to inform and consult. The average number of this type of claim over the five year period from 2007/08-2011/12 was 1,800 per year.

Between 2001/02 and 2003/04, TUPE related unfair dismissal claims accounted for around 3% of total unfair dismissal claims. After 2003/04 separate figures on TUPE related unfair dismissal claims were no longer made available, with the numbers included within overall unfair dismissal claims. The 3% proportion was applied to the average annual number of unfair dismissal claims over the period 2007/08 – 2011/12 to estimate the average number of TUPE related unfair dismissal claims, the estimated figure being nearly 1,500 per year.

Using the same method, the average number of breach of contract claims linked to TUPE was estimated at approximately 1,000 per year. Since HMCTS does not publish data on claims resulting from a breach of contract related to TUPE, we assumed that the proportion of TUPE related breach of contract claims in all breach of contract claims is the same as the corresponding proportion for unfair dismissal claims, 3%. This provides an estimate of around 4,300 employment tribunal claims arising from TUPE.

In spring 2014 the Government will be introducing early conciliation into the employment tribunal process. The BIS/Acas Early Conciliation model estimated that 24.8% of cases referred to early conciliation would not progress to a full employment tribunal claim¹⁰.

Applying this proportion to the total number of TUPE related tribunal claims provides an estimate of the number of claims settled in early conciliation, approximately 1,100. This means that the number of claims expected to progress to Employment Tribunal is 3,200.

2.4.2 The scale of potential reductions in TUPE related Employment Tribunal claims

We expect that the proposed changes to the current TUPE framework are likely to reduce the number of workplace disputes and as a result reduce the number of resulting employment tribunal claims arising from TUPE.

In particular, specific reforms may impact on numbers of claims. One of the reforms being introduced will mean that change in workplace location can qualify as a ETO reason entailing changes in the workforce. Changes in location will therefore not, in themselves, automatically allow employees in the transferring workplace to claim unfair dismissal under the TUPE regulations. A number of respondents to the consultation identified this an important reform, stating that a change in service provider often required a change in workplace location. Data aren't available on how many unfair dismissal claims relate to TUPE, and therefore there is no information on the proportion of these that were due to changes in workplace location. However, on the basis that consultation response suggests

¹⁰ Department for Business, Innovation and Skills, Early Conciliation: a consultation on proposals for implementation, impact assessment, January 2013, p 16 – This impact assessment estimates that the rate of employment tribunal cases taking place following Acas pre-claim conciliation (PCC) was around 25.2% (take up rate of PCC (75%) x ET rate for PCC cases (20.3%) + ((1- take up rate of PCC (25%) x ET rate for control group 38%). Due to partial treatment of the control group (those unwilling to participate in PCC, or with unsuitable cases), including some self selection the ET rate for the control group was increased to 50%. This figure minus 25.2% gives 24.8%.

that location change on transfer could be quite common, this reason could have accounted for a substantial proportion.

The requirement for transferors to provide ELI information at latest 28 days prior to a transfer (extended from 14 days) will provide transferees extra time to get their systems updated so that transferring employees will be on the correct terms and conditions on transfer. Again, information is not available on the number of claims on underpayment of wages or breaches of contract by employees that are related to TUPE (or, specifically, resulting from late provision of ELI information). However, respondents have indicated that currently the 14 day limit can impose some difficulties on transferees in getting their systems right, impacting on the pay and conditions that transferring employees may receive when they initially transfer.

Also, the additional flexibility potentially resulting from amending regulations on both varying terms and conditions and dismissals so that they more closely reflect the wording of the ARD and CJEU case law could lead to a drop in claims on breach of contract and dismissal.

There might also be a drop in claims of failure to inform and consult employees during a TUPE transfer due to the additional flexibility given to micro organisations to consult directly, and potentially from the change to allow transferees to consult on potential collective redundancies with transferring employees prior to the transfer taking place.

However, given the lack of specific information on employment tribunal claims it is difficult to predict with any certainty the extent of the reduction in claims. It is possible but very unlikely that the increased certainty and engagement with employees will lead to no TUPE based claims (a 100% reduction). Transfers of undertakings and service provision changes will remain potentially sensitive for affected employees, and involve some complexity. In these circumstances, especially as employers are likely to face cost pressures, there are very likely to be some claims. Similarly, these changes could result in no reduction over time in TUPE based claims, though this is equally unlikely given the greater certainty and flexibility resulting from the reforms, the effect of specific changes discussed above, and increased scope for engagement helps transferees and employees to agree new, mutually beneficial terms. We think it is more likely that the new framework would lead to a reduction in TUPE employment tribunal claims somewhere in the middle of these two extremes. Not all firms and employees will be able or willing to take advantage of the opportunities offered by the change, but many will be motivated to do so. Therefore, we make an assumption that the number of employment tribunal claims arising from TUPE will be reduced by 50%.

This will lead to a benefit for both employees and employers in reduced costs from respectively taking and defending claims in the employment tribunal process. As noted in the discussion on data sources used, in Annexes A and B, BIS has estimated the average unit costs for employees and employers using data from Acas, the 2008 Survey of Employment Tribunal Awards and the Annual Survey of Hours and Earnings (ASHE).

The table below provides unit costs to employee and employer of disputes resolved in an early conciliation as well as those that go to a full tribunal hearing:

Table 2.1 Average costs of Employment Tribunal and early conciliation claims

Unit costs		
	Average across ET claim outcome	Early conciliation claim
Employer	£3,900	£512
Claimant	£1,400	£73

Source: BIS estimates from Acas, SETA and ASHE data in 2012 prices. Figures are rounded.

The estimated benefit is calculated as follows:

The reduction in claims disposed of at early conciliation x the unit cost of an early conciliation claim + the reduction in full employment tribunal claims x the unit cost of an employment tribunal claim.

The table below sets out the best estimate for benefits arising to employers and employees, based on a 50% reduction in claims going through the employment tribunal process.

Table 2.2 Estimated benefits to employers and employees of reduction in TUPE related work disputes

Estimated annual benefits (based on 50% reduction in claims) 2012 prices, rounded to nearest £100,000			
	Employment Tribunal claim	Early conciliation claim	TOTAL
Employer	£6,300,000	£270,000	£6,500,000
Employees	£2,200,000	£39,000	£2,300,000

The two unlikely extremes (of no reduction in cases to complete reduction in cases) would give ranges of:

Employers: From £0 to £13.1m.

Employees: From 30 to £4.6m.

Benefits to the Exchequer:

Estimates from the Employment Tribunal Cost Model (see Annex B, table B2) show that, at 2012 prices, the estimated unit cost to HMCTS of a claim that reach different stages is as follows:

£, 2012 prices

Receipt and Allocation	400
Interlocutory	900
Hearing	1,900

Based on information on case numbers, from the latest available Cost Model, using data for 2010/11, it is estimated that 2% of employment tribunal cases only got to the receipt and allocation stage, while 79% reached the interlocutory stage before disposal and 19% reached a full hearing. On this basis, the average unit cost to HMCTS of an employment tribunal case is:

$$£400 \times 0.02 + £(400+900) \times 0.79 + £(400+900+1,900) \times 0.19 = £1,635.$$

Data from Acas on the estimated unit cost at 2012 prices for early conciliation shows that for fast track cases, the unit cost is £120, while for standard track cases the unit cost is £160¹¹. Under HMCTS's allocation of cases by track, breach of contract claims are fast track, while failure to inform and consult and unfair dismissal are both standard track. Therefore around a quarter of the estimated 4,300 employment tribunal cases are fast track, while around three-quarters are standard track. An average unit cost for early conciliation in these cases is:

$$£160 \times 0.75 + £120 \times 0.25 = £130.$$

Applying these figures to the best estimate of a 50% reduction in claims going through the employment tribunal process would produce the following benefits to the Exchequer.

Table 2.3 Estimated benefits to the exchequer of reduction in TUPE related work disputes

**Estimated annual benefits (based on 50% reduction in claims)
2012 prices, rounded to nearest £100,000**

	Employment Tribunal claim	Early conciliation claim	TOTAL
Exchequer	£2,600,000	£69,000	£2,700,000

The range between the unlikely extremes of none of the cases being brought, or no reduction in the number would give a maximum range of benefits to the Exchequer of £0 to £5.4m

¹¹ BIS, Recruitment Sector Legislation: Consultation on Reforming the regulatory framework for employment agencies and employment businesses, January 2013, p32

The regulatory revision to include the existing case law test on the necessary degree of similarity of the activities under the SPC provisions may impact slightly on the number of Employment Tribunal claims. As it is expected that this will make the existing legal situation clearer to some parties involved in transfers, the impact might be a slight reduction in claims related to this part of the TUPE regulations. However, this may depend on the specifics of individual changes in service provision, with Employment Tribunals (and EATs where there are grounds for an appeal) ultimately responsible for applying the test of applicability to changes in service provision. We have considered potential impacts of this particular change in the Regulations in Section 2.8, but note here that we have not monetised any impacts: essentially the regulatory change is a provision of information – explicitly setting out the existing legal interpretation, so is not a regulatory change designed to effect a change in the law. Any effect of the Regulatory revision will depend on behavioural change among businesses, which are indirect effects, and therefore difficult to quantify.

2.5 The costs and benefits associated with the inclusion of change of location within the definition of an economic, technical or organisational reason entailing changes in the workforce – and, therefore, outside the automatic dismissal protection

The inclusion of change of location within the ETO definition means that the treatment of employees affected by this provision is covered by the usual employment legislation provisions rather than the more restrictive TUPE provision (on automatic unfair dismissal). However, it is important to recognise that not being covered by the TUPE provision still means that the general employment law rules will apply (including law related to redundancy, unfair dismissal, the Equality Act 2010 and law relating to the exercise of mobility clauses).

It is not possible to judge precisely how much use the new employers will make of this new flexibility. As noted above, it is expected that there will be some benefit to employers from a reduction in employment tribunal claims related to change of workplace location. In this section we are considering potential benefits from net workforce reduction arising from the additional flexibility.

The approach below is to estimate the number of people who may consider changing location as a result of a transfer. This in itself is a fairly uncertain number. We then apply an arbitrary but very cautious assumption of the net reduction in the size of this workforce and the associated reduction/saving in labour costs. This reduction might come from a variety of sources – increased productivity of the workers in the new workplace or increased use of unused capital or other factors of production.

Over time the size of this labour cost reduction will fall for individual employers as it is essentially due to bringing forward the (net) departure of the people who did not make the move to a new location. If the employees had moved to the new location, the employer would continue to pay their labour costs, so there is an ongoing saving in labour costs as

the employees have not transferred over or been replaced. As overall roughly 15%¹² of the workforce leave work each year we assume that the initial labour costs savings will diminish by 15 percentage points a year so that the cost saving in each case is eliminated by the end of 8 years.

2.5.1 Estimated benefit to transferees resulting from the regulatory reform on change of workplace location

The Workplace Employment Relations Survey 2011 suggests that between 2009-2011 an annual average of around 5,000 workplaces underwent both a TUPE transfer and a change in workplace location. These workplaces employed around 100,000 employees in 2011.

Generally, employers will want to manage employees in accordance with employment law, so would want to meet the TUPE regulations' requirements. In other words, they would not want to reduce an undertaking's workforce where it has transferred to them and the transfer involves a change in workplace location, if that reduction involved dismissing staff unfairly.

Under existing regulations, where a transferee employer dismisses employees where the sole or principal reason, although connected with the transfer, is an ETO reason entailing changes in the workforce, then the dismissals are not automatically unfair.

Under the revised regulations, there will be some additional flexibility, whereby change of workplace location is included as an ETO reason entailing changes in the workforce. Some employers may want to use this additional flexibility to make some reductions in overall workforce as part of a TUPE transfer. However, we expect these to be slight. In these cases, the transferee is not expected to be radically restructuring the business operations of the transferred undertaking, except through a change in workforce location (which may have been required rather than through choice) so will predominantly need to employ similar numbers of workers to carry out the work of the undertaking. If there was a substantial re-structuring process, then the employer would be likely to utilise existing ETO reasons entailing changes in the workplace. Also, remaining employee protection in relation to change in workplace location, through existing contract law and the Equality Act 2010 etc will mean that transferees overall will only be able to marginally reduce employee numbers through redundancies.

We therefore assume that the regulatory reform on change of workplace location would marginally increase the numbers of redundancies involved in TUPE transfers involving a change in workplace location, where the redundancy would lead to a reduction in workforce, by 50 employees a year.

We further assume that these employees are on the median weekly wage (excluding overtime) of £391 at 2012 prices (Annual Survey of Hours and Earnings). Taking account of employers non-wage costs, which the Eurostat Structure of Wage Costs database

¹² The Department for Business, Innovation and Skills publication, Employment Law 2013, Progress on Reform, March 2013, publishes figures on page 8 suggesting that out of 29.7 people in employment, around 1.6 million people left employment to become unemployed, while around 1.9 million went from employment to inactive in the 2012. BIS Analysis of the relevant LFS longitudinal dataset (Q42011 to Q42012) suggests that a further 2.3 million people changed employers, while remaining in employment. So around 5.8 million people left their employer in a year, around 20% of the total in employment.

estimates at 17% of wages in 2011 (the latest year for which figures are available, and the weekly cost of labour for each employee is:

$$£391 \times 1.17 = £457.$$

This produces an annual cost per employee of $£457 \times 52 = £23,788$

For 50 employees, this totals: $50 \times £23,788 = £1,189,000$ (to the nearest thousand).

As noted above, as roughly a 1/5th of the workforce leave their employer each year, the cost saving for transferees of not replacing these redundant staff would reduce by a fifth each year. Therefore over 6 years, transferees would benefit as follows for each set of 50 redundancies, at 2012 prices:

<u>Year 0</u>	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>	<u>Year 4</u>	<u>Year 5</u>
£1,189,000	£952,000	£714,000	£476,000	£238,000	£0

As we are estimating that an extra 50 employees each year is made redundant and not replaced, the benefit in year 2 for transferees would be: $£1,189,000 + £952,000 = £2,141,000$, and so on.

2.5.2 Estimated cost to transferees resulting from the regulatory reform on change of workplace location

We have assumed that this regulatory change will allow employers to make an additional 50 employees redundant each year where a TUPE transfer involving a change in workplace location has taken place. This will mean that these employers will face additional redundancy costs.

Under the statutory redundancy scheme, employees with two or more years' service are entitled to a redundancy payment from their employer, based on their age, length of service (up to a 20-year cap) and earnings capped to the weekly limit. Statutory redundancy pay is calculated in the following way: Number of years service (max 20 years) x multipliers x week's pay (actual pay is used if the employee earns below the limit; otherwise the weekly limit is used).

The multipliers used in the payment calculation are:

- 1-and-a-half-weeks' pay for each full year of service, where age during the year was not below age of 41;
- 1 week's pay for each full year of service, where age during the year was not below age of 22;
- ½-a-week's pay for each full year of service, not falling in the categories above.

To estimate the average redundancy pay for workers BIS uses a model¹³ that takes into account the age and length of service of those workers. The model works as follows:

¹³ The model was first used in the Statutory Redundancy Impact Assessment

- A. Calculate the number of weeks of pay an employee in each age group is entitled to;
- B. Estimate the number of workers in each of these age groups, using LFS data;
- C. Use ASHE data to provide average weekly pay by age group (taking into account the weekly limit as described above);
- D. Multiply A x B x C and divide it by the total number of workers to obtain the average redundancy pay for all workers.

The model estimates that average statutory redundancy for an employee at 2012 prices is £3,400.

The annual cost to employers of the additional redundancy is:

£3,400 x 50 = £170,000.

2.6 Costs and benefits associated with the reduced requirements on micro businesses

The Government intends to amend TUPE to permit some small employers (whether transferor or transferee) to inform their employees directly of the matters related to the transfer (which are set down in regulation 13(2)), and to consult them individually if measures are envisaged. If this is the route that is taken by the employer then there would be remedies for failure to inform and consult on an individual basis.

However, if there is a recognised independent trade union, then there would still have to be consultation with its representatives and, likewise, if there are existing appropriate employee representatives, who would have authority to receive information and be consulted. They too would need to be informed and consulted.

The vast majority of consultation respondents supported the proposal to enable micro businesses to inform and consult with affected employees directly. Of those who provided a response to this question over 80% were in favour.

This reform is likely to be important for the individual micro business but not substantial at an aggregate level. It is estimated that the requirement to elect employee representatives costs single independent workplaces with 5-9 employees between £70,000 and £140,000 a year in total.

The cost of carrying out an election is estimated at approximately £126 per workplace, calculated as 1 hours' pay for the business owner at £13.45 per hour and 10 hours' pay for a staff member paid £11.21 per hour. This includes time spent on planning and carrying out the ballot, assuming that it is done internally (please see table 2.4 below)¹⁴. The hourly earnings are drawn from ASHE 2012.

According to WERS 2011, 97% of single independent workplaces with 5-9 employees don't have any on-site representation (union or non-union). In 2011, nearly 2,000 of those

¹⁴ It is possible that some businesses hire external resources to carry out the secret ballot in which case the cost of an election is likely to be higher.

workplaces underwent a TUPE transfer and assuming that 97% of them did not have any representatives, nearly 1900 were required to carry out an election. Although consultation responses suggest that some micro businesses inform and consult employees about a transfer directly instead of providing for the election of representatives, precise figure on the proportion of micro businesses that do so is not available. There are also a number of responses, including from small business representatives, that suggest that removing the requirement from micro businesses to hold an election in these circumstances will be beneficial, removing a time consuming process. It seems sensible to argue that not all of the 97% of micros involved in a transfer would take advantage of the change, some because direct informing and consulting already takes place in some circumstances, and potentially some because they will prefer to hold an election for a worker representative. However, the consultation responses demonstrate that there is some demand for this change, so it is likely that some micro businesses would make use of it. On this basis, and given the lack of precise numbers, we assumed that between 30% and 60% of single independent workplaces with 5-9 employees comply with the current regulation and carry out the election, the total cost of election would be between approximately £70,000 (30% x 1,900 x £126) and £140,000 (60% x 1,900 x £126). For our best estimate, we would look to use a point in the middle, at around £105,000.

Table 2.4 Breakdown of costs associated with holding an election of representatives in a micro business

<u>Activities:</u>	<u>Time needed (hours)</u>		<u>Cost (£)</u>		<u>Total</u>
	<u>Staff member</u>	<u>Owner</u>	<u>Staff member</u>	<u>Owner</u>	
Draw up timetable	1	0.5	11.2	6.7	17.9
Specify number of reps, their role, specify who can be nominated, decide how the ballot will be carried out	2	0.5	22.4	6.7	29.1
Write to all employees to inform about the process and the role of reps, invite nominations	0.5		5.6	0.0	5.6
Write to nominees, send the ballot form to employees	1		11.2	0.0	11.2
Carry out the ballot, count votes	5		56.1	0.0	56.1
Announce the results	0.5		5.6	0.0	5.6
Total	10	1	112.1	13.5	125.6

2.7 The costs and benefits of changing the provisions restricting changes to contracts

The revised TUPE framework retains the key element of the Acquired Rights Directive that generally, changes to contracts for which the reason is the transfer itself are void.

However, the increased certainty (after any transitional phase) associated with the revised TUPE framework and also the increased incentives in some circumstances to seek agreement on mutually beneficial terms should imply that there is an increase in such agreements. The reforms to the regulations associated with terms and conditions are set out, along with other reforms, in section 2.1.3. These include:

- a) the amendment to the effect that change whereby the transferee employer is usually only bound by transferring employees' terms derived from collective agreements existing at the time of the transfer (in accord with the CJEU judgement on *Alemo-Herron v Parkwood Leisure*), and
- b) the rule making changes to terms derived from collective agreements void (where the reason for the change is the transfer) will cease to apply one year after the transfer – though new terms must be no less favourable overall to the employee, and
- c) the wording of regulations 4(4) and 4(5) are being altered to more closely reflect the wording of the Directive and CJEU case law, so that any variation to a transferring employee's existing terms and conditions is void if the reason for the variation is the transfer itself (but this does not apply if the reason is an ETO reason entailing changes in the workforce, or the employer has a legal contractual power to make unilateral changes). Currently, variations are void if the reason is the transfer itself or a reason connected to the transfer (and is not an ETO reason entailing changes to the workforce).

Recently, there has been uncertainty on the approach to terms derived from collective agreements as the issue has been litigated up to the Supreme Court (and referred to the Court of Justice of the EU). The Court of Justice has now given judgment, but the Supreme Court has yet to give judgment on the interpretation of TUPE in light of the Court of Justice's judgment. The change in (a) above, will give some certainty. Also, until now, there has been no time limit imposed on the rule making changes to these terms void. The changes to the wording of Regulations 4(4) and (5) potentially offers additional flexibility to employers and employees to vary terms.

A number of consultation responses indicate that the regulations and their legal interpretation inhibit the ability of employers and transferring employees to negotiate new terms and conditions, and this results in additional administrative cost as HR and payroll systems have to deal with multiple sets of terms and conditions. The revised regulations (specifically those identified above) are aimed at facilitating negotiations between employers and transferring employees on terms and conditions in more situations. This may lead to what would generally be a change in behaviour (according to many consultation responses), and resulting negotiated variations in terms and conditions in some situations.

An increase in valid changes is likely to reduce the overhead costs associated with managing a workforce. For example, it might enable the consolidation of the payroll costs if the number of different sets of terms and conditions from collective agreements can be reduced one year after transfer.

Again we have no precise view of the scale of this behavioural change. However, again, based on the number of undertakings covered by the TUPE process we have produced a ballpark estimate.

Our estimate based on the 2011 Workplace Employment Relations Study (WERS) is that there are probably around 31,000 transfers of workplaces covering around 914 thousand employees averaging around 29 employees per transfer.

A number of respondents felt that the administrative cost of having employees on multiple terms and conditions was potentially high, and being able to unify aspects of payroll like payment dates or method of salary payment, as well as other elements of HR administration, could generate substantial benefits. Evidence from Dickmann and Tyson's *Outsourcing Payroll: beyond transition-cost economics*¹⁵ suggested that the cost of payroll administration to business based on 2002 data for 20 mainly large businesses was an annual average of £67 per full time equivalent (FTE) employee. Updated by CPI inflation, this would rise to £86. As each of the 31,000 TUPE workplaces would have on average around 29 employees, the average annual cost of payroll administration could be estimated at around £2,500. Cuts in payroll administration costs due to simplification resulting from varied terms and conditions would produce an annual savings: for example if a 20% cut in costs on average could be made, there would be an annual saving of £500 per workplace. Economies of scale mean it is likely that on average SMEs would have higher payroll costs per FTE employee.

Other HR costs arising from having employees on multiple terms and conditions include:

- different reward systems,
- different working-time and leave accounting systems,
- costs of training management to deal with staff on differing terms, for instance some terms may restrict certain staff from doing some types of work that others doing similar jobs may be required to do.

While not all transferee employers face these costs, some will find the costs substantial, consultation respondents identifying the need in some cases for purchasing more advanced HR software, or more HR resource in general.

Based on these potential areas for cost reduction, the saving is likely to be more than marginal, with some employers potentially benefiting substantially, though some may not realise any benefits, such as those becoming independent from a larger organisation. However, it is not clear that the average gains per workplace would be substantial (into the tens of thousands). As pointed out in the Government's response to the consultation, the change to the TUPE regulations on varying terms and conditions, while reflecting case law, is not expected to enable wholesale reductions to terms and conditions¹⁶. There is also the potential that some businesses will not be able to successfully negotiate

¹⁵ Dickmann. M and Tyson. S, *Outsourcing payroll: beyond transaction-cost economics*, Personnel Review Vol.34, No.4 2005, p451-467.

¹⁶ Department for Business, Innovation and Skills, *Transfer of Undertakings (Protection of Employment) Regulations 2006 Government Response to Consultation*, September 2013, paragraph 6.5, p20.

variations. Therefore, we assume a relatively conservative annual saving of £2,000 per transferred workplace associated with increased valid changes to terms and conditions taking place. This would result in an overall annual saving to business of £62 million.

However, as argued above, these savings to business are indirect and dependent on behavioural changes resulting from the revisions to the regulations. We have therefore not included them in the overall cost benefit assessment shown in the summary.

2.8 The cost and benefits of expressly setting out the test for the SPC provisions of the necessary degree of similarity in the activities after a change in service provision

The inclusion of the case law test on the necessary degree of similarity in the activities for whether the SPC provisions apply to a change in service provider will mean that the case law interpretation is expressly apparent in the revised Regulations. This may add clarity where employers and employees are not aware of how the current regulations are being applied. On this basis, this should reduce the disincentive for some businesses to undertake the extra economic activity associated with taking over the provision of a service.

The additional clarity may lead to a reduction in Employment Tribunal claims related to this part of the TUPE regulations, in which case employees, employers and the Exchequer would benefit from reduced costs in relation to making, defending or administering cases. However, ultimately it would be the Employment Tribunal (or EAT on appeal on a question of law) that has responsibility for applying its test of whether the SPC provisions apply to a change in provider, and so the specifics of individual cases would determine how numbers of claims might vary.

Any other costs or benefits depend on how far the explicit inclusion of the test in the regulations would result in additional changes in service provider involving a fundamental change to the delivery approach. There is no information available on the number of current SPCs that result in a fundamentally different delivery approach such that the SPC provisions wouldn't apply under the test. There is also no information about the extent to which the lack of an explicit exception in the Regulations has held back innovative options for service provision. As the latter would be due to a change in business behaviour (potentially influencing businesses to consider a wider range of economic activity) this would be an indirect effect of the inclusion of the test in the Regulations. It is therefore impossible to quantify the effect. However, the consultation responses discussed in 2.1.2 indicate that respondents consider that some latent demand for innovative provision could potentially be released through providing greater clarity about how TUPE would apply in these situations. As the responses indicate that the SPC provisions introduced greater certainty, this would suggest that there are likely to be relatively few SPCs where it isn't clear whether TUPE applies: This may mean that innovative SPCs form a small proportion of the total, or that the case law interpretation of the current regulations is relatively clear. On this basis, we would assume that the inclusion of the test in the revised Regulations would lead to relatively few additional SPCs where the SPC provisions wouldn't apply.

2.8.1 Estimated costs and benefits to employers arising from the express setting out in the regulations the test for the SPC provisions

Costs:

There are potential costs to employers, as incumbent providers will not be able to transfer staff with the service where delivery approach is sufficiently different for the SPC provisions not to apply. However, this risk exists under the current regulations, so the additional risk created would depend on the number of additional innovative SPCs where the SPC provisions wouldn't apply, which we expect to be low. It is possible that service providers may increase their bid prices for contracts to reflect the expected small increase to risk.

Benefits:

Transferees able to offer innovative approaches to service provision may be more confident in bidding, and customers being more confident in commissioning innovative service provision, where the explicit inclusion of the case law test in the regulations adds clarity to the application of SPC provisions. Where additional changes in service provider not subject to TUPE occur, the transferees would not be subject to liabilities arising from the SPCs, and would therefore be able to provide the service more cost efficiently, benefitting both themselves and the commissioner (who may also benefit from greater ability to tailor the service provision to their needs).

2.8.2 Estimated costs and benefits to employees arising from the express setting out in the regulations the test for the SPC provisions

Costs:

Where the inclusion of the test in the regulations generates additional SPCs not covered by TUPE, the employees of the incumbent supplier may be made redundant, with some potentially facing a loss in earnings through unemployment.

As noted above, we do not have any information about the number of current SPCs that involve fundamental change in the delivery approach and are therefore outside TUPE. We are also unclear about how far the explicit exception would bring added certainty to businesses, and to what extent the current regulation inhibits businesses from commissioning or offering innovative service provision approaches. Therefore we have not attempted to monetise the costs and benefits arising from this change.

2.9 The costs and benefits of amending the Trade Union and Labour Relations (Consultation) Act 1992 (TULRCA) to expressly state that consultations which begin pre-transfer can, in certain circumstances, count for the purposes of complying with the collective redundancy rules.

This amendment to TULRCA will provide certainty to parties involved in transfers that consultations which begin prior to the transfer can count for the purposes of the collective redundancy rules if:

- the transferor and transferee agree that consultation with staff due to transfer can begin prior to the transfer, and
- the transferee can ensure that meaningful consultation is carried out

Evidence from the consultation responses indicates that many employers involved in TUPE transfers in practice will agree that the transferee can begin consultation with transferring employees on collective redundancies, prior to the transfer. Although many businesses already engage in such consultation the businesses that do so run the risk of legal challenge that it may not count – our amendment seeks to provide certainty to employers.

Collective redundancy legislation requires that when collective consultation is triggered (as 20 or more redundancies are proposed at one establishment, within a 90 day period), the employer must consult with the appropriate representatives of the employees who may be affected by the proposals. If the planned collective redundancy is of between 20 and 99 employees, then consultation must commence 30 days prior to when the first dismissal takes effect. If the collective redundancy is of 100 or more, consultation must start at least 45 days before the first dismissal takes effect. The consultation should be with a view to reaching agreement on ways of avoiding redundancies, reducing the number of employees to be made redundant, and mitigating the impact of any redundancies that do occur¹⁷.

The TUPE Regulations include a separate requirement for transferors and transferees to inform and consult with any of their employees who may be affected by the transfer or by measures taken in connection with the transfer.

2.9.1 Benefits to employers from the amendment to TULRCA to expressly allow consultation which begins prior to the transfer to count under the collective redundancy rules in certain circumstances.

As noted above, the amendment to TULRCA will provide parties involved with certainty that consultations which begin pre-transfer can count as being compliant with collective redundancy rules, subject to certain conditions.

¹⁷ Acas guidance, Redundancy consultation and procedure, <http://www.acas.org.uk/index.aspx?articleid=4256>, accessed 22nd July 2013.

As noted above, the consultation responses suggested that many employers already agree to the transferee carrying-out pre-transfer consultations on collective redundancies. The new certainty provided by the legislative change will benefit transferees (as the risk of facing an employment tribunal claim will be reduced). This certainty may also encourage additional employers to agree to undertake pre-transfer consultation on collective redundancies, though we expect that relatively few transfers would be affected, because the transferor would have to agree to the transferee undertaking pre-transfer consultation, and the transferee would have to want to pursue it. Responses to the consultation suggest that in several transfer situations either the transferor or transferee may prefer that such pre-transfer consultation by the transferee is not undertaken – for example the transferee may have commercial reasons to wait until the transfer has occurred.

We have not attempted to monetise the potential benefits to transferees as we don't have information on the numbers of transferees:

1. that, in such situations, would be able to get the transferor's agreement to consult with potentially transferring employees pre-transfer
2. that already carry out pre-transfer consultation with potentially transferring employees, with the transferor's agreement, specifically for the purposes of compliance with collective redundancies rules.

However, particularly where there is a relocation proposed we envisage that where pre-transfer consultation is agreed, there would be benefits to transferees and some employees in being able to hold consultations prior to transfer. This is because the affected employees can begin consultation before location changes, when there will still be a place of work at which the employee can be consulted (subject to agreement from the transferor). In some cases it may be possible for employees to find out pre-location change, the likelihood of them being made redundant post-transfer.

Another benefit to transferees could be that where redundancies still occurred, they could be made earlier than if the consultation does not begin until the transfer had occurred. This would have some operational benefit for the transferee from a slightly earlier reorganisation of the work of the transferred undertaking, with an earlier return to greater certainty and focus on work with the transferee's organisation. We have no information available to monetise this. Also, there could be a benefit to the transferee from a reduction in wage and non-wage costs of up to 30 days if there were between 20 and 99 redundancies resulting, or up to 45 days if 100 or more employees were made redundant, if the minimum consultation periods were used. It may be that meaningful consultations will require longer than the minimum periods set by law. The benefits could be bigger, depending on how far before the transfer the consultation can began.

2.9.2 costs and benefits to employees from the amendment to TULRCA to expressly allow consultation started prior to the transfer to count under the collective redundancy rules if certain conditions apply

Employees could benefit from a reduced period of uncertainty and potential anxiety - this may be especially true where transfer involves a change of location. The pre-transfer consultation should indicate that redundancies might be a possibility following the transfer. Currently, employees may have to wait until the transfer has been completed, and move to the new employer, before consultation on collective redundancy can take place. The transferee's existing employees may also be kept waiting prior to consultations. By being

able to carry out meaningful collective redundancy consultations at the same time as the TUPE consultations, this period of uncertainty should be reduced.

Pre-transfer consultations could in some situations enable employees representatives to reach agreement at an earlier stage, or allow more options to be explored, which mitigate the impact of redundancies. This benefit has not been monetised.

As noted above, transferees may benefit from being able to reduce labour costs earlier if pre-transfer consultation can count as the consultation on collective redundancy. Employees affected will therefore suffer a loss of some wages that otherwise they may have received. Around 70% of employees made redundant would be expected to find alternative employment relatively soon after the redundancy (within 6 months), so, depending on the relative wages, may not suffer a significant wage loss. Others seeking work may not immediately regain work, and will therefore lose out from the full loss of wages due to the bringing forward of redundancies. For many of those individuals the loss in wages may be mitigated by receipt of welfare benefits or tax rebate if they have earned less than the personal allowance for that year. Some employees may choose not to seek new work immediately.

For an employee on median gross wage who has been made redundant earlier than would have been the case (who is seeking but does not find alternative work within the period) then loss of gross wages (excluding overtime), based on the period the redundancies were brought forward by, would be :

After 30 days: $£391 \times 4.3 = £1,700$ gross (to the nearest £100)

After 45 days: $£391 \times 6.4 = £2,500$ gross (to the nearest £100)

These illustrative figures are based on gross median wages excluding overtime for the whole economy. Collective redundancies are more likely to happen in businesses operating in certain sectors, such as manufacturing, where potential losses in gross wages would vary from the whole economy estimate.

2.10 Effect of revised TUPE framework on the number of transfers

The reduced costs and uncertainty and increased flexibility available to transferee firms associated with the revised TUPE framework is likely to mean that they are better able to compete for or bid for contracts. It is likely, therefore that there will be greater competition in the market and also more transfers. However, apart from this qualitative assessment it is not possible to even hazard a guess at the likely scale of this effect.

3.0 Risks to cost/benefit analysis

There is very little data available that specifically relates to TUPE transfers, therefore all of the estimates in the IA have involved a degree of assumption. The IA sets out uncertainties related to the data used, and also makes clear where arbitrary assumptions have been made to estimate the extent of changes expected to result from the reforms. The estimated costs and benefits are therefore illustrative, and subject to a wide margin of error. However, as explained above, the deregulatory approach is expected to provide net benefits to the parties affected by TUPE transfers.

Her Majesty's Courts and Tribunal Service (HMCTS) have announced their intention to introduce fee charging for employment tribunals from summer 2013. The level of fees charged could have an impact on the number of employment tribunal claims made. In addition, as the fees are charged at two stages – for issue, and for hearing – the introduction of fees could change patterns for what happens with claims once they enter the employment tribunal system.

It is impossible to predict exactly how fee charging may affect claims and journeys through the ET system. In addition, as there will not be a fee charged at the point where Acas offers early conciliation (EC) this may not translate to a reduction in expected cases considered for EC. On the other hand, the availability of an accessible service like this could encourage more claims than current levels of employment tribunal claims.

The behaviour of parties in EC may also change as a result of employment tribunal fees. Claimants may be more likely to engage in EC and make more efforts to resolve the situation given that they may be liable for fees (though they may have a full or partial remission from fees depending on their individual circumstances). This could lead take-up of EC to rise above current expectations.

However, the respondent (employer) may be less likely to engage in EC if they do not believe the claimant will pay the ET fee. It is not possible to predict how this would change the overall take-up rate of EC and we believe at this point in time a take-up rate assumption based on the current take-up of post-claim conciliation is the best approach to take (this is 75 per cent).

3.1 One in Two Out Rule

As the revisions to the 2006 TUPE Regulations are a Red Tape Challenge measure in scope of One-in-Two-Out, we are currently seeking RPC validation of the equivalent annual net cost to business (EANCB).

The direct costs and benefits to business are expected to come from:

1. A **benefit** from reduction in costs faced by employers in defending employment tribunal claims, as increased certainty provided by the revised TUPE framework is expected to lead to a fall in the number of employment tribunal claims related to the TUPE regulation. The benefit is estimated at £6.5m annually (2012) prices.
2. The additional flexibility by including change of workplace location in the definition of an ETO reason entailing changes in the workforce. This will enable transferees to marginally increase any reduction in their workforce on a transfer involving relocation. Transferees will therefore **benefit** from a saving on wages and non-wage labour costs for employees made redundant (taking account of the evidence that 1/5th of employees leave their employer each year). This benefit is estimated at £1.2m in year 0, rising to £43.6m by year 4.
3. However, these businesses will face an additional redundancy **cost** for those employees made redundant. This cost is estimated at £0.2m annually.
4. Micro businesses are expected to **benefit** slightly from being able to directly inform and consult their employees affected by a transfer, where the employees do not

already have a suitable employee representative. Some will save from not having to face the cost of holding an election among employees for a representative. This benefit is estimated at £0.1m annually.

Table 3.0 Summary of equivalent annual costs and benefits to business (2009 prices)

<u>Proposed change</u>	Equivalent annual <u>cost £m</u>	Equivalent annual <u>benefit £m</u>	Equivalent annual <u>net benefit £m</u>
TUPE Reform package	0.2	8.8	8.7

Annex A

A.1 Available Data Sources forming the Evidence Base

A.1.1 Workplace and Employment Relations Survey 2011

Calculating the total number of TUPE transfers and the number of employees involved

The **Workplace and Employment Relations Survey** (WERS) gives details on workplace transfers that took place in the two years prior to the fieldwork in 2011 respectively as well as the number of employees involved in these transfers.

WERS only interviews workplaces with 5 employees and above, therefore none of the transfers involving workplaces smaller than this will be recorded. Also, WERS isn't able to measure those cases where an undertaking being transferred only forms part of a workplace.

The survey asks workplaces if they have experienced changes in certain areas in the last 2 years¹⁸.

The categories for change are:

1. Change of Name
2. Change of Address
3. Change of Activity
4. Agreed takeover / merger
5. Government acquired share in operation
6. A takeover / merger formally opposed
7. Sold by parent organisation
8. Ex-public sector now privatised / denationalised
9. Management buy-out
10. Buy-out by employees generally
11. Establishment split from another workplace in this organisation
12. Establishment merged with another workplace in this organisation
13. Acquisition by venture capital/private equity

Categories 1, 2 and 3 would not (on their own) qualify for TUPE regulations.

Category 6 is unlikely to be covered by TUPE regulation as an opposed take-over would have to be a share buy-out. Share buy-outs do not qualify for TUPE. Categories 5 and 13 are also likely to be share based changes in ownership.

¹⁸ *Methodology Note: respondents can give several responses to this question which are coded individually as question 1, 2, 3, 4 etc. If any of the options given is one of the TUPE related options then the employer is counted as experiencing a transfer within scope of TUPE.*

Categories 11 and 12 indicate that the workplace remains within the same organisation as before, so a transfer of ownership hasn't taken place (TUPE doesn't apply).

The remaining categories: 4,7,8,9,10 might qualify for TUPE. The number of workplaces that have undergone a change falling into one of these categories in 2009-2011 is 62,000. This is equivalent to 31,000 transfers per year¹⁹.

It needs to be stressed that not every change of this nature would have been covered by TUPE²⁰. Therefore, the estimate could be an overcount of the number of workplaces involved in a TUPE transfer. However, as noted above, the figure does not include any TUPE transfers that involved part of a workplace being transferred into another already existing workplace (so the employees would become part of that establishment's workforce).

Based on the above estimate for the number of TUPE transfers, the estimated number of employees working for a workplace that experienced a TUPE transfer is likely to be 910,000 per year²¹. This measures all employees who are working for the workplace at the time of interview which could include those transferred using TUPE, those who have been hired since and possibly those who have been relocated post transfer from the transferee's existing workforce but excludes those who have left the workplace in the last 12 months which could have been due to the transfer or for other reasons.

All of these numbers are annual averages valid for 2009-2011, the years the WERS 2011 survey reported on.

It is important to note that TUPE numbers will be affected by the economic cycle, perhaps with a greater pressure to outsource, or change ownership during the recession. Equally the number of TUPE transfers may group together in waves, for example if there was a drive in the public sector to outsource more processes there might be a large increase in TUPE transfers over that period for no cyclical or trend based reason other than an increase in demand from management.

Many employers experience TUPE transfers in the form of service provision changes. Some but most likely not all of those service provision changes are included in the figure provided above. We have also attempted to estimate the number of service provision changes in the next section of this IA but due to unavailability of data, we have only been able to estimate the minimum number. As some service provision changes will be included in the estimate of TUPE transfers, we have not combined the estimates as this would involve some double counting.

¹⁹ The proportion of workplaces that have undergone a TUPE transfer (as defined above) over the last two years is 8.4%. Multiplying through by the number of workplaces with 5 or more employees in GB, (736,647 – source: IDBR) and dividing by two to create an annual estimate.

²⁰ Evidence from an employment law firm, based on its experience of dealing with TUPE transfers, suggests that nearly all of those changes identified in categories 4 and 7-10 would have been TUPE transfers, but the firm makes clear that its estimates are 'best guesses' and not broad based research.

²¹ Calculated as the proportion of employees affected, 8% (based on WERS 2011) multiplied by the average employee population for the period of 22.5 million (ONS).

Measuring the number of Service Provision Changes (SPCs)

Since 2006, TUPE regulations include specific provisions covering Service Provision Changes (SPCs). A service provision change occurs where a client:

- Out-sources activities for a contractor to perform them on its behalf
- Re-tenders for such activities
- Brings the activities back in house.

In addition, for a service provision change to be captured by TUPE regulations, immediately before the change there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client.

WERS can also be used to provide some measurement into the volume of SPCs.

1. The WERS survey asks employers whether they contract the following services:

Cleaning of premises	Security
Catering	Building maintenance
Printing/Photocopying	Payroll
Transportation of goods, documents	Computing
Training	Recruitment
Temporary filling of vacant posts	

As noted above, TUPE only applies when an SPC involves an organised grouping which principally provides the service to the client changing supplier. So often, it will be where employees service only one client that TUPE applies, which is unlikely to be the case for several of these activities. As a result, BIS considers that SPCs in the following activities are more likely to qualify for TUPE: cleaning of premises, catering, security, building maintenance, payroll, computing and printing/photocopying²².

Over 80% of workplaces contract out at least one of the above activities. This amounts to approximately 600,000 workplaces. However, there is no data available on the number of these contracted out services where the service customer has changed provider between two independent companies. We also don't know how many of these employers would have contracted out to a provider where employees would be principally working on

²² Evidence from an employment law firm, based on its experience of dealing with service provision changes suggests that at least 80% of changes in provider in these categories are TUPE transfers, but the firm makes clear that its estimates are 'best guesses' and not broad based research

providing the service to a particular customer. Most of these workplaces are micro or small businesses, and many of these may not need a full-time exclusive service.

If we exclude businesses with less than 10 employees on the assumption that they would not require an exclusive service, the number of workplaces contracting one of the above services becomes slightly smaller, just under 500,000. Of these 500,000 workplaces contracting a potentially TUPE service, 72,000 have contracted out at least one that was previously done in-house in the last 5 years. Meanwhile, 55,000 workplaces have brought at least one potentially TUPE service in house in the past five years that was previously contracted out. By adding these two figures together and deducting the number of employers who have conducted both these activities, we can get the number of workplaces that have contracted out or brought back in-house at least one potentially TUPE service, 120,000²³. This provides an annual average of around 24,000. Again, some of these changes may not have involved employees who were principally working on service provision to this particular customer, perhaps where the workplace involved is a micro or small business.

There is no evidence to suggest what proportion of these changes would have been covered under the 1981 TUPE legislation because it is legally very complex. One argument for including SPCs as part of TUPE was to avoid confusion for the transferring parties themselves.

In summary the WERS data can provide some qualified estimates of numbers of TUPE transfers and SPCs. There are limitations to both estimates.

Other data drawn from WERS

Apart from estimating about the number of TUPE transfers and service provision changes, WERS was also used to provide information about transfers that involved change of location, presence of employee representatives and micro-businesses involved in transfers.

A.1.2 Employment Tribunal data

HMCTS publish the number of claims by jurisdiction. Across all jurisdictions (TUPE and not) tribunal numbers have been increasing since 2006, yet in the last year, the numbers of tribunals relating to employers failing to inform and consult employees during a transfer has continued to increase whereas most other jurisdictions have seen a fall in tribunal numbers.

Up until 2003/04, the Employment Tribunal Service (now part of HMCTS) published separate figures for the number of unfair dismissal claims related to TUPE, and the number of claims for failure to inform and consult employees under TUPE. While separate information continues to be reported separately for the latter (as shown in the main IA document in Figure 1), after 2003/04 figures on unfair dismissal under TUPE were no longer reported separately, but were included within the overall unfair dismissal figures. Although the numbers of claims for failure to inform and consult under TUPE have risen in recent years, reaching a peak of around 2,600 in 2011/12, this is still a relatively low

²³ This is the number of workplaces who have either changed service provider or brought a service in house in the last 5 years, weighted by the ONS business population statistics for workplace numbers in 2011 (used to develop the weighting for WERS).

number, given that in 2011/12 there were 392,800 jurisdictional claims overall. Between 2001/02 and 2003/04, the number of unfair dismissal claims relating to TUPE varied between around 1,100 and 1,800, accounting on average for 3% of total unfair dismissal claims²⁴.

Employment tribunal costs

BIS estimates of the cost to individuals, employers and HMCTS of managing an employment tribunal claim (without considering any awards made) are shown in table A1 below. More details on how these estimates are arrived at can be found in Annex B.

	Employment Tribunal Hearing	Individual Conciliation	Average across ET claim outcome
Employer	£6,200	£3,500	£3,900
Claimant	£1,800	£1,100	£1,400
Exchequer	£3,200	£590	

Source: BIS estimates from Acas, HMCTS, SETA and ASHE data in 2012 prices. Figures are rounded.

Individuals and businesses face costs from making and opposing claims, with the average for each tribunal claim, at 2012 prices being £1,400 for individuals and £3,900 for businesses. Meanwhile, the Exchequer's costs per claim vary from £590 if the claim is disposed of at the individual conciliation stage, to £3,200 if the claim goes to a full tribunal hearing²⁵.

However, in 2014 the Government will be introducing early conciliation into the employment tribunal process. This would require most prospective claimants to send the details of their claim to Acas before they are able to file a formal claim with the Employment Tribunal. This would enable Acas to offer a conciliation service to the claimant and respondent, with the aim of resolving the dispute without involving the tribunal.

BIS estimates based on Acas analysis suggest that the unit costs for an early conciliation claim would be £512 for employers and £73 for employees at 2012 prices. It is estimated that 24.8% of cases referred to early conciliation would not progress to a full employment tribunal claim²⁶.

²⁴ 2003/04 Employment Tribunal Service Annual report, and Employment Tribunal and EAT Statistics 2011/12

²⁵ Employment Law 2013: Progress on Reform, Department for Business, Innovation and Skills, March 2013, p26

²⁶ Department for Business, Innovation and Skills, Early Conciliation: a consultation on proposals for implementation, impact assessment, January 2013, p 16 – This impact assessment estimates that the rate of employment tribunal cases taking place following Acas pre-claim conciliation (PCC) was around 25.2% (take up rate of PCC (75%) x ET rate for PCC cases (20.3%) + ((1- take up rate of PCC (25% x ET rate for control group 38%)). Due to partial treatment of the control group (those unwilling to participate in PCC, or with

Annex B

B.1 Approach to estimating costs of employment tribunal cases

B.1.1 Cost of Running the ET

1. The total cost of administering the ET was £87 million in 2012/13 prices during 2010/11. The table below shows that the largest single component of 48% was the combined judicial cost – mostly related to judges' salaries, fees and expenses (including £10 million on lay members).

Table B.1 Cost of administering the Employment Tribunal Service (2010/11 figures updated to 2012/13 prices)

Category	2012/13 £m	Share of total
Staff admin	15.4	18%
Other admin	2.7	3%
Estates	14.2	16%
Overheads	11.3	13%
Judicial salaries	24.2	28%
Judicial fees	15.9	18%
Judicial expenses	1.8	2%
Court costs	1.1	1%
TOTAL	86.7	100%

2. Historically, the ET and EAT have not produced management information-based estimates of costs per case by stage. The cost estimates have therefore been produced using a new cost model that was developed specifically to support the development and analysis of the proposed fee-charging regime. The cost model is underpinned with a case model using ET statistics and case sampling. This model provides our current best estimate of the costs per case at each main stage, which means that the figures may contain inaccuracies. To improve the cost modelling and

unsuitable cases), including some self selection the ET rate for the control group was increased to 50%. This figure minus 25.2% gives 24.8%.

support the response to consultation the cost model has been reviewed and updated earlier this year including using 2010-11 data and supported with further case sampling data. In the future the cost model will continue to be updated and refined - e.g., to provide representative costs of administering single claims and multiple claims, instead of the weighted averages of all claims that are set out in the preceding table.

- Based on 2010/11 figures as the most recent year for which outturn data have been made available in the cost model, the following table sets out the estimated cost per case (updated to 2012/13 prices using the UK GDP deflators published on HM Treasury’s website and rounded to the nearest £10) of processes by ET track. The core stages in the ET process are “receipt & allocation” and “hearing”, whereas the other elements are optional in that there is no obligation, for instance, to undergo mediation or to obtain written reasons.

Table B.2 Estimated unit cost per case of ET procedures (at 2012/13 prices)

	Receipt & allocation	Interlocutory	Final Hearing	Pre-hearing review	Dismissal after settlement	Written reasons	Review
Average unit cost	£400	£900	£1,900	£900	£200	£900	£1,300
variable	44%	62%	90%	86%	50%	86%	90%

- The table also shows the approximate proportions of the estimated average total cost per case by ET stage that is variable – i.e., the element of cost that will vary as the number of cases varies. For example, the cost of mediation (which only takes place in the open track) is a pure variable cost because it solely involves judicial time. Overall, it is currently estimated that variable costs accounted for 69% of the total ET cost in 2010/11.

B.1.2 Estimated costs to claimant when making an ET claim

- Claimant costs incurred from completing an employment tribunal application form onwards consist of:
 - Communication costs (for example telephone calls, correspondence)
 - Travel (to hearings or to meet with advisers)
 - Loss of earnings
 - Advice and representation

6. The 2008 Survey of Tribunal Applications (SETA) asked employment tribunal claimants whether they had incurred these costs.²⁷ Table 3 shows the proportion of respondents that incurred these costs, with Table 4 reporting this for legal advice and representation costs.

Table B.3 Proportions of people that incur travel and communication costs and suffer a loss of earnings

Communication costs	37%
Loss of earnings	31%
Travel costs	26%

Source: BIS estimates based on SETA 2008 Table 10.1

Table B.4 Claimants' and Employers' survey: Free advice and representation

	Claimant	Employer	All
Whether paid for advice			
Paid for all	26%	69%	49%
Paid for some	7%	8%	8%
Paid (paid for all + paid for some)	33%	77%	57%
All free	66%	21%	42%
Don't know	1%	3%	2%
Didn't pay (all free + don't know)	67%	23%	44%

Source: BIS estimates based on SETA 2008 Table 5.20

7. For those that do pay, SETA yields estimates for the amount paid which are summarised within SETA Table 10.2. In constructing unit cost estimates, these amounts are adjusted to account for those that do not pay, and hence to provide a figure averaged across all claimants. Furthermore, the costs for advice and representation, and travel and communications are adjusted to account for RPI inflation between the survey (2008) and 2012.

1. ²⁷ The data from SETA 2008 was published in *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010, <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008>

Table B.5: Summary of Costs to a claimant from an employment tribunal

	Case went to Tribunal hearing	Acas settled	Total
Time spent on case	£714	£568	£636
Costs for advice and representation post ET1	£1,017	£558	£763
Costs incurred for travel, communication	£23	£20	£21
Total cost	£1,754	£1,146	£1,419
Total cost rounded to nearest £100	£1,800	£1,100	£1,400

Source: BIS calculations based on SETA 2008, ASHE 2011, expressed in 2012 prices

8. Time spent is multiplied by the median wage for all employees. Table 6 below sets out the relevant wages. For later consideration of employer costs non-wage labour costs are added at 24 per cent so these are demonstrated here but not incorporated into claimant costs. The wage costs are adjusted to account for the increase in average wages (excluding bonuses and arrears) between April 2011 and April 2012.

Table B. 6 Hourly pay (excluding overtime) in the UK, 2011

	SOC Code	Median	Median, including non- wage labour costs at 24%
All employees		£11.15	£13.83
Personnel, training and industrial relations managers	1135	£21.97	£27.24
Corporate managers and senior officials	111	£40.70	£50.47
Directors	1,112	£52.68	£65.32

Source: ASHE 2011 Table 14.6a

B.1.3 Estimated costs to an employer when responding to an ET claim

9. Employers face costs in terms of time spent by a variety of staff in an organisation on a case. They also face advice and representation costs. Table 4 illustrates using SETA findings the proportion of employers who paid advice and representation costs in responding to an employment tribunal claim.
10. SETA (2008) also establishes the median amounts spent on advice and representation (SETA table 5.24) and the median time spent by different staff members (SETA tables 10.5 and 10.6)²⁸. The estimates below multiply time spent (this is given in days, but SETA assumes 8 working hours in the day) by the wage rate of the relevant staff (given in Table 6). In constructing unit cost estimates, these amounts are adjusted to account for those that do not pay for advice and representation, and hence to provide a figure averaged across all employers. The figures for costs for advice and representation are adjusted to account for RPI inflation between the survey (2008) and 2012, with the wage figures adjusted as described in paragraph 48 above.

Table B.7 Summary of Costs to an employer from an employment tribunal application

	Case went to Tribunal hearing	Acas settled	total
Time spent on case Directors and senior staff	£2,286	£1,234	£1,234
Time spent on case (other staff)	£444	£444	£444
Costs for advice and representation post ET1	£3,488	£1,780	£2,225
Total cost	£6,218	£3,458	£3,903
Total cost rounded to nearest £100	£6,200	£3,500	£3,900
Source: BIS calculations based on SETA 2008, ASHE 2011			

²⁸ The data from SETA 2008 was published in *Findings from the Survey of Employment Tribunal Applications 2008*, March 2010, <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/10-756-findings-from-seta-2008>

Annex C

C.1 Specific Impact Tests

This section examines the impact of the proposed policy changes on the specific areas identified by BIS as requiring particular attention:

Contents:

- 1) Equality Impact Assessment
- 2) Competition
- 3) Small Firms
- 4) Wider Environmental Issues
- 5) Health & Wellbeing
- 6) Human Rights
- 7) Justice System
- 8) Rural Proofing
- 9) Sustainable Development

Specific Impact Test (1) - Equality Impact Assessment

Introduction

This final stage Equality Impact Assessment forms part of the Impact Assessment which accompanies the Government response to the consultation on revisions to the 2006 amendments on TUPE

Any queries about this EQIA should be addressed to:

Ian Young
Labour Market Directorate
Department for Business Innovation & Skills
ian.young@bis.gsi.gov.uk

The available data does not provide clear evidence that the proposals specifically affect groups with “protected characteristics”. As the impact assessment argues, the proposals aim to simplify the TUPE framework in a way that maintains the protection of the worker but also maximises the opportunities of workers and employers to reach agreements within the framework which they consider to be mutually beneficial. As noted in, the Developing Options section below, the proposed reforms ensure that employees have some protection when engaging with employers on varying terms and conditions, as well as in relation to change in workplace location. By generally requiring transferors to provide

transferees with employee liability information for transferring employees earlier (at least 28 days pre-transfer, compared to 14 days currently), employees should benefit through the transferee having more time pre-transfer to set up their systems with correct information transferring employees' pay and conditions. This should help smooth the transfer process for employees.

We raised the issue of equality and diversity at each meeting with stakeholder groups held as part of the consultation process. As noted below, we also specifically asked a question in the consultation document about the impact on equality and diversity of the proposed changes to the 2006 TUPE Regulations. We will publish a list of those who responded to the consultation (and were content that their consultation response could be made public) during October 2013. Many organisations with a specific role in equality & diversity responded to the consultation.

Background and scope

In the draft consultation stage EQIA, we initially identified there could be an impact on the following protected groups:

- Disability;
- Ethnicity ;
- Religion or belief;
- Gender.

We anticipated that the following proposals were most likely to have impact on these groups:

- a) Repeal of Service Provision Changes (SPCs) – see Q1 & Q2 of the consultation;
- b) Restrictions on changes to Terms & Conditions – see Q4 of consultation;
- c) Changes to the Economic, Technical and Organisational reasons entailing changes in the workforce – see Q8 of consultation.

We noted that that we had little conclusive evidence (about impact/lack of impact) at the time, and we encouraged respondents to provide further evidence.

In the consultation, we therefore asked the following question:

Question 16

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

a) Please explain your reasons.

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

We received 178 responses to the consultation. Of those, 83% answered question 16, with some providing detailed evidence. Those who responded represented a wide range of stakeholders, including large businesses, Trade Unions, charities, voluntary, community and social enterprises (VCSEs), local and central Government and individuals.

Description of the policy

TUPE is the legislation which protects employee rights when the business or undertaking for which they work transfers to a new employer. TUPE implements the EU Acquired Rights Directive (ARD).

Two types of transfer are protected under TUPE Regulations:

i) Business Transfers

This is where a business or part of a business moves from one employer to another. This can include mergers where 2 companies close and combine to form a new one.

To be protected under TUPE during a business transfer the identity of the employer must change.

ii) Service provision changes

This is when:

- a service provided in-house (e.g. cleaning, workplace catering) is awarded to a contractor
- a contract ends and is given to a new contractor
- a contract ends and the work is transferred in-house by the former customer

The Government is committed to making TUPE easier for both employers and employees to understand. We sought views on a range of proposals to reduce burdens on business, whilst protecting fairness to employees, and provide a framework which supports a competitive environment and economic growth.

Evidence base – quantitative

In order to assess the extent to which protected groups are affected by TUPE regulations, we looked at the incidences of each of those groups in all employees and compared it with the corresponding incidence in:

- workplaces that are likely to have undergone a TUPE transfer (based on WERS 2011) – ‘TUPE employees’;
- heavily outsourced sectors where changes of providers are likely to qualify for TUPE²⁹;
- ‘TUPE sectors’, defined as sectors that account for over 60% of TUPE transfers according to WERS³⁰.

There is little evidence that the incidence of employees from protected groups based on disability, ethnicity, religion and caring responsibilities in workplaces that either have undergone a TUPE transfer or those that are in ‘TUPE sectors’ is different from the corresponding incidence in all employees. However, we have found some evidence that the proportion of women in ‘TUPE sectors’ is higher than the overall proportion of women in employment.

The table below, based on WERS data, provides information about ethnic minorities and employees with a long-term disability.

²⁹ For a service provision change to be captured by TUPE regulations, there must be an organised group of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client. Based on this definition, the following sectors have been identified as likely to qualify for TUPE where a service provision change occurs: Passenger rail transport, inter-urban; Urban, suburban or metropolitan area passenger land transport; Other than railway transportation by underground, metro and similar systems; Other food service activities including industrial catering - office canteens, cafeterias on concession basis; Computer facilities management activities, Other human resources provision (payroll, human resources services etc); Private security activities (including security guard services); Combined facilities support services; General cleaning of buildings (e.g. offices, factories, shops, institutions); Residential care activities; Social work activities without accommodation. It is likely that a substantial proportion of employees in heavily outsourced sectors will undergo a transfer covered by TUPE regulations.

³⁰ These are: wholesale and retail services, accommodation and food, administrative and support service activities, real estate, human health and social work activities.

Table C.1 Incidence of disabled and non-white employees in TUPE workplaces, heavily outsourced sectors and all employees

Protected group:	Proportion of employees from protected groups in:		
	'TUPE employees' ³¹	Heavily outsourced sectors	All employees
Long term disability	3.85%	2.71%	1.52%
Non-white ethnicity	8.01%	13.17%	10.45%

Source: WERS 2011

The proportion of employees with a long-term disability is slightly higher in workplaces that are likely to have undergone a TUPE transfer compared to all employees. So is the proportion of employees with disabilities in heavily outsourced sectors where changes of providers are likely to qualify for TUPE).

When it comes to ethnic minorities, the proportion of non-white employees in employees that have undergone a TUPE transfer is slightly lower than in all employees whereas incidence of ethnic minorities in heavily outsourced sectors is slightly higher than the incidence in all employees.

However, it needs to be stressed that these differences are not statistically significant. This means that they are likely to have occurred by chance rather than represent true patterns in the employee population.

WERS does not provide information on other characteristics of interest, such as religion, gender, and whether an employee has caring responsibilities. This has been drawn from the Labour Force Survey. The tables below provide a proportion of employees from protected groups in all employees compared to employees in heavily outsourced sectors and in 'TUPE sectors' defined above.

³¹ Employees at workplaces that are likely to have undergone a TUPE transfer according to WERS 2011

Table C.2 Proportion of women, employees with caring responsibilities and religion in ‘TUPE sectors’, heavily outsourced sectors and all employees

Proportion of employees from protected groups in:

Protected group:	TUPE sectors ³²	Heavily outsourced sectors	All employees
Women	61%	35%	49%
At least one child under 16	38%	36%	38%
Any religion	67%	71%	66%

Source: LFS 2013Q1

According to the table above, proportion of employees of any religious denomination and proportion of employees with at least one dependent child in TUPE sectors and heavily outsourced sectors closely match the corresponding proportions in all employees, which suggest that amendments to TUPE regulations are unlikely to have a disproportionate impact on these groups.

Although proportion of women is slightly lower in heavily outsourced sectors compared to all employees, it is also slightly higher in “TUPE sectors” which suggests that they might be affected by TUPE regulations to a greater extent than men. Please note that this difference is statistically significant.

Qualitative

We obtained qualitative evidence

- Responses to the consultation (discussed below);
- Discussions at stakeholder meetings;
- Responses to the 2011/2012 TUPE Call for Evidence;
- Feedback from BIS Equality & Diversity networks.

Key facts and findings

Summary of consultation findings

Of the 84 respondents who answered the question about the impact on equality and diversity,

- 44 answered that our proposals would have an 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

³² wholesale and retail services, accommodation and food, administrative and support service activities, real estate, human health and social work activities

- 40 answered that our proposals would have a neutral effect, or no effect at all.

Comments on specific questions

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

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 & 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 with 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 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. A smaller proportion of respondents believe that TUPE proposals will have a positive impact on workforces, particularly focusing on the ability for transferees to harmonise 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

Question 1: Repeal of 2006 Service Provision Changes amendments

Many respondents expressed concerns about the potentially **negative** aspects of this proposal, particularly about the effect that it would have on low wage sectors. The TUC helpfully provided information to illustrate their concerns, such as data from the ONS 2012 Annual Survey of Hours and Earnings about the prevalence of women in low-paid sectors such as catering and cleaning.

Question 4: Restrictions in Regulation 4 on changes to terms and conditions

Some business respondents stated that any moves towards post-transfer harmonisation of terms & conditions would have a **positive** effect on protected groups by removing the current equality risks caused by a potential 'two tier' workforce post-transfer.

Question 5: TUPE and Collective Agreements

Trade union respondents believed that our proposals could have a **negative** impact on protected groups in the public service workers whose terms & conditions are currently the subject of collective agreements which have been 'equality proofed'. These respondents were concerned about the potential for undermining negotiated agreements which support equality and diversity. Specific sectors mentioned include NHS (Agenda for Change) and education. The TUC believe that implementation of our proposal will lead to a 'two-tier' workforce, with outsourced staff being treated less favourably than existing in-house staff.

A Trade union in the educational field said that the following groups could particularly be affected:

- women teachers;
- disabled teachers;
- BME teachers.

One trade union representative body suggested that the Government's proposals may encourage more outsourcing and privatisation. The respondent suggested this would negatively impact on gender pay gap (differences in weekly earnings) within organisations. The stakeholder added that this gap is more evident within private sector organisations, and provided analysis on this point, based on the 2001 Annual Survey of Hours and Earnings (ASHE).

Question 8 Dismissals arising from a change of location

Our proposal is to amend the Regulations so that changes in location of the workforce, following a transfer, can be within scope of ETO (Economic Technical and Organisational reasons), thereby preventing place of work redundancies not involving reductions in the workforce from being automatically unfair and allowing some valid changes to contracts when a work place location changes.

In the draft stage EQIA, we discussed the effect that this proposal would have on protected groups. We specifically considered that it might have an effect on:

- People with disabilities, who receive specific support services at home and may therefore find it difficult to move to another part of the country;
- People belonging to particular ethnic or faith groups who may find it difficult to move to a part of the country where their faith or race is under-represented.

A Trade Union representative organisation also added that the proposals would disproportionately affect women with caring responsibilities and pregnant workers, who are less likely to be able to relocate to travel longer distances for work.

A legal organisation thought that this proposal would impact adversely on less mobile employees, including lower wage earners and secondary earners, and those with caring responsibilities. Another respondent mentioned older workers.

However, as set out in the Government's response, this 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 it to exercise; this might amount to a serious breach of contract, and so could give rise to constructive unfair dismissal.

In the practical terms, the position on any individual case will depend on the particular circumstances, including 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.

Question 10: Allowing pre-transfer consultation by transferees on collective redundancies

Some respondents questioned whether allowing transferees to consult prior to the transfer with transferring staff on collective redundancies would be unfair to the transferring staff. They considered that transferees might target redundancies on those staff transferring, rather than the whole of the transferee's workforce (including those transferring) affected by the transfer. Respondents didn't identify any equality and diversity issues relating specifically to this question.

The Government's response makes clear that any pre-transfer consultation by the transferee on collective redundancies would only count as complying with the collective redundancy rules if the consultation was meaningful as defined by those rules. Unfairly excluding groups of employees would mean that the consultation wouldn't qualify as meaningful, and therefore would not be in compliance with the collective redundancy rules.

Question 13: Exemption for micro businesses

The consultation proposed that micro businesses should not be exempt from the changes to the TUPE regulations. A few respondents argued that this proposal would give rise to equality and diversity issues, perhaps because of lack of capital resources. One noted that they would have specific adverse effects on BME groups, because they tend to form SME organisations, and may find it harder to bid for work if they are unclear about the risks.

Developing options

We have carefully considered the evidence we have received.

As set out in the Government response, we have decided that we will no longer go ahead with the proposal to remove most Service Provision Changes (SPCs) from within the scope of TUPE (Q1 & Q2). The responses to the consultation have presented a clear rationale for retaining the current SPC. It was clear from the consultation responses that repealing the SPC rules would not lead to significant benefits to either the labour market or the economy.

In an E&D context, this proposal was mentioned by respondents more than any other proposal. We hope that our decision not to proceed with the proposal will allay the many concerns raised by respondents.

We are making one change to the current regulations: the inclusion of a **new provision making plain that the existing legal 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. This change will provide greater clarity for business, but we do not believe it will have an adverse affect on equality and diversity**

We plan to go ahead with the proposals described in questions Q4, Q5, Q6, Q8 and Q10.

On Question 4 (Restriction in Regulation 4 on terms & conditions), employees will retain the protection that, in most cases, they would need to agree any changes

On Question 5 (Collective Agreements), employees will still retain the protection that any change to terms and conditions which is by reason of the transfer will need to be no less favourable overall

On Question 6 (protection against dismissal) employees involved in a TUPE transfer will still be protected against dismissal in accordance with the Acquired Rights Directive's objective.

On Question 10 (collective redundancy consultations), transferring employees will retain the protection that the consultation must be meaningful as set out in the collective redundancy rules.

On Question 13 (Micro-business exemption)

We note the concerns expressed by respondees. However, we do not see any strong argument for changing the current situation whereby micro-businesses are covered by all TUPE recommendations. We have not seen any conclusive evidence that this situation has any adverse effect on equality and diversity, and we believe that a two tier system could in itself result in inequality. We therefore propose not to exempt micro-businesses from the reforms to the 2006 TUPE regulations..

Workers affected by our proposed changes will still have access to their employment rights including:

- National Minimum Wage
- Redundancy rights
- Claiming for unfair dismissal
- Rights under the Equality Act 2010 not to be discriminated against
- Access to Employment Tribunals

They also have access to the ACAS helpline

<https://www.gov.uk/acas>

and (in cases of potential discrimination)

<https://www.gov.uk/discrimination-your-rights>

The Government is fully aware of the concerns raised by respondents and will be producing appropriate TUPE guidance. Where appropriate this guidance material will cover equality and diversity aspects.

Monitoring and review

We will be monitoring the effect of the amended regulations at suitable intervals after implementation. As part of this, we will review the impact of the regulations on equality and diversity, including any unexpected consequences. We will involve organisations with an interest in E&D in this review.

Specific Impact Test (2) - Small Firms

There are no SME exemptions in the original EU Acquired Rights Directive or the 2006 TUPE regulations. Out of 31,000 TUPE transfers per year, nearly 4,000³³ involve small businesses (those with less than 50 employees)

Currently the UK government is operating a micro business exemption rule whereby regulation exempts organisations of 10 or fewer employees and start-ups.

BIS has obtained a micro exemption waiver to the forthcoming revisions to TUPE regulations on the basis that it would not be advantageous to exempt micros from these revisions for the following reasons.

1. These changes are thought to be deregulatory and so micro businesses should be able to benefit from the revisions, along with other businesses. This view is supported by a number of consultation respondents.
2. Excluding micros would create a two-tier legal system that would at the very least cause, considerable confusion for everyone where a transfer involves a transferor and transferee to which different rules apply (because only one of them is a micro-employer) and at worst, may cause real problems in how it applies, and so may need separate rules to make it work.
3. Unlike some other areas of legislation, transitional costs for these amendments are thought to be low, especially amongst micro businesses that are unlikely to be familiar with the current legislation as TUPE transfers are relatively individualised events. In addition, micro exclusion could involve significant risks for micro-businesses, who would be less likely to take professional advice, and may not have existing knowledge of how TUPE works, so might rely upon guidance or practice based upon the law applicable to non-micro-businesses
4. One specific revision is aimed at benefitting micro businesses. It is proposed to enable those micro businesses that don't already have appropriate employee representatives to forgo the requirement to enable employees to elect representatives, allowing them to consult directly with all employees instead. It is estimated that that micro businesses involved could benefit by between £70,000 and £140,000 a year at 2012 prices. (Details of how this estimate was obtained are provided in the "Costs and benefits associated with the reduced requirement on micro businesses" section of the main IA.)

³³ Source: WERS 2011. Strictly speaking this is the number of workplaces that had undergone a TUPE transfer and at the time of the interview were either an independent organisation with less than 50 employees or part of an organisation with less than 50 employees in total.

The proposal not to exclude micro businesses from the TUPE revisions was widely supported by the respondents to TUPE consultation. Of those who responded to the question on micro business inclusion under the revised regulations 95% supported their inclusion.

The revisions to the 2006 TUPE Regulations are expected to provide businesses, including smaller businesses with greater flexibility in a number of areas by more closely aligning the revised regulations with the requirements of the Acquired Rights Directive. The legislation should make the business environment around TUPE transfers less restrictive by amongst other things:

- Aligning the regulations more closely with the wording of the Directive/case law in the following areas:
 - Variation of contract terms;
 - Protection from dismissal;
- Making it easier for businesses to manage workplace relations by:
 - Providing expressly for the position required by the Directive (as explained in the recent Court of Justice of the EU Judgment in the *Alemo-Herron v Parkwood* case) that a 'static' approach applies to the transfer of terms derived from collective agreements so that only those collective agreements agreed at the date of the transfer and not subsequent ones relating to the transferor will bind the transferee.
 - Introducing a 1 year post-transfer limit on the restriction voiding variations that are by reason of the transfer itself (subject to any change not being overall less favourable).
Both will benefit small businesses particularly as in some circumstances small businesses are unable to bid for some contracts due to the risks of taking on large staff liabilities which they may not be able to afford.
- Where a TUPE transfer involves a change of workplace location, revising the regulations to prevent dismissals for redundancies due to the change in the place of work from being automatically unfair.

Specific Impact Test (3) - Competition

The reduced costs and uncertainty and increased flexibility available to transferee firms associated with the revised TUPE framework are likely to mean that the firms are better able to compete for or bid for contracts. It is likely, therefore that there will be greater competition in the market and also more transfers.

Several consultation respondents seem to support this view, particularly in relation to service provision changes and limiting future applicability of current collective agreements.

Inclusion of SPCs in TUPE regulations is thought to have lead to fairer competition for bidding contractors and greater ability of small businesses to compete resulting from greater certainty regarding employment liabilities. A number of respondents also argue that greater flexibility for employers and employees in respect of re-negotiating terms and condition is likely to enable employers to manage workplace relations post-transfer more effectively. The inclusion of the case law test on the necessary degree of similarity of activities after a change in service provision for the purpose of the SPC test will signal the existing flexibility under the TUPE regulations in relation to innovative service delivery.

This may increase business awareness of the flexibility available, potentially reducing the perceived disincentive for some businesses of taking over the provision of a service. This may increase competition and changes in service provider where commissioners are interested in a fundamental change in the way their service is delivered. .

However, apart from this qualitative assessment it is not possible to estimate the likely scale of these effects.

Specific Impact Test (4) - Wider Environmental Issues

These proposals are intended to improve and simplify particular aspects of employment regulation. We do not believe that any of the proposals will have a noticeable impact on greenhouse gas emissions or the environment more widely.

Specific Impact Test (5) - Health & Wellbeing

We do not believe that any of the proposals will have a significant impact on health and wellbeing.

Specific Impact Test (6) - Human Rights

We believe that these proposals are in accordance with the Human Rights Act.

Specific Impact Test (7) - Justice System

BIS has met with the Ministry Of Justice (MOJ) to discuss the revisions to the 2006 TUPE Regulations. MOJ officials agreed with BIS officials that the reforms were unlikely to impact substantially on the justice system, and they were likely to lead to a reduction in TUPE related employment tribunal cases. BIS submitted a justice impact assessment to MOJ who responded that they were content with it.

HMCTS would face a small transitional cost in training judges on the revised regulations.

Specific Impact Test (8) - Rural Proofing

We do not consider that these proposals will have any adverse impact on rural communities.

Specific Impact Test (9) - Sustainable Development

We believe that these proposals will have a neutral impact on sustainable development

© Crown copyright 2013

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. Visit www.nationalarchives.gov.uk/doc/open-government-licence, write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

This publication available from www.gov.uk/bis

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

If you require this publication in an alternative format, email enquiries@bis.gsi.gov.uk, or call 020 7215 5000.

BIS/13/1015