

CALL FOR EVIDENCE:

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

NOVEMBER 2011

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Foreward

As part of the Employment Law Review I am now calling for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

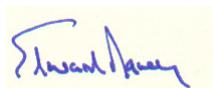
The Government believes that the UK economy should be supported by a framework of laws that ensures that the labour market is both strong and efficient. It should be flexible to encourage the creation of jobs, effective to enable employers to manage their staff productively and fair to create a level playing field for employers and a strong foundation of protection for workers.

Through the Employment Law Review launched in May 2010, the Government is seeking to ensure a UK labour market where both employers and workers are informed and empowered and able to negotiate their relationship with minimal intervention by Government. We want to reduce the fear factor for employers to encourage them to take on new employees and manage them effectively, while recognising the fear factor for employees who worry about job security.

Underpinning this approach is a need for a core of fundamental employment protections to safeguard employees from unscrupulous employers and create a level playing field for good employers.

Within the Employment Law Review, we have already consulted on reforms to the dispute resolution and employment tribunal system, and announced that we will extend the qualifying period for unfair dismissal from one to two years.

Building on this, I am now calling for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 in protecting employees' rights and smoothing the process of business restructuring. This is a complex area of legislation and it is important we gather evidence from a wide range of stakeholders in considering the case for change. I would like to thank you in advance for contributing.



Edward Davey
Minister for Employment Relations, Consumer and Postal Affairs

Call for Evidence: Effectiveness of current TUPE regulations

The call for evidence seeks views on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and how they might be improved, if at all. Whilst the Regulations implement a European Directive and provide important protections for both employers and employees, the Government is concerned that some businesses believe they are 'gold-plated' and overly bureaucratic. A series of questions have been provided to gauge views on whether this is the case and whether the Regulations should be changed. Should the balance of evidence call for possible changes to the current Regulations there will be a formal consultation on any proposed changes in 2012.

Issued: 23 November 2011

Respond by: 31 January 2012

Enquiries to: E-mail: tupe.callforevidence@bis.gsi.gov.uk

This consultation is relevant to: Employers and employees; voluntary sector; unions and civil society.

Purpose and Scope of Call for Evidence

1. The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) were originally introduced in 1981 in order to implement the 1977 EC Acquired Rights Directive. They are designed to safeguard employees' rights where a business, part of a business or a service provision in which they are engaged changes hands. They also benefit employers by smoothing the process of necessary business restructuring and public sector modernisation by clarifying transfer terms.
2. They were further revised in 2006 with the aim of providing greater certainty over whether or not the Regulations applied in certain situations. The Government believes it is now timely to reflect on how well they have achieved this goal. Therefore, as part of the Employment Law Review the Government announced a review of the regulations to see if there is scope to improve their implementation of the Directive and reduce burdens on business, whilst continuing to provide appropriate levels of protection for employees.
3. The call for evidence is a precursor to the review. It is being taken forward to ensure that the review encompasses all relevant issues of concern and is also an opportunity to feed in potential solutions. The Government is keen for all parties who have an interest or stake in TUPE to take part in the policy debate at this early stage by feeding in their views and suggestions. In order to help the Government gather this evidence, this document asks you a number of questions based on your experience of TUPE. However, this is an open call for evidence and respondents should not feel constrained by these if there are other areas they would like to put forward for consideration.
4. The Government is also interested to hear about where the interaction between TUPE and other areas of legislation may have unintended and adverse consequences on businesses and/or employees. In particular, the Government is aware that there are specific issues around the interaction with collective redundancy consultations, on which a call for evidence has been launched in parallel.
5. It should be noted that the scope of this call for evidence is to some extent constrained by the need to implement the EC Acquired Rights Directive, and is only looking at benefits from changing implementation within its limits. But there are areas where the implementing legislation goes beyond the requirements of the Directive. The call for evidence is focussed on whether the legislation could be improved in these areas or whether improved guidance and best practice examples could better address the issue. However, the Government recognises that the implementation of the Directive in other European Member States will also be of concern for some businesses and is interested to hear about these issues.
6. The issue of the protection of occupational pension rights on a TUPE transfer is dealt with under separate legislation – the Pensions Act 2004 - and is not within scope of this review. Similarly public sector transfers involving an administrative re-organisation of public administration authorities or the transfer of administrative functions are *excluded* as they do not form part of the Regulations and the Directive (although transfers from the public to the private and voluntary sectors are clearly in scope). They are instead covered by the Cabinet Office Statement of

Practice (COSOP), which generally requires TUPE principles to be applied to these situations, as well as covering other transfers involving the public sector.

Next Steps

7. The Government will consider all responses in developing its policy towards TUPE. Should the balance of evidence call for possible changes to the current Regulations there will be a formal consultation on any proposed changes in 2012.

Questions

Clarity and Transparency of 2006 Regulations Overall

The 2006 Regulations are designed to provide more clarity over whether or not the Regulations apply to particular contracting-out or analogous situations; and increased transparency by ensuring transferor employers and public sector commissioners give new employers proper notification about the employment rights and obligations that are to be transferred.

Question 1: Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

Question 2: Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

Question 3: Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

Service Provision Changes

The 2006 Regulations included almost all service provision changes (i.e. when a contract is outsourced, brought back in house or relet) in scope. The intention was to provide much greater clarity on the application of TUPE to service provision changes, since the European Acquired Rights Directive is less clear on this point. By removing this uncertainty the intention was to create a more level playing field for business when a contract is let by clarifying that TUPE obligations should be taken into account in the tendering process.

Question 4: Does inclusion of service provision changes within the 2006 Regulations provide benefits in terms of increased transparency and reduced burdens on business? If yes what are these benefits? If no, what additional burdens have resulted from their inclusion?

Question 5: Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

Question 6: Have the 2006 amendments led to fewer tribunals resulting from service transfers?

Question 7: Is the inclusion of service provision changes in principle helpful, but there are alternative models for their inclusion that would lead to improvements? What might these look like?

Question 8: Should professional services be included in the definition of service provision and be covered by the Regulations?

Question 9: Would the exclusion of professional services lead to uncertainty over whether TUPE did or did not apply, requiring businesses to seek further legal advice?

Harmonisation of Terms and Conditions

*The Directive prevents a reduction in **any** of the employees' terms and conditions by reason of a transfer. This rule is designed to protect the rights of transferred employees. This is a problem for an employer who wants to agree with employees to harmonise employment terms across his workforce. The only option may be to increase **all** of the terms and conditions to the most favourable level.*

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

Question 11: Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

Insolvency and Liabilities

In order to help rescue some failing businesses and to try and protect jobs, the Directive and the Regulations were amended to relax the TUPE rules in some insolvency cases and disapply the main rules in others. Under the 2006 Regulations the UK chose to ‘copy out’ the Directive’s generic description of the different categories of insolvency proceedings, rather than specify which type of proceeding falls under which description (which was not immediately obvious in some cases). This reduced the risk of infraction proceedings against the UK for not properly implementing the Directive and left the answer to be determined by case law. This approach has meant that Employment Tribunals and the EAT have had to resolve the issues, particularly in relation to administration proceedings.

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

Question 14: Have the 2006 amendments meant that transferees (ie businesses taking over the contract) have a greater awareness of potential liabilities, and has this helped to reduce transaction costs and risks? If not, how could this be improved?

Question 15: Should liability for pre-transfer obligations be transferred entirely to the transferee as is the case currently in the Regulations ie should the business taking on the contract take on all the liabilities of the business or part of the business they are taking over? Or should both parties be jointly liable, as permitted by the Directive.

Guidance

Employees may not be dismissed where the reason is either the transfer itself, or it is a reason connected with it which is not an economic, technical or organisational reason entailing changes in the workforce. There is no statutory definition of ‘economic, technical or organisational reason’, but it is likely to include (a) a reason relating to the profitability or market performance of the new employer’s business (i.e. an economic reason); (b) a reason relating to the nature of the equipment or production processes which the new employer operates (i.e. a technical reason); or (c) a reason relating to the management or organisational structure of the new employer’s business (i.e. an organisational reason).

Question 16: Is the provision on ‘Economic, Technical or Organisational reason entailing changes in the workforce’ sufficiently clear? Would additional guidance be helpful and if so in what form?

Question 17: Are there other areas of TUPE that would benefit from additional guidance/clarification?

Implementation of TUPE in other EU Member States

Question 18: Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

TUPE and other areas of employment law

Question 19: Have you experienced problems from the interaction of TUPE with other areas of employment law?

Question 20: The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

Other

Question 21: Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

Question 22: Have developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating?

Question 23: Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

Question 24: Are there any other issues you wish to raise?

Background

1. The Transfer of Undertakings (Protection of Employment) Regulations 1981 – commonly known as the TUPE Regulations – were introduced in order to implement the EC Acquired Rights Directive (sometimes known as the Business Transfers Directive), adopted in 1977. They safeguard employees' rights when the business in which they work changes hands between employers. The Regulations have been amended on a number of occasions since their introduction.

2. The Regulations were last amended in 2006 following a prolonged series of consultations with stakeholders. A public consultation exercise was carried out in September 2001 and there was also consultation with social partners and other Government Departments with an interest. In 2003 the previous Government announced its intention to make the scope of the Regulations more comprehensive in relation to service contracting operations with the aim of reducing disputes and uncertainty in that area. There was a further round of public consultation on draft revised Regulations from March to June 2005. Amendments were only agreed in 2006 after this second consultation.

3. The 2006 Regulations were intended to provide greater certainty over whether or not the Regulations apply to particular situations, by extending the scope of the Regulations with the aim of:

- ensuring that new employers are given proper notification by transferor employers about the employment rights and obligations that are to be transferred, to ensure a smooth transition;
- clarifying the extent of the protection that the Regulations afford employees against transfer-related dismissals or changes to terms and conditions;
- making it clear that the Regulations apply to service provision changes (e.g. contracting out); and
- increasing the likelihood that such businesses will be rescued and their employees' jobs saved, by applying provisions from the Directive which give more flexibility in the context of transfers of insolvent businesses.

4. However, concerns have been raised that the Regulations unnecessarily 'gold-plate' the implementation of the Directive and are overly bureaucratic. Therefore, the Government has announced a review to ensure that they are fit for purpose and to see whether there is scope to make the legislation easier to understand, improve efficiency and reduce bureaucracy. In considering any potential reforms the Government has made it clear that it will ensure that fairness to individuals is not compromised, recognising that the Regulations provide important protections.

5. The review of TUPE is part of the wider review of employment law launched in 2010, which is an important part of the Government's plans to deliver growth by breaking down barriers, boosting opportunities and creating the right conditions for businesses to start up and thrive.

6. In parallel the review has also launched a call for evidence on collective redundancies. Redundancies are often part of the process of a business transfer. It is usually the case that these redundancies take place after the transfer and are effected by the transferee company. Both the TUPE Regulations and the collective redundancy rules require that employers consult with representatives of their employees. However, these consultations cannot currently take place at the same time, despite their being a degree of connection between the decisions to be taken.

7. The collective redundancy consultation rules require that the employer consults with representatives of his employees. As the transferee does not become the employer until after the transfer, he cannot engage in consultations over possible post-transfer redundancies until after the transfer has completed. This has a significant impact on the employers' ability to restructure effectively after the transfer and could result in him employing staff for whom there is no work for a significant period of time. The transferee will need to conduct a full consultation after the transfer and cannot fulfil even part of his obligation to consult in advance. Employees' representatives may also be disadvantaged as they lose the opportunity for early engagement, early access to information and the ability to discuss some possible alternatives to redundancy, including redeployment within the transferor company.

How to Respond

You can complete your response online through Survey Monkey:

<https://www.surveymonkey.com/s/QSZ89BK>

Alternatively, you can email, post or fax this completed [response form](#) to tupe.callforevidence@bis.gsi.gov.uk at the Department for Business, Innovation and Skills (BIS)

Email: tupe.callforevidence@bis.gsi.gov.uk

Postal Address:

Cathryn Law
3rd floor Abbey 1
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Fax: 0207 215 6414

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

The closing date for this consultation is: **31 January 2012**

Name:**Organisation (if applicable):****Address:**

Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate group. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the boxes below that best describes you as a respondent to this consultation:

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

Call for evidence: Effectiveness of Current TUPE regulations

Clarity and Transparency of 2006 Regulations Overall

Question 1: Have the 2006 amendments provided greater clarity and transparency on application of TUPE rules?

Yes []

No []

Question 2: Do the 2006 Regulations provide enough transparency around employment rights and obligations being transferred to ensure a smooth transition? If not, how could this be improved?

Yes []

No []

Question 3: Do employers and commissioners generally comply with the transparency obligations under the 2006 Regulations? If not, are there particular problems around timing and/or accuracy of the information they provide; and are problems particularly noticeable in respect to transfers from the public or private sector?

Yes []

No []

Service Provision Changes

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Yes []

No []

Question 5: Have the 2006 amendments led to less need to take legal advice prior to tendering or bidding for contracts?

Yes []

No []

Question 6: Have the 2006 amendments led to fewer tribunals resulting from service transfers?

Yes []

No []

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Yes []

No []

Question 8: Should professional services be included in the definition of service provision and be covered by the Regulations?

Yes []

No []

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Yes []

No []

Harmonisation of Terms and Conditions

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

Yes []

No []

Question 11: Would it be helpful to have a provision limiting the future observance of terms and conditions derived from collective agreements?

Yes []

No []

Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

Yes []

No []

Insolvency and Liabilities

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

Yes []

No []

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Yes []

No []

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Yes []

No []

Guidance

Question 16: Is the provision on 'Economic, Technical or Organisational reason entailing changes in the workforce' sufficiently clear? Would additional guidance be helpful and if so in what form?

Yes []

No []

Question 17: Are there other areas of TUPE that would benefit from additional guidance/clarification?

Yes []

No []

Implementation of TUPE in other EU Member States

Question 18: Do you have experience of the implementation of the Acquired Rights Directive (TUPE) in other EU Member States? If so, are there any problems you have encountered, or conversely are there lessons that the UK could learn, from their implementation of the Directive?

Yes []

No []

TUPE and other areas of employment law

Question 19: Have you experienced problems from the interaction of TUPE with other areas of employment law?

Yes []

No []

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Yes []

No []

Other

Question 21: Do you have particular concerns around the application of TUPE to different managerial levels of employees within the same organisation? If so, what are these and how would you like to see them addressed, bearing in mind the requirements of the Directive?

Yes []

No []

Question 22: Have developments in case law since 2006 raised issues that mean the 2006 Regulations would benefit from updating?

Yes []

No []

Question 23: Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

Yes []

No []

Question 24: Are there any other issues you wish to raise?

Yes []

No []

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

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