



Department  
for Business  
Innovation & Skills

Transfer of undertakings  
(protection of employment)  
regulations 2006: Consultation on  
proposed changes to the  
regulations

Impact Assessment

JANUARY 2013

# Contents

Contents.....	1
Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Changes to the Regulations.....	2
Impact Assessment (IA).....	2
Summary: Intervention and Options.....	2
RPC Opinion: Red Tape Challenge.....	2
Summary: Analysis & Evidence Policy Option 1b.....	4
Summary: Analysis & Evidence Policy Option 2b.....	5
Summary: Analysis & Evidence Policy Option 3b.....	6
Summary: Analysis & Evidence Policy Option 3c.....	7
Summary: Analysis & Evidence Policy Option 4b.....	8
Summary: Analysis & Evidence Policy Option 5b.....	9
Summary: Analysis & Evidence Policy Option 6b.....	10
Summary: Analysis & Evidence Policy Option 6c.....	11
Summary: Analysis & Evidence Policy Option 7b.....	12
Summary: Analysis & Evidence Policy Option 8b.....	13
Summary: Analysis & Evidence Policy Option 8c.....	14
Summary: Analysis & Evidence Policy Option 9b.....	15
Summary: Analysis & Evidence Policy Option 10b.....	16
Evidence Base: Revision of the Transfer of Undertakings (Protection of Employment) Regulations 2006.....	17
1. Background.....	17
2. Purpose and intended effect of the review.....	18
3. Rationale for government intervention.....	18
4. Consultation.....	19
5. Summary of Options.....	19
6. Available Data Sources forming the Evidence Base.....	22
7. Calculating the total number of TUPE transfers and the number of employees involved.....	22
8. Measuring the number of Service Provision Changes (SPCs).....	23
9. Employment Tribunal data.....	24
10. A specific note on Familiarisation Costs.....	26
11. Summary of Evidence.....	26
Summary.....	49
Specific Impact Tests.....	50
Specific Impact Test (1) - Equality Impact Assessment.....	50
Specific Impact Test (2) - Small Firms.....	56
Specific Impact Test (3) - Competition.....	57
Specific Impact Test (4) - Wider Environmental Issues.....	57
Specific Impact Test (5) - Health & Wellbeing.....	57
Specific Impact Test (6) - Human Rights.....	57
Specific Impact Test (7) - Justice System.....	57
Specific Impact Test (8) - Rural Proofing.....	58
Specific Impact Test (9) - Sustainable Development.....	58

Title:

# Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Changes to the Regulations

IA No: 1

Lead department or agency: **BIS**

Other departments or agencies:

## Impact Assessment (IA)

Date: 27/11/2012

Stage: Consultation

Source of intervention: Domestic

Type of measure: Secondary legislation

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### Summary: Intervention and Options

RPC Opinion: Red Tape Challenge

#### 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, One-Out?	Measure qualifies as
£m	£m	£m	Yes/No	In/Out/zero net cost

#### What is the problem under consideration? Why is government intervention necessary?

The Transfer of Undertakings (protection of employment) regulations (TUPE) could be creating an unnecessary burden, reducing the efficiency of the supply side of the economy. The regulations could be constraining competition and limiting labour market flexibility, going beyond the remit of the EU Acquired Rights Directive. Government intervention is required to implement any changes to the regulations that will be supported by stakeholders. As part of the Red Tape Challenge, BIS conducted a call for evidence earlier this year on TUPE regulation. Alongside the call for evidence, this consultation is driven by other feedback from users on how the regulations could be improved and by the increase in Employment Tribunal cases related to TUPE.

#### What are the policy objectives and the intended effects?

These reforms aim to simplify the TUPE framework which is seen as overly complicated particularly by smaller businesses involved in transfers. BIS aims to make the transfer process easier for employees and employers by amending any sections of the legislation where wordings are causing unintended consequences or undue confusion. Secondly, BIS aim to cut out unnecessary gold plating going above and beyond the EU Acquired Rights Directive.

#### What policy options have been considered, including any alternatives to regulation? Only preferred options have been given (where one exists), see Evidence Base for full information

- 1) Remove service provision changes from TUPE legislation.
- 2) Removing the guidance from the regulations and allowing employers to negotiate arrangements for transferring information themselves.
- 3) Changing the wording of the provisions restricting changes to contracts to better reflect the wording of the Directive.
- 4) Change the wording of the provisions giving protection on dismissals to more closely reflect the wording of the Directive
- 5) Replacing regulations 4(9) and (10) concerning a substantial change to working conditions to the material detriment of the employee with a provision that copies article 4(2) of the Directive
- 6) To amend the meaning of 'entailing changes in the workforce' to include a change of location of the workforce as an economic, technical or organisational (ETO) reason, and allow the transferor to rely upon the transferee's ETO reason (entailing changes to the workforce) for fairly making an employee redundant during a transfer.
- 7) To allow the transferee to engage with the transferring employees in order to consult before a transfer.
- 8) To provide guidance on what is a "reasonable" time for the election of employee representatives, and allow micro businesses to engage directly with employees.
- 9) Whether to exempt micros from these amendments to the regulations?
- 10) To improve the online guidance on TUPE.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?			Yes		
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 <sub>2</sub> equivalent change in greenhouse gas emissions? N?A			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:

## Summary sheets of Costs and Benefits

This next section summarises the costs and benefits associated with each option. Note that “do nothing” options are not summarised as their costs and benefits are the benchmark from which the other options are measured from.

Note that costs and benefits have not been monetised for many of the options in this Impact Assessment. This is because robust up-to-date data are frequently not available and, wherever data is available, several strong assumptions would need to be made to assign a specific cost or benefit to the policy option. Therefore, it is thought to be more helpful to the consultation respondents to indicate the direction of costs and benefits with each option without prescribing an exact value which could be inaccurate and misleading.

Additional data on the number of firms and employees will be available in 2013 and through this consultation, BIS crucially are looking to increase their understanding of the costs and benefits likely to accrue to each of these policy options. It is hoped that respondents will feel able to provide numeric information into exactly how certain policy options will affect them.

For more information on the sources of evidence used in this impact assessment see section 6 in the Evidence Base section of this Impact Assessment titled: ‘Available Data Sources forming the Evidence Base’.

Note that the “a)” options associated with the changes 1-9 above are the “do nothing” options.

# Summary: Analysis & Evidence

# Policy Option 1b

Description: PREFERRED OPTION Remove Service Provision Changes from TUPE legislation

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
<b>Best Estimate</b>					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<p>The Impact Assessment in 2006 identified a gain to individuals of between £13 million to £30 million per year (in current prices) from better terms and conditions. Repealing service provision changes from TUPE would remove any of these benefits from future transferred employees who would no longer be covered by the legislation.</p>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
<p>Transition costs to businesses for familiarisation.                      Transferors could end up with surplus employees, whilst the transferee needs to recruit. This may cause unnecessary redundancies.                      Exchequer will have to pay for these at times when the transferor has become insolvent.                      The service commissioner may end up with more costly contracts to allow for these inefficiencies.</p>					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
<b>Best Estimate</b>					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<p>The 2006 IA estimated a cost to British business (transferees) of between £13 million to £30 million per year (in 2012 prices) made up of more expensive terms and conditions (less fewer redundancies). A repeal would remove any of these costs that have accrued and therefore this option presents a net benefit to business.</p>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
<p>Transferees may find the recruitment costs are more than paid for by the quality of the staff they recruit. Previously there has been a risk of bad employees being passed around.                      The service commissioner may find re-tendering a contract has more impact on the quality of the service provided the employees are also able to be transferred.</p>					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
<p>The monetised costs and benefits assume that the monetary values have been accrued since 2006 although there is no evidence for this.</p>					

## BUSINESS ASSESSMENT (Option 1)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	Yes	OUT

# Summary: Analysis & Evidence

# Policy Option 2b

Description: PREFERRED OPTION Removing the requirement to provide employee liability information from the regulations and allowing employers to decide arrangements for transferring information themselves.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Cost (Present Value)</b>		
Low	Optional	Optional	Optional		
High	Optional	Optional	Optional		
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
<p>Every transfer would have to allow for either a negotiation for when information was to be transferred or risk not receiving information in time. Evidence suggests that a substantial number of employers (maximum of 37,000) are involved in a TUPE transfer each year, and so the costs with this policy are considerable. Any additional employment tribunals would cost the exchequer (£4450 per completed hearing). These could result either from transferring parties caused by information not being provided as agreed, or between one of the parties and a grieved employee whose situation was not satisfactorily managed by their employer due to poor arrangements around information transfer.</p>					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>	<b>Average Annual (excl. Transition) (Constant Price)</b>	<b>Total Benefit (Present Value)</b>		
Low	Optional	Optional	Optional		
High	Optional	Optional	Optional		
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
<p>Deregulation allows transferring parties to transfer information at a time and in a way that suits them. Guidance would alert transferees on the importance of agreeing this at an early stage.</p>					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 2)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 3b

Description: PREFERRED OPTION Changing the wording of the provisions restricting changes to contracts to better reflect the wording of the Directive

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
Description and scale of key monetised costs by 'main affected groups'					
Other key non-monetised costs by 'main affected groups' All options (on changes to terms and conditions) could cost employees in terms and conditions					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
Description and scale of key monetised benefits by 'main affected groups'					
Other key non-monetised benefits by 'main affected groups' Transferees are likely to benefit from any adjustments to the legal wording that either enables employers more flexibility in agreeing variations to their workers terms and conditions (or reduces their risk in doing so) or simplifies the situation to increase understanding.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
As there is limited scope for changing terms and conditions, complex changes to the law may technically allow more freedom but in practice employers may not be confident enough in the legal position to action any changes to employees' terms and conditions.					

## BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 3c

Description: Limit the future applicability of terms and conditions derived from pre-transfer collective agreements to one year.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
As above: All options (on changes to terms and conditions) could cost employees in terms and conditions (although it should be mentioned that the government proposal includes a condition that the changes are no less favourable to the employee).					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
TUPE regulations currently form a large barrier to parties considering taking on previously unionised workers. This amendment limits a transferee's exposure to unionised terms and conditions which should better enable non-unionised prospective transferees to bid for a contract and hence potentially increase competition.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 4)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost



# Summary: Analysis & Evidence

# Policy Option 4b

**Description: PREFERRED OPTION:** Change the wording on the provisions giving protection on dismissals to more closely reflect the wording of the Directive

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
Employees dismissed when a transfer of an undertaking takes place will be less able to claim unfair dismissal. This will probably lead to reduced payments to employees dismissed in these circumstances, as they will not be entitled to compensatory payment due to unfair dismissal.					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
Transferees would benefit from fewer dismissals for non-ETO reasons being treated as unfair under the new regulations, potentially reducing the cost of workforce reductions in workplaces being transferred.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
There is a risk that the proposed change to the regulation may introduce more uncertainty as to what circumstances the regulation covers, leading potentially to an increase in litigation.					

## BUSINESS ASSESSMENT (Option 5)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 5b

**Description: PREFERRED OPTION: Replacing regulations 4(9) and (10) concerning a substantial change to working conditions to the material detriment of the employee with a provision that copies article 4(2) of the Directive**

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
In situations where an employee has their contract effectively terminated in a TUPE process, because of a substantial change in their working conditions post-transfer which is to their material detriment, they would be less likely to be able to claim unfair dismissal. In most cases, the processes governing wrongful dismissal would apply, generally reducing the potential compensation that the employee could obtain (though in some cases wrongful dismissal would provide a better outcome for the employee).					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
Transferees making substantial, detrimental changes to working conditions for transferring workers for non-ETO reasons, so that they were considered contract terminations, would generally not be subject to unfair dismissal claims. Instead they'd be treated as wrongful dismissals, which should in most cases lead to reduced costs in compensating the employees affected. Transferors whose employees anticipated termination in post-transfer changes in working conditions would also probably face lower payment costs.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 6)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 6b

Description: PREFERRED OPTION Including a change so that “entailing changes in the workforce” covers changes in the location of the workforce, so that place of redundancies (which do not involve an overall reduction in the workforce) are not automatically unfair.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
Description and scale of key monetised costs by ‘main affected groups’					
<p><b>Other key non-monetised costs by ‘main affected groups’</b>                      Employees could be made redundant by choosing not to relocate, without it automatically qualifying as unfairly dismissed</p>					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
Description and scale of key monetised benefits by ‘main affected groups’					
<p><b>Other key non-monetised benefits by ‘main affected groups’</b>                      Transferees are able to relocate new staff or make them redundant where necessary without exposing themselves to automatic unfair dismissal claims which increases flexibility. This may enable more potential transferees to bid for contracts in different locations and hence potentially increasing competition.</p>					
Key assumptions/sensitivities/risks					Discount rate (%)

## BUSINESS ASSESSMENT (Option 7)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 6c

**Description: PREFERRED OPTION:** The transferor should be able to rely upon the transferee's 'economic, technical or organisational reason entailing changes in the workforce' for making dismissals prior to the transfer.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b> No main costs					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b> This option benefits employees who are more likely to want to be made redundant earlier in a transfer process to avoid unnecessary changes to their working patterns. Also this policy would benefit any employees who want alternatives to redundancy in transferor to be considered.  This option benefits transferees administratively as they would not need to make redundancies with their initial workforce that the transferor had already made. The transferor would not be under obligation to make employees redundant and therefore any additional costs would be passed to the transferee. Note that the transferor potentially bears the risk for any unfair dismissals, but this could also be passed onto the transferee in an indemnity.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 8)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	NA

# Summary: Analysis & Evidence

# Policy Option 7b

**Description: PREFERRED OPTION** The transferee should be able to engage with the transferors employees in order to consult transferring staff before a transfer.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
This may cost the transferor administratively as they would be required to allow the transferee access to their employees' details, or allow employees time to engage with the transferee.					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
The transferee and the employees both benefit from increase opportunities for communication throughout the process. This could enable employees to feel better informed and consulted which could reduce the employment tribunal cases in this area. Employees might also be more able to affect the outcome of transferees' plans to their advantage.					
Secondly the transferee would be able to consult on any envisaged measures before the transfer speeding up the process and reducing administrative costs post transfer.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
This assumes that details of which employees are being transferred have been settled. It would be inappropriate and unsettling for employees to be involved in a negotiation and then not transferred or, transferred without the negotiation when other colleagues had been consulted.					

## BUSINESS ASSESSMENT (Option 9)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
Costs:	Benefits:	Net:	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 8b

Description: **PREFERRED OPTION:** To provide guidance on what is a reasonable time for the election of employee representatives

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
<p>Proportionate guidance should help transferors and transferees meet their obligations appropriately, but may potentially make the case for employment tribunal claims clearer where businesses have not properly informed and consulted due to failure to identify employee representatives, causing the costs of these firms to rise.</p> <p>There will be some initial small cost to the Exchequer from the process of drawing up the guidance.</p>					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
<p>Transferors, transferees and employees should all benefit from proportionate guidance about the timescales for the election of representatives – as it should help firms to meet their obligation to inform and consult, and help employees feel adequately involved in the process. If the guidance helps more firms meet their obligations, employment tribunal claims should fall, benefitting employers, employees and the Exchequer through reduced costs.</p>					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
<p>It is assumed that the guidance will be proportionate, and take account of a range of different circumstances to ensure that the suggested timescales enable proper consultation without proving additionally burdensome to business</p>					

## BUSINESS ASSESSMENT (Option 10)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 8c

Description: PREFERRED OPTION Micro businesses should be able to engage directly with employees (not solely through representative) where there is no recognised trade union nor existing representatives.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
This option is unlikely to carry any significant costs, provided any engagement is conducted in a clear and formal manner.					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
This option will be a benefit to micro businesses and their employees as it is in effect an opt out from the TUPE regulations in relation to going through the procedure to elect employee representatives. The employer must still inform and consult their employees, but need only do so directly, and the consultation need not be with a view to agreement. In a transfer involving a micro business so few employees are involved that in practice it seems unnecessary to have all communication passed through a formal representative when it is more likely that each of the employees would like to be involved individually in the process.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
From an administrative perspective, a regulation affecting only micros will complicate these regulations and it is possible that confusion will be caused surrounding definitions of business sizes and whether the transferor or transferee must be classified as a micro for this legislation to apply.					

## BUSINESS ASSESSMENT (Option 11)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 9b

Description: Micro businesses should not be exempt from the changes to TUPE legislation

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b>					
<b>Other key non-monetised costs by 'main affected groups'</b>					
Micro businesses may have comparatively larger familiarisation costs than larger firms and may want to be excluded.					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b>					
These amendments aim to make TUPE legislation easier for businesses to comply with; therefore it is thought that micros would prefer to have the regulations apply.					
Secondly, it is complicated to exempt micros from regulations involving two parties, as if one party were not a micro business the two parties would be following different sets of regulations.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 12)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	No	Zero net cost



# Summary: Analysis & Evidence

Policy Option 10b

Description: PREFERRED OPTION: BIS to improve guidance to TUPE regulations.

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate	20,000				<b>20,000</b>
<b>Description and scale of key monetised costs by 'main affected groups'</b> This review and improvement of the online guidance will cost the exchequer up to £20,000 based on a higher executive officer working in the area for approximately 4 months.					
<b>Other key non-monetised costs by 'main affected groups'</b>					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low	Optional		Optional		<b>Optional</b>
High	Optional		Optional		<b>Optional</b>
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b>					
<b>Other key non-monetised benefits by 'main affected groups'</b> All stakeholders would hope to gain from a simplification of the TUPE guidance or an online tool helping employers through the process. The tool could offer support and explanation to employees, employers and unions as they look to transfer undertakings smoothly. This would also aim to reduce tribunal costs as better educated parties will hopefully avoid tribunals more successfully. Therefore in the long run, the exchequer also should gain from an improvement in TUPE guidance potentially in the form of an online tool for businesses and employees taking part in a transfer process.					
<b>Key assumptions/sensitivities/risks</b> There is a risk that if the job was not done well, employers who have undergone TUPE in the past would have to re-learn where the information can be found, but BIS are confident that significant improvements could be made to the guidance.					<b>Discount rate (%)</b>

## BUSINESS ASSESSMENT (Option 13)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	Yes/No	Zero net cost

## Evidence Base:

# Revision of the Transfer of Undertakings (Protection of Employment) Regulations 2006

November 2012

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.

## 1. Background

The TUPE regulations were originally introduced in 1981, to implement the EU Acquired Rights Directive. They were replaced by amended regulations in 2006<sup>1</sup>.

TUPE regulations aim to implement the EU acquired rights directive aims 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 provide 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 all the related rights, powers, duties and liabilities of the old employer (transferor) pass automatically to the transferee.
- There is protection against unfair dismissal for employees of the transferor or of the new employer (transferee): it is treated as unfair dismissal if they are dismissed and the sole or principal reason for the dismissal is the transfer or a reason connected with the transfer. However, this does not apply where the reason connected with the transfer is an economic, technical or organisational reason entailing a change in the workforce; the employer is still subject to general unfair dismissal law in such circumstances.
- Both the old and the new employer have duties to inform appropriate employee representatives of any affected employees about the legal, economic and social implications of the transfer and to consult on any measures envisaged in relation to employees affected by the transfer.

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<sup>1</sup> The aim of the amended regulations was to provide greater certainty over whether or not the Regulations apply to particular situations

## 2. Purpose and intended effect of the review

In May 2010, the Government committed to review employment laws for employers and employees (including the TUPE regulations) to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.

So far in the review, concerns have been raised that the TUPE Regulations:

- ‘gold plate’ the implementation of the Directive unnecessarily; and
- are overly complicated, particularly for smaller businesses involved in transfers.

The review is intended to ensure that the regulations are fit for purpose and to see whether there is scope to make the legislation easier to understand, improve efficiency and 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.

## 3. Rationale for government intervention

The Government is conscious that some business groups believe that the TUPE regulations go beyond the requirements of the Acquired Rights Directive and are overly bureaucratic, placing undue burden on businesses undergoing restructuring. Unnecessary burden caused by the TUPE regulations could affect the efficiency of the supply side of the economy. The lack of harmonisation is expensive to business in administrative costs, and potentially constraining competition. Problems with the transfer of liability information and uncertainty around service provision changes may also hinder competition. There is also an information failure in the problems with the transfer of liability information and it is generally acknowledged that guidance here could be improved.

The responses to the call for evidence broadly reflect the following common concerns from business and business organisations:

- The Regulations gold plate the Acquired Rights Directive by including service provision changes (SPC) in the scope;
- 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.

The approach to economic, technical or organisational reasons entailing changes in the workforce (“ETOs”) needs attention. (It is treated as unfair dismissal to dismiss an employee if the sole or principal reason for the dismissal is either the transfer itself, or it is a reason connected with it which is not an ETO and similarly, variations of contract for such reasons are void). Some respondents say guidance would help as there is no statutory definition of the phrase, and instead there is a list of what is likely to be included as an Economic, technical or organisational reason, and how entailing changes in the workplace has been interpreted by the courts. Others find the rules themselves (as interpreted by the courts) unduly restrictive. For

example, some consider the meaning of “entailing changes to the workforce” (which is restricted to changes in the numbers employed or changes in the functions performed by employees) too restrictive and that it causes uncertainty.

Failure to introduce the revised Regulations would mean that their shortcomings remained unaddressed, contrary to the Government’s commitment to review employment laws for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.

## **4. Consultation**

### **(i) Within government**

These proposals have been developed in consultation with interested government departments including HM Treasury, The Department for Education, The Department for Work and Pensions and Cabinet Office.

### **(ii) 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. In addition to the key businesses concerns outlined above, additional points emerged from the responses:

- Further guidance is needed in relation to service provision changes. The aspects of service provision changes which cause confusion are where there is a fragmentation of services, deciding whether employees are assigned to the transferring group and knowing which activities must transfer.
- Further guidance is needed on the application of TUPE in cases of insolvency.
- The current requirement to provide ELI at least 14 days before the transfer should be increased as it is felt that is too close to the transfer and can make transfers less transparent. ELI should also be provided with sufficient detail to aid transparency.
- 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 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 2012<sup>2</sup>.

## **5. Summary of Options**

The paper now lists each of the areas of change and, within each area, the possible options. The subsequent chapters cover each of the options in detail, summarising the policy change and providing analysis into the impacts of the proposed change.

### **1. Service Provision Changes**

Option 1a: No change to Service Provision Changes (i.e. retain SPCs within TUPE).

Option 1b: Remove SPC changes from TUPE legislation.

### **2. Employee Liability Information**

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<sup>2</sup> <http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/E/12-1141-effectiveness-transfer-of-undertakings-response.pdf>

Option 2a: No change to the Provision of Employee Liability Information. Transferor is required to provide transferee with Employee Liability information 14 days before the transfer takes place.

Option 2b: Removing the requirement to provide employee liability information from the regulations and allowing employers to decide arrangements for transferring information themselves.

### **3. Restrictions on changes to employee terms and conditions**

Option 3a: No Change to current position on variations to contract

Option 3b: Changing the wording of the provisions restricting changes to contracts to better reflect the wording of the Directive

Option 3c: Limit the future applicability of terms and conditions derived from current collective agreements to one year.

### **4. Protection on dismissal**

Option 4a: No change

Option 4b: Changing the wording of the provisions giving protection on dismissals to more closely reflect the wording of the Directive

### **5. Substantial change in working conditions to the material detriment of an employee (regulation 4(9) and (10))**

Option 5a: No change

Option 5b: Replacing regulations 4(9) and (10) concerning a substantial change in working conditions to the material detriment of the employee with a provision that copies article 4(2) of the Directive

### **6. Economic, Technical and Organisation reasons entailing changes in the workforce (ETOs) for dismissal**

Option 6a: No change to ETOs.

Option 6b: Including a change so that “entailing changes in the workforce” covers changes in the location of the workforce, so that place of redundancies (which do not involve an overall reduction in the workforce) are not automatically unfair

Option 6c: The transferor should be able to rely upon the transferee’s ETO for making dismissals prior to the transfer.

### **7. Collective Redundancy Rules and the Application of TUPE**

Option 7a: No change to current collective redundancy rules and application of TUPE, (Improve guidance – Option 9).

Option 7b: The transferee should be able to engage with the transferors employees in order to consult transferring staff before a transfer.

### **8. Duty to Inform and Consult Representatives**

Option 8a: No change – do not clarify “reasonable” time for the election of employee representatives (See Improve Guidance: Option 9).

Option 8b: To provide guidance on what is a reasonable length of time for the election of employee representatives

Option 8c: Micro businesses should be able to engage directly with employees (not through a representative).

### **9. Micro Exemption**

Option 9a: As other policy amendments, exempt micros from TUPE amendments until XXXX 2014.

Option 9b: Allow TUPE amendments to apply to micro businesses.

### **10. Guidance**

Option 10a: No Change to current guidance.

Option 10b: BIS to improve guidance to TUPE regulations.

## 6. Available Data Sources forming the Evidence Base

TUPE is a complex area of legislation. There is little data available on the exact numbers of employers which might be affected and likely costs and benefits for specific effects. The government collect data on transfers through the Workplace and Employment Relations Study and although a total number of transfers can be calculated using this data, it is difficult to ascertain which of this number would qualify for TUPE or be affected by the changes discussed. The Impact Assessment published alongside the 2006 amendments to TUPE makes certain assumptions (for example assuming that 65% of service provision changes were covered by a TUPE prior to the revisions to the regulations in 2006). Some impacts have been illustrated using estimates made in the 2006 IA (up rated by CPI inflation) but broadly speaking BIS are unwilling to replicate these assumptions due to the changes in policy, economic cycle and UK business culture over the last few years. Some of these assumptions have been included as consultation questions to enable BIS to update the figures.

Several of the consultation questions ask respondents directly for examples of costs and benefits that they are aware of, or may have accrued in previous transfers. Therefore, it is hoped that as a result of this consultation, the government will have a much better idea about both the types of employers that will be affected by each of the changes and possible costs or benefits from these. The Impact Assessment for the final legislative changes will contain more detailed monetisation of costs and benefits. However, in the light of this, the analysis provided in this Impact Assessment is deemed proportionate at this point. In the cases where monetised costs and benefits are not available, the impacts of a policy change have been described with some indication of risk or likelihood of the event occurring.

This paper now goes on to describe the evidence available. Much of this evidence sets the scene for many of the policy options described in further detail in this Impact Assessment.

## 7. Calculating the total number of TUPE transfers and the number of employees involved.

The **Workplace and Employment Relations Survey** (WERS) gives details on transfers that took place between February 2002 and April 2005 and the number of employees involved in these transfers. Note that WERS 2011 will be released by the final IA for this policy and so these numbers will be updated.

WERS only interviews employers with 5 employees and above, therefore none of the transfers involving businesses smaller than this will be recorded.

The survey asks employers if their business has experienced changes in certain areas in the last 2 years<sup>3</sup>.

The categories for change are:

Change of Name

Change of Address

Change of Activity

Agreed takeover / merger

A takeover / merger formally opposed

Sold by parent organisation

An ex-public sector now privatised / denationalised

Management buy-out

Buy-out by employees generally

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<sup>3</sup> *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.*

Establishment split from another workplace in this organisation  
Establishment merged with another workplace in this organisation

Categories 1, 2 and 3 would not (on their own) qualify for TUPE regulations. Category 5 is also 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. However, it was decided that all the other options could qualify for TUPE regulations. Many of them would not qualify for TUPE (due to being share buy-outs or for other reasons). However, BIS will take all of these other categories as TUPE (as an upper limit).

Therefore, the estimated maximum number of TUPE transfers per annum is 37,000<sup>4</sup> – on the basis of the WERS 2004 data for the number of businesses undergoing at least one agreed takeover/merger in a year.

However, it is likely that only a proportion of these cases will represent a TUPE transfer, so this 37,000 is likely to be an over-estimate of the number of TUPE transfers occurring due to transfers of an undertaking.

The lower limit of the number of employers experiencing a TUPE transfer is unknown although the actual number is still considered to be several thousand. Note that several employers experience TUPE transfers in the form of Service Provision Changes (SPCs) which are not included in this analysis. The number of SPCs is calculated in the section below but it would not be possible to add the figures together because some employers experience both sorts of changes and would therefore be counted twice.

These numbers are annual averages valid for 2002-2005, the years the WERS survey reports on. WERS 2011 results will be published in January 2013 when this data can be updated.

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 will 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.

## 8. Measuring the number of Service Provision Changes (SPCs)

Since 2006 TUPE applies to all Service Provision Changes (SPCs). WERS 2004 can also be used to provide some measurement into the volume of SPCs.

The WERS survey asks employers whether they contract certain services including:

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

Firstly, TUPE only qualifies when the provider's employees performing the work are an organised grouping of employees, whose principal purpose is to carry out the service for the client which is unlikely to be the case for several of these services. Therefore this should also be viewed as an over count.

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<sup>4</sup>WERS estimates 37,000 of employers experienced a TUPE transfer in a 2 year period, (with a confidence interval between 26,500 and 48,000). 12 per cent of the interviewed employers experienced at least one transfer or merger that could qualify as TUPE over a 2 year period. Multiplying through by the number of employers in the population (700 thousand according to ONS workplace population 2004) and dividing by 2 to create an annual estimate.



Over 80% of employers contract out at least one of the above activities. This amounts to around 585,000<sup>5</sup> employers and of these employers around 100,000<sup>6</sup> have changed service provider in the last 5 years. About 70,000<sup>7</sup> employers have brought a particular service (of those stated above) in house in the past five years that was previously contracted out. Note that these two figures cannot be added together simply due to some employers doing both activities. Also, there are no statistics for those who have started to tender a project in the last 5 years (changing from supplying internally to hiring a company would also be within the scope of the current TUPE regulations).

In total, BIS estimate that over the last 5 years between 100,000 and 200,000 businesses have conducted a service provision change<sup>8</sup>. That amounts to between 20,000 and 40,000 per year. As noted above, a number of these will not be service provision changes covered by TUPE, as the employees of the service provider will not predominantly provide the service to the hiring business. Of those where the contractor's employees do predominantly provide the service to a single hiring business, then in many cases the change would be covered by the pre-2006 TUPE regulations (i.e. they would involve a transfer of an undertaking). However, some cases would only be covered if Service Provision Changes were included as part of TUPE legislation. There is no evidence to suggest what proportion of these changes is under basic TUPE legislation without the SPC inclusion 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 goes some way to provide numbers of both TUPE transfers and SPCs. There are limitations to both counts such that neither can directly be used to calculate costs and benefits relating to TUPE as BIS would have to make further assumptions about the numbers of transfers, which are assumed to be both disproportionate and unhelpful at this stage as our consultation respondents will be able to offer further information on costs, benefits and the numbers of employers affected.

There is also a question included in the consultation giving respondents the opportunity to comment on the logic contained within this IA, to suggest areas that have not been discussed, to offer amendments to the discussion provided and to propose monetised evidence/estimates of the impact of the proposals. It is hoped that several respondents will provide useful information that will further enable BIS to assess the impacts of this policy.

## **9. Employment Tribunal data**

Her Majesty's Courts and Tribunal Service provide BIS with breakdowns of the tribunal numbers relating to TUPE. 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.

However, it should be noted that as there are so many TUPE transfers occurring every year and a comparatively low number of tribunal cases, TUPE legislation should be viewed as an area where there is good compliance.

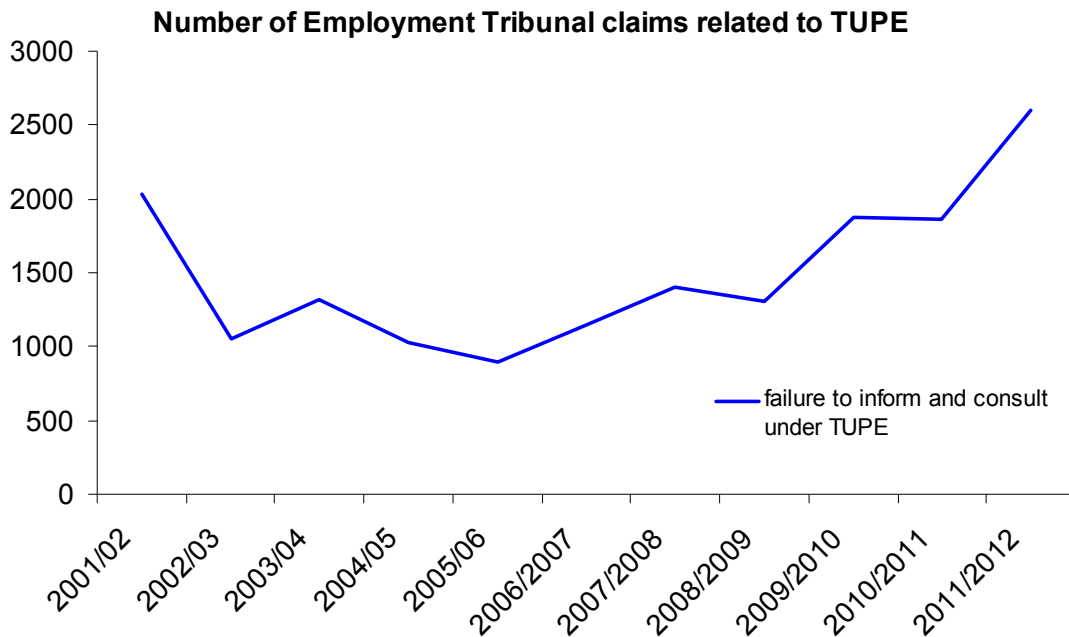
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<sup>5</sup> As the 585,000 is calculated from a survey the number is actually in the range of 560,000 to 610,000

<sup>6</sup> Between 75,000 and 120,000

<sup>7</sup> Between 50,000 and 95,000

<sup>8</sup> This is the number of businesses 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 an average of 2002-2005



This increase may not be the result of the legislation but perhaps more the economic climate, however, the desired decline in tribunals relating to TUPE (predicted as an outcome of the 2006 amendments) has not appeared to have occurred. Figures showing the number of tribunal claims relating to unfair dismissal due to TUPE have not been presented separately since 2003/04, so it is not clear what has happened in these cases, though overall unfair dismissal tribunal claims rose during the recession.

Therefore, while the worsening economic conditions may account for the rise in recorded employment tribunal claims relating to TUPE, the increased scope in TUPE to cover more service provision changes could have led to an increase in tribunals relating to “failure to inform or consult under TUPE”. However, as it is unclear how many transfers of undertakings have taken place in each year, it is also unclear whether the rate of tribunal claims due to TUPE as a proportion of the number of transfers, has risen or fallen, even if the numbers of claims has risen.

As mentioned above TUPE related claims have increased further in 2012, against a trend where most other types of cases have decreased in number. This could be due to an increased number of transfers occurring due to the economic climate, or it could be that employees are becoming more aware of their rights as the 2006 changes are bedded in.

In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims.

Employment tribunals can be expensive for employers and the exchequer. Employers incur costs through time spent on the tribunal, potentially fees for advice and representation as shown in Table 1 and finally any compensation payments (not shown in the table). The number of TUPE related case that go to a full hearing is unknown, however for those that do, on average an employment tribunal hearing costs the exchequer £4450 administratively Therefore any simplification to the TUPE regulations or the guidance around complying with them that would enable businesses to comply more easily, and therefore incur fewer tribunal claims would be beneficial

<b>Table 1: Summary of costs incurred throughout employment tribunal process, by outcome</b>		
	<b>Employment Tribunal Hearing</b>	<b>Individual Conciliation</b>
Employer	£4,200	£3,300

Claimant	£1,500	£1,100
Exchequer	£4,450	£640
Source <sup>9</sup> : BIS estimates from Acas, HMCTS, SETA and ASHE data in 2011 prices. Figures are rounded.		

## 10. A specific note on Familiarisation Costs

Many policy changes incur substantial familiarisation costs on the affected parties as they must adjust their current behaviour for new government regulation. It is worth noting that, except for very large employers who regularly conduct service provision changes, the familiarisation costs directly incurred by the transferor or transferee to do with this legislation are thought to be low. It is assumed that employers experience a TUPE process relatively infrequently, so each time a business goes through a such a process they will need to familiarise themselves with it. On this basis, there will be no one-off familiarisation costs for the proposed change, and so most of the options below do not set out familiarisation costs as a separate category.

Transfers are complex legal procedures, and parties will mostly receive comprehensive legal advice throughout the process. Therefore legal professionals will become acquainted with any changes and advise transferring parties accordingly. Perhaps there is a familiarisation cost in the legal profession that will be passed onto businesses, but this is thought to be negligible.

Note that some of the specific options do carry familiarisation costs and these are identified individually.

## 11. Summary of Evidence

In summary, BIS are able to obtain some scale of the numbers of employees and employers involved with TUPE and details on the recent increase of tribunals relating to employers failing to inform and consult under TUPE.

There are no sources on information on the expected sizes of costs and benefits for employers but it is hoped that by providing the numbers consultation respondents will be able to advise the government effectively on their proffered options.

As a general rule, rather than attempting to monetise values, BIS have mostly explained the cost in terms of likelihood or risk without attributing precise figures. It is thought that rather than making several assumptions, consultation respondents again can advise the government where data is lacking.

Final Impact Assessment will make use of the information provided in the consultation, and an update of the WERS survey due to be published in January 2013 and provide more comprehensive numbers. However this approach is deemed proportionate for the consultation at this stage.

Respondents are asked to respond fully to question 16 on the consultation which asks about the impact of these changes on equality and diversity in the workplace.

<sup>9</sup> Table taken from .BIS Resolving Workplace Disputes Final Impact Assessment (<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1381-resolving-workplace-disputes-final-impact-assessment.pdf>)

## **1) Service Provision Changes**

A **service provision change** (SPC) occurs when a client either: out-sources activities for a contractor to perform them on its behalf; re-tenders for such activities; or brings the activities back in-house.

### **Option 1a: No change (i.e. retain SPCs within TUPE)**

There are no costs or benefits directly related to this “no change” option because this option is used as a benchmark to the others and therefore the costs and benefits are simply the inverse.

However, it should be noted that one cost related to all the other options will be a familiarisation cost on the time and legal fees associated with stakeholders becoming familiar with the changes to the laws. In the case of SPCs this cost is potentially high because one of the reasons for including SPCs in TUPE was to limit the confusion experienced by transferring parties trying to ascertain whether or not their SPC change qualified for the TUPE regulations. The previous government decided to minimise this confusion by covering the majority of SPC changes by TUPE. There is no quantitative information available on this as the cost would differ from business to business.

To give some scale of the numbers of employers affected by the decision on whether or not to include SPCs, according to the Workplace Employment Relations Study (WERS), in 2002-2005 over 80% of employers had some sort of function run by another company. Evidence suggests that between 20,000 and 40,000 employers re-tender a contract every year<sup>10</sup>. Not all of these transfers are affected by whether SPCs are included in TUPE legislation because about 65%<sup>11</sup> of cases many would qualify under TUPE regulations even if SPCs were no longer included and some would not (and do not) qualify for TUPE even if SPCs are included<sup>12</sup>. One argument for including SPCs as part of TUPE was to avoid confusion for the transferring parties themselves.

The call for evidence, conducted by BIS in January 2012 fed back mixed views on whether SPCs should be included in TUPE.

66 respondents favoured including SPCs  
47 respondents wanted them repealed  
61 expressed no view

### **Preferred Option**

**Option 1b: Remove SPC changes (but some would still be covered under the main test for a relevant transfer)**

#### **Costs:**

##### **Familiarisation Costs**

Some service providers and some large commissioners will regularly conduct transfers of this nature and therefore any change will incur some familiarisation costs amongst these employers in particular. This is in contrast to most other TUPE transfers because non SPC transfers generally occur infrequently (and therefore familiarisation costs are less of an issue).

##### **Ongoing Costs**

**Transferor:** If the transferor loses a contract they remain responsible for the employees working on the contract and must either make them redundant or employ them elsewhere within their

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<sup>10</sup> See 'Available Data Sources forming the Evidence Base' above for detailed methodology on the Workplace Employment Relations Study (WERS)

<sup>11</sup> The 2006 IA estimated that 65% of SPCs were covered by TUPE, 25% were unclear cases needing legal advice and 10% were definitely not included in TUPE. We are looking to update this percentage now that SPCs are included in TUPE and the consultation asks respondents for information on this.

<sup>12</sup> This can occur for several reasons including employees working for several contractors, or it only being by chance that an employee always works for the same contractor.

organisation. Where the transferor finds themselves with excess employment it is costly to reduce the numbers.

**Transferee:** The transferee must recruit or reassign employees when they win a contract. This could be expensive and may make them less able to offer a competitive bid for a tender.

One of the drivers for introducing this reform in 2006 was to enable SMEs to compete with large businesses for government tenders (as they would inherit a workforce). If this were to increase competition in tender bids as all employers would get same employees (favouring SMEs particularly who may find it more difficult to bid otherwise) there would be a strong case to keep the SPCs within TUPE. However there is no evidence to suggest whether the number of SMEs winning tender contracts has increased.

Due to increased uncertainty surrounding whether a service provision will qualify as TUPE there will be a possible increase of legal or insurance costs associated with a transfer.

It should be noted that even with SPCs included within TUPE, there is still a risk incurred on all bidders, other than the incumbent, as others do not know what quality workforce they will receive (or even if the employees will agree to transfer).

**Services Consumer:** The services customer may not get the most competitive bids in response to a tender because the cheapest suppliers may not be able to bid due to having to recruit all the staff from scratch. However, note that it could also be argued that external bids may be more competitive as they would not need to offer the same terms and conditions.

Secondly, the consumer loses the experience in staff members which it could retain were they to be included with the bid. However, this is potentially outweighed by the benefit of service customers being able to lose the contracted employees that they do not value.

There is also a potential cost in that bids may be made on different assumptions as to whether or not TUPE will apply.

**Employees:** Employees would be made redundant more frequently when their companies lost service provision bids. The Impact Assessment in 2006 identified a gain to individuals of between £10.8 million and £24.1 million per year<sup>13</sup> from better terms and conditions. Repealing SPCs from TUPE would remove any of these benefits that have accrued for the proportion of employees who would no longer be covered by the legislation [in respect of particular transfers].

**Exchequer:** Firstly, as the customer of many SPCs the exchequer will incur costs as the services consumer. Additionally where the exchequer is the transferor or (less often) the transferee they will incur costs as these groups.

Secondly, there is a potential cost to the Insolvency Service who would have to contribute to redundancy payments from any employers who became insolvent after losing the service contract. Both the cost and the probability of insolvency would increase if the employer continued to be liable for their employees after losing the contract.

Both the confusion caused by whether a service provision change was caught under TUPE legislation and the increased likelihood of employees being made redundant should result in an increase in employee tribunals. The Impact Assessment in 2006 identified a £0.6million (in current prices) benefit to the exchequer with a reduction in tribunals. However, the only available data shows that the number of tribunals relating to failure to consult under TUPE has

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<sup>13</sup> The net benefit to employees equals the gains from better terms and conditions (17-39million) less the loss from fewer redundancy payments (6.4-14.5million) = 10.8-24.1 in 2004 prices. Uplifting to 2011 prices using the CPI gives £13million to £30million quoted elsewhere in this document.

increased. The effect of TUPE legislation on the number of unfair dismissals is unknown. Therefore, there is no predicted cost or benefit to the exchequer at this stage through the tribunal system as the exact effects of the SPC inclusion is unknown.

## **Benefits**

**Transferor:** With SPCs currently under TUPE, the transferor cannot easily allow their employees to continue working for them, because they would be legally required to move employees across to the transferee; these may be employees who have a good relationship with the company. Repealing the SPCs allows transferors to keep these employees more easily. However, transferors can sometimes rotate employees within their organisation to not lose the best; therefore, this benefit may be minimal as there is currently some scope for this.

**Transferee:** Where TUPE does not apply, the transferee would get to recruit their own staff under their own terms and conditions which may be considerably more favourable to the company. The recruitment costs may be more than covered by quality of staff recruited. Also the current risk of the transferee inheriting bad staff members without the good ones is nullified. BIS have received reports (TBC) of some transferors removing all their top quality employees from the area of transfer and replacing them with those employees that may be less good.

The Impact Assessment in 2006 identified a cost to British business of between £10.8 million to £24.1 million per year<sup>14</sup> made up of more expensive terms and conditions (less fewer redundancies)<sup>15</sup>. A repeal would remove any of these costs that have accrued and therefore this option presents a net benefit to business (the cost being bourn by employees). Also, transferees would gain from de-regulation due to saved staff time and legal fees related to complying with TUPE, although this benefit cannot be quantified and could well be neutralised by the additional fees of having to agree on the arrangements for taking on the service without the TUPE framework.

**Services Consumer:** The consumer may tender a contract because they are unhappy with the service provided by the current company. When SPCs are not included in TUPE, the consumer gets to change both the managing company and the staff actually providing the service. If the staff were the cause of the dissatisfaction, then this is a crucial element of the re-tender.

**Employees:** Any employee who would rather be offered redundancy than being transferred will benefit from this system, equally any additional churn in employees adds to labour market flexibility which could reduce the time workers spent unemployed, providing new jobs were available. This would be more likely to benefit employees in times of growth.

**Exchequer:** As the customer of many service contracts, the exchequer will benefit from better value for money as the services consumer. Additionally where the exchequer is the transferor or (less often) the transferee they will benefit as these groups.

## **Summary of Consultation Questions in this section:**

- Question 1** Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No.
- a) Please explain your reasons
  - b) Are there any aspects of the pre -2006 domestic case law in the context of service

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<sup>14</sup> £13 million to £30 million uplifted to 2012 prices using the CPI.

<sup>15</sup> When SPCs are included in TUPE businesses would gain from fewer redundancy payments but lose out in more expensive terms and conditions for employees. The figures calculated in 2006 were £57 per week per employee x 52 weeks x 8,000 to 19,000 employees affected x 70% = £17.4 million to £38.7 million less 6.4-14.5million on fewer redundancies and then uplifted to 2012 prices.

provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

**Question 2**

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

- a) Do you believe that removing the provisions may cause potential problems? Yes / NO
- c) If yes, please explain your reasons.

**Additional IA question A: please provide any estimates you have of the likely costs and benefits of the proposals on SPCs, and their likely impact on competition.**

**Additional IA question B:** Before service provision changes were included within TUPE, it was thought that 65 per cent of such changes qualified as TUPE transfers. Since service provision changes have been included, more are likely to be caught, but not necessarily all. This is because not all changes in service provider are covered by TUPE, for example, the service may be too fragmented between different providers, or the activities post-transfer may not be sufficiently similar to those pre-transfer, or the activities might be performed for a different client, or there might not have been a team organised by reference to the requirements of the client.

BIS would be interested in any information on the proportion of changes to these service provision contracts that is thought are currently covered by TUPE under regulation 3 (i) (b).

If you are responding to this consultation as, or on behalf of an entity that contracts out services, what proportion of service provision contract changes that occurred in the last 3 years do you consider were covered by TUPE?

## **2) Employee Liability Information**

The Call for Evidence has made clear that two of the current requirements under employee liability information are not working properly in some instances; these are: (i) the requirement on the transferor to provide employee liability information to the transferee at least 14 days before the transfer (unless in the case of special circumstances), and (ii) the categories of information required to be provided, which were designed to ensure that the new employer is better informed of the ongoing employment rights of the employees they are taking on. It can sometimes be that the relevant information is supplied at the last minute, such that key arrangements affecting employees are made in a hurry. This includes, setting up benefits and payroll, organising inductions and other procedures, and is particularly problematic for businesses with a large number of employees.

**Option 2a: No change. Transferor is required to provide transferee with Employee Liability information 14 days before the transfer takes place.**

This is the current baseline and therefore contains zero policy or administrative costs or benefits.

To give some scale of the numbers of employers affected by TUPE regulations on the whole, it should be noted that in 2002-2005 evidence suggests that a maximum of 37,000 employers experience a change in undertakings of some kind every year. See the section on 'Available Data Sources forming the Evidence Base' above on the Workplace and Employment Relations Study for detailed methodology and quality. This figure contains some Service Provision Changes but only those where a transfer of undertakings also occurs, and therefore where TUPE would have applied under the pre-2006 regulations (Option 1b). It should be noted that the BIS website indicates that the provision of employee information is part of the initial information supply in a business sale/merger – to enable the buyer to carry out due diligence. Where this is the case, the 14 day limit would presumably be well exceeded, although it should be noted that information can only be supplied on an anonymous basis at this early stage. However, it may be a smaller population of transfers where the 14 day limit ends up being binding.

### **Preferred Option**

**Option 2b: Removing the requirement to provide employee liability information from the regulations and allowing employers to decide arrangements for transferring that information themselves (the government will guidance).**

Wherever possible, the market, and not regulation, should control transferring parties' behaviour. Different transfers in different circumstances will need different lengths of time to transfer information. If this part of the regulations were removed, entities would be able to agree a date for information transfer between themselves.

### **Cost**

**Transferor and Transferee:** As both parties would have to agree an acceptable information transfer between themselves, there may be an increase in the legal costs or indemnity insurance around the transfer negotiations as this would be a further aspect that needed agreeing. Arguably, however, this is not much of a cost because parties have to agree on transfer of information under current regulations; the agreed time is just required to be above 14 days, however BIS are aware that in many cases it seems that companies simply take the 14 days as an adequate deadline and do not negotiate further. There is also a potential cost if employers may be confused about what can and cannot be disclosed consistently with data protection principles. This doubt might provoke a cautionary approach (insufficient transfer).

**Employees and Exchequer:** If information is received at the last minute, the transferee may not deal with the employees situations well enough which could result in higher numbers of tribunals due to grievances.



## **Benefit**

**Transferor and Transferee:** Some transfers will require information earlier in the process due to the complexity of the information and others would not require the finalised information until later on. This method encourages transferring companies to consider when it is appropriate to transfer the information across and include it as terms of the transfer. As it is in all parties' interests for the transfer to go smoothly, a more optimal date will be agreed than could be imposed by government regulation using a one size fits all method. However, guidance should be provided to transferring parties to warn them of the necessity of agreeing a date for liability information to be transferred well in advance of the transfer if possible.

**Employees:** The transferee having information earlier could facilitate both a better and more timely consultation of employees.

**Exchequer:** This would be a deregulatory approach which would increase autonomy amongst transferring parties, removing the exchequers responsibility in this area.

## **Summary of Consultation Questions in this section:**

- Question 3** Do you agree that the employee liability information requirements should be repealed? Yes/No.
- a) If yes, please explain your reasons.
  - b) Would your answer be different if the service provision changes were not repealed?
  - c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

**Additional IA question C: please provide any estimates you have of the likely costs and benefits of the proposals on employee liability information**

### **3. Restrictions on changes to employee terms and conditions**

Regulation 4 sets out the effect on contracts in a transfer situation. Regulation 4(4) and (5) were introduced in TUPE 2006. They make void any changes where the sole or principal reason for the change is the transfer itself, or connected to the transfer and not an economic, technical or organisational reason entailing changes in the workforce. Domestic courts have interpreted “entailing changes in the workforce” as meaning that there must be a change in the number of those employed in the workforce or a change in job function.<sup>16</sup> The result is that in practice, the exception is difficult to make out if the employer only wishes to change terms and conditions (e.g. to avoid redundancies). It also means that it is not available where the employer may merely wish to harmonise terms and conditions.

BIS have considered the possibility of giving transferees more flexibility to change their new employees’ terms and conditions with their current employees. This would reduce the cost to businesses of taking on TUPE employees.

However, the Government has concluded that, on the basis of the existing case law interpreting the Directive, there is a very high risk that any provision allowing parties to agree to variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the Directive.

#### **Option 3a: No Change to current position on variations to contract**

This is the baseline option from which other options will be measured. BIS are aware that it is inefficient for employers to have different groups of employees on different terms and conditions with no flexibility to make changes, but are also aware of the importance from an employee perspective of keeping terms and conditions through a transfer.

As always there will be a familiarisation cost associated with any changes to this law that transferees will incur.

#### **Preferred Option**

#### **Option 3b: Changing the wording of the provisions restricting changes to contracts to better reflect the wording of the Directive**

##### **Cost**

##### **Transferee**

Any new wording that did not clearly guide transferees with what they could and could not change would create more cost in confusion and potential legal cases if the transferee wrongly interprets the law or guidance.

##### **Employee**

Employees do not want their terms and conditions to be more easily changed (especially made worse) and therefore incur the main cost associated with this option

##### **Exchequer**

As with transferees, any increase in confusion caused by poorly thought out legislative changes could increase the number of employment tribunals, costing the exchequer an average of £4540 per hearing.

##### **Benefit**

##### **Transferee**

Ability to change terms and conditions should be more closely aligned to the restrictions in the Directive and reduce risks of the provisions being interpreted more widely than the Directive

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<sup>16</sup> The leading authority is the Court of Appeal judgment in *Berriman v Delabole Slate* [1985] IRLR 305.

requires. This may mean that changes will be able to occur in some cases where they currently could not, or would be higher risk of being found to be void.

### **Employee**

The employee is still protected against purported variations which are because of the transfer. Where changes could be more easily made under this provision, there could be benefit to the employee as they are more likely to have a good, lasting employment relationship if there are fewer large overheads associated with their transfer.

### **Exchequer**

As this area becomes clearer, the number of employment tribunal cases would be likely to decrease, saving the government £4540 on average per hearing.

### **Option 3c: Limit the future applicability of terms and conditions derived from current collective agreements to one year**

Employees transferring from a unionised employer (perhaps particularly so if they become non-unionised) are likely to cause large costs to their new employer if the terms and conditions from the current collective agreements are allowed to continue indefinitely.

### **Costs**

#### **Transferor, Transferee and Exchequer**

There are no costs expected to be incurred by the transferor or transferee except for any increased tribunal costs being borne by the transferee and the exchequer.

### **Employee**

Again the employee incurs most of the cost associated with this option. Unionised employees may not want to move to a non-unionised employer as after the “limit” to their terms and conditions expires there would be more scope for their variation. However, there would be more protection if, in cases where the change is by reason of the transfer, there is a condition that overall the terms should be no less favourable than the pre-transfer terms.

### **Benefits**

#### **Transferor**

Changes in this legislation may enable more non-unionised potential transferees to bid in areas where employees are unionised. Therefore, the transferor may have more options when choosing a transferee. In SPC transfers, this benefit is accrued by the Service Commissioner.

#### **Transferee**

There is more scope for changes to terms and conditions of new employees.

### **Summary of Consultation Questions in this section:**

**Question 4** Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? Yes / No

a) If you disagree, please explain your reasons.

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

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

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year

period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes / NO

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

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? Yes / No?.

**Additional IA question D: please provide any estimates you have of the likely costs and benefits of the proposals on the restrictions on changes to employee terms and conditions**

## **4) Protection on dismissal**

The current wording of the TUPE regulation on dismissal of employee because of a relevant transfer (regulation 7, clauses (1) and (2)) states that if the sole or principal reason for a dismissal is the transfer itself or a reason connected with the transfer that is not an ETO reason entailing changes in the workforce, then the dismissal will be treated as unfair.

However, this goes wider than the Acquired Rights Directive which, in Article 4(1), states that just the transfer in itself will not constitute grounds for dismissal. This more narrow approach is also reflected in recent Court of Justice of the European Union (CJEU) case law.

The proposed change, under Option 4b, is to amend the wording of regulation 7 to make it more closely reflect the Directive, and the related case law.

### **Option 4a: No change**

This is the baseline option from which other options will be measured. BIS are aware that the UK regulations go slightly further than required by the Directive, and this may result in more dismissals than required under the exact wording of the Directive being treated as unfair.

As always there will be a familiarisation cost associated with any changes to this law that transferees will incur.

### **Option 4b: Changing the wording of the provisions giving protection on dismissals to more closely reflect the wording of the Directive**

#### **Costs**

##### **Transferee**

If the wording of the revised regulation was unclear in relation to the meaning of the wording of the Directive, and the related EU case law, then there may be uncertainties in interpretation, resulting potentially in additional legal costs for advice and potentially costs of facing additional litigation.

##### **Employee**

Using a narrower interpretation of the protection against dismissal will probably lead to fewer dismissed employees being able to claim unfair dismissal, and therefore getting compensation in addition to any redundancy payment they would be entitled to.

##### **Exchequer**

As with transferees, any increase in confusion caused by poorly thought out legislative changes could increase the number of employment tribunals, costing the exchequer an average of £4540 per hearing.

#### **Benefits**

##### **Transferee**

The change in wording should provide transferees with more leeway to dismiss employees transferring to them without risk of facing claims of unfair dismissal. Therefore transferees may be more able to make efficiencies through redundancies, with the redundancies costing less than would be the case if subject to automatic treatment as unfair dismissal (which could generate compensation payments, and/or employment tribunal costs).

##### **Employee**

There are no direct benefits to the employee

##### **Exchequer**

With fewer dismissals automatically treated as unfair, there should be a reduction in employment tribunal cases.

**Summary of Consultation Questions in this section:**

- Question 6** Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes / No
- a) If you disagree, please explain your reasons.
  - b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? Yes/No

**Additional IA question E: please provide any estimates you have of the likely costs and benefits of the proposals on the protection on dismissal**

## **5) Substantial change in working conditions to the material detriment of an employee (Regulation 4(9) and (10))**

Currently, The TUPE regulations go further than the Directive in that where a transfer involves or would involve a substantial change in working conditions to the material detriment of an employee, under Regulation 4(9) the employee can treat the contract as terminated and is treated as having been dismissed. The protection against dismissal under regulation 7 then applies, so leading to the dismissal automatically being treated as unfair, unless the sole or principal reason for changing working conditions is an ETO. It is possible that in some cases the changes in working conditions applying under these regulations would not be sufficient in other circumstances to enable a constructive dismissal claim.

In addition, if the employee treats the contract as terminated prior to the transfer, in anticipation of a substantial and detrimental change to their working conditions post-transfer, and making use of their right to object to the transfer, the transferor could be subject to unfair dismissal claims.

In Article 4(2) of the Directive, it refers to the employer being responsible for the 'termination', rather than the 'dismissal'. The CJEU has ruled that, on this basis, Member States are not required to guarantee the same rights for employees as would be available for unfair dismissal. The requirement under the Directive is to align compensation with that obtainable in respect of a lawful termination.

The proposal is to replace regulations 4(9) and (10) with a provision using the wording of Article 4(2) of the Directive. This should reduce the scope for terminations induced by employees facing materially detrimental changes to working conditions (for non-ETO reasons) being classified as unfair dismissals – unless the change in conditions was sufficient to give rise to a constructive dismissal claim. It is likely that instead such terminations would be treated as wrongful dismissals, which would involve payment of a notice period, and other contractual benefits.

### **Option 5a: No change**

This is the baseline option from which other options will be measured. BIS are aware that the UK regulations go slightly further than required by the Directive, and this may result in more dismissals than required under the exact wording of the Directive being treated as unfair.

As always there will be a familiarisation cost associated with any changes to this law that transferees will incur.

### **Option 5b Replacing regulations 4 (9) and 4 (10) concerning a substantial change to working conditions to the material detriment of the employee, with a provision that copies article 4(2) of the Directive**

#### **Costs**

##### **Transferees and transferors**

As in section 3 and section 4, there is a possibility that if the wording of the new regulation proved unclear then there may be uncertainties in interpretation, resulting potentially in additional legal costs for advice and potentially costs of facing additional litigation. Given clear rulings by the CJEU, this seems unlikely. Also, in some cases, it may be more costly to pay the employee under a wrongful dismissal claim than under an unfair dismissal claim.

##### **Employee**

The employee would lose the right to claim unfair dismissals if their contracts were effectively terminated through substantial changes to working conditions by the transferee that prove

materially detrimental to the employee. This is likely to reduce the value of any settlement that employees in this situation will get.

### **Exchequer**

If the replacement regulations caused confusion there may be increased administrative costs to the Exchequer due to additional employment tribunal claims. However, as noted above, this is unlikely due to the clear CJEU rulings.

### **Benefits**

#### **Transferees and transferors**

The transferee and transferor would in most cases benefit from not having to face unfair dismissal claims. Therefore transferees and transferors would not face additional costs of compensating dismissed employees when such changes occurred, for example when they were beyond their control – a service provision change that requires relocation, or where substantial changes intended by transferees are anticipated by employees due to transfer (leading to a claim against the transferor due to a potential decision of the transferee).

### **Employee**

The employee affected in these circumstances would mainly have their effective contract termination treated as wrongful dismissal. In some cases, wrongful dismissal will provide the employee with better compensation – through payment for the notice period and other specified contract benefits, than may be achieved if the remedy is unfair dismissal.

### **Exchequer**

The Exchequer should benefit from a reduction in employment tribunal claims.

- Question 7** Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes / No  
a) Please explain your reasoning.

**Additional IA question F: please provide any estimates you have of the likely costs and benefits of the proposals on the protection on dismissal**



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## **workforce (“ETOs”)**

Currently an employer (whether transferor or transferee) can dismiss transferred employees if the sole or principal reason for dismissal is connected to the transfer but is an ETO. Otherwise if the sole or principal reason is connected to the transfer, any dismissal will be automatically unfair. In light of domestic case law, the ETO reason for the dismissal must be a reason of the dismissing employer. This means that if a transferor dismisses staff in advance of the transfer on the basis that the transferee will require fewer staff to perform the work which is transferring, the dismissal is treated as automatically unfair.<sup>17</sup> The liability for this unfair dismissal passes to the transferee at the point of the transfer.

Note also that the redundancy payments may be paid by whichever employer makes the employee redundant (however the redundancy payments would be passed across in the transfer as an increase in the value of the operation if the transferor pays the costs). This becomes relevant in options below where the transferor and transferee can dismiss employees based on the others reason for transfer.

Also, in light of domestic case law, an ETO is only available if it entails a change in the numbers employed or a change in job function of those employed. This means that if there is a redundancy in relation to the location of the work, but the same number of staff is required to continue the work in a different location (so no overall reduction in staff numbers), there is not an ETO and so such dismissals would be treated as unfair.

### **Option 6a: No change.**

This is the baseline option and all other costs and benefits will be measured against it.

### **Option 6b: Including a change so that “entailing changes in the workforce” covers changes in the location of the workforce, so that place of redundancies (which do not involve an overall reduction in the workforce) are not automatically unfair.**

The point has been made that the meaning of ETO does not align with the definition of redundancy under the Employment Rights Act 1996,<sup>18</sup> and therefore does not cover situations where there is a redundancy situation in relation to the place of work, but not affecting the overall numbers of the workforce. This means that if, because of the transfer, the transferee employer intends to carry on the business in a different location, but with the same number of staff overall, then any dismissals as a result of the change of location will be automatically unfair (in respect of staff who have the applicable qualifying period for unfair dismissal purposes). Had there not been a transfer and the employer had sought to make the location change, then the dismissal would have been capable of being fair for unfair dismissal purposes.

### **Cost**

**Transferor:** Little impact, except employees might be more against any proposed transfers as they may be less likely to have an automatic unfair dismissal claim. One potential larger cost to incumbents may be if this change opens up the transfer of undertakings market, reducing the geographical barrier to transfer from the transferee.

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<sup>17</sup> The qualifying period for unfair dismissal claims still applies, so if the employee does not have the requisite service, it will not be unfair dismissal.

<sup>18</sup> Section 139.

**Transferee:** Increasing the transferee's scope to change the workforce location (with less risk attached) is unlikely to cost them unless the change is dealt with insensitively or it is applied to a workforce in a way that breaches employment law.

**Employees:** (See the Equality Impact Assessment for specific employee groups)  
Employees bear most of the cost for this legislative change: it removes an automatic unfair dismissal claim in cases where, had there not been a transfer, there could have been a fair dismissal (which in most cases would be on a redundancy basis, except possibly in some cases where there is a mobility clause and the employer could have relied upon it to move the employee to the new location). Employees would usually be entitled to redundancy payment in this case<sup>19</sup>, but it would still be considered negative.

Not all TUPE transfers would require a geographic change so it is unknown how many employees may be affected.

**Exchequer:** If there was a tendency for transferees to relocate jobs into London this would be out of line with the localism<sup>20</sup> agenda. However, it is also likely that potential transferees outside of London may bid for London jobs and win the contract due to lower costs. This could move jobs outside of London which is potentially in line with the localism agenda.

Tribunals may increase due to increased dismissals (but they may also decrease due to there being fewer automatic unfair dismissal cases).

### **Benefit**

**Transferor:** Transferors may find they have an easier time transferring due to the transferee being less regulated and freer to make changes to the workforce.

**Transferee:** Transferees both benefit from moving a newly acquired workforce geographically without risking automatic unfair dismissal claims and the ability to bid for contracts that are not in a convenient location for them (note that many service provision contracts are location specific so these points are not relevant to them).

**Service Consumer:** If the case of an SPC transfer (many SPCs qualify for TUPE regardless of whether they are explicitly contained within the legislation) the service consumer is more likely to get competitive bids from other bidders than the incumbent due to geography no longer being a barrier to entry.

**Employee:** Employees do not benefit from this scheme

**Exchequer:** As above this may result in fewer tribunals due to any geographic move no longer amounting to automatic unfair dismissal (but tribunals may also increase if there were more dismissals occurring that could potentially be unfair for other reasons).

**Option 6c: The transferor should be able to rely upon the transferee's 'economic, technical or organisational reason entailing changes in the workforce' for making dismissals prior to the transfer.**

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<sup>19</sup> <https://www.gov.uk/selling-your-business-your-responsibilities>  
and

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

<sup>20</sup> The Unemployment rate in London is relatively high compared to some other regions at the moment, so moving jobs into London may not necessarily be removing them from an area with higher unemployment.

Currently, transferees may know how many or which employees they will need to make redundant after a transfer but be unable to make them redundant until the transfer takes place. This adds to the administrative time of the transfer process.

Note that the costs of any redundancies are unlikely to enter into the costs or benefits here because if the transferor pays on behalf of the transferee, this would be included in the price of the transfer. Rather this option aims to make transfers more flexible for all parties by allowing any necessary redundancies to occur earlier in the process.

**Costs:**

**Employees:** Employees may lose their jobs unnecessarily if the transferee is too hasty to request the transferor to remove employees that they end up keeping. Also employees coming up to 2 years employment (the threshold for statutory redundancy pay) may miss out on payments that they may have received under the current system.

**Exchequer:** Potentially where the transferor is insolvent, the Insolvency service would become responsible for this area.

**Benefits:**

**Transferor and Transferee:** The transferor would be able to make employees redundant earlier in the process to save them being moved through the TUPE process unnecessarily. This would benefit the transferee in that they would not need to process the dismissal themselves. Note that the costs would be borne by the transferor, and passed onto the transferee so on net there is not cost to business

**Employee:** The employee benefits from not having to go through a change in ownership before they are dismissed and can start looking for new jobs as quickly as possible.

**Summary of Consultation Questions in this section:**

- Question 8** Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? Yes / No  
a) If you disagree, please explain your reasons?
- Question 9** Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes / No  
a) Please explain your reasons.

**Additional IA question G: please provide any estimates you have of the likely costs and benefits of the proposals around the Economic, Technical and Organisational reasons for dismissal**

## **7. Collective Redundancy Rules and the Application of TUPE**

The new employer who is taking on the function may already have employees to carry out some or all of that function; they may wish the function to be carried out in a different location; or they may feel that they can carry out the function with fewer employees. Where the potential for redundancies is likely to exceed 20, employers must comply with consultation requirements under the collective redundancy rules as well as the requirements to consult under the TUPE Regulations. However, the transferee employer does not constitute the “employer” for the purposes of consultation on collective redundancies until the TUPE transfer is complete. This means that consultation cannot start until after the transfer and any redundancies cannot take place until the consultation is complete<sup>21</sup> and after employees’ individual notice periods.

Note that this section has some overlap with Option 6c:

*“The transferor should be able to rely upon the transferee’s ‘economic, technical or organisational reason entailing changes in the workforce’ for making dismissals prior to the transfer”.*

Both sections aim to enable the transfer period to run quickly, efficiently and with the least hassle to employees and transferees.

### **Option 7a: No change to current collective redundancy rules and application of TUPE, (Improve guidance – Option 9)**

Currently employees can be subjected to two consultations in quick succession and long periods of uncertainty (one consultation for transfer and the second for redundancies) and there is a cost on business efficiency.

#### **Preferred Option**

### **Option 7b: The transferee should be able to engage with the transferors employees in order to consult transferring staff before a transfer**

#### **Cost**

##### **Transferor**

This may cost the transferor administratively as they would be required to allow the transferee access to their employees’ details, or allow employees time to engage with the transferee.

##### **Transferee**

No expected costs

#### **Employees**

It may be confusing for employees to be consulted simultaneously on redundancies and transfers. The redundancy consultation will certainly affect the employee’s opinions towards the transfer consultation and so this would have to be thoughtfully managed.

#### **Exchequer**

The effect on the number of employment tribunals is unknown

#### **Benefits**

##### **Transferor and Exchequer**

No Benefits

##### **Transferee**

The transferee will benefit from a reduction to complexity and time taken to reorganise the workforce after a transfer.

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<sup>21</sup> A minimum of 30 days for 20-99 redundancies, and 90 days for 100 or more.

## **Employees**

Employees will benefit from having a shorter period of consultations and uncertainly through a transfer process.

### **Summary of Consultation Questions in this section:**

- Question 10**      Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes / No.  
a) If you disagree, please explain your reasons

**Additional IA question H: please provide any estimates you have of the likely costs and benefits of the proposals around redundancy rules**

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Further scope to make the transfer process smoother, more efficient and less bureaucratic has been pointed out in relation to the need to consult employees regarding transfers. It has been suggested that regulation 13(11) should be amended to make clear what might be a “reasonable” time to allow for employees to elect representatives having been given the opportunity to elect them

**Option 8a: No change – do not clarify “reasonable” time for the election of employee representatives (See Improve Guidance: Option 9)**

Not clarifying a reasonable time allows for transferring parties to judge what is a suitable period for electing an employee representative themselves. Regulation in this area could prove unnecessary and inefficient.

**Preferred Option**

**Option 8b: To provide guidance on what is a reasonable length of time for the election of employee representatives**

Rather than regulate, we will provide proportionate guidance.

**Costs**

**Transferor and Transferee**

If transferors and transferees follow the guidance, they should not suffer additional costs (they are already required to inform and consult employees). If they do not enable the election of employee representatives in good time for the consultation process, the guidance may leave them more open to an employment tribunal claim and the associated costs involved.

**Employees**

No costs to employees.

**Exchequer**

While the guidance is expected to be acted upon, and therefore have a positive impact, if businesses do not adequately take account of the guidance, then it could result in more employment tribunal claims, as employees would have a clear framework against which to benchmark the actions of the transferor and transferee. This would have a small upward effect on the administrative costs of HMCTS.

**Benefit**

**Transferor and Transferee**

Guidance should help provide transferors and transferees greater clarity on when they need to do to ensure employees can select their representatives in good time. This should help these businesses meet their obligations to inform and consult, reducing the number of employment tribunal claims based on failure to do so. Improved consultation processes may help to improve the morale of affected staff, which could benefit the transferee going forward.

**Employees**

Employees should benefit from clear guidelines, as they should be able to select their employee representatives in good time for the consultation process, and gain a sense of involvement in the process. The guidelines may help more businesses meet their obligations to inform and consult, further benefitting employees. This should reduce instances where employees feel compelled to make employment tribunal claims, but, where the guidelines have not been followed, provide clearer grounds for a case.

**Exchequer**

The guidance should result in increased clarity, therefore making it less likely that transferor and transferee businesses will not enable staff to elect representatives in good time for the consultation process. This should help businesses to comply with the requirement to inform and consult, potentially reducing employment tribunals. Where employment tribunals did occur, the guidance may help in resolving the claim. Therefore guidance could lead to a small reduction in administrative costs of the employment tribunal system.

## **Preferred Option**

### **Option 8c: Micro businesses should be able to engage directly with employees (not through a representative)**

#### **Costs**

##### **Transferor and Transferee**

The only danger with this option is that if communication becomes more informal there is a higher chance of employees not feeling properly consulted which could cause grievance issues

##### **Employees**

Potentially employees who would rather be represented than dealt with personally may dislike this option. Employees could feel less inclined to speak out if they were consulted directly. However, in micro businesses, it is likely that each employee would liaise with the employer individually, and there would be nothing stopping employees responding as a group if they desired. This option merely removes any obligation from the micro business owner to appoint a representative additionally to consulting their staff.

#### **Exchequer**

From an administrative perspective, a regulation affecting only micros will complicate these regulations and it is possible that confusion will be caused surrounding definitions of business sizes and whether the transferor or transferee must be classified as a micro for this legislation to apply.

Finally, there is a risk that tribunal costs could increase if employees do not feel as well consulted as they did with a representative.

#### **Benefit**

##### **Transferor and Transferee**

This option will be a benefit to micro businesses as it is in effect an opt out from the TUPE regulations specifying that the transferee must engage with their employees through a representative. In a transfer involving a micro business employer so few employees are involved that in practice it seems unnecessary to have all communication passed through a formal representative.

##### **Employees**

Employees are likely to appreciate being liaised with personally (not through a representative) when there are only a small number of them.

### **Summary of Consultation Questions in this section:**

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

a) Please explain your reasons.

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

**Question 12** Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a

recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i), rather than have to invite employees to elect representatives? Yes / No.

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

**Additional IA question I: Please provide any estimates you have of the likely costs and benefits of the proposals to Inform and Consult Representatives.**



## **9. Micro Exemption**

The micro exemption options are fully discussed in the Small Firms Impact Test towards the end of this document.

**Option 9a: As other policy amendments, exempt micros from TUPE amendments until 2014.**

**Option 9b: Allow TUPE amendments to apply to micro businesses.**

**Question 13** Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

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

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes / No

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

## **10. Guidance**

The Government will review its guidance and improve it where appropriate.

**Option 10a: No Change to current guidance**

### **Preferred Option**

**Option 10b: BIS to improve guidance to TUPE regulations.**

#### **Costs**

This review and improvement of the online guidance will cost the exchequer up to £20,000 based on a higher executive officer working in the area for approximately 4 months. There is a risk that if the job was not done well, employers who have undergone TUPE in the past would have to re-learn where the information can be found, but BIS are confident that significant improvements could be made to the guidance given this resource.

#### **Benefits**

All stakeholders would hope to gain from a simplification of the TUPE guidance helping employers through the process.

The guidance could offer support and advice to employees, employers and unions as they look to transfer undertakings smoothly. This would also aim to reduce tribunal costs as better educated parties will hopefully avoid tribunals more successfully. Therefore in the long run, the exchequer also should gain from an improvement in TUPE guidance potentially in the form of an online tool for businesses and employees taking part in a transfer process.

## **Summary**

The Government has consulted widely on a number of changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Firstly, the Government aims to remove the gold plating from the European directive, including repealing the service provision changes and the 14 day limit on supplying pre-transfer employee liability information.

Secondly, the Government aims to simplify TUPE legislation by making several changes to the wording of certain sections of the regulations that it hopes will enable employers to better comply with the regulations, without endangering employees rights.

Finally, the Government proposes to commit resource to improving the online guidance in this area to help participants during the transfer process.

The proposed changes are likely to have an impact mainly on employees, employers and the exchequer and many of the expected costs and benefits have been discussed in this paper. Consultation participants should note that the costs and benefits presented above are not considered exhaustive.

The final questions in the consultation document refer to how the Government have carried out the consultation. BIS are particularly interested in any additional evidence that could be provided to further broaden our understanding of TUPE regulations.

### **Summary of Consultation Questions in this section:**

- Question 14** Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes / No
- Question 15** Have you any further comments on the issues in this consultation?
- Question 16** Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No.
- a) Please explain your reasons
- b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
- Question 17** Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

## **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 consultation stage Equality Impact Assessment accompanies the consultation document

We have primarily considered whether these proposals will have an effect on the following protected groups. At the moment, the evidence is not clear, so we would welcome further views. These can be submitted via the response to Q17 in the consultation

### **Scope of this Equality Impact Assessment**

On 5th April 2011 the new public sector Equality Duty came into force. The Equality Duty replaces the three previous duties on race, disability and gender, bringing them together into a single duty, and extends it to cover age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment (as a whole these are called protected characteristics or protected groups). The Duty is based on section 149 (1) of the Equality Act 2010:

A public authority must, in the exercise of its functions, have due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

This Equality Impact Assessment takes an initial summary view of the equality impacts of the proposals to amend the TUPE regulations.

### **Equality Impact**

During our initial discussions, it has been suggested that there may be an impact on the following protected groups. However there is no conclusive evidence available to us as yet.

Disability  
Ethnicity  
Religion or belief

Gender

At the moment, we do not expect that the proposals will have an impact on the other protected groups:

Age

Gender Reassignment

Marriage & civil partnership

Pregnancy & Maternity

Sexual Orientation

We would appreciate receiving any evidence that any of the protected groups may be affected by the proposals.

## **The evidence base**

### Quantitative Data

Our main source of quantitative data to date has been the ONS Labour Force Survey (quarter 2, 2012).

This shows that:

- Employees with a disability represent 14.3% of employees (source ONS Labour Force Survey)
- Employees who have declared themselves to be outside the 'white' ethnic group form 10.9% of employees
- Employees who have declared themselves to have a religious belief form 67.2% of employees

### Qualitative Data

We have made use of

- Research carried out for the 2006 TUPE Impact Assessment
- Responses to the 2011/2012 TUPE Call for Evidence

Three respondents to the 2011/2012 Call for Evidence specifically represented protected groups. These were:

- Mencap
- Papworth Trust
- Voluntary Organisations Disability Group

However the majority of the comments (with one exception – below) did not refer specifically to the impact on protected groups. Comments from these and other respondents who specifically mentioned equality or the protected groups are shown below:

- If post-transfer harmonisation of terms and conditions result in reduced pay, this will affect low paid workers. It will also affect disadvantaged groups, including women and black and ethnic minority workers who are disproportionately affected in contracted out services and the majority of public service workforces (GMB, Usdaw, NASUWT).

- Nationwide Building Society are unhappy with the present systems, which they believe creates a 2 tier workforce, which does not sit comfortably with the notion of equality and receiving equal pay for equal work.
- The TUC and Unite approve of the concept of collective/sectoral agreements, which is in force in many EU countries, but not the UK. This promotes equality.
- Employees on maternity leave have been ‘forgotten’ by a transferor and have not been properly consulted (Irenicon).
- Papworth Trust are concerned about situations where a group with one protected characteristic receives more favourable terms and conditions than others employed in the same role because they are protected by the TUPE Regulations.
- Prospect mention a situation about a potential conflict of employment rights: between the transferor’s employees’ rights under the Equality Act in relation to equal pay and the transferee’s employees’ right in regard to protection of terms and conditions post-transfer.

## **Involvement and Consultation**

We have discussed the policy proposals internally with the BIS Equality staff networks through their involvement with the BIS EQIA peer review group.

We are including a question (Q.16) in the TUPE consultation about the equality impact of our proposal. Based on the response to the Call for Evidence, we expect that there will be a strong response to the consultation. We will actively raise awareness of the consultation with groups representing people with protected characteristics. Such groups will be encouraged to respond to the consultation.

### Who does TUPE affect?

The TUPE proposals will affect all parties involved in a transfer i.e.

- The employer transferring a business activity (the ‘transferor’)
- The employer taking over a business activity (the ‘transferee’)
- The employees transferring from one business to another
- Employees of a transferor or transferee who are not themselves transferring, but may be impacted by a transfer

### Impact on Protected Groups

Our initial assessment has suggested that four elements of the proposals have the potential to impact on protected groups. However we would welcome comments on the potential impact of all the proposals, not just these four.

Service provision changes concern relationships between contractors and clients who hire their services. Examples include contracts to provide such labour-intensive services as office cleaning, workplace catering, security guarding, refuse collection and machinery maintenance. An SPC occurs when a client either:

- out-sources activities for a contractor to perform them on its behalf;
- re-tenders for such activities; or
- brings the activities back in-house

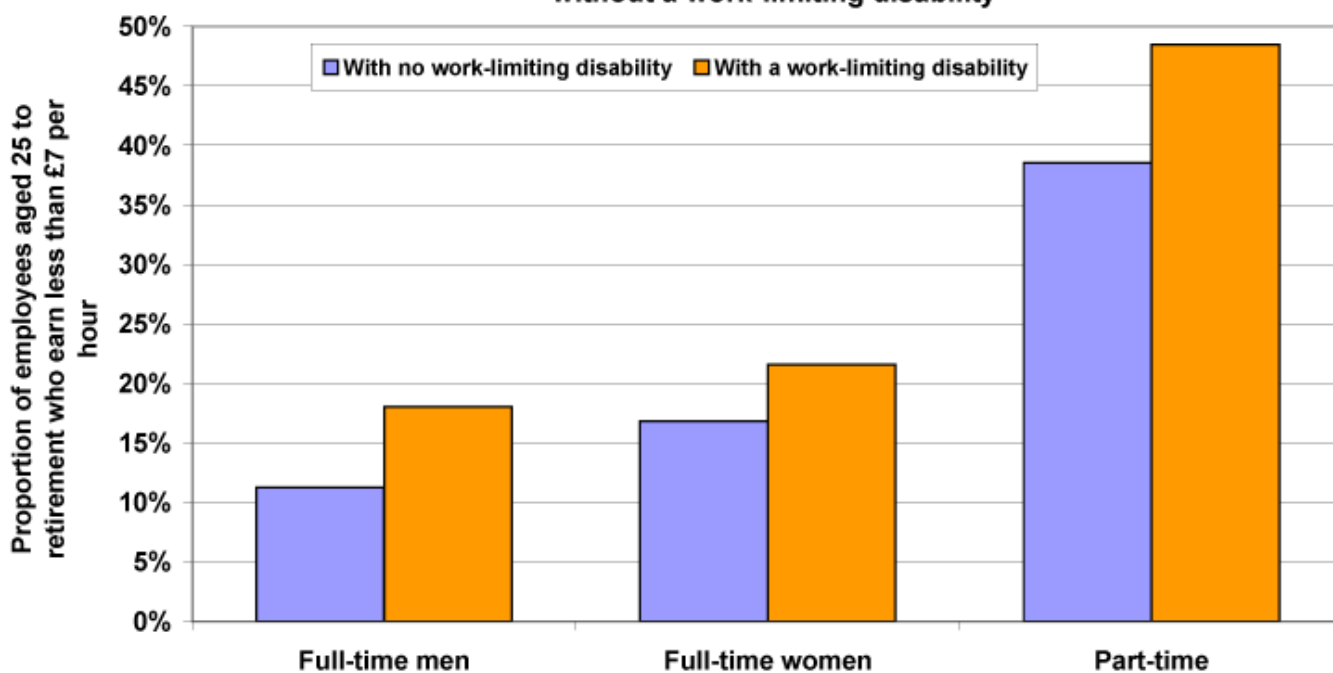
The TUPE 2006 amendments resulted in a higher proportion of SPCs being covered under TUPE. Therefore TUPE protection was extended to a greater number of workers.

One of these intentions of the 2006 amendments was to ensure that a greater number of workers in low paid jobs would receive protection under TUPE. In the 2006 IA, it was argued that the amendments would have a “positive equity impact”<sup>22</sup>

During the current consultation, we therefore will need to test whether the 2006 amendments did in fact have the desired affect of extending TUPE protection to more low-paid workers, as well as testing whether their reversal would have an adverse effect of those who share protected characteristics.

There is some evidence that some protected groups are disproportionately low paid. For example, workers with a work-limiting disability the proportion of employees who are low paid is higher than that for employees without a work-limiting disability.

**For both full-time and part-time work, the proportion of employees with a work-limiting disability who are low paid is higher than that for employees without a work-limiting disability**



Source: Labour Force Survey, ONS; the data is the average for 2008 to 2010; UK; updated Mar 2011

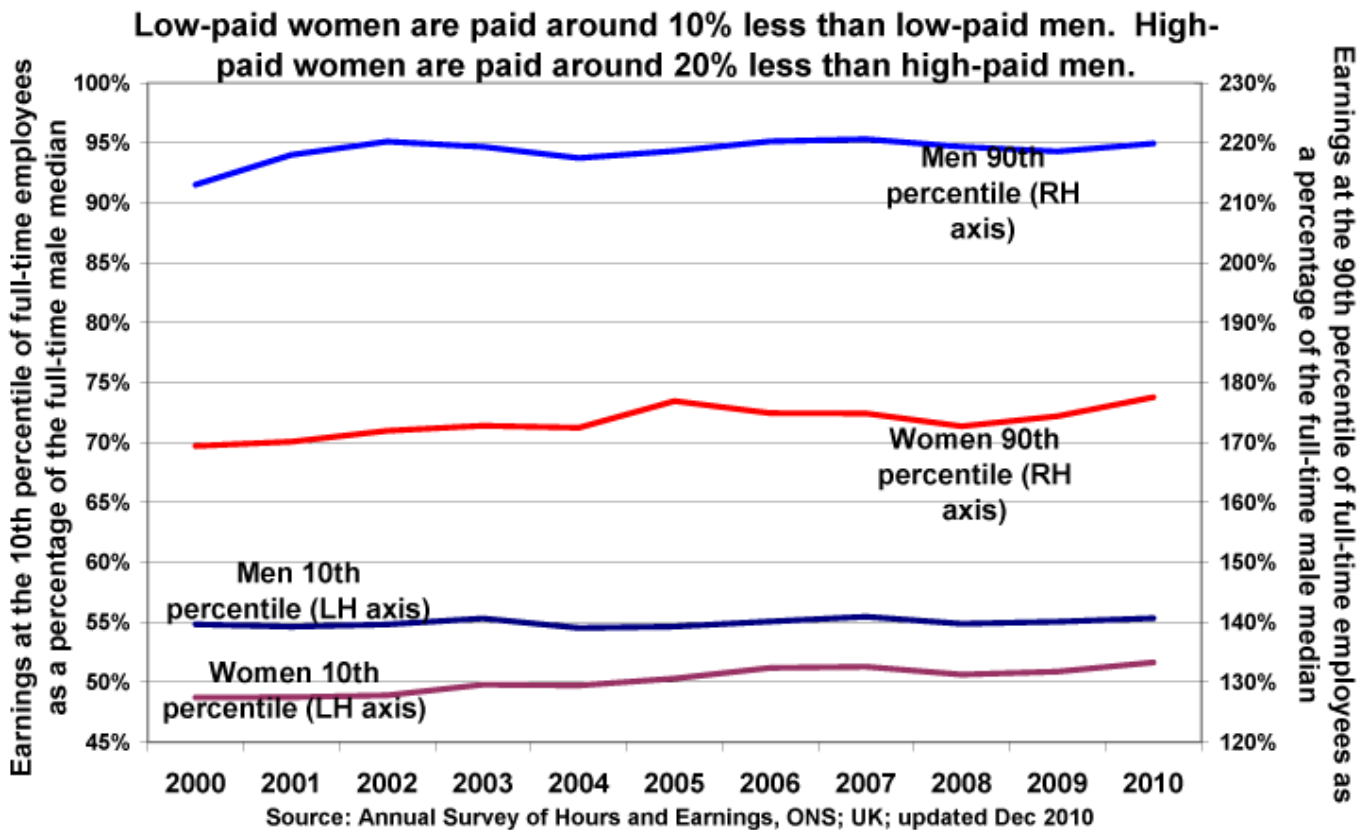
There is some evidence that some protected groups are disproportionately low paid. For example, the proportion of workers with a work-limiting disability who are also low paid is higher than that for employees without a work-limiting disability. Also, low paid women are paid around 10% less than low-paid men.

<sup>22</sup> The text below is extracted from the Revision of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (January 2006).

#### Equity and fairness

73. The Regulations will affect employees in a number of ways. They will increase protection for employees when subject to a transfer of services provision, they will increase certainty when subject to any TUPE transfer and they will increase the chance of keeping a job when the employer that they work for becomes insolvent. Any distributional impacts will depend of the proportions of certain groups (low income, ethnic minorities, women) that are affected.

74. The extension of TUPE to certain types of service provision changes is likely to have an impact on employees in catering, cleaning, security and certain types of computer related services. On the whole these are made up of workers that earn below average wages, both on an hourly and a weekly basis. Giving these workers some protection will have a positive equity impact, firstly through the protection of their incomes and secondly through the increase in their labour market attachment.



However if it was decided to repeal the 2006 SPC provisions, there may well be benefits to the labour market. If TUPE were not to apply to most SPCs, it may increase opportunities for those without jobs to access jobs

b) Restrictions on changes to Terms & Conditions

Under the current regulations, an employee who is taking on staff is subject to restrictions on agreeing changes to their terms and conditions

In the call for evidence, 77% of respondents stated that lack of provision of post-transfer harmonisation is a significant burden. Several respondents made specific comments about the equality aspects of harmonisation. However, we are not making any proposal to allow changes for the purpose of harmonising terms and conditions.

We are proposing to change the wording of the restrictions on changes to terms and conditions, which might have the result that changes can be agreed in more cases than currently. We will need to consider any equality impact of this further.

c) Changes to the Economic, Technical and Organisational reasons entailing changes in the workforce.

Under the current TUPE regulations, if an employer dismisses a transferred employee where the sole or principal reason is the transfer or a reason connected with it, their dismissal is automatically unfair.

However if the reason is an 'economic, technical or organisational reason entailing changes in the workforce' ('ETO'), the dismissal is not automatically unfair.

In some transfers, the transferee company plans to relocate the transferring part of the business without reducing staff numbers. If the employees refuse to relocate, and are dismissed as a

result, then the dismissals are automatically unfair under TUPE. This is because the dismissal would not be for an ETO reason.

The effect of this proposal is likely to be that the affected employee is no longer regarded as being automatically unfairly dismissed. Instead, the employee is likely to be redundant. In this case, the employee may receive any redundancy payment to which they are entitled. If the process has not been carried out fairly, then they may claim unfair dismissal.

It has been suggested that this may affect some members of protected groups who would find it difficult to transfer their working location e.g.

-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. For example, observant Jews need to live in a location which there is a suitable infrastructure which allows them to practice their faith.

However, employment regulations will still provide protection for affected employees:

- if a worker without a mobility clause in their contract is unwilling to transfer their working location, then their job will be redundant, and unfair dismissal laws will apply.

-if a worker has a mobility clause, then the law places constraints on its use. So the worker may still be redundant or may have to move, but the situation would be no different to if there was not a transfer.

d) One of the general amendments on which we are consulting is relevant to micro-businesses. We are proposing that such businesses should be allowed to inform and consult directly with employees on a transfer rather than via elected representatives such as trade unions. This would come into effect where there is no recognised union, and no existing employee representatives that could be consulted. If this proposal goes ahead, would there be an impact on vulnerable members of protected groups who would prefer to depend on elected representatives to represent them in consultations? On the other hand, there may be advantages for employees in receiving information and being heard directly.

### Protection for affected employees

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

- National Minimum Wage
- Redundancy rights
- Claiming for unfair dismissal
- Access to Employment Tribunals

The new Gov.UK website provides clear advice and information on how to take advantage of these rights.

Proposed updated Government guidance will clarify many aspects for TUPE for employers and employees.

### Further Research

Before formulating final proposals, we need to obtain further evidence on the impact of these proposals on equality. We therefore will:



- include a question on equality impact in the consultation (Q.16)
- encourage equality groups to respond to the consultation
- Meet stakeholders with an interest in equality issues
- Carry out further desk-based research

## **Monitoring and review**

We are drawing up proposals for evaluating the effects of the proposals following their implementation. This will include the impact on equality and protected groups.

### **Specific Impact Test (2) - Small Firms**

1. There are no SME exemptions in the original EU Acquired Rights Directive. However, in creating these amendments in the UK, BIS are taking steps to minimise the impacts on SMEs by, for example providing micro businesses with alternatives to electing employee representatives.
2. Currently the UK government are operating a micro business exemption rule whereby regulation exempts organisations of 10 or fewer employees and start-ups.
3. BIS suggests that it would not be advantageous to exempt micros from these TUPE amendments as creating a two tier system would be legally complex. Additionally these changes are thought to be deregulatory and favourable to micro business and unlike some other areas of legislation, familiarisation costs for these amendments are thought to be low, especially amongst micro businesses who are unlikely to be familiar with the current legislation as TUPE transfers are relatively individualised events.
4. Consultation respondents have been asked the following question:  
 “Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No  
  
 a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.  
  
 b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes / No  
  
 c) If so, please give details and suggestions where these costs could be decreased or avoided entirely”
5. Specific areas where SMEs may be disproportionately affected include the proposed repeals of SPCs. Initially one of the reasons why SPCs were included in TUPE was to ensure smaller businesses could bid for contracts without needing the staff to carry out the work. However, as the SME has to reply on inheriting potentially sub standard staff from the previous incumbent, it seems that this is just as risky to the SME as recruiting their own staff. Therefore BIS do not expect the repeal of SPCs to negatively impact on SMEs, but it is worth noting that they may be affected more than larger businesses due to larger familiarisation costs.
6. Finally the proposed micro opt out on having to inform and consult employees through a representative is intended to remove this seemingly unnecessary regulation which should slightly simplify the information and consultation process in respect of employers that are micro businesses.

7. In summary, it is hoped that the proposed changes in this consultation will benefit smaller businesses, and BIS expect consultation respondents to favour these changes applying to all businesses including micros. However, whatever the outcome, throughout this consultation and any subsequent implementation BIS will continue to work to with small businesses to ensure that the TUPE regulations will not impose disproportionate costs on small businesses operating in the UK.

### **Specific Impact Test (3) - Competition**

1. There is little evidence that amendments to the TUPE regulations will have a detrimental effect on competition in the UK. The proposed changes are generally meant to increase the scope for competition in transfers in the UK.
2. Nevertheless, some areas may be viewed as anti-competitive. For example, SPCs were initially included in the regulations to enable smaller businesses to bid for larger contracts that they would not have the resources to carry out without inheriting staff from the previous incumbent. However, there is no evidence, even anecdotal, to show that SMEs have won more tender contracts since the addition of these regulations.
3. Furthermore, BIS have received reports of transferors passing their worst employees onto transferees under the SPC laws. This is anti competitive behaviour and damages all transferees regardless of size, but could be particularly destructive to SMEs.
4. BIS' proposal to amend the TUPE regulations is therefore, not expected to have a negative impact on competition in the UK.

### **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 accord with the Human Rights Act.

### **Specific Impact Test (7) - Justice System**

BIS have completed a Justice Impact Assessment which has been signed off by the Ministry of Justice and HM Courts and Tribunal Service.

It was agreed that the impact on the tribunal system was currently unknown. This will be monitored as this legislation progresses.

It was also agreed that currently there are no other definite impacts on the judicial system.

The Justice Impact Assessment is for internal use, but included the following information that may be of use to consultation respondents:

**Do you expect there to be an impact on HMCST through the increase of tribunal cases?**

As set out above one of the proposals is to repeal the 2006 provisions relating to Service Provision changes. One of the original aims of the proposals was to reduce the number of tribunals. However, the only available data shows that the number of tribunals relating to failure to consult under TUPE has increased. The effect of TUPE legislation on the number of unfair dismissals is unknown. Therefore, there is no predicted cost or benefit to the exchequer at this stage through the tribunal system as the exact effects of the SPC inclusion is unknown

**Do you expect there to be fewer numbers of cases as a result of the proposal?**

Changes to TUPE would in itself be likely to result in some litigation, as inevitably there would be some uncertainty as to the meaning of the new provisions, so it is very likely that there would be litigation to test it, at least initially. They would be put off both by the direct risks (financial) and the risk that it produces an unhelpful precedent. So the level of litigation is not necessarily an indicator of the clarity of the law.

However, the level of litigation is also affected by other factors, e.g. a downturn in the economy may mean that there are fewer business transfers / SPCs, or the downturn may in itself decrease business's appetite to litigate.

So generally the proposals could affect the level of litigation, potentially resulting in an increase at least in the short term. This is unlikely to be a large increase, due to the disadvantages of litigation. If SPCs were to be repealed, there might possibly be slightly fewer cases on those points - this might cancel out some of any extra litigation

**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

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