



Department
for Work &
Pensions

The Transfer of Employment (Pension Protection) (Amendment) Regulations

Government response

March 2014

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Introduction

1. This consultation ran from 25 February 2013 to 5 April 2013. It asked for views on two proposed changes to the Transfer of Employment (Pension Protection) Regulations 2005 (SI 2005/649) (“the TEPP Regulations”).
2. The TEPP Regulations confer protection on employees in relation to occupational pension schemes following a transfer of an undertaking to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) apply. The proposed changes were intended to:
 - clarify the policy intention in relation to pension protection as set out in the Explanatory Memorandum to the TEPP Regulations; and
 - align the pension protection requirements following a transfer of employment with the Automatic Enrolment legislation.
3. There were 39 responses to the consultation. A list of the respondents is included in the Annex.

Part 1 – Clarifying the policy intention in relation to pension protection following a transfer of employment

Background

4. Sections 257 and 258 of the Pensions Act 2004 provide pension protection for certain employees involved in a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply. The protection applies to employees who, before the transfer, had rights in an occupational pension scheme, or a right (including a future right) to join an occupational pension scheme.
5. The new employer must offer the transferring employee membership of an occupational pension scheme. The employer can choose to provide a money purchase scheme, a defined benefit or hybrid scheme, or a stakeholder pension scheme, but it must meet prescribed requirements. Whichever type of scheme is provided, these include a requirement for the new employer to offer to make “relevant contributions”.
6. The TEPP Regulations, made under section 258, define “relevant contributions” for these purposes. “Relevant contributions” means contributions which at least match those being made by the employee, up to a maximum of 6% of the employee’s remuneration.

7. The TEPP Regulations do not explicitly give scheme members the right to choose the level of their own contributions. It was the Government's intention to make the right explicit.

Consultation question one

8. The consultation asked:

“Do you consider that the proposed changes to regulation 3 will correctly reflect the original policy intention as set out in the Explanatory Memorandum attached to the TEPP Regulations; and do the changes make the regulations workable in practice?”

Responses to question

9. A number of respondents did not consider that the proposed amendments would have the intended effect of ensuring that employees had the right to choose the level of their own contributions following a TUPE transfer unless this was specifically provided for in their schemes' rules.

Government response

10. The Government agrees that the regulations as drafted did not give all members the right to choose the level of their own contributions. This right was not made explicit in the TEPP Regulations because the right was conferred by section 111 of the Pension Schemes Act 1993. That provision was repealed with effect from 6 April 2006 (section 111 gave members the right to pay additional contributions to their occupational pension scheme, but it was repealed when tax law was reformed to permit concurrent membership of more than one scheme). It follows that primary legislation would be required to give the member the right to require the scheme to accept the level of contributions the member chooses to make.
11. The Government considered amending the Pensions Act 2004 in order to restore the right of scheme members to choose their contribution level but decided not to do so. The TEPP Regulations, which require a minimum level of contributions from the new employer, were introduced at a time when the provision of a workplace pension was optional for employers. The Pensions Act 2008 has, by introducing automatic enrolment, introduced mandatory requirements for the first time. Under automatic enrolment, all eligible jobholders will become members of a qualifying pension scheme with a minimum contribution requirement imposed on both the employer and the employee. Those minimum contributions will increase so that, over time, the impact of not amending primary legislation to allow employees to choose the level of their contributions over and above those permitted by their schemes' rules will diminish.

Part 2 – Interaction between the Transfer of Employment (Pension Protection) Regulations and Automatic Enrolment legislation

Background

12. The Pensions Act 2008 requires all private and public sector employers, irrespective of size or industry, to automatically enrol all workers who satisfy the age and earnings criteria into a workplace pension scheme. The Government estimates that automatic enrolment will bring between 6 and 9 million people into pension saving for the first time.
13. The Pensions Act 2008 sets out minimum contribution levels for money purchase schemes, including a mandatory minimum employer contribution. From July 2012 to September 2017 the minimum contributions are 1% of qualifying earnings, increasing to 2% for the period between October 2017 and September 2018, and 3% from October 2018.
14. The interaction of the automatic enrolment requirements with the pension protection legislation could require some employers to pay much higher contributions than would be required to comply with their automatic enrolment duties. Under automatic enrolment it is possible that an employer could automatically enrol its employees in an occupational money purchase or stakeholder scheme with initial minimum contributions of 1% from the employer and 1% from the employee. If such employees are transferred to a new employer during the initial automatic enrolment phasing period, the new employer could then be required to pay contributions at the rate of 6%. This would increase costs for business beyond that envisaged under automatic enrolment, and could also lead to the transferred employees being placed in a more favourable position than they would have been had they remained with their former employer.

Proposed amendment

15. In order to address this impact the Government proposed that transferee employers should be able to satisfy the “relevant contributions” provisions of the pension protection legislation by matching the contributions paid by the transferor immediately prior to the transfer, instead of having to match the level of contributions chosen by the employee up to the 6% maximum.

Consultation question two

16. The consultation asked:

“Do you consider that the proposed introduction of an alternative method of satisfying the ‘relevant contributions’ requirement will remove the risk that transferee employers might face substantially higher pension contributions than the transferor employer whilst maintaining the principle of adequate pension protection for transferring employees?”

Responses to question

17. A number of respondents supported the proposal as a measure which would assist sponsoring employers. Some representing the interests of employees, however, considered that it would reduce the pension protection offered by the TEPP Regulations to some extent.

18. The following additional issues were raised:

- some respondents suggested that the new matching rule should not be available where the previous employer operated a non-money purchase scheme, because the level of contributions could be very different depending on the scheme’s funding position, and might be difficult to calculate;
- a number said that there could be difficulties in applying the new matching rule if, for a variety of reasons, the transferor was not contributing to the scheme immediately before the transfer.

Government response

19. The Government has decided to proceed with this proposed amendment, and will amend the TEPP Regulations to allow transferee employers to satisfy the prescribed requirements by matching the contributions payable by the former employer immediately before the transfer.

20. A number of changes have been made to the detail of the draft regulations in response to issues raised in the consultation. The regulations will provide that:

- the transferee employer will be able to meet the requirements of the regulations by either matching the employee’s contributions, up to 6% of the employee’s remuneration, or, in specified circumstances, matching the contributions payable by the former employer immediately before the transfer;
- the option of matching the former employer’s contributions will only be available where those contributions were payable to provide money purchase benefits.

Other issues raised in responses

21. A number of respondents raised additional issues in connection with the TEPP Regulations. These included suggestions that:

- employers should be able to satisfy the TUPE requirements by providing access to a personal pension, including a Group Personal Pension;
- the regulations should make clear the point in time at which employees could choose their level of contributions, and whether they could change their minds;
- the 6% maximum for requiring matching employer contributions should be abolished;
- the reference to stakeholder pensions in the TEPP Regulations should be removed.

22. These suggestions are outside the scope of the specific questions which formed the basis of this consultation, and the first two would require primary legislation. The Government has considered all the suggestions carefully, but does not believe it would be appropriate to address them in the response to this consultation. The Government will, however, monitor the interaction of the TEPP Regulations with the introduction of automatic enrolment, and the additional issues raised in this consultation, including those listed above, will be considered in this context.

Next steps

23. We intend to make amending regulations introducing these changes before Parliament in early 2014. The regulations are subject to negative resolution, and we anticipate that they will come into force on 6 April 2014.

Annex – Respondents to the consultation

Aon Hewitt	Mercers
ASLEF	National Association of Pension Fund
Association of Pensions Lawyers	National Union of Rail, Maritime & Transport Workers
Bob Ward	NEST
Capita Employee Benefits	PMI
Dickinson Dees LLP	Royal College of Midwives
DLA Piper	Sacker & Partners LLP
Dundas & Wilson LLP	SJ Berwin LLP
Elizabeth Harrison	Society of Pension Consultants
Employment Lawyers Association	Speechly Bircham LLP
Eversheds LLP	Standard Life
First Division Association	Thompsons Solicitors
Freshfields	Towers Watson
Freshfield Bruckhaus Deringer LLP	Trades Union Congress
GMB	UK Retirement Resource Group
Hogan Lovells International	Unison
Hymans Robertson	Unite
Institute & Faculty of Actuaries	Universities & colleges Employers Association
John Stamford Associates	
Law Society of Scotland	
Lawrence Graham LLP	