

Title: Changing Transfer of Undertakings (Protection of Employment) (TUPE) Regulations in relation to Retained European Union Law IA No: DBT020(C)-23-LM RPC Reference No: N/A Lead department or agency: Department for Business and Trade Other departments or agencies:	Impact Assessment (IA)			
	Date: 08/11/2023			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
Contact for enquiries: lm.correspondence@businessandtrade.gov.uk				
Summary: Intervention and Options				RPC Opinion: Not applicable

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status Non -Qualifying provision
£m -0.6	£m -0.6	£m 0.1	

What is the problem under consideration? Why is government action or intervention necessary?

The UK government is taking the opportunity to review and revise retained EU Law to introduce flexibility and reduce unnecessary burdens on business. Currently, employers undertaking a Transfer of Undertakings Protection of Employment (TUPE) transfer have to consult with workers' representatives. Where the affected employees do not have representatives, the employer is required to allow these employees to elect representatives. The consultation then takes place between the employer and the elected representatives. There is however an exemption for micro businesses with fewer than 10 employees, who may consult with employees directly if employee representatives are not already in place. The reforms we are consulting on would extend this exemption to small businesses undertaking a transfer of any size, and businesses of any size undertaking transfers of fewer than 10 employees. For some employers, it may be more efficient to consult with affected employees directly rather than go through an election process for employee representatives to consult with. The proposed policy aims to introduce flexibility to the TUPE Regulations to overcome this potential burden. Legislative reform is necessary to revise the regulations.

What are the policy objectives of the action or intervention and the intended effects?

The policy objective is to introduce flexibility into the TUPE information and consultation process. The proposed reforms would give employers with fewer than 50 employees or employers undertaking a transfer of fewer than 10 employees the option to consult affected employers directly if they did not already have employee representatives. This would avoid the time and cost of an election of such representatives. It is a permissive policy option that gives such employers a choice rather than imposing any new obligations. Where employers perceive that a direct consultation with employees will be more efficient, they will be able to take that option, reducing the costs and time associated with electing new worker representatives, and making the regulations easier for businesses to navigate.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The 'Do Nothing' option is that employers undertaking a TUPE transfer who do not have employee representatives would still have to enable an election of employee representatives to take place. The employer would then consult with these representatives.

Option 1 – would enable a) small employers (fewer than 50 employees) involved in a TUPE transfer of any size and b) all employers involved in a TUPE transfer of fewer than 10 employees to consult their affected employees directly if the affected employers did not have existing representatives.

Will the policy be reviewed? No If applicable, set review date:				
Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?	Micro No	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: N/A	Non-traded: N/A	

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 Kevin Hollinrake MP, Minister for Enterprise, Markets and Small Business  Date: 19/09/2023

Summary: Analysis & Evidence

Policy Option 1

Description: Employers involved in a TUPE transfer where fewer than 10 employees are being transferred and small employers involved in a TUPE transfer can consult their affected employees directly where the employees do not have existing representatives.

FULL ECONOMIC ASSESSMENT

Price Base Year 2022	PV Base Year 2024	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -0.8

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0.9	0.0	0.8

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

The cost for employers going through a TUPE transfer (not a service provision change) to familiarise themselves with the proposed regulatory changes is estimated at £0.09 million a year. We estimate that all small, medium and large employers in industries most likely to undergo service provision changes affected by TUPE (cleaning, catering, building maintenance and security) would familiarise themselves with the policy at £0.03 million in year 1.

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

We have not monetised the cost of consulting directly because we lack the evidence to do so robustly. We expect that employers would choose to consult directly with affected employees (rather than enable them to elect representatives and then consult with the representatives) where it was beneficial to the employer. Where there were no existing employee representatives, any elected representatives would be from the affected employees, who would also be involved in direct consultations. Therefore, it is not clear that there would be any cost to affected employees from direct consultations.

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

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

We have not monetised any benefits. The proposed policy change is a permissive change which employers would only utilise if it was net beneficial to them to do so. Given the small transition costs for employers, it would only require a modest benefit to employers for this policy to reduce burdens on them overall.

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

We have not monetised the benefit from not having to elect employee representatives and carry out a consultation via these representatives.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
--	--------------------------	-----

We assume that familiarisation costs per employer would be low, therefore only a relatively small number of employers required to carry out a TUPE consultation would need to see a modest financial benefit for the policy to be net beneficial. Since, we do not have information on the proportion of transfers that involve micro undertakings (i.e. less than 10 employees), we assume all medium and large employers going through a TUPE transfer will familiarise with the changes to the regulations. This is conservative approach and represents an upper-bound estimate.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0.1	Benefits: 0.0	Net: 0.1	

Evidence Base

Problem under consideration and rationale for intervention

1. The Government is taking the opportunity to review retained EU law and make necessary changes to ensure that it supports the UK economy and labour market going forward. Our proposals will remove unnecessary bureaucracy in the way those rights operate, allowing business to benefit from the additional freedoms we have following exiting the EU.
2. This is in line with the Government's objective to support long term growth. The Government aims to build UK businesses' competitive advantage, create jobs and encourage investment.
3. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) implement the EU Acquired Rights Directive. The purpose of the TUPE Regulations is to protect employees' employment rights when the business or undertaking for which they work transfers to a new employer. TUPE may apply when a business changes owner, or when a service transfers to a new provider (for example when another company takes over a cleaning contract).
4. Where TUPE applies, employees' employment and associated rights legally transfer from their previous employer to their new one. Some changes to terms of employment are allowed under specific circumstances, for example, where there is an economic, technical or organisational (ETO) reason for the variation.
5. The Government recognises that the TUPE regulations provide important protections for employees, and they provide a legal framework for transfers of staff. However, we know that businesses can find certain aspects of the TUPE regulations burdensome.
6. Therefore, on 12 May 2023, the Government launched a consultation on areas which we believe could benefit from reform and where we could remove unnecessary bureaucracy. This included the consultation requirements under the TUPE regulations.
7. The consultation sought views on two proposals for reforming the TUPE regulations. The first proposal was that the flexibility for employers to consult directly with employees before a TUPE transfer should be extended to small businesses (if there are no existing employee representatives in place). The second proposal was that the flexibility to consult directly with employees should be extended to businesses of any size who are undertaking a small transfer of fewer than ten employees.
8. The Government is proceeding with the planned reforms to the TUPE consultation requirements. These reforms will allow small businesses (with fewer than 50 employees) and businesses of any size undertaking a small transfer (of fewer than 10 employees) to consult directly with their employees if there are no existing worker representatives in place.
9. The full consultation response is available at:
at:www.gov.uk/government/consultations/retained-eu-employment-law-reforms.

TUPE consultation requirements

10. In advance of a transfer, the current employer (the transferor) and the new employer (the transferee) need to inform and consult with the affected workforce's existing representatives or hold elections for representatives if they are not already in place before the transfer takes place. The transferor must inform representatives about:
 - The fact that the transfer is to take place and the date or proposed date of the transfer;
 - The reasons for the transfer;
 - The legal, economic and social implications of the transfer for any affected employees;
 - The measures (e.g. business reorganisation) envisaged in relation to any affected employees;
 - The measures envisaged in relation to any affected employees by the new employer; and
 - Agency workers used (if applicable).
11. As part of the consultation on a TUPE transfer, the employer must consider and respond to any representations during the consultation and if they reject them the employer must state the reasons. The employer must also allow representatives access to the affected employees.
12. Currently, micro businesses (with fewer than 10 employees) may inform and consult affected employees directly if there are no existing appropriate representatives in place, for example if there is no recognised trade union. This means that they are not required to arrange elections for employees to elect new employee representatives. Larger businesses, however, are required to arrange elections for employee representatives if they are not already in place, which can add to the complexity of the TUPE transfer process. Businesses with more than 10 employees are also required to elect employee representatives even if they are undertaking a very small transfer (e.g. a transfer of just two employees).
13. The Government recognises the importance of consultation with employees and employees' representatives on TUPE transfers. However, we want to ensure that businesses are not unduly burdened by the current requirement for businesses larger than microbusinesses to elect employee representatives if they are not already in place.
14. The proposed changes mean that the flexibility for employers to consult directly with employees will be extended to small businesses (with fewer than 50 employees) and to businesses of all sizes involved in transfers of fewer than 10 employees. This will allow businesses – which do not have existing employee representatives in place – to consult directly with workers and involve their workers directly in conversations about the transfer.

Rationale and evidence to justify the level of analysis used in the IA (proportionality approach)

15. Under the current regulations, employers going through a TUPE transfer with no worker representatives (with a relevant role, such as a trade union representative or information and consultation representative) would need to enable affected workers to elect representatives for the information and consultation process.
16. There is expected to be a cost involved in enabling an election, even if only a few workers are affected by the transfer. The policy proposal would allow eligible employers without relevant representatives to inform and consult directly with affected workers if they choose. This additional flexibility for employers will enable them to choose the approach they consider most beneficial, while still being required to meet the obligations of the TUPE regulations: carrying out a consultation with affected employees with the aim of reaching an agreement. The proposal will reduce the burden of the regulations on businesses by simplifying and clarifying the transfer process, while also ensuring that workers' rights continue to be protected. It will enable those businesses which do not have existing employee representatives in place to consult directly with workers and involve their workers in conversations about the transfer. It will particularly help small businesses which are undertaking TUPE transfers to navigate the complex transfer process.
17. There is limited quantitative evidence on TUPE transfers and consultations. As a result, this Impact Assessment (IA) uses data from the last Workplace Employment Relations Survey (WERS), which was published in 2014. This looks at changes to a workplace in the previous 2 years, and workplaces with contracted out services to estimate the number of transfers.
18. Additionally, we have limited information in relation to service provision changes, but we can make informed assumptions based on the size of workplaces affected by relevant changes. We also use assumptions based on evidence from other comparable legislation to inform the monetised estimates in this IA.

Description of options considered

19. The do-nothing option would be to retain the regulations as they stand and keep the requirement of employers (except microbusinesses) facilitating the election of at least one representative if one is not in place, providing them with the relevant training to fulfil this role and giving them adequate paid time to perform this role. Under the current requirements, time is also allowed by the employer for the representatives to engage with affected employees to consult with them. This regulation applies to small (10-49 employees), medium (50-249 employees), and large (250+ employees) but not micro (1-9 employees) businesses. This is currently how the regulations are enforced and therefore this is the counterfactual option.
20. The option for changing the regulations provides employers with the choice of consulting the affected employees directly. The proposed reforms would provide this flexibility to organisations or undertakings where affected workers did not have representatives already in place. This would remove the requirement to elect a representative, potentially train them, and provide them with the paid time (away from work duties), facilities and access to affected workers required to fulfil the representative role. While this will reduce

the cost to the employer, there would be a requirement to adequately consult with the employee body as a whole instead which will bring a certain additional cost to employers.

21. The policy option is to enable a) small (10 to 49 employees) employers involved in a TUPE transfer and b) all employers involved in a TUPE transfer of under 10 employees to inform and consult their affected employees directly if the affected employees do not have worker representatives in place.

Policy objective

22. The policy objective is to introduce flexibility into the inform and consult part of TUPE transfers to enable employers who don't already have the relevant employee representatives to directly consult affected employees. This may enable an earlier, more efficient consultation as it would avoid the need for affected workers to elect representatives. Employers would also consult all the affected workers directly which may be beneficial in a situation where there are no existing worker representatives.
23. The employers involved in the transfer process would still be required to engage in a meaningful information and consultation process with affected employees. If they do not do so, employees would be able to seek redress through the Employment Tribunal as they can do currently.
24. The policy proposal will enable those employers subject to the policy change to choose to inform and consult affected employees directly when involved in a TUPE transfer, if there are no existing workers' representatives in place. These employers will therefore have more flexibility than they currently do in how they meaningfully consult affected employees.
25. The objectives will be met if the TUPE transfer process becomes more efficient for employers involved, while affected employees continue to be meaningfully consulted of any changes that arise in connection with the transfer.
26. Indicators of success will be:
 - a. businesses reporting that they are able to undertake TUPE transfers with greater ease and speed;
 - b. workers reporting that they feel consultation on TUPE transfers continues to be sufficient; and
 - c. no increases in tribunal cases relating to inadequate consultation on TUPE transfers.

Summary and preferred option with description of implementation plan

27. Small employers, or any employer involved in a TUPE transfer where less than 10 employees are transferring, will no longer be required to hold elections to elect new employee representatives to consult if their affected employees do not have existing representatives. This will potentially reduce the burden of the TUPE transfer process on employers and will enable transfers to take place more quickly.
28. Secondary legislation will be required to amend the TUPE Regulations and the policy will come into effect in 2024.
29. Employers will still be responsible for ensuring that the required information was provided and that meaningful consultation was carried out. Employees would be able to make a claim to the Employment Tribunal if they felt that the employer had failed to meet their legal obligations to inform and consult.

Monetised and non-monetised costs and benefits of each option (including administrative burden)

30. There is little quantitative data available that specifically cover TUPE transfers, or the information and consultation process required by the regulations. However, we are able to make informed assumptions about the number of transfers, how many would involve consultation and what the consultation would involve in order to be compliant with the regulations.
31. To estimate the number of TUPE transfers in a year we have used WERS 2011¹. This asked questions about a) whether the workplace had undergone any of a range of changes, from a change of name or address to a takeover, and b) whether the workplaces uses contracted out services in ten service areas, whether these services had been contracted out in the past five years, or whether these services had been brought back in-house.
- a. We assume a TUPE transfer may have taken place if a change faced by workplaces in the previous two years included an agreed takeover/merger, if it was sold by parent organisation, privatised from the public sector, or if there were management and employee buyouts. We divide this by two to get an annual figure.
 - b. The TUPE regulations also generally cover service provision changes² where the workers role is primarily providing the service for an organisation. We assume that service provision changes covered by TUPE are most likely in labour intensive services. Therefore, from WERS we estimate the proportion of employers that have contracted out cleaning, security, catering or building maintenance services in the previous 5 years (and assume that a TUPE transfer has taken place)³. Similarly, we estimate the proportion of employers that have brought any of these services in-house in the past 5 years. To estimate the proportion of those employers who have changed their outsourced service provider, we assume it is a similar proportion to that for outsourcing services in the past 5 years (as we don't have data on the changes of providers of outsourced services). This is then divided by 5 to get an annual percentage.
32. The percentages for organisations affected - obtained from WERS - are then applied to the 2022 Business Population Estimates to get an annual estimate of the number of small, medium and large employers involved in a TUPE transfer.
33. The WERS survey also asked about union and non-union worker representatives. We combine the questions on worker representatives with those we have used to estimate TUPE transfers to get an estimated number of affected organisations where representatives were present. We also reflect different levels of worker representation in public and private sectors in these estimates. For service provision changes, estimates of the proportion of employers in the relevant service industries that had worker representatives are used.
34. These produced the following estimates for employers undergoing transfers or service provision changes each year which do not have representatives in place:

¹ The Workplace Employment Relations Study collected data from face to face interviews with close to 2,700 managers responsible for HR in their workplace, conducted between March 2011 and June 2012 there were also interviews with workers and worker representatives.

² Where an organisation changes which undertaking provides a specific service for them.

Table 1: Estimated annual number of employers without employee representatives going through a TUPE transfer or service provision change

	Private and third sector	Public Sector	Total
TUPE Transfer			
Small employers (10-49)	6,860	30	6,880
Medium employers (50-249)	1,400	30	1,430
Medium-large employers (250-499)	200	20	210
Large employers (500+)	250	30	280
Total	8,700	110	8,810
Service provision changes			
Small employers (10-49)	23,590	240	23,820
Medium employers (50-249)	4,960	380	5,340
Medium-large employers (250-499)	400	50	450
Large employers (500+)	520	130	650
Total	29,470	790	30,260
Total employers affected			
Small employers (10-49)	30,440	260	30,710
Medium employers (50-249)	6,360	410	6,770
Medium-large employers (250-499)	590	70	660
Large employers (500+)	770	160	930
Total	38,170	900	39,070

35. It should be noted that these organisation sizes do not necessarily reflect the size of the undertaking transferred since we do not hold information on this. For service provision changes, the estimates reflect the size of the employers with contracted out services, rather than the size of the contractor (or the undertaking transferred). Therefore, it is likely that in many cases the undertakings being transferred are smaller than the organisations as a whole.

Regulatory requirements

36. The TUPE regulations⁴ set out that the employer should provide worker representatives with information about various aspects of the transfer. The information should be provided in sufficient time to allow for a consultation to take place prior to the transfer. If any measures in connection with the transfer that impact the affected employees are going to be undertaken by the transferor, or are envisaged to be undertaken by the transferee, then representatives of the affected workers should be consulted. The consultation should be conducted with the aim of reaching agreement with the affected workers' representatives. These representatives are able to make representations, which the employer must consider and respond to, explaining why any representations have been rejected. Employers are also required to allow the representatives access to the

⁴ [The Transfer of Undertakings \(Protection of Employment\) Regulations 2006 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

affected employees and provide them with the facilities that they need. The regulations do not further specify what should occur during a consultation.

37. Government guidance on the TUPE regulations⁵ suggests that micro employers consulting affected employees directly should deal 'with each of the affected employees as if they were an appropriate representative'.
38. Larger (non-micro) employers are not required to consult directly with affected employees, though Acas guidance⁶ suggests that all affected employees should be kept informed. Other evidence suggests that some employers may already have meetings with affected staff and may meet transferring employees individually – but this is not a requirement under the regulations or suggested in the Acas or Government guidance.

Number of consultations

39. Given the lack of data available explicitly about TUPE transfers, we do not have any data about how many such transfers generate consultations, or how many consultations take place per transfer. Consultations are required if an employer envisages that they will take measures connected with the transfer that will impact affected employees⁷. The issue is further considered in the risks and assumptions section.

Direct costs and benefits to business calculations

40. As indicated above, Option 1 is a permissive change. The option enables some employers going through a TUPE transfer process (potentially due to a service provision change) where affected employees do not have existing (relevant) employee representatives to consult directly with these employees. The employers that will be able to benefit from the proposed option are:
 - a. small employers or
 - b. all employers involved in the TUPE transfer where less than 10 employees are transferred.
41. Employers would only choose to consult directly with employees when this approach was considered as preferable to the current requirement: electing representatives from among the affected employees and consulting with these employee representatives.
42. Our monetised cost and benefits analysis focuses on familiarisation costs which would be required for employers to become aware of the proposed legislative change. We have no robust quantitative data on the costs and benefits from consulting directly rather than electing and consulting via representatives, and therefore monetising this would be speculative. However, given the small familiarisation costs for employers, it would only require a modest benefit to employers for this policy to reduce burdens on them overall.

Familiarisation

43. Small employers and larger employers involved with a small transfer would need to familiarise themselves with the legislation. Since we do not have good evidence of the extent to which small undertakings within larger employers are transferred, we assume that all affected employers will familiarise themselves in Option 1. This is a conservative

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf

⁶ [How to inform and consult staff: Inform and consult staff in a TUPE transfer - Acas](#)

⁷ [The Transfer of Undertakings \(Protection of Employment\) Regulations 2006 \(legislation.gov.uk\)](#)

approach and represents an upper-bound estimate. The actual realised cost will likely be lower.

44. The proposed changes under Option 1 do not require any new knowledge (i.e, the requirement to provide information and consult if measures connected to the transfer will impact affected employees). However, they would enable those small employers and those employers transferring micro undertakings where affected employees do not have existing representatives to consult affected workers directly if they wished to. We therefore estimate that it would take ten minutes of a HR manager or director's time to familiarise themselves with the policy proposal at an hourly labour cost of £28.99. This is in line with the estimated familiarisation costs for minor changes to the right to request flexible working⁸ which would require the employer to respond within two rather than three months to such requests, and for employers to consult with the worker if they intend to reject the request. The flexible working changes do add these requirements to employers, but the changes are relatively small and the requirement to reasonably consider all requests in line with the Acas code of practice remains unchanged. We therefore deem this a suitable proxy.
45. We estimate that around 8,800 employers go through a TUPE transfer each year, of which 6,900 are small employers. The transferors and transferees would both have to know the regulatory requirements. We assume that as only a small number of employers go through the process each year, they familiarise themselves with the legislation when they are required to do so (when the transfer takes place. We therefore estimate an annual familiarisation cost for employers undergoing a TUPE transfer of
- $$£28.99 \text{ (hourly labour cost)} \times 0.167 \text{ (time taken to familiarise)} \times 8,806 \text{ (number of TUPE transfers)} \times 2 \text{ (transferors and transferees)} = £85,000$$
46. For service provision changes, we know these are most likely to occur in labour intensive services: cleaning, catering, security and building maintenance. We estimate that annually there might be around 30,000 such service provision changes. However, the ONS business counts suggest that there are around 6,715 small, medium and large employers in these industries of which 5,840 are small. It therefore seems reasonable that given the potential prevalence of service provision changes in these sectors that all employers would familiarise themselves with the proposed changes. This again is a conservative approach to our cost estimates. Using the same familiarisation time, the estimate is
- $$6,715 \text{ (number of businesses in labour intensive industries)} \times £28.99 \text{ (hourly labour cost)} \times 0.167 \text{ (time taken to familiarise)} = £32,000$$

Costs and benefits of changes to consultation

47. The option for employers to consult directly with affected employees when going through a TUPE transfer is a permissive reform that doesn't require the employer to take that approach. They can choose to enable the affected workers to elect representatives and then carry out the consultation with those representatives.
48. There are various costs that would be the same regardless of whether the reform was enacted or not. The management would have to produce the information required by the TUPE regulations (an information document) and distribute it either to all affected employees or to the representatives. If distributed digitally the costs would be the same.
49. It is likely that the management team would need to meet with the affected employees or their representatives. There is likely to be an introductory meeting, discussing the

⁸ This is in line with the estimate for familiarisation time for the proposals to reform Flexible Working Regulations – where small changes to the current regulations are proposed [Employment Relations \(Flexible Working\) Bill publications - Parliamentary Bills - UK Parliament](#)

transfer, and the measures connected to the transfer expected to impact the employees and enabling the employee side to make representations about these measures. There is likely to be a follow up meeting, where the management responds to the representations and some discussion takes place with a view to reaching an agreement. There may be other meetings required. Management time allocated to these meetings, preparation, attending the meeting, responding to representations and attempting to reach an agreement would presumably be similar whichever consultation approach was used.

50. The areas where costs will differ depending on the approach are:

- a. The need to elect representatives [elected representative approach]
- b. The need to provide representatives with paid time away from their work duties to enable them to represent affected employees, to have access to affected employees and to have the facilities required to carry out their representative role [elected representative approach]
- c. The cost of paid time away from work for affected employees to represent themselves, potentially to meet and agree representations, and the cost of any facilities required [direct consultation]

51. There are potential savings in costs and time from taking the direct consultation option; there would be no need to elect representatives from the affected workers. Elected representatives have the right to consult with affected workers and take the paid time off work to carry out their representative duties. The regulations also require employers to take such actions as a reasonably practical to ensure the elections are fair and the ballot secret. They need to make sure that all affected workers can vote and that anyone who wants to stand for election can stand within reason. These costs would be avoided under direct consultation. Those costs are likely to be relatively proportional to the number of affected employees (there are likely to be more representatives, more candidates, more time needed for workers to decide their vote(s) and more time to count the votes).

52. The savings arising from direct consultation are most likely to arise when relatively small numbers of employees are transferred or affected, which is why the proposed change is focused on transfers involving micro undertakings and/or small employers.

53. However, the Government guidance on TUPE⁹ states that micro employers consulting directly must “deal with each of the affected employees as if they are the appropriate representative”. Therefore, there may also be some additional costs arising under the direct consultation approach.

54. Nevertheless, since this move empowers employers so they have the choice of options, we are confident that the net benefit will be positive for them (i.e. the admin savings from direct consultation will outweigh the benefits).

55. There is some evidence that some employers already engage with all affected employees in a TUPE consultation even if the regulations do not require them to. Under these circumstances it might be beneficial to be able to just consult directly and save the time and cost of electing representatives.

Break-even analysis

56. The estimated familiarisation costs above can be converted into an annualised estimate. If sufficient employers can make a saving from choosing a direct consultation route so that the total saving outweighs the cost of familiarisation, then the policy will have an overall direct benefit.

57. The annualised familiarisation cost over a ten year period can be estimated at:

⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf

$£85,000 + £32,000/10 = £88,000$ (to the nearest £000).

58. We estimate that there could be around 39,000 TUPE transfers or service provision changes each year. In each case, the transferor and transferee could have to carry out a consultation of affected employees (and it is possible that there could be separate consultations for transferring employees and affected employees who are not transferring).
59. However, only a small number of situations where consultations were required would need to see a benefit from direct consultation as opposed to electing representatives and negotiating with them for the benefits to be greater than the monetised costs. The policy would “break even” at the following levels:

Table 2: Levels of break even for policy for Option 1

Number of consultations	Saving per consultation
89	£1,000
177	£500
884	£100

60. As suggested above, it is much more likely that where there are a smaller number of affected employees the marginal cost of a direct consultation would be below the cost of electing employee representatives and negotiating with those representatives. Where the number of affected employees is low, given that new elected representatives would come from among affected employees, the added bureaucracy of conducting an election for representatives is more likely to push the financial and time cost of the current requirement above that of direct consultation.
61. Small employers are much less likely to have existing employer representatives than larger employers, so it is more likely that small employers going through TUPE would need to go through an election process. Therefore, the policy change is likely to benefit small employers the most.

Summary

62. The policy change will create familiarisation costs for employers. They are: an annual £85,000 for employers involved in a TUPE transfer (that isn't a service provision change), plus a one-off £32,000 for employers in the cleaning, catering, building maintenance and security industries (those most likely to require TUPE in service provision changes).
63. These produce (at 2019 prices and 2020 present value – as required by current Better Regulation Framework guidelines):
- a. For Option 1
 - i. a 10-year Net Present Value of £-0.6 million
 - ii. An equivalent annual net direct cost to business of £0.1 million.
64. However, this is an enabling change and employers will only carry out direct consultations with affected employees for TUPE transfer reasons when it is net beneficial for them to do so. In order to estimate the impact of this measure, we would need to make a number of assumptions and do not have the evidence to do this robustly. Therefore, we have instead shown that given the low transition costs associated with the policy option, that only a low proportion of consultations would need to produce cost savings if carried out directly rather than through a consultation for the policy to be net beneficial.

65. It is likely that consultations involving low numbers of affected workers (in transfers involving small employers or low numbers of affected employees) would predominantly account for the consultations where direct consultation could prove more cost efficient.

Risks and assumptions

66. There is limited quantitative information available about the number of TUPE transfers and service provision changes involving TUPE. We have used data from WERS 2011 to estimate these numbers, but the questions used to collect the data used did not specifically refer to TUPE. The questions we used to estimate survey provision changes related to contracting out and provided some evidence on employers that contracted out services over a 5 year period, and brought services back in house. However, there is no data on service provision changes between contractors where a service is contracted out. Again, these questions did not refer to TUPE. Therefore, these numbers used should be considered illustrative rather than precise estimates of the number of transfers involving TUPE.
67. For service provision changes, small employers dominate our estimate. However, service providers may be less likely to provide staff solely to a particular small employer than they are to a larger employer. This would suggest that this estimate is likely to be an overestimate of the number of TUPE service provision changes among small employers.
68. It is unclear that the quality of consultation should necessarily differ if being held directly with affected employees rather than with representatives. Any negative impacts on the quality of consultation are somewhat mitigated by direct consultations only being allowed where there are no existing employee representatives. In these circumstances those who would be elected as representatives would also be able to participate in direct consultations. There may be an impact on consideration of collective impacts as employee representatives, given that they are representing the collective group of affected employees, may be more focused on this aspect as part of the process than under direct consultation.
69. We do not hold information of the extent that transfers require more than one consultation. Where this is the case, there could be more than one group of affected workers, e.g., those remaining with the transferor, those transferring, and those already with the transferee. Some guidance suggests that both the transferor and transferee should consult with transferring workers, if there are measures connected to the transfer that will impact them. If there are more consultations, then this would increase both the familiarisation costs and the scope for savings from direct consultation. As such we do not believe this would alter the conclusion of our analysis that this policy change is likely to be net beneficial.

Impact on small and micro businesses

70. Micro businesses are already exempt from the requirement to elect new worker representatives if they are not already in place, and will not be affected by any of the options considered.
71. The proposal will be of particular benefit to small businesses, who will be made exempt from having to elect new employee representatives where they are not in place. It will therefore clarify the TUPE process for these businesses and save the time and expense which a consultation would require.
72. The proposed policy is permissive in that it gives employers the option to consult directly if they don't have employee representatives. However, it does not require them to do so. No additional requirement is therefore being placed on the employers covered.

Wider impacts (consider the impacts of your proposals)

73. Wider impacts are expected to be limited. Employers will still be required to carry out meaningful consultations with affected employees when taking measures connected with a transfer that will impact those employees. Affected employees will be able to make claims to the employment tribunal seeking redress if they consider the information and consultation process has not met the regulatory requirements.
74. We do not have data on the demographics of those undergoing a TUPE transfer. However, the analysis above identifies cleaning, catering, building maintenance and security as labour intensive services most likely to undergo TUPE service provision changes.
75. Employees in these industries are more likely than employees overall to:
- a. Be aged 50 and over
 - b. Be male
 - c. Have a disability, as classified by the Equality Act 2010
 - d. Be from an ethnic minority
 - e. Be Christian, or of a non-Christian religion
76. However, the policy proposal is aimed at enabling employers a choice as to how they meet their regulatory obligations to inform and consult affected workers when going through a transfer. For employers without existing employee representatives, it might be more efficient to consult affected employees directly. However, there is still a requirement for employers to try and reach agreement with affected employees on any measures connected with the transfer that may impact them. Therefore, the regulatory requirement to meaningfully consult has not changed. Government guidance for TUPE transfers sets out that micro employers consulting directly need to treat each affected employee as though they are an employee representative (which would mean they had entitlement to paid time off to engage in the consultation, any facilities they might require to engage in the consultation and access to other affected workers). Therefore, the proposed policy should not materially affect employees going through TUPE.

A summary of the potential trade implications of measure

77. The regulation changes are not anticipated to have any trade implications. The proposed change is a permissive change that will allow some employers involved in a TUPE process to consult directly with affected employees rather than elect representatives from among affected employees. There is no change to the requirements to meaningfully inform and consult.

Environmental Impacts

78. Consideration has been given to the Environmental Principles Policy Statement and there is not thought to be any relevant impact as a result of this policy.

Monitoring and evaluation

79. Data on TUPE transfers and consultation processes related to employment law are not routinely collected. We will monitor any potential unforeseen impacts on the policy through employment tribunal and Acas data, and stakeholder engagement.
80. We do not plan to conduct a formal review of the policy as it is a permissive change which is expected to have a low impact. We expect the proposed policy to be net beneficial overall to employers. However, the requirement to carry out a meaningful TUPE consultation where one is required remains, so at minimum affected employees should not be negatively impacted.