Safeguarding TUPE Rights

BIS Consultation on Proposed Changes to the Regulations - TUC Response

Introduction

The Trades Union Congress (TUC) has 58 affiliated unions which represent nearly 6 million members employed in a broad variety of sectors and occupations in the public, private and voluntary sectors. Trade union officials and workplace reps have extensive experience of representing members before and after TUPE transfers.

The TUC is fundamentally opposed to the government's plans to revise the TUPE Regulations. The measures represent a major attack on basic rights at work and the ability for unions to protect their members' interests through collective bargaining. If implemented, the proposals will do nothing to generate growth. Instead they will heighten job insecurity, and lead to a major erosion of pay and conditions and increased inequality for millions of employees affected by TUPE transfers each year.[1]

The government has stated that during the review of TUPE rights *'it will ensure that fairness to individuals is not compromised, recognising that the regulations provide important protections'*. [2] However the TUC is unable to identify a single measure in the consultation document which is designed to protect the interests of working people. As the government's own, albeit inadequate, impact assessment concludes - business will be the primary beneficiaries of the government's proposals; whilst the vast majority of costs will be borne by employees.

Social and economic implications

The TUC is seriously concerned that the government is planning to make sweeping changes to TUPE protections, even though they lack a reliable evidence-base to assess the impact of the proposals or to demonstrate the changes are necessary or justified.

The government has repeatedly asserted it is necessary to deregulate employment law, including TUPE rights, in order to remove barriers to growth and to encourage job creation. However, there is no evidence that the TUPE Regulations has constrained growth or employment levels. According to Oxford Economics, the UK outsourced sector has a turnover in the region of £199 billion, which is equivalent to approximately 7.5 per cent of total economy wide output. The sector directly supports around 3.3 million jobs, equivalent to 10 per cent of the UK workforce.[3]

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[1] The government estimates that between 1.42 and 2.11 million employees are likely to be affected by a TUPE transfer each year. BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations, p 16, para. 6.22

[2] Ibid

[3] *UK Outsourcing across the private and public sectors*: *An updated national, regional and constituency picture*. Report prepared by Oxford Economics for the Business Services Association, November 2012.

Equally there is no evidence that the TUPE Regulations have restricted the ability of businesses or public services to restructure or outsources services. According to the government's impact assessment between 26,500 and 48,000 TUPE transfers take place each year,[4] a figure which is only predicted to increase as a result of growing privatisation in the public sector.

The government claims that their reforms will help to improve the efficacy of the regulations and to reduce burdens on businesses. However many of the proposals are likely significantly to increase transaction risks and costs for businesses:

- It is widely predicted that the removal of the service provision change amendments will result in escalating litigation on when TUPE rules apply.
- Amending the regulations more closely to reflect the wording of the Directive will also create new uncertainties for business and will generate litigation on what the revisions mean in the UK context.
- Proposals aimed at increasing the flexibility for firms to vary terms and conditions post transfer appear to conflict with the requirements of the Acquired Rights Directive and will expose employers to uncertainties and the serious risk of compensation claims.
- The removal of the statutory obligation relating to employee liability information will also expose the new employers to grievances which were unforeseen and for which they have made no financial provision.

The original aim of the Acquired Rights Directive and TUPE Regulations was to facilitate the smooth management of restructuring by securing the interests and commitment of the employees affected. The government's proposals, in particular those aimed at weakening unfair dismissal rights and safeguards for terms and conditions of employment, will seriously undermine this objective. This will reduce employee buy-in, undermine workforce morale and retention and damage employment relations. In turn it will also affect the quality of services delivered.

The government also claims their proposals will help to create a competitive environment in which business can thrive. The TUC believes the opposite is true. The repeal of the service provision changes and increased flexibility for businesses to vary pay and conditions following a transfer will remove the level playing field which currently exists for contractors. It will encourage competition based on reduced pay and conditions rather than on innovation and the quality of service delivery, meaning that reputable businesses will be undercut by unscrupulous operators.

The downward pressure on wages will also have wider economic and social implications. It will reduce the spending power of service sector workers which will do nothing to encourage consumer confidence or stimulate demand in the

[4] BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations, p 16, para. 6.22.

economy. Rather it will encourage a 'race to the bottom', fuelling low pay, in-work poverty and inequalities. The drive towards low pay will increase pressure on the welfare bill by necessitating in-work benefits, and making it impossible for large sections of the workforce to plan and save for their future retirement.

The TUC therefore strongly urges the government to withdraw its proposals for reforming the TUPE Regulations.

Responses to consultation questions

Question 1:

Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

a) **Please explain your reasons**

b) **Are there any aspects of the pre -2006 domestic case law in the context of service 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)?**

No. The TUC is firmly opposed to the removal of the 2006 service provision change (SPC) amendments.

The amendments have generated significant benefits for the key stakeholders, including reduced transaction risks and costs and increased certainty for contractors and service commissioners. They have also provided increased job and income security for service sector workers. These benefits will be lost if the amendments are repealed.

Findings from the call for evidence also reveal there is no consensus in favour of removing the measures. Indeed a higher number of respondents favoured retaining the provisions (66 respondents) as compared with those calling for their repeal (47 respondents). [5]

The TUC also does not agree with the premise on which the government proposes to repeal the 2006 provisions. Firstly, we do not accept that the SPC amendments represent 'gold-plating'. It is well-established that an SPC can amount to relevant transfers for the purposes of the Acquired Rights Directive and the under Regulation 3(1). This includes the outsourcing of services, in-sourcing exercises and second generation outsourcing.[6] The impact assessment estimates that at least

[55] 61 respondents did not express a view.

[6] *Rask v ISS Kantineservice A/S* [1993] ICR, *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* (C-108/10); [2011] IRLR 1020, *Dines and ors v Initial Health Care Services* [1995] ICR.

65 per cent of all service provision changes would still qualify under TUPE regulations even if SPCs were no longer included.[7]

It is a misnomer therefore to refer to the SPC amendments as gold-plating. Rather these provisions have increased the efficacy of the regulations by increasing certainty and reducing the likelihood of costly and protracted litigation to determine whether TUPE applies.

Secondly, the TUC does not agree that the ECJ case law on the application of TUPE rules to service provision changes became more settled following the *Suzen*[8] case. Indeed the opposite is true. The *Suzen* case introduced a distinction in the way that the Directive is applied to 'asset-reliant' undertakings (which appeared to require the transfer of significant assets) and 'labour intensive' undertakings (which appeared to require the transfer of the entire or major part of the workforce). The decision represented a departure from the multi-factorial test, set out in the *Spijkers*[9] case, which had previously been used to determine whether an economic entity had retained its identity.

In doing so, the *Suzen* case created significant confusion and acted as the catalyst for a series of inconsistent ECJ judgements which, whilst affirming the *Suzen* approach, often resulted in diametrically opposed outcomes. See for example the ECJ decisions in the *Oy Liikkene* and *Abler v Sodexho*[10] relating to the need for the transfer of assets in asset intensive industries. The vagaries of the ECJ case law created huge uncertainty for contractors and employees and proved a key driving force behind the adoption of the SPC amendments in 2006.

Far from settling the case law, the *Suzen* decision also increased the TUPE related case load for UK courts and tribunals and generated a steady stream of appeals to the Court of Appeal, and in some cases references to the ECJ, on whether or not there was relevant transfer for the purposes of the 1981 TUPE Regulations.

This only stopped in 2007, as a result of the adoption of the SPC amendments in the 2006 Regulations. Since that point, the number of the Court of Appeal decisions on the application of Article 3(1)(a) and 3(1)b has significantly reduced.

The TUC recognises there have been a number of EAT decisions dealing with the requirements of the SPC amendments. This is a natural occurrence with any new legislative rules. The TUC however strongly disagrees with the view[11] that

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[7] BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations. Impact Assessment p 27.

[8] *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* C-13/95 [1997] IRLR 255

[9] *Spijkers v Gebroeders Benedik Abbattoir CV C-24/85* [1986] ECR 1119

[10] *Oy Liikenne Ab v Liskovarji* C-172/99 [2001] IRLR 171; *Abler and others v Sodexho MM Catering Gesellschaft mbH and Sanrest Grosskuchen Betriebsgesellschaft mbH* C-34/01 [2004] IRLR 168

[11] BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations, paragraph 7.13.

uncertainties created by these cases outweigh the benefits gained from the 2006 amendments. The main focus of the SPC cases relates to whether TUPE rules apply where there has been a fragmentation of services. This is an issue which has also arisen under the standard definition of a transfer.[12] There have also been a limited number of cases to determine whether there was an organised grouping of employees. However a similar test was applied by the CJEU in the *Scattolon*[13] case under the standard transfer provisions. The consultation also inaccurately suggests that the SPC amendments have generated new uncertainties on whether employees were assigned to a transfer. The assignment provision applies equally to a standard transfer as to an SPC. The removal of the SPC provisions will therefore not necessarily reduce litigation in these areas.

Thirdly, the TUC is not surprised that businesses report that their requirements for legal advice have not diminished since 2006. Contractors and commissioners will always seek legal advice on large commercial contracts, regardless of the legal framework. It is therefore misleading for the government to cite this as a reason for repealing the 2006 SPC provisions.

Fourthly, the TUC does not agree with the government's claim that the repeal of the SPC amendments will promote fair competition. On the contrary, it will remove the level playing field which currently exists for contractors. The main anti-competitive behaviour which the government states it is seeking to address is avoidance tactics by employers. The TUC believes it is completely inappropriate for government to reward employers who seek to evade their legal obligations by simply removing the regulations. Indeed, this sets a dangerous precedent.

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 (iii) 3-5 years (iv) 5 years or more

The TUC is opposed to the repeal of the SPC amendments. If the government decides to go ahead, it is important that a long lead in period is provided, which should be no shorter than 5 years.

a) Do you believe that removing the provisions may cause potential problems?

Yes

b) If yes, please explain your reasons.

The removal of the SPC provisions is expected to lead to a major increase in litigation relating to whether TUPE applies. This will create legal uncertainty

[12] *Fairhurst Ward Abbotts Ltd v Botes Buildings and others* [2004] IRLR 304

[13] *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* (C-108/10); [2011] IRLR 1020 (ECJ).

similar to that which existed before 2006. It will delay restructuring exercises and expose commissioners, contractors and employees to a high level of legal fees.

The TUC is also seriously concerned that the repeal of the SPC amendments will have a detrimental impact on service sector workers, including for those on low pay. There is extensive evidence that contracting out leads to job losses, a serious erosion of pay and conditions of employment, rising inequality and an increased reliance on welfare provision.[14] The removal of the SPC amendments will escalate and intensify these effects.

The government's own impact assessment estimates that the repeal of the SPC will result in a loss in pay and conditions for affected service sector workers amounting to between £10.8 million and £24.1 million per year. In contrast contractors and service commissioners are expected to benefit by an equivalent amount, in the form of reduced costs and increased profits.

The TUC also believes that the removal of SPCs from TUPE coverage will inevitably lead to significant job losses. This will increase job insecurity and levels of unemployment amongst service sector employees. It will also lead to associated redundancy costs for transferors, including the public sector employers. In the case of insolvent businesses, redundancy costs will pass to the Exchequer.

Unions also report that it is not uncommon for cleaning and catering staff to be affected by numerous outsourcing exercises each year. The removal of the SPC provisions will mean these individuals will face heightened job and income insecurity, being uncertain what pay they will receive and whether they will have a job whenever their service is retendered.

The removal of the SPC amendments will also lead to increased inequality for disadvantaged groups, including women and black and ethnic minority workers who are disproportionately employed in contracted out services (see comments on the Equality Impact Assessment below for more details).

The proposal will also affect the quality and consistency of services delivered. The downward pressure on pay will undermine workforce morale and retention, and will ultimately affect the quality of service. The removal of the SPC amendments will also mean that new contractors are less likely to take on the existing workforce. This could a detrimental impact on the elderly and more vulnerable groups who are reliant on social care provision and other public services and who will have developed trusting relationships with staff.

Question 3:

Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

[14] *Protecting Staff in PPP/PFI deals* National Audit Office March 2008; Social Enterprise UK (2012) *The Shadow State;* Sanji Sachdev (2001) *Contracting Culture from CCT to PPPs The private provision of public services and its impact on employment relations*: A report for Unison.

The TUC believes that the proposal to repeal employment liability information (ELI) requirements is misconceived. During the call for evidence many expressed serious concern that information was provided too late. It is incongruous that these responses are being treated as a reason for deregulating the provisions. Instead the government should strengthen the rules and require fuller and earlier disclosure.

Leaving it to parties to agree voluntarily when, how and what information should be provided will not prove effective. It will lead to less information being supplied. This will create uncertainty and significant risks for contractors and making it difficult for them to prepare accurate business and financial plans. It is also likely to deter some contractors from bidding for contracts.

This proposal will also be detrimental for transferred employees. The failure by the transferor to provide full information about pay and conditions will generate unnecessary grievances between employees and the transferee.

b) Would your answer be different if the service provision changes were not repealed?

No. The ELI requirements are relevant to all TUPE transfers. The impact assessment also estimates that at least 65 per cent of service provision changes will continue to be covered by TUPE even if the SPC amendments are removed.

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?

Yes. The TUC believes that this amendment should be introduced, regardless of any changes to the ELI requirements. Regulation 13 should clearly state that information should be supplied to the transferee at an early stage and should include information of any collective agreement and details relating to all terms and conditions of employment (not only those specified under section 1 of the Employment Rights Act 1996). The transferor should also be required to provide the information to trade union representatives, who can check its accuracy. This will assist in avoiding disputes and employment tribunal claims following the transfer.

There is a widespread perception that transferees are not required to consult workplace representatives prior to the transferor. Regulation 13 should be amended to make clear that the obligation to consult applies to both the transferor and the transferee employers. This change would bring UK Regulations into line with EU law. It would also help to build good working relations between the union reps and the new employer and to reassure transferring employees before the transfer takes place.

The TUC also believes that trade unions should be consulted when the procurement process is being decided. Employees and their representatives have expert knowledge on how business and services operate and can be improved. Workplace representatives can therefore make a valuable contribution to decisions on service reviews, tendering specifications and future delivery plans.

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?

No

a) If you disagree, please explain your reasons.

The TUC is seriously opposed to the proposals to amend Regulation 4. The proposed changes will accelerate the erosion of the pay and conditions of transferred staff, leading to growing inequalities, low pay and in-work poverty. The proposals also appear to conflict with the requirements of the Acquired Rights Directive (2001/23/EC).

The consultation document acknowledges that provisions which allow for the harmonisation terms and conditions are prohibited by the Directive. Nevertheless the government appears intent on introducing measures which will make it easier to vary contracts to give greater harmonisation. This approach appears to be both incoherent and foolhardy.

Turning to the specific policy proposals, the consultation document suggests that the Directive only prohibits variations to terms and conditions which are 'by reason of the transfer', and not those which are 'connected with the transfer'. The TUC does not agree that this distinction is valid given the decision of the ECJ in *Martin* case, where the Court appeared to use the terms 'connected to the transfer' and 'the transfer … is the reason' interchangeably.[15] This point is acknowledged in footnote 20 of the consultation document, but is then effectively ignored.

The TUC is therefore not convinced that the restrictions in Regulations 4 & 5 are broader than the requirements of the Directive. Amending Regulation 4 in the way proposed is likely to generate further confusion and uncertainty. It may also mean that some UK employees lose out on their entitlements under EU law.

In the TUC's opinion, the draft text contained in paragraph 7.42 of the consultation document is fundamentally flawed:

1) Sub-paragraph (4) does not take account of the fact that the Directive and decisions of CJEU appear to prohibit variations which are connected to the transfer, as well as those which are by reason of the transfer.

2) Sub-paragraph (5) would drive and coach and horses through employees' protections by appearing to give employers licence to act as if the TUPE rules did not exist. This is clearly not consistent with the Directive.

The text appears to be based on a misreading of the ECJ's decision in the *Martin* case. In paragraph 42 of the judgement the Court made it clear that the transferee had the same ability to vary terms and conditions as the transferor '*provided that the transfer of the undertaking itself may never constitute the*

[15] *Martin and another v South Bank University* C-4/01 [2004] IRLR 74 paragraphs 44 and 45.

reason for that amendment'. The wording of sub-paragraph (5) would have the opposite effect by providing that a variation to terms and conditions would not be void if the variation could have been made had there been no transfer.

3) Sub-paragraph (5A) ignores the fact that Article 4 of the Directive prohibits all variations where the transfer is the reason for the variation.

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

No. The TUC believes that the exception does not comply with Article 4 of the Directive, as interpreted in the *Daddy's Dance Hall* case.[16] In this judgement the ECJ made it clear that the transfer of an undertaking itself may never constitute the reason for a detrimental variation to an employees' terms and conditions of employment. Nothing in the ECJ's ruling or in subsequent ECJ decisions, suggests that even a limited exception to this rule is permissible.

In our opinion Regulation 4(4) and (5) of the 2006 Regulations should be amended to make clear that all variations which are by reason of or connected to the transfer are prohibited.

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?

No.

a) Please explain your answer.

The TUC is fundamentally opposed to this proposal, which would limit the ability of unions to protect their members' interest through collective bargaining.

The consultation document and accompanying impact assessment state that the aim of the proposal is to enable non-unionised prospective transferees to compete for contracts involving previously unionised staff[17] by allowing them to reduce previously negotiated pay and conditions.[18] The intention is clearly to make it cheaper for private businesses to restructure and for the public sector to privatise public services.

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[16] *Foreningen AF Arbejdsledere I Danmark v Daddy's Dance Hall A/S* [1988] IRLR 315

[17] BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations. Impact Assessment, p.7.

[18] BIS (2013) Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations, Paragraph 33.

The TUC believes this policy would have very damaging effects. Employees are already under immense pressure to respond to the major reorganisation and fragmentation of public services and private sector businesses. The removal of protection for pay and conditions would have serious implications for workforce morale and retention and will in turn affect the quality of services which are delivered. Evidence from the NHS, for instance, shows that staff wellbeing is closely linked to patient satisfaction. Higher turnover resulting from the downgrading of collectively agreed terms and conditions would increase costs for employers and public service commissioners and impact on service continuity and quality and could undermine safety and standards.

Permitting employers to cut collectively agreed terms and conditions will also rapidly expand the two-tier workforce, with in-house employees being protected by negotiated pay and conditions and outsourced staff experiencing pay cuts and reduced terms and conditions. This will fuel increased inequality, low pay and in-work poverty. The proposals are also likely to have a negative effect on on-going negotiations in the public sector and on industrial relations more generally, leading to rising workplace tensions.

The TUC is extremely concerned that the government is even considering implementing a policy which would have the effect of providing *less protection* for contractual rights of trade union members and those who benefit from collective agreement than those enjoyed by other UK employees. This approach is clearly discriminatory. We also question if it is consistent with the government's obligation under Article 11 of the European Convention on Human Rights.[19]

It is also far from certain if or how the provisions contained in Article 3(3) could be made to work in the context of the UK. The measure was clearly designed for other industrial relations systems where collective agreements tend to be time limited and negotiated terms and conditions are enforceable via legally binding collective agreement or even statute. The presence of sector level bargaining in these countries also means that employees are guaranteed the same pay rate for the job and other conditions following a transfer.

These systems operate on a very different basis to that in the UK, where (subject to incorporation requirements) collectively agreed terms and conditions form part of and are enforceable via the contract of employment. Once collectively agreed terms are incorporated into the contract of employment, their status and enforceability is not affected, even if the collective agreement is terminated.[20]

The ECJ has repeatedly underlined that the contractual rights of employees under national law should be preserved on transfer.[21] The government's proposal therefore appears to conflict with the requirements of the Directive. Equally, the proposal appears to be inconsistent with the basic tenets of UK law. Contract law

[19] *Wilson and National Union of Journalists v United Kingdom and others* [2002] IRLR 568; ***Demir and Baykara** v Turkey* [2008] ECHR 1345

[20] *Robertson and Jackson v British Gas* [1983] ICR 351 CA

[21] *Foreningen af Arbejdsleder I Danmark v A/S Danmols Inventar* Case C-105/84 [1985] ECR 2639

provides that once a term derived from a collective agreement is incorporated into the contract of employment it has the same status as any other incorporated term.

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?

The TUC is firmly opposed to the proposal to limit the application of collectively agreed terms and conditions to 1 year.

However if the government is intent on making these changes, it will be essential that this safeguard is introduced. In our opinion, this proposal would not meet the requirements of the Acquired Rights Directive.

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

In the *Alemo-Herron* case the CJEU has been asked to determine whether the dynamic approach currently operating in the UK is permissible under the Directive. If the Court follows the opinion of Advocate General Cruz Villalon is followed, the answer to that question will be 'yes'. Given the Advocate General's opinion, we think it is unlikely that the Court will rule that a static approach is required by the Directive.

If this is the case, the TUC believes it is important for the dynamic approach to be preserved. This would be consistent with the basic tenets of contract law, as confirmed in cases such as *Whent v T Cartledge Ltd*[22] and with the government's obligations under Article 11 of the European Convention on Human Rights.

The dynamic approach has also helped to prevent the creation of a two-tier workforce, with in-house employees being protected by annually negotiated pay rises and outsourced staff experiencing pay freezes or even pay cuts.

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)?

No.

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?

[22] [1997] IRLR 153

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?

No. The TUC does not agree that dismissal protections should be weakened for in any respect for staff affected by transfers. Restructuring exercises are extremely stressful and can have a seriously detrimental effect on health and well-being.[23] Effective dismissal protections help to reassure staff and improve their sense of security. They also deter employers from dismissing staff in an attempt to circumvent TUPE rules and avoid employee liabilities.

For the reasons as outlined in response to Question 4a, the TUC also does not agree that CJEU draws a distinction between reasons for the transfer and reasons connected with the transfer.[24] We therefore believe that the Regulation 7(1) and (2) accurately reflect the requirements of the Directive. Any amendments to the provisions are likely to create uncertainty and will lead to litigation.

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?

No

a) Please explain your reasoning.

The current provisions provide important protections for staff affected by transfers. The TUC believes that individuals should be able to resign and claim automatic unfair dismissal where a transfer would lead to a substantial change to terms and conditions which is to their material detriment. These provisions are fully consistent with the overall purposes of the Directive to preserve employees' terms and condition where there is a transfer.

The TUC also believes that the right to receive payments for salary (and other benefits) relating to their notice period does not represent an adequate remedy for employees. Nor does it create an adequate disincentive to deter employers from attempting to circumvent their TUPE obligations.

The fact that transferor employers may face claims for unfair dismissal based on the prospective actions of the new employer is also not adequate grounds for weakening these provisions. The current rules encourage commissioners to monitor their contractors and supply chains to ensure that their employees' terms and conditions are protected. The TUC believes this is good practice and helps to avoid reputational damage for the commissioner. Indemnity arrangements negotiated with transferees also ensure transferors are compensated.

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[23] Thomas Kieselbach et al, (2009) *Health in restructuring: Innovation Approaches and Policy Recommendations*. Project supported by DG Employment, Social Affairs and Equal Opportunities, European Commission. University of Bremen

[24] See *P Bork International A/S v Foreningen af Arbejdsledere I Danmark* C-101/87 [1989] IRLR 41

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?

No

a) If you disagree, please explain your reasons.

The TUC does not agree that the definition of 'entailing changes in the workforce' should be extended to include changes in location. Requiring employees to move or travel further to work may make it difficult for employees to accommodate their work and caring responsibilities and may disrupt their household and community life.

The aim of the Directive and the TUPE Regulations is to ensure that an employee's terms and conditions of employment should be preserved in relation to the new employer, as if the transfer had not taken place. This includes their place of work. In our opinion the ability of the new employer to require an employee to change their work location should depend on the individual's contract and any relevant mobility clauses.

The TUC is not convinced that the government's proposal is consistent with the requirements of the Directive. The wording of Regulation 7(1) is virtually identical to Article 4(1). UK courts have concluded that 'location' is not included in this provision. The TUC can see no reason why the CJEU would decide the issue differently. Until either the CJEU or the domestic courts reach a different conclusion, the government's proposed amendments does not appear to be permissible.

The TUC also believes that the premise of this question is mistaken. The fact that the UK definition of redundancy is broader than the definition of 'an economic, technical or organisational reason entailing changes to the workforce' is not relevant to the interpretation and application of an EU right.

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?

No.

a) Please explain your reasons.

The TUC believes that the government's proposals would not be consistent with the purposes of the Directive. There are also clear policy reasons why the current provisions should be retained.

The Court of Session's decision in *Hynd v Armstrong* is the main legal authority on this issue. The Court concluded that a transferor cannot rely on the ETO of the transferee in order to justify a dismissal prior to a transfer. Although this is a decision of a domestic court, the Court was interpreting Article 4(1) of the Directive. And, as the Court of Session pointed out, the ECJ's decision in the *Dethie* is not relevant as in that case the transferor was not seeking to rely on the ETO of the transferee.

The Court of Session also helpfully identified important policy (as well as legal) reasons why the current provisions should be retained. The Court rightly concluded that if insolvent transferors were able to rely on the ETO of the transferee, there would be every incentive for the transferor to dismiss staff in advance of the transfer in order to avoid employee liabilities transferring to the new employer.

This may mean that the sale of the business was more attractive. However, this approach would not be consistent with the main aims of the revised Acquired Rights Directive to protect employees. It would also leave many dismissed employees out of pocket. The individuals would receive only limited levels of redundancy pay and unpaid wages from the Redundancy Payments Office. They would also face serious difficulties in recovering additional sums from the insolvent company.

The TUC also agrees with the Court that ensuring staff transfer to the new employee means there is an increased possibility they will form part of a larger pool for the purposes of any subsequent redundancy selection. This will clearly be beneficial for the affected employees. It is also consistent with the aims of the Directive to protect staff affected by transfers. Union reps may also be able to work with the new employer to identify ways of avoiding or reducing the need for redundancies.

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?

No

a) If you disagree, please explain your reasons.

The TUC recognises that it is beneficial for transferee employers to consult with trade unions in advance of a transfer. Early consultation enables the new employer and trade unions to establish good working relations. It also helps to alert union reps to any measures which the transferee considers may be necessary following the transfer, including potential redundancies.

There is currently a widespread perception that new employers are not required to consult prior to a transfer. The TUC believes that the Regulations should be

strengthened to make clear that transferees should always consult with trade unions.

However we do not agree that pre-transfer consultation can or should count for the purposes of the transferee's obligations to consult on collective redundancies under section 188 of TULR(C)A 1992. The TUC does not believe that this would be consistent with the requirements of the Collective Redundancies Directive for the following reasons:

- The Directive requires the employer of the affected staff to initiate consultation about proposed redundancies. However, the transferee will not be the employer of the affected staff prior to the transfer.
- Under section 188, the duty to consult relates not only to the employees who are due to be dismissed, but also to employees who may be affected by the proposed redundancies or by measures taken in connection to them. It is likely that proposals for redundancies following a transfer will affect not only transferred employees but also the transferee's wider workforce. It is difficult to see how consultation starting prior to the transfer and involving only group of employees will therefore meet the obligations of s.188 or the Collective Redundancies Directive.
- Starting consultation on collective redundancies prior to the transfer will also inevitably affect the pool identified for the selection of redundancies. It will limit the ability of the representatives of transferring staff to argue that the pool should be broadened to include all or part of the transferee's existing workforce.

Question 11:

Rather than amending Regulation 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?

a) Please explain your reasons.

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

The TUC generally believes that the provisions for the election of non-union workers' representatives for TUPE information and consultation purposes are far too weak. The process is in the hands of the employer. The employer determines the constituencies and number of representatives, conducts the election and counts the ballots. In our opinion a comprehensive review of these arrangements is needed.

The TUC does not believe it would be helpful to identify a fixed time period for the election of workplace representatives.

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?

No. While managers may decide to consult individually with staff prior to a transfer, this is no replacement for the benefits of indirect consultation through independent and elected workplace representatives. Consultation with workplace representatives can start at an early stage. It enables employers to take the views of employees into consideration before reaching final decisions. Workplace representatives also benefit from additional protections from dismissal and detriment when engaging in consultation with employers.

Unsurprisingly the TUC believes that consultation is most effective where it involves independent trade union representatives who are trained and have extensive experience of negotiating with employers. It is therefore essential that the government retains the right for recognised trade unions always to be consulted on transfers in micro firms. Failure to do so is likely to conflict with the government's obligations under the Directive and under Article 11 of the European Convention on Human Rights.

The TUC also believes that the government's proposal for an exemption for micro firms is inconsistent with the Directive. The Directive applies equally to all workplaces, regardless of the number of staff employed. It does not allow for exemptions for micro businesses.

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)?

Question 13:

Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

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

The provisions of the Acquired Rights Directive apply to all organisations, regardless of the number of staff they employ. No provision is made in the Directive for exemptions for micro businesses. Any such exemptions would therefore not be possible.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No. All of the measures proposed in the consultation document are deregulatory.

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

The TUC recognises that most micro businesses will not have internal HR Departments and their managers may not be experts in employment rights. It is important therefore that such firms are able to access reliable information and advice to assist them to comply with their TUPE obligations. To this end, the TUC believes the government should reverse the recent removal of legal aid for

employment rights advice. The government should also provide Acas with adequate resources to fund advice and training for small firms.

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?

As outlined above the TUC is fundamentally opposed to all the proposals contained in the consultation document. In our opinion, they should not proceed at all.

Question 15:

Have you any further comments on the issues in this consultation?

No.

Question 16:

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

The proposals will have a seriously negative impact on equality.

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.

The TUC believes that the equality impact assessment is woefully inadequate and fails to address many of the equality implications of the government's proposals.

The government's proposals are clearly designed to encourage outsourcing and the privatisation of public services. There is extensive widespread evidence that contracting out and the marketisation of public services is associated with increased inequality, particularly for women and black and ethnic minority workers.[25] The equality impact assessment fails to take this into account.

Analysis[26] carried out by the TUC using data from ASHE 2011 explored pay for women in the public and private sector. This analysis found that:

- Almost a third of women (28 per cent) working full-time earn less than £300 in the private sector compared to 8 per cent in the public sector.
- Over half of all women (56 per cent) earn less than £300 in private sector compared to just over a third (35 per cent) in the public sector.
- Over three quarters of women working part-time in the private sector (77 per

[25] Margie Jaffee, et al (2008) *Equal Pay, Privatisation and Procurement*, Institute of Employment Rights; *Protecting Staff in PPP/PFI deals* National Audit Office March 2008; Social Enterprise UK (2012) *The Shadow State;* Sanji Sachdev (2001) *Contracting Culture from CCT to PPPs The private provision of public services and its impact on employment relations*: A report for Unison.

[26] TUC (2012) Women's pay and employment update: a public/private sector comparison. A report to the TUC Women's Conference 2012.

cent) earn less than £200 compared to less than half (47 per cent) in the public sector.

- Low paid jobs are far more prevalent in the private than public sectors, with 17 per cent of full-time workers earning less than £300 in the private sector, compared to only 6 per cent of public sector workers

Table 1: Gross Weekly Earnings – gender pay differences

	ALL- FT & PT			FT			PT		
	Less than £200	Less than £300		Less than £250	Less than £300		Less than £200	Less than £150	Less than £100
Public Sector ALL	15.3%	27%		1.7%	6.0%		47.3%	31.4%	19%
Private Sector ALL	20.2%	35.8%		7.6%	17.3%		76.6%	58.3%	32.5%
Public Sector MALE	6.8%	12.7%		0.7%	3.5%		46.8%	34.6%	21.6%
Public Sector FEMALE	19.9%	34.6%		2.4%	7.9%		47.4%	30.8%	18.6%
Private Sector MALE	10.2%	22.3%		5.2%	12.7%		75.6%	58.3%	33.1%
Private Sector FEMALE	34.9%	55.5%		13.2%	27.9%		76.9%	58.2%	32.1%

More specifically, the TUC believes that the government's proposals to remove the SPC provisions, to permit increased harmonisation of terms and conditions following a transfer and to limit the applicability of collective agreements will all lead to a downward pressure on pay and conditions and will increase inequality.

These proposals are also likely to have a disproportionate impact on women and black and ethnic minority workers who tend to be employed in sectors associated with outsourcing, including catering and cleaning.

- Analysis of employees in the lowest paid occupations reveals that 73 per cent of cleaners and domestics are women and 84 per cent of those women work part time. [27]
- Similarly 65 per cent of kitchen and catering assistants are women, of which 73 per cent work part time.

Proposals to limit the applicability of collective agreements will also have a seriously detrimental impact on equality. Collective agreements negotiated in the public sector, including Agenda for Change in the NHS, have been equality proofed. These agreements have succeeding in significantly narrowing the levels

[27] Source: 2012 ONS Annual Survey of Hours and Earnings

of pay inequality in the public sector; whilst in the private sector unequal pay particularly for women remains high.

Research carried out by the TUC in 2012 revealed that for full time employees, the gender pay gap is half that in the private sector.[28] Part-time women suffer a significant pay penalty in both sectors but this is also lower in the public sector. The lowest paid part-time jobs for women are better paid in the public sector – the bottom 10% earn up to £9.98 an hour in the public sector compared to just £7.00 an hour in the private sector.

Gender Pay Gap (median hourly earnings, excluding overtime, for public and private sectors -2011)

	Public Sector	Private Sector
All Employees	18%	26.8%
Full-Time Employees	9.2%	18.4%
Part-Time Employees[29]	36.3%	42.8%

Limiting the applicability of collective agreements after one year will mean that effective equality protections have been dismantled. This will lead to increased inequality, particularly relating to pay inequality for women. It will also help to create a two-tier workforce with in-house employees being protected by negotiated pay and conditions and outsourced staff experiencing pay cuts and reduced terms and conditions.

The equality impact assessment highlights that the proposals making it easier for businesses and service providers to relocate will have equality implications. However the effects will not be limited to the disabled workers and those with religious beliefs. They will also disproportionately affect women with caring responsibilities and pregnant workers, who are less likely to be able to relocate to travel longer distances for work.

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.

As highlighted throughout this response, the TUC does not agree with the analysis set out in the impact assessment.

The TUC is seriously concerned that the government is proposing wide ranging changes to TUPE protections, even though they lack a reliable evidence-base to assess the impact of the proposals or to demonstrate the changes are necessary or justified.

[28] Ibid

[29] When measuring the part-time women's pay gap we have used the Equality and Human Rights Commission's measure (a comparison of women's hourly part-time earnings compared to men's hourly full-time earnings) rather than the ONS measure (a comparison of women's hourly part-time earnings compared to men's hourly part-time earnings). Part-time work is gendered and this measure is preferred as it shows how far women are being penalised by their propensity to work part time.

The main conclusion which can be drawn from the assessment is that businesses will be the primary beneficiaries of the government's proposals; whilst the vast majority of costs will be borne by employees.

The outcome is clearly inconsistent with the government's objective of ensuring '*that fairness to individuals is not compromised, recognising that the regulations provide important protections*'. [30]

There are also major gaps in the impact assessment. For example, the impact assessment fails even to attempt to evaluate the financial costs which will be incurred by employees if the government proceeds with plans to remove restrictions on changes to pay and conditions. The impact assessment also fails to consider or evaluate the increased transaction risks and costs which employers will almost certainly incur if the SPC provisions are removed.

Much of the impact assessment is based on assertion and speculation rather than evidence or financial evaluations. For example, the government has offered no evidence to support the repeated proposition that SPCs lead to under-performing employees being deliberately included within the transferring employees.

The TUC also believes that the evidence provided relating to levels of TUPE related employment tribunal claims is inaccurate and misleading. The impact assessment concludes 'the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims'.

As the consultation document acknowledges, the only specifically TUPE-related claims which are recorded by employment tribunal statistics are those relating to information and consultation. These figures do not provide a reliable overview of the impact of the 2006 Regulations in employment tribunal claims. The great majority of TUPE-related claims do not relate to the failure by employers to inform and consult but to claims for unfair dismissal and unlawful deductions from wages. And it is precisely these types of claims which are expected to rise if the government proceeds with its proposals.

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[30] Ibid