

**EXPLANATORY MEMORANDUM TO
THE TRANSFER OF UNDERTAKINGS (PROTECTION OF
EMPLOYMENT) REGULATIONS 2006**

2006 No. 246

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. **Description**

2.1 The Transfer of Undertakings (Protection of Employment) Regulations 2006 revoke the Transfer of Undertakings (Protection of Employment) Regulations 1981¹ – commonly known as the TUPE Regulations – and implement Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings or businesses. They provide that the transferor’s rights and obligations arising from a contract of employment or from an employment relationship shall by reason of a transfer be transferred to the transferee. They provide protection for employees from dismissal by the transferor or the transferee by sole or principal reason of the transfer itself. They allow a dismissal for a reason connected with the transfer where that reason is an economic, technical or organisational one entailing changes in the workforce.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 These Regulations are laid under the power contained in section 2(2) of the European Communities Act 1972 to the extent that they implement obligations under, and options conferred by, Council Directive 2001/23 EC (please see attached Transposition Note for detail). To the extent that they do more than implement an obligation under, or an option conferred by, that Directive, they are laid under the power in section 38 of the Employment Relations Act 1999. That section empowers the Secretary of State to make provision by statutory instrument for employees to be given the same or similar treatment in circumstances falling outside the scope of the Acquired Rights Directive as employees are given under the UK’s implementing legislation in circumstances falling within the scope of the Directive. In other words, the power in section 38 is exercisable in circumstances other than those to which the Community obligation under the Directive applies.

3.2 Section 38 is used restrictively. It is used principally to make Regulation 3(1)(b), which applies TUPE to what are described as “service

¹ SI 1981/1794

provision changes” (which includes situations where a client business outsources or contracts out a service to a contractor). Many service provision changes will also constitute the transfer of an undertaking or business within the meaning of Regulation 3(1)(a). Provision made in respect of a transfer that is a relevant transfer falling within Regulation 3(1)(b) but outside Regulation 3(1)(a) is identical to that made in respect of a relevant transfer within Regulation 3(1)(a). Insofar as the Regulations make provision for that narrow category of service provision change that is not also a relevant transfer within Regulation 3(1)(a), they are made under section 38.

3.3 Section 38 does not extend to Northern Ireland and Schedule 1 provides that Regulation 3(1)(b) and consequential provisions do not extend to Northern Ireland.

4. Legislative Background

4.1 Council Directive 77/187/EEC was amended in 1998, by Council Directive 1998/50/EC and subsequently consolidated under 2001/23/EC. The 2006 TUPE Regulations revoke the Transfer of Undertakings (Protection of Employment) Regulations of 1981 and implement the revised Directive. (See Transposition Note attached)

5. Extent

5.1 This instrument applies to all of the United Kingdom save for the provisions relating to service provision changes which do not apply to Northern Ireland, as described in paragraph 3.3 above. Modifications in the application of the Regulations to Northern Ireland are listed at Schedule 1.

6. European Convention on Human Rights

6.1 Mr Gerry Sutcliffe, Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs, has made the following statement regarding Human Rights:

In my view the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 are compatible with the Convention rights.

7. Policy background

7.1 The aim of the revised Regulations is to implement options contained in the revised Directive and to update UK legislation in the light of case law. Preparations and preliminary steps toward the reform of the Regulations have been in train for a number of years. Throughout that time, the Department of Trade and Industry has engaged in a process of thorough consultation (both formal and informal) with key stakeholders, such as the CBI, TUC, Business Services Association (BSA) and the Engineering Employers’ Federation (EEF), as well as other government departments and the TUPE Forum (a group of organisations representing business and employees convened to

provide views on the Regulations to Government). Specific policy proposals were put forward in a formal public consultation document, and a supporting background paper, in September 2001. The responses to that consultation were evaluated and a set of draft Regulations were prepared. Further consultation took place on the draft revised Regulations between March and June, 2005.

7.2 The main changes that will be effected by the revised Regulations are:-

(a) bringing a wider range of “service provision changes” (i.e. contracting-out and similar exercises involving business services) within the scope of the Regulations;

(b) clarification of the effect of the Regulations in relation to the key issues of transfer-related dismissals and changes to terms and conditions;

(c) the introduction of a requirement on the old employer (the transferor) to provide information about the transferring employees to the new employer (the transferee) in advance of the transfer. That information is termed “employee liability information”;

(d) greater flexibility in the application of the Regulations in cases where the transferor is insolvent.

(a) Service provision changes

7.3 The scope of the legislation is the most extensively debated and litigated aspect of the existing Regulations, both nationally and at a European level. The Government considers that, ideally, everyone should know where they stand when a business sale or reorganisation, or a contracting-out or similar exercise, takes place, so that employers can plan effectively in a climate of fair competition and affected employees are protected as a matter of course.

7.4 The term “service provision change” describes situations where a contract to provide a client (public or private sector) with a business service, e.g. office cleaning is: a) awarded to a contractor (“contracted out” or “outsourced”); b) re-let to a new contractor on subsequent re-tendering (“reassigned”); or c) ended with the bringing “in house” of the service activities in question (“contracted in” or “insourced”).

7.5 In most cases, service provision changes fall within the scope of the Directive and the existing Regulations; however, not all do. In some cases, uncertainty arises, leading to unnecessary disputes and litigation. The rationale for the new measure is that it would reduce such uncertainty in practice by establishing a position in which service provision changes would be comprehensively covered by the legislation, subject to certain specified exceptions. A major reason for introducing Section 38 of the Employment Relations Act 1999 was to ensure that adequate order-making powers were in

place to enable the Government to achieve this extension of the existing scope through secondary legislation.

7.6 Businesses and employees will thus be clearer where they stand when such changes occur, and will be insulated to a significant extent from the effects of any further developments in ECJ jurisprudence on the application of the Directive itself in relation to such cases. The Government's intention is to ensure a "level playing field" for contractors bidding for service contracts, so that tendering decisions are taken on commercial merit rather than on differing views as to the employment rights of employees, and so that transaction risks and costs are reduced. Therefore, under the revised Regulations if:

- a service provision change (as described above) takes place; and
- prior to the change, there are employees assigned to an organised grouping the principal purpose of which is to carry out the service activities in question on behalf of the client concerned;

then:

- the employees assigned to the organised grouping shall be treated in the same way as in cases where the TUPE Regulations have historically applied ; and
- the party responsible for the carrying out of the service activities before the change shall be treated as the transferor and the party responsible for the carrying out of the service activities after the change shall be treated as the transferee.

(b) Dismissals and changes to terms and conditions of employment

7.7 In the light of conflicting case law and confusion surrounding the meaning of the existing provisions the Government decided to update and clarify the effect of the Regulations in relation to dismissals and changes to terms and conditions of employment. The aim is to set out clearly how dismissals or variations of contract are to be treated in three different sets of circumstance:

- first, dismissals or variations for which the sole or principal reason is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce (an "ETO" reason) will be unlawful;
- secondly, dismissals or variations for which the sole or principal reason is not the transfer itself, but is a reason connected with the transfer that is an ETO reason will be potentially lawful;
- thirdly, dismissals or variations for which the sole or principal reason is unconnected with the transfer will be potentially lawful.

(c) Notification of employee liability information

7.8 Member States were given a new option in the revised Directive to introduce provisions requiring the transferor to notify the transferee of the rights and obligations in relation to employees that will be transferred, so far as those rights and obligations are or ought to be known to the transferor at the time of the transfer.

7.9 The introduction of these new provisions will entitle transferees to full, accurate information about the employees, and the associated rights and obligations, that they are taking on in a relevant transfer, and so are well placed to honour those rights, obligations etc. The Government considers that this will be of benefit not only to the employees who transfer but also to the transferees themselves as it would help transferees prepare more fully at an earlier stage for the incoming staff.

7.10 The employee liability information must be in writing or in another form which is accessible to the transferee. After the information in question has been notified, any changes in that information must also be notified. The information can be notified in instalments, and can be passed between contractors via the client in a service provision change case.

7.11 Where the transferor breaches the requirement, the transferee will be able to present a complaint to the employment tribunal. If the tribunal finds in the transferee's favour, it will be required to make a declaration to that effect and to award compensation for any loss which cannot be mitigated. However, a minimum amount of compensation must be awarded (£500 per employee involved), unless the tribunal considers that it would be just or equitable to award a smaller sum.

(d) Insolvency

7.12 The revised Directive gives Member States two options in cases where its requirements are applied in relation to "insolvency proceedings ... under the supervision of a competent public authority (which may be an insolvency practitioner determined by national law)". The two new options are to provide that:

- in cases giving rise to protection for employees at least equivalent to that provided for in situations covered by the EC Insolvency Payments Directive (80/987/EEC), the transferor's pre-existing debts toward the employees do not pass to the transferee; and/or
- employers and employee representatives may agree changes to terms and conditions of employment by reason of the transfer itself, provided that this is in accordance with current law and practice and with a view to ensuring the survival of the business and thereby preserving jobs.

7.13 The underlying aim of these options is to allow Member States to promote the sale of insolvent businesses as going concerns and to promote the “rescue culture”.

7.14 The statutory insolvency payments provisions in Part XII of the Employment Rights Act 1996 and equivalent Northern Ireland provisions (as amended from time to time) will in future apply to relevant employees who transferred to the transferee notwithstanding the fact that they were not dismissed by the transferor, as would normally be a prerequisite for entitlement under those provisions.

7.15 Where the transferor is in one of the types of insolvency proceedings described in Article 5.2, all relevant employees – those who transferred to the transferee and those who were unfairly dismissed by the transferor by reason of the transfer itself or a non-ETO reason connected with the transfer – will in future be entitled to receive payments from the Secretary of State in respect of relevant debts incurred by the transferor. In cases where the relevant employee has transferred, the date of transfer will be treated as the date of dismissal for the purposes of calculating insolvency payments in respect of which the “appropriate date” is the date of dismissal (section 185 of the Employment Rights Act 1996).

7.16 The liability for any other debts owed by the insolvent transferor to relevant employees – i.e. debts that either fall outside the categories payable under the relevant statutory schemes or exceed the statutory upper limits on payments under those provisions – will still pass to the transferee in the relevant transfer, as they would do under the existing Regulations.

7.17 Where the transferor is in one of the types of insolvency proceedings described in Article 5.2 of the Directive, the Regulations will in future not stand in the way of the transferor or transferee (or insolvency practitioner) agreeing “permitted variations” to terms and conditions with appropriate representatives of the employees. “Permitted variation” means a variation that would normally be rendered unlawful under the Regulations (because, say, the sole or principal reason for it is either the transfer itself or a reason connected with the transfer that is not an ETO reason) and is designed to safeguard employment opportunities by ensuring the survival of the organised grouping involved in the relevant transfer.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

8.2 There is no real impact on the public sector, as far as the extension of scope is concerned, as the practical impact of this change is essentially confined to purely private sector transfers. This is because TUPE-type requirements are already applied comprehensively when public sector contracts change hands between private sector contractors by virtue of the public policy set out in the Cabinet Office Statement of Practice “Staff Transfers in the Public Sector”. In addition, extending the scope of the

legislation in “service provision change” cases will reduce significantly the proportion of cases in which disputes, involving legal proceedings, arise. This would mean savings to employers of up to £1.6 million per year. Taking together all the quantifiable costs and savings identified gives total additional quantifiable cost to business of a maximum of £9.5 million to £24.3 million each year. However, it is expected that the figure is likely to be at the lower end of the range. Also, there will be other unquantifiable but significant benefits and savings resulting from the change and these will offset the expected cost.

8.3 As far as the insolvency provision are concerned, then there is likely to be a saving to business of £6.5 million to £14.5 million each year in redundancy payments.

9. Contact

Mr Bernard Carter at the Department for Trade and Industry Tel: 0207-215-2760 or e-mail: Bernard.Carter@dti.gsi.gov.uk can answer any queries regarding the instrument.



Final Regulatory Impact Assessment

Employment Relations Directorate

Revision of the Transfer of Undertakings (Protection of Employment) Regulations 1981

January 2006

<http://www.dti.gov.uk/er>

1. The Transfer of Undertakings (Protection of Employment) Regulations 1981, commonly known as the TUPE Regulations, implement the EU Acquired Rights Directive and safeguard employees' rights when the business in which they work changes hands between employers.

Purpose and intended effect

Objective

2. The aims of the legislation are to:
 - assist the smooth management of necessary business restructuring and public sector modernisation by securing the interests and commitment of the employees affected;
 - promote a co-operative, partnership approach toward change; and
 - help create a level playing field, and reduce transaction risks and costs, in business acquisitions and in contracting operations in the business services sector.
3. There are at present, however, a number of problems with the way the Regulations operate, and transfers can be the subject of confusion and dispute. The Government has therefore decided to amend the Regulations with the objective: a) to improve and simplify their operation, remedying some widely recognised shortcomings and reducing the potential for disputes and litigation; and b) to take advantage of some additional flexibilities afforded by a number of new Member State options introduced in a revised version of the Directive adopted in June 1998, following successful negotiations under the UK Presidency.

Background

4. The 1981 TUPE Regulations provide that when an undertaking or business, or part of one, is transferred from one employer to another:

- The employment contracts of the employees, along with all the rights, powers, duties and liabilities of the old employer (transferor) pass automatically to the transferee
 - Employees of the transferor or of the new employers (transferee) may not be lawfully dismissed by reason of, or for a reason connected with the transfer. However, the Regulations provide that that prohibition shall not prevent lawful dismissals for an economic, technical or organisational reason entailing a change in the workforce; the employer will remain under a duty to act reasonably in the circumstances.
 - Both the old and the new employer must inform employee representatives and consult them about the legal, economic and social implications of the transfer and any measures envisaged in relation to any of the employees affected by the transfer.
5. At the end of 2001, the Government carried out formal public consultation on a package of proposals for reform of the Regulations. This was both preceded by and followed by extensive informal consultation with key stakeholders and TUPE specialists. In February 2003, the Secretary of State for Trade and Industry announced the Government's decisions as to how the reform would be taken forward.
 6. In March 2005, the DTI issued another consultation document containing new draft TUPE Regulations², seeking views as to whether or not the draft Regulations correctly and effectively implement the policy decisions taken in February 2003.
 7. The 2005 public consultation document included a Partial RIA. The present RIA has been developed from that, in the light of comments received on the proposed measures.

Rationale for government intervention

8. The Regulations are widely regarded, by all groups whose interests are affected by them, as less than satisfactory in their present state. For instance:
 - The scope of the legislation is the most extensively debated and litigated aspect of the current Regulations. Ideally, everyone should know where they stand, so that employers can plan effectively in a climate of fair competition and affected employees are protected as a matter of course. In the past, however, this has not always been the case. There are two particular areas which have been a frequent source of dispute – avoidance devices and service provision changes.
 - It is often difficult for the transferee to understand the rights and obligations of employees conferred by the transferor. This increases the degree of uncertainty of the transfer market, thus leading to unnecessary barriers.

² TUPE Draft Revised Regulations: Public Consultation Document, Employment Relations Directorate, DTI, March 2005, URN 05/926

- There are a number of disputes that arise because of a lack of clarity of whether dismissal by reason of a transfer of an undertaking is always unlawful.
 - It is unclear in which circumstances the regulations allow transfer related changes to terms and conditions that arise for an economic, technical or organisational reason entailing changes in the workforce. This results in uncertainty and unnecessary disputes.
 - Around 69 per cent of insolvencies result in the break-up of the assets of the company, thus resulting in job losses and a loss of productive potential.³ There are a number of barriers that could potentially prevent a rescue of an insolvent business that could be reduced by changes to the TUPE regulations.
9. Failure to introduce the revised Regulations would mean that their shortcomings remained unaddressed, contrary to the Government's commitment to review and where necessary reform outdated and deficient regulation that imposes undue burdens on business. It would also mean that the valuable new flexibilities in the revised Directive, successfully negotiated by the UK in 1998, were not taken advantage of. It would impact negatively on policy priorities not only of the Department of Trade and Industry (DTI) but also of a number of other government departments.

Consultation

(i) Within government

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

(ii) Public consultation

11. In 1997, the Government made it a social affairs priority for the then forthcoming UK Presidency of the EU to secure a revision of the Acquired Rights Directive, so as to: a) clarify the meaning of certain provisions by incorporating elements of the jurisprudence of the European Court of Justice (ECJ); and b) give the UK – and other Member States – increased flexibility in tailoring national implementing legislation to domestic circumstances. The DTI carried out a formal public consultation exercise to canvass views on the UK's stance in the negotiations leading up to the revision.
12. In September 2001, the DTI published another formal public consultation document, accompanied by a detailed background paper, setting out specific policy proposals for the reform of the Regulations.
13. In the light of those consultations, the Government announced in February 2003 that it would proceed with its policy proposals. Since that date, the Government has been working on a new set of TUPE Regulations to

³ Source: R3 (2004) 12th *Corporate Insolvency Survey*. Available at www.r3.org.uk/publications

replace the existing ones, and, as part of that exercise, it has undertaken extensive prior consultations with interested parties.

14. On 15 March 2005, the DTI issued another consultation document containing new draft TUPE Regulations. It sought views as to whether or not the draft Regulations correctly and effectively implement the policy decisions taken in February 2003. The consultation document made it clear that the Government was not seeking views on the policy proposals, except in relation to a few outstanding issues such as the exemption of “professional services” from the scope of the Regulations. The document was therefore aimed principally at TUPE specialist groups such as legal advisers, trade unions, employer’s organisations and experts with knowledge of the operation of the Regulations.
15. The consultation closed on 7 June 2005. There were 72 responses to the consultation overall. However no concerns were raised with respect to the estimated costs and benefits presented in the Partial Regulatory Impact Assessment.

Options

16. A range of options was considered in the 2001 consultation. These were mainly concerned with the provision of pensions (which have been addressed in the Pensions Act 2004) but also included the costing of policy recommendations to deal with the problems described above. The results of the formal and informal consultation, have enabled the drafting of legislation on the following measures to, briefly:
 - give more comprehensive coverage to service contracting operations, with the aim of improving the operation of the market, promoting business flexibility and reducing insecurity for employees affected by such operations;
 - introduce a requirement on the transferor to notify the transferee of the employees and associated employment liabilities that it will be transferring, thus increasing the transparency of the transfer process and combating ‘sharp practice’;
 - clarify the circumstances in which employers can lawfully make transfer-related dismissals and negotiate transfer-related changes to terms and conditions of employment for ‘economic, technical or organisational’ (ETO) reasons; and
 - introduce new flexibility into the Regulations’ application in relation to the transfer of insolvent businesses, giving a worthwhile boost to the promotion of the ‘rescue culture’.

Costs and benefits

Assumptions

17. The RIA considers the different aspects of the revision of the Regulations individually. Some of the assumptions are common. We use evidence from the Workplace Employee Relations survey 1998 (WERS 98) and from the Small Business Survey business database to establish the proportion and numbers of employees and undertakings likely to be affected.

18. WERS 98 questioned managers of workplaces with over 25 employees about whether or not there had been a change of ownership in their workplace over the past 5 years. 312 responded 'yes', and of those, 94 implied that a private sector to private sector TUPE transfer was involved.⁴ The latter equates to 4.3 per cent of those surveyed, or about 1 per cent per annum. Anecdotal evidence shows – as would be expected – that small firms are less likely to be involved in transfers. We assume therefore that those affected comprise: between 0.1 per cent and 0.5 per cent of businesses with 1-9 employees; between 0.5 per cent and 0.9 per cent of businesses with 10-19 employees; and 1 per cent of businesses with 20 or more employees.
19. This indicates that between at least **2,500 and 7,100** businesses with between about **200,000 and 220,000** employees will benefit each year from the changes to the legislation. The true figure will be somewhat higher, however, as while the WERS data gives a good indication of the incidence of businesses changing hands through ordinary sales and buy-outs, it probably does not capture transfers occurring through contracting-out and analogous operations. The proportion of such operations to which the Regulations will apply in future will be increased by the changes. The numbers likely to be affected in these cases are considered further below.
20. We assume that there would be no additional implementation costs to companies. Companies who are involved in a TUPE transfer, would in any case be referring to lawyers on what they can and cannot do, so would incur the costs with or without the changes in the Regulations.

Extension of scope

21. The aim of this aspect of the revision of the Regulations is to reduce the high degree of uncertainty felt by the parties involved in service provision changes, as to whether or not the Regulations apply in relation to their particular case.⁵ The measure will involve the scope of the Regulations being extended to give more comprehensive coverage to service provision changes.
22. The practical impact of this change will be essentially confined to purely private sector transfers, i.e. transfers not involving a public sector or former public sector service. This is because TUPE-type requirements are already applied comprehensively when public sector service contracts change hands between private sector contractors, by virtue of the public policy set out in the Cabinet Office Statement of Practice "Staff Transfers in the Public Sector". The Government remains committed to this policy. The Local Government Act 2003 confers powers on the Secretary of State, the National Assembly of Wales and Scottish Ministers to require best value authorities in England, Wales and Scotland to deal with staff matters in accordance with Directions. The purpose of these powers was to enable

⁴ The takeovers included in the analysis include 'sold by parent organisation' and 'management buyout'. See Annex A for details. It should be pointed out that WERS 98 was not a survey conducted to answer TUPE questions

⁵ 'Service provision changes' is a term coined to describe a) contracting-out ("outsourcing"); b) reassignment of a contract ("re-tendering") and c) contracting-in ("insourcing") of labour-intensive services

the provisions of the Statement of Practice to be made a statutory requirement for those authorities. No Directions have yet been issued under these powers.

23. The change will entail new provisions being made to the effect that if:

- a service provision change is to take place; and
- prior to the change, there are employees assigned to an organized grouping the principal purpose of which is to perform the service activities in question specifically on behalf of the client concerned;

then, subject to certain specified exceptions:

- the employees assigned to the organized grouping shall be treated in the same way as in cases where the TUPE Regulations normally apply; and
- the party with responsibility for the carrying out of the service activities before the change shall be treated as the transferor, and the party with responsibility for this after the change shall be treated as the transferee.

24. The measure is expected to impact principally on private sector clients for, and contractors providing, 'blue collar' services such as office cleaning, workplace catering, security guarding, maintenance, and some computer services; and on the employees of such clients and contractors.

25. To estimate the numbers of businesses and employees involved in this type of service provision we use statistics from a selection of industry sectors.⁶ We then make assumptions about the number of times that service providers are changed, including being contracted-in. Annex B provides details.

26. We estimate that between about **2,500 and 4,500** businesses employing between about **60,000 and 100,000** employees are involved each year in a service provision change not involving a public sector service.

27. We further assume that 65 per cent of these service provision changes are, at the point when they actually take place, clearly TUPE transfers under the current Regulations, and are generally recognized and treated as such by all parties concerned. We also assume that 10 per cent of cases are clearly not TUPE transfers under the current legislation. This implies that in 25 per cent of cases it is, at present, legally uncertain and unclear to the parties involved whether or not the change involves a TUPE transfer. Some of the cases in this category will in fact involve TUPE transfers (and may eventually be established to do so by way of legal action); others not. It is impossible to say exactly where the dividing line currently falls, owing to the legal uncertainty. 25 per cent is, in effect, the margin of uncertainty.

28. It should be noted that this considerably understates the true degree of uncertainty surrounding service provision changes as, although the majority – as indicated in the preceding paragraph, we assume 65 per cent

⁶ See Annex B

– are clearly TUPE transfers at the point when they actually take place, they may well have been subject to uncertainty at an earlier stage. This is because the uncertainty arises mainly where the new service provider declines, or seeks to decline, to take over a major part (in terms of numbers or skills) of the old service provider’s workforce, and it may not be known at the outset – for instance, at the stage when a client invites contractors to bid for a contract – whether or not any given case will ultimately fall into this category. The parties themselves can however take steps to reduce the chances of their case ultimately falling into the 25 per cent margin of uncertainty. The client, for instance, can make clear in initiating a tendering exercise that it will exclude bids that contemplate the existing workforce not being taken over; and, even where the client makes no such stipulation, the contractor can choose to bid on a basis that will almost certainly involve a TUPE transfer (provided of course that the bid is successful, and that the contractor is not undercut by a competitor bidding on a purported ‘non TUPE’ basis).

29. The extension of scope is expected to bring clearly within the coverage of the Regulations the majority of cases that are currently within the assumed 25 per cent margin of uncertainty. It will also bring within the coverage of the Regulations a proportion of the assumed 10 per cent of cases that are, at the moment, clearly not TUPE cases. We assume that, under the new Regulations, 85 per cent to 90 per cent of cases will be clearly TUPE cases, and 5 per cent clearly not TUPE cases. This will leave 5 per cent to 10 per cent of cases in which there will still be uncertainty over whether or not the Regulations apply. The change will thus bring certainty to an additional 15 per cent to 20 per cent of cases, involving the transfer of 390 to 880 businesses with between 9,000 to 21,000 employees per annum⁷ – a considerable reduction in the margin of uncertainty.
30. We assume that, of this subset of cases, 10 per cent will already apply the full TUPE Regulations even if they do not have to. This may, on first consideration, seem a low percentage. However, as explained above, where the new service provider in a service provision change does in fact take over a major part (in terms of numbers and skills) of the old service provider’s existing workforce, this generally, in practice, has the effect of causing the Regulations clearly to apply – i.e. of avoiding those cases falling within the margin of uncertainty in the first place. There are, where a labour-intensive service is concerned, only a relatively narrow range of circumstances in which the new service provider might take over a major part of the existing workforce and treat them as if TUPE applies, when in fact TUPE does not apply. An example might be a case where the business is completely reorganized following the change, so that the undertaking does not ‘retain its identity’ in the hands of the new service provider – part of the test for the transfer of an undertaking under the Directive and the existing Regulations.

⁷ These results are obtained by applying the percentages to the numbers of service provision changes that we estimate will be affected each year, as set out – after rounding - in paragraph 19.

31. This leaves the net numbers likely to be affected at between 350 and 790 businesses with (prior to the service provision changes) between 8,000 and 19,000 employees in total. Again, however, these estimates understate the benefits of the change in terms of avoiding disputes, because: a) disputes would at present arise in a proportion of the 10 per cent of cases where, notwithstanding the uncertainty, TUPE was ultimately applied; and b) because – for reasons explained in the following paragraph – the 5 per cent to 10 per cent of cases in which legal uncertainty will remain following the change will be the types of cases in which disputes are, in practice, relatively unlikely to arise.
32. It is unavoidable that some uncertainty will remain following the extension of scope, because the precise facts will be different in every case and it is impossible to draft provisions that draw an absolutely clear line between those that fall within the Regulations' coverage and those that do not. There could potentially be uncertainty about such matters as whether or not there was, prior to the change, an organised grouping of employees dedicated to meeting the needs of one particular client.
33. The main benefits of making this change are that it will:
- help to ensure that all parties involved in service provision changes know where they stand from the outset, and thereby:
 - reduce transaction risks and costs for clients and contractors, and allow for services to be provided more cheaply, in part because of a reduction in the cost of commercial indemnity insurance;
 - help 'take the fear out of transfer' and reduce insecurity for affected employees;
 - reduce the number of TUPE-related employment tribunal and court cases;
 - help to create a 'level playing field' for contract bids and promote fair competition, encouraging *bona fide* potential bidders (including small firms) to become involved in service contracting while deterring 'cowboys' who would seek to compete by cutting employees' terms and conditions;
 - minimise the risk to employees of facing redundancy, and to contractors of facing large associated redundancy payment liabilities, when contracts reach the end of their term;
 - help to insulate contractors, clients and employees from possible future upheavals in the case law on this aspect of the scope of the Directive, such as occurred when the European Court of Justice gave its unexpected judgment in the *Suzen* case in 1997;
34. Set against this, there will be some marginal costs arising from the additional protections that employees will gain in the 350 to 790 cases per annum in which the change will have a direct impact (i.e. in which the legal position will change, leaving aside the indirect impact of providing greater certainty and helping to avoid disputes in cases where the legal position

will remain the same). Even leaving aside the – unquantifiable – benefits described in the preceding paragraph, these will be largely offset by savings. A more detailed analysis of quantifiable costs and savings follows.

35. Redundancy payments: In cases where the change results in TUPE being applied, and where otherwise it would not have been, there is likely to be a significant reduction in the number of redundancies made. This is because:

a. the workforce will pass from the old service provider to the new along with the contract whereas, but for the application of the Regulations, all those who could not be redeployed by the old service provider on other work would have had to be made redundant by the old service provider; and

b. this is likely to result in more employment stability in these sectors as new contractors will have less freedom, and less incentive, to undercut using cheaper labour on worse terms and conditions.

36. We assume below that, if TUPE did not apply, only 5 per cent of the workforce on average would be able to be redeployed by the old service provider. (Some of the others might subsequently be taken on, on new contracts, by the new service provider; but this would not avoid the necessity for the old service provider to make them redundant and pay them – subject to the normal qualifying conditions – a statutory, or possibly an enhanced contractual, redundancy payment.)

37. The new service provider might still wish to make some redundancies following the transfer, however, if this is warranted by increased efficiency, meaning that fewer employees are required. We assume that, on average, there would be a reduction of 25 per cent in the number of employees engaged in carrying out the service activities, and that these employees would all be shed through redundancy (although it would be wrong to suppose that they would necessarily all be employees who had transferred from the old service provider, as there would need to be a fair redundancy selection exercise). This compares with 95 per cent of employees being made redundant by the old service provider if TUPE did not apply - i.e. a 70 per cent reduction in the total number of redundancies. **This will result in a saving to business of £6.5million to £14.5 million each year in redundancy payments.**⁸ The cost of redundancy payments for the 25 per cent of employees who were made redundant would shift from the old service provider to the new. This would be a shift of £2 million to £5 million each year.

38. Number of tribunal applications: Currently there are 1,428 applications each year to the Employment Tribunals Service that include a claim of unfair dismissal under TUPE and 1,321 that include a claim regarding

⁸ We assume an average duration of employment of 4 years. The calculation is therefore: 8,000 x £280 x 4 x 0.70 = £6.546 million, 19,000 x £280 x 4 x 0.70 = £14.546 million. This is based on the assumption that employers only pay the statutory minimum of £280 per year of service. They may choose to pay more.

failure to inform and consult under TUPE.⁹ A certain proportion of breach of employment contract claims (which are generally heard in the civil courts rather than the Employment Tribunals), claims for unauthorized deductions from wages and redundancy payment claims will also be claims arising from a dispute over the application of the TUPE Regulations, but these are not separately identified in the statistics that are collected and cannot be quantified – hence the analysis below understates the benefits of the change in terms of reducing costs associated with legal proceedings. We assume therefore that the number of cases that include either types of claim to be between 1,400 and 2,700 each year.

39. A certain proportion of these TUPE-related claims arise from the current uncertainty over the Regulations' scope in relation to service provision changes. As discussed above, extending the scope of the Regulations is expected to reduce significantly the proportion of cases in which disputes, and consequent legal proceedings, arise. This will mean savings to employers and the Exchequer. On average, a tribunal application costs the employer involved £3,000¹⁰ and the Exchequer £990.
40. On the other hand, broadening the scope of the legislation will mean more cases in which there is potential to make a claim; particularly a claim regarding an alleged transfer-related change to terms and conditions. We assume however, that this effect will be overshadowed by the impact of making the Regulations clearer.
41. If we assume that the changes result in a reduction of between 10 per cent and 20 per cent in applications, this is equivalent to between 140 and 540 applications per year. **This will result in a saving to employers of up to £1.6 million and to the exchequer of up to £0.5million each year.**
42. Changes in terms and conditions: If there is no TUPE transfer, the new employer can essentially determine the terms and conditions of new employees, subject to market conditions. We assume that the average total employment package is worth 110 per cent of gross wages. On average this would be about £382 per week.¹¹ If, but for the application of TUPE, the service provision change would lead to the employees in the new workforce having a remuneration package worth 15 per cent less than the employees in the old workforce (who would be mostly different individuals), this would mean a 'loss' of about £3,000 per employee per year. It was assumed above that, if TUPE applied, the new service provider would reduce the total workforce by 25 per cent. We now further assume that if TUPE did not apply, the new service provider would reduce the workforce by 30 per cent – in other words, that the application of TUPE would, mainly as a result of the transfer of redundancy payments liabilities, act as a marginal disincentive on the new service provider to reduce the

⁹ Source: Employment Tribunal Service Annual Report 2003/04.

¹⁰ This is an estimate of the median cost of an employment tribunal to an employer. This includes the cost of legal services as well as the cost of staff time. The estimates are based on information from the Survey of Employment Tribunal Applications 2003 and the Annual Survey of Hours and Earnings 2004 (available at www.statistics.gov.uk)

¹¹ Source: Annual Survey of Hours and Earnings 2004. Average (median) gross weekly earnings for full and part time workers (including overtime) in United Kingdom is £346.9. 110% of this is £382.

size of the workforce. The additional costs falling to the transferee as a result of the extension of scope would thus be: a) the full cost of the remuneration package, i.e. £382 per week, for 5 per cent of the old workforce; and b) the difference between the old remuneration package and the new, i.e. 15 per cent x £382 =£57 per week, for 70 per cent of the old workforce. **This totals between £17 million and £39 million¹² each year.** This is a direct transfer from the new employer to the employees. All or part of it may have an influence on the price of the contract, and so effectively be 'passed back' to the transferee.

43. Information and consultation: In the case of a TUPE transfer the old employer has to inform and consult employee representatives. For those extra 350 to 790 businesses that will now fall under TUPE Regulations this would have cost implications. We assume that the consultation process takes three days of management and worker representative's time. This includes a consultation meeting as well as discussions before and after. We estimate the daily cost of a manager's time to be about £152 and that of an employee representative about £85.¹³ The total cost per business will therefore be about £710¹⁴. This will bring the costs to all businesses to **£0.3 million to £0.6 million each year.**

44. Summary of costs and benefits: Taking together all the quantifiable costs and savings identified above gives total additional quantifiable costs to business of a maximum of **£9.5 million to £24.3 million each year.** Table 1 gives a breakdown of how this figure is derived.

1. Summary of costs and benefits of extending the scope of the legislation

	Annual benefits (£m)	Annual Costs (£m)
Firms		
Redundancy payments	6.4-14.5	
Tribunal applications	1.6	
Terms and conditions		17-39
Information and consultation		0.3-0.6
Total net impact		9.5-24.3
Individuals		
Redundancy payments		6.4-14.5
Terms and conditions	17-39	
Total net impact	10.8-24.1	
Exchequer		
Tribunal applications	0.5	

45. It should be noted however that the assumptions used in this analysis have – as explained in the appropriate paragraphs – consistently

¹² £57 per week x 52 weeks x 8,000 to 19,000 employees affected x 70% = £17.4 million to £38.7 million.

¹³ Median weekly rate for managers is £583.2, source Annual Survey of Hours and Earnings 2004. Therefore daily cost of managers time is £583.2 x 1.3 /5 = £151.63. Weekly cost of employee representatives time is £327.6. Therefore daily costs of employee reps time is £327.6/5 x 1.3 = £85.18.

¹⁴ (£152 + £85) x 3 = £710.

understated the savings and overstated the costs that will flow from the change. It is therefore likely that the true additional quantifiable costs associated with the change will be at the lower end of this range, i.e. a maximum of around £10 million per annum. This must also be viewed in the light of the fact that there will be other, unquantifiable but nonetheless significant, benefits and savings resulting from the change, as discussed in paragraphs above. It is likely that these will more than offset the estimated maximum £10 million per annum quantifiable costs, so that, overall, the effects of the measure will be positive for business and for the operation of the market as well as for the affected employees. This is certainly the strong view of consultation respondents closely involved in the service-contracting sector – including for example the Business Services Association, which represents many private sector contractors for services. The contracting industry in general strongly supports the measure to extend the scope of the Regulations.

46. Employees would benefit by about £11 million to £24 million each year (see Table 1 for details).
47. The following sections address specific Regulations where there are potential cost and benefit issues arising.

Notification of employee liability information

48. The consultation document dealt with the flow of information from the transferor to the transferee regarding the transfer of employment liabilities.
49. At present, there is no legal obligation on the transferor to pass any information to the transferee. Under the revised Regulations, however, the transferor will be obliged to give the transferee information about the employees who are to transfer, and all the associated rights and obligations towards them. The information will need to be provided at least fourteen days before the transfer, or, if special circumstances mean that that is not reasonably practicable, as soon as reasonably practicable thereafter. If the details change between the time they have first been notified to the transferee and the actual completion of the transfer, the transferor has to inform the transferee.
50. In light of responses to the 2005 consultation, the Regulations have been amended to identify the main categories of information which should be supplied. These include the age and the employment particulars of each transferred individual. As much of this information is already collected by employers under other information obligations, this should reduce the administrative burden on the transferor. Simplifications have also been made to the means of transferring data: the Regulations now allow for the non-written notification of the information, as long as such other forms of communication can be accessed by the transferee.
51. The intended effect of the measure is to increase transparency for the transferee as well as for the employees, and to reduce the number of cases in which the transferee feels obliged to seek commercial indemnities from the transferor to afford cover against exposure to unforeseen liabilities. In cases where no commercial indemnities are or would be

agreed, the measure will protect the transferee, and indirectly its employees, against acquiring such unforeseen liabilities and suffering adverse consequences –including potentially, in extreme cases, insolvency – as a result. The measure also aims at increasing competition as it introduces a strong disincentive to hide any relevant information about a business to be transferred. This might have an effect on the price of a business. If there were significant unusual liabilities toward employees this would reduce the price. This benefit to the transferee would be a cost to the transferor. We cannot quantify this effect, but assume that it would mainly support the functioning of the market.

52. We assume that even at present, in the absence of a legal requirement, equivalent information is already in most cases (90–95 per cent) made accessible in writing to the transferee. The benefit of the measure in those cases will thus be to increase security for the parties against the risk that the information provided may be incomplete or inaccurate, and to reduce the need for commercial indemnities (which can be time consuming and costly for the parties to negotiate and agree). In the other 5-10 per cent of cases – i.e. 240 to 1,100 transfers per annum¹⁵ - the new measure will have the additional effect of causing the transferor to incur costs through time spent identifying the information and writing it down.
53. In the Partial RIA that accompanied the public consultation document we assumed that this would not take more than one day of management time. In light of the simplifications discussed above we now assume that the time needed is reduced by one-quarter. At a daily cost of £152 for senior management this would cost up to **£0.125 million each year in total for all transfers.**¹⁶

Dismissal by reason of a transfer of an undertaking

54. The consultation document raised the issue of the circumstances in which transfer-related dismissals may be lawfully made for economic, technical or organisational reasons entailing a change in the workforce (ETO reasons), and indicated that the Government intended to change the wording of the Regulations in order to clarify the legal position. There has been no change to that position.
55. This aspect of the current Regulations has been subject to uncertainty. We would expect the clarification to reduce the number of disputes over this issue and so save businesses and employees the costs arising from such disputes, including in some instances the costs of contesting court and tribunal cases (and the associated costs to the Exchequer).
56. There were 1,428 transfer-related unfair dismissal cases brought by employees to employment tribunals in 2003/04¹⁷, either as a main or other

¹⁵ These are 5 to 10% of the 4,800 to 11,000 transfers (including TUPE transfers under new regulations) taking place every year.

¹⁶ Calculation: $240 \times 0.75 \times \pounds 152 = \pounds 27,360$ to $1,100 \times 0.75 \times \pounds 152 = \pounds 125,400$.

¹⁷ The official figure for TUPE related unfair dismissal cases may underestimate the actual figure as some of these cases may be filed under other unfair dismissal cases. We do not know the size of this effect. Source of official data: ETS annual report 2003/04

jurisdiction. This is 0.5 per cent of all employees affected by a transfer. This is about the same as the general proportion of all employees making a tribunal application. Therefore even though we expect a reduction, this is likely to be modest. We assume about 5 per cent, or about 70 cases.

57. An employment tribunal case costs business on average £3,000. A reduction of 70 cases would therefore reduce costs to employers by about £0.2 million each year. There would be additional benefits: a reduction in uncertainty over when transfer-related dismissals can be lawfully made would also give employers the ability to make people redundant etc, where necessary, with more confidence, and therefore reduce risks and transaction costs around transfers. These are important benefits but it is not possible to quantify them.

Changes to the terms and conditions of employment affected employees

58. The consultation document also raised the issue of transfer-related changes to the terms and conditions of affected employees and, again, indicated that the Government aimed to clarify the legal position. The Government has now reaffirmed its view that there should be greater scope in the new Regulations for the transferee to be able to vary contracts after the transfer for an economic, technical or organisational reason connected with the transfer.
59. The effects of this increased clarity and flexibility in the Regulations will be to:
- reduce the number of disputes over this issue and so save businesses and employees the costs arising from such disputes, including in some cases the costs (and the costs to the Exchequer) of contesting court and tribunal cases;
 - give employers the confidence to negotiate changes to terms and conditions, and potentially gain improvements in business efficiency (for example, more logical payment systems with lower administration costs), in some cases where they would otherwise have refrained from doing so because of the perceived legal risk;
 - reduce a perverse incentive for employers to make transfer-related dismissals, and attempt to rely on the ETO defence in any resulting unfair dismissal claims, simply in order to be able to offer the employees re-engagement on new terms and conditions (and thereby achieve changes by the 'back door'); and
 - reduce employers' risks and transaction costs associated with transfers.
60. These benefits would be significant, but are unquantifiable.

Application of the legislation in relation to insolvency proceedings

61. The consultation document discussed the situation of an insolvent business. It indicated that the Government had decided to take advantage

of two new derogations in this regard in the revised Acquired Rights Directive.

62. The Regulations have been revised to provide that, in transfers of businesses in certain types of formal insolvency proceedings:
- the debts that, but for the transfer, would have been met by the Secretary of State for Trade and Industry from the National Insurance Fund under the insolvency payments provisions of the Employment Rights Act 1996, will in future remain with the insolvent transferor and still be met by the state in this way even though a transfer has occurred (although debts outside the categories or in excess of the amounts covered under the insolvency payments provisions will transfer as at present); and/or
 - employers and employees may (subject to certain specified safeguards) agree transfer-related changes to the terms and conditions even where there are no ETO reasons that would render them potentially lawful in any event.
63. The intended effect of taking up these derogations is to support the 'rescue culture' by reducing burdens on the transferee. This will create an additional incentive to rescue a business, or parts of it, reducing the proportion of insolvent businesses that are simply wound-up and saving at least some of the jobs of their employees. It will also increase the chances of a rescued business remaining viable after the transfer.

(i) Pre-existing debts not passed to transferee

64. The benefits to business and to employees flowing from the first of the two changes described above will be achieved at the cost of some deadweight expenditure falling to the National Insurance Fund.
65. Under the insolvency payments provisions, employees of formerly insolvent businesses may claim from the state, up to eight weeks' arrears of wages and up to six weeks' arrears of holiday pay, subject to a statutory upper limit on the amount of a week's pay that may be taken into account for these purposes, plus certain other amounts that are largely irrelevant in the present context.¹⁸ If, however, the business is rescued and transfers to a solvent transferee, then – under the current TUPE Regulations – the transferee has to pay any wages or holiday pay owed to the transferred employees and the state is relieved of this liability. Under the new Regulations, where businesses in certain specified types of insolvency proceedings are concerned (these types of insolvency proceedings being dictated by the scope of the derogation in the Directive), the state will continue to pay the debts that it would have paid in the absence of a transfer, even though a transfer has occurred. We estimate that this will result in an increase in payments for the state in this category of about 12 per cent. This is equivalent to about £6.6 million per annum.¹⁹ See Annex C for details of calculations. These will be benefits for the transferee.

¹⁸ For detailed information please see www.dti.gov.uk/access/job_1/pl718/insolv2.htm

¹⁹ The Insolvency Service paid about £56 million in compensation for arrears in pay and holiday pay. 12 per cent of this is about £6.6 million.

66. It is anticipated that insolvent businesses will be easier to sell with one level of debts less. We assume that the measure will increase the preservation rate of businesses in the specified types of insolvency proceedings by between 2 and 3 percentage points. This compares with the current average preservation rate for all insolvencies of about 30 per cent.²⁰ This implies an increase in the number of insolvent businesses rescued through TUPE transfers of between 240 and 360 per annum.²¹
67. The 240-360 additionally rescued businesses would have between 4,900 and 7,300 employees.²² Not all of these would keep their jobs. We assume that about 50 per cent (2,400 to 3,700) of them would do so.
68. The rescue of 240 to 360 additional businesses per annum would benefit the taxpayer. Benefits would include savings in redundancy payments (only between 2,400 to 3,700 employees would claim such payments from the National Insurance Fund), reduced levels of unemployment payments to those who would otherwise not have been able to find another job, and future tax payments. The latter are the consequence of a successful business. In every individual case these benefits would be significant for the jobholder. Overall we cannot quantify these benefits.

(ii) Transfer-related changes to terms and conditions

69. Under the second of the two changes impacting on the transfer of insolvent businesses, transfer-related changes to the terms and conditions of employment of affected employees would be lawful, even in the absence of ETO reasons, if:
- they were agreed between the transferor or the transferee and appropriate employee representatives;
 - they were designed to safeguard employment opportunities by ensuring the survival of the undertaking; and
 - they were not otherwise contrary to UK law (e.g. the National Minimum Wage Act).
70. This measure would have the effect of increasing flexibility for the transferee and would thereby support the 'rescue culture' that the Government is keen to foster.
71. The main benefit for employers would be that there would be the potential to secure agreement to less favourable terms and conditions and enable businesses to be rescued in cases where unaffordable terms and conditions were responsible, or partly responsible, for their becoming insolvent in the first place. The terms and conditions of employees include

²⁰ Source: R3 (2004) 12th Corporate Insolvency Survey. Available at www.r3.org.uk/publications

²¹ Relating this to the number of insolvent business (in the relevant categories) being sold or partly sold as an ongoing concern of around 3,000 the increased rescue of between 240 and 360 enterprises seems reasonable.

²² There are 1.22 million businesses with employees in the UK with 24.8m employees. If the employee distribution of the rescued businesses is the same as for the population of businesses as a whole then this would mean between $(240 \times 24.8m / 1.22m) = 4,879$ and $(360 \times 24.8m / 1.22m) = 7,318$ employees in additional rescued businesses.

a large area of benefits apart from pay, such as holiday entitlement, additional maternity and parental leave, company cars etc. If the annual net value for the benefits were to be reduced by £100 for all the employees involved in this type of transfer, benefits to the transferee would be up to £ 3 million per annum.²³ These would be costs to the employees.

72. The benefit for employees would be that in some cases they would keep their jobs where otherwise they would have lost them. The same principle applies as under the first of the two measures in this area. The benefits to employees would be reduced by any worsening in their terms and conditions. The benefits for the taxpayer would be similar to those under the first measure.

Equity and fairness

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

74. The extension of TUPE to certain types of service provision changes is likely to have an impact on employees in catering, cleaning, security and certain types of computer related services. On the whole these are made up of workers that earn below average wages, both on an hourly and a weekly basis²⁴. Giving these workers some protection will have a positive equity impact, firstly through the protection of their incomes and secondly through the increase in their labour market attachment.

Small firms impact test

75. The Regulations will affect small firms, like all firms, in several ways. The extension of scope to certain service provision changes that are not considered as TUPE transfers will allow them to bid for contracts in a more certain environment. The requirement for notification of employee liability for all TUPE transfers will increase transparency at a modest cost to some transferors. The clarification of when ETO reasons for redundancy and when changes to terms and conditions of employment can apply, will reduce the number of tribunals and reduce uncertainty. And lastly the changes in relation to insolvency proceedings will increase the chances of rescue.

76. The question that we need to answer for the Small firms impact test is whether small firms are likely to be affected disproportionately by these

²³ This is £100 times the estimated number of employees that are currently transferred to another company as a result of insolvency.

²⁴ In the UK the average (median) gross hourly rate (excluding overtime) in 2004 for kitchen and catering assistants was £5.13, for cleaners and domestics £5.33, for security guards/related occupations £6.75, for database assistants and clerks was £7.22. Source Office of National Statistics, Annual Survey of Hours and Earnings 2004. Available at www.statistics.gov.uk

changes to the regulations. To answer this question the Small firms impact test draws on the following:

- our assessment of the relative numbers of small firms that are involved in TUPE transfers which involve a straight purchase;
- how many small firms are likely to be involved in transfers of services;
- the rescue rate of small firms after an insolvency;
- evidence on implementation costs for small firms;
- responses from small firms to our previous formal consultation;
- informal discussions with small firms and organizations that represent small firms amongst others.

77. We do not have any figures on the number of small firms that are currently involved in a TUPE transfer which involves a sale or management buy-out. However, anecdotal evidence suggests that small firms are less likely to be involved in transfers and in particular are less likely to be the transferee.

78. In terms of transfers of service provision (private sector to private sector), we have looked at the proportion of small firms in the affected sectors (cleaning, catering, security and some computer related activities) and compared this with the population of small firms in all sectors. The result shows that small firms are not overly represented in these sectors²⁵.

79. However, surveys have shown that preservation rates in the case of an insolvency are lower the smaller the company²⁶. This is probably not surprising as small firms are more likely to be subject to compulsory liquidations, where preservation rates are low. There is also some concern about the prevalence of insolvency amongst small firms. These statistics would tend to support a view that small firms stand to gain most from changes in the regulations whereby the National Insurance Fund takes on the debts to employees (up to the normal limits) where there is a buy-out.

80. Consultation has revealed no particular concerns from small firms.

Competition assessment

81. We have applied the Competition Filter and this did not reveal any concerns overall. However that is not to say that these measures will have a neutral effect on the markets for transfers generally, changes in service provisions, rescues and on the labour market. We have outlined these impacts in the text. This section summarizes the impacts.

82. The overall effect on the market for transfers would be positive as it would

²⁵ Of the affected sectors 96% are small firms employing between 1 and 49 employees, compared with 97% for all sectors. Source: Small Business Service

²⁶ Source: R3 (1992) *A decade of change* (10th annual company survey). Available at www.r3.org.uk/publications

- increase transparency by improving information on the extent of employee liabilities;
 - clarify the circumstances under which it is lawful to make transfer related dismissals for ETO reasons;
83. There would also be improvements to the workings of the market for service provisions such as cleaning and catering by increasing the certainty of when a transfer is a TUPE transfer and when it is not. This would encourage more and possibly smaller bidders for service provision tenders by giving them a greater understanding of their potential liabilities.
84. Extra protection for employees in the service provision markets would maintain the overall value of their terms and conditions. This could be seen as anti-competitive in that it acts a barrier to new entrants, who are prepared to work for less. One could argue that this will give some existing employees some extra market power, resulting in wages that are uncompetitively high. On the other hand redundancy can serve to weaken the labour market attachment of workers resulting in a shrinking of the labour supply.
85. The market wages for the types of workers that the extension of the legislation is designed to protect are at present above the minimum wage, but not by much. Maintaining minimum standards at work is important in maintaining incentives for those that are out of employment.
86. Our conclusion is that although there may be some short-term costs in terms of reduced labour market flexibility, in the longer term these measures will act to prevent a reduction in the labour supply and are hence on balance positive.

Enforcement, sanctions and monitoring

87. Enforcement continues to be through the Employment Tribunals and the courts.

Implementation and delivery plan

88. The revised draft Regulations will be laid before Parliament in late 2005, to come into effect on 6 April 2006. To assist understanding and implementation, the Department will also publish guidance on the revised Regulations.

Post implementation review

89. Monitoring the effectiveness of the legislation will take place through the talking to stakeholders, monitoring tribunal statistics, data from baseline surveys and case law developments. Officials will also monitor insolvency statistics and any reports into look into the rescue of insolvent companies.

Summary

90. The Government has consulted widely on a number of changes to the Transfer of Undertakings (Protection of Employment) Regulations 1981. The proposed changes are likely to have an impact on employees, firms and the Exchequer. The quantifiable costs and benefits are outlined in Table 2.

2. Summary of costs and benefits of changes to TUPE Regulations

	Annual benefits (£m)	Annual costs (£m)
Firms		
Extension of scope		9.5-24.3
Employee liability information	0.13	
Dismissal by reason of a transfer	0.2	
Insolvency	3	
Individuals		
Extension of scope	11-24	
Insolvency		3
Exchequer		
Insolvency		6.6

91. There will also be unquantifiable benefits to firms and individuals deriving from the increased certainty that the changes to the Regulations will bring, and the increased chances of a successful rescue after insolvency.

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for Employment Relations and Consumer Affairs

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Annex A

Of 2,191 workplaces surveyed in WERS 98, there had been 312 changes in ownership. These were disaggregated into 8 categories which were not mutually exclusive.

A1. Takeovers over the last 5 years

	Number of workplaces	% of changes
Agreed takeover	110	35.2
Takeover/merger formally opposed	2	0.6
Sold by parent organisation	63	20.2
Ex public sector, now privatised/denationalised	9	2.9
Management buy out	31	9.9
Buy out by employees	0	0
Change in partners/major shareholders	86	27.6
Other	36	11.5

Source: Workplace Employee Relations Survey 1998, Department of Trade and Industry

For TUPE-related transfers we include 'sold by parent organization' and 'management buy out'. This means that up to 94 of the 312 changes of ownership could be relevant. This equates to 4.3 per cent of those surveyed, or about 1 per cent per annum. These questions were only asked of workplaces with 25 or more employees. Anecdotal evidence shows – as would be expected – that small firms are less likely to be involved in transfers. We assume therefore that those affected comprise: between 0.1 per cent and 0.5 per cent of businesses with 1-9 employees; between 0.5 per cent and 0.9 per cent of businesses with 10-19 employees; and 1 per cent of businesses with 20 or more employees.

A2. Total number of businesses in UK, by number of employees

	Number of businesses by number of employees	Number of employees (000s)
1 - 4	802,860	1,733
5 - 9	215,260	1,403
10 - 19	112,780	1,515
20 - 49	59,015	1,790
50 - 99	17,740	1,234
100 - 199	9,155	1,270
200 - 249	1,855	413
250 - 499	3,770	1,315
500 +	4,485	13,326
1 or more	1,207,995	23,618

Source: Small Business Service: Small and Medium sized Enterprises in the UK 2003 (<http://www.statistics.gov.uk/>)

Table A3 takes the numbers of businesses and employees in each firm size band and multiplies this by the expected proportion of transfers to get an estimate of the number of businesses and employees affected by a TUPE transfer each year.

A3. Number of businesses and employees affected by a TUPE transfer each year

	Number of businesses	Number of employees
1- 9	1,020 – 5,090	3,140 – 15,680
10 - 19	560 – 1,020	7,580 – 13,640
20 and over	960	193,480
total	2,540 – 7,070	204,200 – 222,800

Source: DTI estimates. Figures may not add up due to rounding

Annex B

Details of calculations due to changes in service provision in the private sector.

The following outlines details of the estimates of the number of firms and employees in service sectors which are likely to be affected by the extension of TUPE.

B1. Number of firms and employment in sectors affected

Industry Sector	Number of businesses	Numbers in employment	Number of employees*
Canteens and catering	4,695	214,000	211,000
Investigation and security services	3,760	155,000	153,000
Industrial Cleaning	10,355	372,000	365,000
Software consultancy and supply	23,710	299,000	286,000
Maintenance and repair of office, accounting and computer machinery	1,230	16,000	16,000
Total	43,750	1,056,000	1,031,000

Source: Office of National Statistics (www.statistics.gov.uk) * DTI estimate taking into account the likely number of non-employees

We assume that the firms in these sectors are providing services for other companies, mainly in the private sector. These services are provided under contracts which will be periodically reviewed and as a result service providers may change, or may even be brought in-house. By making assumptions of the average duration of contracts and the chances of a change in provider after expiry of a contract, we come to an estimate of the number of firms and employees that are affected each year.

B2. Estimate of number of firms and employees affected by extension to TUPE

	Low scenario	High scenario
Duration of an average contract for services	5	4
Chances of contract expiring in year (%)	20	25
Chance of change in service provider after expiry of contract (%)	30	40
Chance of change of contract per year (%)	6	10
Number of firms affected each year	2,625	4,375
Number of employees affected each year	62,000	103,000

Source: DTI estimates

Details of calculations from changes in relation to insolvencies

The table below shows changes to the case load of the Insolvency Service as a result of pre-existing debt not passed to the transferee. Although company liquidations are not within the scope of the legislation, they are already covered by other legislation. For voluntary arrangements and administrations we assume that only in the case of a partial recovery would the Insolvency Service need to pay pre-existing debt. The partial recovery rate for these types of cases is 40 per cent of all recoveries. Receiverships are not covered.

C1. Impact of changes to Regulations on the Insolvency Service

Type of insolvency	Covered under the legislation?	Numbers (average over three years)	Recovery rate	Numbers of cases picked up by insolvency service now	Numbers picked up by insolvency service after new Regs
Company liquidations	N	5,824	10%	5,824	5,824
Creditor voluntary liquidations	Y	9,083	10%	8,175	9,083
Voluntary arrangements	Y	663	76%	159	361
Administrations	Y	2,241	76%	538	1,219
Receiverships	N	1,326	76%	318	318
Total				15,011	16,800

Source: DTI (data on insolvencies) 2002 to 2004, and R3 12th Corporate Insolvency Survey (data on recovery rates)

The estimates show that the insolvency service would have a 12 percent increase in its caseload.²⁷

²⁷ $16,800/15,011 = 1.12$ or 112 per cent.

Annex D – Detailed note on the rationale for, and impact of, the extension of scope in relation to service provision changes

Rationale for the extension of scope

1. At present, in some cases where a service provision change takes place – i.e. a contract to provide a client with a service is: a) awarded to a contractor; b) re-let to a new contractor on subsequent re-tendering; or c) ended with the bringing ‘in house’ of the service activities in question – uncertainty arises as to whether or not the TUPE Regulations apply. This is due to conflicting and unsettled case-law on the scope of the Regulations and of the EU Acquired Rights Directive. The uncertainty centres mainly on service provision changes involving labour-intensive, blue collar services – e.g. office cleaning, workplace catering, refuse collection – where the new contractor declines to take over a major part of the existing workforce from the old contractor. There are essentially two competing views in the case law on the existing legislation. On one view, failure to take over a major part of the existing workforce in a case such as this conclusively avoids the application of the legislation – so that its application is essentially ‘voluntary’. On the other view, such a failure may point toward the conclusion that the legislation does not apply, but is only one factor to be weighed up in the overall assessment, along with other factors such as, in particular, what the new contractor’s motive was for failing to take over the workforce (which can be difficult to assess). In the absence of further ECJ jurisprudence to resolve this case law conflict, it is a moot point to what extent the Directive and the Regulations already apply to the category of ‘problem cases’ described above.

2. This uncertainty has a number of negative consequences. If the new contractor fails to take over a major part of the existing workforce from the old contractor and maintains that TUPE does not apply, but the old contractor and/or the employees or their representatives disagree, all parties concerned – the two clients, the contractor and the employees – are left ‘in limbo’ until the dispute is resolved, which can often be achieved only months later through legal action. If the new contractor ultimately succeeds in the argument that TUPE did not apply, the old contractor is landed with a large unanticipated redundancy liability toward his or her former employees, many of whom may be left without jobs. If, on the other hand, the tribunal or court finds that TUPE did apply, the old contractor’s workforce will be entitled to return to their jobs or – more realistically, given that the new contractor will usually, by this point, have taken on a new workforce in order to carry out the contract – to claim unfair dismissal, landing the new contractor with a large unanticipated compensation bill.

3. In addition, the possibility of avoiding the application of the legislation by failing to take over a major part of the existing workforce creates a perverse incentive for contractors to bid for contracts on this ‘non-TUPE’ basis, so that they can undercut competitors by taking on a new workforce on inferior terms and conditions. This tends to place the focus of the competition on the

question of which contractor can keep labour costs to the lowest level, rather than which contractor can deliver the best management and the greatest efficiency savings.

4. The rationale for the extension of scope is that it will establish in the Regulations themselves that (other than in certain exceptional circumstances) they do apply in the ‘problem cases’ described above, reducing significantly the number of instances in which uncertainty arises in practice. This will help all parties to know where they stand from the outset and avoid unnecessary disputes and employment tribunal and court proceedings.

Anticipated impact of the extension of scope

5. The extension of scope will ensure that service provision changes are (except in certain exceptional circumstances) clearly covered by TUPE. The new contractor will thus be obliged to take over the existing workforce from the old. In general, therefore, contractors will no longer be able to bid for contracts on the basis that they could carry them out with a new workforce on poorer terms and conditions. The estimated cost of the proposed measure (see Annex B) mainly represents the difference between the TUPE-protected terms and conditions of the existing workforce and the inferior terms and conditions that the newly-recruited workforce would otherwise have had in this minority of ‘problem cases’. These costs would be offset by savings.

6. The application of the Regulations in such cases will not prevent the making of genuine redundancies for ‘economic, technical or organisational reasons entailing a change in the workforce’ (ETO reasons), e.g. where the new contractor considers that the contract could be carried out with fewer employees. Where there is a surplus of staff, the responsibility for carrying out the redundancy selection exercise (which will naturally have to be done on a fair basis), making the dismissals and paying any redundancy payments due will generally fall to the new contractor – who can, however, be expected to have been aware of the surplus when bidding for the contract, and to have factored these associated costs into the bid. If the new contractor is simply concerned about the competence or efficiency of employees transferring from the old contractor, these issues can be addressed through training and development and, if necessary, inefficiency action. Transfers should not, in the Government’s view, be used as a device for removing underperforming employees ‘by the back door’.

7. As far as service employees are concerned, the comprehensive application of TUPE in such cases will reduce insecurity and help to ‘take the fear out of transfer’. This can be expected to smooth the transfer process, improving workplace relations and partnership and promoting business flexibility.

Competitiveness considerations

8. The extension of scope will not, in the Government’s view, adversely affect competitiveness in the service contracting market. On the

contrary, it will go a long way towards removing a perverse market distortion and creating a 'level playing field' for contract bids, increasing fairness and transparency. Responsible contractors who bid for contracts on the basis that they can deliver improved management and efficiency will no longer be at risk of being undercut by 'cowboys' who bid on the basis that they can slash labour costs. The Government wishes to discourage such 'low cost, low quality' competition.

9. Although there is perhaps an argument that contractors should take steps to protect themselves, through commercial indemnities or other means, against incurring redundancy liabilities on the loss of a contract, or of becoming involved in a legal dispute not of their own making, this does not always happen in practice. It is also something with which small firms, with little in-house expertise and limited bargaining power, are particularly ill-equipped to cope. Maintaining the status quo would thus perpetuate a disincentive for small firms to become involved in bidding for service contracts, at odds with the Government's 'think small first' philosophy. Even where well-advised contractors do negotiate commercial indemnities, this adds to the transaction costs. The comprehensive application of TUPE in service provision change cases will reduce these costs.

10. A contractor bidding for a service contract will not normally have a large surplus workforce that it can readily assign to that contract if successful. The choice it faces, as things stand under the existing Regulations, is normally between taking over a major part of the existing workforce or recruiting a new workforce from scratch. The extension of scope will in most cases close off the latter option for the minority of contractors who would prefer to take it. This will not disadvantage the sitting contractor in the bidding for the contract, as all bidders will have to work on the basis that the existing workforce will continue to carry out the contract on their established terms and conditions, with no wholesale redundancies being necessary.

11. Contractors and their representative bodies, along with many clients for services, strongly supported the extension of scope in their replies to the 2001 public consultation document, and in other informal representations. There is, in addition, no evidence to suggest that the similar approach already being taken as a matter of policy in the public sector – by virtue of the Cabinet Office Statement of Practice Staff Transfers in the Public Sector and, in local government, the extended legal protections introduced under powers in the Local Government Act 2003 – has had any adverse effect on competitiveness within public service contracting.

TRANSPOSITION OF COUNCIL DIRECTIVE 23 OF 2001 (EC)

The Transfer of Undertakings (Protection of Employment) Regulations 2006 implement the EC Acquired Rights Directive, now revised and consolidated in EC Directive 23 of 2001. They safeguard employees' rights when the business in which they work changes hands between employers.

These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply.

Transposition of 2001. 23 EC by the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")

Article	Regulations
1.1(a) – This Directive shall apply to any transfer of an undertaking or business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.	3(1)(a) and 3(2) Regulation 3(1)(a) provides that these regulations apply to the transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another employer where there is a transfer of an economic entity which retains its identity.
1.1(b) – The Directive applies where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity.	3(1)(a) and 3(2).
1.1(c) – The Directive applies to public and private undertakings engaged in economic activities.	3(4)(a)
1.2 This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty.	3(1)(a) and 3(4)(b) 3(1)(a) – the provision is set out above. Regulation 3(4)(b) provides that the Regulations apply - to a transfer or service provision howsoever effected notwithstanding that the transfer is governed or effected by the law of a country or territory outside the United Kingdom; that persons employed in the undertaking or part transferred ordinarily work outside the United Kingdom or that the employment of any of those persons is governed by any such law.
1.3 This Directive shall not apply to seagoing vessels.	3(7) Regulation 3(7) provides that where, in consequence (whether directly or indirectly) of the transfer of an undertaking or part of one which was situated immediately before the transfer in the United Kingdom, a ship within the meaning of the Merchant Shipping Act 1995 registered in the United Kingdom ceases to be so registered, these Regulations shall not affect the right conferred by section 5 of that Act (right of seamen to be discharged when ship ceases to be registered in the United Kingdom) on a seaman employed in the ship.
2.1(a)	2(1) and 3(1)

<p>“transferor” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business.</p>	<p>Regulation 2(1) provides that a “relevant transfer” means a transfer to which these Regulations apply in accordance with regulation 3 and “transferor” and “transferee” shall be construed accordingly.</p> <p>Regulation 3(1) as set out above provides for the scope of the Regulations.</p>
<p>2.1(b)</p> <p>“transferee” shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1) becomes the employer in respect of the undertaking, business or part of the undertaking or business.</p>	<p>2(1)</p> <p>The definition of “relevant transfer” as set out above includes a definition of “transferor” and “transferee”.</p>
<p>2.1 (c)</p> <p>“representatives of employees” and related expressions shall mean the representatives of the employees provided for by the laws of practices of the member States</p>	<p>9, 13 and 14</p> <p>If the employees are of a description in respect of which an independent trade union is recognised by their employer, employee representatives are representatives of that trade union. In other circumstances, provisions for the appointment and election of employee representatives are set out in regulations 9(2), 13(1) and 14.</p>
<p>2.1 (d)</p> <p>“employee” shall mean any person who, in the Member State concerned, is protected as an employee under national law.</p>	<p>2(1)</p> <p>“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person’s employer shall be construed accordingly.</p>
<p>2.2</p> <p>This Directive shall be without prejudice to national law as regards the definition of contract of employment relationship.</p> <p>However Member States shall not exclude from the</p>	<p>2(1)</p> <p>Regulation 2(1) provides that a “contract of employment” means any agreement between an employee and his employer determining the terms and conditions of his employment.</p>

<p>scope of this Directive contracts of employment or employment relationships solely because:</p> <p>(a) of the number of working hours performed or to be performed.</p> <p>(b) they are employment relationships governed by a fixed-duration contract of employment within the meaning of Article 1(1) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary relationship, or</p> <p>they are temporary employment relationships within the meaning of Article 1(2) of Directive 91/383/EEC, and the undertaking, business or part of the undertaking or business transferred is, or is part of, the temporary employment business which is the employer.</p>	<p>Such contracts/employment relationships are not so excluded from the scope of the TUPE Regulations.</p>
<p>3.1</p> <p>The transferor's rights and obligations arising from a contract of employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.</p> <p>Member States may</p>	<p>4(1), 4(2), 4(4) and 4(5).</p> <p>Regulation 4(1) provides that a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor or in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.</p> <p>Regulation 4(2) provides that on the completion of a</p>

<p>provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations, which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.</p>	<p>relevant transfer –</p> <ul style="list-style-type: none"> (a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this Regulation to the transferee; and (b) Anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee. <p>Regulation 4(4) provides that in respect of a contract of employment that is, or will be, transferred by paragraph (1) described further up any purported variation of the contract shall be void if the sole or principal reason for the variation is:</p> <ul style="list-style-type: none"> (a) the transfer itself, or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. <p>Regulation 4(5) provides that paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1) (set out above), from agreeing a variation of that contract if the sole or principal reason for the variation is -</p> <ul style="list-style-type: none"> (a) A reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce, or (b) a reason unconnected with the transfer.
<p>3.2</p> <p>Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been</p>	<p>11 and 12</p> <p>This is an option that has been exercised at Regulations 11 and 12.</p> <p>Regulation 11 introduces a new duty on the transferor to notify the transferee of the rights and obligations in relation to the employees to be transferred.</p> <p>Regulation 12 provides a remedy of a complaint to an employment tribunal where a transferor has failed to comply with Regulation 11.</p>

<p>known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect The transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.</p>	
<p>3.3</p> <p>Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.</p>	<p>5</p> <p>Regulation 5 provides that where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by regulation 4(1) above, then that agreement shall have effect in its application in relation to the employee after the transfer as if it were made with the transferee.</p> <p>Regulation 5(b) provides that any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement.</p>
<p>3.4</p> <p>(a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.</p> <p>(b) Even where they do not provide in accordance with subparagraph (a) that</p>	<p>10</p> <p>Article 3.4(a) gives Member States an option to include the right to an occupational pension scheme as a right which transfers, but otherwise it is excluded. The UK Government considers there is no need for it in the light of the ECJ's judgements in Beckmann and Martin cases. Those judgements merely interpreted the requirements of the Directive.</p> <p>Regulation 10 provides that Regulations 4 and 5 above shall not apply to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993 or the Social Security Pensions (Northern Ireland) Order 1975; or to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such scheme or otherwise arising in connection with that person's employment and relating to such a scheme.</p>

<p>paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).</p>	<p>Regulation 10(2) provides that for the purposes of paragraph (1) above any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall be treated as not being part of the scheme.</p>
<p>4.1</p> <p>The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.</p> <p>Member States may provide that the first subparagraph shall not apply to certain specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal.</p>	<p>7(1)</p> <p>The UK Government has implemented this article through Regulation 7 by providing a right to automatic unfair dismissal if the sole or principal reason is the transfer itself or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. This fits in with the UK's existing remedies for breach of employment rights. In accordance with the second paragraph of the Article, those who are excluded from protection are those who are not protected by the unfair dismissal legislation in the UK.</p> <p>This shall not prevent a dismissal being potentially lawful where it is for a reason connected to the transfer that is an economic, technical or organisational reason entailing changes in the workforce.</p> <p>7(5) provides that paragraph (1) above shall not apply in relation to the dismissal of any employee which was required by reason of the application of s5 of the Aliens Restriction (Amendment) Act 1919 (10) to his employment.</p> <p>7(6) provides that paragraph (1) above shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.</p>

<p>4.2</p> <p>If the contract of employment or the employment relationship is terminated because the transfer involves as substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship.</p>	<p>4(9)</p> <p>Regulation 4(9) provides that where a relevant transfer involved or would involve a substantial change in working conditions to the detriment of a person whose contract of employment was or would be transferred under Regulation 4(1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed with notice by the employer.</p>
<p>5.1</p> <p>Unless Member States provide otherwise, Article 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority)</p>	<p>8(7)</p> <p>This is implemented through Regulation 8(7) which provides that Regulations 4 and 7 above do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.</p>
<p>5.2</p> <p>This provides options to Member States to provide additional assistance and flexibility to transferees of insolvent undertakings by providing that certain debts will not transfer and that certain changes to terms</p>	<p>8 and 9</p> <p>The UK Government has decided to exercise these options in the new regulations.</p> <p>Regulations 8 and 9 contain special rescue provisions in insolvency situations – by ensuring that pre-existing debts do not transfer to the transferee and providing greater scope to vary terms and conditions of contract.</p>

<p>and conditions can be agreed with the workforce.</p>	
<p>5.3</p> <p>This provides an option to Member States whose national law provides for a “situation of serious economic crisis”.</p>	<p>UK national law does not provide for “ a situation of serious economic crisis”, so Article 5.3 is not relevant to the UK.</p>
<p>5.4</p> <p>Member States shall take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights provided for in this Directive.</p>	<p>The UK Government has reviewed its existing insolvency legislation and considers that sufficient safeguards are already in place. The relevant legislation is the Insolvency Act 1986 (as amended).</p>
<p>6.1</p> <p>If the undertaking, business or part of an undertaking or business preserves its autonomy, the status and function of the representatives or of the representation of the employees affected by the transfer shall be preserved on the same terms and subject to the same conditions as existed before the date of the transfer by virtue of law, regulation, administrative provision or agreement, provided that the conditions necessary for the constitution of the employee’s representation are fulfilled.</p> <p>The first subparagraph shall not apply if, under the laws, regulations, administrative provisions or practice in the Member States, or by agreement with the representatives of</p>	<p>6</p> <p>This regulation relates only to voluntary agreement. Regulations are to be made in due course, under section 169B of the Trade Union and labour relations (Consolidation) Act 1992, inserted by section 18 of the Employment Relations Act 2004, to ensure that declarations made by CAC as to recognition, under statutory trade union recognition procedure are preserved in the event of a change of employer, including by reason of a transfer.</p> <p>Regulation 6 applies where after a relevant transfer the transferred organised grouping of resources or employees maintains an identity distinct from the remainder of the transferee’s undertaking.</p> <p>It provides that in such a circumstance, where before such a transfer an independent trade union is recognised to any extent by the transferor in respect of employees of any description who in consequence of the transfer become employees of the transferee, then, after the transfer-</p> <ul style="list-style-type: none"> (a) the union shall be deemed to have been recognised by the transferee to the same extent in respect of employees of that description so employed; and (b) any agreement for recognition may be varied or rescinded accordingly.

the employees, the conditions necessary for the reappointment of the representatives of the employees or for the reconstitution of the employees are fulfilled.

Where the transfer is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be) an insolvency practitioner authorised by a competent public authority), Member States may take the necessary measures to ensure that the transferred employees are properly represented until the new election or designation of representatives of the employees.

If the undertaking, business or part of an undertaking or business does not preserve its autonomy, the member States shall take the necessary measures to ensure that the employees transferred who were represented before the transfer continue to be properly represented during the period necessary for the reconstitution or reappointment of the representation of employees in accordance with national law or practice.

The third paragraph introduces a new option which the UK Government has not taken up.

Other than representation for health and safety purposes and under the Information and Consultation Regulations 2004, UK legislation only provides for employees to be represented temporarily and for specific purposes such as on transfer of an undertaking or when redundancies are being considered. Insofar as any need arises for such representatives, transferred employees are in the same position after the transfer as they are before, in that appropriate representatives for them would be elected as and when they are needed, rather than on a permanent basis. The UK Government does not consider it necessary or appropriate to provide for transferred employees to be given permanent representation for these purposes when they did not have such representation before the transfer and indeed no other employees have such representation.

However, the Commission may wish to note that the concept of general representation for all employees is currently under review in the UK.

UK law gives all employees the right to be represented at all times for health and safety matters. All employers are a duty to consult safety representatives concerning arrangements for employees' health and safety. In respect of unionised employees, safety representatives are appointed by the union in accordance with the Safety Representatives and Safety Committees Regulations 1977. In respect of non-unionised employees, employers are obliged to consult elected representatives, or if there are no elected representatives, the employees themselves, concerning health and safety matters by virtue of the Health and Safety (Consultation with Employees) Regulations 1996. Union appointed safety representatives are entitled to paid time off for training and to carry out their duties

	<p>and are protected against unfair dismissal and victimisation.</p> <p>Following a transfer employees are covered by the transferee's arrangements for health and safety representation from the moment they transfer. There is no time during which they are not properly represented. The UK Government therefore considers that it is not necessary to take further measures.</p> <p>In the case of Information and Consultation issues, transferred employees may make use of the provision in the Information and Consultation Regulations to seek a negotiated information and consultation agreement with the new employer or make use of the standard procedures provided for in those Regulations. The employer may also have existing arrangements which will apply to the transferred employees.</p>
<p>6.2</p> <p>If the term of office of the representatives of employees affected by the transfer expires as a result of the transfer, the representatives shall continue to enjoy the protection provided by the laws, regulations, administrative provisions or practice of the Member States.</p>	<p>The protections afforded to the employee representatives are set out in Employment Rights Act 1996 as follows:</p> <p>Section 47(1)(a): An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that being an employee representative for the purposes of Regulations 9,13 and 15 of the Transfer of Undertakings (Protection of Employment Regulations) 2006 he performed (or proposed to perform) any functions or activities as such an employee representative or candidate.</p> <p>Section 47(1A): An employee has the right not to be subjected to any detriment by any act, or by any deliberate failure to act, by his employer done on the ground of his participation in an election of employee representatives for the purposes of Regulations 9,13 and 15 of the Transfer of Undertakings (Protection of Employment Regulations) 2006.</p> <p>Section 103(1)(a): An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being... an employee representative for the purposes of Regulations 9,13 and 15 of the Transfer of Undertakings (Protection of Employment Regulations) 2006 performed (or proposed to perform) any functions or activities as such an employee representative or candidate.</p> <p>Section 103(2): An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee took part in an election of employee representatives for the purposes of Regulations 9,13 and 15 of the Transfer of Undertakings (Protection of Employment Regulations) 2006.</p> <p>The UK Government considers that these protections apply</p>

	<p>equally to a former employee representative who is subjected to detriment or dismissed because of his activities in that capacity as to a current one. There is therefore no need to make further provision to implement Article 6.2</p> <p>There are also provisions entitling employee representatives to paid time off to carry out duties under TUPE in Trade Union and Labour Relations (Consolidation) Act 1992 ss 168 and 169 (union representatives) and considers that these would enable a former employee representative to recover pay for time spent in activities under TUPE if it had not been paid by the time he/she ceased to be a representative.</p>
<p>7.1</p> <p>The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:</p> <p>the date or proposed date of the transfer;</p> <p>the reasons for the transfer;</p> <p>the legal, economic and social implications of the transfer for the employees;</p> <p>any measures envisaged in relation to the employees.</p> <p>The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.</p> <p>The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment</p>	<p>13(2)</p> <p>Regulation 13(2) provides: Long enough before a relevant transfer to enable the employer of any affected employees to consult all the persons who are appropriate representatives of any of those affected employees, the employer shall inform those representatives of-</p> <ul style="list-style-type: none"> (a) The fact that the relevant transfer is to take place, the date or proposed date of the transfer and the reason for it; (b) the legal, economic and social implications of the transfer for the affected employees; (c) the measures which he envisages he will, in connection with the transfer, take in relation to those employees or, if he envisages that no measures will be so taken, that fact; and
<p>7.2</p> <p>Where the transferor or the</p>	<p>13(2)(d), 13(4) and 13(6)</p> <p>Regulation 13(2)(d) provides that if the employer is the</p>

<p>transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.</p>	<p>transferor, the measures which the transferee envisages he will, in connection with the transfer, take in relation to such of those employees as, by virtue of regulation 4 above, become employees of the transferee after the transfer or, if he envisages that no measures will be so taken, that fact.</p> <p>13(4) the Transferee shall give to the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph 2(d) above.</p> <p>Regulation 13(6) provides that where an employer of any affected employees envisages that he will, in connection with the transfer, be taking measures in relation to any such employees he shall consult all the persons who are appropriate representatives of any of the affected employees in relation to whom he envisages taking measures with a view to seeking their agreement to measures to be taken.</p>
<p>7.4</p> <p>The obligations laid down in this Article shall apply irrespective of whether the decision resulting in the transfer is taken by the employer or an undertaking controlling the employer.</p> <p>In considering alleged breaches of the information and consultation requirements laid down by this Directive, the argument that such a breach occurred because the information was not provided by an undertaking controlling the employer shall not be accepted as an excuse.</p>	<p>13(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.</p>
<p>7.6</p> <p>Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees</p>	<p>13(11)</p> <p>Regulation 13(11) provides that if, after the employer has invited affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to each affected employee the information set out in paragraph (2).</p>

<p>concerned must be informed in advance of:</p> <p>the date or proposed date of the transfer</p> <p>the reason for the transfer</p> <p>the legal, economic and social implications of the transfer for the employees</p> <p>any measures envisaged in relation to the employees.</p>	
<p>8 – 14</p> <p>These are Final Provisions not requiring to be implemented, other than article 9 (which concerns remedies).</p> <p>9</p> <p>Member States shall introduce into their national systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.</p>	<p>The main remedy in the UK is a claim for unfair dismissal which can be brought in the Employment Tribunals. TUPE provides employees who are dismissed by reason of the transfer or for a reason connected with the transfer where there is no economic, technical or organisational reason with a right to claim that they have been automatically unfairly dismissed (see Article 4.1 above). The remedy for unfair dismissal is reinstatement, re-engagement or compensation. The unfair dismissal legislation is contained in Part X of the Employment Rights Act 1996.</p> <p>In addition there are the following remedies for specific breaches of TUPE.</p> <p>Regulation 12 provides a remedy for failure on the part of the transferee to notify employee liability information.</p> <p>Regulation 15 provides a remedy for failure to inform or consult employee representatives (as required by Article 7 of the Directive)</p> <p>There are also the following rights and remedies in connection with employee representatives and their election (also referred to at Article 6.2 above) which are included in the UK legislation other than TUPE-</p> <p>Section 47 of the Employment Rights Act 1996 (“ERA 1996”): This gives employees the right not to suffer detriment by their</p>

	<p>employer because of their activities as an employee representative, or the fact that they have participated in an election of employee representatives.</p> <p>Sections 61-63 ERA 1996: This gives non-union representatives the right to paid time off to carry out their duties in that capacity, and the right to complain to an Employment Tribunal if the employer is in breach of this.</p> <p>Section 103 ERA 1996: This provides that where an employee is dismissed because he/she has performed activities as an employee representative the dismissal shall be regarded as unfair.</p> <p>Section 168 of Trade Union and Labour relations (Consolidation) Act 1992: This gives union representatives the right to paid time off to carry out their duties as appropriate representatives under TUPE and the right to complain to an Employment Tribunal if their employer is in breach of this.</p>
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