AN IER RESPONSE

Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: Consultation on proposed changes

Response to the Department for Business, Innovation and Skills.

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By

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Introduction

Two fundamental features of the Acquired Rights Directive (the "Directive") need to be kept firmly in mind:

(i) as with its predecessor, the purpose of the Directive is to promote the harmonisation of relevant national laws providing for the protection of employees in the event of a transfer of an undertaking and requiring transferors and transferees to inform and consult; and

(ii) the purpose of the legal measures in relation to which harmonisation is to be promoted is the safeguarding of employees in the event of a transfer of an undertaking.

The Court of Justice has consistently held that the purpose of the Directive is *not* to achieve a uniform level of protection across the EU. Instead, the objective is *"partial harmonisation"*[1]. Against this background, it is misplaced for some to speak of the current version of TUPE "gold-plating" the requirements of the Directive.

What those who use the term mean when they complain that the current version of TUPE "gold-plates" the Directive is that, in certain limited circumstances (and the inclusion of Service Provision Changes is one example), the protections afforded by TUPE may exceed the bare minimum requirements of protection laid down by the Directive. It is a gross manipulation to say that if TUPE exceeds the minimum requirements of the Directive, then that amounts to "gold-plating". Instead, what is clear amongst these interests is a desire to see the Directive implemented so as to provide for the absolute minimum of employee protection.

Notwithstanding the purpose of TUPE and the Directive,, it is impossible to identify one single measure in the consultation document which is even claimed to further the aim of safeguarding employees' rights. This is a set of proposals aimed at benefiting employers and is, as the Impact Assessment acknowledges, likely to disadvantage the low paid (especially women), and those with disabilities.

Even then, the proposals are not backed up by a sound evidence base, an issue we return to in our answer to Question 17. At this stage, we draw attention to three features:

(i) throughout the summaries of questions in the Impact Assessment, additional "IA" questions are asked which seek estimates of the likely costs and benefits of the various proposals. This gives the impression that BIS is not able to quantify and analyse the projected costs and benefits-even though it has now set a timeline for the implementation of the proposals;

(ii) the most prominent proposal is the abolition of Service Provision Changes ("SPCs"). The fact that there is no consensus that this is desirable is reflected in the outcome of the BIS Call for Evidence in 2012 in which there as w a majority in favour of retaining SPCs. In fact, amongst lawyer practitioners in the field, we understand there to be a consensus in favour of retaining SPCs; and

[1] See for example Juuri v Amica Oy Case C-396/07 [2009] 1 CMLR 33

(iii) much reliance is placed on the Employment Tribunal data. Yet, as BIS acknowledegesAs BIS acknowledges, the only figures reproduced relate to information and consultation claims under TUPE. The vast majority of claims are for unfair dismissal and/or unlawful deductions form wages. These are not taken into account at all. BIS then proceeds to the conclusion that *"In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims"*. This simply doesn't follow.

In addition, the approach consistently adopted through the consultation of proposing amendments which "more closely reflect the wording of the Directive" or even "copy out" the relevant provisions of the Directive is not, in our view, helpful to anyone. As we have highlighted, the Directive does not seek to achieve full harmonisation of the laws across the EU. Many areas are left to the determination of Member States. In those circumstances, it is simply irresponsible.and bound to generate litigation and confusion for all concerned, to adopt a seemingly blanket policy of simply seeking to mirror the text of the Directive.
We also note that, at many points, BIS is at pains to emphasise what it sees as the possible anti-competitive effects of not making the amendments it proposes. We do not accept most of those propositions-and they are not backed up by argument or evidence.
We turn now to questions posed in the consultation.

Question 1:
Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No
No.

a) **Please explain your reasons**

b) **Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as implemented by the Court of Justice of the European Union).**

a) The government seems to base this proposal on its statement that the introduction of SPCs in 2006 *"may have actually imposed unnecessary burdens on business, and questions whether they have delivered the benefits actually anticipated."* The government's reasoning seems to be that the position on the application of the Directive became more settled as a result of the Suzen[2] case, and subsequently; that

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

the numbers of Employment Tribunal claims has been increasing and various competition-related arguments.

That reasoning simply ignores the facts.
The position on the application of the Directive (and TUPE) certainly –did not become more settled after the Suzen case. Quite the opposite in fact. - and we strongly suspect that most experienced practitioners, whether acting for employers or employees, would agree.
The Suzen case which introduced the apparent distinction between the application of the Directive to labour-intensive undertakings (which seemed to require the transfer of a major part in terms of their numbers and skills of the workforce) and asset-reliant undertakings (which seemed to require a transfer of significantassets). That was a departure from the previously applicable multi-factorial test set out in the Spijkers[3] case as to the circumstances in which an economic entity retained its identity. That departure came as a significant surprise to practitioners and led to uncertainty-not just in the United Kingdom, but in other EU Member States as well. That uncertainy, directly caused by by the Suzen case, led to a series of cases in the Court of Justice which appeared to reinforce the distinction. These included Vidal[4] (organised group of wage-earners in a labour-intensive undertaking capable of amounting to an economic entity); Oy Liikkene[5] (no retention of identity where no substantial transfer of assets in asset-reliant undertaking); Abler v Sodexho[6] (a requirement to prepare meals in the hospital kitchen amounted to a taking-over of substantial assets); and CLECE[7] (in a labour-intensive undertaking, the non-transfer of staff meant there was no transfer).
That sequence of cases in the Court of Justice led to still greater uncertainty in the United Kingdom Courts which had to grapple with the extent to which the Court of Justice really meant to resile from its previous jurisprudence and the particular problem of TUPE-avoidance in labour-intensive undertakings UK Courts have pointed out that the classifications of asset-reliant and labour-intensive undertakings are simply opposite ends of the same spectrum[8] - and even questioned whether the Court of Justice intended to say that it was necessary, as a matter of law, to distinguish between labour-intensive and asset reliant undertakings[9]. Indeed the UK Courts have been prepared to find that there was a transfer notwithstanding the absence of a transfer of assets in a business which was arguably asset reliant[10].
The problem for the UK Courts in relation to labour-intensive undertakings was that the determination as to whether a transfer had occurred seemed to depend on whether the new employer was willing to take on a major part of the existing workforce. The new employer could seemingly circumvent the application of TUPE

[3] Spijkers v Gebroeders Benedik Abbattoir CV C-24/85 [1986] ECR 1119
[4] Francisco Hernandez Vidal SA v Gomez Perez C-127/96 [1999] IRLR 132
[5] Oy Liikenne Ab v Liskovarji C-172/99 [2001] IRLR 171
[6] Abler and others v Sodexho MM Catering Gesellschaft mbH and Sanrest Grosskuchen Betriebsgesellschaft mbH C-34/01 [2004] IRLR 168
[7] CLECE SA v Valor and another C-463/09 [2011] IRLR 251
[8] See Scottish Coal Co Ltd v McCormack and others [2005] SC 105, approved in Balfour Beatty Power Networks Ltd v Wilcox [2007] IRLR 63
[9] See Balfour Beatty at note 8
[10] P & O Transport European Ltd v Initial Transport Services Ltd and others [2003] IRLR 128

by declining to take on a major part of the workforce. This led to a sequence of cases (at Court of Appeal level) dealing with the discrete issue of the importance to be attached to the new employer's unwillingness to take on a major part of the workforce[11]., and culminating in the absurdity revealed by the Atos case. r[12].
Until 2007, there was a steady stream of appeals to the level of the Court of Appeal (and, in some cases, references from UK Courts to the Court of Justice) dealing with these fundamental issues relating to whether or not there was a transfer for the purpose of the 1981 version of TUPE (ie before the introduction of SPCs in 2006). In fact, it is probably fair to say that appeals and references on issues other than the application of TUPE/the Directive were relatively few and far between. The issues being pursued on appeal were *not* esoteric and of limited application; they were fundamental and wide-ranging, such as the correct approach to asset-reliant and labour-intensive undertakings and how to take account, in labour-intensive undertakings, of the new employer's unwillingness to take on the workforce.
That all changed very dramatically following the introduction of SPCs in 2006. Since the Court of Appeal's decision in the Balfour Beatty case[13], appeals to the Court of Appeal dealing solely with the application of Regulations 3(1)(a) and 3(1)(b) have all but dried up. There is the Court of Appeal's decision in Hunter v McCarrick[14], which clears up the point that, for there to be an SPC, the activities after the transfer must be carried out for the same client. But there is not much else.There have also been no decided references to the Court of Justice from courts in the United Kingdom dealing with the corresponding subject matter under the Directive.
It is true that there have been appeals to the Employment Appeals Tribunal dealing with some of the requirements for an SPC. The first issue to emerge was the effect of fragmentation of services following transfer[15]. It can not be said that the issue of fragmentation creates the wide-spread uncertainty that differing approaches to asset-reliant and labour-intensive undertakings created. It is instead a relatively confined and esoteric issue, necessarily to be decided on the facts on a case by case basis. In any event, this is an issue which has also arisen under the standard definition of a transfer (ie pre-2006)[16]. It is not a major issue of uncertainty generated by the existence of SPCs, as is suggested at paragraph 7.13 of the consultation document.

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[11] See ECM (Vehicle Delivery Services) Ltd v Cox and others [1999] IRLR 559, ADI (UK) Ltd v Willier and others [2001] IRLR 542 and RCO Support Services and another v UNISON [2002] IRLR 401
[12] Atos Origin UK Ltd v (1) Amicus and others (2) Compaq Computers Ltd (3) Compaq Computer Customer Services Ltd EAT/0566/03 26 February 2004: The new employee was initially willing to take on a minority of the existing workforce but subsequently decided not to take on any of them in order to ensure that there was no transfer. After dismissing the concept of a deemed transfer of employees, the Employment Appeal Tribunal held that, in the context of an undertaking which will require fewer workers, the correct approach was to consider whether those who have been taken over constitute a major part of the workforce required after the transfe
[13] See note 7
[14] [2013] IRLR 26
[15] See Kimberley Group Housing Ltd v (1) Hambley and others (2) Angel Services (UK) Ltd [2008] IRLR 682, Clearsprings Management Ltd v Ankers and others UKEAT/0054/08 24 February 2009 and Enterprise Management Services Ltd v Connect-Up Ltd and various Claimants [2012] IRLR 190.
[16] See Fairhurst Ward Abbotts Ltd v Botes Buildings and others [2004] IRLR 304

Likewise, there is the issue of "assignment". Again, contrary to what is suggested at paragraph 7.13 of the consultation document, the existence of SPCs does not introduce new uncertainties as to which employees are assigned. Regulation 4 provides for the automatic transfer of employees employed by the transferor and assigned to the organised grouping of resources or employees. As such, the relevant assignment provision caters both for standard transfers and SPCs. Such uncertainties as there are apply equally to assignment in the context of standard transfers and SPCs[17].

It is essential that a sense of proportion is maintained. The issues of fragmentation and assignment are not unique to SPCs. They did not arise as distinct issues because of the introduction of SPCs. In any event, it is simply not true to suggest that they represent a major issue of uncertainty when viewed in the context of the aftermath of the Suzen case.

Other issues have emerged in relation to SPCs. There has been a handful of appeals to the Employment Appeals Tribunal dealing with how to determine whether there is an organised grouping of employees which has as its principal purpose the carrying out of the activities in question; what is meant by a contract for the supply of services; and the need for the client to remain the same. It is true that all of these issues are applicable only to SPCs. But it is also true that the number of appeals to the EAT raising these issues is very limited indeed.

We think that HHJ Judge Burke QC accurately stated the position in the Metropolitan Resources case: the service provision change provisions were introduced *"to remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under TUPE 1981 to establish a transfer of a stable economic entity which retains its identity in the hands of the alleged transferee, particularly in the case of a labour-intensive operation".*[18]

It is therefore absolutely clear that the existence of SPCs has greatly reduced the scope for dispute as to whether TUPE applies. A return to the pre-SPC position will lead to a return to the escalation in the number of cases contesting whether there has been a transfer. This will inevitably increase the costs for businesses as more and more cases are litigated, increase the burden on the Employment Tribunal and Courts system and lead to a diminution in the protection of employees. What the government clearly intends as a de-regulatory measure will not only diminish the protection employees have, it will also increase the burdens on business (through additional risk and litigation).

Further, the competition-based arguments at paragraphs 7.13 to 7.14 of the consultation document are not substantiated by any evidence, or are simply perverse. No evidence is presented as to the effect that the reason for re-tendering a contract is often that the identified of the persons performing the contract. No explanation is given as to why it is anti-competitive for staff the transferor wishes to keep on to be re-assigned prior to transferor (even if this is a widespread practice). In any event, it simply does not follow from these two flawed notions that *"Removing*

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[17] See for example Edinburgh Home-Link Partnership v The City of Edinburgh Council *UKEATS/0061/11* (10 July 2012, unreported

[18] Metropolitan Resources Limited v Churchill Dulwich Limited [2009] IRLR 190

the service provision changes should act as a spur to competition within the outsourcing market".

At paragraph 7.14, BIS says that "*….Prior to the 2006 amendments, it was necessary to establish whether TUPE applied, whereas now advice is often needed to see how TUPE might be avoided, or concerning how its effects might be mitigated…"*. BIS tells us that this means that the need for legal advice has not been diminished.

We think that it is wholly inappropriate for BIS to acknowledge as legitimate the efforts of employers to circumvent an important piece of social legislation. Still less do we think it appropriate for BIS to use the desire by some employers to seek advice as to how to avoid TUPE as a justification for removing SPCs from TUPE.

We elaborating on why the use of Employment Tribunal statistics relating to information and consultation claims under TUPE only to support the contention that SPCs should be abolished is misleading in our answer to question 17. But, for now, we wish to draw attention to an important statement appearing under the heading of "Employment Tribunal data" on page 24 of the Impact Assessment:

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

Coupled with our arguments as to the dramatic decrease in disputes as to the application of TUPE since the introduction of SPCs, we consider that this is yet further evidence that including SPCs within TUPE is generally working well.

c) There should be no attempt to revert to the pre-2006 situation and to do so would inevitably restrict the protection for employees and re-introduce the previous uncertainty as to when TUPE applies. Re-considering the 2006 domestic case law would inevitably lead to questions of compatibility with the Directive-and yet more confusion.

Question 2:

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

The government should not repeal the service provision changes, If it is determined to whatever the consequences, then there should be as long a lead in period as possible, and certainly no less that five years.

a) **Do you believe that removing the provisions may cause potential problems? Yes/No**

b) **If yes, please explain your reasons.**

a) Yes.

b) See our answers to question 1.

Question 3:

Do you agree that the employee liability information requirements should be repealed? Yes/No

No.

a) Please explain your reasons.

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

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

a) The fact that the current arrangements may be leading to late provision of inadequate information is not justification for repealing the employee liability information provisions.

It is in everyone's interest that there is a formal requirement, set out in the Regulations, for the provision of employee liability information. This is particularly important for the transferring employees because disputes as to their entitlement are less likely to arise if the transferee has been told before the transfer what those entitlements are.

b) No.

c) On balance, we would favour such an amendment subject to the proviso that non-provision of the information would not be any defence to a claim brought by an employee representative for a failure to inform and consult under Regulation 13.

Question 4:

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

No.

a) If you disagree, please explain your reasons.

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

a) There is general agreement that harmonisation is not permitted by the Directive. BIS's stated desire to make it easier to vary contracts to give greater harmonisation is inconsistent with that prohibition.

BIS seems to take the view that the Directive only prohibits variations which are by reason of the transfer, as opposed to variations for a reason which is connected with the transfer.

We don't think that distinction is valid in the light of the Court of Justice's most recent detailed judgment dealing with the issue in the Martin[19] case. We refer in particular to paragraphs 44 and 45 of the Court of Justice' judgment which use the phrases *"…the alteration of the employment relationship is nevertheless connected to the transfer……"* and *"…..the transfer of the undertaking is indeed the reason for the unfavourable alteration of terms….."* interchangeably.

In fact, we think that the current version, in seeking to make the distinction between variations by reason of the transfer and those for a reason connected with the transfer, and permitting variations for a reason connected with the transfer where there is an economic, technical or organisational reason entailing changes in the

[19] Martin and another v South Bank University C-4/01 [2004] IRLR 74

workforce, does not comply with Article 4 of the Directive. It is perhaps surprising that this issue has not been referred to the Court of Justice from the UK courts.
In an area so nuanced and fraught with controversy as this, it is not helpful for BIS simply to propose the amendment of the restriction in regulation 4 *"so that the restriction more closely reflects the wording of the Directive"*.
In any event, we think that the indicative text put forward at paragraph 7.42 of the consultation paper is flawed. First, the new subparagraph (4) does not take account of the fact that the Court of Justice apparently also prohibits changes which are for a reason connected with the transfer.
Secondly, the new subparagraph (5) misunderstands the effect of paragraph 42 of the Court of Justice's judgment in the Martin case. There, the Court explains very clearly that the ability of the transferee to vary terms and conditions is the same as the transferor's, provided that the transfer of the undertaking itself may never constitute the reason for that amendment. The new subparagraph (5) would operate the other way round: the voiding provision of subparagraph (4) would not apply if the variation was one which could have been made had there been no transfer.
Thirdly, the new subparagraph (5A) does not take account of the fact that Article 4 of the Directive prohibits variations where the reason for the variation is the transfer, and makes no separate provision for variations where the reason is connected with the transfer.
It's not clear exactly what the government has in mind. What it has indicated as a possible proposal is fatally flawed and is likely to lead to outright confusion.

b) No. As explained, we do not think that the exception for economic, technical or organisational reasons complies with Article 4 of the Directive.

Question 5:
The government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Yes/No
No.
a) Please explain your answer
b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes/No
c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.
d) Do you think there are any other changes that should be made regarding the continued applicability of term sand conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive? Yes/No
a) The reason behind this proposal isn't made explicit in the consultation document, but it is in the accompanying Impact Assessment. The Impact Assessment

explains that the rationale for the proposal is that employees transferring from unionised employers (especially those transferring to non-unionised employers) are likely to cause large costs to the new employer, and that the proposal may enable more non-unionised potential transferees to bid in areas where employees are unionised. In other words, the reason is to enable prospective transferees to avoid union-bargained terms after one year.

The point has been made many times during the course of the Alemo-Herron[20] litigation that the legal structure within which collective agreements operate at the individual level in the United Kingdom is different to the legal structures in other EU Member States. In the United Kingdom, collectively bargained terms (subject to their incorporation) are enforceable through the individual contact of employment. That is very different from many Member States where collectively bargained terms are enforceable through statute.

Time and time again, the Court of Justice has said that the Directive requires that the contractual rights of employees under national law should be preserved on transfer[21]. And if terms from a collective agreement become incorporated into a contract of employment, then they should be protected to the same extent as any other terms of the contract of employment.

A number of features of the system of collective bargaining in the United Kingdom fortify this conclusion. First, terms derived from collective agreements only become incorporated into contacts of employment, and therefore legally enforceable if the parties to the contract of employment so agree (expressly or impliedly). Secondly, the parties are perfectly free to agree that future changes in the collectively bargained terms will also become incorporated into contracts of employment. Thirdly, terms derived from collective agreements will only become incorporated into contracts of employment if they are apt for incorporation[22]-and terms relating to pay generally are regarded as apt for incorporation. Fourthly, because the terms derived from the collective agreement become terms of the contract of employment, it makes no difference to their legal enforceability via the contract of employment if the collective agreement is terminated[23]. Fifthly, it follows that the question whether a given employee is entitled to the benefit of the terms of a collective agreement falls to be determined solely by reference to the terms of their contract of employment, rather than by reference to membership of a trade union, or whether the employer is party to the collective agreement or is operating within a given sector.

The proposal would also create a two-tier system of contractual rights under the contract of employment. Rights not derived from collective agreements would be protected to the extent provided for by Regulation 4 without temporal limitation. Rights derived from a collective agreement would only be protected to the extent provided for by Regulation 4 for one year, after which they could be amended by varied. To provide for asymmetrical protection of contractual rights depending on the source of the rights is not only perverse, it is also bound to lead to confusion. Quite apart from the blatant unfairness of the proposals, issues are bound to arise.

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[20] Alemo-Herron and others v Parkwood Leisure Limited Case C-426/11

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

[22] Alexander v Standard Telephones and Cables Ltd (No.2) [1991] IRLR 286

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

For example, what happens if an individual contact of employment replicates terms agreed collectively? Also, the logic of the proposal seems to be that, where a collective agreement is terminated, terms which became incorporated into contracts of employment before its termination may acquire a greater degree of protection once the collective agreement has expired. That is bizarre.

The proposal will also create an impediment to long-term, mutually beneficial, collective bargaining. As matters stand, a union could enter into, say, a three year pay deal and be reasonably confident that it would be honoured by the employer. That may be an incentive for the union to make concessions for the benefit of the business. If there was then a transfer during the three year period, the three year pay deal would be protected as a contractually incorporated term.

The position would be very different under the government's proposal. In the event of a transfer during the first two years of the pay deal, it would become open to the transferee to seek to re-negotiate the deal one year after the transfer.

It is true that, absent the transfer, the employer could have sought to re-negotiate the three year deal during its currency and it might have chosen to do so. But, an incoming transferee would be much more likely to feel (at best) ambivalent about honouring an agreement it had not negotiated itself and which it could now vary by agreement. It is all to easy to envisage long-term collective agreements simply refusing to be honoured. The necessary consequence is that union would be less likely to enter into long term agreements.

b) If, contrary to what we have said, variations to collectively bargained terms are to be permitted after a year, there should be a requirement that any change should be no less favourable than the terms applicable before the transfer.

c) The question is misplaced. The outcome of the Alemo-Herron case is likely to be a determination as to whether or not the dynamic approach currently operating in the United Kingdom is *permissible* under the Directive. If the Opinion of Advocate General Cruz Villalon is followed, the answer to that question will be "yes". We think it unlikely, in the light of the Advocate General's opinion, that the Court will rule that a static approach is *required* by the Directive.

Repeating the point we made in our answer at a), we think that there are overwhelming grounds, given the legal structure in the United Kingdom, for preserving the dynamic approach adopted though cases such as Whent v Cartledge[24] and BET Catering Services Ltd v Ball[25].

And there are further grounds for retaining a dynamic approach. The expectations of the employees who have the benefit of dynamic clause in their contracts are certainly that those dynamic clauses will continue to be honoured unless and until the terms are varied validly or the contract is terminated.

Further, it may well be the case that the introduction of such a measure would constitute a disincentive or restraint on the use by employees of union membership to protect their interests in contravention of Article 11 of the European Convention on Human Rights[26].

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[24] [1997] IRLR 153

[25] EAT 637/96

[26] See Wilson and National Union of Journalists v United Kingdom and others [2002] IRLR 568

A particular issue would arise in relation to the application of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). That provision, which is intended to implement the Strasbourg Court's judgment in the Wilson case, makes it unlawful for a worker who is a member of an independent trade union to have an offer made to her or him if acceptance of the offer, together with other worker's acceptance of offers made to them, would have the "prohibited result". The "prohibited result" is that any of the worker's terms and conditions of employment will no longer be determined by collective agreement. The intent of the proposal is, to use the government's language, to unburden business from the effect of collectively bargained terms. Yet, if the proposal is implemented and employers do seek to use this facility as a means to move away from collectively bargained terms, they would apparently be inviting Employment Tribunal claims under Section 145B TULRCA.

It may also be possible to characterise ongoing entitlements under dynamic clauses as property or possessions for the purpose of Article 1 Protocol 1 of the Convention[27], meaning that any interference would require justification.

Further, if the government were somehow to seek to impose a requirement for a static interpretation for contractual terns derived from collective agreements, that would offend basic principles of ordinary contract law. As matters stand, once a term has become incorporated into a contract of employment, or any other contract for that matter, it has the same status as any other express term of the contract. To provide somehow that a dynamic incorporation clause morphs into a static clause on a transfer of an undertaking would be to make a unique example of collectively bargained terms and their incorporation into contracts of employment.

d) No.

Question 6:

Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

We think that the existing structure of regulation 7 is likely to be the most accurate implementation of Article 4 of the Directive.

We refer back to what we say about the way in which the Court of Justice does not make the same distinction between variations which are by reason of the transfer and variations which are for a reason connected with the transfer (see in particular paragraphs 43 and 44 of the Court's judgment in Martin). We think the same applies to dismissals by reason of, and for reasons connected with, the transfer.

[27] See Murungaru v Secretary of State for the Hoe Department and others [2008] EWCA Civ 1015

We also believe that Article 4 does preclude dismissals which are for a reason connected with the transfer which are not for an economic, technical or organisational reason entailing changes in the workforce.
This interpretation of Article 4 is supported by the Court of Justice's decisions in Bork[28] and Jules Dethier[29].

b) No.

As we have said, in Martin the Court of Justice uses the phrases "by reason of the transfer" and "for a reason connected with the transfer" interchangeably. According to the Court of Justice in that case, variations for both types of reason are not permitted by the Directive.
Further, Article 4 of the Directive permits dismissals for a reason connected with the transfer which are also for an economic, technical or organisational reason entailing changes in the workforce. There is no such exception, either in the Directive or the Court's case law, for variations to terms and conditions.

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

No.

a) Please explain your reasoning.

It is clear that the remedies available where the employee is entitled to terminate the contract of employment in the circumstances envisaged by Article 4(2) are for Member States to determine - subject to the restrictions we set out below.
We do not think that it is safe to rely on the Court of Justice's decision in the Juuri case (which is not reported and has been the subject of little academic commentary) as establishing that Member States have a free hand, subject to providing for notice payments and other benefits during the notice period, to determine the remedies available where the contract is terminated in the circumstances envisaged by Article 4(2).
First, that case was heavily influenced by the fact that the substantial detriment relied upon was the expiry of a collective agreement and its replacement with another. The fact that the detriment operated *"independently of any failure on the part of the transferee employer to fulfil its obligations under that directive"* is specifically referred to when the Court gives its conclusions on this aspect[30].
Secondly, as acknowledged by the Court of Justice in the Juuri case, the freedom to choose ways and means of ensuring that a Directive is implemented does not affect the obligation incumbent on all Member States to adopt in their national legal systems all measures necessary to ensure that the directive concerned is fully effective in accordance with the objective it pursues[31]. Further, as the Directive is intended to safeguard the rights of employees in the event of a change of employer

[28] P Bork International A/S v Foreningen af Arbejdsledere I Danmark C-101/87 [1989] IRLR 41
[29] Jules Dethier Equipement SA v Dassey [1998] IRLR 266
[30] See paragraph 30
[31] See paragraph 26 and von Colson and Kamman [1984] ECR 1891 and Impact [2008] ECR I-0000

by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor[32].
The government will not be meeting those requirements if it simply copies out Article 4(2) of the Directive. Instead, it will be introducing a measure guaranteed to lead to more uncertainty and litigation.

Question 8:
Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purpose of the Employment Rights Act 1996? Yes/No
No.
a) If you disagree, please explain your reasons.
Save that Regulation 7(1)(b) expresses the "reason" in the singular, the operative wording is exactly the same as that set out in Article 4(1) of the Directive, which provides "……economic, technical or organisational reason entailing changes in the workforce".
We are not aware of any decision of the Court of Justice touching on the definition of "workforce" in Article 4(1). But courts in the United kingdom have consistently held that the term "workforce" connotes *"the whole body of employees as an entity: it corresponds to the strength or establishment"*[33]. That definition of "workforce" adopted by the courts in the United Kingdom does not include the location at which the work is carried out. There is no reason to suppose that the Court of Justice would define the same word any differently. There is a further reason to support this definition of the word "workforce" for the purpose of Article 4(1).
The words "….entailing changes in the workforce……" must be taken to qualify the preceding words "….economic, technical or organisational reason…". If they didn't, they would be superfluous. And if location was to be included within the concept of workforce, it is difficult to see why other aspects of terms and conditions would also not be included within the definition of "workforce".
Therefore we do not think that the proposal put forward by BIS can be accommodated within Article 4(1) of the Directive.

Question 9:
Do you consider that the transferor should be able to rely on the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes/No
No.
a) Please explain your reasons.
The current position - that a transferor is not able to rely on a transferee's ETO reason - is based on domestic law. But it is based on domestic case law which

[32] See for example Juuri, paragraph 28.

[33] See Delabole Slate Ltd v Berriman [1985] IRLR 305 CA

considers and interprets Article 4(1) of the Directive ie the Hynd v Armstrong[34] case. As was recognised by the Court of Session in that case, the Court of Justice's decision in the Dethier[35] case is not relevant because in that case the Court was not considering the situation of a transferor relying on a transferee's ETO reason.
The Court of Session's reasoning in Hynd v Armstrong is sound. It correctly construed Article 4(1) of the Directive as meaning that an ETO reason relied upon by the transferor to justify a dismissal as fair had to be its own ETO reason. It added that there was no reason why the transferor should be able to rely on a transferee's ETO reason when it didn't have a valid one of its own.
As the Court of Session remarked, that conclusion was fortified by two further considerations. First, there are the insolvency situations referred to at paragraph 7.77 of the consultation document. If the transferor is insolvent, there would be every incentive, if the transferor were able to rely on the transferee's ETO, for the transferor to dismiss the employees to make the sale of the business more attractive. This would subvert the purpose of the Directive. In our view, avoiding this outcome should be given more weight than permitting such dismissals so as to make the purchase of the business a more attractive proposition.
Secondly, we consider that the prospect of enabling a larger pool for redundancy selection purposes is a factor in favour of maintaining the current position. It is likely that any impact in terms of a larger pool will favour the employees whose employment is to transfer. That is in accordance with the purpose of the Directive. It may also be more likely that collective redundancy consultation obligations would be triggered.
Article 4(1) of the Directive does not, in our view, permit the government to amend TUPE so as to enable transferors to rely on transferees' ETO reasons - and there are sound policy reasons for this.

Question 10
Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purpose of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992, therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes/No
No.
a) If you disagree, please explain your reasons.
We doubt whether such an approach would be permitted by the Collective Redundancies Directive[36]. Article 2 of that Directive provides that the consultation obligation is triggered when an employer contemplates collective redundancies. And it is the employer which has to begin consultations. The transferee, of course, will not be the "employer" in advance of the transfer.

[34] Hynd v Armstrong [2007] IRLR 338
[35] Jules Dethie v Dassy C-319/94
[36] Council Directive 98/59/EC

A problem which has always existed with the consultation obligations under TUPE would also be exacerbated if the transferee were to be allowed to consult about collective redundancies in advance of the transfer.

From the employees', and their representatives', perspectives, there has long been a defect at the heart of the information and consultation obligations. The widely held view is that the transferee is not required to consult with the employee representatives of the transferring affected employees in advance of the transfer. The reason for this is that the obligation to consult contained in Regulation 13(6) applies only to an employer of an affected employee which envisages that it will take measures in relation to an affected employee.

It would be grossly unfair if the transferee were to be able to take advantage of an ability to consult about collective redundancies before the transfer without at the same time being required to consult with those employee representatives for the purpose of Regulation 13 of TUPE.

There is also the issue of pool selection for redundancy purposes we have already referred to. If consultation is effectively allowed to start before the transfer in respect of redundancies to be made after the transfer, it is virtually certain that the pool selected will include only employees of the transferor, thereby denying them the opportunity to advance a case for a selection pool encompassing the transferee's existing employees.

Further, the consultation required by TULRCA relates not only to the employees to be dismissed, but also to the employees who may be "affected" by the proposed dismissals or by measures taken in connection with them. If pre-transfer consultation is allowed to count, there is every chance that there will be two groups of employees under consideration - those employed by the transferor and those otherwise "affected" employees of the transferee. We don't see how the consultation could work effectively in those circumstances.

There are also practical reasons why the government's suggested approach should not be adopted. First, the employee representatives for the transferor's transferring affected employees will probably not be familiar with the workings and business of the transferee before the transfer. It is unrealistic to expect them to be in a position to consult about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and ways of mitigating the consequences of the dismissals in advance of the transfer. It may well even be unrealistic to expect transferees to be in the necessary state of readiness in advance of the transfer to supply sufficient information to the transferor workforce's employee representatives. These points carry particular weight as the government introduces measures to shorten the period within which consultation must commence where 100 or more redundancies are proposed.

It is essential to have in mind that the purpose of the Collective Redundancies Directive is to find ways of *avoiding* dismissals, reducing their numbers and mitigating the consequences. It is not to enable redundancies to be rushed through as quickly as possible.

Question 11:
Rather than amending Regulation 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?
No.
a) Please explain your reasons.
b) If you disagree, what would you propose is a reasonable time period?
Further provisions contained in guidance are less likely to be legally enforceable than if they appear in the Regulations themselves. We do not think it is either necessary or appropriate to put forward a fixed time period.

Question 12:
Do you agree that the regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employees representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? Yes/No
No.
a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees) Yes/No
In our view, amending Regulation 13 to permit micro businesses to inform and consult directly with affected employees without making arrangements for the election of employee representatives is not permitted by Article 7 of the Directive. As the Court of Justice held in European Commission v United Kingdom[37], the objective of what is now Article 7 is to enable employees to be informed and consulted about the transfer through their representatives. It is not open to Member States to permit a situation to exist whereby employers are not required to inform and consult employee representatives.
There are two exceptions to this. The first is that provided for in Article 7(5) of the Directive, which permits Member States to limit the obligations of paragraphs 1,2 and 3 "*…to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees*". In the United Kingdom, there is no such condition for the election or nomination of a collegiate body representing the employees. The first exception is not therefore available.
The second exception is where the employees, through their own default, fail to elect employee representatives. Unless the employees fail to elect representatives, that exception is not available.

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

[37] Commission of the European Community v United Kingdom of Great Britain and Northern Ireland [1994] IRLR 392

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes/No
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.
It will be apparent that we oppose all of the amendments proposed by the government – mostly on the grounds that they introduce greater uncertainty and/or do not comply with the Directive.
Whatever the government decides to do by way of amendment, the amendments should apply equally to micro businesses. To provide otherwise would lead to the intolerable position of different provisions applying to different organisations. Quite apart from being confusing and unfair, that may well be, to coin a term much favoured by BIS, "anti-competitive".

Question 14:
Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes/No
We believe that all of the proposals are fundamentally flawed, for the reasons given above.

Question 15:
Have you any further comments on the issues in this consultation?
No.

Question 16:
Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No
They will have a negative impact.
Please explain your reasons.
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
In our view, the quality of the Equality Impact Assessment is woefully inadequate given the extent and potential impact of the proposals put forward by BIS.
It is inevitable that the proposals, if implemented, will have a negative impact on equality and diversity within the workforce. Despite what is said at page 53 of the Impact Assessment document, it must be the case that the introduction of SPCs in 2006 extended the coverage of TUPE to many low paid workers who would not previously have been protected. To remove that protection will necessarily have an impact on the low paid.
We also believe that there will be disproportionate impact on women (particularly where they are low paid) and those with disabilities, and possibly by reference to ethnicity and religion or belief.
We are surprised that these potential impacts were not explored more thoroughly before the proposals were published.

Question 17:
Do you agree with the analysis and evidence provided in the Impact Assessment? Please details for any area of disagreement or if you can provide any further knowledge in an area.
No.
Page 2 of the Impact Assessment seeks to answer the question why government intervention is necessary in relation to TUPE. The answer is laced with unsubstantiated propositions and anecdote: that TUPE could be creating an unnecessary burden on business, reducing the efficiency of the supply side of the economy and that the consultation is driven by "other feedback" and by the increase in Employment Tribunal cases related to TUPE (a claim which we address below). The policy objective to be achieved is simplification of TUPE and cutting out "unnecessary gold-plating".
We don't think that stated policy objective is consistent with the rationales given for the separate proposals in the consultation document, which are more to do with conferring advantages on employers at the expense of workers.
The specific analysis and evidence for the removal of SPCs points out that transferors "*could end up with surplus employees, whilst the transferee needs to recruit*". According to the evidence presented by BIS, up to 40,000 SPCs per year may be removed from the scope of TUPE. We consider it to be inevitable that removing SPCs from TUPE coverage will lead to significant job losses. Further, the associated redundancy costs will lie with the transferor and, in the public sector, that means public sector employers (or for insolvent employers, the Exchequer).
BIS offers no evidence to support the repeated proposition that SPCs lead to under-performing employees being deliberately included within the transferring employees.
And the department does not even attempt to advance a cost benefit, even for employers, beyond the recoupment of the £13million to £30million benefits estimated to have accrued to individuals arising out of the introduction of SPCs.
The specific analysis for changing the wording of restricting changes to terms and conditions does not even set out a description of the monetised costs for the main affected groups. A key risk is identified in terms of employers potentially not being confident enough to avail themselves of the amended provisions even if they are introduced. We think that this should have been, and should still be, properly investigated.
On the analysis and evidence in relation to limiting the effect of collective agreements, although it is an objective we condemn, the government is at least clear in why it is proposing these changes: to make it easier for non-unionised employers to bid for contracts and avoid having to pay unionised terms and conditions.
The other specific analyses and evidence for specific proposals follow in similar vein. There is no quantification and analysis of costs and benefits. There are occasional statements as to how particular measures might lead to beneficial results for employers.
Whilst we appreciate the difficulties in obtaining data as to the number of TUPE transfers each year, the evidence produced at pages 22 to 24 is at best unconvincing. The only conclusion which can sensibly be drawn is that BIS doesn't really know

how many standard transfers, and how many SPCs, there are each year. That is not an encouraging position from which to propose wholesale changes to the Regulations.

But perhaps most objectionable is the use of the Employment Tribunal Data to reach the conclusion that: *"…In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims".*

As the consultation document acknowledges, the only claims which are recorded as being TUPE-related are claims relating to information and consultation. And claims in this category have risen from about 1000 in 2006/2007 to about 2500 in 2011/2012. This is against a background of TUPE applying to something less than 37,000 transfers in 2006 and around 77,000 in 2011/2012. It is acknowledged by BIS that, with so many TUPE transfers taking place each year, this is still a comparatively low number of Tribunal cases and that TUPE legislation should be viewed as an area where there is good compliance.

But the figures for information and consultation cases can not possibly provide a reliable picture of the overall operation of the Regulations. The great majority of TUPE-related claims do not present themselves as claims for a failure to inform and consult. They are instead claims for unfair dismissal and unlawful deductions from wages, which types of claims are likely to engage many of the issues raised in this consultation.

It is, at best, misleading to say that figures for failure to inform and consult cases under TUPE can be used as a driver for the subject matter of this consultation.