

**dti**

TUPE: DRAFT REVISED  
REGULATIONS

Government response to the  
public consultation

DATE: FEBRUARY 2006

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Government Response to the Public Consultation on the draft revised TUPE Regulations

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## **Chapter One: Introduction**

### **Background**

1.1 The Transfer of Undertakings (Protection of Employment) Regulations 1981 - commonly known as the TUPE Regulations - were introduced in order to implement the EC Acquired Rights Directive, adopted in 1977. They safeguard employees' rights when the business in which they work changes hands between employers.

1.2 The TUPE Regulations have been amended on a number of previous occasions. Also, the Acquired Rights Directive was itself revised in 1998 through an amending Directive. This was subsequently consolidated with the original Directive, resulting in the adoption of the current Acquired Rights Directive in 2001.

1.3 The Government regards the TUPE Regulations as a positive measure with the potential to facilitate necessary business reorganisation and public sector modernisation whilst protecting affected employees. The Government has, however, recognised for several years that the Regulations are working less effectively than they might, and it therefore committed itself to their reform. In September 2001, the Department of Trade and Industry published a formal public consultation document, accompanied by a detailed background paper, setting out specific policy proposals for the reform of the Regulations. 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 replace the existing ones, and, as part of that exercise, it has undertaken extensive prior consultations with interested parties.

1.4 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, employers organisations and experts with knowledge of the operation of the Regulations.

1.5 This document summarises the views received during the formal consultation and sets out the Government’s response to the points raised.

### **Responses to the consultation**

1.6 Around 35 copies of the consultation document were sent to interested parties. The document was also posted on the DTI’s website. In addition, DTI officials held meetings with representatives of various key stakeholders during the consultation period. The consultation closed on 7 June 2005.

1.7 A total of 73 responses were received. A summary of the responses is set out in the table below.

<b>Category</b>	
Employer / Employer Organisations	<b>23</b>
Trade Unions	<b>10</b>
Lawyers and Lawyers’ Organisations	<b>27</b>
Central and Local Government	<b>9</b>
Others	<b>4</b>
<b>Total</b>	<b>73</b>

1.8 A list of those respondents who were willing to have their names and responses disclosed can be found at Annex A. The Government would like to thank all the respondents who contributed.

## **Understanding this document**

1.9 In the consultation document, a set of 17 draft Regulations was published. The main changes were contained in the following five areas:

- draft Regulation 3 (a relevant transfer);
- draft Regulation 4 (effect of a relevant transfer on contracts of employment);
- draft Regulation 7 (dismissal of an employee because of a relevant transfer);
- draft Regulations 8 and 9 (insolvency); and
- draft Regulations 11 and 12 (notification of employee liability information).

The consultation document presented seven specific questions for consultees to address in relation to those five areas.

1.10 Chapters 2 to 6 of this response document deal with these five key areas in turn. Chapter 7 goes on to discuss comments received about Regulations 13 – 15 concerning the obligations on the employer to consult representatives of the affected workers in advance of the transfer. Finally, Chapter 8 deals with the points made about the remaining Regulations.

1.11 In each chapter, a summary of the views expressed by respondents is presented. Not every respondent is cited in each case, not least because some submissions repeated views already expressed by others. Then, the Government's response to those views is presented and set out in bold lettering.

## **Overview of the consultation**

1.12 In general, consultees supported the need to revise the existing regulations, though the CBI pointed out that the Acquired Rights Directive might itself be revised

again. Respondents made a large number of detailed points on the drafting, most of which focused on the need to clarify the meaning of the Regulations to reduce the potential for litigation and uncertainty. Most comments were received on Regulation 3 (which defines a relevant transfer), Regulation 4 (variations of contract), and Regulations 11 and 12. (which concern employee liability information).

**1.13 Whilst the Government intends to retain the existing structure of the Regulations, it accepts that at several points the Regulations could be made clearer. It proposes making most changes to Regulations 3, 4, 11 and 12. The Government has decided not to exempt professional services from the scope of the Regulations, the main policy issue on which respondents were asked to comment.**

1.14 Many respondents expressed strong support that the DTI should issue guidance to help parties apply the regulations in practice, though Eversheds thought guidance would be unnecessary if the law itself were clear. **The Government confirms its intention to produce guidance on the new regulations.**

### **Next steps**

1.15 The Government will revise the draft Regulations as indicated in this response document. The revised draft Regulations will then be laid before Parliament in this calendar year, to come into effect on 6 April 2006. To assist understanding and implementation, the Department will also publish guidance on the revised Regulations.

1.16 The Government published a detailed Regulatory Impact Assessment (RIA) assessing the costs and benefits of the draft Regulations as an annex to the consultation document. Shortly after the final Regulations are laid before Parliament, the final version of the RIA will be published on the DTI's website.

## **Chapter Two: A Relevant Transfer - The Scope of the Regulations**

2.1 Draft Regulation 3 defines a “relevant transfer” for the purpose of TUPE. Draft Regulation 2 supplements that definition by providing interpretations of some of the terms used within draft Regulation 3. The definition includes the type of standard business transfer which is already covered by the existing regulations, but added “service provision changes” to the scope – a term which describes situations where a contract to provide a business service to a client is let, re-let or ended by bringing it in-house. Draft Regulation 3 also sets out a number of conditions which must be met for a transfer to fall within the scope of the Regulations. For example, in the case of a service provision change, it stipulates that an organised grouping of employees must exist immediately prior to the change, which, as its principal purpose, provides the service in question to the client. It also sets various exemptions to exclude the one-off buying-in of services; services which consist wholly or mainly of the supply or procurement of goods; and transfers within public administrations. Draft Regulation 3 also deals with the territorial coverage of the TUPE protections.

2.2 Draft Regulation 3 also included an exemption for professional services, but the consultation document discussed at some length the pros and cons of that aspect of the Regulation. The consultation document therefore explicitly invited views on the desirability of including such an exemption in the revised Regulations.

2.3 54 respondents commented on this Regulation.

2.4 There was strong support for taking measures to ensure that service provision changes were covered in the Regulations. The TUC and other unions all favoured this option and were broadly content with the way the provision was drafted. Those in favour also included a wide range of other bodies with an interest in service contracting, both public sector (e.g. local government respondents) and private sector (e.g. Environmental Services Association, Factors and Discounters Association, the Recruitment and Employment Confederation and the Royal Mail Group). A number of law firms (e.g.

Barnes Associates, Thompsons Solicitors and Travers Smith) also expressed satisfaction with the general approach. The Confederation of British Industry, whilst not opposed in principle, questioned the benefit of the reform as it believed that the Commission is also planning to review further the Directive. In common with several respondents, the CBI argued that detailed guidance on the new concepts in Regulation 3 would be needed. In contrast, the Engineering Employers' Federation were strongly against the inclusion of the provisions on service provision changes : they opposed the policy behind this aspect of Regulation 3 arguing it would create inflexibility in contract provision and reduce competition and innovation at the same time as creating new areas of legal uncertainty.

**2.5 The Government indicated in the consultation document that it was a set policy to widen the TUPE protections to encompass “service provision changes”. Many service provision changes are also in fact business transfers and are thus already covered by TUPE. The net effect of the policy is not as great therefore as some respondents suggested. In the light of the opinions expressed by consultees, the Government reaffirms its intention to ensure that service provision changes should be explicitly covered in the new Regulations. In terms of timing as there is no prospect of the Directive being revised again in the immediate future, the Government considers that there is no basis for further delays in bringing these Regulations into force.**

2.6 Though often supportive in principle, respondents identified a number of areas where Regulation 3 could be improved. Several respondents including the Treasury Solicitors and the Business Services Association questioned whether the position of sub-contractors was clear. Other respondents including the Employment Lawyers' Association and the law academic Philip Millington questioned whether the definition of a service provision change adequately handled the situation where the new contract splits up the service “activities” across several transferees and several separate contracts. In other words, they wondered whether the provisions, which were drafted on the basis that a set of activities undertaken by one employer's workforce would switch en bloc to another employer, adequately dealt with situations where those activities were re-

packaged and transferred to two or more different employers. Others, including the City of London Law Society, expressed misgivings about the way the Regulation referred to the service “activities” which would be transferred to another provider, and called for a clear definition of “activities” to be given. Thompsons Solicitors considered that this term might mean that fewer transfers would qualify for the protections and they preferred using the term “service” or “function”. Others questioned whether the definition implied that the activities must carry on with the transferee in exactly the same form as before. Eversheds considered whether the definitions contained in Regulation 3 would be better positioned within Regulation 2, where other definitions were presented. Thompsons Solicitors also referred to the *Celtec v Astley* judgment where the ECJ held that parties could not postpone the effective date of transfer. They questioned whether the wording at Regulation 3(6)(a) was consistent with that judgment as it provides that transfers can be effected over two or more transactions.

**2.7 The Government considers it essential that Regulation 3 should define as clearly as possible a service provision change that will fall within scope of the Regulations. It maintains its view that the use of the word “activities” best suits that purpose. In most cases, it should be clear what roles or functions comprise the activities in question and therefore which individuals will be transferred along with the service provision change. The term “activities” is more precise than some of the other alternatives suggested and is sufficiently broad to capture the nature of the service provision that the Government intends should be within this provision. There is no implied requirement for those activities to be carried out by the transferee in an identical manner. As the decision of the Court of Appeal in *Fairhurst Ward Abbotts v Botes* on the existing regulations governing business transfers confirmed, there is no requirement that what is transferred must be a separate economic entity in the hands of the transferee before the transfer takes place. It is sufficient if part of a larger stable economic entity becomes identified for the first time as a separate economic entity on the occasion of the transfer. The Government considers that this approach to what constitutes an economic entity applies equally to the construction of activities in the context of a service provision**

**change. The Government recognises that contractors often sub-contract to others, and a failure to refer explicitly to sub-contractors in the Regulations may cause uncertainty. The Government has therefore decided to make it explicit (rather than implicit) that sub-contractors are in the same position as contractors when activities are performed by them.**

2.8 Several respondents commented that use of the phrase “an organised grouping of employees” in Regulation 3(3)(a)(i) meant that the protections would not apply where the service is provided by just one employee. If so, they wondered whether the proposals complied with the ECJ’s judgment in the *Schmidt* case. **The Government considers that the phrase could be interpreted as meaning that at least two employees must be involved for service provision change to occur. Some contractual services - for example, the cleaning of a relatively small office - are sometimes undertaken by just one person, and the Government accepts it would be unfair to deny rights to such individuals simply because they are single employee units. The Government intends to revise the Regulations to ensure that the protection applies to service provision changes involving just one person.**

2.9 Respondents pointed out that the wording in Regulations 3(3)(a)(i) and 3(4)(b)(ii) which dealt with the territorial issues were inconsistent. Some questioned the extent to which the extra protection for service provision changes should apply to the letting of contracts overseas or vice-versa. The EEF also found the Regulations were confusing on this point, and added to the existing difficulty in ascertaining the territorial coverage of UK employment rights. **The Government agrees that there is inconsistency in the Regulation’s wording as regards the territorial coverage, which should be removed.**

2.10 The exemptions to the definition of a service provision change elicited many comments. In particular, several respondents including the TUC questioned whether the use of the Regulation 3(3)(a)(ii) was sufficiently precise and some long-term contracts (such as designing a nuclear station or organising security for the Olympic Games) might as an unintended consequence fall within the definition of the “single specific event or

task”. The TUC proposed that the exemption should be limited to single events or tasks which were completed within a set time period. Some respondents also pointed out that the exemption depends on the “intention” of the client. As such intentions might change over time, there might be a case to specify a point in time or a range of such points when the employer’s intention counted for these purposes. Philip Millington thought that the use of the “intentions” concept was dangerous because it introduced extra uncertainty. On the exemption at Regulation 3(3)(b)(i), various respondents suggested that “procurement” be deleted, because term was unclear in this context and might mean that procurement departments could be outsourced without the protections applying. The Law Society thought that the exemption was unnecessary and did not provide adequate protections to a small but deserving group of employees. The TUC considered that the distinction between the supply of a good and the supply of a service was not always clear and the exemption should be monitored closely. On the exemption for changes within public administrations at Regulation 3(5), the TUC, GMB, other unions and the Law Society argued that the protections should apply to such intra-Governmental transfers as this would simplify the system of protections. Others questioned the drafting of the exemption which seemed cumbersome, even though it repeated language used in the Directive.

2.11 53 respondents expressed views as to whether or not there is a case to introduce a professional business services exemption. A majority was against the exemption, including the CBI, EEF and TUC. Trade unions and some legal firms were concerned about the practical difficulties that would arise over the definition as to which services should be excluded. A number of respondents simply considered that the exemption was unnecessary and wrong in principle, and thought that practical problems were unlikely to arise in any event. A minority was in favour of the exemption, including the Factors and Discounters Association, the Institute of Practitioners in Advertising and the Newspaper Society, who argued that the application of the Regulations to these sectors would add to business burdens, complicate contractual arrangements and decrease competition.

**2.12 As regards the exclusions from the definition of a service provision change, the Government considers that the weight of opinion requires several changes to be made to the Regulation. First, the Government has concluded that there should be no exclusion for professional services. There are strong arguments against this exclusion, which were described in detail in the consultation document. Most consultees considered that these disadvantages outweighed the potential benefits, which were also set out in detail in the consultation document. The Government does not therefore propose including an exemption for professional services in the Regulation.**

**2.13 Second, the Government acknowledges that the wording at 3(3)(a)(ii) on a “single specific event or task” was not sufficiently precise, and did not adequately capture the Government’s intention to ensure that long-lasting contracts would not be covered. The Government also recognises the scope provided by the wording for unnecessary litigation as to whether a particular contract concerned a specific, over-arching task or a series of inter-linked tasks. The Government therefore intends to amend the Regulation by making it clear that the exemption applies to tasks or events of short-term duration. The Government acknowledges that the exemption could be misused by clients who deliberately break up longer term contracts into a series of smaller contracts of a short-term duration. This potential loophole can be closed or greatly narrowed by ensuring that the client’s “intention” must be to ensure that each contract is distinct and not part of a deliberate design to let linked contracts to the same contractor in the future. Employment tribunals are accustomed to assessing the motivation of parties when considering cases put before it.**

**2.14 Third, the Government acknowledges the case to change the reference to “procurement and supply” in Regulation 3(3)(b)(i). The reference to “procurement” might mean that the outsourcing of a client’s “procurement department” would also be caught by the exemption, an effect which the Government did not want to achieve as such departments clearly provide a service**

**function. The Government therefore proposes to delete the reference to “procurement”.**

## Chapter Three: Contracts of Employment

3.1 Draft Regulation 4 defines what happens to contracts of employment on a transfer. It establishes the basic rule that contracts will continue in the same way under the transferee employer as they had operated under the transferor employer. It also stipulates that neither the transferor nor the transferee may alter the terms of an employment contract because of the transfer itself or in certain other circumstances connected with the transfer. Regulation 4 also contains provisions which define when contracts may be changed, including provisions which state that contracts may be lawfully varied for a reason connected with the transfer “entailing changes in the workforce”, which is an “economic, technical or organisational” reason (i.e. an ETO reason) .

3.2 52 respondents commented on this Regulation.

3.3 Respondents focused their comments mostly on the provisions concerning the ability to vary contracts for an ETO reason connected with the transfer. Most employers and public bodies were strongly in favour of the approach suggested in the draft Regulation. However, many of these respondents, including the CBI, were concerned that the inclusion of the term “entailing changes in the workforce” would greatly restrict the ability of employers to vary contracts. In particular, they considered that the expression would mean that the law would still frustrate their ability to harmonise the contracts of the transferred workforce with the existing workforce of the transferee. This would result in inefficient, complicated and unfair contractual structures. Some respondents including the EEF and Eversheds suggested that the phrase “entailing changes in the workforce” should therefore be deleted. The CBI suggested that harmonisation should be expressly permitted in the Regulation, though harmonisations should be permitted only where employees did not lose as a result. In contrast, trade unions strongly opposed the ETO defence on the grounds that it would dilute employee protections. They argued that employees in a business transfer would be in a particularly weak position to challenge employer moves to reduce pay and other terms and

conditions. The TUC, Amicus, GMB and NUT also argued that the proposal had no basis in EU law and was incompatible with the Acquired Rights Directive. Lewis Silkin argued that, to protect employees during transfers, any contractual variations would have to be agreed with employee representatives, as well as the employees concerned, along the lines of draft Regulation 9. Some lawyers including Thompson's Solicitors also raised similar questions, though in general legal firms saw the practical benefits of achieving greater flexibility to vary contracts. However, Lewis Silkin and other respondents questioned whether there was a clear distinction between the various categories of reason for varying contracts which were specified in the draft Regulation. In particular, was it clear what constituted a reason which was "the transfer itself" and a reason "connected with the transfer" ?

**3.4 In response, the Government re-affirms its view that there should be greater scope in the new regulations for the transferee to vary contracts after the transfer for an economic, technical or organisational reason connected with the transfer, and that such variations are fully compatible with the terms of the Acquired Rights Directive. Other EU member states have argued that their implementation of the Directive also allows for contracts to be so varied.**

**3.5 The Government understands the strong arguments why employers and employees should be allowed to agree variations of contracts to achieve greater harmonisation of terms and conditions. It recognises that employers face extra costs in running separate payment systems for different groups of employees. Importantly, the application of different terms to employees doing the same or similar jobs can give rise to grievances and workplace disharmony. The Government also sees the advantages in the CBI's proposal that any variations for such purposes should not leave individual employees worse off overall. However, the Government must ensure that the new regulations are compatible with the Acquired Rights Directive. Having assessed the relevant case law in considerable detail, the Government has concluded that there is a very serious risk that widening the ability of parties to agree to vary contracts for the express purpose of**

**harmonisation would be incompatible with the Directive (as interpreted by the European Court of Justice). The Government has therefore decided not to amend the regulations to permit harmonisation.**

**3.6 It is with regret that the Government has reached this conclusion. To repeat, it sees considerable merit in employment relations terms in permitting an employer and an employee to agree to vary terms and conditions to achieve greater harmonisation, as long as the employee is left no worse off overall. The Government will therefore pursue this policy objective by pressing for the Acquired Rights Directive to be revised accordingly. The Government considers that this is an eminently sensible policy which would command support from other member states, though it would inevitably take some time to achieve. Once the Directive was amended to deal specifically with harmonisation, the Government would proceed to make the corresponding changes to the regulations.**

3.7 Respondents raised a number of other issues about draft Regulation 4. For example, some respondents including the Business Services Association and Philip Millington referred to the wording used in the existing regulations which linked the protections just to those contracts “which would otherwise be terminated” by the transfer. This phrase had been removed from draft Regulation 4 on the grounds that it was unnecessary and encouraged the transferor to pick and choose which employees to transfer, an approach supported by the TUC and other unions. However, some respondents wanted the wording reinstated into regulation 4(1) to provide scope for them to retain employees who would otherwise transfer. Some respondents including the City of London Law Society also argued that Regulation 4(1) should be amended to ensure that the contracts of employees of “associated employers” who were assigned to the organised grouping should also be protected on a transfer. **In response, the Government notes that many respondents considered that the term “which would otherwise be terminated” was not redundant and they thought there were practical advantages in retaining it. In the light of those views, the Government intends to retain the term in the revised Regulations. As regards associated employers, no**

**practical problems have come to light and the Government does not therefore propose adding to the existing complexity of the Regulations by explicitly covering the circumstances of associated employers.**

3.8 At Regulation 4(2)(b), the draft stated that “anything done” by the transferor in relation to the contracts of transferred employees before the transfer occurs shall be deemed to have been done by the transferee. Some respondents pointed out that for completeness the Regulation should also apply to failures by the transferor to have acted or done things. **The Government agrees with this point about omissions and the Regulations should be amended accordingly.**

3.9 The EEF questioned whether Regulation 4(3), in combination with other Regulations, had the unintended effect of ensuring that the contract of an employee unfairly dismissed by the transferor would transfer to the transferee, and permit the employee to claim unfair dismissal against the transferee. Both they and Philip Millington also thought the Regulations might wrongly imply that the transferee inherits employees dismissed by the transferor, and must then either dismiss them again or revoke the notice of dismissal. A similar point also applied to draft Regulation 7 where the same two terms are used. The Government considers that 4(3) should be read in conjunction with 4(1), and correctly identify those employees who ought to be transferred and should have enjoyed continuity of employment. It does not provide scope for employees unfairly dismissed before the transfer by the transferor to be transferred as employees to the transferee, UK law does not recognise the nullity of a dismissal. Their status in respect of the transferee is as an ex-employee.

3.10 At Regulation 4(9), the draft provided additional protection for employees who suffered a “substantial change in working conditions” to their detriment as a result of the transfer. Such employees could be treated as having been “dismissed with notice”, a situation which would permit them to claim compensation for constructive dismissal (but not damages for breach of contract in respect of a notice period). Some lawyers and employers responded to this wording by suggesting that employees could in effect claim

constructive dismissal for changes to working conditions which had no more than a minor detrimental effect. Some respondents including Ashursts Solicitors were also concerned that this additional ground for claiming constructive dismissal would cause confusion with the established ground applying to all employees which concerned repudiatory breaches of employment contracts. Eversheds thought Regulation 4(9) was not helpful as it was inconsistent with the stated policy intention. The Law Society also thought that Regulations 4(9) and 4(10) were potentially confusing and should be re-expressed in a mutually consistent way within one paragraph. In contrast, the TUC thought that the wording was clear. Philip Millington thought that Regulations 4(9) and 4(10) should refer to the “transferor” and the “transferee” in place of the term “employer” which had an uncertain meaning in the context of a transfer. Some respondents including the Birmingham Law Society were concerned about the clarity of using the phrase “with notice” in this setting. The EEF raised another concern about the interaction between this wording and the statutory dismissal procedure which employers must follow before a dismissal takes place.

**3.11 The Government agrees that aspects of draft Regulation 4(9) could create some room for uncertainty. It intends to revise the Regulation to ensure that employees have no entitlement to claim damages for wrongful dismissal because of the failure to provide payments in lieu of notice. The Government is also clear that there is no conflict between this wording and the dispute resolution procedure, a point which the EEF has subsequently accepted. An employee can use draft Regulation 4(9) and 4(10) to seek redress against either the transferor or the transferee, depending on the identity of his employer at the material time. Recognising that fact, the term “employer” is used here (and in similar situations throughout the draft Regulations) because it can mean either the transferor or the transferee. The Government does not think other wording needs to be used in these cases.**

## Chapter Four: Dismissals And Redundancies

4.1 Draft Regulation 7 concerns the situation where employees may be dismissed because of a transfer or for reasons connected with a transfer. The draft Regulation seeks to clarify the meaning of the existing regulations, which have given rise to considerable confusion and conflicting case law. It provides for a dismissal to be automatically unfair where it was made by either the transferor or the transferee employer because of the transfer itself or for a reason connected with the transfer which was not an economic, technical or organisational reason entailing changes in the workforce (i.e. an ETO reason). Dismissals, however, could be fair where the reason for the dismissal was unconnected with the transfer or was for an ETO reason connected with the transfer which entailed changes to the workforce. Draft Regulation 7 also seeks to correct an error in the existing Regulations concerning the inability of employees in situations where they have been dismissed on grounds of redundancy to claim a statutory redundancy payment or to claim unfair dismissal by virtue of unfair selection.

4.2 43 respondents commented on this Regulation.

4.3 Respondents were generally in favour of the way the draft Regulation clarified the circumstances where dismissals were automatically unfair or potentially fair. Unions were positive about the provision and welcomed the removal of the provision that restricted dismissals in these circumstances to a dismissal “for some other substantial reason” under the Employment Rights Act 1996 framework.

4.4 As they had done in connection with draft Regulation 4, several lawyers including Lewis Silkin raised their concerns about the distinction between the various categories of reason for a dismissal. In particular, they thought it would be very difficult to distinguish between a reason which was the transfer itself and a reason connected with the transfer. Several organisations including the Royal Mail Group plc asked that detailed guidance should be given to illustrate the distinction. They thought the terminology would give rise to much legal argument and dispute. The EEF, Lewis

Silkin, the City of London Law Society and others argued for consistent wording to be used at Regulation 7(4), which referred to people who were “employed in” an organised grouping, where the term “assigned to” an organised grouping is used in Regulation 4 and elsewhere.

4.5. Keoghs Solicitors and other lawyers were generally content that the error about redundancy entitlements had been effectively addressed in Regulation 7, though CMS Cameron McKenna thought that EAT decision in the key *Canning v Niaz* case had in fact ensured that redundancy entitlements were not removed under the existing regulations. Lewis Silkin also thought that Regulation 7(3) could be improved, and the objective of ensuring that a redundancy payment would be paid would be secured, if a cross-reference to section 135 of the Employment Rights Act 1996 were included.

4.6 The Law Society queried whether Regulation 7(3)(b) would be clearer if there were reference to Section 29 of the Employment Act 2002, which concerned the case where dismissals could be unfair if the employer had not followed the statutory dismissal procedure.

**4.7 The Government notes that respondents considered that the draft Regulation was broadly acceptable. On drafting points, the Government acknowledges that a new cross-reference to s135 of the 1996 Act would put the meaning beyond doubt, and that the wording at 7(4) should be changed, as suggested, to “assigned to”. In strict legal terms, there is much less need to refer to section 29 of the 2002 Act, as the Law Society acknowledge, and the Government does not therefore wish to pursue that suggestion. The Government understands the concerns expressed about the terms used in the regulations when defining the reasons for a dismissal, and it intends to provide some advice to assist understanding in the guidance on the Regulations.**

## Chapter Five: Insolvency

5.1 Draft Regulations 8 and 9 deal with the situation where a relevant transfer occurs and the transferor employer is subject to insolvency proceedings. Draft Regulation 8 concerns the pre-existing debts owed by the transferor to those employees who transfer or who would have transferred had they not been unfairly dismissed by the transferor before the transfer. It ensures that those employees are entitled to receive payments from the Secretary of State in respect of relevant debts such as statutory redundancy payments incurred by the transferor as if they had been made redundant by the transferor. The debts in excess of these statutory payments pass over to the transferee. Draft Regulation 9 provides for the transferor, insolvency practitioner or transferee to agree permitted variations to terms and conditions with appropriate representatives of the employees. Where those representatives are non-union representatives, the agreement has to be in writing and signed by each representative, and the employer has to have given the affected employees the text of the agreement in advance of it coming into force along with the necessary guidance to understand it.

5.2 46 respondents commented on these two draft Regulations.

5.3 Respondents shared the broad aim of encouraging the survival of business activity and the safeguarding of employment. Public sector organisations saw merit in the package because it would lift the burden of transferring debts to local authorities dealing with an insolvent contractor and deciding to transfer back in-house previously transferred employees.

5.4 Employers and lawyers, whilst welcoming the proposal in theory, had reservations over the limitation of the insolvency coverage. Some argued that UK insolvency proceedings are much wider than the definition of insolvency proceedings which had been used in the Directive and copied out in the draft Regulations. The CBI believed there was a danger that the transferees could still inherit substantial liabilities arising from transferred debts. The EEF asked whether it was clear that the employee's

continuity of service for future statutory redundancy pay would fall to zero immediately after the transfer, because they could claim redundancy payments from the National Insurance Fund at the point of transfer.

5.5 Some respondents argued that there should be greater scope for the employer to vary contracts in these extreme situations, especially where it takes too long to find appropriate representatives or where agreement with representatives on new contracts cannot be reached. One idea was to allow for a temporary new contract to be imposed, thereby ensuring a speedy outcome. Some respondents questioned whether it would be necessary for every non-union representative to sign the agreement, as a failure to do so by just one person could render the agreement invalid. On a point of detail, it was questioned whether the requirement for agreements to “safeguard employment” would lead to unnecessary disputes about whether the new contracts would actually achieve that end. Eversheds argued that the use in Regulation 9(8)(a) of the term “entailing changes to the workforce” was too restrictive and should be deleted. They and other respondents also questioned whether trade union representatives always had the authority to agree to changes in individual contracts, and suggested that Regulation 9(2)(a) should deem them to have such authority. The Law Society proposed that agreements reached with trade union representatives to vary contracts should also be notified to the employees concerned to allow individuals to question the variation, if necessary.

5.6 Trade unions generally supported the approach as a means to preserve jobs. Amicus agreed the measure was a sensible way to reduce the liabilities on the transferee whilst ensuring that employees would be paid their statutory payments. The TUC, Prospect, UCATT and Unison shared that view but they had reservations that some employers might misuse the insolvency proceedings to avoid paying debts and to try and introduce lesser terms and conditions of employment. Trade unions were also concerned that the provisions would not adequately safeguard the position of the affected employees, particularly if there were no experienced trade union representatives present to negotiate an acceptable package of terms and conditions. They suggested that the additional freedom to vary contracts should be limited just to those situations where an

independent union was recognised. In addition, it was suggested that there should be a requirement on the employer to disclose information to the appropriate representatives to enable them to negotiate as equal partners.

**5.7 The Government considers that these draft Regulations strike the right balance in regulating the ability of the employer to vary contracts in the extreme situations of insolvency by establishing some safeguards without imposing unnecessary burdens or impediments. It has therefore decided to reject suggestions made by employers to make it easier for variations to be achieved as well as the suggestions made by trade unions to impose further requirements on the process. The Government believes that its proposals are workable: in these acute situations where jobs and the businesses are very much at risk, it would be in everyone's interests to ensure that the prescribed steps are taken expeditiously. The proposals to ease the burden of pre-existing debts are measured and ensure that only reasonable costs are met by the public purse. Where statutory redundancy payments are made under this provision, the effect is to ensure that the transferred workers have to build up their future entitlement to redundancy payments with the new employer from zero.**

## **Chapter Six: Notification of Employee Liability Information**

6.1 Draft Regulation 11 establishes a new duty on the transferor to provide information in writing to the transferee in advance of the transfer about the “rights, powers, duties and liabilities” under the contracts of those employees who are due to transfer. The notification should include information which the transferor knows or ought to know about these matters, and must include the identity of every employee involved. It should be provided in good time before a transfer; however, if that is not reasonably practicable, the information must be provided no later than the completion of the transfer. If the information changes between the time it was first notified to the transferee and the actual transfer, the transferee has to be informed of those changes in writing. Draft Regulation 12 provides a remedy for a failure by the transferor to provide the information. It provides for the transferee to complain to the High Court of the failure and, where a breach has occurred, the Court can order the transferor to pay a penalty to the transferee, which cannot exceed £75,000.

6.2 53 respondents commented on either or both of these Regulations.

6.3 Almost all respondents were generally in favour of creating a new duty on the transferor to provide this type of information. However, the EEF considered that there is no need for it because all the necessary information would have been covered under the relevant contractual agreement between the parties.

6.4 Respondents commented on aspects of the Regulations. Trade unions including the TUC, GMB, UNISON and PROSPECT called for an additional requirement to disclose the same employee liability information to a representative of a recognised trade union. They considered that trade unions could play a useful role in policing the new provisions and reducing the scope for sharp practices. Other respondents including the Business Services Association considered that the employee liability information should be made available to all contractors tendering for a service provision contract, arguing that such an approach would create a level playing field for tendering organisations.

**6.5 The Government considers that it would be unnecessarily burdensome to require the employer to pass the information to recognised trade unions as well. It might also risk the disclosure of confidential information to the trade union about non-union members, each of whom could be readily identified. The Government also rejects the argument that this information should be compiled and distributed to all contractors who are tendering for a contract. That would significantly increase the obligation on the transferor employer, and would mean that other employers, most of whom would not become the transferee employer, would receive detailed information about individual employees. The prime purpose of the duty to provide employee liability information is to enable that transferee employer to plan for the arrival of his new employees and fully to assess the liabilities and obligations he will inherit. The duty is not designed to assist the tendering process, though the knowledge that employee liability information would be supplied to the successful tendering organisation may lessen the risk for them and encourage more of them to tender. In any event, it is generally open to the client to release detailed financial information to tendering organisations to ensure that the tendering process is informed and competitive.**

6.6 Many respondents commented on the broad definition of employee liability information given in draft Regulation 11(1). Some, including the CBI, thought the definition was unclear and the EEF argued that the regulations should provide a list of the information which should be notified, basing that information on the requirements in section 1 of the Employment Rights Act 1996 concerning the statement of employment particulars. Thompsons Solicitors considered that the age of transferred employees and the existence of any collective agreements applicable to them should be notified. Several respondents including the BSA, Lewis Silkin, the Law Society and Eversheds were concerned about the imprecision of the wording relating to information which “ought to be known” to the transferor. They thought the lack of clarity could lead to unnecessary litigation. Other lawyers questioned whether the transferor should be required to disclose information concerning those employees who refused to transfer.

Several respondents, including the City of London Law Society, CMS Cameron McKenna, and Serco, were concerned about possible conflicts with the Data Protection Act 1998 (which places limits on the disclosure of personal information), especially where a third party provided the information on behalf of the transferor.

**6.7 The Government accepts that the definition of employee liability information is too imprecise and it would be better to identify the main categories of information which should be supplied. That would include the age and the employment particulars (as defined by section 1 of the 1996 Act) of each transferred individual. Greater certainty should therefore be achieved. The Government also accepts that the use of the term “ought to be known to the employer” should also be removed. By setting out these data requirements on the face of the Regulations, their disclosure should be fully compliant with the Data Protection Act 1998.**

6.8 Some respondents questioned why the notification must always be “in writing”. It may be more efficient to provide the information in the form of electronic files or computerised data. The CBI and other respondents questioned whether the Regulations implied that the transferor would be required to supply documentation verifying the information it provided. The CBI considered that documentation would be useful. **The Government agrees that the Regulations should provide for the non-written notification of the information, as long as such other forms of communication could be accessed by the transferee. The Regulations should not specify whether verificatory documentation should be supplied, as that would significantly expand the amount of material to be disclosed. However, the desirability of providing such documentation in some circumstances could be explored in the guidance on the Regulations.**

6.9 A large number of comments were addressed to Regulation 11(5) which specified the time limits within which the information should be supplied. For example, questions were raised about the imprecise meaning of the phrase “in good time”, which led some respondents to state that the regulation should specify a date before the completion of the

transfer by which the information should normally be supplied. Eversheds and other respondents were generally favourable to the idea that the regulation should provide for circumstances where it would be impracticable to provide the information by the normal date. However, some respondents questioned the value of using “the completion of the relevant transfer” as the last date by which the information should be provided. Some thought that phrase was unclear, and others argued that there would be occasions - for example, because the transferor was not told the identity of the transferee until the last moment - when it would still be impracticable for the transferor to provide the information at that point.

**6.10 The Government considers that the timetable for providing the information should be clearer, thereby avoiding the possibility of unnecessary litigation. The Government therefore intends that the information should be provided at least fourteen days before the transfer unless it is not reasonably practicable to do so. A fortnight should be a sufficient period to permit the transferee to study the information, discuss any points of detail with the transferor and to prepare for the transfer. The Government also accepts that in some rare circumstances it may not be practicable to provide the information in advance of the transfer. The Regulation will therefore be amended to provide for that possibility.**

6.11 Among other issues raised, it was questioned whether it was clear from Regulations 11 and 17, that the transferor and transferee could agree to contract out of the requirement to provide employee liability information. Also, the point was made whether the third party would be liable for the failure to provide the information, where a third party had agreed with the transferor to supply it. Questions were also raised about the position where the transferor is in administration or otherwise insolvent and under the control of an insolvency practitioner. In such situations, it was doubted whether an insolvency practitioner would always be able to assemble the relevant information at short notice.

**6.12 The Government considers that parties should not be free to contract out of supplying this information, and the Regulations will be redrafted to make that clearer. Any provision to permit contracting out is likely to be used most frequently where the transferee is a small contractor who could be coerced into accepting this requirement by a large client/transferor. Also, the interests of employees, who would have no say in the decision to contract out but who stand to benefit from the disclosure of the information, are not taken into account. The Government is content that the liability for a failure to provide the information should remain with the transferor and should not pass to any third party whom the transferor engaged to deliver it. The reference to a third party is made to provide extra flexibility to the transferor but it is not designed to enable the transferor to re-assign the duty to another person.**

6.13 Several specific points were made about draft Regulation 12 and the system of remedies and enforcement which it would establish. Opinion was divided on whether the High Court would be the suitable body to determine claims. In general trade unions supported that proposal, but both lawyers and employers had mixed views. Royal Mail, the Liverpool Law Society and the Chemical Industries Association favoured the High Court, but many respondents including the EEF and the Business Services Association thought the High Court would be too expensive and remote, especially for small businesses with limited resources. Some respondents including South East Employers for Local Authorities, the Employment Lawyers' Association, the Law Society and Eversheds favoured the employment tribunals, which already had the power in effect to impose fines in certain jurisdictions and dealt with certain employer/employee disputes under the existing TUPE regulations. The CBI wanted claims to be made to the county court, which was a view shared by CMS Cameron McKenna provided the penalty regime remained. Travers Smith felt that the High Court should have the power to refer a claim to an employment tribunal, where the tribunal was considering a related case about breaches of other TUPE entitlements.

6.14 The Employment Lawyers' Association considered that the Regulations should set a time limit for bringing a claim, as the proposed formulation of "on or after the relevant transfer" was too open-ended.

6.15 Several lawyers including the Employment Lawyers' Association thought the remedy should constitute an award for damages or compensation, rather than a penalty. Several respondents commented on the adequacy of £75,000 as the maximum level of penalty. The EEF thought it was too much and the issue of compensation for the transferee should best be handled contractually. Many organisations argued that it was insufficient to ensure compliance, especially where large transfers were involved. This group included many unions, Serco, Travers Smith, and ODPM. Fujitsu and the Business Services Association also thought the maximum was too low but favoured the idea that the penalty should be scaled to the number of employees involved.

6.16 Several respondents commented on the factors at draft Regulation 12(5) which the court should take into account when setting the level of the penalty. Travers Smith, for example, considered that the ability to reclaim loss in other ways (e.g. through a term in the transfer contract) should also be included.

**6.17 The Government considers that the views of respondents require a major revision to draft Regulation 12. It has decided that the High Court is not the appropriate body to determine complaints, and the Employment Tribunals should take on that role, with the Employment Appeals Tribunal acting as the appellate authority. Whereas the ETs deal principally with employee/employer disputes, the addition of this new category of employer/employer dispute is not such a significant innovation : many TUPE cases already involve the ET deciding employer-employer disputes over liability. Also, as the ETs already decide cases involving section 1 of the 1996 Act, they are already familiar with the type of information which should be disclosed under this new duty.**

6.18 The Government also considers that the remedy should change from a penalty to compensation for the loss resulting from the failure to provide the employee liability information. However, the Government recognises that it may be difficult for some transferees to identify any specific loss and therefore there needs to be some additional means to encourage compliance. That would be achieved if a minimum amount of compensation were set. The Government therefore proposes to set this minimum at £500 per employee for whom information is not provided in full. This formulation should ensure that the minimum compensation increases with the size of the transfer. Though this minimum amount of compensation should apply in most cases, the Government recognises that it would be fair to provide the ETs with some discretion to disapply that minimum in special circumstances. So, if the failure to provide all the necessary information was minimal or trivial, then the minimum amount need not apply.

## Chapter Seven: Informing and Consulting Employee Representatives

7.1 Draft Regulations 13 – 15 deal with the duties on both the transferor and transferee to inform representatives of affected employees about the transfer, and to consult with those representatives about matters relating to the transfer. These draft Regulations are very similar to the corresponding provisions in the existing Regulations. One difference appears at Regulations 15(8) and (15(9) which provide for the transferee and the transferor to be jointly and severally liable for any award of compensation for failure by the transferor to comply with the information and consultation requirements.

7.2 In paragraph 85 of the consultation document, the Government asked for views as to whether there was also a case to apply the joint and several liability regime in respect of any “protective award” made by the Employment Tribunal if the transferor and transferee fail to provide information and to consult on collective redundancies made for a reason connected with the transfer.

7.3 30 respondents commented on either Regulations 13 – 15 or Paragraph 85 of the consultation document.

7.4 Most comments related to the provisions at 15(8) and 15(9) about joint and several liability. The TUC, GMB and other trade union respondents were in favour because they consider the current sanctions on the parties were inadequate. The Birmingham Law Society also approved the suggested wording. Opinion among other respondents was less supportive. The CBI and EEF, for example, considered that the transferee should not be liable for the failing of the transferor, a point shared by most of the employers who responded to this point, and several lawyers. Travers Smith argued that there was no conflicting case law which required the provisions, because the *Alamo Group (Europe) Ltd v Tucker* case had resolved the matter by confirming that liability does transfer to the transferee. If correct, the proposal for joint and several liability would be undermined because the transferor’s liability would always transfer to the transferee after the transfer.

7.5 **The Government considers there remain compelling arguments for joint and several liability in these cases as set out in the consultation document. In particular, it ensures that both the transferor and the transferee should have a clear incentive to comply with the duty to inform and consult. The Government therefore intends to retain this element of the draft Regulations.**

7.6 Several respondents pointed to mistaken cross-references to the law within these Regulations. CMS Cameron McKenna argued that the burden of proof at Regulation 15(3) should not rest with the employer. Fujitsu was in favour of specifying at Regulation 15(5) a minimum period of notice which the transferor must give the transferee of his intention to plead a lack of information from the transferee as a justification for failing to consult adequately. **The Government will correct the cross references but it does not consider that the other proposals should be pursued because those aspects of the Regulation are in general working well.**

7.7 The TUC proposed that a form of injunctive relief should be introduced to prevent a transfer occurring until consultations had been completed in accordance with the Regulations. **The Government considers that the remedy for failure to consult were adequate and there was not a strong case significantly to delay a transfer (an act which might have far-reaching business consequences) in order for the consultation process to take place.**

7.8 As regards the proposal at paragraph 85 of the consultation document, the TUC and other unions agreed there was a case for the transferor and transferee to be jointly and severally liable for the protective award. The Birmingham Law Society, Newman Charles and a number of other law firms, supported the proposal and commented that it was a logical extension of the regime for liability for failure to inform and consult. In contrast, many other respondents opposed the idea including Ashurst, CMS Cameron, the Law Society of Scotland, Travers Smith, the CBI and the Construction Employers Federation. They were unanimous that the liability should rest with the culpable party

and only apply jointly if both parties are at fault. They felt it was unfair to make one party jointly responsible for something outside his control, particularly if the culpable party were insolvent and would have no incentive to comply. **Given the lack of a clear consensus on this issue, the Government has decided not to change the law on the consultation of employees about collective redundancies.**

## Chapter Eight: Other Aspects of the Regulations

8.1 The other draft Regulations deal with a range of issues, including the position of collective agreements on a transfer (draft Regulation 5), the position where a union was recognised by the transferor in respect of some or all of the transferred employees (draft Regulation 6), the treatment of pensions (draft Regulation 10), and the liability for injury or disease arising from pre-transfer employment in the public sector (draft Regulation 16). Draft Regulation 17 concerns the ability of parties to contract out of TUPE rights and obligations. Several of these draft Regulations contained little change from the existing regulations.

8.2 39 respondents commented on one or more of these Regulations.

8.3 On draft Regulation 6 (union recognition), the TUC whilst welcoming the proposal to preserve union recognition across the transfer noted that the provision only covers voluntary recognition. They called for parallel regulations to be introduced as soon as possible to cover the position where statutory recognition was involved. Serco thought the draft Regulation could lead to confusion and uncertainty on enforcement, where statutory recognition was involved. **The Government intends to amend the statutory recognition procedure when resources permit to clarify the consequences of a change in employer identity. It should be noted, however, that the Central Arbitration Committee, the body responsible for applying the statutory procedure, has not reported significant difficulties which need to be addressed speedily.**

8.4 Draft Regulation 10 (pensions) has the effect of ensuring that certain entitlements under occupational pension schemes do not transfer. However, the Pensions Act 2004 provides for a minimum standard of occupational pension entitlement to be provided by the transferee for those transferred employees who had such an entitlement before the transfer. Ashursts are concerned that employers who read the TUPE Regulations in isolation may not be aware of their obligations under the Pensions Act 2004. Phillip Millington, a law academic, considered that draft Regulation 10 may not sufficiently

reflect the decision in the *Beckman and Martin* cases, and uncertainty could be created by the current draft. Some legal firms expressed a similar view. **The Government considers that the Pensions Act 2004 remains the most appropriate way to deal with the position of occupational pensions when a transfer occurs, and no further changes to the Regulations are required.**

8.5 Draft Regulation 16 (Employers' Liability Compulsory Insurance - ECLI) provides for the transferor and transferee to be jointly and severally liable to employees for injury or disease arising from their pre-transfer employment in those cases where the transferor is a public sector employer not subject to, or exempted from, the requirement to effect ECLI insurance. Several respondents, including trade unions, supported the proposal. Whilst the CBI saw the proposal as encouraging, they preferred an approach where liability would follow fault. The Employment Lawyers' Association queried whether draft Regulation 16 adequately dealt with liabilities relating to employees dismissed by the transferor for a transfer-related reason. **The Government notes the various points made and it intends to leave the draft Regulation as it is.**

8.6 The EEF and Philip Millington drew attention to draft Regulation 17. They argued that the status of "compromise agreements" in resolving disputes about the application of the Regulations was uncertain and should be clarified in this draft Regulation concerning contracting out. **The Government does not consider that the issue is sufficiently pressing as to warrant complicating the TUPE Regulations by inserting new references to compromise agreements.**

8.7 The Business Services Association and the EEF called for clear transitional provisions to be added to the Regulations to ensure that they do not apply to contracts which began before the date of the commencement. **The Government intends that transitional provisions will be added to the Regulation which will be designed to ensure they do not have a retrospective effect.**

8.8 The TUC, other unions and Thompsons Solicitors proposed that the Regulations should apply to all workers and not just to employees. **The Government is examining the wider issue about the application of employment rights to workers as part of the ongoing employment status review.**

## **Annex A: List of organisations and individuals who responded to the consultation document**

Of the 73 respondents, those listed below were willing for their details to be disclosed:

Amicus  
Association of Business Recovery Professionals (“R3”)  
Ashurst  
Barnes Associates  
Birmingham Law Society Employment Law Committee  
Business Services Association (BSA)  
Chartered Institute of Purchasing & Supply (CIPS)  
Chemical Industries Association  
City of London Law Society  
CMS Cameron McKenna  
Colin F L McGrath  
Confederation of British Industry (CBI)  
Construction Employers Federation (CEF)  
Department for Transport (DfT)  
Department for Work and Pensions (DWP)  
Employment Lawyers’ Association (ELA)  
Engineering Construction Industry Association (ECIA)  
Engineering Employers Federation (EEF)  
Environmental Services Association (ESA)  
Eversheds LLP  
Factors & Discounters Association (FDA)  
Fujitsu Services Ltd (Fujitsu)  
GMB  
Grant Thornton UK Heating and Ventilating Contractors’ Association (HVCA)  
Institute of Practitioners in Advertising (IPA)  
Insolvency Service  
Keoghs Solicitors  
Kirklees Metropolitan Borough Council  
Lewis Silkin Solicitors  
National Business Sales (NBS)  
Numast  
National Union of Journalists (NUJ)  
National Union of Teachers (NUT)  
Newman Charles  
Phillip Millington  
Prison Officers’ Association  
Prospect  
Pricewaterhouse Coopers LLP (PwC)  
Royal Mail Group plc

Serco Group plc (Serco)  
Simon Storage Ltd  
South East Employers for Local Authorities in the SE  
Surrey County Council  
The Aiken Driver Partnership  
The Law Society of Scotland  
The Newspaper Society (Newspaper Society)  
The Recruitment And Employment Confederation (REC)  
Thompsons Solicitors  
Trades Union Congress (TUC)  
Travers Smith  
Treasury Solicitors (Tsol)  
Union of Construction, Allied Trades & Technicians (UCATT)  
Unison

The remaining 20 respondents did not wish their details disclosed.