



**Unite Response to
Consultation on clarifications
to the Transfer of Undertakings
(Protection of Employment)
Regulations 2006 (TUPE) and
abolishing the legal framework
for European Works Councils**

July 2024

About Unite the Union

This submission is made by Unite, the UK and Ireland's largest trade union with over 1 million members across all sectors of the economy, including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, health, local government, and the not-for-profit sector. Unite also organises in the community, enabling those who are not in employment to be part of our union.

Introduction

The Transfer of Undertakings (Protection of Employment) Regulations 2006 will be referred to within this document as TUPE, unless some other reference is necessary.

TUPE involves legal complexity which has for many years led to numerous legal claims involving UK jurisdictions, and decisions subject to review by the European Court of Justice (ECJ), often resulting from referrals made by EU countries. The legal complexity arising from TUPE has impacted on the rights of Unite members and workers generally, and will have impacted upon employers, required to make business decisions against a backdrop of legal uncertainty. Unite believes that it would be appropriate for TUPE to be subject to review, to provide clarity on the rights of workers before and after a relevant transfer, to create certainty for transferors and transferees, and to provide effective remedies when legal obligations are not adhered to. This would be a matter to be considered, along with other employment rights, when reviewing how decisions of Employment Tribunals are enforced.

Unite is committed to maintaining the rights of members impacted upon by a relevant transfer and in considering collective rights, including trade union recognition and obligations linked to provision of information and consultation. The existing TUPE provisions concerning these matters do not provide sufficient protection for workers and their union representatives, and the current consultation exercise does not address these matters. As above, the rules relating to effective consultation may require broader consultation with interested parties, for example, when reflecting upon the obligation to consult about planned redundancies. It is relevant that TUPE was amended some years ago to allow proposed redundancies to be the subject of consultation alongside other TUPE obligations. If consultation is to be effective, it must be subject to clearly set out obligations, with effective remedies.

A long term issue for Unite members and all of those involved in relevant transfers, has been the issue of pension rights. It is a matter of regret that pension rights are not protected effectively at the time of a business transfer, and the protection that exists is actually included in legislation which is separate to the main TUPE provisions.

The observations set out below are subject to the views set out above, and the need for more effective protection for workers and their representatives when being required to deal with what can often be complex business transactions, subject to secrecy and often late notification to workers and their representatives.

Proposal 1: reaffirming that only employees are protected by TUPE

This consultation does not engage of itself in the debate about employment status. Whilst a response is provided to the proposal, Unite's view is that effective consultation should take place about the rights afforded to different categories of worker, as regards issues within the workplace, and the availability of enforceable legal rights. Any review of the legal cases in this area decided over recent years will confirm that this most basic issue remains subject to uncertainty. It is easy to focus upon the decisions through to the Supreme Court involving gig economy networkers, but the status of workers in many sectors is unsatisfactory and for those involved, creates uncertainty as regards their basic rights and the security of employment. The vulnerability of individuals often comes to be a matter of priority at the time of a relevant TUPE transfer, when an incoming transferee may be looking at ways of making savings at the expense of those with the fewest rights. Reducing employer costs should not be seen as a valid reason to diminish employment rights.

Unite takes the view that the proposal is defined incorrectly and addresses a matter which is the wrong focus for this debate. Reaffirming the absence of rights for a particular group should instead be replaced with an approach which seeks to ensure that all of those working and subject to a TUPE transfer benefit from an effective legal framework. The proposal in effect endorses the continuation of uncertain categories of worker, with the associated vulnerability for the workers involved.

Proposal 2: the application of TUPE where a business is transferred to multiple transferees

Unite members have experience of having to deal with the practical application of TUPE transfers, including when business undertakings are transferred to multiple transferees. The ECJ decision in 2020 in ISS Facility Services NV v Govaerts and Atalian NV may have established legal authority in this area, but on a day to day basis this problem is not new. It can cause significant practical issues for workers and can require the union to become engaged in difficult personal situations for individuals. In matters such as cleaning contracts, it is common for service related undertakings to pass to several transferees, meaning that workers face uncertainty, and the union may be required to engage in consultation with multiple parties. Despite the fact that TUPE has existed for more than 40 years, Unite still encounters employers refusing to apply TUPE and seeking to exploit loopholes to the detriment of those who may have worked in the business for many years.

This response has also ready included reference to the importance of consultation, and the fact that on occasions workers and their recognised representatives only become aware of transfers very late in the day, meaning that the provision of information and consultation is not effective. Unite would endorse more detailed provisions in relation to consultation, and for the provision of open and transparent information to our members. All too often, transferees withhold information about how those transferring will fit into an existing structure, and about measures planned. Stronger regulation in this area would assist in removing uncertainty and protecting worker rights. Any measure which confirms that obligations under TUPE are paramount would also ensure that consultation was open and transparent, and engaged legal

consequences in the event of there being unnecessary secrecy about future plans which impact upon Unite and its members.

When any undertaking is split following a relevant TUPE transfer, the outcome should take into account the circumstances of workers, remembering that TUPE is about “protection of employment”, and this should be the driving principle behind regulation which is designed to protect the work of our members if they should become involved in this kind of factual situation.

Proposal 3: abolishing the legal framework for European Works Councils

For the purposes of this response, European Works Councils will be identified as EWCs. The Regulations implementing the original EU Directive date back to 1999, and EWCs have long been important for UK workers and their representatives when engaging with transnational employers. Far from seeing Brexit as a reason to have less use of EWCs, Unite recognises that a significant number of UNITE members are employed by businesses that are not UK owned and are subject to employment across national borders, and therefore EWC's often provide the only opportunity for UNITE representatives to meet central management, who make decisions at a corporate/group level, to be consulted on decisions that directly impact UK employees. UNITE is of the view that the rights of Unite members should not be diminished in this area, if anything, they should be enhanced. For example, through their EWC's UNITE representatives:

- Are currently addressing the issues which will arise if The Post Office is bought by a Czech business/investor.
- Are currently being consulted on the proposed merger between the US company Westrock with Smurfit Kappa.
- Are currently being consulted on the proposed acquisition of Princess Food Group by the Italian company Newlatt.
- Were consulted when the Danish company Trygg acquired Royal Sun Alliance.
- Were consulted when General Electric's US corporate management made the decisions to spin off its Aviation business.

All these corporate decisions have a significant impact on the UK employees of these companies which, without their EWC's, would be exposed to not having a seat at the table, and there are other examples of this kind.

Unite considers that domestic collective bargaining arrangements should be strengthened, and protections linked to recognition and the status of our representatives are far from perfect under existing UK law. EWCs provide an opportunity for a greater understanding of collective and individual issues on a transnational basis, which may and can have a considerable impact on UK employees matters include corporate-wide business strategies, the economic and financial situation of the business, possible developments of employment, proposed corporate restructuring, (including possible redundancies) proposed acquisitions, divestments and mergers, major financial investment, health and safety etc. Unite considers that workers across jurisdictions will often face similar issues of uncertainty, and EWCs are a vehicle that provides consistent information consultation and communication which enables all stakeholders to be involved. It provides also an opportunity to exchange views and to inform

employers through senior management about the concerns of workers, and the important views of collective organisations such as trade unions.

Whilst the UK is no longer a member of the EU, many UK employers are part of transnational groups of businesses, and UK Government should not be sending a message of isolation for the benefit of the UK economy, but also the individual workers who might be excluded from provision of information, providing also less opportunity for those workers through their union representatives to influence decisions and future policy. In addition, UNITE has successfully argued and negotiated the continued participation of UNITE representatives in many EWC's based on the fact that UK EWC legislation continues to exist. If this legislation was abolished this would send a very clear message to Multinational companies that it is acceptable to simply remove UK employees and their representatives from their EWC structures.

The technical rules relevant to EWCs are such that most businesses subject to the current regime have in place established frameworks for the EWCs to operate across relevant jurisdictions. Unite members have seen EWCs assist in developing transnational policies involving health and safety and equality, and representatives involved in EWCs are protected against unfair treatment or detriment, possibly already going beyond the basic position under UK law. The union is unaware of specific concerns about the costs associated with operating EWCs, as companies with EWC's would still need to operate them even if UK workers and representatives were removed from within their scope and the benefits for businesses and workers will far exceed the costs, which in most cases will already have been factored into budgets. The Government has advanced this consultation by reference to an assertion that there was no intention to retain EWCs in the UK indefinitely. Unite disputes this. As indicated above, Unite is unaware of any meaningful information which might support the Government's cost based analysis, and UK law of itself would not provide access to an effective transnational body which can continue to meet the needs of workers who are increasingly subject to management crossing national borders. Unite opposes the proposal strongly, and practical arrangements should exist to protect the rights of workers and their representatives. Unite can see no reason to seek to devise arrangements involving more than one EWC to be run by a business, when the existing arrangements have been in place for many years and operate effectively.

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