



TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006 – CONSULTATION ON PROPOSED CHANGES

Comments by the Association of Recovery Professionals ('R3') in response to the consultation document issued by the Department for Business Innovation and Skills in January 2013

Introduction

1. The Association of Business Recovery Professionals ('R3') represents insolvency practitioners authorised to practise in all jurisdictions of the UK. R3's membership comprises licensed insolvency practitioners, lawyers and other professionals involved in the insolvency and turnaround industries. Over 97% of authorised insolvency practitioners are members of R3.

TUPE and insolvency

2. Our interest in the TUPE Regulations is primarily in relation to their effect in formal insolvency proceedings. We have commented before on this aspect of the Regulations, both in response to the original consultation carried out in March 2005 and in response to the call for evidence issued in November 2011. We also wrote to the Minister about the Regulations following the debate in the House of Lords on 3 May 2006.
3. In our previous submissions we drew attention to the poor drafting of the Regulations, which do not accurately reflect the wording of the underlying Directive, and pointed out that it would require extensive litigation to arrive at a stable and workable interpretation of the Regulations as they apply to insolvency. As noted in paragraph 6.30 of the consultation document, the Court of Appeal decision in *Key2law (Surrey) Ltd v De'Antiquis* appears to have settled for now the question of how the courts will apply the Regulations in the future. The effect of the CA decision is that the relief afforded by regulation 8 of the Regulations will never be available in administrations, which are the most commonly used rescue procedures in formal insolvency cases. This means that the situation will continue largely as it did before the 2006 Regulations came into effect. Potential purchasers will continue to be cautious about taking on employees and incurring pre-transfer liabilities, which will lead to bids for going concern sales being discounted, to the detriment of creditors. It may also see a move towards liquidations being used.
4. We have the following comments in response to the specific questions raised in the consultation document. Questions which are unanswered reflect the fact that we have no opinion on the point at issue.

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?

5. We agree that this would be helpful.

Question 4(b): Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

6. Yes. It is essential to retain the ETO exception as it can in some cases restrict the extent of the liabilities passing to the transferee.

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?

7. We agree. In insolvencies it might help to restrict the risk of liabilities passing over where dismissals are made to render the business more saleable but before any particular transfer is contemplated. This could help to mitigate the effects of the Court of Appeal decision in *Spaceright Europe Ltd v Baillavoine*.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

8. Yes. This could help to facilitate sales in insolvency situations.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

9. Yes. The problems caused by the current approach in insolvency situations are clearly set out in paragraph 7.74 of the consultation document. Allowing the transferor to be able to rely on the transferee's ETO reason would clearly help to mitigate these problems.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

10. Yes. There seems to be no need for two sets of requirements.

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?

11. We agree that guidance would be helpful. It will be important to ensure that special guidelines are developed for insolvency situations. We should be happy to discuss this further with the Department in due course.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

12. Yes, this seems sensible. However, we suggest that this provision is extended not just to micro-businesses, which have ten or fewer employees, but to businesses with 50 or fewer employees, in line with the European Commission's definition of a 'small' business.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

13. Yes.

Association of Business Recovery Professionals
4 April 2013