

TUPE and EWC consultation

**TUC response to Department for
Business and Trade consultation. July
2024.**

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

Introduction

The TUC is the voice of Britain at work. We represent more than 5.5 million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 provide important protections for many workers when their employer is sold or changes, generally following transfer of a public contract to a different provider.

We are therefore deeply concerned that the proposals in this consultation paper are focused on weakening those protections and making short-term savings for employers, rather than ensuring the existing regime works as effectively as possible.

There are some key shortcomings with the current regime:

- Trade union recognition only transfers to the new employer if the transferring employees keep a separate identity within the new employer's organisation. This weakens the collective voice of workers at a time when they are particularly vulnerable.
- The exemption of occupational pension rights from TUPE means that workers often have a vital benefit cut.
- The permissibility for an employee's dismissal ahead of a transfer for economic, technical or organisational reasons provides a significant loophole for employers to evade TUPE protections.
- Employers often fail to carry out their consultation duties properly, which reduces the scope for unions to provide input so the process works for both employers and workers.
- The effect of the *Alemo Herron* case in denying outsourced workers the benefits of evolving collective agreements.

We urge the Department for Business and Trade to consider these issues as a matter of priority.

The TUC and its affiliates wholeheartedly oppose the proposal that the statutory basis for European Works Councils is scrapped. These are crucial institutions for safeguarding workers' interests and encouraging investment in the UK.

Proposal 1: reaffirming that only employees are protected by TUPE

The TUC acknowledges that there is unhelpful uncertainty as the law stands about the applicability of TUPE to limb-b workers.

However, we urge the government to consider the relative protections afforded to workers and employees under TUPE as part of a wider consideration of employment status.

We note that the Labour Party document *Labour's Plan to Make Work Pay* states: "We will carry out full and detailed consultation on our plans to move towards a single status of worker."

We expect this to be an early priority for incoming ministers.

The issue of employment status has long been a problem for workers and their employers. The current rules on status are complex and confusing. The current uncertainty means that individuals can miss out on their rights at work. It is also all too easy for employers to devise sham arrangements to deprive workers of their rights, including rights relating to business transfers.

The TUC believes that there is a compelling case for the reform of employment status rules so they reflect the reality of the workplace and raise the floor of rights for working people. This should include a new single and broad 'worker' definition in UK employment law. The new worker test should determine access to all statutory rights.

If the issue of TUPE protections for so-called limb-b workers is considered in isolation, there is potential for government policy to be pulling in contradictory directions.

It is certainly inappropriate for such a view to be conducted with the explicit goal of reducing employer costs.

We note, in particular, the equalities impact assessment contained in the consultation paper concludes that removing workers from the scope of TUPE could have a particular impact on Black and minority ethnic workers and disabled workers.

The government's priority should be ensuring that employment protections are effective and clear.

It is therefore vital that this matter is considered as part of a broader assessment of employment status.

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

In 2020, the Court of Justice of the European Union ruled in *ISS Facility Services NV v Govaerts and Atalian NV* ruled that a full-time employment contract can be split between multiple employers when a business transfers to multiple transferees.

The TUC agrees with the analysis contained in the consultation paper that splitting roles between multiple transferees can cause problems for workers.

For instance, a worker can find that they are expected in locations many miles apart.

Transferees could all insist that a worker work on the same day, or all seek, for example, 30-hour contracts.

We are concerned about the burden seeking to resolve such issues places and could continue to place on an already overstretched tribunal system.

The effect is to weaken worker protections by giving employers additional grounds on which to dismiss them.

We therefore believe that at the very least there should be stronger guidance, produced in consultation with trade unions, on how transfers to multiple transferees are conducted. This should encompass how a split of employees or liabilities is to be determined in terms of functions, time spent and, situations where such a division is not possible or will have an adverse impact on the employee's working conditions.

This should be accompanied by strengthened rights to consultation for trade unions when the TUPE regulations are engaged.

Our affiliates' experience in workplaces is that too many employers are unwilling to work effectively with trade unions to ensure the most effective outcome for workers and employers.

Once a contract is awarded under TUPE, both the old employer and the new employer must provide trade union reps (or employee representatives where a union is not recognised) with specified information and an outline of any "measures" that are to be taken which could affect the employees.

In addition to providing information, the legislation places a statutory obligation on the employer to consult with trade union or elected reps over the consequences of the transfer.

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However, there are currently significant shortcomings. In reality, some employers choose to bypass the need to elect representatives, by informing and consulting with the employees directly, in contravention of their obligations.

In other cases, the consultation is not undertaken in good faith.

We therefore urge the Department for Business and Trade to consider how to strengthen and more robustly enforce employers' consultation and information obligations.

Proposal 3: abolishing the legal framework for European Works Councils

The TUC and our affiliated unions strongly oppose the abolition of the legal framework for European Works Councils contained in the Transnational Information and Consultation of Employees (TICE) Regulations 1999.

European Works Councils remain a hugely important means for UK workers and their representatives to engage with transnational employers.

They are a particularly significant source of information for UK workers, which is often not available even where collective bargaining structures are in place. EWCs are provided with information on the structure of the company, the economic and financial situation, the probable development and the production and sales. They also consult on issues such as employment, investments, substantial changes to the organisation, the introduction of new working methods or production processes, transfers of production, mergers, cutbacks or closures of operations, establishments and collective redundancies. Often topics such as health and safety, equal opportunities and data protection are matters for information and consultation by EWCs. Much of this information would not necessarily be available through domestic collective bargaining routes.

EWCs ensure that workers in different countries are all told the same thing at the same time about transnational policies and plans.

They give workers' representatives in unions and national works councils the opportunity to consult with each other and to develop a common European response to employers' transnational plans, which management must then consider before those plans are implemented.

By having regular contact with the most senior managers of a company, EWC members receive first-hand information on the business. This can provide early warning of planned changes. It allows workers to be better-informed and prepared in their discussions with domestic management. Worker reps on EWCs can also be proactive in providing opinions, advice and recommendations to management. While management is under no obligation to take this on board it can allow difficult issues to be aired without being filtered out by country or middle management who might avoid controversial topics.

Abolition of the UK EWC regime would mean that UK workers are no longer in the room when management discuss investment plans or unions formulate their response. This would put them in a less favourable position to their colleagues in other European countries and could also put UK business at a competitive disadvantage, as UK interests would be excluded from discussions on strategic decisions that are being taken at a corporate level, such as investments, or restructuring plans.

It is also worth noting that many of those companies that operate EWCs under the current regime are significant providers of outsourced UK public services. So removing such companies from the scope of these regulations would remove one form of oversight and information concerning the operation of these services and the welfare of the staff they employ. This would have significant knock-on effects on the ability of workers to play a role in ensuring the effectiveness, transparency and taxpayer value for money of public services contracts.

Moreover, transnational issues affecting the UK would no longer be within scope of the affected EWCs, and employers would lose the benefit of consulting with their UK employees' representatives.

Unions report to us that there can be particular benefit in EWCs harmonising equalities policies across a company's European operations, ensuring that best practice is adopted and that no individual country unit is disadvantaged by having a particularly progressive policy.

Furthermore, there are businesses that come within scope of the legislation only if their UK employees are counted for the purpose of the employee thresholds in the legislation. These businesses are not required to operate an EWC under the European Union's EWC Directive, but they are currently required to operate one subject to UK law. These businesses would no longer have to operate an EWC at all, so the transnational information and consultation rights of all of their employees would be lost. The consultation document does not consider this point.

The TICE regulations contain important rights and protections for UK employees and their representatives who serve on EWCs governed by the law of another country. TICE regulation 4(2) applies various provisions including the right to paid time off to carry out their role, protection against unfair dismissal or detrimental treatment for carrying out their role, rules governing the election of UK representatives, and rules designed to protect confidential information. All of these rights and protections would be lost if the regulations are lost, leaving UK EWC members unprotected in carrying out their role. The consultation document does not consider this point.

The proposal to abolish the legal framework for EWCs rests on the following arguments:

- It was never the government's intention that EWCs in the UK should continue to operate indefinitely.
- The cost to businesses of having to operate an EWC in the UK in addition to a parallel one in the EU to meet their obligations under EU law.

- Existing structures can effectively represent workers at company level.
- The impact on employees of losing their transnational consultation rights “will be small where EWCs are ineffective as reported in some cases”.

We look at these arguments in turn:

Intention

The TUC does not accept that the government has previously said it was never the intention to retain EWCs in the UK indefinitely.

Rather, when passing the legislation which retained EWCs (The Employment Rights (Amendment) (EU Exit) Regulations 2019) ministers reassured Parliament by saying: “the government will ensure the enforcement framework, rights and protections for employee representatives in the UK European Works Councils continue to be available, as far as possible” (Explanatory Memorandum to the Regulations, paragraph 7.4).

Cost

Contrary to the assertion in the consultation document, we don’t accept that there is an on-going cost to businesses in having to operate two EWCs in parallel.

This is because we are not aware of any employers actually doing so.

Businesses that come within scope of the TICE Regulations are either (a) in practice operating a single EWC subject to the TICE Regulations and that of an EEA member state; or (2) acting as though they have no obligations under the TICE Regulations.

Moreover, businesses that are subject to both the TICE Regulations and the recast EWC Directive are able to reach an agreement with their employees providing for a single EWC which includes UK representation.

Even if the financial estimates in the consultation paper were taken at face value, the amounts concerned are a tiny fraction of revenues generated by these transnational employers so have no meaningful effect on profits.

For example, Sodexo Ltd, the main Sodexo UK subsidiary reported revenues of £1.5bn for the year to August 2022, generating a pre-tax profit of £72.4m. Its French parent company made a pre-tax profit of €960m (£813m).

It is notable, too, that much of the profit generated by some of these businesses comes from public contracts. The implementation of the TICE regulations supports scrutiny and transparency of the use of that money and supports government good work objectives including those set through the procurement framework.

Existing structures

The paper asserts that existing structures can effectively represent workers at company level in the absence of an EWC, such as unions or other employee representatives.

However, no other existing structure mandated by law gives UK employees the right to be consulted on transnational issues, as set out above, that may affect them. These rights are found only in the EWC legislation, and they would be lost through abolition of the TICE regulations.

Some employers may be willing voluntarily to include transnational issues within scope of any agreement they may have with a trade union or under the Information and Consultation of Employees Regulations 2004. But, without legislative change, this could only ever be voluntary.

On top of this, comparable legislation regarding other employee representatives – *The Information and Consultation of Employees Regulations 2004* – is rarely used and is not a sufficient replacement.

Ineffectiveness

The purported “ineffectiveness” of transnational consultation rights in some cases is not an appropriate ground for abolishing those rights for all UK employees, and we are surprised the government should suggest this.

Where EWC consultation has proved ineffective in practice, EWCs in the UK have been able to bring complaints to the Central Arbitration Committee, and this has demonstrated the adequacy of the fundamental information and consultation rights.

Other options

The consultation asks: “Are there any other options the government should consider instead of abolishing the legal framework for EWCs?”

Given absence of claimed cost savings to business, the loss of consultation rights, the loss of protections for EWC members and the loss of exemptions for some businesses, we strongly urge the government to retain the existing regulations in their entirety.

An alternative is to exempt from the main provisions of the regulations (set out in regulation 4(1)), an undertaking in which there is a EWC governed by the recast EWC Directive and which includes UK employees and UK issues within its scope.

UK employees and their representatives would continue to enjoy their transnational consultation rights alongside their European colleagues, and would continue to be protected in carrying out their role. Such businesses would not have to operate two EWCs and their EWC would not be subject to the governing law of two countries.

Additionally, employees of businesses who only meet the employee thresholds by including UK employees, would keep the benefit of having their EWC.