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TRANSFERRING EMPLOYMENT BETWEEN THE PUBLIC AND PRIVATE SECTORS IN THE UNITED KINGDOM: ACQUIRED RIGHTS AND REVISING TUPE.

Abstract. *This paper analyses the reasons for the United Kingdom's long-delayed response to the European Union's Acquired Rights Directive. It assesses the British government's overdue updating of the domestic legislation in 2006 in line with the latest version of the Directive, attributing its dilatory response to a combination of technical legal difficulties and conflicting political objectives. The paper concentrates on the 'privatisation' of public services, explaining the most recent protection now available to workers whose jobs are out-sourced to the private or voluntary sector. Member States contemplating reform of their own regulatory regimes may find the British experience instructive.*

1. INTRODUCTION.

When an organisation (or some part of it) changes hands, how secure are the jobs of those who work there? This question can arise in a variety of contexts - when companies merge, a business is sold, a function sub-contracted or some public sector activity is 'out-sourced' to the private or voluntary sector. Throughout the European Union the answer to the question depends on whether a special legal regime applies. If it does not, such a transfer in Britain will effectively terminate the contracts of the workforce.¹ Consequently, the new owner or provider (the transferee) is free to decide which, if any, of the dismissed workers it wishes to employ and on what terms and conditions. Those who are taken on will, almost certainly, lose all of their accrued seniority rights. Those who are not wanted will have no complaint

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¹ At common law, when an organisation changes its identity its employment contracts, being personal, terminate rather than transfer, see Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014.

against the transferee, although their former employer (the transferor) may be obliged to compensate them for their loss of employment.²

In an attempt to regulate some (but not all) transfer transactions the EEC in 1977 adopted the Acquired Rights Directive (ARD).³ This special legal regime has two basic purposes.⁴ The first is to safeguard the jobs of employees in the transferred undertaking by requiring the transferee to continue their employment on the same terms. The second purpose is to ensure that competition between Member States is not unduly distorted by the operation of widely disparate national rules governing business restructuring. The Directive tries to reconcile the protection of social (employment) rights with economic (competition) rights at a time when some European governments have sought to promote greater labour market flexibility.⁵

The 1977 Directive was belatedly implemented in Britain by The Transfer of Undertakings (Protection of Employment) Regulations 1981⁶ (known as TUPE for short) by a Conservative government which frankly admitted to doing so with a marked 'lack of enthusiasm'.⁷

In 1998 an amending Directive replaced the original ARD, which Member States were supposed to implement by July 2001 at the latest.⁸ Despite the amending Directive being a

² Employees who have two years' continuous service will ordinarily be entitled to a statutory redundancy payment, see Part XI, Employment Rights Act 1996. A claim for unfair dismissal, which potentially attracts higher levels of compensation, may also be available to those with a year's service under Part X of the 1996 Act.

³ Directive 77/187/EC. [1977] O.J. L61/ 27

⁴ The aims of the ARD are set out in points 2-5 of the Recital. For comment, see C. Bourn (ed.), The Transfer of Undertakings in the Public Sector, (Aldershot: Ashgate Publishing, 1999) at 12-16.

⁵ See G. More 'The Acquired Rights Directive: Frustrating or Facilitating Labour Market Flexibility?' in J. Shaw and G. More, New Legal Dynamics of European Union (Oxford: Clarendon Press, 1995), 129-145.

⁶ SI 1981 No.1794.

⁷ See the remarks of the relevant Minister, David Waddington, 14 HC Deb 680, 8 December 1981.

policy initiative of the first Blair administration,⁹ its adoption turned out to be surprisingly tortuous. It was not until September 2001 that the Department of Trade and Industry (DTI) brought forward specific proposals for consultation,¹⁰ publishing draft Regulations only much later in April 2005.¹¹ A further consultation round produced numerous technical submissions from specialist consultees, such as lawyers, which resulted in further delay,¹² the finalised Regulations coming into force on 6 April 2006.¹³ The necessary revision of TUPE was thus eventually almost five years late. The reasons for this apparently dilatory approach lie partly in the field of politics and partly in the complexities of reforming the legal rules.¹⁴

⁸ Directive 98/50/EC. [1998] O.J. L201/ 88. The 1998 ARD was itself replaced in 2001 by a consolidating measure, Directive 2001/23/EC, see [2001] O.J. L82/16.

⁹ See DTI, European Acquired Rights Directive and Transfer of Undertakings (Protection of Employment) Regulations 1981, Public Consultation, URN98/513, December, 1997. J. Hunt, 'Success at last? The amendment of the Acquired Rights Directive', European Law Review, vol. 24, 1999, 215-230 examines how the incoming Labour government secured the agreement of the various Community institutions to an updated ARD in 1998.

¹⁰ See DTI, Public Consultation Document. TUPE. Government Proposals for Reform, 2001, and Detailed Background Paper, URN 01/1158, 2001.

¹¹ See DTI website: www.dti.gov.uk/er/tupe_consult.htm

¹² See DTI, TUPE: Draft Revised Regulations. Government response to the public consultation, February 2006. Of the 73 submissions, 27 came from lawyers and lawyers' organisations, 23 from employers and 10 from trade unions.

¹³ The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006 No.246). See too the associated guidance note, DTI, Employment Rights on the Transfer of an Undertaking, January 2006.

¹⁴ Three legal problems stand out as having contributed to the delay. How to re-define a 'relevant transfer' and what to do about pensions are considered later, see section 3.1 and 3.5. How best to promote the rescue of companies in financial trouble is not discussed in any detail since we focus on the transfer of (solvent) public sector undertakings. The evidence suggests that the 1981 version of TUPE hindered the salvation of insolvent commercial enterprises. See S. Hardy, 'TUPE in action in insolvency proceedings', Insolvency Law Journal, vol. 1, 2003, 24-26. According to a DTI Press Release, 25 February 2003, a principal purpose of the new regulations would be to better promote a 'rescue culture' for insolvent businesses and so protect private sector jobs. The position is now governed by regs. 8 and 9, TUPE 2006, see section 3.2 below.

2. PUBLIC TO PRIVATE SECTOR TRANSFERS.

2.1. *The meaning of 'undertaking' in the not-for-profit public sector.*

As is well known, the Thatcher government was strongly committed to shrinking the public sector and, correspondingly, to securing a larger role for the private sector in the delivery of services traditionally seen as the preserve of the state. Accordingly, TUPE 1981 was intentionally confined to the transfer of undertakings that were 'not in the nature of a commercial venture'. No doubt the government suspected that private sector bidders might be disinclined to tender if they had to take on the original public sector workforces on their existing terms and conditions. This strategy was to be trenchantly caricatured later by a trade union leader as the deliberate promotion of a 'Dutch auction' designed to see 'who could pay the least to the fewest in the privatisation of public services'.¹⁵

Eventually, in 1994, the European Commission brought successful enforcement proceedings against the UK¹⁶ alleging that confining TUPE to *profit making* undertakings was contrary to Article 1(1) of the Directive, as interpreted by the ECJ in Dr Sophie Redmond Stichting v Bartol.¹⁷ Anticipating an adverse outcome to those proceedings, the Conservative government amended TUPE in 1993 so that operating with a view to profit henceforth became irrelevant.¹⁸ The 1998 Directive put the matter beyond doubt by declaring that it

¹⁵ Jack Dromey, national secretary of the TGWU, quoted in The Times, 17 November 1997. See too, D. Foster and P. Scott, 'Conceptualising union responses to contracting out municipal services 1979-97', Industrial Relations Journal, vol. 29, 1998, 137-151.

¹⁶ See Commission v UK. C-383/92. [1994] ECR I-2479.

¹⁷ C-29/91. [1992] ECR I-3189. Charitable foundation providing services to drug abusers funded by a Dutch municipality was engaged in an economic activity (albeit not-for-profit) and hence was an 'undertaking' within the 1977 ARD.

¹⁸ See Trade Union Reform and Employment Rights Act 1993, ss. 33(1) (2), 51, and Schedule 10.

applies to ‘private or public undertakings engaged in economic activities whether or not they are operated for gain’.¹⁹

One consequence of the Conservative’s initial legislative strategy was that the state, in the form of the in-coming New Labour government, faced the prospect of so-called Francovich actions for damages.²⁰ Large numbers of former public sector employees, who either lost their jobs on transfer before 1993 or who transferred to private sector employers but on less favourable terms, complained that their deliberate exclusion from TUPE was unlawful and that their acquired rights had not been protected as they should have been. In litigation in 1997 it was confirmed that ministers in the previous Tory administration had been advised on a number of occasions that the policy of exclusion was a serious breach of European rules.²¹ A large out-of-court settlement was expected to follow. In fact, no compensation was ever paid,²² and a further union-sponsored test case was lost towards the end of 2003.²³

¹⁹ TUPE 2006, in reg. 3(4)(a), continues this formula. However, Article 1 (1) (c), and reg. 3(5) TUPE 2006, in line with the ECJ’s earlier decision in Henke v Gemeinde Schierke, C-298/94, [1996] ECR I-4989, exclude any ‘administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities’. It is hard to see how this exclusion (which has subsequently been narrowly interpreted by the ECJ and other courts) is consistent with the employment protection purposes of the ARD or that it is necessary to the efficiency of public administration. The view of the British government is that this exclusion applies to only a narrow range of public entities pursuing ‘non-economic objectives’. Moreover, its policy is that the rights of all public employees should be protected in the event of transfer (regardless of whether the ARD mandates it) using the device of administrative codes, discussed in section 2.3 below, or by enacting specific legislation.

²⁰ See Francovich v Italy, C-9/90. [1991] ECR I-5357.

²¹ See Bradley, Ball and others v Secretary of State for Employment (1997, unreported).

²² We are grateful to the DTI for confirming this outcome.

²³ See Alderson v Secretary of State for Trade and Industry [2003] EWCA Civ 1767. It was held that the transfer of refuse collection from a local authority to a private company *was* the transfer of an undertaking ‘in the nature of a commercial venture’, even though not operated for profit when in council hands. Accordingly, TUPE *did* apply and the employee’s Francovich action against the state failed. On this analysis, the claim should have been brought against the private contractor for failing to respect existing terms and conditions, though by then it was far too late to do so. This litigation vividly illustrates a serious issue, namely, the widespread confusion surrounding the precise scope and operation of the transfer legislation, whether domestic or European.

2. 2. What is a 'relevant transfer'? Some case law on the ARD and TUPE 1981.

Undoubtedly one of the gravest charges against the law is the high degree of uncertainty that has surrounded the key question of when there is a 'relevant transfer' within the Directive or its domestic equivalents. The problem of opaque legislative drafting has been compounded by 'a marked difference of approach not only between the English judiciary and their European counterparts but also as between different (British) judges'.²⁴ As we shall see, one of the aims of TUPE 2006 is to reduce, if not eliminate, these difficulties.

Since 1998 the legislative test in the Directive has been whether 'an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary' has been transferred.²⁵ This difficult form of words largely derives from, and was intended to reflect, the jurisprudence of the ECJ, particularly as expressed in the Süzen case.²⁶ A private school in Germany replaced one cleaning firm with another. The outgoing contractor dismissed as redundant the six cleaners who had been working at the school. The cleaners claimed that re-allocation of the contract amounted to a relevant transfer and, consequently, that they were entitled to continue working at the school, albeit for the incoming contractor. The ECJ unexpectedly rejected this submission, distinguishing an 'economic activity' from an 'entity', saying that an entity could not be reduced to the activity entrusted to it. The mere loss of a service contract to a competitor could not, by itself, indicate a transfer. When a service undertaking loses a customer, observed the Court, it does not normally cease to exist,

²⁴ M. Dulovic, 'A Sense of Deja-Vu: Remedies in Employment Claims' (London: 2 Gray's Inn Square Chambers. Conference paper, 2003) at 32.

²⁵ Now contained in Article 1(1) (b) Directive 2001/23/EC.

²⁶ Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice. C-13/95. [1997] ECR I -1259.

implying that responsibility to maintain the employment of staff remained with the original employer. Since no tangible or intangible assets had transferred, and nor had a major part of the workforce, there was no transfer to which the ARD or domestic German legislation could apply simply because the new contractor provided the same service.²⁷

The decision in Süzen seemed to signal at least a change of emphasis, if not direction, on the part of the ECJ. It caused dismay among some British trade unions fearful of its potential to undermine the protection previously thought to be available to employees. Concerns were also expressed by some commercial contractors' groups about the financial costs to them if staff did not transfer when a service contract was lost or otherwise reallocated. They would either have to keep staff on finding them fresh work or pay them off as redundant.²⁸ One commentator spoke of the 'storm after the calm'.²⁹ It seems clear that the Court was reacting to its own earlier decision in Christel Schmidt, though the ECJ did not disavow it. That case had held that there *was* a transfer when a bank hired an outside contractor to clean one of its branches, a job that had formerly been done by a single, directly employed, part-time cleaner, whose employment contract, accordingly, *should* have transferred to the incoming contractor.³⁰

²⁷ Conversely in Oy Liikenne AB v Liskojarvi and Juntunen, C-172/99. [2001] ECR I-745, the ECJ held that retaining a majority of the workforce did not necessarily signify a relevant transfer either, at least where the entity in question is heavily asset-reliant, unless those assets also transfer. Which businesses will be treated as asset-reliant, and which labour-intensive, is by no means clear, however. See, for example, Abler v Sodexo MM Catering GmbH, C-340/01. [2003] ECR I-4023.

²⁸ See evidence of the Business Services Association to a House of Lords Select Committee, 'Acquired Rights Revisited', Session 1997-1998, 22nd Report, HL Paper 98.

²⁹ N. Dobson, Best Value: Law and Management, (Bristol: Jordans, 2000) at 213.

³⁰ See Christel Schmidt v Spar-und Leihkasse, C-392/92. [1994] ECR I-1311. This decision had not been well received in some Member States, notably Germany and France, nor by the UK government. Ironically, it fared better in the UK courts, despite the absence (prior to the ARD) of any legal tradition recognising the compulsory transfer of workers' employment contracts.

As may be inferred, the European Court's judgments in this area have not been a model of clarity or consistency with outcomes seeming to depend on how much emphasis is put, at any particular moment, on protecting jobs and how much on facilitating competition and business re-structuring.³¹ We confine ourselves to noting that whether there is an 'economic entity' to be transferred continues to depend on a wide variety of factors, none of which appear to be necessary or sufficient for the test to be satisfied in every case.³² Deakin and Morris say that the result in situations 'involving privatisation, sub-contracting and other forms of outsourcing has been particularly problematic'.³³ Of course, these are exactly the sorts of transactions likely to be in question where the private sector is invited to replace public service provision.

A particular difficulty, not definitively resolved in the revised 1998 Directive, was how to categorise the contracting out of services that are heavily labour-intensive but which are light on assets.³⁴ Where no (or only minimal assets) transfer can an incoming contractor simply refuse to take on the existing staff and then successfully argue that there is no relevant 'undertaking' to which TUPE can apply? After all, if no assets go across and no personnel

³¹ P. Davies, 'Taken to the Cleaners? Contracting Out of Services Yet Again' *Industrial Law Journal*, vol. 26, 1997, 193-195, argues that *Süzen* substituted a 'commercial' for an 'employment' law test. It is not to be supposed that decision-making by the ECJ is insulated from currents in economic and political thinking. For a detailed account of the interaction between the ECJ, the Commission and the national courts of six Member States, see S. Sciarra (ed), *Labour Law and the Courts*, (Oxford: Hart Publishing, 2001), 131-228. See too S. O'Leary, *Employment Law at the European Court of Justice*, (Oxford: Hart Publishing, 2002), 241-292 concentrating on the role of the ECJ in relation to acquired rights.

³² See *Spijkers v Gebroeders Benedik Abbatoir CV*. C-24/85. [1986] ECR 1119 at paras 11-13. The potentially relevant factors include the type of undertaking, whether tangible or intangible assets (and their value) transfer, whether essential staff are kept on or customers transfer, the degree of similarity between the activities before and after, and the length of any intervening suspension of activity. No one factor is determinative or to be considered in isolation but rather as part of an overall assessment.

³³ S. Deakin and G. S. Morris, *Labour Law* (London: Butterworths, 3rd ed, 2001) at 221.

³⁴ The difficulty continued notwithstanding (i) that *Süzen* accepted that an entity might retain its functional identity where a new contractor merely takes over a majority of the workforce dedicated to the activity by his

either, what is left to give the 'entity' its continuing 'identity'? Clearly, if this argument is accepted an incoming contractor will benefit since it will acquire a 'clean package' unencumbered by the existing workforce. By and large, British courts were unprepared to concede the full logical force of Süzen, and reluctant to accept its circular (and employment protection defeating) reasoning. In one case, it was said that the question 'whether employees *should* have been taken on cannot be determined by asking whether they *were* taken on'.³⁵ Another decision pointed out that there was 'a real danger' that the Süzen approach risked jeopardising the acquired rights of 'the most vulnerable of all classes of workers, those with only relatively simple and commonly-available skills'. The court recognised that there might be 'economic arguments that incoming contractors should be free to bid for their contracts as competitively as they may dare' but concluded that 'such economic arguments are not for us and, had they been intended to hold sway, the Acquired Rights Directive would surely never have been called into existence'.³⁶ The result of these (and other decisions³⁷) was that British courts effectively 'stretched the meaning of the transfer of an undertaking close to the simple transfer of a contract to provide services'.³⁸

predecessor and (ii) that TUPE 1981 was amended in 1993 so that a transfer 'may take place whether or not any property is transferred to the transferee by the transferor'.

³⁵ See ECM (Vehicle Delivery Service) Ltd v Cox [1998] IRLR 416, 419 (emphasis added).

³⁶ See RCO Support Services and Aintree Hospital Trust v Unison [2000] IRLR 624, 629 holding that TUPE 1981 applied to a new contractor supplying cleaning and catering services to an NHS hospital, despite the contractor's refusal to keep on the existing workers because they would not accept new (and inferior) terms and conditions: affirmed [2002] IRLR 401.

³⁷ See e.g. Dines v Initial Health Care Services Ltd [1994] IRLR 336.

³⁸ See H. Collins et al, Labour Law. Text and Materials (Oxford: Hart Publishing, 2001) at 1055.

2. 3. Responding to uncertainty.

Utilising a mixture of primary and secondary legislation and a form of 'soft law', the British government's response to these interpretive and other difficulties was fourfold. In 1999, it created a special legislative power to extend TUPE beyond TUPE situations.³⁹ Second, and more radically, in 2000, it used an administrative dictat - the Cabinet Office Statement of Practice - to declare that all transfers from central (and, subsequently, local) government would ordinarily be treated as if subject to TUPE-type controls, even where TUPE is technically inapplicable because, for example, the transfer is internal to the public service so that there is no change in the identity of the employer.⁴⁰ Where contracting out proper to another external employer does take place, these administrative codes require all contractors to respect the existing terms and conditions of transferred staff, and to pay those who join subsequently no less favourably, thereby aiming to avoid the creation of a so-called 'two-tier workforce'.⁴¹ Thirdly, some protection for transferring private sector occupational pensions was introduced by the Pensions Act 2004: the public sector is governed by codes.⁴² Finally, TUPE 2006, as from April 2006, completes this process by dealing with some important outstanding issues, such as redefining a relevant transfer so as to embrace virtually every contracting transaction.

³⁹ See s. 38 Employment Relations Act 1999. To date this power has been utilised on only two occasions: in relation to the Rent Officer Service (SI 1999 No. 2511) and OFCOM staff (SI 2003 No. 2715).

⁴⁰ See Cabinet Office, Staff Transfers in the Public Sector: Statement of Practice, 2000 and Office of the Deputy Prime Minister, Code of Practice on Workforce Matters in Local Authority Service Contracts, 2003.

⁴¹ See P. Maltby and T. Gosling, Ending the 'two-tier' Workforce (London: Institute for Public Policy Research, 2003) arguing that if such moves were to prove ineffective, political and industrial opposition to public/private partnership deals would be likely to increase. S. Sachdev, The Impact of Contracting Out on Employment Relations in the Public Services (London: Institute of Employment Rights, 2006) at 14 notes that despite the Private Finance Initiative having existed for 'well over a decade, there is little robust evidence of its impact on public service workers'.

⁴² See section 3.5 below.

All of this is to be welcomed since, arguably, the only beneficiaries of the definitional uncertainties have been lawyers. It is unlikely that workers, their trade unions, client-users, or contractors have taken any comfort from the awkward and expensive reality that doubts are ultimately only resolvable long after the event in the courts. Research in 1997 claimed that more than two thirds of employers surveyed had been involved in litigation and had typically spent some £30,000 on legal advice about tendering for contracts.⁴³ These findings were broadly confirmed in a later survey commissioned by a large firm of commercial lawyers, Pinsents, which found that more than three-quarters of employers had difficulty in deciding when TUPE 1981 applied. When it did apply, 77 per cent of employers highlighted differences with matching terms and conditions of employment and 81 per cent complained of difficulty in changing them. Unsurprisingly, the research concluded that this uncertainty was costly. 'It seemed almost impossible to apply TUPE without legal advice'. Some 85 per cent of employers 'always took advice on when TUPE applied', while '21 per cent of respondents were the subject of employment tribunal litigation'.⁴⁴

3. TUPE 2006 - THE NEW REGULATORY CHANGES.

The 2006 version of TUPE is intended to implement the recommendations that followed the first consultation exercise in 2001.⁴⁵ With one exception (concerning whether TUPE should apply to the transfer of white collar 'professional business services') the final consultation process in Spring 2005 was explicitly confined to considering whether the wording of the

⁴³ See S. Hardy et al, TUPE and CCT Business Transfers: Survey Report No. 1 (Staffordshire University Law School, 1997).

⁴⁴ J. McMullen, 'All in a muddle over TUPE', The Times, 25 June 2003. See too IDS, Employment Law Brief, No. 785, July 2005, noting in an editorial that a June 2005 survey of human resource professionals showed only 8% considered TUPE 1981 and its associated official guidance to be well drafted, ranking it the second worst of 16 pieces of employment-related legislation.

⁴⁵ See n 10.

new draft Regulations achieved these earlier settled policy objectives. Even so, government felt it necessary to provide consultees with more than 80 pages of explanation and guidance. This process resulted in a further twenty or so drafting changes designed to make the final version of the Regulations clearer.⁴⁶ We consider below those aspects most relevant to transfers between the public and private sectors.

3.1. Expanding the definition of a relevant transfer.

Historically, much of the service contracting industry opposed TUPE 1981 because of its potential to limit price-based competition when bidding for (public service) contracts.⁴⁷ More significantly, the confusion surrounding the application of TUPE proved to be a source of difficulty for *all* parties. This grave uncertainty seems to have persuaded government, clients and many contractors that clarity would be preferable.⁴⁸ Accordingly, TUPE 2006 adds a new definition of a relevant transfer - one involving a 'service provision change' - designed to catch virtually all outsourcing transactions.

In practice, this extension will impact mainly on private sector transfers since, as we saw earlier, administrative codes of practice already regulate transfers from (and within) the public sector. As the March 2005 consultation document observed:

In the public sector, there is already a well-established policy, as set out in the Cabinet Office Statement of Practice, to afford TUPE-type protections comprehensively to employees whose jobs transfer to the private sector, or subsequently between private sector employers, even in cases which fall outside the scope of the Directive and thus of the existing Regulations. This policy has been

⁴⁶ See DTI, TUPE: Draft Revised Regulations. Government response to the public consultation, February 2006.

⁴⁷ See the submissions of the Business Services Association (BSA) and others to a Parliamentary Select Committee, Transfer of Undertakings: Acquired Rights, Session 1995-1996, 5th Report, HL Paper 38.

⁴⁸ See M. Sargeant, 'New Transfer Regulations', Industrial Law Journal, vol. 31, 2002, 35-54, citing the desire of BSA members for clarification and greater certainty concerning the application of TUPE.

enshrined in legislation in the local government sector, in measures introduced under powers in the Local Government Act 2003. The extension of the Regulation's scope will bring the benefits of this policy to employees and employers in the private sector too.'⁴⁹

TUPE 2006 thus defines a relevant transfer in two ways. Firstly, Regulation 3 (1) (a) repeats what McMullen calls the 'standard' transfer definition, which has operated since 1981; that is, the transfer of a business or undertaking or part of one as a going concern.⁵⁰ This definition is based on the wording of the Directive and applies to the transfer to another employer of an 'economic entity which retains its identity', defined by Regulation 3 (2) to mean 'an organised grouping of resources which has the objective of pursuing an economic activity', whether central or ancillary. The retention of the requirement for a change of employer is particularly significant in Britain where the great majority of commercial business acquisitions continues to be effected by means of share transfers. Such corporate take-overs have always fallen outside TUPE because they entail no change in the *identity* of the employer, only a change in control and ownership.⁵¹ The new Regulations do not alter this position.

Secondly, Regulation 3 (1) (b) extends the definition of a relevant transfer to include any 'service provision change', including first and second generation contracting out and taking

⁴⁹ See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, para. 19. Consistent with the Directive and ECJ jurisprudence, see n 19, reg. 3(5), TUPE 2006 declares that 'an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer'.

⁵⁰ J. McMullen, 'TUPE Revised (1)' Solicitors Journal, vol. 149, 2005, 528-529 at 528 (6 May 2005).

⁵¹ See Brookes v Borough Care Services [1998] IRLR 636. In 1981, Lord Wedderburn likened this omission to 'Hamlet without the Prince', see 425 HL Deb. 1491. In 1995, a recommendation to include share transfers within TUPE was made by a Parliamentary Select Committee but ignored, see n. 47.

services back in-house.⁵² The intention is that TUPE 2006 should apply 'more comprehensively' to service contracting operations, particularly (but not confined to) those involving labour-intensive 'blue collar' activities, such as cleaning, workplace catering, security guarding, and maintenance.⁵³

For the Regulations to apply to a 'service provision change' there must be 'an organised grouping of employees...which has as its principal purpose the carrying out of the activities concerned on behalf of the client'.⁵⁴ According to the DTI's 2005 consultation document, this is intended to confine the extension to situations where the incumbent service provider (including on an initial contracting-out, the client) has in place an identifiable employee or team of employees who carry out the service in question and are essentially dedicated to meeting the *particular* client's needs. It will thus exclude 'cases where there is no identifiable grouping of employees' as well as situations where 'there is an organised grouping of employees, but their principal purpose is to carry out service activities on behalf of clients in general, rather than a single specific client.'⁵⁵ If a courier company has different staff undertake collections and deliveries to a client on an ad hoc basis, the new Regulations would not apply should the courier contract subsequently be re-allocated to a different provider.

⁵² See DTI, Detailed Background Paper 2001, n 10, paras 23-35. The DTI Guidance Note, January 2006, n 13 at 8, points out that the two categories of 'business transfer' and 'service provision change' are not 'mutually exclusive'. Frequently, outsourcing a service may meet both definitions.

⁵³ See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, Annex D, and DTI, Press Notice, 25 February 2003.

⁵⁴ See reg. 3 (3) (a) (i). Originally, the draft Regulations simply referred to 'an organised grouping of employees', which seemed to imply that where a service was provided by a single employee (as in the Schmidt case, n 30) there could be no relevant transfer. Accordingly, reg. 2 now declares that such an organised grouping 'shall include a single employee'.

⁵⁵ See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, paras 22 and 23.

Moreover, the client must intend that the activities will, following the service provision change, be carried out by the transferee 'other than in connection with a single specific event or task of short-term duration'.⁵⁶ This excludes 'one-off' transactions, such as organising a conference, where no ongoing arrangement (such as preferred supplier status) to provide services is intended. The reference to 'short-term duration' was added following the final consultation when it was decided that long-lasting contracts (such as designing a power station) ought not to be exempted, even though otherwise falling within the notion of a 'single specific event or task'.⁵⁷ Transfers consisting principally of the 'supply of goods' for a client's use do not qualify as a relevant transfer either.⁵⁸

Whether transfers concerning the provision of 'professional business services' (such as those provided by lawyers and management consultants) should also be excluded was hotly disputed.⁵⁹ In the event, the government decided to accept the view of the majority of consultees that the disadvantages outweighed the potential benefits, removing the proposed exemption at the last minute.⁶⁰ Not only would it have been difficult to identify clearly which professional services should be excluded (whether by listing or generic definition) but there seems no principled reason to discriminate between those who are employed by 'white' or 'blue collar' service providers.

⁵⁶ See reg. 3 (3) (a) (ii) and Public Consultation Document, n 53, paras 24 and 25.

⁵⁷ See DTI, TUPE: Draft Revised Regulations. Government response to public consultation, February 2006, para 2.13.

⁵⁸ See reg. 3 (3) (b).

⁵⁹ See Public Consultation Document, n 53, paras 30-36, for a detailed account of the arguments.

⁶⁰ See DTI, TUPE: Draft Revised Regulations. Government response to the public consultation, February 2006, paras 2.11 and 2.12.

By treating most service changes as relevant transfers, TUPE 2006 goes beyond what the 2001 Directive, as presently interpreted, appears to require.⁶¹ According to government, an advantage of extending TUPE in this way is that all parties will be 'insulated to some extent' from the effects of possible further developments in ECJ jurisprudence concerning the application of the Directive.⁶² As well as providing greater certainty and protection for employees, the change should provide contractors with the added benefit that they will no longer face unfair competition from 'cowboy' companies claiming to be able to operate with lower labour costs because not bound by TUPE to respect existing employment conditions. For clients, tender bids will be made on a comparable basis.

The DTI Regulatory Impact Assessment suggests this extension will bring within the new Regulations most of the (conservatively estimated) 25 per cent or so of cases where previously there was legal uncertainty about whether or not the change involved a TUPE transfer.⁶³ Nonetheless, some uncertainty will inevitably remain leading to the possibility of litigation. The DTI cites as an example the concept of an 'organised grouping of employees'.⁶⁴ McMullen points to the exceptions concerning the one-off purchase of services and the supply of goods.⁶⁵

⁶¹ It has been permissible since the ARD 1998 for Member States to better protect employee interests by adopting a broader definition of a relevant transfer, see now Article 8 Directive 2001/23/EC.

⁶² See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, para 18.

⁶³ DTI, Final Regulatory Impact Assessment, January 2006, para 27.

⁶⁴ *Ibid*, para 32.

⁶⁵ See McMullen, n 50, at 529. The original draft reg. 3 (3) (b) had referred to 'the *procurement* or supply of goods'. In the final version, the reference to 'procurement' was deleted because it might mean, contrary to government's intention, that the outsourcing of a client's 'procurement department' would also be caught by the exemption. See DTI, TUPE: Draft Revised Regulations. Government response to the public consultation, February 2006, para 2.14.

3. 2. *Allowing changes to terms and conditions.*

The ARD and TUPE 1981 have conventionally been interpreted as proscribing subsequent changes to employees' terms and conditions that are transfer-related.⁶⁶ This has been a source of perceived difficulty for some employers since dismissing an employee who refuses to accept a variation risks a claim of *automatically* unfair dismissal,⁶⁷ unless it was done for an 'economic, technical or organisational reason entailing changes in the workforce' (an 'ETO' reason).⁶⁸ Even so, anecdotal evidence suggests that, in practice, contractual changes are not uncommon, alongside alterations to non-contractual aspects, such as 'custom and practice' concerning the way work is organised.⁶⁹ The inconclusive Wilson and Meade litigation, while seeming to accept the principle that re-negotiating terms is legally impermissible (except where transfer is not the reason) also appeared to say that it might be evaded by the device of sacking staff and then re-hiring them on different terms.⁷⁰

⁶⁶ See Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S. C- 324/86. [1988] ECR 739, and reg. 12, TUPE 1981. Even changes freely negotiated and of considerable benefit to the employee are apparently unenforceable if transfer-related, see Credit Suisse First Boston (Europe) Ltd v Lister [1999] ICR 794.

⁶⁷ See reg. 8, TUPE 1981, now reg. 7, TUPE 2006.

⁶⁸ See reg. 8(2), TUPE 1981, now reg. 7(2), TUPE 2006. What amounts to an 'ETO' reason is unclear, though potentially very wide. While it may include reasons related to the undertaking's economic performance, production processes or management structure, seemingly, it must involve some change in the numbers or functions of workers. Merely attempting to harmonise or standardise the contractual terms of two or more sets of employees is insufficient, see Berriman v Delabole Slate Ltd [1985] ICR 546.

⁶⁹ Reg. 4(9), TUPE 2006, reversing the effect of Rossiter v Pendragon plc [2002] ICR 1063, enables employees to resign and claim to have been dismissed where a 'substantial change in working conditions' to their material detriment will or has arisen from a relevant transfer. Such detrimental change need not amount to a repudiatory breach of contract, as is normally the case where constructive (unfair) dismissal is claimed. The latter right is expressly preserved by reg. 4(11).

⁷⁰ See Wilson v St Helens BC and Meade v British Fuels Ltd [1999] 2 AC 52.

The government accordingly wished to clarify the position of 'transfer related changes to terms and conditions that arise for an ETO reason'.⁷¹ TUPE 2006 sets out two main categories of contractual variations. First, impermissible variations; those where the sole or principal reason is the 'transfer itself' or 'a reason connected with the transfer that is not an ETO reason'. These are declared by Regulation 4 (4) to be 'void', seemingly meaning legally ineffective rather than simply unlawful, which is contrary to the usual understanding in Britain where an unlawful dismissal has traditionally been regarded as terminating the contract.

The second category comprises permissible, agreed, variations where the reason *is* an ETO reason 'connected with the transfer' as well as variations which are 'unconnected with the transfer'. These are to be potentially effective according to Regulation 4(5). The government expressed the view in March 2005 that transfer-related, negotiated *variations* should be binding and capable of being defended as potentially fair on the same basis as ETO *dismissals*, and that this was the correct interpretation of the Directive itself since:

'Although the Directive contains no explicit provision allowing for variations to be potentially effective where the sole or principal reason for them is a transfer-connected ETO reason, it does contain a provision - in Article 4.1 - permitting dismissals made for such a reason. It would be illogical for the Directive to permit dismissals for such a reason but not agreed changes to terms and conditions. This would constitute, in effect, a perverse incentive for employers to dismiss employees and offer to re-engage them (with loss of continuity), or recruit new staff, on different terms and conditions, contrary to the employment protection aims of the legislation.'⁷²

Plausible as this appears, it is open to at least three objections. First, it is debatable how consensual such variations are likely to be given the usual inequality in bargaining power,

⁷¹ See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, Annex B, para 7.

⁷² *Ibid*, para 45 (emphasis in the original).

particularly where there is no strong trade union presence. Second, an ETO reason must 'entail a change in the workforce', a requirement which has been interpreted to mean that there must either be a change in the job functions of the affected employees or a change in their number.⁷³ Consequently, variations which merely aim to harmonise terms and conditions without entailing changes in the workforce (as defined) would continue to be impermissible. Thirdly, and contrary to what government initially asserted, this change seems not be compatible with the ARD because, arguably, it is directed to providing employers with greater flexibility rather than to increasing employee protection and so would be open to challenge.⁷⁴ After the final consultation exercise, the government declared that whilst it saw 'considerable merit' in permitting agreed variations to 'achieve harmonisation, so long as the employee is left no worse off overall', it had regretfully concluded that amending the Regulations in this way would be incompatible with the Directive. It declared instead its longer term intention to press for revision of the ARD to specifically allow harmonising variations.⁷⁵

Finally, as regards commercial businesses in financial difficulty, TUPE 2006 allows post-transfer changes to be imposed as a means of helping to promote corporate rescues and so protect jobs, provided 'relevant insolvency proceedings' have begun and the changes have been agreed with appropriate workforce representatives.⁷⁶ Government estimates this change

⁷³ See Berriman v Delabole Slate Ltd [1985] ICR 546 and n 67.

⁷⁴ See Article 8 ARD 2001/23/EC permitting 'more favourable' *employee* protection.

⁷⁵ See DTI, TUPE: Draft Revised Regulations. Government response to the public consultation, February 2006, paras 3.5 and 3.6.

⁷⁶ See regs. 8 and 9, TUPE 2006. A 'permitted variation', such as a reduction in pay, must be made with the intention of safeguarding jobs and the survival of the undertaking rather than liquidating the assets. It takes effect as a contractual term or condition in place of the one it varies. Such measures were first permitted by the ARD 1998, now Art. 5(2)(b) ARD 2001.

may help to save between 2,400 and 3,700 jobs a year.⁷⁷ Potential salvors, including local authorities taking outsourced work back in-house on the insolvency of a contractor, will also be encouraged since liability for arrears of wages and other relevant employee debts will not be inherited by the transferee but will instead be met by the state, though subject to a cap.⁷⁸

3. 3. Requiring transferors to provide information.

While the one of the *purposes* of TUPE is to secure continuity of employment, one of its *effects* is to save the transferor money since potential liabilities (to compensate future redundancy dismissals, for example) are inherited by the transferee. Where a commercial undertaking is acquired, the buyer may be able to protect himself to some degree by seeking an indemnity from the seller or by offering a lower price. However, these strategies may be of limited value or simply unavailable, particularly in so-called 'second generation' contracting out where a client re-lets a service contract to a new provider who may well have no direct dealings with the out-going contractor. In such circumstances, the next best thing is that transferees know what they are taking on as regards (potential) obligations to transferred employees. Accordingly, a new Regulation 11 obliges the transferor to disclose to the transferee in a readily accessible form 'employee liability information' including, inter alia, the identity, age, and employment particulars of every employee who is to transfer, at least fourteen days before completion of the transfer, unless this is not reasonably practicable.⁷⁹ Failure is actionable before an Employment Tribunal which can award compensation for

⁷⁷ See DTI, Final Regulatory Impact Assessment, January 2006, para 67.

⁷⁸ See reg. 8, TUPE 2006. The existing insolvency guarantee limits in Part XII, Employment Rights Act 1996 operate here.

⁷⁹ J. McMullen, 'TUPE Revised (3)', Solicitors' Journal, vol. 149, 2005, 628-629 at 629 (27 May 2005) says that because the duty is not triggered until (shortly before) a transfer, the proviso may be of 'limited use', at least to potential transferees who wish to know the likely extent of any post-transfer obligations before committing themselves to the contract.

losses sustained by a transferee who is landed with unexpected or, at least, undeclared obligations. Ordinarily, a minimum award of £500 per employee in respect of whom inadequate information was provided will be ordered, unless it is just and equitable to impose a lesser sum.⁸⁰

The new Regulations continue the long standing requirement on transferors and transferees to inform and consult appropriate workforce representatives in advance of a transfer.⁸¹

3. 4. Employers' liability insurance.

Private sector employers are obliged to insure against potential liability to employees for occupational injury, illness and disease.⁸² In a surprising decision it was held that not only did the obligation to provide suitable compensation pass to the transferee, but so too did the benefit of the transferor's insurance.⁸³ The government says this is 'satisfactory', at least so far as concerns transfers between purely private sector employers. However, the public sector is not covered by or is exempt from any similar legal obligation to insure. Some public employers do insure voluntarily, but those who do not will have no cover to transfer to a private sector contractor. Accordingly, where an uninsured liability arises from pre-transfer public employment, Regulation 17 (2) TUPE 2006 makes both public transferor and private transferee jointly and severally liable to compensate the employee.

⁸⁰ See reg. 12, TUPE 2006. This replaces the original proposal to allow the High Court to sanction failure with a penalty of up to £75,000.

⁸¹ See regs. 13 to 15. Failure attracts a compensation award for the benefit of affected employees. Transferor and transferee may be made jointly and severally liable.

⁸² See Employers' Liability (Compulsory Insurance) Act 1969.

⁸³ See Bernadone v Pall Mall Services Group [2000] IRLR 487.

3. 5. Protecting pensions.

Pensions were outside the original 1977 ARD and so did not transfer alongside other employee contract-related benefits.⁸⁴ The 1998 amending Directive 98/50/EC allowed (but did not require) Member States to include occupational pensions in the transfer package. Britain resolved to remedy this grave omission in two stages. First, where public sector workers transfer to the private sector, Treasury and Cabinet Office guidelines require every transferee to make ‘broadly comparable’ pension provision.⁸⁵ Whether this test is met is a question for the Government Actuary to decide.

How best to tackle the pension question in the private sector was seen as more contentious and has been a major cause of the delay in reforming TUPE. The 2001 consultation document canvassed six options, including amending TUPE 1981 so that pension rights for public and private sector employees alike would receive the same degree of protection.⁸⁶ Government gauged that it was politically unacceptable simply to do nothing, leaving employees in the private sector to fend for themselves, but was unprepared to level up. It was troubled by a fear that saddling private employers with too onerous a burden might cause them to pull out of pension provision altogether or dissuade them from participating in transfers.

⁸⁴ More accurately, it was the right to continuing membership of the transferor’s occupational pension scheme that did not transfer. Already accrued pension and retirement benefits were always within the ARD and TUPE 1981. Agreed early retirement benefits are also capable of transferring under the ARD because they are not old age pension benefits, see Martin v South Bank University. C-4/01.[2004] ICR 1234.

⁸⁵ See HM Treasury, Staff Transfers from Central Government: A Fair Deal for Staff Pensions, 1999. Local government staff are similarly protected under the relevant Code of Practice, see n 40, and Part 2, Local Government Act 2003. In some former public sector environments, pension rights have been protected by specific legislation, such as the Railways Act 1993.

⁸⁶ See Detailed Background Paper, para 38, n 10. See too S. Ward, Current Treatment of Occupational Pension Rights under TUPE Transfers (London: IRS Research, 2000).

In February 2003, the Trade and Industry Secretary eventually announced that it had been decided to de-couple the two issues and to deal with pension transfers as part of a general overhaul of pensions' law.⁸⁷ Entirely separate pension proposals were placed before Parliament; ironically well ahead of any legislative scheme to reform TUPE itself. In broad terms, sections 257-258 of the Pensions Act 2004, as from 6 April 2005, introduced a minimum level of protection where transferred employees had access to an occupational pension scheme pre-transfer.⁸⁸ Where the transferor operated such a scheme and the employee was a member or was eligible (or potentially eligible) to join, then it will be a condition of his contract that he is allowed to join the transferee's scheme, which need not be comparable. Alternatively, where no such scheme exists, the transferee must match any contributions the employee makes to a 'stakeholder' pension.⁸⁹ How much and for how long is settled by regulations, though the amount is capped at 6 per cent of earnings.⁹⁰ If the transferor made no pension provision, then neither need the successor employer. Since pensions in the public sector are near universal, but much less common elsewhere, clearly many employees in the private and voluntary sectors will, to this extent, continue to be worse off than their public sector counterparts.⁹¹

⁸⁷ See DTI, Press Release, 14 February 2003.

⁸⁸ For a detailed analysis, see D. Pollard, 'Pensions and Tupe', Industrial Law Journal, vol. 34, 2005, 127-157.

⁸⁹ The Welfare Reform and Pensions Act 1999 (as from 1 October 2000) introduced stakeholder pensions, which are provided by commercial financial services companies. They are regulated, low cost pensions aimed at those who do not have access to an occupational pension scheme. A explanatory guide can be found at www.thepensionsservice.gov.uk

⁹⁰ See Transfer of Employment (Pension Protection) Regulations 2005 (SI 2005 No. 649).

⁹¹ See B. Davies et al, Pension Promises and Employment Rights (London: Institute of Employment Rights, 2004) for an evaluation of the pensions 'crisis'.

Regulations 10 (1) and 10 (2) of TUPE 2006 replicate the previous provision in Regulation 7 of TUPE 1981 excluding pensions. However, a new proviso, in Regulation 10 (3), seeks to lay to rest what the 2005 consultation paper describes as a 'a long-standing difference of view between public sector and private sector lawyers'. Once it takes effect, government says there will no longer be any 'risk to the transferor of successful breach of contract or constructive unfair dismissal claims if the transferee fails to afford transferred employees any given level of occupational pension entitlement following a relevant transfer.'⁹²

4. CONCLUSIONS

There has always been an implicit conflict between the 'economic' and the 'social' dimensions of the EU as a whole, and this particular area of European law is no different. The trick is to strike the right balance between promoting economic integration and competition, while protecting those who are likely to suffer unfairly from it, lest the whole 'European project' is brought into public disrepute. The objectives of coupling market flexibility with security and fairness for employees are easier to state than achieve, as the varying approaches of the ECJ, the Commission, and successive British governments over time have shown.⁹³ It also evident that reform has been made more difficult still by what has turned out to be a highly technical area of law. In total the preparatory work, extensive consultation, and drafting processes have taken the British government some eight years to complete. It is estimated that TUPE 2006 will catch 85 to 90 per cent of all transfers and that

⁹² See DTI, TUPE, Draft Revised Regulations, Public Consultation Document, URN 05/926, March 2005, para 76 (emphasis in the original).

⁹³ For an account of the longstanding tensions between social and economic policy objectives, see M. Fuchs, 'The Bottom Line of European Labour Law (Parts I and II)' International Journal of Comparative Labour Law and Industrial Relations, vol. 20, 2004, 155-176 and 423-444. How best they might be reconciled is considered by S. Klosse, 'The European Employment Strategy: Which Way Forward?' International Journal of Comparative Labour Law and Industrial Relations, vol. 21, 2005, 5-36.

some 200,000 employees a year will benefit from its expanded protections.⁹⁴ The British experience of utilising a variety of different legal mechanisms to secure employee rights may be instructive to other Member States contemplating reform of their own transfer regimes.

New Labour continues to be committed to flexible labour markets and to a partnership approach to industrial relations, but it also realises that the task of 'modernising' public services will prove to be unsustainable 'if potential outsourcing and other arrangements are stillborn through TUPE uncertainties'.⁹⁵ Hence, government moved to deal with the issues of certainty, the 'two tier' workforce, and pensions. The result of these largely administrative measures, which preceded the long-delayed legal reforms to TUPE itself, has been that the rights of former public sector employees were already better protected than some private sector employers may have believed. Many of the improvements are the result of intense political lobbying by trade unions and others. We shall have to wait to see what effect TUPE 2006 has on the enthusiasm of private contractors for further joint ventures with the public sector.

⁹⁴ See DTI, Final Regulatory Impact Assessment, January 2006, paras 19 and 29.

⁹⁵ See N. Dobson, 'Sophie's Other World', Journal of Local Government Law, vol. 3, 2000, 21-27 at 26.