Transfer of undertakings (TUPE)

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Author: Vincent Keter and Tim Jarrett
Section Business and Transport Section

The *Transfer of Undertakings (Protection of Employment) Regulations 1981*, commonly known as TUPE, implemented an EC directive – the *Acquired Rights Directive* – in the UK.

The directive was amended in 1998 to allow Member States more flexibility in how it is implemented and a consolidated Directive was published in 2001.

In 2006, new TUPE regulations replaced the 1981 regulations, which introduced: a widening of the scope of the regulations; a new duty on the old transferor employer to supply information about the transferring employees to the new transferee employer; special provisions for insolvent businesses; clarification of the ability of employers and employees to agree to vary contracts of employment in circumstances where a relevant transfer occurs; and clarification of the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.

In November 2011, the Government issued a "call for evidence" on the 2006 regulations to "ensure that they are fit for purpose and to see whether there is scope to make the legislation easier to understand, improve efficiency and reduce bureaucracy". The Government said that "should the balance of evidence call for possible changes to the current Regulations there will be a formal consultation on any proposed changes in 2012".

The Government also announced the end of the two-tier code for public sector workers, the code meant that "where TUPE does not apply in strict legal terms to certain types of transfer within the public sector, the principles of TUPE should be followed". It has been replaced by the new *Principles of good employment practice*.

A separate Standard Note, *TUPE and Pensions* (SN/BT/1665), can be found online.

Contents

1 Implementation of the EC's *Acquired Rights Directive*

The European Council's *Acquired Rights Directive* (77/187/EEC) was adopted in 1977 and originally implemented in UK law by the *Transfer of Undertakings (Protection of Employment) Regulations 1981* (SI 1981/1794).

The Directive was on the "approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses".[1]

In the late 1980's and early 1990's, TUPE and the *Acquired Rights Directive* became controversial as a result of a series of decisions in the European Court of Justice (ECJ) which established that their application was wider than originally thought.[2]

1.1 Amendments to the 1981 regulations

Transfer to wholly owned subsidiary (SI 1987/442)

SI 1987/442, which amended regulation 4(1) of SI 1981/1794 "so that it applies where the administrator of a company transfers the company`s undertaking to a wholly owned subsidiary, as it applies where such a transfer is made by the receiver or, in the case of a creditors` voluntary winding up, the liquidator". The then Government added that SI 1987/442 implemented "Council Directive No. 77/187/EEC in the light of Part II of the Insolvency Act 1986 (c. 45), which makes provision in respect of administration orders".[3]

Recognised trade unions (SIs 1995/2587 and 1999/1925)

TUPE originally stated that consultation was only necessary where there was a recognised trade union. But, following a ruling in the European Court of Justice on 8 June 1994 that this failed to implement the Directive properly,[4] the regulations were amended by SI 1995/2587 so that employers had a duty to consult either a recognised trade union or elected representatives of the affected employees.[5] This ensured that consultation occurred even where there was no recognised trade union, but it also enabled employers to by-pass trade unions should they so wish.

Subsequently, the Labour Government introduced a further amendment (SI 1999/1925) which provides that where employers do recognise a union they must consult that union.[6]

Contracting out (Trade Union Reform and Employment Rights Act 1993)

During the 1990s, it became clear that TUPE could apply to cases where local or central government contracted out their services to private contractors. If TUPE did not apply, private companies tendering for contracts to perform public services (eg school or hospital cleaning) under Compulsory Competitive Tendering (CCT) or, indeed, voluntary contracting out exercises, could submit low tenders based on lower rates of pay, longer hours of work or redundancies.

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1 77/187/EEC

2 including *Watson Rask AO v ISSS* [1993] IRLR 133; *Dr Sophie Redmond Stichting v Bartol* [1992] IRLR 366; *Schmidt v Spar und Lihkasse* [1994] IRLR 302

3 SI 1987/442, explanatory note

4 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*

5 *The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995*, SI No 2587

6 *The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999*, SI 1999/1925

One reason why contracting out was thought to be excluded in the 1980's was that TUPE (though not the Directive) excluded undertakings which were "not in the nature of a commercial venture". Another was that, as there was usually no transfer of stock, premises or equipment when a contract changed hands, it was thought that no "undertaking" was transferred.

In 1993, the Government was, in any case, compelled by an imminent decision of the European Court,[7] to amend TUPE so that non-commercial ventures were no longer excluded and to make it clear that transfers effected in two stages and which did not include the transfer of property were covered. This meant that transfers of franchises or sub-contracts could be covered. The amendment to the 1981 regulations was achieved through section 33 of the *Trade Union Reform and Employment Rights Act 1993*.

There continued to be much uncertainty about the application of TUPE to "second generation" contracting (i.e. where the contractor who won a contract in the first round of contracting out does not win it in the second or subsequent round and a new contractor takes over the service provision). In one case – *Suzen* –the ECJ ruled in 1997 that the mere loss of a service contract to a competitor did not, on its own, count as a transfer covered by the Directive. The Court ruled that:

> the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.[8]

This encouraged some contractors to believe that TUPE did not apply to cases where they did not take over the existing workforce.

However, in *ECM (Vehicle Delivery Service) Ltd v Cox and Others*, the Employment Appeal Tribunal ruled that where employees are working on servicing a particular contract, without which they would not be employed, and that contract is transferred to a competitor employer, then this can be a transfer covered by TUPE despite the *Suzen* ruling.[9] Moreover, the tribunal was entitled to look at the reason why the existing workforce had not been taken on. If it was solely to avoid the operation of TUPE, then it should not be effective.[10] This decision was upheld in the Court of Appeal.[11]

2 The 2001 consolidating directive

2.1 Background

The European Commission had long been aware of some of the uncertainty surrounding the interpretation of the *Acquired Rights Directive*, and in September 1994, issued a proposal to revise the directive:

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7 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, 8 June 1994*

8 Judgment of the European Court of Justice, 11 March 1997, in Case C-13/95

9 *Times* law report, 10 June 1998, "Transfer of undertaking in loss of contract"

10 1998 IRLR 416

11 1999 IRLR 559

> in the light of a number of factors, namely, the impact of the internal market, new tendencies in Member States' laws on the rescue of undertakings in economic difficulties, the case-law in the European Court of Justice of the European Communities, the adopted revision of Council Directive 75/129/EEC on collective redundancies and the legislation already in force in most Member States.[12]

A revised proposal from the Commission was issued February 1997, following considerable criticism from, amongst others, the European Parliament,[13] and the then Labour Government issued a consultation document on the Commission's February 1997 proposals.[14]

In June 1998, the European Council agreed a final version of the amendments (98/50/EC) to the original *Acquired Rights Directive*; Member States had to implement these amendments by 17 July 2001. The amendments and original directive were consolidated into what is now the current directive, which came into effect on 11 April 2001 (2001/23/EC). The 2001 consolidating directive resulted in some renumbering but made no changes of substance.

2.2 The 2001 Directive and the UK

The main changes, of importance to the UK, introduced by the revisions to the directive are:

- There is an explicit definition of a transfer covered by the Directive. Article 1 (1) (b) says:

  > there is a transfer within the meaning of this Directive where there is a transfer of 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.

  This is, in effect, a re-statement of ECJ case law, but it does make it clear that contracting out can be covered.

- There is an explicit statement that both public and private undertakings engaged in economic activity are covered, whether or not they are operating for gain. This is distinguished from a purely administrative reorganisation of public administrative authorities. Article 1 (1) (c) says:

  > This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.

- Member States are given the option to allow independent workers' representatives to negotiate changes to terms and conditions in order to save jobs when the undertaking of an insolvent employer is transferred (just as they can in an insolvency where no transfer is involved). (Article 5 (2) (b))

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[12] Covering letter from European Commission to the President of the Council, with the *Proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses,* COM(94) 300, 8 September 1994

[13] *Amended Proposal for a Council Directive amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses*, COM(97) 60 final, 24 February 1997

[14] DTI Employment Rights Directorate, *European Acquired Rights Directive and Transfer of Undertakings (Protection of Employment) Regulations 1981 (The TUPE Regulations)*, December 1997. .DTI press release, 12 January 1998, *Better Regulation Proposed on Business Transfers*

- Member States are given the option to provide that, in order to save jobs when the undertaking of an insolvent employer is transferred, the transferor's outstanding debts in relation to the employees do not pass to the transferee. (Article 5 (2) (a))

- Member States are given the option to ensure that the transferor notifies the transferee of all the rights and obligations that will be transferred in a relevant transfer (so far as they are or should be known to the transferor). (Article 3 (2))

- Member States are given the option to include all occupational pension rights within the terms and conditions that pass from the transferor to the transferee in a relevant transfer. (Article 3 (4) (a)).

2.3 Implementation of the new directive

After the amendments to the original Directive were agreed by the European Council in 1998, the Government began "discussing the issues with the main social partners and TUPE specialist groups" to ensure that any proposals would "meet the needs of all those whose interests the Regulations affect, in both the private sector and the public".[15]

In September 2001, the Government published a consultation document setting out its proposals for reforming TUPE, making use of the new options offered by the revised directive. The former Department of Trade and Industry explained:

> The main proposals in the consultation document include:
>
> - Options for new rules on when the TUPE Regulations apply, particularly in cases where services are contracted out;
> - Proposals for better protection of employees' occupational pension rights;
> - Greater flexibility when applying the Regulations to transfers of insolvent businesses, to make it more attractive for potential buyers to rescue those businesses and save jobs;
> - Better guidance for both employees and employers on the extent of protection against transfer-related dismissals or changes to terms and conditions; and,
> - A legal requirement for the old employer (transferor) to give the new employer (transferee) proper notification about the rights and obligations being transferred.[16]

Preliminary results of the consultation were published in February. This included plans for new TUPE amendment regulations. Draft regulations were subsequently published for consultation in March 2005, and in 2006 regulations were made that "implement the European Community Acquired Rights Directive (77/187/EEC, as amended by Directive 98/50 EC and consolidated in 2001/23/EC)".[17]

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15 DTI press release, *Hewitt pledges reform of workers' protection*, 10 September 2001 [on the Workplace Law Network website]

16 DTI press release, *Hewitt pledges reform of workers' protection*, 10 September 2001 [on the Workplace Law Network website]

17 Department for Business, Innovation and Skills, *Employment Rights on the Transfer of an Undertaking – A guide to the 2006 Regulations for employees, employers and representatives*, June 2009, p2

The new regulations were made under powers in section 2(2) of the *European Communities Act 1972*, and section 38 of the *Employment Relations Act 1999*. Fuller details of how TUPE works were given in guidance on the revised 2006 regulations:

> The 2006 Regulations introduced:
>
> - a widening of the scope of the Regulations to cover cases where services are outsourced, insourced or assigned by a client to a new contractor (described as "service provision changes") ;
> - a new duty on the old transferor employer to supply information about the transferring employees to the new transferee employer (by providing what is described as "employee liability information") ;
> - special provisions making it easier for insolvent businesses to be transferred to new employers ;
> - provisions which clarify the ability of employers and employees to agree to vary contracts of employment in circumstances where a relevant transfer occurs ;
> - provisions which clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.
>
> The rights and obligations in the 1981 Regulations remain in place, though the 2006 Regulations contain revised wording at some points to make their meaning clearer, as well as reflecting developments in case law since 1981.[18]

Service provision changes

One of the main difficulties with TUPE has been ascertaining whether or not it applies to any particular transfer. As the Government's September 2001 consultation document said:

> 5. The scope of the legislation is the most extensively debated and litigated aspect of the current Regulations. Ideally, everyone should know where they stand, so employers can plan effectively in a climate of fair competition and affected employees are appropriately protected as a matter of course. In the past, however, this has not always been the case.[19]

It is fairly clear that when one company sells a business to another as a going concern, TUPE does apply. Before TUPE, such transfers ended the existing contract of employment, as there was a new employer. TUPE does not apply to transfers by share take-over as the same company continues to be the employer and contracts of employment are not ended.

However, the application of TUPE to "service provision changes" has generated an enormous amount of uncertainty and often conflicting legal decisions. Service provision changes include cases where a service is contracted-out or "outsourced", or a service contract is re-let to a new contractor, or a previously contracted-for service is taken in-house or "contracted-in".

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[18] Department for Business, Innovation and Skills, *Employment Rights on the Transfer of an Undertaking – A guide to the 2006 Regulations for employees, employers and representatives*, June 2009, p3

[19] DTI, *Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) - Government proposals for reform*, 10 September 2001

The 2006 regulations widened the scope of TUPE to cover these cases. The guidance explained this as follows:

> ***Q. What business transfers are therefore covered by the Regulation ?***
>
> A. The precise application of the Regulations will be a matter for the tribunals or courts to decide, depending on the facts of each case. However, the economic entity test would generally mean that the Regulations apply where there is an identifiable set of resources (which includes employees) assigned to the business or to a part of the business which is transferred, and that set of resources retains its identity after the transfer. Where just a part of a business is transferred, the resources do not need to be used exclusively in the transferring part of the business and by no other part. However, where resources are applied in a variable pattern over several parts of a business, then there is less likelihood that a transfer of any individual part of a business would qualify as a business transfer under the Regulations.
>
> *Service provision changes*
>
> "Service provision changes" concern relationships between contractors and the clients who hire their services. Examples include contracts to provide such labour-intensive services as office cleaning, workplace catering, security guarding, refuse collection and machinery maintenance.
>
> The changes to these contracts can take three principal forms:
>
> - where a service previously undertaken by the client is awarded to a contractor (a process known as "contracting out" or "outsourcing");
>
> - where a contract is assigned to a new contractor on subsequent re-tendering; or
>
> - where a contract ends with the service being performed "in house" by the former client ("contracting in" or "insourcing").
>
> The Regulations apply only to those changes in service provision which involve "an organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client". This is intended to confine the Regulations' coverage to cases where the old service provider (i.e. the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out the activities that are to transfer (though they do not need to work exclusively on those activities) . It would therefore exclude cases where there was no identifiable grouping of employees. This is because it would be unclear which employees should transfer in the event of a change of contractor, if there was no such grouping. So, if a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than by an identifiable team of employees, there would be no "service provision change" and the Regulations would not apply.
>
> A service provision change will often capture situations where an existing service contract is re-tendered by the client and awarded to a new contractor. It would also potentially cover situations where just some of those activities in the original service contract are re-tendered and awarded to a new contractor, or where the original service contract is split up into two or more components, each of which is assigned to a different contractor. In each of these cases, the key test is whether an organised grouping has as its principal purpose the carrying out of the activities that are transferred.

> It should be noted that a "grouping of employees" can constitute just one person, as may happen, say, when the cleaning of a small business premises is undertaken by a single person employed by a contractor.[20]

There are therefore two ways that a transfer can come within the scope of the regulations: under the standard definition that is set out in regulation 3(1)(a) that existed prior to the 2006 revisions; and under regulation 3(1)(b) which relates to service provisions changes. The two are not mutually exclusive. The leading authority on whether or not a TUPE transfer has occurred under the standard definition is the ECJ ruling of 18 March 1986 on the *Spijkers* case.[21] This stated that:

> the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity.
>
> Consequently, it cannot be said that there is a transfer of an enterprise, business or part of a business on the sole ground that its assets have been sold. On the contrary, in a case like the present, it is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by a new employer, with the same or similar activities.
>
> To decide whether these conditions are fulfilled it is necessary to take account of all the factual circumstances of the transaction in question, including the type of undertaking or business in question, the transfer or otherwise of tangible assets, such as buildings and stocks, the value of intangible assets at the date of transfer, whether the majority of the staff are taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between activities before and after the transfer and the duration of any interruption in those activities. It should be made clear, however, that each of these factors is only a part of the overall assessment which is required and therefore cannot be examined independently of each other.[22]

3 Recent changes to TUPE

In November 2011, the Government issued a "call for evidence" on the 2006 regulations "to ensure that they are fit for purpose and to see whether there is scope to make the legislation easier to understand, improve efficiency and reduce bureaucracy".

The Government also withdrew the "two-tier code" which regulated the employment benefits of new staff recruited by contracted providers of outsourced public services, and said that it would be replaced by new "Principles of Good Employment Practice".

3.1 Call for evidence on effectiveness of TUPE regulations

In November 2011, the Coalition Government issued a "call for evidence" on the 2006 TUPE regulations, as part of its Employment Law Review which began in May 2010. Launching the consultation as part of a wider statement on employment relations, the Business Secretary, Vince Cable, said:

> The Government are also looking at the current rules on consultation in collective redundancy situations. Today I am launching a call for evidence on the experience of

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20 Department for Business, Innovation and Skills, *Employment Rights on the Transfer of an Undertaking – A guide to the 2006 Regulations for employees, employers and representatives*, June 2009, pp5–7

21 *Spijkers v Gebroeders Benedik Abbatoir CV* (Case 24/85) [1986] 3 ECR 1119; [1986] 2 CMLR 296

22 [1986] 2 CMLR 296, paras 11-13 of the judgment

> employers and employees in collective redundancies. The call for evidence will seek to identify where changes, if they are thought necessary, could be made that will help improve the ability of businesses to restructure, while ensuring that employees have access to support in finding alternative training or employment opportunities.
>
> Some businesses have raised concerns that the current TUPE arrangements are overly bureaucratic and may in some areas, such as service provision, unnecessarily gold-plate European rules. Therefore, today I am launching a second call for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 in protecting employees' rights and smoothing the process of business restructuring. This is a complex area of legislation and it is important we gather evidence from a wide range of stakeholders in considering the case for change.[23]

The document, *Call for Evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006*, reflected on the 2006 regulations:

> concerns have been raised that the Regulations unnecessarily 'gold-plate' the implementation of the Directive and are overly bureaucratic. Therefore, the Government has announced a review to ensure that they are fit for purpose and to see whether there is scope to make the legislation easier to understand, improve efficiency and reduce bureaucracy. In considering any potential reforms the Government has made it clear that it will ensure that fairness to individuals is not compromised, recognising that the Regulations provide important protections.[24]

Noting that the regulations were revised in 2006 "with the aim of providing greater certainty over whether or not the Regulations applied in certain situations", the Government explained the reason for the call for evidence, which was intended to be a precursor to a full review of the regulations (within the boundaries of the *Acquired Rights Directive*):

> The Government believes it is now timely to reflect on how well they have achieved this goal. Therefore, as part of the Employment Law Review the Government announced a review of the regulations to see if there is scope to improve their implementation of the Directive and reduce burdens on business, whilst continuing to provide appropriate levels of protection for employees.
>
> The call for evidence is a precursor to the review. It is being taken forward to ensure that the review encompasses all relevant issues of concern and is also an opportunity to feed in potential solutions. The Government is keen for all parties who have an interest or stake in TUPE to take part in the policy debate at this early stage by feeding in their views and suggestions. In order to help the Government gather this evidence, this document asks you a number of questions based on your experience of TUPE. However, this is an open call for evidence and respondents should not feel constrained by these if there are other areas they would like to put forward for consideration.
>
> The Government is also interested to hear about where the interaction between TUPE and other areas of legislation may have unintended and adverse consequences on businesses and/or employees. In particular, the Government is aware that there are specific issues around the interaction with collective redundancy consultations, on which a call for evidence has been launched in parallel.

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23 HC Deb 23 November 2011 cc27WS–28WS

24 Department for Business, Innovation and Skills, *Call for Evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006*, November 2011, p11, para 4

> It should be noted that the scope of this call for evidence is to some extent constrained by the need to implement the EC Acquired Rights Directive, and is only looking at benefits from changing implementation within its limits. But there are areas where the implementing legislation goes beyond the requirements of the Directive. The call for evidence is focussed on whether the legislation could be improved in these areas or whether improved guidance and best practice examples could better address the issue. However, the Government recognises that the implementation of the Directive in other European Member States will also be of concern for some businesses and is interested to hear about these issues.[25]

The call for evidence was launched on 23 November 2011 and closes on 31 January 2012. BIS said that "the Government will consider all responses in developing its policy towards TUPE. Should the balance of evidence call for possible changes to the current Regulations there will be a formal consultation on any proposed changes in 2012".[26]

3.2 TUPE and the public sector

TUPE principles in the public sector have in part been governed by policy and specific codes of practice. The policy framework was introduced in 2000 and covered transfers involving public sector organisations where TUPE does not legally apply.

A Cabinet Office *Statement of Practice* from January 2000 dealt with transfers of staff between one public sector employer and another. This stated that where personnel are transferred between public sector employers, even if TUPE does not apply in strict legal terms, staff should be treated no less favourably than they otherwise would have been if TUPE had applied: "where TUPE does not apply in strict legal terms to certain types of transfer within the public sector, the principles of TUPE should be followed".[27]

The two-tier code applied when public sector services were outsourced, or retendered, resulting in a transfer of staff under TUPE. One effect of the code was that the terms and conditions of new employees hired to work alongside employees who had transferred over from the public sector had to be "no less favourable overall" than the terms and conditions of the ex-public-sector employees. The aim of the code was to avoid a "two-tier" workforce with transferred employees on better contractual terms than new recruits.

In addition, the guidance set out the policy that public/private partnerships and contracting exercises (including retendering) will be conducted on the basis that staff will transfer and TUPE will apply, unless there are genuinely exceptional reasons for it not to. A later *Code of Practice on Workforce Matters in Local Authority Service Contracts* concerned the transfer of staff from a local authority to a private sector employer when services are outsourced.[28] These policy documents did not seek to extend the legal scope of the TUPE regulations.

On 18 March 2005 the scope of the rules had been was extended,with immediate effect, to cover not only local government but also the wider public sector, including the Civil Service,

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[25] Department for Business, Innovation and Skills, *Call for Evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006*, November 2011, p4, paras 2–5

[26] Department for Business, Innovation and Skills, *Call for Evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006*, November 2011, p5, para 7

[27] Cabinet Office, *Staff Transfers in the Public Sector Statement of Practice*, January 2000, p3, para 5

[28] The *Code of Practice on Workforce Matters in Local Authority Service Contracts* was originally issued in March 2003 and updated in March 2005

NHS and maintained schools.[29] Thus the requirements concerning "new joiners" apply more widely beyond local government contracting exercises.

In November 2010, the Government announced that it was considering the abolition of these policy rules. A written parliamentary answer in November stated:

> […] the Minister for the Cabinet Office and Paymaster General (Mr Maude) who has responsibility for to the Code of Practice on Workforce Matters in Public Sector Service Contracts, often referred to as the Two Tier Code[,] has sought the views of interested parties including trade unions and employers groups with a view to abolishing the code. A decision will be made by the Government in due course.[30]

Following this, a Cabinet Office press release in December 2010 announced the withdrawal of the Two-Tier Code:

> Minister for the Cabinet Office Francis Maude has withdrawn the two-tier code with immediate effect from today.
>
> The code, which regulated the employment benefits of new staff recruited by contracted providers of outsourced public services, will be replaced by new Principles of Good Employment Practice which provide a more flexible guide giving employers the power to build a motivated workforce.
>
> The decision will remove a significant barrier to smaller organisations that want to deliver public service contracts.
>
> SMEs, charities, social enterprises, voluntary groups and staff owned mutual providers of public services will all benefit from greater freedom to manage their business without central government interference. However, this change will have no impact on the TUPE terms under which public service staff transfer to new organisations.
>
> Francis Maude, Minister for the Cabinet Office, said:
>
> > "The two-tier code was a voluntary regulation that did little to protect staff while deterring responsible employers from delivering public service contracts. Small organisations have been particularly hard hit by this two-tier code. We should not be making it more difficult for SMEs and voluntary organisations to succeed in the public service market.
> >
> > The new Principles of Good Employment Practice set clear standards and give employers freedom to provide terms for staff which are motivating and affordable."
>
> The Coalition Government is committed to opening up government procurement and reducing costs, so that public services benefit from a more competitive market place.
>
> This announcement builds on the Government's aspiration of awarding 25% of government contracts to SMEs. Measures to support this aspiration include cutting away unnecessary red tape, improving transparency in commissioning and ensuring that major suppliers pay subcontractors working on Government contracts within 30 days is underway.

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29 Cabinet Office Press Release CAB 018/05 *Prime Minister announces roll-out of code to tackle two-tier workforce across the public sector*, 18 May 2005

30 HC Deb 3 November 2010 cc842-3W

> An information note for Cabinet Office supplier information is available along with the original Code of Practice on workforce matters in public sector service contracts.[31]

A Cabinet Office *Supplier Information Note* on the withdrawal of the Two-Tier Code explained the changes as follows:

> Removal of the Code will help enable SMEs, mutuals, co-operatives, charities and social enterprises to enter the public sector market and have a much greater involvement in the running of public services and is designed to facilitate greater competitiveness and to drive value for money for the taxpayer. A mixed contractor economy will deliver greater competitiveness, drive efficiency and value for money for the taxpayer, and generate opportunities for greater innovation in how public services are provided.
>
> **Effect of the withdrawal of the Code**
>
> - The Code will be withdrawn from immediate effect. However, its withdrawal does not impact on existing TUPE regulations and provisions in the Employment Act 2008. Nor does it reduce or remove the statutory duties on public authorities to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity, which can apply to contracting authorities and to suppliers in some circumstances.
>
> - Where contracts are renegotiated and any provisions giving effect to the Code are removed as part of the renegotiation, the changes will apply only to future new entrants. Existing employees' terms and conditions will be unchanged.
>
> - Where contracts that have previously applied the Code are being re-competed (resulting in a new contract), the Code will not be invoked upon award of the contract.
>
> - When existing contracts which have invoked the Code are being extended, the Code will continue to apply where adherence to the Code is included in the terms and conditions of the original contract, unless both parties agree otherwise.[32]

The Code is being replaced by new *Principles of good employment practice*. The principles have a voluntary status and the Cabinet Office has stated that "contracts will still be awarded on the basis of value for money and not on the basis of who signs up to the principles". The impact of the principles on employment practice will be reviewed by the Public Services Forum in January 2012.

While the Cabinet Office announcement did not affect the *Code of practice on workforce matters in local authority service contracts*, on 23 March 2011 the Secretary of State for Communities and Local Government, Eric Pickles, announced that this Code would also be scrapped with immediate effect.[33]

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31 Cabinet Office, *Two-tier code withdrawn*, 13 December 2010
32 Cabinet Office, *Supplier Information Note: Withdrawal of Two-Tier Code*, December 2010, p1
33 Department for Communities and Local Government, *Open public services*, 23 March 2011