



Ian Young  
Labour Market Directorate  
Department for Business, Innovation and Skills (BIS)  
3 Floor Abbey 1  
1 Victoria Street  
London SW1H 0ET

11 April 2013

Dear Sirs,

**Re: BVCA response to BIS consultation on "Transfer of Undertakings (Protection of Employment) Regulations 2006 – proposed changes"**

This response is submitted on behalf of the Legal and Technical Committee of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body for the private equity and venture capital industry in the UK. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers. This submission has been prepared by the BVCA's Legal & Technical committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

Our members have invested £40 billion in over 5,000 UK companies over the last five years. Companies backed by UK-based private equity and venture capital firms employ over half a million people and 90% of UK investments in 2011 were directed at small and medium-sized businesses. As major investors in private companies, and some public companies, our members have an interest in financial reporting matters, the conduct and information presented by such companies, and the burdens placed on the management of such companies.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

**Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? (Yes/No)**

Yes.

**a) Please explain your reasons:**

The BVCA recognises the intention of this proposal, namely, to make business transfers easier. However repealing the 2006 amendments is likely to create its own set of issues to which we refer in our response to question 2, below.

**b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?**

The BVCA is not entirely clear about the scope of this question. The BVCA assumes it relates to how pre-2006 domestic cases such as *Balfour Beatty Power Networks Ltd v Wilcox* [2007] IRLR



63, or the EAT case of P&O Transport European Ltd v Initial Transport Services Ltd and others [2003] have interpreted the distinction between “asset reliant undertakings” and “labour intensive undertakings”. This is a distinction identified in the European Court of Justice (ECJ) cases of Spijkers v Gebroeders Benedik Abbattoir CV C-24/85 [1986] ECR 1119 and Oy Liikenne Ab v Liskojarvi C-172/99 [2001] IRLR 171.

In summary, the ECJ decided in Oy Liikenne that where tangible assets contribute significantly to the performance of an activity, there can be no transfer if none of the relevant assets are taken over by the new employer. However, the UK courts (e.g. in Balfour Beatty) have interpreted the distinction between asset reliant undertakings and labour intensive undertakings as not being necessary as a matter of law. As a result of the UK interpretation, TUPE may apply more readily.

The BVCA suggests that, in the context of service provision changes, it would be useful to consider these distinctions further.

**Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect? (i) less than one year (ii) 1- 2 years (iii) 3-5 years (iv) 5 years or more**

1 to 2 years.

**a) Do you believe that removing the provisions may cause potential problems? (Yes/No)**

Yes.

**b) If yes, please explain your reasons.**

The BVCA considers that likely problem areas will be:

- Greater uncertainty around whether TUPE will continue to apply in certain outsourcing situations. The BVCA would welcome government Guidance in order to address this uncertainty.
- Redundancy costs that existing service providers may now have to bear when their contracts expire, if their employees do not transfer to the new service provider (or back in-house). The longer the delay in the implementation of these changes the easier it will be for such service providers to prepare for the changes.

**Question 3: Do you agree that the employee liability information requirements should be repealed? (Yes/No)**

No.

**a) If yes, please explain your reasons.**

N/A.

**b) Would your answer be different if the service provision changes were not repealed?**

No.



**c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?**

Whilst the BVCA welcomes a requirement for the earlier provision of employee liability information by the transferor to the transferee than currently applies, it considers that supplementary guidance should make clear the extent of such disclosure obligations.

**Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? (Yes/No)**

Yes (but see (b) below).

**a) If you disagree, please explain your reasons.**

N/A.

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

The BVCA recognises the difficulty of changing the legislation in this regard whilst at the same time remaining consistent with European law. Whilst the BVCA welcomes the proposal to amend regulation 4 so that it more closely reflects the wording of the Directive, the fact that there is still an inability to harmonise terms will present a significant obstacle to acquisitions due to the additional cost and administrative burden on businesses as a result of having to replicate generous employment terms. However, the BVCA welcomes the fact that the Government has said that it will keep the issue of harmonisation of contracts under review and will tackle this problem if the opportunity arises.

The BVCA is of the view that it remains beneficial to retain the ETO carve out but that it would be useful if the Government could give clear examples in the guidance of the circumstances in which an ETO reason would arise. In particular, the BVCA would welcome additional guidance on what is meant by the phrase "entailing changes in the workforce", albeit that it is recognised that any such guidance would have to be consistent with current European case law.

The BVCA submits that the drafting of new regulation 4(5) is potentially confusing. It is assumed that this wording is meant to clarify that changes can take place where they are not by reason of the transfer. However, a transferor could agree on any variation to contractual terms with the consent of the employees and so this wording could be interpreted as allowing more substantial changes than those intended by the Government.

The BVCA still considers that a time limit after which a harmonisation exercise could no longer be said to be "by reason of the transfer" would be helpful and that such a time limit would not contravene the Directive. It would introduce much needed certainty into this area of law and would enable businesses to be able to plan effectively. The BVCA believes that a period of 12 months would be appropriate in these circumstances.

**Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible**



**provided that overall the change was no less favourable to the employee. Is this desirable in your view? (Yes/No)**

Yes (but see (a) below).

**a) Please explain your answer.**

The BVCA believes that this is likely to have limited practical value in the UK given that the terms of collective agreements are not usually enforceable between the employer and the relevant trade union. Instead, terms from the collective agreements are more usually incorporated into the employees' contracts themselves. Therefore, regardless of these proposals, UK employers will still be bound by the restrictions on making changes to terms and conditions.

**b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? (Yes/No)**

Yes (but see (a) above).

**c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?**

Yes (but see (a) above).

**Please explain your answer.**

See (a) above.

**d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? (Yes/No)**

The BVCA is conscious that the ECJ has not yet reached its decision in *Alemo-Herron and others v Parkwood Leisure Ltd.* The Advocate General's opinion (delivered on 21 February 2013) is that the Directive does not preclude member states from providing that "dynamic" contractual clauses referring to existing and future collective agreements will transfer to the transferee on a relevant transfer. If the ECJ decision is in line with the Advocate General's opinion, then the Supreme Court may decide that a dynamic interpretation should apply in then UK. If this is the case, then the one year restriction is likely to be of considerable value. The BVCA considers that the government should pre-empt this (rather than waiting for the Supreme Court to make a determination) by introducing the one year rule at this time.

**Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? (Yes/No)**

Yes.

**a) If you disagree, please explain your reasons.**

N/A.



**b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? (Yes/No)**

Yes. Please also see our response to question 4 in relation to additional guidance which would be welcomed from the Government in relation to the meaning of ETO reason.

**Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? (Yes/No)**

Yes.

**a) Please explain your reasoning.**

The BVCA agrees that Regulation 4(9) and (10) should be replaced with wording which more closely mirrors the wording of the Directive. The fact that the wording links to the actual termination of the contract by the employer rather than allowing the employee to treat the contract as having been terminated should hopefully mean that employees are less likely to seek to bring unfair dismissal claims in circumstances where the changes do not amount to a repudiatory breach of contract.

However, the BVCA also considers that the legislation should be amended to ensure that a transferee is liable (regardless of whether the employee has also objected to the transfer) for constructive dismissal claims which arise from anticipated contractual breaches for which the transferee is responsible.

**Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? (Yes/No)**

Yes. The decisions in *Tapere v South London and Maudsley NHS Trust* and *Abellio London Ltd v Musse* had left transferees in an impossible situation and this is a welcome clarification in the law.

**a) If you disagree, please explain your reasons.**

N/A.

**Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? (Yes/No)**

Yes, but only in respect of dismissals falling under regulation 4(9) of TUPE.

**a) Please explain your reasons.**

The BVCA believes that a general provision which allows the transferor to rely on the transferee's ETO reason is not necessary and could lead to confusion and/or be open to abuse. However, it can see the sense in allowing the transferor to rely on the transferee's ETO reason in relation to dismissals falling under regulation 4(9) of TUPE. As the transferor can, under



regulation 4(9), be liable for the actions of the transferee, it would make sense if the transferor could also rely on any potential defence the transferee might have in relation to its actions.

As set out in our response to the call for evidence, it is worth emphasising that the BVCA's preferred position in relation to regulation 4(9) is that liability for acts of the transferee should pass to the transferee and not remain with the transferor and that constructive dismissals falling under the regulation should be limited to cases of actual or anticipated fundamental breaches of contract.

**Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? (Yes/No)**

Yes.

**a) If you disagree, please explain your reasons.**

N/A.

**Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? (Yes/No)**

Yes.

**a) Please explain your reasons.**

The BVCA agrees that it is difficult to set a fixed period for all circumstances.

**b) If you disagree, what would you propose is a reasonable time period?**

N/A.

**Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? (Yes/No)**

Yes.

**a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? (Yes/No)**

The BVCA would welcome the option being extended to all employers, provided that the employer has less than 20 employees affected by the transfer in question.

**Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? (Yes/No)**



Yes.

**a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.**

N/A.

**b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? (Yes/No)**

No.

**c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.**

N/A.

**Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? (Yes No)**

Yes.

**Question 15: Have you any further comments on the issues in this consultation?**

Whilst it is noted that, where pensions are concerned, BIS intends to continue to work with DWP to identify improvements in the information available to employers, we would welcome a commitment from BIS to issue detailed guidance to employers in relation to pensions, particularly in respect of those elements of an occupational pension scheme which are in scope to transfer under TUPE.

Additionally, as stated in our response to the call for evidence, we would welcome confirmation (by way of guidance) that there is no obligation imposed on a transferee to consult (pre-transfer) regarding measures which the transferee envisages taking.

Whilst the proposed amendments to Regulations 4(9) and 4(10) are noted, we consider that further clarification regarding constructive dismissals is required. In particular, we do not believe that it is appropriate that the question of who bears the liability for any constructive dismissal should turn on whether the employee has formally objected to the transfer (a position which creates uncertainty and which is open to abuse). Rather, we consider that the liability for a constructive dismissal which arises from a transferee's threatened breach of contract should always pass to the transferee.

**Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? (Yes/No)**

**a) Please explain your reasons.**

We consider that the impact will be neutral overall.

**b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.**

Whilst we acknowledge that the proposed changes relating to service provision changes and post-transfer changes to terms and conditions are likely to impact low paid workers and



potentially, as a result, a disproportionate number of employees from disadvantaged groups, we consider that the changes will be good for business and good for the economy overall, thereby creating more opportunities for any workers who may be impacted.

Additionally, we consider that the ability for transferees to harmonise terms and conditions following a transfer avoids the potential difficulty for the transferee (and inherent inequity) in having a two-tier workforce.

**Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.**

Broadly speaking, we agree with the analysis provided. However, we have the following additional comments:-

- in relation to the SPC proposal, the IA is predicated on the assertion that more service provision changes are caught by TUPE than was the case under the 1981 Regulations. Whilst this may have been the case in the initial period following the coming into force of the 2006 Regulations, this has not been the case recently, as employment tribunals have increasingly been inclined to find that TUPE does not apply to a service provisions change, for example because there is no organised grouping, or because of fragmentation of the activity in question;

- removing the requirement to provide employee liability information is likely to lead to an increase in cost in those situations where the contract does not provide for information to be shared (as there is more likely to be a dispute between the incoming and outgoing service provider which could result in tribunal proceedings); furthermore, it may act as a disincentive to prospective suppliers to bid for a contract;

- uncertainty over when (and whether) a transferee can change terms and conditions of employment following a transfer is likely to lead to increased legal costs for the transferee, together with more tribunal claims by transferring employees (which will be a further cost to the exchequer).

That said, we consider that any additional burden in terms of cost will be outweighed by the benefits to business overall.

The BVCA would of course be willing to discuss further this submission and if you wish you should contact Gurpreet Manku.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Witney', with a stylized flourish at the end.

Simon Witney  
Chairman – BVCA Legal and Technical Committee