



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

Submission by Prospect to the Department for Business & Trade

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<https://prospect.org.uk/>

Introduction and Summary

Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to the consultation on TUPE clarifications and the abolition of EWCs.

Before addressing the specific questions, Prospect would like to express concern over proposals to weaken the protection of employees and workers.

We have had the benefit of seeing the TUC's response to this consultation and can confirm that Prospect agrees with the points made by the TUC. We would repeat the shortcomings of the current regime set out in the TUC's consultation response document. These matters should be a priority for the government.

CONSULTATION QUESTIONS

1. Proposal 1: reaffirming that only employees are protected by TUPE

1. *What effect has the ruling in the case of Dewhurst v Revisecatch (that TUPE applies to workers) had on employers or workers?*

It is unclear what effect this judgment has had on employers and workers, as there has been no subsequent litigation that has reached the tribunal and/or appellant courts. Workers may not be aware of this case and the potential effect it has on them. However, we consider the decision to be positive for workers.

2. *Do you agree that the government should amend the definition of 'employee' in the TUPE regulations to confirm the generally accepted principle that the regulations apply to 'employees' but not 'workers'?*

Prospect does not agree with this proposal. We consider workers and employees should be protected by TUPE.

The consultation document suggests that *"It was previously accepted that the TUPE regulations cover employees only."* Prospect does not agree with this statement. The definition of "employee" in the TUPE regulations states:

*...any individual who works for another person whether under a contract of service or apprenticeship **or otherwise** but does not include anyone who provides services under a **contract for services** and references to a person's employer shall be construed accordingly. (Our emphasis)*

In fact, the consultation document accepts the definition is different from the Employment Rights Act 1996.

It is Prospect's position that the definition has therefore always included workers. The Regulations should therefore not be amended to now exclude them.

Further, we understand that the government's intention in their document *Labour's Plan to Make Work Pay* is to review employment status more generally. We would be supportive of this approach.

3. *Do you think that the government's proposal to amend the definition of 'employee' in the TUPE regulations by explicitly stating that limb (b) workers are excluded is the best way to achieve this?*

As stated above, Prospect does not consider workers should be excluded from TUPE protections.

Instead, guidance should be issued to confirm workers are covered by the definition in line with the current definition and the recent employment tribunal decision.

4. *We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?*

Prospect is not aware of any other evidence.

However, the impact assessment undertaken in relation to these proposals highlights that this could disproportionately affect those over 50, men, disabled workers, those from ethnic minorities and those affiliated to or belonging to a religion. This is because there are a greater number of these workers in sectors where SPC occur.

Prospect does not accept that there will only be a small proportion affected by the changes. The government has estimated 30,000 SPC per annum. It is not clear the average number of workers engaged on those contracts. The government therefore cannot say, with confidence, that the proposals are only likely to have a minimal impact. In fact, the consultation document recognises the evidence gaps and asks for more information from stakeholders.

Further, no consideration has been given to the impact on women. Statistics from Policy Bee¹ suggests that a greater proportion of women work in cleaning services, one of the sectors identified as more likely to be subject to SPC. Catering is another area where SPC occur and where more women are likely to be engaged.

Another group of vulnerable workers the government has failed to consider is migrant workers, who may be put on worker or self-employed contracts to stop them having certain rights and may not have the knowledge of employment law to challenge this.

Finally, with the growth of the gig economy, there will in fact be more workers negatively affected by this proposal.

2. Proposal 2: removing the obligation to split employees' contracts between multiple employers where a business is transferred to more than one new business.

1. *What effect has the ruling in the case of *ISS Facility Services NV v Govaerts and Atalian NV* had on how the TUPE regulations work?*

It is unclear what effect this judgment has had on TUPE transfers.

2. *In your experience, how common are TUPE transfers involving multiple transferees, and what are the practical considerations that arise from these?*

Prospect do not consider they are that common, as such does not consider the Regulations should be amended.

3. *Do you agree that the government should legislate to prevent employment contracts being 'split' between multiple transferees during a TUPE transfer, reverting to the generally accepted principle that existed prior to the Govaerts ruling?*

Whilst Prospect accepts that splitting roles between multiple transferees could cause problems, in our opinion there are other mechanisms that could be implemented rather than amending the Regulations.

Given each 'split' will depend on the facts of the case, we consider guidance should be given on how transfers to multiple transferees might work. Such guidance should be created in consultation from the trade unions.

In addition, we concur with the TUC's proposal that there should be strengthened rights to consultation with trade unions. This will not only assist with multiple transfers but will give employees greater protections overall.

4. *We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?*

Prospect is not aware of any other evidence.

However, the impact assessment undertaken in relation to these proposals highlights that this could disproportionately affect those over 50, men, disabled workers, those from ethnic minorities and those affiliated to or belonging to a religion. This is because there are a greater number of these workers in sectors where SPC occur.

The government consultation document suggests the proposal will have a positive impact but also accepts it is unable to estimate the impact. In our view, these vulnerable groups are likely to be negatively impacted. These employees will be at greater risk of losing jobs, when there could be potential for a solution to undertake multiple contracts.

Further, as set above, statistics show a greater proportion of women work in cleaning services, one of the sectors identified as more likely to be subject to SPC. We also consider a greater proportion of women are also likely to work in catering, another area affected by SPC. The government has not undertaken any impact assessment on these employees. Women are more likely to be single parents. These proposals could therefore have a significant impact on single parent families and their income.

The government accepts that there are evidence gaps. Prospect is concerned that the government is seeking to amend legislation without having completed a proper assessment of data and the risks to vulnerable groups.

3. Proposal 3: abolishing the legal framework for European Works Councils.

1. *Do you agree or disagree that the government should legislate to abolish the legal framework for EWCs?*

Prospect strongly oppose this proposal, for the reasons set out the in TUC's consultation response.

2. *Are there any other options the government should consider instead of abolishing the legal framework for EWCs?*

Prospect strongly urges the government to retain the existing regulations for the reasons set out the in TUC's consultation response.

3. *We have analysed the potential impacts of this proposal in the annex of this consultation. Are you aware of any other evidence to inform our analysis of impacts?*

Prospect is not aware of any other evidence. However, the impact assessment undertaken in relation to these proposals states the impact on employees will be small, following reports of ineffectiveness in some cases. No evidence has been provided in support of this assertion or what the 'ineffectiveness is' in the consultation document or impact assessment.

The government also confirms that survey data has shown some firms believe EWCs demonstrate a positive commitment to employees.

Again, the government accepts that there are evidence gaps and confirms it does not have access to EWCs to assess the impact to workers with protected characteristics. Prospect is therefore concerned that this proposal has not had an equality assessment in line with the government's statutory duties.

ⁱ [UK cleaning industry statistics | PolicyBee](#)