Skadden

30 June 2026

RESPONSE TO THE GOVERNMENT'S 2026 CALL FOR EVIDENCE ON TUPE

#	Discussion Questions	Response	Explanation
Topic 1: Current protections offered by TUPE			
1.	To what extent do you agree or disagree that the current TUPE regulations strike the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.	• strongly agree • **agree** • neutral • disagree • strongly disagree • other	In general, we agree that TUPE in its current form strikes the right balance between supporting employer needs and protecting employees' employment rights. However, please refer to the responses below for our comments on potential areas for reform. These are largely focused on areas where, in our experience, more flexibility is required to harmonise terms or to vary terms and conditions of employment in connection with a TUPE transfer.
2.	To what extent do you agree or disagree that the current TUPE regulations sufficiently protect employees' employment rights when a transfer takes place? Please explain your answer.	• **strongly agree** • agree • neutral • disagree • strongly disagree • other	In our experience, employees' rights are sufficiently protected, particularly as compared to other jurisdictions where there is no TUPE equivalent and, for example, continuity of service is not protected on a transfer (which is important to preserve an employee's statutory rights).
3.	To what extent do you agree or disagree that the current TUPE consultation requirements are sufficient to ensure employees are informed and consulted with when a transfer takes place? Please explain your answer.	• **strongly agree** • agree • neutral • disagree • strongly disagree • other	In our experience, TUPE is sufficient in this regard. In particular, the changes that came into force in 2024 relating to businesses employing less than 50 employees / where fewer than 10 employees transfer were helpful, as they give employers flexibility to choose whether or not to invite employees to elect representatives (which might not be practically feasible or appropriate in certain circumstances). However, one issue that we have identified in our experience is uncertainty with respect to which employees should be consulted with and when the pool of "potentially" affected employees is not always certain and can lead to odd outcomes. For example, where two businesses are combining, it might be disproportionate to require an employer to invite an employee population that is not transferring, but that *might* be affected by the transfer, to elect representatives, especially where an employers plans for the combined business are not fully formed. Therefore, the Government should consider whether to require a different standard for consulting with employees who are merely "affected" by a TUPE transfer, but do not themselves transfer, such as removing the requirement for collective consultation for this group or relying on collective consultation under TULRCA for material changes at the time they are proposed.
4.	To what extent do you agree or disagree that collective	• **strongly agree** • agree	In our experience, collective agreements are sufficiently protected. However, we think it would be helpful to draw a distinction between terms in a collective agreement which are

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	agreements are sufficiently protected under a TUPE transfer? Please explain your answer.	• neutral • disagree • strongly disagree • other	incorporated into an employee's contract (which should transfer) and other terms, which a new employer should have more flexibility to vary if it has a good reason to do so, such as the terms governing how collective consultation, grievances, disciplinary procedures etc. are carried out.
5.	To what extent do you agree or disagree that employee pension rights are sufficiently protected under a TUPE transfer? Please explain your answer.	• strongly agree • agree • neutral • disagree • strongly disagree • **other**	In our experience, employee pension rights are sufficiently protected. However, we recommend that the Government provides legislative clarity around the status of occupational pension schemes on a TUPE transfer and, in particular, the application of the ECJ's decision *Beckmann v Dynamco Whicheloe Macfarlane Ltd*, which has generated uncertainty around the scope of pension rights that might not be captured by the general rule that occupational/ defined benefit pension scheme liabilities do not transfer. In addition, in our experience, *Beckmann* liabilities (being the entitlement to enhanced defined benefit pension benefits on an early retirement, whether on redundancy, for ill health or just because an employee can elect to retire early) are difficult to quantify and can risk having a chilling effect on M&A in circumstances where such liabilities arise. Furthermore, from our experience the practical effect of *Beckmann* can be that employers do not let their employees retire early (notwithstanding the fact that there might be other good reasons to let them do so). It is also not logically consistent with the carve-out from TUPE that a limited set of potentially very costly and, in practice, often impossible to replicate defined retirement benefits should transfer when TUPE explicitly carves out such obligations. Therefore, the Government should consider clarifying that *Beckmann* does not apply in the UK.
Topic 2: Determining whether a "relevant transfer" has taken place			
6.	To what extent do you believe that it is clear when a 'relevant transfer' has taken place and TUPE regulations apply? Please explain your answer.	• completely clear: no improvement required • **mostly clear: it could be improved** • neutral • mostly unclear: it should be improved • completely unclear: it must be improved • other	In most cases, the position on what constitutes a "relevant transfer" is clear. However, uncertainty can arise in the context of more complex transactions, including fragmentation of activities between multiple incoming providers, mixed asset-and-service deals, service redesign on re-tender engaging the 'fundamentally the same activities' threshold and employee assignment in fluid or hybrid arrangements. There is an opportunity for targeted clarification, particularly on fragmentation and the "fundamentally the same activities" test, without disturbing a framework that otherwise works well.

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Topic 3: Process of a TUPE transfer			
7.	If you have previously been involved in a TUPE process, in your view, what aspects of the process worked well? Please explain your answer.	N/A	As professional advisers, we are not directly involved in the management of a TUPE process, but we advise employer clients on the process. In our experience, the process generally works well, with the regulations and common law providing certainty on the scope of the information and consultation process (subject to our response to question 3), liability for failing to comply with TUPE and the exchange of measures and employee liability information.
8.	If you have previously been involved in a TUPE process, did you encounter any issues with the process?	• yes • no • other (please specify)	See the response to question 9.
9.	At which stage of the transfer process did you encounter these issues? Please select all that apply.	• after the transfer was complete • **dealing with complications resulting from employees disagreeing with the transfer or raising a disagreement with your employer about the transfer** • **employee liability information** • **employees' redundancies** • **employees' terms and conditions after the transfer** • **employer insolvency** • **informing and consulting the employees or being**	In our experience, issues with a TUPE transfer process fall into five broad categories: • <u>TUPE and redundancy</u>: TUPE causes issues in cases where there is very clearly no role for an employee following a TUPE transfer and the transferee will need to make the employee redundant to avoid an automatically unfair dismissal (as only the transferee will have the protection of an economic, technical or organisational reason entailing changes in its workforce ("ETO reason") in these circumstances). Since the transferor does not have a fair reason to make the employee redundant, the parties have to go through an artificial TUPE process and transfer the employee momentarily to the transferee, even when the employee is aware through the process that there will be no role for them after they transfer. In these cases, it would be preferable from an employee experience perspective and for administrative ease if the parties could agree the redundancy prior to the transfer without the automatic unfair dismissal risk and the employee would not then need to transfer to the transferee. In our experience on international transactions, certain other European jurisdictions take a more pragmatic approach to individual redundancies in this situation. • <u>Replication of non-standard benefits on small TUPE transfers</u>: The lack of flexibility relating to the replication of benefits on a TUPE transfer means that employers are required to replicate non-standard benefit terms at a cost disproportionate to the value of the benefit to the employee. This is particularly the case in transactions where a small number of employees are transferring

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		informed and consulted regarding the transfer • **planning the transfer** • **throughout the process** • **transferring the employees to a new business or being transferred to a new business** • other (please specify)	(e.g., where part of a business is carved out into a new company, or a start-up acquires a small business). In these situations, there should be additional flexibility to allow employers to make changes to the terms of particular benefits on a TUPE transfer, provided that the employee is offered terms that objectively are no less favourable overall. This could be by reference to a standard (e.g., a requirement that benefits are replicated to the extent that the terms of each benefit are substantially the same as the terms of such benefit prior to the transfer, or that benefits provided are no less favourable in the aggregate to those provided prior to the transfer, for example) or that an employer can make changes to benefits in the same way as they would be able to when the change was not in connection with a TUPE transfer. Please see the response to questions 16 and 18 below for further detail on changing terms and conditions of employment in connection with a TUPE transfer. In conjunction with the proposed introduction of new rules on restricted variations to terms and conditions of employment generally, the current approach is likely to become very difficult to navigate. • <u>Cherry picking terms and conditions and new employment agreements</u>: There is a risk that employees will cherry pick terms and conditions following a TUPE transfer (i) without any limitation period, and (ii) even if the employer has made a reasonable effort to make them whole with their consent. In practice, if terms and conditions are varied on a TUPE transfer in circumstances where there is not an ETO reason to do so, with employee consent in circumstances where an employer has made a reasonable effort to make the employee whole, this variation should be binding on the parties and there should not be an opportunity for employees to challenge the change. Similarly, in circumstances where employees agree to sign a new employment agreement with effect from the date that they transfer (for example on the transferee's standard terms), there should be no ambiguity as to the enforceability of the new terms as a whole. This would mirror the position in other European jurisdictions, such as Germany, where transferee employers can request that employees sign new employment agreements with effect from the transfer date (and with continuity of service preserved in any event). In practice, employers who cannot replicate a benefit end up having to reach agreement with the employee anyway, so it would be helpful for the law to more accurately reflect this position. See the response to

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			question 16 for further details regarding the scope to change terms on a TUPE transfer. • Objecting to a TUPE transfer: There is currently a "loop hole" in TUPE derived from case law around the fact that an employee's contract of employment falls away altogether if they object to a TUPE transfer in circumstances where there is no proposed change to their detriment, they just don't want to join the transferee. We see circumstances where employees who are well advised object to the transfer of their employment with the intention of joining a competitor, which would be in breach of their confidentiality and restrictive covenant obligations if those obligations did not fall away automatically on the termination of their employment in these circumstances. The purpose of TUPE is to ensure employees are not disadvantaged on an asset sale compared to the status quo, not to give employees additional benefits over and above the status quo. The fact that post-termination restrictions fall away on an objection can mean that a fundamental part of the employment relationship falls away to the employer's significant detriment. If an employee is not objecting to their TUPE transfer due to a substantial change in working conditions which is to their material detriment, core post-termination obligations, including those relating to return of property, confidentiality and post-termination restrictions, should continue to remain in force following the objection. • Restrictive covenants: Scope to vary restrictive covenants with employee agreement on a TUPE transfer should be increased so that the transferee gets the intended benefit of the covenants. Unlike other changes to terms and conditions, for which it may be inconvenient for a transferee to replicate, the value of restrictive covenants to business protection is such that employers are potentially substantially disadvantaged if they are not able to rely on them following a TUPE transfer.
10.	Which, if any, of these issues did you face during a TUPE process? Please select all that apply. Please explain your answer.	• **insufficient guidance or clarity on the process** • issues with trade union recognition	We see employers struggle with drafting employee communications on a TUPE transfer, and think that some ACAS or government precedent documentation for employers to use in a TUPE information and consultation process would be helpful.

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		and collective agreements • lack of clarity about employees' employment rights in continued employment • lack of clarity on identifying a 'relevant transfer' **• lack of clarity on transferring employees' terms and conditions** • lack of consultation for employees and their representatives • lack of enforcement regulation if the process is not followed • loopholes in the existing process **• practicalities are too complicated** **• rules not followed or discrepancies in following rules** **• the cost to businesses is too high** • other	In addition, please see the response to question 9, including in relation to changes to terms and conditions of employment, practicalities, discrepancies in following the rules, and the cost to businesses of replicating legacy employee benefits.

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11.	To what extent do you agree or disagree that the TUPE process can be challenging for employers to navigate? Please explain your answer.	• strongly agree • **agree** • neutral • disagree • strongly disagree • other	See the response to question 10.
12.	In your view, how do you think the TUPE process could be made more efficient for employers?	N/A	See the response to question 10.
13.	In your view, how do you think the TUPE process could be strengthened to provide greater protections for employees' employment rights?	N/A	In our experience, TUPE provides sufficient protection for employees' employment rights.
Topic 4: Current guidance and support during TUPE transfer			
14.	In the process of undergoing TUPE, what support, if any, did you use?	• employment organisation • employee representatives • legal representatives • trade union • government • **other – please specify**	N/A – employment legal professionals.
15.	How helpful do you believe the guidance (GOV.UK and Acas) currently available on TUPE is? Please explain your answer.	• very helpful: no improvement required • **somehow helpful: it could be improved** • neutral • somehow unhelpful: it should be improved	See the response to question 10.

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		• very unhelpful: it must be improved • other	
Topic 5: Variation of terms and conditions of employment			
16.	To what extent do you agree or disagree that the current circumstances that an employer can change the contractual terms and conditions of an employee (e.g. ETO reasons), strikes the right balance between supporting employer needs and protecting employees' employment rights? Please explain your answer.	• strongly agree • agree • neutral • disagree • **strongly disagree** • other	The current circumstances in which an employer can change contractual terms and conditions of employment in connection with a TUPE transfer is limited and requires that the sole or principal reason for the change is an "ETO reason entailing a change in the workforce". In practice, the established position in the case law is that a change in the workforce must involve a change in the numbers or possibly the functions of the employees. While a change of work location and a genuine redundancy situation are both changes that would be permitted under the current rules, the circumstances in which an employer can change contractual terms are unduly limited and can create uncommercial and impractical outcomes for employers and employees. For example: • Employers often have good business reasons to integrate two workforces as fully as possible following a TUPE transfer and this includes harmonizing terms and conditions of employment. This is important for employee relations purposes as it avoids creating a two tier workforce, for example if a group of employees transfer to a new employer with different benefits to the employer's existing employees. The current regime does not allow an employer to make changes to terms and conditions of employment in circumstances where it is intending to harmonise the terms and conditions of employment of two groups of employees, even if the changes proposed are objectively beneficial to or neutral for the employees. Even if beneficial, such new terms are not enforceable in the future even if they are accepted by the employees who can still "cherry pick" and later choose to revert to their prior terms and conditions of employment. The ability of employees to subsequently "cherry pick" even in circumstances where they have already agreed to new terms creates uncertainty for employers. • The treatment of share and equity incentive schemes on a TUPE transfer has long been an area of difficulty for employers and practitioners in this area. Following the decision of the Court of Session in *Ponticelli v Gallagher XA61/22* where the Court of Session held that an incoming employer was

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			required to provide a share incentive plan of "substantial equivalence" to that provided by the outgoing employer, there is a lot of uncertainty around what precisely is required in relation to share and equity incentives following a TUPE transfer. Given that (i) these types of benefits are often difficult if not impossible to replicate in a private company context, and (ii) the difficulties outlined above in even offering a (more valuable) equivalent, the result is that employers face undue exposure when trying to deal with these types of benefits on a TUPE transfer in circumstances where it is often near impossible to replicate them. This exposure and uncertainty risks having a chilling effect on M&A in the UK.
17.	In your view, to what extent do you agree or disagree with the reasons, as outlined above, for being able to vary employment contracts (ETOs)? Please explain your answer.	• strongly agree • agree • neutral • **disagree** • strongly disagree • other	Please see above.
18.	To what extent do you agree or disagree that the circumstances where employers can change the contract terms and conditions of an employee (for example using ETO exemptions), following a transfer, are sufficiently clear and specific? Please explain your answer.	• strongly agree • **agree** • neutral • disagree • strongly disagree • other	The current circumstances in which employers can change terms and conditions of employment are clear and specific. The issue, as outlined above, is that they are too restrictive and give employers and employees little flexibility when trying to integrate two workforces and harmonise terms and conditions of employment following a TUPE transfer. In addition, the new restrictions on fire and rehire contained in the Employment Rights Act will limit even further the already limited circumstances in which an employer can change contractual terms and conditions of employment following a TUPE transfer, particularly with respect to any restricted variations where the change cannot be made without risking automatic unfair dismissal claims.
19.	If answered strongly disagree, disagree, or other to question 18, what further guidance/clarifications do you think will be most beneficial and why? Please explain your answer.	N/A	In order to provide flexibility for employers to harmonize terms and conditions of employment in connection with a TUPE transfer, the regime must provide some sort of mechanism to allow employers and employees to agree new terms of employment. This could be achieved while also ensuring employees are protected, for example by requiring that replacement terms or benefits are no less favourable to the employee in the aggregate or requiring that the employee take independent legal advice on the changes in certain circumstances.

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			While there should also be some form of mechanism for employers to enforce a change to terms and conditions of employment where agreement with the employee cannot be met, in light of the policy direction of the Employment Rights Act we realise that this is unlikely to be compatible with the new ban on fire and rehire.
Topic 6: Cost and impact of a TUPE transfer			
20.	To what extent do you agree or disagree that the overall cost of TUPE-protected transfers is too high for businesses? Please explain your answer.	• strongly agree • **agree** • neutral • disagree • strongly disagree • other	The cost of TUPE-protected transfers will vary dependent on the nature of the business, the workforce being transferred and the contractual and other (e.g. benefit) arrangements that transfer with them. It would therefore be too broad to say that TUPE-protected transfers are always too costly. However, in a number of cases the cost burden on incoming employers can be significant and disproportionate, particularly for employers who are smaller or less established in the market than the transferor. The position is particularly difficult in relation to certain legacy benefits that are expensive or impractical (or even impossible) to replicate. For example, liabilities arising from *Beckmann* rights (for example, enhanced early retirement benefits or redundancy-related pension enhancements) may transfer even where the corresponding pension scheme assets do not. Similarly, where employees participate in share plans or other incentive arrangements that are linked to the transferor's corporate structure, the incoming employer may face significant cost and complexity in attempting to provide an equivalent benefit. In certain cases it might not be possible to replicate these benefits, such as a public company employee share scheme if the incoming employer is not a public company. Any reform should consider whether particular categories of benefits should be excluded from transferring liabilities. This would be consistent with the existing approach to certain occupational pension scheme rights and would help ensure that TUPE continues to protect the key terms of employees without imposing excessive or impractical costs on incoming employers.
21.	Please provide information on the types of costs that businesses need to consider during a TUPE-protected transfer and where in the process these costs occur.	N/A	Pre- transfer: • Due diligence on transferring employees' terms and conditions, including benefits packages, share plans, bonus schemes, and pension arrangements. • Legal advice to confirm application of TUPE and information and consultation process. • Management and HR / legal time in undertaking information and consultation process.

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			• Setting up equivalent benefit plans (e.g. insurance policies). Post-transfer costs: • Honouring transferred contracts. • The additional cost of maintaining dual benefit structures where harmonisation is not immediately achievable. • Litigation costs where disputes arise – e.g. claims that a variation is connected to the transfer, claims of constructive dismissal or failure to inform and consult. This will become even more complex under the fire and rehire provisions of the Employment Rights Act 2025 because these provisions apply to constructive dismissal claims, in addition to actual dismissals.
22.	If have been through a transfer process, please provide an estimate of the total cost of the transfer for your business.	N/A	N/A
Topic 7: Additional considerations			
23.	In your view, have the TUPE regulations resulted in any unintended consequences for individuals with a protected characteristic under the Equality Act 2010 or different socio-economic background? Please explain your answer.	• yes • no • **do not know** • other	We have not seen any evidence of this.
24.	Is there anything else you would like to share your reflections on, that was not covered by the previous questions?	N/A	The application of TUPE to workers should be clarified. Before the Employment Tribunal's decision in *Dewhurst v Revisecatch Ltd*, TUPE was generally understood to apply only to employees and to transfer contracts of employment. In *Dewhurst*, however, the tribunal held that TUPE could also apply to workers within section 230(3)(b) of the Employment Rights Act 1996. Although the decision was at first instance and is not binding, it has created uncertainty regarding the scope of TUPE. In our view, extending TUPE protection to workers would sit uneasily with the broader concept of worker status. Workers do not have unfair dismissal rights, may have no continuing obligation to provide services, and often do not have formal written contracts. These factors would make the TUPE consultation process difficult in practice. In many

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			cases, status will also be unclear: it may be difficult to determine whether an individual is a limb (b) worker or a genuinely self-employed consultant. This uncertainty creates risk for businesses involved in TUPE transfers. If individuals who have been treated as self-employed contractors are later found to be workers within the scope of TUPE, businesses may face significant unexpected liabilities, including for a failure to inform and consult. It could materially increase the cost and complexity of transactions and outsourcing arrangements, and thereby the risks to employers. In our experience, most companies continue to approach TUPE on the basis that it applies only to employees. Furthermore, this clarification would be consistent with the direction of the previous Government's proposed reforms. In addition, once the new rules on fire and rehire come into force, this will likely make the circumstances in which an individual can object to their TUPE transfer under Regulations 4(9) and/or 4(11) clearer and/or those provisions will effectively give individuals a second bite of the cherry if they opt not to go down the Regulation 4(9)/(11) route.