CALL FOR EVIDENCE: EFFECTIVENESS OF CURRENT TUPE REGULATIONS

Introduction

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 and public body advocate for the private equity and venture capital industry in the UK. More than 430 firms make up the BVCA members, including over 200 private equity, mid market and venture capital firms, together with over 200 professional advisory firms. The BVCA Legal and Technical Committee includes amongst its objectives the shaping of policy and the implementation of policy to ensure that it accommodates the needs of the British venture capital and private equity community.

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

Response

Question 10: Is lack of provision for post-transfer harmonisation a significant burden? How might the Regulations be adjusted to enable this whilst remaining in line with the Directive?

The BVCA recognises the difficulty of changing the legislation in this regard whilst at the same time remaining consistent with European law. However, the BVCA welcomes this review as it considers that the lack of provision for post-transfer harmonisation is a significant burden for business.

Firstly, the inability to harmonise can be a significant barrier to an acquisition proceeding. This is because, in situations where the transferor's terms and conditions are more generous than the transferee's terms and conditions, the additional cost of employing the inherited employees may make a potential acquisition wholly unattractive.

Secondly, the inability to harmonise causes administrative inefficiencies. This is because businesses which have inherited employees under a number of different TUPE transfers frequently have to contend with operating many different sets of terms and conditions of employment.

Thirdly, the inability to harmonise has the potential to be divisive in the workplace. This is because employees who work alongside each other performing the same job following a TUPE transfer may be employed on very different terms and conditions, which can cause resentment.

The BVCA is supportive of recent case law which underlines that the purpose of TUPE is not to put the employees in a *better* position than they would have been in but for the transfer. It seems to the BVCA, therefore, that, as is currently the case at the time of the transfer, this principle should also apply to allow *post*-transfer harmonisations to take place. If this is not the case then the transferring employees are placed in a better position as a result of a TUPE transfer than they would have been in had the transfer not taken place, given that the transferor would always have had the ability to change terms and conditions had the transfer not taken place.

The BVCA 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 the law and would enable businesses to plan accordingly. The BVCA believes that a period of 12 months would be appropriate in these circumstances. Alternatively, the BVCA would welcome an adjustment which would enable a post-transfer harmonisation to be negotiated collectively, which the individual employees would then have the option of agreeing to or not; this approach would not appear to be inconsistent with current European legislation.

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Question 12: Would it be helpful to agree with employees a renegotiation of their contract provided that overall the resulting contract was no less favourable than at the point of transfer?

There is currently a lack of inconsistency regarding the "whole package" approach to terms and conditions of employment. For example, the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 encourage the whole package approach, whereas the Equal Pay legislation favours a term by term comparison; furthermore, the Agency Workers Regulations 2010 are silent on the issue, which is adding to the confusion.

Accordingly, the BVCA would welcome clarity on this issue, both within the TUPE Regulations, and across all other pieces of legislation. The BVCA favours the whole package approach, as it creates the most flexibility for employers whilst still protecting the employees overall. However, it is questionable whether such an approach is compatible with European law which seems to focus on individual terms and conditions of employment. Furthermore, if a "no less favourable" test is adopted, it is likely to lead to further litigation, particularly in respect of those benefits where an appropriate cash alternative is not readily identifiable.

Question 13: Should more be done to clarify the application of TUPE in insolvency situations? If so, would this require changes to the legislation, for example, by setting out which insolvency procedures fall under which provisions, or would more detailed guidance than currently provided be sufficient?

The BVCA believes that clear guidance and/or a change in legislation is required regarding the application of TUPE in insolvency situations. In particular, the BVCA considers that clarity should be provided regarding which types of insolvency procedures fall under which provisions.

In considering this issue further, the BVCA would recommend that the views of the insolvency community are sought, in particular regarding whether it can be said that, in some cases, administrations are genuinely entered into with a view to liquidating the assets of the Company, thereby triggering the TUPE exception.

Question 16: Is the provision on 'Economic, Technical or Organisational reason entailing changes in the workforce' sufficiently clear? Would additional guidance be helpful and if so in what form?

The BVCA is of the opinion that the domestic approach to the ETO defence is *more* restrictive in some respects than the European approach.

Accordingly, the BVCA considers that additional guidance on the 'ETO reason' would be helpful. In particular, the BVCA would welcome additional guidance on what is meant by the phrase "entailing changes in the workplace"; albeit that it is recognised that any such guidance would have to be consistent with current European case law. In clarifying the guidance, the BVCA would welcome a revisiting of the decision in *Tapere v South London and Maudsley NHS Trust* in which it was held that a change in location which creates a redundancy situation is not a valid ETO reason where there is no overall reduction in the number of employees. This decision places transferees in an invidious position and, conceptually at least, would appear to be wrong.

At the same time, the BVCA would also welcome clarity regarding ETO reasons and changes to contracts of employment. The particular issue to be addressed is whether, once there is a valid ETO reason, the *whole* of the contract can be changed, or whether it is just those terms to which the ETO reason relates.

Question 20: The Government is also calling for evidence on collective redundancy consultation rules. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

The BVCA finds the question of how TUPE fits with the collective redundancy legislation very problematic.

In particular, where the transferee envisages 20 or more redundancies following the transfer, the current position appears to be that the transferee is not able to begin the collective consultation until he becomes the employer of the transferring employees (i.e. at the point of transfer). Furthermore, the employer cannot serve notice to terminate the contracts of employment until the collective consultation is completed. The result is that an employer has to budget for 30 or 90 days' post-transfer consultation in addition to any termination costs, which can represent a significant barrier to acquisitions proceeding. Furthermore, because the potential redundancies will have been disclosed as part of the transferee's measures, and often consulted about informally, the post-transfer consultation has the tendency to come across as something of a sham exercise.

It seems to us that the solution is either: (i) to allow the transferee to commence the collective consultation pre-transfer; (ii) to enable the transferor to consult on the transferee's behalf and for the transferee to be given 'credit' for the transferor's consultation; or (iii) for the TUPE transfer to be a special circumstance entitling the transferee to foreshorten the collective consultation post-transfer. In the BVCA's view, allowing the transferee to commence collective consultation pre-transfer (and penalising the transferor if he does not allow the transferee access to the employees) is the most sensible solution.

Question 23: Are there other areas of the Regulations that would benefit from change/review? Conversely are there areas that it is important to keep?

Firstly, there is considerable lack of certainty around the Beckmann and Martin cases in relation to pension liabilities. The BVCA would welcome clarity in the form of guidance, based on the outcome of the forthcoming case law.

Secondly, the obligation to consult under TUPE is placed on the 'employer' who envisages taking measures in relation to 'his employees'. However, in most cases, this is the transferee; the transferring employees do not become 'his' until the point of transfer, but case law confirms that there is no need to consult after the transfer date regarding measures. Accordingly, the BVCA would welcome guidance regarding the extent of the transferee's obligation to consult in this regard (which, it is submitted should be minimal).

Thirdly, the rules on constructive dismissal are currently confusing. The BVCA considers that they should be changed to make the transferee 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. Further, these constructive dismissal claims should be limited to cases of actual or anticipated fundamental breaches of contract, not to mere detrimental changes in non-contractual working conditions.

Finally, the BVCA considers that, whilst welcome, the requirement on a transferor to provide employee liability information to a transferee is of little benefit in practice given that the information need only be provided 14 days before the transfer. A workable solution would appear to be to require the transferor to give the information at the same time as it gives the required Regulation 13 information to the appropriate representatives, but in any event no later than, for example, 28 days before the transfer.