

# LCP's response to the consultation on reforms to retained EU employment law

7 July 2023

*This document sets out LCP's response to the Department for Business and Trade's consultation on reforms to retained EU employment law published on 12 May 2023 (the "Consultation"). We are responding only in relation to certain pensions aspects of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE).*

## Who we are

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The provision of actuarial, investment, covenant, governance, pensions administration, benefits advice, and directly related services, is our core business. About 90% of our work is advising trustees and employers on all aspects of their pension arrangements, including investment strategy. The remaining 10% relates to insurance consulting, energy, health and business analytics. LCP is authorised and regulated by the Financial Conduct Authority and is licensed by the Institute and Faculty of Actuaries in respect of a range of investment business activities.

## Our overall thoughts

We are responding only to Question 20 "What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved?"

This response is on the single issue of pensions. We think that TUPE Regulation 10(2) should be re-examined because it causes needless complications in corporate transactions involving asset transfers. There is an opportunity to do so now that the UK has left the European Union. We would be happy to explore the issue further with you, including putting you into contact with appropriate pensions industry bodies.

We are happy for LCP to be named as a respondent to the Consultation and happy for our response to be in the public domain. We are happy for you to reference our comments in any response.

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## LCP's response to the questions in the Consultation relating to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

TUPE Regulation 10(1) provides:

*“Regulations 4 and 5 shall not apply—*

*(a) to so much of a contract of employment or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993; or*

*(b) to any rights, powers, duties or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise arising in connection with that person's employment and relating to such a scheme.”*

However, the scope of this occupational pension scheme exemption is limited by Regulation 10(2):

*“For the purposes of paragraphs (1) and (3), any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.”*

In other words, if an employee, who is a member of an occupational pension scheme, is “TUPE'd” from Employer A to Employer B then their rights under the occupational pension scheme do not transfer with them. Except, that is, so far as their rights that are **not** “old age, invalidity or survivors” benefits, which do.

Most rights under the occupational pension scheme will relate to “old age, invalidity or survivors” benefits and so they will not transfer. But some rights arguably don't fall within this definition and so will transfer, in particular, early retirement rights in certain situations.

In essence, the existence of Regulation 10(2) raises all sorts of uncertainties about exactly what does and doesn't transfer, without disturbing the basic premise that occupational pension scheme rights generally do not transfer. It is not clear what purpose Regulation 10(2) serves.

The reference to “old age, invalidity or survivors” benefits stems from (most recently) Article 3(4) of EU Directive 2001/23/EC 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 Undertakings or Businesses. However, it was introduced in a much earlier EEC Directive 77/187.

Unsurprisingly, the meaning of “old age, invalidity or survivors” benefits has been the subject of litigation over the years, in both the UK courts and the ECJ including:

- Beckmann v Dynamco Whicheloe Macfarlane, a 2002 case in the ECJ in which it was held that employees' rights to certain early retirement benefits transfer.
- Martin v South Bank University, a 2003 case, in the ECJ which reinforced the view in Beckmann.
- Procter & Gamble v SCA, a 2012 case in the London High Court which held that certain early retirement rights under the seller's occupational pension scheme transfer.

However, none of these cases have provided definitive judicial guidance on the limits of the scope of the occupational pension scheme exemption.

As things currently stand, Regulation 10(2) introduces a complicating factor in corporate transactions involving an asset transfer subject to TUPE. The parties have to investigate whether there are any provisions of the seller's occupational pension schemes which potentially transfer under TUPE. Warranties, indemnities and purchase price adjustments may have to be negotiated and agreed which is usually a complicated process given the legal uncertainty around this issue caused by Regulation 10(2). In addition, the security of members' existing pension benefits are not improved by the TUPE provision.

The wording in Regulation 10(2) is drafting from the 1970s with no obvious rationale today. Because Regulation 10(2) comes from the EU Directive it has not been disturbed. This can now all change following the UK's withdrawal from the EU.

One possibility would be to delete Regulation 10(2) as part of your current consultation so that there is clarity that no occupational pension scheme rights transfer. This might be welcomed as a valuable simplification in TUPE exercises – indeed, a 'benefit of Brexit'. Whilst this would clarify that no occupational pension benefits transfer (in particular, early retirement rights in certain situations), there would be nothing to stop parties to corporate transactions from agreeing that certain benefits should transfer where there are good commercial or employee relations reasons for them to do so.

However, before removing it, we suggest that you reach out to interested parties to establish whether there are any drawbacks of such an approach. We would be happy to facilitate this through our connections with pensions industry bodies.