



# TUPE or not TUPE?

Private equity share acquisitions have escaped the clutches of TUPE for now, but this will not be the end of the story, says [Charles Wynn-Evans](#)

Those negotiating and structuring private equity transactions will be relieved to hear that the Private Equity (Transfer of Undertakings and Protection of Employment) Bill has been withdrawn. This private members' bill would have introduced significantly greater employment law protections for employees affected by the acquisition or disposal by private equity owners of controlling shareholdings in their employers. This would have been affected by extending to private equity transactions some (but not all) of the employment protection provisions relating to business transfers under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006.

Under TUPE, any change to an employee's terms and conditions of employment, even if freely negotiated, which is connected with a transaction within its scope is invalid, subject to an exception where the change is for an "economic, technical or organisational reason entailing changes in the workforce". As this exception requires there to be associated job losses or changes, the application of this provision to private equity transactions would have made the restructuring and renegotiation of employment terms on or post completion much more difficult. The bill would have protected trade union recognition and collective agreements similarly.

The bill also proposed to apply to private equity transactions TUPE's collective information and consultation regime. This requires provision to a recognised trade union (or, if there is none, elected employee representatives) information relating to issues such as the fact of, reason for and timing of the proposed transaction, its legal, economic and social implications and the 'measures' (by way, for example, of redundancies or changes to terms) proposed by either seller or buyer. Consultation is also required about such measures.

However, these obligations would have been made even more onerous than those under TUPE. The bill proposed that employee consultation should take place before a decision was made to effect the transaction, that agreement of employee representatives be sought to it and that (in addition to the normal financial penalty for breach of 13 weeks' pay per employee) employee representatives be able to seek an injunction to prevent the transaction proceeding if these information and consultation obligations were breached. Employee representatives would have had the right to commission an expert study on any measures proposed in relation to the transaction

## The application of TUPE to private equity transactions would have made the restructuring and renegotiation of employment terms on or post completion much more difficult

and/or produce a formal opinion on the proposed transaction and for there to be a reasoned response and subsequent exchange of views.

The obligation to provide information would also have been increased in scope. In advance of and in respect of the period of five years from completion, information would have been required about a long list of issues including the structure, economic and financial situation of the seller, purchaser and employer; the probable development of the employer's business, production and sales; the situation and probable trend of employment, investments, introduction of new working methods transfers of production, mergers, cutbacks, closures and collective redundancies. The bill appeared to require consultation in relation to any potential action relating to these issues and connected with the original transaction. The acquisition of the share capital of a target by private equity buyers would have attracted an obligation effectively to operate a works council for five years post completion in relation to any business decisions affecting employees which could be seen as related to the original transaction.

One crucial question which the bill left unanswered was what would have constituted a private equity company whose acquisitions or disposals fall within its scope. This was to be decided at a later date by statutory instrument. The uncertain scope and operation of the bill and its potential consequences for corporate transactions were debated in the House of Commons on 7 March 2008 during its second reading and it was withdrawn following assurances from the Government that it would consult about greater employment protection and consultation rights in relation to private equity transactions. The efforts which the trade unions continue to devote to the issue of private equity ownership no doubt mean that this will not be the end of the story. ■

*Charles Wynn-Evans is a partner and head of employment at the London office of Dechert.*