

(a) is a Member State entitled to define, in national law, the funds that fall within the concept of 'special investment funds' in such a way as to exclude funds of the type referred to in Question 1 above while including collective investment undertakings as defined in Directive 85/611, as amended?

(b) to what extent (if at all) are the following relevant to the question whether or not a fund of the type referred to in Question 1 above is to be identified by a Member State in its national law as 'special investment fund':

(i) the features of the fund (set out in Question 1 above);

(ii) the degree to which the fund is 'similar to and thus in competition with' investment vehicles that have already been identified by the Member State as 'special investment funds'?

3. If in answer to Question 2(b)(ii) above it is relevant to determine the degree to which the fund is 'similar to and thus in competition with' investment vehicles that have already been identified by the Member State as 'special investment funds', is it necessary to consider the existence or extent of 'competition' between the fund in question and those other investment vehicles as a separate question from the question of 'similarity'?

⁽¹⁾ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment
OJ L 145, p. 1

⁽²⁾ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
OJ L 347, p. 1

Reference for a preliminary ruling from Supreme Court of the United Kingdom made on 12 August 2011 — Mark Alemo-Herron and others v Parkwood Leisure Ltd

(Case C-426/11)

(2011/C 311/40)

Language of the case: English

Referring court

Supreme Court of the United Kingdom

Parties to the main proceedings

Applicants: Mark Alemo-Herron, Sandra Tipping, Christopher Anderson, Stacey Aris, Audrey Beckford, Lee Bennett, Delroy Carby, Vishnu Chetty, Deborah Cimitan, Victoria Clifton, Claudette Cummings, David Curtis, Stephen Flin, Patience

Ijelekhai, Rosemarie Lee, Roxanne Lee, Vivian Ling, Michelle Nicholas, Lansdail Nugent, Anne O'Connor, Shirley Page, Alan Peel, Mathew Pennington, Laura Steward

Defendant: Parkwood Leisure Ltd

Questions referred

1. Where, as in the present case, an employee has a contractual right as against the transferor to the benefit of terms and conditions which are negotiated and agreed by a third party collective bargaining body from time to time, and such right is recognised under national law as dynamic rather than static in nature as between the employee and the transferor employer, does article 3 of Council Directive 2001/23/EC ⁽¹⁾ of 12 March 2001 read with *Werhof v Freeway Traffic Systems GmbH & Co KG* [2006] ECR I-2397-

(a) require that such right be protected and enforceable against the transferee in the event of a relevant transfer to which the Directive applies; or

(b) entitle national courts to hold that such right is protected and enforceable against the transferee in the event of a relevant transfer to which the Directive applies; or

(c) prohibit national courts from holding that such right is protected and enforceable against the transferee in the event of a relevant transfer to which that Directive applies?

2. In circumstances where a Member State has fulfilled its obligations to implement the minimum requirements of article 3 of Directive 2001/23 but the question arises whether the implementing measures are to be interpreted as going beyond those requirements in a way which is favourable to the protected employees by providing dynamic contractual rights as against the transferee, is it the case that the courts of the Member State are free to apply national law to the interpretation of the implementing legislation subject, always, to such interpretation not being contrary to Community law, or must some other approach to interpretation be adopted and, if so, what approach?

3. In the present case, there being no contention by the employer that the standing of the employees' dynamic right under national law to collectively agreed terms and conditions would amount to breach of that employer's rights under article 11 of the European Convention on Human Rights and Fundamental Freedoms, is the national court free to apply the interpretation of TUPE contended for by the employees?

⁽¹⁾ Council Directive 2001/23/EC of 12 March 2001 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
OJ L 82, p. 16