Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 19 February 2013[1]

Case C-426/11

Mark Alemo-Herron
Sandra Tipping
Christopher Anderson
Stacey Aris
Audrey Beckford
Lee Bennett
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Deborah Cimitan
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David Curtis
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Rosemarie Lee
Roxanne Lee
Vivian Ling
Michelle Nicholas
Lansdail Nugent
Anne O'Connor
Shirley Page
Alan Peel
Mathew Pennington
Laura Steward
v
Parkwood Leisure Ltd

(Request for a preliminary ruling from the Supreme Court (United Kingdom))

(Transfer of undertakings — Safeguarding of employees' rights — Directive 2001/23/EC — Article 3(3) — Collective agreement applicable to the transferor and to the employee at the time of the transfer — Dynamic clauses referring to current and future collective agreements — Scope of the judgment of the Court of Justice in Werhof — Negative aspect of the fundamental right to freedom of association — Freedom to conduct a business — Articles 12 and 16 of the Charter of Fundamental Rights of the European Union)

1 — Original language: Spanish.

1. By this request for a preliminary ruling, the Supreme Court of the United Kingdom is raising three questions concerning the interpretation of Article 3(3) of 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.[2] The referring court asks whether Directive 2001/23 prohibits, permits or requires the acceptance by Member States of the transfer of 'dynamic clauses referring to collective agreements'. These are clauses that have been agreed between the employees and the transferor employer prior to the transfer of an undertaking and that have the effect of requiring the transferee employer to abide by the conditions agreed in future collective agreements, even where that employer cannot be a party to the negotiations leading to that agreement.

2. UK law has traditionally given the social actors significant freedom of action and has permitted the transfer of dynamic clauses referring to collective agreements as part of the transfer of an undertaking. The transferee employer thus remains bound, seemingly indefinitely, not only by agreements in whose negotiation it took no part, but also by those in whose negotiation it could not take part. In the *Werhof*[3] judgment, delivered in the specific context of German employment law, the Court of Justice ruled that Directive 2001/23 did not require Member States to ensure that dynamic clauses referring to collective agreements were transferred in cases of transfers of undertakings. This decision has given rise to conflicting decisions in the UK courts, some taking the view that the judgment prevents any dynamic clause referring to collective agreements from being transferred, while others consider that it relates to the very specific case of the German legislation, which limited the scope of such clauses. The Supreme Court of the United Kingdom has referred these questions for a preliminary ruling so that the Court of Justice can define the scope of Article 3(3) of Directive 2001/23, in the light of its interpretation in *Werhof*.

I – Legal framework

A – *European Union legal framework*

3. Article 3 of Directive 2001/23, which replaced Directive 77/187/EEC,[4] comes under Chapter II, on the safeguarding of employee's rights, and it provides as follows:

'*Article 3*

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

2 — Council Directive of 12 March 2001 (OJ 2001 L 82, p. 16).

3 — Case C-499/04 *Werhof* [2006] ECR I-2397.

4 — Council Directive of 14 February 1977 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 businesses (OJ 1977 L 61, p. 26).

2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

3. Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Member States may limit the period for observing such terms and conditions, with the provision that it shall not be less than one year.

4.

(a) Unless Member States provide otherwise, paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes outside the statutory social security schemes in Member States.

(b) Even where they do not provide in accordance with subparagraph (a) that paragraphs 1 and 3 apply in relation to such rights, Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits, under supplementary schemes referred to in subparagraph (a).'

4. Article 8 of Directive 2001/23 contains the following minimum harmonisation provision:

'This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or agreements between social partners more favourable to employees.'

B – *National legal framework*

5. Directive 77/187/EEC, the predecessor to Directive 2001/23, was incorporated into UK law by the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE'). Regulation 5 of TUPE transposes the substance of Article 3 of Directive 2001/23 and, more specifically, Regulation 5(2)(a) provides as follows:

'… all the transferor's rights, powers, duties and liabilities under or in connection with any such contract, shall be transferred by virtue of this Regulation to the transferee'.

6. Until the judgment of the Court of Justice in *Werhof*, UK employment courts and tribunals had been interpreting Directive 2001/23 and Regulation 5(2)(a) TUPE in a *dynamic* way. Consequently, contractual terms containing an explicit reference to future collective agreements reached by a particular collective bargaining body were, by virtue of the directive and its implementing legislation,

binding on the transferee employer following the transfer of an undertaking.[5] When questioned on this aspect at the hearing, both the legal representative of Parkwood and that of the employees confirmed this point, stating that it was a common contractual practice followed mainly in the public sector.

II – Facts and procedure before the UK courts

7. In 2002, the London Borough of Lewisham's leisure activities were contracted out to a private sector undertaking, CCL Limited, and the employees working in that department became part of the staff of CCL Limited. In May 2004, CCL Limited sold the business to Parkwood Leisure Limited ('Parkwood'), another private sector undertaking.

8. While the activities formed part of the council, the contracts of employment between the employees and the council had the benefit of the terms and conditions negotiated by the National Joint Council for Local Government Services ('NJC'), the local government collective bargaining body. The agreements negotiated by the NJC were not binding as a matter of law but as a result of the following contractual term contained in the relevant contracts of employment:

'During your employment with the Council your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the NJC ..., supplemented by agreements reached locally through the council's negotiating committees.'

9. At the time of the contracting out to CCL, the NJC agreement for 1 April 2002 to 31 March 2004 applied. In May 2004 the undertaking was transferred to Parkwood.

10. In June 2004 a new agreement was reached by the NJC, which was retrospectively effective from 1 April 2004 and continued in force until 31 March 2007. Agreement was therefore reached after the transfer of the undertaking to Parkwood. On that basis, Parkwood concluded that the new agreement was not binding on it and notified the employees to that effect, refusing to increase their pay as agreed by the NJC for the periods from April 2004 to April 2007.

11. Parkwood does not participate in the NJC, and would, in any event, be unable to do so, since it is a private sector undertaking and not a public authority.

12. In the light of Parkwood's refusal to abide by the terms agreed by the NJC, the employees brought a claim in an employment tribunal, which was dismissed in 2008. That tribunal took the view that the judgment of the Court of Justice in *Werhof* ruled out the possibility of any transfer of dynamic clauses referring to collective agreements in the context of the transfer of an undertaking. The decision at first instance was the subject of an appeal to the Employment Appeal Tribunal, which, in 2009, set it aside, on the basis that *Werhof* did not apply to circumstances such as those covered by the UK law.

13. Parkwood successfully appealed against the decision of the Employment Appeal Tribunal to the Court of Appeal, which, in a judgment of 2010, subscribed to the employment tribunal's interpretation of the directive and of the scope of the *Werhof* judgment.

14. Finally, the employees have brought an appeal before the Supreme Court, which stayed the proceedings in order to make the present request for a preliminary ruling.

5 — This was the settled case-law of the Employment Appeal Tribunal, as reflected in, inter alia, *Whent* v *Cartledge* [1997] IRLR 153; *BET Catering Services Ltd* v *Ball & Others* EAT/637/96; and *Glendale Grounds Management* v *Bradley* EAT/485/97.

III – Procedure before the Court of Justice and the questions referred for a preliminary ruling

15. In accordance with the third paragraph of Article 267 TFEU, on 12 August 2011 the request for a preliminary ruling asking the following questions was received by the Court Registry:

'(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 of 12 March 2001 (OJ 2001 L 82, p. 16) 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?'

16. Alemo-Herron and Others, Parkwood and the Commission have submitted written observations.

17. At the hearing, held on 20 September 2012, the representatives of Alemo-Herron and Others and Parkwood and the agent of the Commission presented their arguments.

IV – The first and second questions referred for a preliminary ruling

18. By its first two questions, which should be answered together, the Supreme Court of the United Kingdom is asking whether, vis-à-vis a Member State, in the context of the transfer of an undertaking, Article 3(3) of Directive 2001/23 requires, permits or prohibits the transfer of dynamic clauses referring to future collective agreements. The Supreme Court is uncertain about the scope of the 2006 *Werhof* judgment, in which the Court of Justice rejected a dynamic interpretation of Article 3(3) in the case of a German employee who was subject to a static clause referring to a specific collective agreement.

19. The uncertainty of the referring court is justifiable. Admittedly, *Werhof* decisively ruled out the possibility that Directive 2001/23 required Member States to transfer dynamic clauses referring to future collective agreements. However, the Court's reasoning was determined, to a large extent, by the specific circumstances of that case, which were appreciably different from those of the case now before the Supreme Court. Similarly, the difficulties caused in this case as a result of the dynamic clause referring to future collective agreements do not arise in the same way as in *Werhof*, since Parkwood, unlike the employer to whom Mr Werhof was transferred, is a private sector undertaking which has taken over an undertaking that was originally in the public sector. Consequently, Parkwood could not, under any circumstances, either take part in or indirectly influence the collective bargaining process that takes place within the NJC, which is exclusively a body for local government collective bargaining.

20. In the light of these differences, I will examine first of all, and in detail, the wording of Directive 2001/23 and that of the *Werhof* judgment. I will then look at the differences, in fact and in law, between *Werhof* and this case, and I will say at this juncture that I am inclined towards the Supreme Court's second proposed interpretation of the directive, in other words, the interpretation whereby, in the context of the transfer of an undertaking, there is no obstacle to Member States allowing the transfer of dynamic clauses referring to future collective agreements on the basis of Directive 2001/23. However, as stated in *Werhof*, the course of action pursued by a Member State must not infringe the fundamental rights safeguarded by the Union, which is an issue that I will look at in my reply to the third question referred.

A – *Directive 2001/23, the application of collective agreements in the context of the transfer of an undertaking and the extent of Member States' freedom of action*

21. The objective of Directive 2001/23, which replaces Directive 77/187, is to protect workers in the event of a change of employer, and, in particular, to ensure that their rights are safeguarded.[6] Amongst other measures contained in the directive, Article 3 ensures that the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are preserved after the undertaking has been transferred. As the Court of Justice has noted, that provision aims to ensure that, despite the transfer of the undertaking, all the working conditions, including those contained in a collective agreement, continue to be observed in accordance with the intention of the contracting parties to the collective agreement.[7]

22. As the Commission has correctly pointed out, Article 3 of Directive 2001/23 is not exhaustive but represents a balance between the protection of the employee and the interests of the transferee employer. Thus, the second sub-paragraph of Article 3(1) permits Member States to provide that the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose from a contract of employment. Equally, the second sub-paragraph of Article 3(3), which relates to the effects of collective agreements, permits Member States to limit the period for observing such terms and conditions, provided that this is not for a period of less than one year.

23. As has become apparent, the safeguarding of the rights and obligations arising from the contract of employment that exists at the time of the transfer, including those deriving from the collective agreement applicable to the employment, is *conditional*. Furthermore, the Member States retain wide powers when it comes to implementing and applying Directive 2001/23. This is due to the fact that, as the Court has pointed out, the directive is intended to achieve only 'partial harmonisation'.[8] It is

6 — See, inter alia, Case 324/86 *Tellerup*, known as '*Daddy's Dance Hall*' [1988] ECR 739, paragraph 9; Case C-362/89 *D'Urso and Others* [1991] ECR I-4105, paragraph 9; and Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 26.

7 — See, inter alia, *D'Urso and Others*, paragraph 9; Case C-396/07 *Juuri* [2008] ECR I-8883, paragraph 33; and Case C-399/96 *Europièces* [1998] ECR I-6965, paragraph 37.

8 — See, inter alia, *Watson Rask and Christensen*, paragraph 27, and Case C-4/01 *Martin and Others* [2003] ECR I-12859, paragraph 41.

'not intended to establish a uniform level of protection throughout the [Union] on the basis of common criteria' but rather to ensure that the employee 'is protected in his relations with the transferee to the same extent as he was in his relations with the transferor under the legal rules of the Member State concerned'. [9]

24. Such Member State powers are, if anything, even more powerfully evident in Article 8 of Directive 2001/23, which states that the directive 'shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'. [10] Moreover, it is particularly relevant to this case that Article 8 goes on to add that the directive shall not affect the right of Member States to 'promote or permit collective agreements or agreements between social partners more favourable to employees'. [11]

25. At this point, it is necessary to examine the substance of Article 3(3) of Directive 2001/23, which is the subject of the Supreme Court's questions. This provision states that the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, 'until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'. The mandatory language of the provision might justify the uncertainty of the referring court, leading it to the conclusion that any dynamic form of protection, by virtue of which the agreement in force at the time of the transfer, or any subsequent agreement, governs the employment relationship between the employee and the transferee, is prohibited. However, this reading of the provision cannot disregard Article 8 of the directive, which expressly empowers the Member States not only to introduce measures that are more favourable to employees, but also to permit collective agreements more favourable to employees.

26. We must now focus on the judgment of the Court of Justice in *Werhof*, which seems to be against any transfer of dynamic clauses referring to future collective agreements. However, as I will go on to demonstrate, this interpretation of the judgment does not take into consideration either the factual circumstances of the case in which it was given, or the ultimate objectives of Directive 2001/23.

B – *The Werhof judgment*

27. The reason why the *Werhof* judgment is thought to be a clear rejection of dynamic protection of terms and conditions agreed in future collective agreements is because of the particular factual and legislative circumstances of the case. Mr Werhof was a German metal industry worker whose contract of employment at the time of the transfer contained a static clause referring to a collective agreement. In other words, Mr Werhof's contract of employment referred to pay conditions agreed in a specific collective agreement that was in force at the time of the transfer. [12] Furthermore. The Federal Republic of Germany had availed itself of the option given to Member States under the second subparagraph of Article 3(3) of Directive 2001/23 and had limited the period of validity of agreements applicable at the time of transfer to a maximum of one year. [13]

9 — Ibid.

10 — The Court of Justice has confirmed that these more favourable provisions include their interpretation by national courts, as is the case here. See, in this regard, Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 40.

11 — It should be noted that this paragraph is one of the additions introduced by Directive 2001/23, by comparison with its predecessor, Directive 77/187/EEC, Article 7 of which merely stated that: 'This Directive shall not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.'

12 — For a detailed account of the facts in the *Werhof* case, see points 16 to 23 of the Opinion delivered by Advocate General Ruiz-Jarabo Colomer in the case.

13 — See the Opinion cited in the previous footnote, at points 14 and 15. For an analysis of the German legal framework applicable to Mr *Werhof* 's situation, see Rémy, P., 'Le renvoi à la convention collective dans le contrat de travail en droit allemand et la directive transfert', *Droit Social*, no 3, 2007, pp. 342 to 346.

28. Thus, the *Werhof* case is determined by two particularly important circumstances, which explain the Court's reasoning, namely: a static clause referring to a specific collective agreement and a statutory limitation on the post-transfer duration of the effects of collective agreements. In these circumstances, Mr Werhof relied on Article 3(3) of Directive 2001/23 to claim dynamic protection which would allow him to have the benefit of a later collective agreement, subsequent to the one in force at the time of the transfer, even though his contract did not contain a dynamic clause at all. It is not, therefore, surprising that the Court of Justice gave a negative response to Mr Werhof's claim.

29. In fact, at the outset of its reasoning, the Court highlighted the fact that the clause referring to the collective agreement in Mr Werhof's contract of employment was static. Thus, 'a clause referring to a collective agreement cannot have a wider scope than *the agreement to which it refers*'.[14] The same idea emerges when the Court refers to Article 3(2) of the directive, which contains limitations to the principle that '*the collective agreement to which the contract of employment refers*' is applicable.[15] In other words, the Court of Justice rejects the idea that the directive imposes dynamic protection where the contract of employment in force at the time of the transfer contains clauses that refer to a specific collective agreement. In short, it is clear that Directive 2001/23 *does not transform* static clauses in force at the time of the transfer into dynamic clauses.

30. The Court of Justice went on to point out that the Federal Republic of Germany had limited the period for observing the terms and conditions, as permitted by the second paragraph of Article 3(3) of Directive 2001/23.[16] The fact that the Member State had made use of this prerogative is important, since, as the Court noted, it is a 'subsidiary' limitation, to cover the eventuality that within a minimum period of one year none of the situations mentioned in paragraph 3 (termination or expiry of the existing collective agreement, or entry into force or application of a new collective agreement) has arisen.[17] Thus, even if the contracts had contained dynamic clauses referring to existing and future collective agreements, the Member States would still have retained the ability to limit their effects, as long as they ensured that they remained effective for a minimum period of at least one year. This was precisely the situation in relation to the German legislation in the *Werhof* case.

31. It follows from the foregoing that *Werhof* did not make a general ruling to the effect that it is incompatible with the directive to preserve the effects of dynamic clauses referring to future collective agreements. *Werhof* merely rejects an interpretation whereby the directive would *require* Member States to give dynamic protection even where the contract contains a static clause, and all the more so where the Member state concerned limits the effects of agreements existing at the time of the transfer to a period of one year. Mr Werhof's claim went beyond the stated objectives of Directive 2001/23 and that is why the Court of Justice added, in a particularly severe tone, that the directive was not intended 'to protect mere expectations to rights and, therefore, hypothetical advantages flowing from future changes to collective agreements'.[18]

32. Where the advantage, namely the explicit adoption of the terms and conditions agreed by the NJC, is not merely hypothetical but has been expressly agreed in the contract of employment and national law permits this, the matter takes on a different complexion. This is the situation here and we must be careful to take into account the characteristics of the case.

14 — *Werhof*, paragraph 28 (emphasis added).
15 — Ibid. (emphasis added).
16 — *Werhof*, paragraph 30.
17 — *Werhof*, paragraph 30.
18 — *Werhof*, paragraph 29.

C – *The present case in the light of Directive 2001/23 and the Werhof judgment*

33. In view of the provisions of Directive 2001/23, and with due regard to the precise scope of the judgment in *Werhof*, we must now analyse the facts and the national legal framework of the case referred by the Supreme Court.

34. As the parties have explained, UK law has transposed Directive 2001/23 by means of the TUPE Regulations, incorporating the provisions of Article 3 in virtually identical terms. The UK legislation has not entered into any great detail in relation to the terms on which the rights and obligations of the employer and the employee are safeguarded by reason of a transfer, but has left this responsibility to the courts and tribunals dealing with employment matters. As a result, the case file shows that these courts have accepted that transfers can also include the transfer of a dynamic clause referring to later collective agreements. [19] Until the judgment in *Werhof*, this interpretation of the TUPE Regulations was consistent and undisputed. When questioned on this point at the hearing, both parties to the main proceedings confirmed the existence of this line of case-law. Furthermore, the representative of the employees added that the transfer of this type of clause was particularly common in connection with transfers of public undertakings.

35. Furthermore, the United Kingdom has not taken advantage of the exception under the second subparagraph of Article 3(3) of Directive 2001/23, whereby Member States can restrict the length of time that contracts agreed prior to the transfer are effective once the transfer has taken place, albeit with a minimum limit of one year. This, together with the case-law of the employment courts referred to previously, would seem to confirm the existence of an approach that tends to favour the transferability of dynamic clauses referring to future collective agreements.

36. According to the submissions of the parties, the rationale behind this approach may lie in the flexible nature of the collective bargaining system in the United Kingdom. Unlike other national legal systems, that of the United Kingdom does not give collective agreements legal effect as a matter of law, since it is by virtue of an explicit or implicit reference to an agreement in a contract of employment that such agreements have legal effects. [20] Thus, as a general rule, the effects of such agreements derive exclusively from the contract and their scope is as stipulated in the clause referring to them. This approach to collective agreements allows the parties a great deal of freedom, even where they agree to be bound by future agreements, since, as the parties to these proceedings have pointed out, there is nothing to prevent them from renegotiating the clause in the contract that refers to the collective agreement.

37. For this reason, and given that a dynamic clause referring to a future agreement is the result of a contract between the parties that can be amended at any time, the UK courts did not consider that this type of clause could be detrimental to the employer's freedom of association or to any other provision of UK law. Instead, they took the view that the UK's flexible and 'contractual' labour relations system would help to make this type of clause transferable in the context of the transfer of an undertaking.

38. Turning now to the case before us, it has been established that the contract of employment existing at the time of the transfer contained a dynamic clause referring to agreements reached by the NJC. At the time of the transfer, the employees of the undertaking therefore had the benefit of a precise and explicit commitment to observe the terms and conditions arising from the collective bargaining process, both present and future, carried out by that body. Thus, unlike the position in

19 — See the case-law of the Employment Appeal Tribunal cited in footnote 5 of this Opinion.

20 — The principle that collective agreements are not binding is well established in UK employment law and has its origins in the nineteenth century, in Section 4 of the Trade Union Act, 1871. The common law gives effect to collective agreements only as a result of an express reference in a term of the contract of employment (see *Ford Motor Co Ltd* v *AUEFW* [1969] 2 QB 303). This is still the position under UK law, as pointed out in Deakin, S. and Morris, G., *Labour Law*, 5th edition, Hart, Portland and Oxford, 2009, pp. 237 and 238.

Werhof, we have here an employment contract containing a dynamic clause adopting the terms agreed in future agreements. To use the Court's expression in that case, the 'expectations' created by this clause for the employees of the transferred undertaking are markedly different from those generated by a static clause such as that in *Werhof*. They are more in the nature of certainties, as the clauses have been freely and expressly agreed between the parties, in accordance with the law in force at the time and are recorded in the contract of employment.

39. In view of the foregoing, I am of the opinion that Directive 2001/23 presents no impediment to the United Kingdom allowing parties to use dynamic clauses referring to future collective agreements and accepting that such clauses are transferable as a consequence of the transfer of an undertaking. As we have seen, *Werhof* confirmed that the directive does not require Member States to adopt a dynamic interpretation to clauses referring to a collective agreement. In other words, the fact that a contract contains a static reference to a collective agreement does mean that the directive turns that reference into a dynamic reference. However, the directive does not, in principle, prevent Member States from allowing dynamic clauses referring to collective agreements to exist. Nothing in the wording of the directive prohibits this and, in stating that Member States preserve the right to 'promote or permit collective agreements … more favourable to employees', Article 8 confirms it. The aim of the UK case-law in support of so-called dynamic reference clauses seems to be this: to promote the safeguarding of terms and conditions more favourable to employees by means of a reference to a collective agreement that will apply them.

40. Moreover, the fact that the directive permits the United Kingdom to offer such protection in no sense precludes the UK legislature from making use of the right given by the second subparagraph of Article 3(3), which allows the agreed terms and conditions at the time of the transfer to be limited in time, as long as they are maintained for a minimum of one year. Similarly, there is nothing to prevent the legislature, or the UK courts, from amending the scope of TUPE with the aim of limiting or prohibiting the transfer of dynamic clauses referring to future collective agreements. In short, this is a decision that falls within the reserved domain in which the Member States are free to act.

41. In the light of the foregoing reasoning, I therefore conclude that Article 3(3) of Directive 2001/23 must be interpreted as not, in principle, precluding Member States from allowing dynamic clauses referring to existing and future collective agreements that are freely agreed between the parties to a contract of employment to be transferred as a result of the transfer of an undertaking.

V – The third question referred for a preliminary ruling

42. In its third question, the Supreme Court asks whether a finding that dynamic clauses referring to collective agreements are compatible with Directive 2001/23 might, in any event, be in breach of Article 11 of the European Convention on Human rights ('ECHR'). As I am proposing that the Court of Justice rules that such clauses do comply with Directive 2001/23, it is necessary to answer the third question, albeit with some rewording of the question.

43. The Supreme Court expresses doubt as to the impact of Article 11 ECHR and, by extension, of Article 12 of the Charter of Fundamental Rights of the European Union, on this case. This article, which states the freedom of association, protects individuals not only against any ban or restriction affecting their ability to join or form associations, but also against being directly or indirectly compelled to join an association. [21] The referring court is therefore raising the question of whether TUPE, as currently interpreted by the UK courts, is compatible with the negative aspect of the freedom of association of the employer.

21 — In this regard, see the case-law of the European Court of Human Rights on the negative aspect of the freedom of association, particularly the judgments in *Sigurdur A. Sigurjónsson* v *Iceland*, of 30 June 1993, *Gustafsson* v *Swede*n, of 25 April 1996 and *Vördur Ólafsson* v *Iceland*, of 27 April 2010.

44. Although a situation such as that of Parkwood might fall within the scope of Article 12 of the Charter, the fact is that this case has a particular feature that distances it, in my opinion, from the negative aspect of the freedom of association. As pointed out in point 11 of this Opinion, the collective bargaining body to which the contractual term refers, the NJC, is a public body that negotiates terms and conditions of employment of local government staff. Given its public nature and its strict terms of reference, the NJC could hardly be expected to represent or express the interests of Parkwood, even in the context of a transferred undertaking that was once in the public sector. The parties have confirmed that this is the case in their written observations and oral submissions and it is also stated by the referring court in the order for reference.

45. Thus, the issue is not that Parkwood is compelled to join an organisation if it wishes to influence the terms and conditions of its employees (which would indeed give rise to issues of compatibility with Article 12 of the Charter). The objection would be rather that Parkwood *has no means of being represented at all* on the NJC. The curtailment of rights suffered by Parkwood derives not from being compelled to join an organisation but from the fact that it is required to take on obligations that were undertaken pursuant to agreements over which it is unable to exert any influence.

46. I will now show that, when viewed from this perspective, the fundamental right at issue here is not the negative aspect of the employer's freedom of association but rather the employer's fundamental right to conduct a business, which is recognised by Article 16 of the Charter 'in accordance with Union law and national laws and practices'.

47. As I have already mentioned, it is my view that Directive 2001/23 does not prohibit Member States from adopting employment legislation pursuant to which dynamic clauses referring to collective agreements form part of the transfer of rights and obligations that takes place as a result of the transfer of an undertaking. However, as we know, even where European Union law expressly gives Member States freedom of action, this must be exercised in accordance with that law.[22] This obligation naturally includes, inter alia, fundamental rights, as expressly provided in Article 51 of the Charter. Accordingly, although the United Kingdom may permit the parties to include dynamic clauses referring to collective agreements in their contracts of employment, this must not result in conduct contrary to the fundamental rights referred to in the Charter, including the freedom to conduct a business mentioned in Article 16.

48. The freedom to conduct a business has a long history in European Union law.[23] Originally seen as a corollary to the fundamental right to property,[24] it started to have a separate existence in the 1980s, ultimately achieving the status of a general principle of European Union law.[25] Today, explanations of the Charter point out that this article is based on the case-law of the Court of Justice recognising not only the freedom to pursue an economic or commercial activity, but also contractual freedom and the principle of free competition.[26]

49. However, despite the fact that the freedom to conduct a business derives from these three sources, to date the case-law has not, in fact, provided a full and useful definition of this freedom. The judgments in which the Court has had occasion to rule in this area have gone no further than either referring to the right to property or simply citing the provisions of Article 16 of the Charter.

22 — *Werhof*, paragraph 32 et seq.

23 — In this regard, see Schwarze, J., 'Der Grundrechtsschutz für Unternehmen in der Europäischen Grundrechtecharta', *Europäische Zeitschrift für Wirtschaftsrecht*, 2001.

24 — See Case 230/78 *Eridania* [1979] ECR. 2749, paragraph 20 et seq. and Joined Cases 63/84 and 147/84 *Finsider* v *Commission* [1985] ECR 2857, paragraph 23.

25 — Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 73.

26 — Such explanations refer, in this connection, to Case 4/73 *Nold* [1974] ECR 491; *Eridiana*; Case 151/78 *Sukkerfabriken Nykøbing* [1979] ECR 1, paragraph 19; and C-240/97 *Spain* v *Commission* [1999] ECR I-6571, paragraph 99.

50. This does not mean that the basic elements of the right cannot be inferred and, in this, the sources referred to in the explanations of Article 16 of the Charter are of considerable assistance. In effect, the freedom to conduct a business, as stated in that article, acts to protect economic initiative and economic activity, obviously within limits but nevertheless ensuring that there are certain minimum conditions for economic activity in the internal market. Thus, the freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law.

51. On the other hand, although the freedom to conduct a business is closely linked to the fundamental right to property, under European Union law, as well as under the laws of several of the Member States,[27] it protects different legal situations. If the right to property operates in the sphere of tangible and intangible assets, the freedom to conduct a business protects economic initiative and the ability to participate in a market, rather than the actual profit, seen in financial terms, that is earned in that market.[28]

52. Lastly, it is worth mentioning that the freedom to conduct a business is a fundamental right that is very much open to being used as a counterweight. The fact that it is not an absolute right means that it is often used in contrast to other fundamental rights, as demonstrated by the case-law of the Court of Justice, which to date has used the freedom to conduct a business as a counterweight to other fundamental rights, such as the right to the protection of privacy,[29] health,[30] and intellectual property rights.[31]

53. In this specific situation, we have national legislation pursuant to which dynamic clauses referring to collective agreements are fully transferred in the event of a transfer of an undertaking. The transfer of the clause means that the transferee, in this case Parkwood, is bound by such terms and conditions as are agreed, now and in the future, by the NJC. Thus, by operation of a contract term expressly included in the contract of employment, UK law permits the employees of public undertakings that are contracted out to private undertakings to preserve the present and future terms and conditions agreed by the NJC, a body in which the transferee is unable to participate.

54. Of course, the right to acquire a particular undertaking does not form part of the freedom recognised under Article 16 of the Charter. Nevertheless, to make acquisitions subject to such draconian requirements that, in practice, they are a strong disincentive to the acquisition or take-over of undertakings, may result in an infringement of this article. The fact that the employer may be indefinitely bound, in the event of the transfer of an undertaking, by terms and conditions of employment to which it did not agree, starts to resemble a restriction on the freedom of contract, which is one of the component parts of the freedom to conduct a business, according to the explanations of Article 16 of the Charter.

27 — A substantial number of Member States recognise a separate fundamental right to conduct a business in the same way as the Charter does. This is so in the case of Spain (Article 38 of the Spanish Constitution), Portugal (Article 61(1) of the Portuguese Constitution) and Italy (Article 41(1) of the Italian Constitution). In France, however, the freedom to conduct a business is inferred from the protection of private property under the Constitution and from a general right to freedom, according to Devolvé, P., *Droit public de l'économie*, Dalloz, Paris, 1998, p. 105 et seq. A different approach is taken by German law, where the freedom of economic initiative derives not only from the right to private property but also from the right to choose a profession. In this regard, see Tettinger, P.-J., 'Artikel 12' in Sachs, M. (ed.), *Grundgesetz-Komentar*, C.H. Beck, Munich, 1996, p. 428 et seq. For a discussion of this fundamental right in comparative European law, see Arroyo Jiménez, L., *Libre empresa y títulos habilitantes*, CEPC, Madrid, 2004, pp. 75 to 79.

28 — See Blanke, H.J., 'Artikel 16', in Tettinger, P. and Stern, K., *Europäische Grundrechte-Charta*, C.H. Beck, 2006, pp. 428, 429 and 439 to 442, and Díez-Picazo Giménez, L.M., *Sistema de Derechos Fundamentales*, 3rd edition, Thomson/Civitas, Madrid, 2008, p. 537 et seq.

29 — Case C-1/11 *Interseroh Scrap and Metals Trading* [2012] ECR, paragraph 44; Case C-70/10 *Scarlet Extended* [2011] ECR I-11959, paragraph 50; and Case C-360/10 *SABAM* [2012] ECR, paragraph 48.

30 — Case C-544/10 *Deutsches Weintor* [2012] ECR, paragraph 55.

31 — *Scarlet Extended*, paragraph 50, and *SABAM*, paragraph 48.

55. That said, however, simply being bound by the terms and conditions settled by the NJC does not automatically translate into a breach of the freedom to conduct a business. Rather, it is necessary to look to the legislative and factual context of the case in order to establish whether UK law is contrary to Article 16. In this regard, the referring court has a particularly important role, since it is in the best position to conduct this assessment, in that it relates to UK employment law. In carrying out this analysis, the referring court must assess, in particular, whether the application of the terms and conditions agreed by the NJC is unconditional and irreversible. Clearly, the effect on the fundamental right will vary, depending on the degree to which the terms and conditions agreed by that body are binding.

56. In this regard, the parties to the main proceedings have highlighted the basic features of the UK system of collective bargaining, which is characterised by its flexibility. As we have established, in the United Kingdom, collective agreements do not have their legal basis in the law, but in individual contracts of employment, which express the free will and freedom of contract of the employee and the employer. Consequently, and without prejudice to the relevant assessment being carried out by the referring court in order to confirm this, all the indications are that, although dynamic clauses referring to collective agreements are transferred, they can be renegotiated and amended by the parties at any time during the term of the employment contract. In other words, UK law does not appear to preclude Parkwood and the employees of the transferred undertaking sitting down to negotiate and agreeing to dispense with, amend or preserve the clause.

57. If this is the case, the objections under UK law from an Article 16 perspective will have been removed. However, this is a matter that demands an analysis of national law that it is for the referring court and not the Court of Justice to conduct.

58. In the light of these arguments, I therefore propose that the Court of Justice reply to the third question referred for a preliminary ruling to the effect that European Union law, and in particular Article 16 of the Charter of Fundamental Rights of the European Union, does not preclude national legislation that requires the transferee of an undertaking to accept the existing and future terms and conditions agreed by a collective bargaining body, provided that the requirement is not unconditional and irreversible. It is for the national court to assess whether, in the specific circumstances of the present case and pursuant to national law, the requirement is in fact unconditional and irreversible in nature.

VI – Conclusion

59. In the light of the foregoing, I propose that the Court reply as follows to the questions referred by the Supreme Court:

(1) Article 3(3) of 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, must be interpreted as not, in principle, precluding Member States from allowing dynamic clauses referring to existing and future collective agreements that are freely agreed between the parties to a contract of employment to be transferred as a result of the transfer of an undertaking.

(2) European Union law, and in particular Article 16 of the Charter of Fundamental Rights of the European Union, does not preclude national legislation that requires the transferee of an undertaking to accept the existing and future terms and conditions agreed by a collective bargaining body, provided that the requirement is not unconditional and irreversible. It is for the national court to assess whether, in the specific circumstances of the present case and pursuant to national law, the requirement is in fact unconditional and irreversible in nature.