I — Introduction

1. In the present proceedings for failure to fulfil obligations under the Treaty, the Commission complains that some provisions of the national law of the United Kingdom on the working time of workers, or the guidance on those provisions, infringe Community law.

2. In particular, the parties disagree as to whether the United Kingdom has taken all the measures necessary for the implementation of the rights of workers to daily and weekly rest periods. That might be ruled out by guidelines issued by the Department of Trade and Industry (DTI), according to which employers are not required to ensure that their employees actually observe those rest periods.

3. Also at issue is whether Community law allows exemptions from the maximum limits of weekly and night working time also where only part of the working time of a worker is measured or predetermined or only part can be determined by the worker himself.

II — Legal framework

A — Community law

4. The Community law framework of these proceedings is formed by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ('the Directive'). Article 1(1) of the Directive states that it lays down minimum...
safety and health requirements for the organisation of working time.

is not measured and/or predetermined or can be determined by the workers themselves ...'

5. Articles 3 and 5 of the Directive provide for minimum daily and weekly rest periods. Under those provisions the Member States are to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period (Article 3) and, per each seven-day period, a minimum uninterrupted rest period of 24 hours plus the 11 hours daily rest (first paragraph of Article 5).

B — National law

7. In the United Kingdom, the Directive was transposed into national law by the Working Time Regulations 3 ('the WTR'). The WTR came into force on 1 October 1998.

6. In view of the specific characteristics of certain activities, the Directive allows the Member States to derogate from some of its provisions, including those on minimum rest periods and maximum weekly and night working time. In that regard, Article 17(1) of the Directive provides:

'With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time

8. Regulation 10(1) of the WTR , which implements Article 3 of the Directive on daily rest, reads:

'An adult worker is entitled to a rest period of not less than 11 consecutive hours in each 24-hour period during which he works for his employer.'

9. Regulation 11(1) of the WTR, which transposes the provisions on weekly rest periods in Article 5 of the Directive, reads as follows:

'Subject to paragraph (2), an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7-day period during which he works for his employer.'

10. In addition, the United Kingdom Department of Trade and Industry has issued guidelines 4 to help the employers and workers concerned to understand the provisions of the WTR. In respect of the daily and weekly rest periods, Section 5 of the guidelines states, inter alia:

'Employers must make sure that workers can take their rest, but are not required to make sure they do take their rest.' 5

III — Pre-litigation procedure and forms of order sought

11. In addition, in application of Article 17(1) of the Directive, Regulation 20(2) 6 was inserted into the WTR in 1999, and reads as follows:

'Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do work the duration of which is not measured or predetermined or can be determined by the worker himself, regulations 4(1) and (2) and 6(1), (2) and (7) shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself.' 7

12. By letter of 21 March 2002 the Commission complained that Regulation 20(2) of the

6 — The amendment was made on 16 December 1999 by Regulation 4 of the Working Time Regulations 1999 (SI 1999/3372) and came into force on 17 December 1999.
7 — Regulations 4 and 6 of the WTR contain the maximum weekly and night working time.
WTR extended unduly the derogation allowed by Article 17(1) of the Directive and that the application of the law recommended by the DTI guidelines was contrary to the objectives of the Directive.

13. The United Kingdom Government gave its opinion on that complaint by letter of 31 May 2002. In its view, the national implementing provisions, including the guidelines, met the requirements of the Directive.

14. On 2 May 2003 the Commission sent a reasoned opinion in which it reiterated its complaints. It invited the United Kingdom to take the necessary measures within two months of notification of that opinion.

15. By letter of 30 June 2003, however, the United Kingdom Government reaffirmed the view it had previously set out.

16. Accordingly, on 23 November 2004 the Commission brought an action under Article 226(2) EC. Initially, it claimed that the Court should:

- declare that:

  (1) by applying the derogation to workers part of whose working time is not measured or predetermined or can be determined by the worker himself, and

  (2) by failing to adopt adequate measures for the implementation of the rights to daily and weekly rest,

the United Kingdom has failed to fulfil its obligations under Article 17(1) of Directive 93/104 and Article 249 EC;

- order the United Kingdom to pay the costs.
17. On 26 January 2006, at the hearing before the Court the Commission reworded in part the form of order it sought. It now claims that the Court should:

— declare that the United Kingdom has failed to fulfil its obligations

(1) under Article 17(1) of Directive 93/104 and Article 249 EC, by applying the derogation to workers part of whose working time is not measured or predetermined or can be determined by the worker himself, and

(2) under Article 249 EC to implement the rights to daily and weekly rest, by maintaining in that regard its official guidelines in their current form;

— order the United Kingdom to pay the costs.

18. The United Kingdom contends that the Court should:

— dismiss the application;

19. In the pre-litigation proceedings the Commission had also complained that the law applied in the United Kingdom in respect of calculating the length of night work, under Regulation 6(6) of the WTR and the DTI guidelines, infringed Article 8 of the Directive in conjunction with the 11th and 12th recitals in the preamble thereto. The United Kingdom therefore amended the provisions in question within the prescribed period. Against that background the Commission did not maintain the latter complaint in its application.

IV — Legal assessment

A — The first complaint: Incompatibility of the exemption in Regulation 20(2) of the WTR with Article 17(1) of the Directive

20. The Commission's first complaint concerns Regulation 20(2) of the WTR 1999,

8 — Regulation 6(6) was repealed by the Working Time (Amendment) Regulations 2002 (SI 2002/3128) with effect from 6 April 2003. Section 3 of the DTI guidelines in the version of July 2003 was amended accordingly.
21. The Commission complains that that provision does not come within the derogation available under Article 17(1) of the Directive. That derogation applies only to workers whose working time, as a whole, is not measured and/or predetermined or can be determined by the workers themselves. However, it does not allow application of the provisions on maximum weekly and night working time restricted to parts of the worker's activity, as provided for in Regulation 20(2) of the WTR where only part of the working time of a worker is not measured and/or predetermined or only part can be determined by the worker himself.

22. It is settled case-law that, in interpreting a provision of Community law, its wording, context and objectives must all be taken into account. 9

23. In the present case, it follows from both the wording of Article 17(1) of the Working Time Directive and the context of that provision as well as from the spirit and purpose of the Directive as a whole that derogations from the maximum limits of weekly and night working time laid down by Community law are only to be possible when, on account of the specific characteristics of the activity concerned, the duration of the working time as a whole is not measured and/or predetermined or can be determined by the workers themselves. On the other hand, the derogation does not apply where only some parts of the working time have the abovementioned characteristics.

24. Thus the wording of Article 17(1) of the Directive refers to 'the duration of the working time' as a whole and not to some parts of it. In addition, the 'activity concerned', the specific characteristics of which justify a derogation from the general provisions of the Directive in respect of minimum daily and weekly rest periods, is used in the singular. It is therefore a question of a general consideration of the activity of the workers concerned, not of the particular nature of some of the duties of which that activity consists.

25. The context of the derogation in Article 17(1) of the Directive confirms that view. Under the definitions in Article 2(1) of the Directive the term 'working time' covers 'any period during which the worker is working,
at the employer's disposal and carrying out his activity or duties ...'. Reference is again made, therefore, to the activity of the worker as a whole, rather than making a distinction between separate parts of that activity. A schematic interpretation thus likewise leads to the conclusion that the concept of working time is an integral whole which is determined by the general nature of the worker's activity, not by the characteristics of individual duties which he performs.

26. The objective of worker protection, to which the Directive as a whole is essentially directed and which is not least also expressly reflected in Article 17(1), suggests the same conclusion as well.

27. It is clear both from the legal basis of the Directive in Article 118a of the EC Treaty, and from the first, fourth, seventh and eighth recitals in its preamble, as well as Article 1(1) thereof, that minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions are to be adopted through the Directive.

28. Further, under the abovementioned provisions harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers, by ensuring, inter alia, that they are entitled to minimum daily and weekly rest periods and adequate breaks and by providing for a ceiling on the duration of the working week.

29. In the Community Charter of the Fundamental Social Rights of Workers, to which the Directive expressly refers, point 7 likewise states that the completion of the internal market must lead to an improvement in the living and working conditions of

10 — My italics.
11 — See the opening words in Article 17(1) of the Directive: 'With due regard for the general principles of the protection of the safety and health of workers ...'
12 — Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 FC.
14 — Case C-303/98 Simap [2000] ECR I-7963, paragraph 49; and BECTU, paragraph 38; Høyer, paragraphs 46 and 92; Pfeiffer, paragraphs 76, 82 and 91; Wippel, paragraph 47; and Della's, paragraph 41, all cited in footnote 13. In addition, see United Kingdom v Council, cited in footnote 13, paragraphs 45 and 75.
15 — The Community Charter of the Fundamental Social Rights of Workers was adopted, in the form of a declaration, at the meeting of the European Council held at Strasbourg on 9 December 1989. That declaration was signed by the Heads of State or of Government of 11 of the then 12 Member States, and was not published in the OJ; see the conclusions of the Presidency, Bulletin of the European Union, EC 12-1989.
16 — Fourth recital in the preamble.
workers in the European Community, and that that process concerns the duration and organisation of working time. Point 8 of the Charter goes on to state that every worker in the Community is to have a right, inter alia, to a weekly rest period, the duration of which must be progressively harmonised in accordance with national practices.

30. Against that background, the Court has consistently held that the various requirements in the Directive concerning maximum working time and minimum rest periods constitute rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health. 17

31. Accordingly, exceptions to those rules on working time, such as the derogations in Article 17(1) of the Directive, are to be interpreted narrowly. 18 Therefore, in accordance with the objective of that directive to ensure the protection of the health and safety of all workers covered by it, the derogations in Article 17(1) must remain limited to those cases in which, on account of the specific characteristics of the activity concerned, working time as a whole and not just part of it is not measured and/or predetermined or can be determined by the workers in question themselves.

32. If the derogation under Article 17(1) of the Directive were also applied to cases in which only part of the working time is measured, predetermined or can be determined by the workers themselves, there would be a risk that the maximum weekly and night working time laid down by Community law would be circumvented. In such cases, the maximum permissible weekly and night working time could already be completely or largely used up by that part of the activity of the worker concerned the duration of which is measured, predetermined or cannot be determined by the worker himself. In order to carry out his other tasks which, on account of their specific characteristics, are not suitable for measurement of length of working time or determination in advance or for which the worker concerned can himself determine working time, the worker might then have to exceed the maximum limits of weekly and night working time.

17 — BECTU, paragraphs 43 and 47; Pfeiffer, paragraph 100; Wippel, paragraph 47; and Delias, paragraph 49; all cited in footnote 13.

18 — To that effect, also Jaeger, cited in footnote 13, paragraph 89: ‘... since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the derogations provided for in Article 17 must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected’ (my italics).
33. In light of the above considerations, it must be stated that the scope of Regulation 20(2) of the WTR goes beyond the derogation provided for in Article 17(1) of the Directive and therefore infringes that provision of Community law.

34. In its defence the United Kingdom accepted that Regulation 20(2) of the WTR 'is not necessary to the proper implementation of Article 17(1) of the Directive' and undertook to repeal that national provision. Further, it was revealed in the oral proceedings before the Court that corresponding amending regulations are currently going through the legislative procedure in the United Kingdom and are expected to come into force on 6 April 2006.

35. According to settled case-law, however, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. In any event, the mere announcement that national legal or administrative provisions are to be amended does not suffice in that respect. 19

36. At the relevant time there was still an infringement of the Treaty. Accordingly, as the proceedings now stand, the Commission's first complaint must be allowed.

37. At the hearing before the Court the Commission stated that it would consider withdrawing its first complaint as soon as the amending regulations repealing Regulation 20(2) came into force. Should the application be withdrawn in part, the subject-matter of these infringement proceedings would then be restricted to the second complaint, with which the following observations deal.

B — The second complaint: failure to adopt adequate measures for the implementation of the rights to minimum daily and weekly rest

38. In its second complaint the Commission claims that the United Kingdom has failed to fulfil its obligations under Article 249 EC to implement the rights to minimum daily and weekly rest, inasmuch as it maintains its official guidelines in its current form. That complaint derives from the DTI guidelines which state that employers must make sure that workers can take their rest, but are not required to make sure that they do take their rest.

19 — See Case C-514/03 Commission v Spain [2006] ECR I-963, paragraph 44.
39. Before the substance of that complaint can be assessed, the issue of its admissibility must be considered.

1. Admissibility

40. In the view of the United Kingdom, the second complaint is inadmissible on two grounds.

(a) Extension of the subject-matter of the proceedings

41. First, the United Kingdom alleges that the Commission has extended the subject-matter of the proceedings during the infringement proceedings. It complains that the Commission's application goes beyond the reasoned opinion. Thus the second complaint in the reasoned opinion was confined to the DTI guidelines. By contrast, in the application the Commission makes the wider and more general complaint concerning the absence of adequate measures to ensure the full and effective implementation of the Directive in practice, without reiterating the initial limitation of its complaint to the guidelines.

42. It is settled case-law that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision. Accordingly, the application must be founded on the same grounds and pleas as the reasoned opinion. If a charge was not included in the reasoned opinion, it is inadmissible at the stage of proceedings before the Court. 20

43. However, that requirement cannot be stretched so far as to mean that in every case the statement of complaints set out in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought by the action must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered. 21

44. In this case the Commission made it clear in point 22 of its reasoned opinion that, although it had no remarks on the provisions of the WTR as such in which Articles 3 and 5 of the Directive on minimum daily and weekly rest were implemented, the practice, as revealed notably by the DTI guidelines, was not in line with the Directive. In point 23 of the reasoned opinion the Commission then concluded that, as the opinion expressed by the United Kingdom in the

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21 — Case C-456/03 Commission v Italy [2005] ECR I-5335, paragraph 39; Case C-147/03 Commission v Austria [2005] ECR I-5969, paragraph 26; and Commission v Luxembourg, cited in footnote 20, paragraph 37; see also Case C-185/00 Commission v Finland [2003] ECR I-14189, paragraph 81, and Case C-433/03 Commission v Germany [2005] ECR I-6985, paragraph 28.
guidelines was incompatible with the purpose of the Directive, the wording of the guidelines had to be amended. Finally, the Commission stated in point 27 of the reasoned opinion that, according to Article 249 EC, a directive is binding 'as to the result to be achieved, upon each Member State to which it is addressed'. Accordingly, in the present case, Member States had a responsibility to ensure that the rights granted by the Directive, notably the rights to daily and weekly rest, were granted and exercised. The mere transposal of the Directive was not enough. The text of the guidelines could endorse a practice contrary to the provisions of the Directive.

45. In its application the Commission again refers in point 25 to the implementation of Articles 3 and 5 of the Directive by Regulations 10 and 11 of the WTR. It then quotes the relevant passage in the guidelines and in point 26 again states that, in its view, the guidelines could endorse and encourage a practice of non-compliance with the requirements of the Directive. In summary, the Commission concludes in point 29 of its application that the practice as revealed by the guidelines is incompatible with the obligation to ensure full and effective implementation of the Directive; under Article 249 EC the Member States have a clear responsibility to ensure that the rights granted by the Directive, and notably the right to daily and weekly rest, are effectively granted and exercised.

46. Against that background it is to be concluded that, in this case, the Commission has certainly not infringed the United Kingdom's rights of defence by extending the subject-matter of the proceedings. Instead, it has based its application in respect of the second complaint on the same considerations as those in the reasoned opinion. Without contesting the implementation of the Directive as such by the WTR, both in its reasoned opinion and in its application the Commission complains only of the officially recommended practice, as expressed in the DTI Guidance.

(b) Failure to provide sufficient particulars in the application

47. In addition, the United Kingdom complains that the application fails to provide sufficient particulars. Instead of referring only to the general obligation imposed on the Member States by Art 249 EC, in the
view of the United Kingdom in a case like the present one, where there is an alleged failure correctly to implement a directive, the Commission ought to have identified clearly and in specific detail each respect in which it considers the implementation of the Directive to be incorrect.

48. It is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice, and from the case-law relating to that provision, that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. 24

50. In those circumstances the Commission has identified the alleged infringement with sufficient precision.

51. That is not affected by the fact that the Commission refers in its application merely to Article 249 EC and does not, for example, seek a declaration that the United Kingdom has infringed Articles 3 and 5 of the Directive. That is because proceedings for failure to fulfil obligations are directed towards a finding by the Court of Justice that a Member State has failed to fulfil an obligation under the Treaty (Articles 226(1) EC and 228(1) EC). In the event of failure to implement or failure properly to implement a directive, the failure to fulfil obligations consists in a breach of the third paragraph of Article 249 EC. The Commission referred precisely to that provision in its application.

49. In this case the express subject-matter of the Commission's second complaint, in both the application and the reasoned opinion, is the DTI guidelines. 25 The essence of its allegation, which is expressed particularly clearly in points 25 and 30 of the application, is the message to employers given by the guidelines that they are not required to ensure that workers are actually benefiting from the rest periods to which they are entitled, but that it is enough that workers who wish to take their rest periods are not prevented from doing so.

52. Of course it must also be clear from the application for failure to fulfil obligations which provisions of a directive, in the view of the Commission, were not implemented or not implemented properly in breach of the third paragraph of Article 249 EC. It would make sense for that to be done by express reference to the provisions at issue in the application itself. However, that is certainly not compulsory. As already mentioned, the statement of the subject-matter of the proceedings and a summary of the pleas in law on which the application is based need only be sufficiently clear and precise to enable the defendant to prepare its defence.

24 — See Case C-178/00 Italy v Commission [2003] ECR I-303, paragraph 6, and Case C-55/03 Commission v Spain, not published in the ECR, paragraph 23.

25 — See above, points 44 and 45 of this Opinion.
and the Court to rule on the application. In the present case those requirements are satisfied by the Commission's reference to the inadequate 'implementation of the rights to daily and weekly rest', in both the form of order sought and the pleas in law on which the application is based. In addition, the Commission expressly refers to Articles 3 and 5 of the Directive in various places in its application.26

(c) Interim conclusion

53. Accordingly, the action with regard to the second complaint is admissible in its entirety.

2. Substance

54. The Commission's second complaint is well founded if the statement at issue in Section 5 of the DTI guidelines is contrary to the objectives set for the Member States in Articles 3 and 5 of the Directive in conjunction with the third paragraph of Article 249 EC.

55. The parties dispute, essentially, whether it is sufficient for the purposes of Articles 3 and 5 of the Directive if the employees concerned are merely granted a legal entitlement to daily and weekly rest periods, or whether the Member States must go further and impose on employers an obligation of result to ensure that rest periods are also actually observed.

(a) Essential arguments of the parties

56. The United Kingdom infers, in particular, from the wording of Articles 3 and 5 of the Directive that workers must merely be granted a legal entitlement to their daily and weekly rest periods ('ensure that ... every worker is entitled to ...'), but employers do not have to ensure that rest periods are actually observed. Unlike other provisions of the directive, no obligation of result arises from those provisions. It cannot be required of employers to force workers to actually invoke the rest periods due to them. In that sense the DTI guidelines merely clarify the limits to employers' responsibility.

57. As a comparison, the United Kingdom refers to the maximum weekly and night working time in Articles 6(2) and 8(1) of the Directive in which a more result-oriented
w wording was chosen ('ensure that ... does not exceed') than that in Articles 3 and 5 of the Directive, at issue here. In addition, the United Kingdom draws a parallel with the rules on maternity leave in Article 8 of Directive 92/85, paragraphs 1 and 2 of which likewise distinguish between an entitlement and an obligation of result, with the wording 'entitled to' again being used for the mere entitlement in Article 8(1).

59. In the Commission's view, Section 5 of the DTI guidelines encourages a practice on the part of employers which does not comply with the requirements of the Directive. It is suggested to employers that they do not have to ensure that their workers actually take the rest periods granted to them. At the very least, the guidelines are a disincentive to employers to ensure that that takes place.

(b) Assessment

58. The Commission opposes those arguments of the United Kingdom based on wording and regulatory context, and refers in that respect in particular to the inconsistencies in the wording to be found not only between the different language versions of the Directive but also within individual language versions. In its view, the Member States have a clear responsibility under the third paragraph of Article 249 EC to ensure that the rights of workers granted by the Directive, notably the right to minimum daily and weekly rest, are effectively granted and exercised. Employers must guarantee that by suitable internal arrangements.

60. Under Articles 3 and 5 of the Directive the Member States are required to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period and, per each 7-day period, a minimum uninterrupted rest period of 24 hours plus the 11 hours daily rest.

61. However, neither the wording of Articles 3 and 5 nor the scheme of the Directive contains more detailed indications as to what specific requirements the Member States must place on employers so that the Com-

62. The wording of the different provisions of the Directive is highly inconsistent depending on language version and also within individual language versions. Admittedly, for example, in its English version in Articles 3, 4, 5 and 7 the term 'entitled to' is used throughout, which could be interpreted as meaning a mere entitlement. However, in the French, Italian and Portuguese language versions of those articles the terms 'bénéficie' (French), 'benefici' (Italian) and 'beneficiem' (Portuguese) are used, which may be translated into German as 'genießen' ('enjoy') or 'zugute kommen' ('benefit') and therefore could also be interpreted as meaning an obligation of result. In other language versions again, the use of terminology is not even consistent within the various provisions on rest periods (Articles 3, 4, 5 and 7). Thus for example the German version of Articles 3, 4 and 5 contains the expression 'gewährt wird', whereas Article 7 uses 'erhält'. Articles 3 and 5 of the Spanish version use the term 'disfruten', whilst Article 4 reads 'tengan derecho a disfrutar' and Article 7 simply 'dispongan'. In a similarly inconsistent manner the Dutch version uses the word 'genieten' in Articles 3 and 5 but the word 'hebben' in Article 4, and the expression 'wordt toegekend' in Article 7.

63. That general inconsistency in language use also explains the fact that the Directive does not employ the same wording in setting the maximum limits of weekly and night working time in Articles 6(2) and 8(1) as in setting minimum rest periods. Thus in those provisions the Member States are required to take the measures necessary to ensure that the weekly or night working time 'does not exceed' the relevant maximum length.  

64. Contrary to the view of the United Kingdom, no qualitative distinction can be derived from the respective choice of wording between the requirements of Articles 6 and 8 of the Directive, on the one hand, and Articles 3 and 5 at issue here, on the other. The eighth recital in the preamble to the Directive in particular militates against such a distinction, referring as it does to minimum rest periods and maximum working time in one breath and against the background of the same defined objective — both serve to ensure the safety and health of workers.

28 — The other language versions I have compared (French, German, Italian, Spanish, Portuguese and Dutch) contain corresponding wording.
65. The extent of the obligations on the Member States under Articles 3 and 5 concerning minimum daily and weekly rest periods must ultimately therefore also be ascertained in light of that objective. As already stated, the Court has consistently held that both the provisions concerning maximum working time and those concerning minimum rest periods are rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health.

It is necessary for the effectiveness of the rights conferred on workers by the Directive to be ensured in full, which necessarily implies an obligation on the Member States to guarantee that each of the minimum requirements laid down by that directive is observed.

66. In order to secure effective protection of the safety and health of employees, it is necessary that they are actually granted the minimum periods of rest provided for. That presupposes that workers are put in a position by their employer actually to take the rest periods which are due to them and are not, for example, deterred from doing so by factual constraints.

67. Certainly it will normally be excessive, if not even impossible, to demand that employers force their workers to claim the rest periods due to them. That was also conceded by the Commission in the oral procedure. Accordingly, the United Kingdom correctly points out that, not least for practical reasons, the employer's responsibility concerning observance of rest periods cannot be without limits.

68. However, an employer may on no account withdraw into a purely passive role and grant rest periods only to those workers who expressly request them and if necessary enforce them at law. Not only the risk of losing a case, but also the risk of becoming unpopular within the business merely for claiming rest periods could distinctly hamper effective exercise of those rights to ensure protection of the health and safety of workers.

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29 — See points 26 to 29 of this Opinion.
30 — In point 30 of this Opinion.
31 — BECTU, paragraphs 43 and 47; Pfeiffer, paragraph 100; Wippel, paragraph 47; and Deltas, paragraph 49; all cited in footnote 13.
32 — Deltas, cited in footnote 13, paragraph 53; the requirement of effective protection of safety and health of workers through the effective guarantee of minimum rest periods is already emphasised in Jaeger, cited in footnote 13, paragraphs 70, 92 and 95.
33 — To that effect also Jaeger, cited in footnote 13, paragraphs 70 and 92.
34 — To that effect — with regard to leave entitlement — Opinion of Advocate General Stix-Hackl in Joined Cases C-131/04 and C-257/04 Robinson-Steele and Others, pending before the Court, point 54.
69. Instead, it is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. In addition it must, however, be a matter of course within a business, in practice as well, that workers' rights to rest periods not only exist on paper but can effectively be observed. In particular, no de facto pressure should arise which may deter workers from actually taking their rest periods. In that regard it is irrelevant whether such pressure derives from the employer — for example through performance targets set by him — or from the fact that some of the employees do not use up the rest periods due to them, and therefore a kind of group pressure arises for other workers to do the same.

70. Against that background the passage of the DTI Guidance at issue is, at the very least, misleading. The first half of the sentence correctly cites the requirement for employers to make sure that workers can take their rest. The second half of the sentence, however, adds that employers are not required to make sure that workers do take their rest. If those statements are read in context — also in conjunction with the rest of the guidelines — it cannot in any event be excluded that the guidelines may encourage a purely passive practice on the part of employers which would be incompatible with the objectives of the Directive. In fact the impression could be given that, to act lawfully, such a practice on the part of the employer is already sufficient. As already stated, however, the role ascribed to the employer may not amount to nothing more than such a passive practice but must also include the duty to create a working environment which encourages workers to observe the rest periods due to them.

71. In so far as it included the abovementioned passage, which is at the very least misleading, in the DTI guidelines, the United Kingdom consequently failed to fulfil its obligation to take the measures necessary to ensure that minimum daily and weekly rest periods within the meaning of Articles 3 and 5 of the Directive are granted to every worker.

35 — The introduction to Section 5 of the guidelines states, for example: 'Employers must check ... how working time is arranged and whether workers can take the time off they are entitled to ...' (see page 14 of the guidelines).
That is not affected by the fact that the guidelines possibly serve only as a recommendation for the employer and the worker and accordingly are not legally binding. As already held by the Court, any conduct of a public body of a Member State, even measures which do not have binding effect, may be capable of influencing the conduct of citizens in that State and thus of frustrating the aims of the Community. That is also true for the aims of a directive which, in accordance with the third paragraph of Article 249 EC, is binding upon each Member State to which it is addressed.

Nor does the Member States' obligation amount to nothing more than the requirement that the directive be properly transposed — by the legislature — into national law. With regard to the general obligation on the Member States to cooperate under Article 10 EC, rather it also includes the obligation on all bodies in which public authority is vested to ensure that the application of national law is compatible with Community law. A Member State may not create the risk, by misleading recommendations of its public bodies, that the practical application of its national law runs counter to the objectives of a directive.

For those reasons, the Commission's second complaint must also be allowed.

V — Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

— To that effect — with regard to an administrative practice which infringes Community law — Case C-278/03 Commission v Italy [2005] ECR I-3747, paragraph 13: 'A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law.'

— If the Commission were to withdraw its first complaint, Article 69(5) of the Rules of Procedure would apply in that respect. Under that provision, most recently in Case C-514/03 Spain v Commission, the Court, on application by the Commission, ordered the Kingdom of Spain to pay the costs relating to the part of the action for failure to fulfil obligations which was withdrawn, since that Member State had provoked the Commission's action through amending its national law belatedly (cited in footnote 19, paragraph 68).
VI — Conclusion

76. In the light of the foregoing observations, I propose that the Court should:

(1) declare that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the third paragraph of Article 249 EC to implement Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time,

— by adopting, contrary to Article 17(1) of the Directive, Regulation 20(2) of the Working Time Regulations in the version of 17 December 1999, under which, in circumstances in which only part of the working time is measured or predetermined or cannot be determined by the worker himself, the maximum limits of weekly and night working time apply only to that part of the working time, and

— by maintaining, contrary to the objective defined in Articles 3 and 5 of the Directive, official guidelines on the Working Time Regulations in accordance with which employers must merely make sure that workers can take their daily and weekly rest, but are not required to make sure that they do take their rest;

(2) order the United Kingdom of Great Britain and Northern Ireland to pay the costs.