OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 12 July 2005 [1]

I — Introduction

1. The French Conseil d'État (Council of State) is due to rule on a number of actions contesting a decree which, with regard to the employees of certain social and medico-social establishments, establishes a system of equivalence for the time they spend at such establishments for the purpose of calculating actual working time.

2. At national level, the system is based on the Code du travail (Labour Code), but the problem is whether the system is compatible with Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. [2]

3. Moreover, there is a further complication in that, when France transposed Directive 93/104, it adopted more favourable measures for employees and those measures are liable to be affected by the reply given.

II — Legal framework

A — *Community legislation*

1. Background

4. For many decades, encouraged by a favourable international environ-

1 — Original language: Spanish.

2 — OJ 1993 L 307, p. 18. After undergoing a number of amendments, Directive 93/104 was replaced by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 (OJ 2003 L 299, p. 9) which has the same title and, in so far as these proceedings are concerned, similar if not identical provisions.

ment,[3] there has been a trend in European countries towards reducing working time. That tendency affects the labour market and, consequently, the fundamental freedoms connected with that market.

5. However, it was not until the 1970s that the European Community, acting through the Council, took its first action in that regard, in the form of Recommendation 75/457/EEC of 22 July 1975 on the principle of the 40-hour week and the principle of four weeks' annual paid holiday,[4] and the resolution of 18 December 1979 on the adaptation of working time[5] which urged limitation of the systematic use of overtime and the reduction of annual working time, in addition to the implementation of measures on flexibility. There was also a proposal for a second recommendation in that area, dated 23 September 1983.[6] However, that proposal was not enacted owing to the controversial nature of the subject-matter, which was debated during a period of crisis in the sphere of social policy.[7]

6. The process which led to the adoption of Directive 93/104 was instigated by the Single European Act,[8] in so far as it inserted Article 118a into Title III of the Treaty of Rome,[9] and by the Community Charter of the Fundamental Social Rights of Workers, adopted by the European Council of Strasbourg on 9 December 1989,[10] in so far as it acknowledged that the duration and organisation of working time play an important role in the approximation of the living conditions of employees.[11]

3 — Of particular significance is the work of the International Labour Organisation, whose first convention, No 1/1919, concerned hours of work in industry. Many other conventions have followed since, including, for example, Convention No 14/1921 on weekly rest, Convention No 30/1930 on hours of work in commerce and offices, and Convention No 47/1935 on the 40-hour week. At a different level, Article 24 of the Universal Declaration of Human Rights, 1948, states that '[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay', while Article 7(d) of the United Nations International Covenant on Economic, Social and Cultural Rights, 1966, lays down the right to '[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'

4 — OJ 1975 L 199, p. 32.

5 — OJ 1980 C 2, p. 1.

6 — Proposal for a recommendation of the Council on the reduction and restructuring of working time (OJ 1983 C 290, p. 4).

7 — On those developments at Community level, see Arrigo, G., *Il diritto del lavoro dell'Unione europea*, Giuffrè editore, Milan, 2001, pp. 200 to 205.

8 — OJ 1987 L 169, p. 1.

9 — As Advocate General Leger noted in his Opinion in Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755 (I will refer to the judgment in that case in more detail later), 'before the adoption of the Single European Act there was no specific provision on the protection of the safety and health of workers' (point 28). The Treaty contained merely two references to working conditions, in Articles 117 and 118, but the former did not confer any competence on the Community in social matters, while, pursuant to paragraph 14 of the judgment in Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany, France, Netherlands, Denmark and United Kingdom* v *Commission* [1987] ECR 3203, the latter was limited in scope (footnote 8 of the Opinion)

10 — COM(89) 471 final.

11 — However, Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32) emphasised the essential nature of the temporal aspect in the relationship by providing that 'the length of the ... working day or week' must be notified to employees (Article 2(2)(i)).

2. Primary legislation

7. Article 118a of the EC Treaty [12] (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) required the Member States to encourage 'improvements, especially in the working environment, as regards the health and safety of workers' and to set as their objective 'the harmonisation of conditions in this area, while maintaining the improvements made' (paragraph 1).

8. To that end, Article 118a authorised the Council, acting by a qualified majority, to adopt directives containing the minimum requirements, having regard to national conditions and technical rules (paragraph 2), and stated that the foregoing did not preclude 'any Member State from maintaining or introducing more stringent measures for the protection of working conditions'.

9. The current Article 136 EC is aimed at 'improved living and working conditions', while Article 137 EC requires the Community to support and complement the activities of the Member States in 'improvement in particular of the working environment to protect workers' health and safety' (paragraph 1(a)) and in improvement of 'working conditions' (paragraph 1(b)).

10. Article 137 EC also lays down the power of the Council to adopt, in the fields referred to, minimum requirements for gradual implementation (paragraph 2(b)), without prejudice to the maintenance or introduction at national level of 'more stringent protective measures compatible with this Treaty' (paragraph 4, second indent).

3. Directive 93/104

11. On 12 June 1989, the Council adopted Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, [13] which, according to the judgment in *BECTU*, [14] laid down general principles in that field, which were subsequently developed in a series of individual directives,

12 — Inserted by Article 21 of the Single European Act.

13 — OJ 1989 L 183, p. 1.

14 — Case C-173/99 [2001] ECR I-4881, paragraph 5.

including Directive 93/104, [15] whose legislative basis and provisions it is appropriate to examine in detail.

(a) Legal basis

12. The basis for Directive 93/104 is Article 118a of the EC Treaty which, because it was a compromise, gave rise to serious interpretative uncertainties concerning the limits of Community action. [16]

13. The directive was adopted by a qualified majority and was opposed by the United Kingdom, which brought an action before the Court of Justice seeking the annulment of the directive or, in the alternative, the annulment of Article 4, the first and second sentences of Article 5, Article 6(2) and Article 7. In the first plea put forward, the United Kingdom complained that the wrong legal basis had been chosen for the directive. The United Kingdom also claimed breach of the principle of proportionality, misuse of powers, and infringements of essential procedural requirements. The United Kingdom contended that the directive should have been based on Article 100 of the EC Treaty (now Article 94 EC) or on Article 235 of the EC Treaty (now Article 308 EC), which require unanimity within the Council.

14. In the judgment in *United Kingdom* v *Council*, [17] the Court dismissed the action apart from annulling the second sentence of Article 5, [18] holding that the organisation of working time was capable of being the subject of a directive in accordance with the provisions of Article 118a of the Treaty, since the concepts of 'working environment', 'safety' and 'health' referred to therein must receive a broad interpretation which

15 — It is appropriate to mention the following individual directives: Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4) and Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9). The sectoral directives include Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ 1999 L 167, p. 33); Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000 L 302, p. 57); and Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35).

16 — Banks, K., 'L'article 118 A, elément dynamique de la politique sociale communautaire', *Cahiers de droit européen*, No 5-6, 1993, p. 537.

17 — Cited in footnote 9.

18 — That provision provided that '[t]he minimum rest period referred to in the first subparagraph shall in principle include Sunday'. The provision was invalid on the ground that the Council failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week (paragraph 37).

embraces 'all factors, physical or otherwise', that are relevant (paragraph 15). [19]

15. It is clear that the view taken in the judgment is that 'the organisation of working time is not necessarily conceived as an instrument of employment policy' (paragraph 28), and that instead the matter is dealt with because it is capable of having a favourable impact on the working environment (paragraph 29).

(b) Content

16. The directive lays down rules which appear straightforward and generic but are, in fact, complex. [20]

17. According to Article 1, the directive lays down minimum safety and health requirements (paragraph 1), and applies to 'minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time' (Article 1(2)(a)) and to 'certain aspects of night work, shift work and patterns of work' (Article 1(2)(b)).

18. Article 2 stipulates that, for the purposes of the directive, 'the following definitions shall apply:

1. *working time* shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. *rest period* shall mean any period which is not working time;

3. *night time* shall mean any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.;

...'

19 — Alonso Olea, M., '¿Es de seguridad y salud del medio de trabajo la regulación de la jornada?', *Revista española de derecho del trabajo*, No 93, January/February, 1999, p. 5 et seq., gives a negative response to the question raised, and therefore disagrees with the judgment. There is also criticism in Ellis, E., 'Case C-84/94 United Kingdom of Great Britain and Northern Ireland v. Council, Judgment of 12 November 1996, not yet reported', *Common Market Law Review*, No 34, 1997, p. 1057, and in Poulpiquet, V., 'La flexibilité de l'emploi et la Communauté européenne', *Revue trimestrielle de droit européen*, No 4, October/December, 1999, p. 726 et seq. Support for the judgment can be found in Kenner, J., 'A distinctive legal base for social policy? The Court of Justice answers a "delicate question"', *European Law Review*, No 22, 1997, p. 586, who takes the view that the Court acknowledged the autonomy of social policy in the Treaties.

20 — Arrigo, G., op. cit., p. 233.

19. The directive goes on to set out certain rules governing the duration of those periods, having regard to the relevant reference periods:

— Daily rest is governed by Article 3:

'Member States shall 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'. [21]

— The week is dealt with from two points of view:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

The minimum rest period referred to in the first subparagraph shall in principle include Sunday.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied' (Article 5).

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours' (Article 6).

21 — Teyssié, B., *Droit européen du travail*, Éditions Litec, Paris, 2001, p. 184, points out that there is no definition of public holidays, which are closely linked to the religious practices and history of each Member State.

— Article 7 governs annual leave:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

20. Articles 8 to 12 then deal with night work, while Article 13 deals with the pattern of work.

21. The fact that the directive has been described as 'flexible' [22] and 'too elastic' [23] is due in part to Articles 15, 16 and 17: [24]

— Article 15 provides that '[t]his Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers'.

— Article 16 fixes the reference periods and authorises the Member States to lay down:

'1. for the application of Article 5 (weekly rest period), a reference period not exceeding 14 days;

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average;

22 — Ribeiro, M. de F., 'O tempo de trabalho no direito comunitário', Oliveira Pais, S. and Ribeiro, M. de F., *Dois temas de direito comunitário do trabalho (Incumprimento das directivas comunitárias/O tempo de trabalho no direito comunitário)*, Publicações Universidade Católica, Oporto, 2000, pp. 120 and 121.

23 — Rocella, M. Aimo, M. and Izzi, D., *Diritto Comunitario del Lavoro*, 2nd edition, Giappichelli, Turin, 1999, p. 906.

24 — Supiot, A., 'Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro")', *Lavoro e Diritto*, year 11, No 1, winter 1997, p. 16, contends that in its first part (Articles 1 to 16) the directive lays down certain rules which the second part (Articles 17 and 18) of the directive proceeds to strip of their obligatory nature.

3. for the application of Article 8 (length of night work), a reference period defined after consultation of the two sides of industry or by collective agreements or agreements concluded between the two sides of industry at national or regional level.

If the minimum weekly rest period of 24 hours required by Article 5 falls within that reference period, it shall not be included in the calculation of the average.'

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...'

— Article 17 allows national authorities to derogate from the Community provisions, subject to certain restrictions. In particular, in accordance with paragraph 2, Member States may, 'by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry', derogate from Articles 3, 4, 5, 8 and 16:

'(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

22. Finally, it is important to note that, under Article 18, a Member State may refrain from imposing the maximum limit of 48 hours' working time per week provided that that derogation is made subject to certain conditions, inter alia the requirement that an employer must first seek and obtain the agreement of the worker concerned (paragraph 1(b)(i), first indent).

B — *French legislation*

1. The Code du travail

23. Part of the Code du travail deals with the duration of work, distinguishing between

working time and rest time. [25] The provisions of the code were amended by Law 98-461 of 13 June 1998 [26] and by Law 2000-37 of 19 January 2000. [27]

(a) Working time

24. Under Article L. 212-1 of the Code du travail, in the establishments and professions referred to in Article L. 200-1, and in small-scale and cooperative establishments and their dependencies, the legal duration of employees' actual working time is 35 hours a week (first paragraph) and must not exceed 10 hours a day, save where derogations are laid down by decree (second paragraph).

25. In accordance with Article L. 212-2, the Council of Ministers may adopt decrees laying down detailed rules for the application of Article L. 212-1, governing in particular, but not limited to, the division of working time, rest periods, derogations and monitoring measures (first paragraph).

26. The first paragraph of Article L. 212-4 defines actual working time as time when an employee is at the employer's disposal and has to carry out the employer's instructions without being able to attend to his own business. In accordance with the second paragraph of Article L. 212-4, meal breaks and breaks are considered to be actual working time, provided that they satisfy the aforementioned conditions. In all other cases, remuneration for such breaks may be provided for in a collective agreement or contract. The third paragraph refers to time for changing clothes, while the fourth paragraph provides for the establishment of 'a period equivalent to the statutory working time in occupations and for specific posts involving periods of inactivity' and states that such periods may be remunerated in accordance with established practice or collective agreements.

27. Article L. 212-4 bis refers to *astreinte* periods, or periods where an employee is not continuously and immediately at the disposal of the employer but is nevertheless obliged to

25 — On the most recent French measures in this field, see Favennec-Héry, F., 'L'évolution de la réglementation du temps de travail en France', in Yota Kravaritou (ed.), *The Regulation of Working Time in the European Union (Gender Approach)/La réglementation du temps de travail dans l'Union européenne (Perspective selon le genre)*, Presses Interuniversitaires Européennes, Brussels, 1999, pp. 221 to 228. On earlier measures which, when considered as a whole, presented a very complex picture, see Barthélémy, J., *La durée et l'aménagement du temps de travail*, Paris, 1989, p. 11 et seq.

26 — JORF, 14 June 1998, p. 9029.

27 — JORF, 20 January 2000, p. 975. That law addresses the need to transpose the provisions of Directive 93/104, since, as was noted in the judgment in Case C-46/99 *Commission* v *France* [2000] ECR I-4379, the directive had not been transposed by the expiry of the prescribed period.

stay at home or nearby in order to perform work on behalf of the employer should the need arise. In such cases, only work carried out is regarded as actual working time.

28. With regard to the calculation of working time, the second paragraph of Article L. 212-7 provides that weekly working time may not exceed 44 hours calculated on the basis of a reference period of 12 consecutive weeks, while working time may not exceed 48 hours in any one week.

(b) Rest time

29. Article L. 220-1 requires a minimum of 11 consecutive hours of daily rest (first paragraph), although derogations may be applied to certain activities (second paragraph).

30. Under Article L. 221-4, weekly rest must be no less than 24 consecutive hours, in addition to the daily rest period (first paragraph).

2. Decree No 2001-1384

31. The decree was enacted on 31 December 2001, in application of Article L. 212-4 of the Code du travail, in order to establish a system of equivalence for legal working time in social and medico-social establishments operated by private persons on a non-profit-making basis. [28]

32. There are four provisions:

— Article 1 defines the scope of the rules and extends it to: (1) residential establishments operated by private persons and referred to in points 1, 2, 4, 5 and 8 of Article L. 312-1 of the Code de l'action sociale et des familles (Code of Social Action and Families); and (2) full-time posts held by educational staff, nurses, nursing auxiliaries, or anyone similarly qualified who replaces such persons, responsible for night duty on call in a room provided in those establishments.

28 — JORF, 3 January 2002, p. 149.

— Under Article 2, for the purposes of calculating working time in such establishments and posts, each nine-hour period of time spent on stand-by at night is counted as three hours of actual work, and a further half hour is added for every additional 60 minutes.

— Article 3 provides that the period of presence in the room provided runs from the time when the residents of the establishment retire until the time when they rise, as stipulated in the rosters, provided that the period does not exceed 12 hours.

— Finally, in accordance with Article 4, responsibility for enforcing the above provisions rests with the Minister for Labour and Solidarity, the Minister for Justice and the Minister for the Interior.

III — The facts, the main proceedings and the questions referred for a preliminary ruling

33. Mr Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT and Fédération nationale de l'action sociale Force ouvrière brought actions contesting Decree No 2001-1384 before the Conseil d'État, Section du contentieux, claiming the incorrect implementation of Article L. 212-4 of the Code du travail, a manifest error of assessment, infringement of the legal objective of the reduction of working time and of the principle of equality with public establishments, breach of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the establishment of a system of equivalence is incompatible with the objectives of Directive 93/104.

34. Union des fédérations et syndicats nationaux d'employeurs sans but lucratif du secteur sanitaire, social et médico-social (UNIFED) was given leave to intervene in support of the administration.

35. The Conseil d'Etat stayed the proceedings and, prior to giving judgment, referred the following questions to the Court of Justice for a preliminary ruling:

'(1) In the light of the purpose of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, namely to lay down minimum safety and health requirements for the organisation of working time as stated in Article 1(1), must the definition of working time in the directive be considered to apply exclusively to the Community thresholds established by the directive or must it be considered to have general scope,

applying also to the thresholds laid down in national legal systems, in particular with a view to transposing the directive, even where those thresholds may, as in France, in the interests of protection of employees, have been set at a level affording greater protection than the thresholds in the directive?

(2) To what extent could a strictly proportional system of equivalence, which consists in taking into account the total number of hours of presence and applying a weighting mechanism to them which reflects the lower intensity of work done during periods of inactivity, be regarded as compatible with the objectives of Council Directive 93/104/EC of 23 November 1993?'

IV — Procedure before the Court of Justice

36. Written observations were submitted within the time-limit laid down in Article 20 of the EC Statute of the Court of Justice by Mr Abdelkader Dellas, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, UNIFED, the German, Belgian, Netherlands and French Governments, and the Commission.

37. At the hearing held on 12 May 2005, oral argument was presented by the representatives of Fédération nationale des syndicats des services de santé et des services sociaux CFDT, the French and Netherlands Governments, and the Commission.

V — Analysis of the questions

38. The Conseil d'État has asked the Court to examine two aspects of Directive 93/104: first, whether the definitions contained in the directive refer to the thresholds laid down therein or to the thresholds provided for in national implementing legislation, and, second, whether the establishment of a system of equivalence which takes into account the intensity of work is compatible with the directive.

39. Before analysing the case-law directly applicable to this case, I will set out a number of considerations regarding the effect of time on work and the calculation of working time. Those points will assist my analysis of the questions, which will begin with the second question because only if it is held that the proportional system is compatible with the directive will it be necessary to ascertain the parameters of that system. Otherwise, the analysis requested would be pointless. [29]

29 — As stated in Johansson, A. and Meyer, F., 'La legalite des heures d'equivalence en question (À propos de l'arrêt du Conseil d'État du 3 decembre 2003)', *Droit ouvrier*, April 2004, p 157, the first question is peripheral

A — *Working time*

1. The limitation of working time

40. 'Basic equality exists. Irrespective of social arrangements, there are 24 hours in the day for everyone. Technically, time is something that is impossible to manufacture.' [30] That view explains the fundamental importance of the temporal aspect in contracts of employment and in the work covered by such contracts, because it determines the duration of both while at the same time defining important aspects of the legal status of workers both individually and collectively. [31]

41. Like all other activities, an occupational activity is carried out over time. Its duration on a daily and weekly basis is defined according to financial criteria which take into account the elements necessary for workers to receive a salary with which to meet their 'basic needs'. [32] However, an employer recruits workers to make a profit because the employer must offer goods and services on the market.

42. In the light of those two opposing interests, the working day lasts for the time required to ensure that the value obtained through the effort invested, in conjunction with other production factors, secures the subsistence of one party while generating finance and profit for the other.

43. Nevertheless, while, from a financial point of view, it is essential to stipulate a minimum level below which the profit of the employer decreases to the point that it disappears, from a social and legal perspective it is necessary to set a maximum level in order to protect the health of employees.

44. That objective combines a number of factors: financial factors, including employment and salary levels; technical factors, such as the varying degrees to which industries are automated; and institutional factors, which are the result of collective

30 — Anisi, D., *Creadores de escasez*, Alianza Ed., Madrid, 1995.

31 — Supiot, A., 'À la recherche de la concordance des temps (à propos de la directive européenne "Temps de travail" n° 93/104 du 23 novembre 1993)', *The Regulation ...* , op. cit., pp. 108 to 111, points out that time enables the restriction of the powers of the employer over the employee and the evaluation of the work carried out by the latter. Overall, time is used to set the pattern of work.

32 — Marx, K., *Das Kapital*, Volume 1, Part 3, Chapter 8: 'The Working Day'. Marx repeats that view in Volume 3, Part 7, Chapter 48: 'just as the wild man must struggle against nature to meet his needs, to find his means of life and reproduce those means, the civilised man must do the same while observing all the social forms and all the possible systems of production'.

bargaining or legislation.[33] In the latter context, one of the first examples of State interventionalism in labour relations culminated in the imposition of a maximum threshold for daily working time, through the establishment of a common system, special systems and a framework of derogations. Historically, that threshold evolved from more than 4 000 hours' work per person per year in the early decades of the 19th century to an average of 1 600 to 1 900 hours today.[34]

45. By setting that limit, it is also possible to distinguish between ordinary and extraordinary work, which leads to important consequences because jobs which are out of the ordinary are governed by special rules.[35]

2. The calculation of working time

46. Having established the importance of defining the period during which an employee carries out his duties, it is necessary to establish the points which delimit that period.

47. Traditionally, working time was measured in continuous periods of varying lengths during which 'actual' work was carried out. That concept was linked to the notion of productivity, on which remuneration was also based.

48. Subsequently, account was taken of breaks for taking meals and changing clothes, in addition to time when an employee is merely present at the workplace and time when an employee is at the employer's disposal, although the characteristics of those situations were incorrectly defined.[36]

49. Limiting that calculation to periods when the activity carried out by the employee creates a profit for the employer gives rise to numerous difficulties, owing to the diverse ways in which work can be performed, the different methods of organising work, and constant changes in technical resources which determine and alter the manner in which employees carry out their duties.

50. The situation is the same if the calculation takes into account the degree of control which the employer exercises over the employee or the presence of the employee at the workplace.

33 — Montoya Melgar, A., *Derecho del Trabajo*, 22nd edition, Tecnos, Madrid, 2001, p. 342.

34 — Riechmann, J. and Recio, A., *Quien parte y reparte ... (el debate sobre la reducción del tiempo de trabajo)*, Icaria, Barcelona, 1997, p. 10.

35 — Merino Senovilla, H., *El trabajo ... a tiempo parcial*, Lex Nova, Valladolid, 1994, pp. 166 and 167.

36 — García Ninet, J.I., 'La jornada de trabajo', in Borrajo Dacruz, E. (dir.), *El Estatuto de los trabajadores, Comentarios a las leyes laborales*, Volume VII, Edersa, Madrid, 1982, p. 90 et seq.

51. Accordingly, it is argued that it is more appropriate to use a broad method of assessment which dispenses with detailed classifications, avoids defining each activity or task, and precludes the application of disproportionate and unfair solutions. [37]

B — *Applicable case-law*

52. The Court has previously examined certain aspects of Directive 93/104. In addition to ruling on the legal basis of the directive in *United Kingdom* v *Council*, the Court also specified the aim of the directive and interpreted the concepts of 'working time' and 'rest period' in Article 2. [38] Of particular relevance are the judgments in *BECTU*, *Simap*, [39] *Jaeger* [40] and, to a lesser extent, *Wippel*. [41]

37 — Merino Senovilla, H., op. cit., pp. 168 to 170.

38 — The Court has also analysed other articles of the directive. Recent examples are Case C-133/00 *Bowden and Others* [2001] ECR I-7031, which considered Article 1(3) with regard to employees in the road transport sector; *BECTU*, where the Court examined Article 7(1) which governs annual leave, and held that the article enshrines a right from which there can be no derogations and ruled incompatible with the directive a national rule under which workers do not begin to accrue rights until they have completed a minimum period of continuous employment with the same employer (paragraph 43 et seq.); Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, which also dealt with the duration of annual leave; and Case C-342/01 *Merino Gómez* [2004] ECR I-2605 which interpreted Article 7(1) 'as meaning that where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the directive relating to paid annual leave cannot be regarded as met' (paragraph 33).

39 — Case C-303/98 *Simap* [2000] ECR I-7963.

40 — Case C-151/02 *Jaeger* [2003] ECR I-8389.

41 — Case C-313/02 *Wippel* [2004] ECR I-9483.

1. The purpose of Directive 93/104

53. In general terms, Directive 93/104 seeks to improve employees' living and working conditions through harmonisation of national provisions concerning, in particular, the duration of working time. That is clear from the first, fourth, seventh and eighth recitals in the preamble to the directive and from Article 118a of the EC Treaty which is its legal basis. [42]

54. Such harmonisation is intended to guarantee better protection of the safety and health of workers by prescribing that they are entitled to daily, weekly and annual minimum rest periods and adequate breaks and by providing for a ceiling on the duration of the working week. [43] That protection constitutes a social right conferred on each worker as an essential minimum requirement in order to ensure the protection of his safety and health, [44] and applies without distinction to full-time workers and part-time workers. [45]

42 — *BECTU*, paragraph 37; *Jaeger*, paragraph 45; and *Wippel*, paragraph 46.

43 — *Simap*, paragraph 49; *BECTU*, paragraph 38; *Jaeger*, paragraph 46; and *Wippel*, paragraph 47.

44 — *BECTU*, paragraph 47, and *Wippel*, paragraph 47.

45 — *Wippel*, paragraph 48.

2. The concepts of 'working time' and 'rest period'

55. The duties performed by doctors in primary care teams who are required to be physically present in the hospital or to be on stand-by and contactable provided the Court with the opportunity to lay down certain criteria concerning the scope of the definitions set out in Directive 93/104.

56. In *Simap*, it was held, on the one hand, that the definitions in the first two paragraphs of Article 2 are in opposition to one another (paragraph 47), and, on the other, that a distinction must be drawn between the situation of doctors on call who are required to be present at the health centre for the purpose of performing their duties, since time spent at the health centre must be regarded as working time 'in its entirety' (paragraphs 48, 49 and 52), and the situation of doctors who must be available to be contacted but are not required to be at the health centre, since for the latter only time 'linked to the actual provision of primary care services' is taken into consideration (paragraph 50).

57. The first general statement of those criteria was set down in the order of the Court in *CIG*,[46] which ruled that, subjectively, doctors and nursing staff carrying out activities in the on-call service in primary care teams and in other services which treat outside emergencies were covered by the scope of the directive, and accordingly all time spent in the exercise of such activities must be regarded 'in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104'.

58. In *Jaeger*, the Court repeated those requirements with regard to on-call services provided by doctors in a hospital who were permitted to sleep when their expertise was not needed. After setting out a number of paragraphs from the *Simap* judgment and pointing out the similarities between the activities in issue in the two cases, the Court held that the concepts concerned 'may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose' of the directive, whose full efficacy and uniform application may only be secured by means of 'an autonomous interpretation' (paragraph 58), adding that no derogations are permitted (paragraphs 81 and 91). Accordingly, 'the fact that the definition of the concept of working time refers to "national law and/or practice" does not mean that the Member States may unilaterally determine the scope of that concept', and Member States may not 'make subject to any condition the right of

46 — Case C-241/99 [2001] ECR I-5139, paragraphs 33 and 34

employees to have working periods and corresponding rest periods duly taken into account' (paragraphs 59 and 82).

59. The Court went on to point out that, since 'the decisive factor' in considering that the characteristic features of the concept of working time are present is the requirement of physical presence at the place determined by the employer and of availability to the employer in order to be able to provide the service concerned when necessary (paragraph 63), periods when no professional activity is carried out cannot be regarded as rest periods (paragraph 65). Furthermore, 'equivalent compensating rest periods' within the meaning of Article 17(2) and (3) of Directive 93/104 are characterised by the fact that during such periods the worker is not subject 'to any obligation vis-à-vis his employer which may prevent him from pursuing freely and without interruption his own interests' (paragraph 94).

60. That approach was followed in *Pfeiffer and Others*,[47] which concerned time spent in attendance by emergency workers in the framework of emergency activities comprising periods of inactivity of varying lengths between emergency assistance. The Court held that such periods must 'be taken into account in their totality in the calculation of maximum daily and weekly working time' (paragraphs 93 to 95).

3. Conclusion

61. The Court has held that the aim of Directive 93/104 is to improve the safety and health of workers. In order to achieve that aim, the directive is based on a binary concept of time, comprising working time and rest time. The former requires that certain criteria must be satisfied cumulatively, namely, that the worker must be present at the workplace, at his employer's disposal and carrying out his activity,[48] while the latter is defined in opposition to the former.

62. It has been pointed out that the rules governing working time were drawn up mainly, but not exclusively,[49] by reference to the factors concerned in order to provide

47 — Joined Cases C-397/01 to C-403/01 [2004] ECR I-8835.

48 — Opinions are divided in France as to whether the Cour de cassation has adopted the same definition (Barthélémy, J., *La notion de durée du travail et la civilisation de l'information*, JCP éd. G 1998 — I — 114, pp. 375 to 379) or retained a wider definition which does not require that the three criteria are satisfied cumulatively (Bélier, B., 'Temps de travail effectif et permanence du lien de subordination', *Droit social*, 1998, p. 5340 et seq.; Moizard, N., *Droit du travail communautaire et protection nationale renforcée (L'exemple du droit du travail français)*, Volume II, Presses Universitaires d'Aix-Marseille, Marseille, 2000, p. 583).

49 — Arrigo, G., op. cit., p. 216.

protection against the risks of insufficient rest, excessive duration of activity, and the unlawful organisation of that activity.

63. By contrast, rest time is characterised by the fact that the employee is not answerable to the employer.

C — *The system of equivalence in the light of the case-law*

64. Under the French weighting system,[50] certain periods spent on call at particular kinds of workplace are calculated as 'actual working time', but that calculation is subject to restrictions.[51] The justification for that approach is that there are certain periods of inactivity inherent in the work[52] or, in the words of the Conseil d'État, that, in some sectors, the work is intermittent in nature or of a lower intensity.[53]

65. Accordingly, the binomial working time/rest time relationship is not disregarded, since, from a legal point of view, time spent on call is not regarded as rest time and is counted as working time, albeit to a lesser degree.

66. That method of calculating time spent in the workplace is not compatible with the interpretation given in the case-law of Directive 93/104, since time spent in the exercise of an employment activity must be regarded in its entirety as working time and no reductions are permitted.[54]

D — *The solution proposed*

67. The impossibility of calculating time spent at the workplace differently according

50 — Some writers place its origin in the 40-hour law of 21 June 1936; for example, Morand, M., 'Temps de présence, temps d'équivalence et droit communautaire', *Semaine sociale Lamy*, No 1138, 6 October 2003, p. 6. Others, including Johansson, A. and Meyer, F., op. cit., p. 154, trace it back to an initiative of the Vichy regime in 1942, and argue that it is impossible to justify under national law a system of equivalence in accordance with the definition of actual working time set out in the Code du travail (pp. 155 and 156).

51 — Morel, F., *Temps de travail — Durée, réduction et aménagement*, Revue fiduciaire, Paris, 2003, p. 58 et seq.

52 — The same view is set out in Gatumel, D., *Le droit du travail en France (principes et approche pratique du droit du travail)*, Édition Francis Lefebvre, 4th edition, Paris, 1993, p. 215.

53 — Morand, M., op. cit., p. 6, argues that the French system of equivalence is similar to the system under German law, which was analysed in *Jaeger*, in that it treats time spent on call in the same way as work by reference to the average duration of the services required (p. 8).

54 — That view is shared, inter alia, by Morel, F., op. cit., p. 342; Morand, M., op. cit., p. 144; and Johansson, A. and Meyer, F., op. cit., pp. 157 and 158.

to the intensity of the activity which the employee carries out is derived from the fact that the Court has held that the definition of working time requires the three criteria set out in Article 2(1) of Directive 93/104 to be fulfilled cumulatively. That requirement gives rise to a bipolar relationship which precludes the inclusion of new concepts and does not take account of the latest developments in employment relations. It also gives rise to other problems, explained in the written observations of the Member States which have taken part in the proceedings, since the result is that periods of inactivity in employment are not taken into consideration, the outcome of the work carried out is disregarded, and other categories are ignored, thereby precluding the creation of a third kind of intermediate or 'grey' time. [55]

68. That interpretation differs from the one put forward by the Advocates General in *Simap* and *Jaeger*, where it was proposed that the elements set out in Article 2(1) be regarded as autonomous aspects.

69. In *Simap*, Advocate General Saggio argued [56] that, although the wording of Article 2 is conducive to the assumption that only time in respect of which all the criteria indicated in that article are fulfilled should be calculated as working time, consideration of the imprecise expressions used in the article leads to a different view, since application of the three criteria together is difficult to reconcile with the aims of the directive (point 34). The Advocate General also warned of the practical consequences of the cumulative effect (point 35).

70. I took the same view in the Opinion I delivered in *Jaeger* (point 28), although I pointed out that only one criterion would not suffice for certain periods to be calculated as working time (point 29). I argued that periods of time when an employee is in the workplace and at the employer's disposal constitute working time even if the employee is not carrying out his duties, since the employer has the power to assign tasks to the staff at any time. The same can be said of times when an employee is at work and carrying out his activity but is not at the

55 — Waquet, P., 'Le temps de repos', *Droit social*, 2000, p. 288, refers to a 'tiers temps'; likewise, Ray, V.J.-E., 'Les astreintes, un temps du troisième type', *Droit social*, 1999, p. 250. However, Barthélémy, J., 'Temps de travail et de repos: l'apport du droit communautaire', *Droit social*, 2001, p. 78, refers to 'grey time'.

56 — According to Baron, F., 'La notion de temps de travail en droit communautaire', *Droit social*, 2001, p. 1098, the Advocate General used 'highly pertinent' arguments. The same author criticises the fact that the Court did not follow the approach put forward by the Advocate General, which was preferable on the grounds of its clarity, in so far as the primary aim of Directive 93/104 is to protect workers. With regard to the same issue, Morel, F., 'Travail et repos: quelle articulation entre le droit communautaire et le droit national?', *Droit social*, 2004, p. 143, also prefers the approach of the Advocate General.

employer's disposal because he has a wide autonomy to obtain a specific result, and of times when he is at the employer's disposal and is carrying out his duties, but is not in the workplace (point 30). [57]

71. The case-law of the Court has also given rise to concern on the part of the Community legislature, which has decided to amend the current provisions. [58] In that regard, the proposal for a directive of the European Parliament and of the Council amending Directive 2003/88 [59] aims to introduce two new concepts: 'on-call time', when the worker is available at his workplace or at another workplace determined by his employer in order to take up his habitual work and/or certain activities and tasks associated with being on duty (Article 2, point 1a), and the 'inactive part of on-call time', when the worker is available in the same way but does not perform any activities or tasks related with being on duty (Article 2, point 1b). 'The entire period of on-call time' is regarded as working time; however, 'by collective agreements or other agreements between the two sides of industry or by means of laws or regulations', inactive parts of such time 'may be calculated in a specific manner in order to comply with the maximum weekly average working time laid down in Article 6' (Article 2a). [60]

72. Permitting 'inactive' periods to be calculated precisely, in accordance with laws or collective agreements, would lead to the system of equivalence being compatible with Community law.

73. All those grounds lead me to repeat the approach advocated in previous Opinions and to propose that the Court relax the definitions so that, for time to be classed as working time, it is not necessary for all the criteria referred to in Article 2(1) of Directive 93/104 to be satisfied, although one criterion alone will not suffice.

57 — According to Morel, F., op. cit., p. 143, that approach had the advantage of being flexible and logical.

58 — See the communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions and the social partners at Community level on the re-exam of Directive 93/104 (COM(2003) 843 final), in particular point 3.2: 'The impact of the Court's case-law' (pp. 22 and 23). In its opinion on the communication (OJ 2004 C 302, p. 74), the European Economic and Social Committee attributes 'the surprise the judgments caused both within the EU institutions and in the Member States' to the fact that 'the scope of the definition of working time [in Directive 93/104] seems neither to have been analysed nor discussed satisfactorily' (point 3.2.4).

59 — COM(2004) 607 final. The explanatory memorandum states that 'the interpretation of certain provisions of the directive by the European Court of Justice, on the occasion of several requests for preliminary rulings under Article 234 of the Treaty, had a profound impact on the concept of "working time" and, consequently, on essential provisions of the directive. The Commission therefore considered that it was necessary and convenient to analyse the effects of this case-law, in particular of the rulings in the *Simap* and *Jaeger* cases, which held that on-call duty performed by a doctor when he is required to be physically present in the hospital must be regarded as working time' (point 3). That was without prejudice to the fact that, as the agent of the Commission acknowledged at the hearing, the proposed changes reflect a political will to engage with the Member States so that they have greater freedom of action. At the time this Opinion is delivered, the European Parliament has amended the proposal at the first reading and I therefore refer to the text approved by that institution on 11 May 2005 (European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 2003 88/EC concerning certain aspects of the organisation of working time (COM(2004) 607 — C6-0122/2004 — 2004/0209 (COD)), which can be viewed at www.europarl.eu.int.

60 — In that regard, see Barthélemy, J., 'Temps de travail ...', op. cit., pp. 77 and 78.

74. Should the Court accept that proposal, the calculation of working time would be affected in such a way that the proportional system would be compatible with the Community measure and there would be no need to await the proposed legislative amendments.

75. The arguments I have set out do not prevent the system of equivalence giving rise to certain difficulties, since, because that system involves a legal fiction (designed to reduce the value of time when an employee is merely present at the workplace waiting to take up his duties, on the ground that such time is presumed to have less productive value), it is necessary to state the rules governing the percentage by which working time is reduced.

76. In addition, too much relaxation of the definitions would lead to extensive blurring of the distinction between them, for the purposes of agreements to extend the working day, since although formally the thresholds laid down would be respected — notwithstanding the breadth attributed to the definitions, actual working time would not exceed those thresholds [61] — in reality, those thresholds would be infringed and the protection of the affected workers would be placed in jeopardy. In that connection, the agent of the French Government acknowledged at the hearing that occasionally the maximum weekly ceiling laid down in the directive is exceeded.

77. Furthermore, Mr Dellas does not dispose freely of his time during the periods he spends on on-call duty. Under the contract of employment, he is required to provide his services on one or more occasions, as circumstances require, and it is impossible to know in advance how many such occasions will arise. There are also instances when the night passes without incident and Mr Dellas's services are not required. It would be difficult to condense the numerous possibilities and contributing factors into an equitable, proportional formula.

78. In that context, the calculation of working time exceeds the bounds of a mathematical operation. The definition of working time includes a framework of protection for the weakest party and creates a system of legal rules which reflects the continual development of improvements in conditions of employment. The fixing of equivalent factors disregards that protective approach and work carried out is assessed from a civil law point of view, which postulates material equality. [62]

79. Finally, the limited scope of Directive 93/104 makes it inadvisable to address other controversial subjects, such as the usefulness

61 — Favennec-Héry, F., 'Les 35 heures: injonction ou incitation', *Droit social*, 1997, p. 1073 et seq.

62 — With regard to part-time work, see Merino Senovilla, H., op. cit., pp. 173 and 174.

of the proportional system in setting salary levels, [63] which is touched on in a number of the written observations submitted in these proceedings. The power to regulate methods of calculating remuneration for periods of less intensive work is not at issue. [64] In any event, as the Court ruled in the cases cited, economic consequences do not preclude the application of the Community rules; the fifth recital in the preamble to the directive states with sufficient clarity that 'the improvement of workers' safety, hygiene and health at work ... should not be subordinated to purely economic considerations'.

E — *Application of the Community definitions*

80. Directive 93/104 sets a ceiling of 48 hours' work per seven-day period as the maximum weekly working time (Article 6). The remaining provisions of the directive relate to rest periods, that is, daily rest (Article 3), breaks (Article 4), weekly rest (Article 5) and annual leave (Article 7), an approach which is based on the need to protect employees from their own actions, thereby circumventing the natural tendency to work more in order to increase remuneration. [65] The provisions governing night work are more stringent and work must not exceed 'an average of eight hours in any 24-hour period', in addition to other guarantees (Articles 8 to 11).

81. It is possible for national measures transposing the directive to confer a higher level of protection, which must be determined by means of a global rather than an analytical assessment — rule by rule — because any other approach would distort the system and alter its features.

82. It is clear from that approach that the concept of weekly working time must be based in its entirety on the Community definitions, which are structural in nature. Member States may not be permitted to reduce weekly working time by underhand means which infringe those definitions.

83. Notwithstanding that there are a number of derogations from the Community rules, [66] none applies to Article 2, from which it

63 — On the question of compatibility in that regard, see Morand, M., op. cit., p. 9, and Morel, F., op. cit., p. 144, who also assert that the system of equivalence is capable of applying to other areas such as overtime and compensatory rest. The same authors argue that, under Article L. 212-4 of the Code du travail, it is not necessary for all equivalent time to be remunerated or taken into account for the purposes of the minimum inter-professional salary.

64 — As the agent of the Netherlands Government pointed out at the hearing, that matter has no bearing on the proceedings.

65 — Waquet, P., 'En marge de la loi Aubry: travail effectif et vie personnelle du salarié', *Droit social*, 1998, pp. 963 to 969.

66 — Such derogations may be general (by means of laws, regulations or administrative provisions), collective (by means of collective agreements), or individual (by means of agreements with employees) — Article 17.