

JUDGMENT OF THE COURT (Third Chamber)  
7 September 2006 \*

In Case C-484/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on  
23 November 2004,

**Commission of the European Communities**, represented by G. Rozet and  
N. Yerrell, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland**, represented initially by  
M. Bethell, and subsequently by E. O'Neill, acting as Agents, and by K. Smith,  
Barrister,

defendant,

\* Language of the case: English.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, S. von Bahr, A. Borg Barthet, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 January 2006,

after hearing the Opinion of the Advocate General at the sitting on 9 March 2006,

gives the following

### Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that by applying the derogation provided for in Article 17(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41), ('Directive 93/104') to workers whose working time is partially not measured or predetermined or can be determined partially by the worker

himself and by failing to adopt the measures necessary to implement the rights of workers to daily and weekly rest, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under the abovementioned Article 17(1) and under Article 249 EC.

## Legal context

### *Community legislation*

- 2 According to Article 1(1) of Directive 93/104, the directive lays down minimum safety and health requirements for the organisation of working time.
- 3 Articles 3 and 5 of that directive, which are included in Section II thereof, regulate the minimum daily and weekly rest periods for workers. Member States are thus 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 (Article 3) and, per each seven-day period, to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3 (Article 5, first paragraph).
- 4 Under Article 17(1) of Directive 93/104:

'With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article[s] 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves ...'.

- 5 Pursuant to Article 18(1)(a) of the same directive, Member States had to adopt the laws, regulations and administrative provisions necessary to comply with it by 23 November 1996.
- 6 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) replaced Directive 93/104 with effect from 2 August 2004. However, the Commission's allegation of failure to fulfil obligations concerns Directive 93/104, which was applicable on the expiry of the period laid down in the reasoned opinion.

### *National legislation*

- 7 The Working Time Regulations 1998, in the version in force in 1999 (the 'WTR'), provides in Regulation 10 thereof, which implemented Article 3 of Directive 93/104, that an adult worker is entitled to a rest period of not less than 11 consecutive hours in each 24-hour period.
- 8 Regulation 11 of the WTR, implementing Article 5 of the directive, provides that, subject to paragraph (2) thereof, an adult worker is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period.

9 Regulation 20(2) of the WTR is worded 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.’

10 In order to help employers and workers understand the WTR, the Department of Trade and Industry published a set of guidelines on the various provisions of those regulations (the ‘guidelines’).

11 In accordance with certain paragraphs in sections 5 and 6 of those guidelines, ‘employers must make sure that workers can take their rest, but are not required to make sure they do take their rest’.

### **Pre-litigation procedure**

12 On 21 March 2002, the Commission sent a letter of formal notice to the United Kingdom under Article 226 EC in which it alleged that the latter had not correctly

implemented Articles 3, 5, 8 and 17(1) of Directive 93/104. The United Kingdom authorities replied by letter of 31 May 2002.

13 Since it was not satisfied with that reply, the Commission sent a reasoned opinion to the United Kingdom on 2 May 2003, requesting that Member State to take the measures necessary to comply with its obligations under Directive 93/104 within two months of notification of that opinion.

14 By letter of 30 June 2003, the authorities of that Member State replied to the reasoned opinion, stating that the amendment relating to the calculation of night workers' hours in accordance with Article 8 of Directive 93/104 had been published, but insisting that the national measures implementing Articles 17(1), 3 and 5 of that directive, including the guidelines, were consistent with it.

15 The Commission therefore decided to bring the present action.

## **The action**

*The first objection, relating to the derogation laid down in Article 17(1) of Directive 93/104*

16 The Commission's first objection is that Regulation 20(2) of the WTR goes beyond the derogation laid down in Article 17(1) of Directive 93/104. The derogation

applies only to workers whose working time as a whole is not measured or predetermined or can be determined by the workers themselves. However, the Commission notes that the WTR provide that where a worker's working time is only partially measured, predetermined or determined by the worker the provisions relating to the weekly working period and night work apply only to that part of the work which is measured, predetermined or cannot be determined by the worker himself.

- 17 In the defence, the United Kingdom states that it no longer challenges that objection and that it undertakes to repeal the contested provision of the WTR. At the hearing it intimated that the provision amending Regulation 20(2) of the WTR would come into force on 6 April 2006.
- 18 In the reply, the Commission contends that the measures necessary to make the national legislation consistent with Article 17(1) of Directive 93/104 have not yet been taken by the United Kingdom and that therefore the subject-matter of its application remains unchanged.
- 19 It is settled case-law that 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 that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-420/02 *Commission v Greece* [2004] ECR I-11175, paragraph 23, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 32).

20 So far as concerns the scope of the derogation set out in Article 17(1) of Directive 93/104, it is apparent from the express wording of that provision, as the Commission rightly pointed out, that it applies only to workers whose working time as a whole is not measured or predetermined or can be determined by the workers themselves on account of the kind of activity concerned.

21 It is common ground in the present case that on the expiry of the period set in the reasoned opinion the United Kingdom had not adopted the measures necessary to comply with that provision, so that the Commission's first objection must be held to be well founded.

*The second objection, relating to the guidelines and the rest periods laid down in Articles 3 and 5 of Directive 93/104*

#### Admissibility

22 The United Kingdom submits that the Commission's second objection must be rejected as inadmissible. First, it points out that in the reasoned opinion the Commission confined its criticism exclusively to the guidelines, whereas the application is not limited in such a way in so far as it is directed at the lack of adequate measures to ensure full and effective implementation of Directive 93/104, thus going beyond the ambit of the reasoned opinion.



- 23 Secondly, it claims that pleading a breach of the general obligation imposed on Member States on the basis of the third paragraph of Article 249 EC is an inadequate argument in cases where incorrect implementation of the directive in question should have been argued. It is for the Commission to identify clearly each respect in which the steps taken by the Member States are insufficient to ensure proper implementation of the directive.
- 24 In that respect, it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity to comply with its obligations under Community law, on the one hand, and on the other to avail itself of its right to defend itself against the objections formulated by the Commission (see, *inter alia*, Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 23, and Case C-29/04 *Commission v Austria* [2005] ECR I-9705, paragraph 25).
- 25 It follows that, first, the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision and that consequently the reasoned opinion and the application must be founded on identical charges (see, *inter alia*, *Commission v Austria*, cited above, paragraph 26). However, that requirement cannot be stretched so far as to mean that in every case the statement of the objections expressly set out in the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings as defined in the reasoned opinion has not been extended or altered (see Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 24).
- 26 Second, the reasoned opinion must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under Community law (see, *inter*

alia, Case C-439/99 *Commission v Italy* [2002] ECR I-305, paragraph 12, and Case C-29/04 *Commission v Austria*, paragraph 27).

27 In the present case, it is clear from both the reasoned opinion and the Commission's originating application that the second objection put forward by the latter relates to the retaining, in the form of the guidelines, of express instructions to employers stating that they are not required to ensure that workers actually take their rest periods. Accordingly, the Commission takes the view that the United Kingdom has not taken all the measures necessary to ensure that the objective of Directive 93/104 is met.

28 The subject-matter of the action, which has been clearly defined, has not changed during the proceedings and the first plea of inadmissibility raised by the United Kingdom must therefore be dismissed.

29 Concerning the United Kingdom's argument that it is not sufficient to rely on the third paragraph of Article 249 EC for the purpose of proving that Directive 93/104 has been incorrectly implemented, the Commission's second objection does not refer to the incorrect implementation of Articles 3 and 5 of that directive per se but rather to the existence, in the form of the guidelines, of national measures likely to encourage a practice of non-compliance with its provisions relating to the daily and weekly rest rights of workers, an objection clearly stated in the reasoned opinion and the application.

30 In the present case, both the pre-litigation procedure and the proceedings before the Court have demonstrated that the United Kingdom was quite capable of submitting

defence arguments against the objections made by the Commission on that issue, those objections being explained in enough detail to enable that Member State to provide a proper reply to them. The fact that the Commission chose to base its second objection solely on the third paragraph of Article 249 EC and not on Articles 3 and 5 of Directive 93/104, which are the provisions of the directive indirectly at issue but whose formal implementation in the WTR is not, as such, the subject of the Commission's action, cannot, in this situation, make the latter's second objection inadmissible.

- 31 The second plea of inadmissibility raised by the United Kingdom must therefore be dismissed and, accordingly, the Commission's second objection must be declared admissible.

## Substance

- 32 The Commission submits that the guidelines endorse and encourage a practice of non-compliance with the requirements of Directive 93/104. Employers are instructed that they are not required to ensure that the workers are actually invoking and benefiting from the rest periods to which they are entitled, but merely that those who wish to claim such periods are not prevented from doing so. The Commission maintains that those express instructions to employers through the medium of the guidelines dissuade the latter from ensuring that the workers benefit from the minimum daily and weekly rest requirements imposed by that directive.

- 33 The United Kingdom submits that, far from encouraging non-compliance with the national implementing rules, the guidelines emphasise the duty upon employers to ensure that their workers can take the rest periods to which they are entitled, while acknowledging the obvious limits to the employers' responsibility in this respect. The latter should not behave in a way which would result in preventing the workers from taking the rest to which they have a right, for example by imposing work commitments incompatible with such rest.
- 34 The United Kingdom claims that an interpretation of Directive 93/104 to mean that it not only requires employers to allow the workers to benefit from the rest periods provided for, but also obliges the workers to take that rest, does not follow from any of the language versions of the directive and would be impractical and ill-defined, given the uncertainties raised as to the extent of the measures which employers would be required to take and the circumstances in which it would be possible to consider that that rest had been appropriately taken.
- 35 So far as the purpose of Directive 93/104 is concerned, it is apparent from Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is the legal basis for that directive, from the first, fourth, seventh and eighth recitals in the preamble thereto, from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, mentioned in Article 136 EC, point 8 and the first subparagraph of point 19 of which are referred to in the fourth recital in the preamble to the directive, and also from the express wording of Article 1(1) of the directive, that the latter's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (see, *inter alia*, Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37, and Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraph 40).

- 36 According to those provisions, this 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 that they are entitled to minimum rest periods — particularly daily and weekly — and adequate breaks and by providing for a ceiling of 48 hours on the average duration of the working week, a maximum limit which is expressly stated to include overtime (see *BECTU*, paragraph 38, and *Dellas*, paragraph 41).
- 37 Under Articles 3 and 5 of Directive 93/104, 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 seven-day period, to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3. Those provisions impose clear and precise obligations on the Member States as to the result to be achieved by such entitlement to rest.
- 38 In addition, in view of both the wording of that directive and its purpose and scheme, the various requirements it lays down concerning 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 (see *BECTU*, paragraphs 43 and 47; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 100; and *Dellas*, paragraph 49).
- 39 Therefore, it follows from the express wording of Articles 3 and 5 of Directive 93/104 as well as from the eighth recital thereto, according to which workers must

be granted minimum periods of rest, from the purpose of that directive as referred to in paragraphs 35 to 38 of this judgment and from the scheme it puts in place that workers must actually benefit from the daily and weekly periods of rest provided for by the directive.

40 In order to ensure that the rights conferred on workers by Directive 93/104 are fully effective, Member States are under an obligation to guarantee that each of the minimum requirements laid down by the directive is observed, including the right to benefit from effective rest (*Dellas*, paragraph 53). In fact, that is the only interpretation which accords with the objective of that directive, which is to secure effective protection of the safety and health of employees by allowing them to enjoy the minimum periods of rest to which they are entitled (see Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 70).

41 As the Court has held, in the light of the essential purpose of Directive 93/104, which aims to effectively protect the safety and health of workers, each worker must, inter alia, enjoy adequate rest periods, which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work, but also preventive in nature, so as to reduce as much as possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are likely to produce (*Jaeger*, paragraph 92).

42 A Member State which, in the national measure implementing Directive 93/104, provides that the workers are entitled to certain rights to rest and which, in the guidelines for employers and workers on the implementation of those rights, indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements laid down by Articles 3 and 5 of that directive or its essential objective.

- 43 As the Advocate General rightly observed in point 67 of her Opinion, and as the Commission furthermore conceded during the hearing, compliance with the obligations set out by Directive 93/104 should not, as a general rule, extend to requiring the employer to force his workers to claim the rest periods due to them. The employer's responsibility concerning observance of the rest periods provided for by that directive cannot be without limits.
- 44 However, in the present case, by restricting the obligations on employers as regards the workers' right to actually benefit from the minimum rest periods provided for in Articles 3 and 5 of Directive 93/104 and, inter alia, letting it be understood that, while they cannot prevent those rest periods from being taken by the workers, they are under no obligation to ensure that the latter are actually able to exercise such a right, the guidelines are clearly liable to render the rights enshrined in Articles 3 and 5 of that directive meaningless and are incompatible with the objective of that directive, in which minimum rest periods are considered to be essential for the protection of workers' health and safety (see, to that effect, *BECTU*, paragraph 49).
- 45 As regards the United Kingdom's argument that the wording itself of Directive 93/104 indicates that there is a clear distinction between Articles 3, 4, 5 and 7, which refer to individual workers' rights and set out a mere discretion, and Articles 6 and 8 of the same directive, which clearly impose a precise obligation as to the result to be achieved concerning the limitation of working time, neither the various language versions of that directive nor the Court's case-law relating to the directive, its objective and the nature of the rights to rest which it lays down support that interpretation.

- 46 In respect of Article 7(1) of Directive 93/104, which provides, in the same terms as those used in Articles 3 and 5, that Member States are to take the measures necessary to ensure that every worker 'is entitled' to paid annual leave of at least four weeks, the Court has also held, in paragraph 44 of *BECTU*, that under that provision the worker is entitled to actual rest, with a view to ensuring effective protection of his health and safety.
- 47 In the light of the foregoing considerations, it must be held that by applying the derogation provided for in Article 17(1) of Council Directive 93/104 to workers whose working time is partially not measured or predetermined or can be determined partially by the worker himself and by failing to adopt the measures necessary to implement the rights of workers to daily and weekly rest, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 17(1), 3 and 5 of that directive.

## Costs

- 48 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 United Kingdom must be ordered to pay the costs.



On those grounds, the Court (Third Chamber) hereby:

1. **Declares that, by applying the derogation provided for in Article 17(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 to workers whose working time is partially not measured or predetermined or can be determined partially by the worker himself and by failing to adopt the measures necessary to implement the rights of workers to daily and weekly rest, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 17(1), 3 and 5 of that directive;**
  
2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]