OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 18 January 2007 [1]

I — Introduction

1. By this application, the Commission of the European Communities is asking the Court to declare that, by restricting the duty upon employers to ensure the safety and health of workers in every aspect related to work to a duty to do so to the extent to which it is reasonably practicable, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. [2]

II — The relevant legislation

A — *Directive 89/391*

2. Adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have now been replaced by Articles 136 EC to 143 EC), in implementation of the Third Community Action Programme on safety, hygiene and health at work of 23 October 1987, [3] Directive 89/391 — also known as the 'framework directive' — lays down general rules concerning the prevention of occupational risks and the protection of the safety and health of workers, thereby seeking to achieve the technical harmonisation of the rules on safety within the Community (hereinafter: the 'framework directive'). The general scope of the framework directive is revealed by Article 1(2), which defines the object of the directive, and by Article 16. Article 16(1) provides that the Council, acting on a proposal from the Commission based on Article 118a of the Treaty, is to adopt directives in specific

1 — Original language: Italian.
2 — OJ 1989 L 183, p. 1.
3 — OJ 1988 C 28, p. 3.

sectors (the so-called 'daughter directives');[4] Article 16(3) then stipulates that 'the provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/or specific provisions contained in these individual Directives'.

3. That said, it is necessary first to call to mind the text of Article 118a of the Treaty and, thereafter, the text of those provisions of the framework directive of relevance in this case, as well as the broad outline of the system which the framework directive adopts.

4. Introduced into the EC Treaty by Article 21 of the Single European Act, Article 118a attached specific and self-standing significance to safety at work in the context of the Community's social policy. It has provided the legal basis for the adoption, in that sphere, of the so-called 'second generation' directives. Unlike their predecessors, these second-generation directives are founded not on Article 100 (now Article 94 EC) or Article 100a (now Article 95 EC) of the EC Treaty, since the teleological constraint that those articles placed on directives adopted using them as the legal basis — namely the requirement that such rules be necessary for the establishment and operation of the common market — left them ill-adapted to extensive regulation of the sector.[5]

5. According to Article 118a(1) of the Treaty, 'Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made'. In order to help achieve that objective, Article 118a(2) provides that the Council, acting in accordance with the procedure referred to therein, 'shall adopt by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States', and avoiding 'imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings'. Finally, Article 118a(3) specifies that the 'provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty'.

6. The framework directive is divided into four sections. Section I, entitled 'General

4 — To date, 19 specific directives have been adopted on the basis of Article 16(1) of the framework directive.

5 — As regards the choice of legal basis appropriate for regulating specific aspects of the sector at issue, see Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755.

Provisions', consists of four articles. Articles 1 and 2 define the object and scope of the directive respectively, while Article 3 defines the terms 'worker', 'employer', 'workers' representative' and 'prevention'. More specifically, Article 3(b) defines 'employer' as 'any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment'. According to Article 4(1), 'Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive'.

7. Section II of the framework directive, entitled 'Employers' Obligations', consists of eight articles. Under the heading 'General provision', Article 5(1) sets out the employer's duty to ensure safety as follows:

'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'

8. According to Article 5(2) and (3):

'2. Where, pursuant to Article 7(3), an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.

3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.'

9. Finally the first subparagraph of Article 5(4) provides that the directive 'shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual or unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care'. Under the second subparagraph of Article 5(4), 'Member States need not exercise the option referred to in the first subparagraph'.

10. The substance of the duty upon the employer to ensure safety is then set out in Articles 6 to 12 of the framework directive.

11. Of particular relevance for the purposes of the present case are the provisions of

Article 6, which is entitled 'General obligations on employers' and provides as follows:

'1. Within the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organisation and means.

The employer shall be alert to the need to adjust these measures to take account of changing circumstances and aim to improve existing situations.

2. The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention:

(a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combating the risks at source;

(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors related to the working environment;

(h) giving collective protective measures priority over individual protective measures;

(i) giving appropriate instructions to the workers.

3. Without prejudice to the other provisions of this Directive, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment:

(a) evaluate the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of work places.

Subsequent to this evaluation and as necessary, the preventive measures and the working and production methods implemented by the employer must:

— assure an improvement in the level of protection afforded to workers with regard to safety and health;

— be integrated into all the activities of the undertaking and/or establishment and at all hierarchical levels;

(b) where he entrusts tasks to a worker, take into consideration the worker's capabilities as regards health and safety;

(c) ensure that the planning and introduction of new technologies are the subject of consultation with the workers and/or their representatives, as regards the consequences of the choice of equipment, the working conditions and the working environment for the safety and health of workers;

(d) take appropriate steps to ensure that only workers who have received adequate instructions may have access to areas where there is serious and specific danger.

4. Without prejudice to the other provisions of this Directive, where several undertakings share a work place, the employers shall cooperate in implementing the safety, health and occupational hygiene provisions and, taking into account the nature of the activities, shall coordinate their actions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers' representatives of these risks.

5. Measures related to safety, hygiene and health at work may in no circumstances involve the workers in financial cost.'

12. Article 7 et seq. of the framework directive place more specific obligations on employers, such as: the organisation of protective and preventive services (Article 7); the adoption of appropriate measures in relation to first aid, fire-fighting, the evacuation of workers and serious and imminent danger (Article 8); possession of an assessment of the risks to safety and health at work and determination of the protective measures to be taken, including the protective equipment to be used (Article 9); as well as obligations in relation to information, consultation, participation and training of workers (Articles 10, 11 and 12).

13. Section III of the framework directive consists of a single article which defines workers' responsibility in relation to safety issues (Article 13).

14. Finally, Section IV of the framework directive concerns 'Miscellaneous Provisions', including the abovementioned Article 16.[6] Article 18(1) provides that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992'.

6 — See point 2 above.

B — *The relevant national legislation*

15. The United Kingdom was the first industrialised country to adopt legislation on the safety and health of workers. The first Factory Act, which was designed to regulate child labour, dates back to 1802, and was followed by numerous pieces of legislation on health and safety, initially confined to specific categories of workers and particular industrial sectors, but subsequently extended to cover all industrial activities by the Factory and Workshop Act 1878.

16. The law on preventing industrial accidents was piecemeal and based on a highly pragmatic approach to legislation, and, with a view to rendering it uniform, a Committee of Inquiry on Safety and Health at Work, chaired by Lord Robens, was set up in 1970. In 1972, that Committee presented a report containing a variety of recommendations which were used as the basis for adopting the Health and Safety at Work Act 1974 (the 'HSW Act').

17. The HSW Act is the cornerstone of the entire British system of safety at work. It is basically a framework law — amended many times over the years — which lays down the minimum requirements applicable to all

workers, regardless of their sector of activity. Various regulatory acts have been adopted on the basis of the HSW Act to supplement the rules which that Act lays down.

18. It should be pointed out here that, under the law of the United Kingdom, the transposition of the framework directive resulted in a limited number of legislative measures, both because the existing system was regarded as broadly consistent with the provisions of the framework directive and because the Conservative Government of the day wished, for political reasons, to restrict to a minimum the impact of the directive — and of Community social policy measures more generally — on the national system.

19. As regards the provisions whereby United Kingdom legislation was brought into line with the provisions of Article 5(1) of the framework directive, the United Kingdom Government cites section 2 of the HSW Act, entitled 'General duties of employers to their employees'. Section 2(1) provides as follows:

'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.'

20. Section 2(2) sets out a non-exhaustive list of obligations incumbent on an employer under the duty to ensure safety which is set out in general terms in section 2(1). It provides:

'Without prejudice to the generality of an employer's duty under the preceding subsec-

tion, the matters to which that duty extends include in particular:

(a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risk to health in connection with the use, handling, storage and transport of articles and substances;

(c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.'

21. Failure to discharge a duty imposed on the employer under section 2 of the HSW Act gives rise to criminal sanctions on the basis of the provisions of section 33(1)(a) and section 47(1)(a) of the HSW Act.

22. In cases of workplace accidents or occupational diseases, victims are compensated on the basis of the provisions of the Industrial Injury Scheme, which is funded through general taxation and, consequently, on a non-contributory basis.

23. Furthermore, although, in accordance with section 47(1) of the HSW Act, failure to discharge a duty imposed under section 2 of the Act does not give rise to civil liability on the part of the employer, civil liability is provided for under various provisions of the Management of Health and Safety at Work Regulations 1999, which have transposed certain of the provisions of the framework directive and the daughter directives. [7]

24. Finally, the duty on the employer to provide compensation in respect of damage resulting from a failure to discharge the duty of care in relation to workers is a principle of common law.

25. As from 1972, under the Employers' Liability (Compulsory Insurance) Act 1969, the majority of employers have been required to take out compulsory civil-liability insurance to cover damage resulting from workplace accidents or occupational diseases.

26. A system similar to that described above operates in Northern Ireland. [8]

III — Pre-litigation procedure

27. On 29 September 1997, the Commission sent the United Kingdom a letter of formal notice in which it set out a number of complaints concerning the transposition of the framework directive into the law of the United Kingdom. One of those complaints alleged that Article 5 of the framework directive had been incorrectly transposed and referred, among other things, to the inclusion in the relevant national legislation of the clause 'so far as is reasonably practicable' (the 'SFAIRP clause'), which, in the Commission's view, limited the scope of the obligation which that provision imposes on employers in a manner incompatible with Article 5(1) of the framework directive.

7 — The case-file indicates that the obstacles to recognising employers' civil liability in cases of the breach of specific obligations under the provisions on the safety and health of workers were definitively removed, following representations by the Commission, by an amendment to the Management of Health and Safety at Work Regulations which entered into force on 23 October 2003.

8 — Provisions that mirror section 2(1) and (2) of the HSW Act are to be found in section 4(1) and (2) of the Health and Safety at Work (Northern Ireland) Act 1978.

28. With regard to that complaint, the United Kingdom responded, in its replies of 30 December 1997 and 23 October 2001 to the letter of formal notice, by enclosing various decisions of the national courts which, in its view, demonstrated that the abovementioned clause was compatible with Article 5 of the framework directive.

29. The Commission was not persuaded by the arguments adduced by the United Kingdom and adopted a reasoned opinion — sent to the United Kingdom on 25 July 2003 — in which it contended, as far as is relevant for the purposes of the present case, that there had been a breach of Article 5(1) for the reasons already set out in the letter of formal notice. The Commission called on the United Kingdom to comply with the reasoned opinion within two months. At the latter's request, that deadline was extended to four months.

30. The United Kingdom responded to the reasoned opinion by a letter of 24 November 2003 in which it challenged the allegation that it had breached Article 5 of the framework directive.

IV — Forms of order sought

31. By an application lodged at the Court's Registry on 21 March 2005, the Commission brought the present action, pursuant to Article 226 EC.

32. The Commission claims that the Court should:

— declare that, by restricting the duty upon employers to ensure the safety and health of workers in every aspect related to work to a duty to do this so far as is reasonably practicable, the United Kingdom has failed to fulfil its obligations under Article 5(1) and (4) of the framework directive;

— order the United Kingdom to pay the costs.

33. The United Kingdom submits that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

V — Analysis

A — *Submissions of the parties*

34. According to the Commission, Article 5(1) of the framework directive, which sets out the fundamental principle that the employer is under a duty to ensure the safety and health of workers in every aspect related to work, is the cornerstone of the system of protection for which the directive provides. Based on the Commission's interpretation of that provision, the employer is liable for any event prejudicial to the safety and health of workers which occurs in his undertaking, with the sole possible exception of the cases specifically mentioned in Article 5(4) of the framework directive. As an exception to the general principle of the employer's responsibility, the latter provision must be given a restrictive interpretation.

35. The Commission submits that its proposed interpretation of Article 5 of the framework directive is consistent with the drafting history of the directive, which indicates a clear intention on the part of the Community legislature to make employers subject to a regime of no-fault liability which can be excluded or limited only in the event of the exceptional circumstances for which Article 5(4) provides. In the Commission's view, that interpretation is further confirmed by the fact that, while the initial directives on the safety and health of workers which preceded the introduction into the EC Treaty of Article 118a took account of the SFAIRP clause in defining the obligations imposed on the employer, the 'new generation' directives, including the framework directive, which were adopted on the basis of Article 118a, have permanently abandoned that clause.

36. While agreeing with the United Kingdom that Article 5(1) of the framework directive does not require employers to guarantee a zero-risk working environment, the Commission points out that its approach differs from that of the United Kingdom in terms of the consequences which flow from the impossibility of attaining such an outcome. According to the Commission, the fact that the duty of the employer to ensure safety is defined in absolute terms means that, should the preventive measures fail, the employer remains in any event objectively liable for the consequences that ensue for the health of his workers.

37. The Commission contends that the argument advanced by the United Kingdom in the alternative, to the effect that the SFAIRP clause is compatible with the combined provisions of Article 5(1) and (4) of the framework directive, must be rejected.

38. In that connection, the Commission points out that, contrary to what the United

Kingdom's arguments suggest, Article 5(4) does not introduce a derogation, based on criteria of reasonableness, from the principle that the employer is liable, but merely provides for those cases in which the employer may, exceptionally, be exonerated from liability, cases which may easily be attributed to the mitigating factor of *force majeure*.

39. However, according to the Commission, it is clear from the case-law of the British courts that the test of the balancing of interests which the courts are required to carry out in accordance with the SFAIRP clause must be applied in all cases in which the issue of the employer's liability arises, including those in which the events detrimental to workers' health were the result of entirely foreseeable occurrences. Since there is neither a definition of the SFAIRP clause that restricts its application solely to circumstances in which the damage to workers' health resulted from unforeseeable circumstances or exceptional occurrences nor any case-law to indicate that the clause may be relied on by the employer as a means of defence solely in the event of such circumstances or occurrences, the Commission takes the view that its application within the legal systems of the United Kingdom does not make it possible to secure the outcome which the combined provisions of Article 5(1) and (4) of the framework directive require.

40. The Commission further points out that the assessment which must be made on the basis of the SFAIRP clause involves account being taken of the financial costs of the preventive measures and that this clearly conflicts with the 13th recital in the preamble to the framework directive, which states that '... the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.

41. According to the United Kingdom, while, on the one hand, Article 5(1) of the framework directive identifies the employer as the person with the primary duty to ensure the safety and health of workers at work and, read in conjunction with Articles 6 to 12 of the framework directive and in accordance with the general principle of proportionality, defines the extent of that duty, it is, however, silent as to the nature of the employer's liability in the event of failure to discharge that duty. That question is left to the Member States in accordance with the duty incumbent on them to take all measures necessary to guarantee the application and effectiveness of Community law, to which Article 4 of the framework directive gives specific expression.

42. As regards the scope of the duty placed on the employer by Article 5(1) of the framework directive, the United Kingdom contends that, although expressed in absolute terms, that duty does not impose upon

the employer a strict duty as to results, consisting in guaranteeing a zero-risk working environment.

43. According to the United Kingdom, that interpretation is consistent with those provisions of the framework directive which are designed to give substance to the duty set out in Article 5(1), and, in particular, with Article 6(2), which places the employer under an obligation to 'prevent or *reduce* risks', 'replacing the dangerous by the non-dangerous or the *less dangerous*', [9] and with various provisions of the 'daughter directives', which, in specifying the preventive measures to be adopted in specific industrial sectors, cite considerations relating to the 'practicability' or 'appropriateness' of such measures. That interpretation is also consistent with the general principle of proportionality and with Article 118a of the Treaty — the legal basis for the framework directive — pursuant to which the directives adopted on the basis of that article are designed to introduce 'minimum requirements for gradual implementation' only.

44. As regards the employer's liability, the United Kingdom points out that nothing in the framework directive or, more particularly, in Article 5(1) thereof suggests that the employer must be subject to a no-fault liability regime. First of all, that article simply provides that the employer has a duty to ensure the safety and health of workers but does not also lay down an obligation to provide compensation in respect of damage arising as a result of workplace accidents. Secondly, the framework directive leaves the Member States free to decide which form of liability — civil or criminal — to impose on employers. Thirdly, it is also left to the Member States to determine who — the individual employer, the general category of employer or society as a whole — is to meet the costs of workplace accidents.

45. As regards the adjustment of United Kingdom legislation to address the requirements of the framework directive and the Commission's complaints, the United Kingdom first submits that a feature of its legislation is the legislature's decision to make the failure to discharge measures to protect the safety and health of workers and, consequently, the general duty of safety established in section 2(1) of the HSW Act a criminal offence subject to criminal sanctions.

46. According to the United Kingdom, that decision guarantees a more effective system, given that a criminal sanction has a greater deterrent effect than civil liability for damages, against which employers are able to take out insurance cover. Furthermore, recourse to criminal sanctions is better suited to a system of protection which, like the United Kingdom's system, is founded on prevention. The effectiveness of the British system is further demonstrated by the statistics which reveal that the United King-

9 — Emphasis added.

dom has long been one of the Member States with the lowest number of workplace accidents.

47. The United Kingdom points out that section 2 of the HSW Act imposes 'automatic' criminal liability, which an employer may escape only by demonstrating that he has done everything reasonably practicable to avoid risks to the safety and health of workers. The employer is able to discharge the burden of proof imposed on him only if he is able to demonstrate that there is a 'gross disproportion' between the risk to the safety and health of workers and the 'sacrifice, whether in money, time or trouble' that the adoption of the measures required to prevent this risk from arising would have involved and that the risk itself was insignificant in relation to that sacrifice. The United Kingdom explains that the test applied under the SFAIRP clause involves a purely objective assessment which excludes any consideration of the employer's financial position.

48. The United Kingdom further contends that the decision to transpose Article 5(1) by laying down duties, the failure to discharge which is subject to criminal sanctions, does not mean that, in the event of workplace accidents, victims are unable to obtain compensation.

49. Under British law, that compensation is provided for on the basis of the social security system.

50. The United Kingdom also contends that the employer is liable for damage resulting from a failure to discharge the duty of care in relation to workers provided for under common law. In accordance with that duty, the employer is required to ensure that the working environment is healthy and safe, to anticipate risks to the safety and health of workers and to adopt the appropriate preventive measures.

51. On the basis of the arguments set out above, the United Kingdom takes the view that it has correctly transposed Article 5(1) of the framework directive.

52. In the alternative, the United Kingdom contends that the scope of the SFAIRP clause, as applied by the British courts, exactly mirrors that of Article 5(4) of the framework directive.

B — *Assessment*

1. Preliminary observations

53. Although it may appear difficult or artificial to separate the analysis of the substance and scope of the duties incumbent on employers under the legislation on safety at work from the analysis of the forms of liability — administrative, civil or criminal — to which a breach of those duties gives rise, it does seem to me to be possible to identify two different levels at which the SFAIRP clause, the compatibility of which with Article 5(1) and (4) of the framework directive the Commission is challenging in this case, may actually function.

54. In the first place, that clause is capable of acting as a limit on the general duty to ensure safety required of the employer under Article 5(1) of the framework directive. In that sense, it may play a part in determining the scope and limits of the activity of risk prevention.

55. Secondly, the clause at issue is also capable of acting indirectly as a limit on the possibility of attributing to the employer the liability consequent on a breach of that duty.

56. The question of the compatibility of the clause at issue with the provisions of the framework directive arises, logically speaking, with reference to both areas in which the clause may function, as described above.

57. It is therefore necessary to ascertain, by way of preliminary, those aspects of the clause which the Commission alleges to be unlawful in the context of these proceedings.

58. The Commission's written observations provide a sufficiently clear outline of its argument. According to the Commission, as well as defining in absolute terms the employer's duty to ensure the safety and health of workers in every aspect related to work, Article 5(1) of the framework directive sets out, as a corollary to that duty, the employer's liability in relation to any event detrimental to workers' health which occurs in his undertaking. The Commission infers the nature of that liability from the combined provisions of Article 5(1) and (4) and defines it as strict liability. According to the Commission, the employer remains liable for the consequences of any event detrimental to workers' health which occurs in his undertaking, regardless of the preventive measures the employer may have actually adopted or could have adopted, with the sole exception of the situations specifically provided for in Article 5(4) of the framework directive. Since it is evident from the provisions of the HSW Act and, more particularly, section 2(1), read

in conjunction with sections 33 and 47, that the employer is not liable for the risks which arise or the consequences of the events which occur in his undertaking if he is able to demonstrate that he took all reasonably practicable measures to ensure the safety and health of his workers, the Commission contends that the United Kingdom's legislation is not compatible with Article 5(1) and (4) of the framework directive.

59. Despite the manner in which the forms of order sought in the application are worded, it is clear from the content of the Commission's written submissions and all of the exchanges that took place during the written procedure and at the hearing that the Commission is not challenging the legitimacy of the clause at issue in terms of its ability to affect the extent of the employer's duty to ensure safety, but rather in terms of its capacity to operate as a limit on the employer's liability in relation to events detrimental to workers' health which occur in his undertaking.

60. The two aspects of possible illegality are clearly inseparable if Article 5(4) of the framework directive, read in isolation or in conjunction with Article 5(1), is regarded as defining the scope of the employer's liability in the event of a breach of the employer's duty to ensure safety, whereas they remain separate if that provision is regarded as having been designed to determine the broad lines of more extensive employer liability.

61. It is therefore necessary to assess whether, as the United Kingdom suggests, there is no discrepancy between the scope of the employer's duty to ensure safety and the extent of the employer's liability under the relevant provisions of the framework directive, or whether, as the Commission maintains, that liability extends to the consequences of any event detrimental to workers' health — with the sole exception of the cases provided for in Article 5(4) — regardless of whether that event or those consequences can be attributed to any form of negligence on the part of the employer in adopting preventive measures.

2. The interpretation of Article 5(1) and (4) of the framework directive

62. The Commission and the United Kingdom proceed on the basis of two divergent interpretations of Article 5(1) of the framework directive. The Commission's argument is based on a reading of that provision largely in terms of the employer's liability for harm

to workers' health, whereas the United Kingdom interprets that provision basically in terms of the obligations devolving on the employer to take the requisite preventive measures.

63. The United Kingdom's interpretation is based on a literal reading of Article 5(1) of the framework directive. The Commission, by contrast, is applying essentially a systematic interpretation of the provision, highlighting in particular the way in which the terms of Article 5(1) and Article 5(4) are interrelated.

64. There is no doubt that an initial interpretation of Article 5(1), based on its actual wording, cannot attribute to that provision any function other than that of identifying a person and imposing on that person a duty which consists in guaranteeing that a legally-protected interest — itself also specified — is safeguarded.

65. From that perspective, Article 5(1) expresses what is traditionally a pivotal rule in the legislation on ensuring safety at work: identifying the employer in his dual role as party to the legal employment relationship and organiser of the factors of production (see Article 3(b) of the framework directive), as bearing principal responsibility for the duty of safety.

66. However, moving on from an interpretation based exclusively on the text of Article 5(1) to viewing it within its whole context, it seems difficult not to interpret the provision it contains as being designed not only to establish the employer's general duty to ensure safety but also to determine the parameters of the minimum liability regime to which the employer, as the person responsible for the duty to ensure safety, must be subject should events detrimental to his workers' health occur.

67. The relevant provision in this respect seems to be not so much Article 5(2) and (3) as the first subparagraph of Article 5(4).

68. Although specifically referring to the concept of responsibility, Article 5(2) and (3) may in fact be construed as designed to clarify the nature and extent of the duty laid down in Article 5(1), confirming that this is a duty which cannot be transferred to persons other than the employer, where those persons are assigned, either by the employer (Article 5(2)) or under specific provisions of law (Article 5(3)), particular tasks relating to the organisation of protective and preventive

measures or, more generally, to ensuring safety and health at work. Those provisions are, furthermore, confined to citing the liability (or rather the duties) of the employer solely with reference to preventing events likely to harm the legally protected interest.

69. By contrast, the first subparagraph of Article 5(4) refers specifically to rules governing the employer's liability for the consequences of events detrimental to workers' health.

70. An *a contrario* interpretation of the wording of the first subparagraph of Article 5(4) necessarily supports the principle that Member States are not entitled to exclude or limit the liability of employers for damage resulting from facts or events that are not included in the list set out in that provision.

71. The first subparagraph of Article 5(4) of the framework directive seems in fact to indicate the legislature's intention to propose the bases for a common model of liability for harm to workers' health, and, at first sight, that model appears to exclude the criterion of fault and tend more in the direction of strict liability.

72. It is, however, necessary to consider in greater detail whether that interpretation, which the Commission strongly supports, is correct.

73. In that connection, it must be pointed out, by way of preliminary remark, that an interpretation of the provisions of the framework directive which regards the employer's liability as a component part of the Community regime for protecting the safety and health of workers could only be justified, in my view, if Article 5(4) were to be construed to the same effect.

74. The Commission's argument that this interpretation is possible on the basis of Article 5(1) of the framework directive alone does not, however, seem to me to be acceptable.

75. As I mentioned above, the latter provision merely sets out the duty of guarantee incumbent on the employer — which is to be construed principally as a duty to take

preventive measures — but says nothing about the liability of the employer should an event detrimental to the health of workers occur.

76. It is certainly true that, implicitly, Article 5(1) also contains a rule relating to liability, since to impose a duty without providing for some form of liability in the event of a breach of that duty would inevitably reduce the provisions establishing it to mere declarations of intent, whereas, in fact, the prescriptive nature of the duties for which the framework directive provides emerges clearly from Article 4(1), which requires the Member States to 'take the necessary steps to ensure that employers ... are subject to the legal provisions necessary for the implementation of this Directive'.

77. However, contrary to what the Commission contends, it seems to me to be difficult, even leaving aside the actual text of Article 5(1) and interpreting it in the light of the context in which it is placed, to claim that, by expressly imposing a legal duty on a person, Article 5(1) of the framework directive also, implicitly, intended to attribute to that same person more extensive liability than that attaching to any failure to discharge that duty. In other words, I do not consider it possible to conclude from the terms of Article 5(1) alone that it imposes on the employer both a duty — which essentially involves taking preventive measures — and, at the same time, strict liability — regardless therefore of whether any fault or negligence attaches to the person under that duty in relation to the adoption of the preventive measures — in relation to events detrimental to the health of workers.

78. It therefore remains to be established whether the Commission's argument that the provisions of the framework directive require the Member States to make employers subject to a strict liability regime in case of events detrimental to workers' health, may be founded on the first subparagraph of Article 5(4) of the framework directive alone.

79. Under that provision, the framework directive 'shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due' to particular circumstances or events.

80. In my view, various factors drawn both from a literal and historical reading of the provision at issue argue against interpreting it in accordance with the Commission's argument.

81. In the first place, the wording of the provision seems to me to be difficult to reconcile with the meaning and function that would have to be attached to the rule it contains, were it to be interpreted in the manner advocated by the Commission.

82. From that perspective, the words '[t]his Directive shall not restrict the option of Member States' seem to be intended to provide clarification of the scope of the provisions of the directive — and, in consequence, of the margin of manoeuvre available to the Member States in transposing those provisions into national law — rather than to establish, on the basis of an interpretation *a contrario* of the provision at issue, a duty on the Member States, which is envisaged neither explicitly nor implicitly by other provisions of the framework directive, to provide in their national legal orders a strict liability regime for employers.

83. Secondly, the possibility of interpreting the first subparagraph of Article 5(4) in the sense argued by the Commission also gives rise to doubts in terms of the legislative technique the Community legislature would have employed.

84. It in fact appears unlikely that the option in favour of the principle of strict liability for employers within the Community system for protecting the health and safety of workers, as well as the harmonisation of the national regimes governing liability to which that option would give rise, must be inferred *a contrario* from a provision which is explicitly limited to stating that Member States have the option of limiting or excluding employers' responsibility in certain cases. That the Community legislature should have taken that approach seems all the more unlikely bearing in mind that some Member States, such as the United Kingdom, have little familiarity with no-fault forms of liability.

85. Thirdly, the scope of the first subparagraph of Article 5(4) of the framework directive is substantially reduced by interpretive arguments based on that provision's origins.

86. In that context, it is clear from the case-file that Article 5(4) was inserted into the text of the directive to meet requests made by the United Kingdom and Irish delegations during the discussion which took place within the Council on the proposed framework directive.

87. More particularly, the documentation that the United Kingdom has submitted concerning the meeting of 21 and 22 June 1998 of the Working Party on Social Questions shows that, at that meeting, the United Kingdom and Irish delegations raised the problems that transposing the directive

would cause in their respective countries if, in establishing the duties placed on employers, the provisions of the directive had retained the rigid wording proposed by the Commission.

88. Basically, those Member States pointed out that, in the field of the safety and health of workers, British and Irish courts, unlike courts in the civil-law systems, have no margin of discretion in interpreting written law. Consequently, if the duties incumbent on employers contained in the proposed directive were worded in absolute terms, the application in the common-law countries of the requirements of the framework directive would have been made unduly more severe. They therefore proposed introducing into the relevant provisions of the proposed directive a flexibility clause, such as the SFAIRP clause, which had already appeared in the so-called 'first generation' directives.

89. Of the possible solutions taken into consideration in order to meet the requirements of the United Kingdom and Irish delegations, [10] it was decided to opt for the introduction of a general clause which took the form of Article 5(4).

90. In the application, the Commission points out that, according to a joint statement by the Council and the Commission, recorded in the minutes of the Council meeting of 12 June 1989, the aim of Article 5(4) of the framework directive was to 'help solve legal problems in countries subject to the English legal system' and that it did not permit, when the directive was transposed into national law, 'derogations ... from the Community level of protection of safety and health at work'.

91. Article 5(4) was therefore inserted into the framework directive as a result of the discussion within the Council concerning how to resolve the problem that wording in absolute terms the *employer's duty to ensure safety* would have raised in the common-law systems, bearing in mind the obligation incumbent on courts in those systems to interpret written law literally.

92. It follows that, even in the light of the arguments based on the legislative history of the framework directive, it is difficult to attach to the provision contained in the first subparagraph of Article 5(4) the meaning that the Commission wishes to attribute to it.

10 — Those solutions were: a joint statement by the Council and the Commission; the inclusion of a general clause in the text of the directive; or the insertion of a special clause in the various provisions of the directive. By contrast, the possibility of adopting a text different from that of the relevant provisions of the framework directive in the various language versions — a solution adopted in certain conventions of the International Labour Organisation — was ruled out from the start.

93. Finally, it is necessary to point out in passing that the Commission's argument seems also to encounter limitations in the legal basis of the framework directive, since it is not in fact clear whether on the basis of Article 118a of the Treaty — which merely provides for the adoption, in the form of directives, of 'minimum requirements for gradual implementation' — the Community legislature was empowered to undertake harmonisation of the liability regimes in force in the Member States.

94. While, on the one hand, all of the elements examined in points 80 to 92 above militate in favour of rejecting the Commission's argument, on the other hand they also allow of and support a different interpretation of the first subparagraph of Article 5(4) of the framework directive.

95. The historical background to that provision makes it possible, in particular, to understand how it fits into the context of Article 5 and how it interrelates to Article 5(1) in particular.

96. It is clear from what has been stated above in relation to the legislative history of the framework directive that the first subparagraph of Article 5(4) was inserted into the body of the directive to clarify the extent of the *employer's duty to ensure safety* established by Article 5(1),[11] and, consequently, the *extent of liability* flowing from a failure to discharge that duty. That clarification is namely provided by identifying and explicitly defining those cases in which a specific event, which is detrimental to workers' health, and the consequences of that event are not attributable to a breach of the duty of safety and may not, therefore, be ascribed to the employer in terms of *fault.*

97. In that sense, the first subparagraph of Article 5(4) constitutes a kind of clause interpreting Article 5(1).

98. Although based on the need to interpret the provision at issue in a manner consistent with the role conferred on it by the Community legislature, as this emerges from the drafting history of the framework directive, the proposed interpretation outlined above is confirmed by elements drawn from the actual wording of that provision, already indicated at point 82 above.

11 — Moroever, the Commssion too seems to have interpreted it to that effect at the time it was inserted into the text of the directive. In a statement included in the minutes of the Council meeting of 12 June 1989, and cited in paragraph 25 of the application, the Commission noted that '[t]he reference to exceptional events the consequences of which could not have been avoided despite the exercise of all due care cannot in any circumstances be interpreted as leaving the employer free to assess whether or not the norms should be applied, having regard to the time, trouble and expense involved in their interpretation'.

99. At this juncture, it is necessary to ascertain whether that proposed reading is further confirmed by the systematic interpretation of Article 5(1).

100. I have already stated that the provision sets out the duty incumbent on the employer to guarantee the safety and health of workers. It is now necessary to define specifically the substance and extent of that duty, which, as we have seen, is formulated in absolute terms.

101. In that context, I agree with the parties that this definition must be established in the light of all the provisions of the framework directive, and, in particular, Article 6 thereof, which defines the employer's general obligations, although it seems to me possible to derive some material indicators from the wording of the text of Article 5(1) itself.

102. First of all, it seems to me clear that that provision requires the person subject to the duty to take positive action, consisting in the adoption of measures designed to pursue the objective of protecting the safety and health of workers.

103. Secondly, since the duty in question consists in 'ensuring' that this interest is safeguarded, those measures must be appropriate and sufficient for that purpose. In other words, in view of the wording of Article 5(1) of the framework directive, the duty which that provision places on the employer requires, in my view, the adoption of all necessary measures to ensure the safety and health of workers in every aspect related to their work.

104. That finding is further confirmed by the first subparagraph of Article 6(1) of the framework directive, according to which '[w]ithin the context of his responsibilities, the employer shall take the measures necessary for the safety and health protection of workers ...'.

105. Thirdly, the objective of protection which Article 5(1) of the framework directive is designed to secure makes it necessary to interpret the duty placed on the employer as being essentially a duty of prevention. That duty therefore takes the form both of anticipating and assessing risks to the safety and health of workers resulting from the undertaking's activities and of determining and taking the requisite preventive measures.

106. Article 9(1) of the framework directive sets out the substance of the preventive obligations which are incumbent on the employer as described above. Under that provision, the employer must 'be in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks' (Article 9(1)(a)) and 'decide on the protective measures to be taken and, if necessary, the protective equipment to be used' (Article 9(1)(b)).

107. Similarly, in listing the general principles of prevention which constitute the substance of the employer's duty to ensure safety, Article 6(2) of the framework directive provides that the preventive measures the employer takes must be aimed, in particular, at 'avoiding risks' (Article 6(2)(a)); 'evaluating the risks which cannot be avoided' (Article 6(2)(b)); 'combating the risks at source' (Article 6(2)(c)); and 'developing a coherent overall prevention policy ...' (Article 6(2)(g)).

108. Fourthly, since technical progress and developments in the production systems may result both in the creation of new risks to the safety and health of workers and in the diversification and improvement of protective measures, the employer's duty to ensure safety must be interpreted as an evolving responsibility, requiring constant adjustment to circumstances which may affect the quantum and extent of the risks to which workers are exposed as well as the effectiveness of the measures required to prevent or reduce them.

109. To that effect, Article 6(2)(e) of the framework directive stipulates that, in adopting preventive measures, the employer must adapt 'to technical progress'.

110. Finally, it is clear from the general criteria for prevention laid down in Article 6(2)(b) — which, as we have seen, requires the employer to evaluate 'the risks which cannot be avoided' — and Article 6(2)(f) — which requires the employer to replace 'the dangerous by the non-dangerous or the less dangerous' — that the general duty to ensure safety laid down in Article 5(1) of the framework directive does not extend so far as to require the employer to provide a totally risk-free working environment.

111. The analysis set out at points 102 to 110 above allow of the conclusion that, pursuant to the duty of safety laid down in Article 5(1) of the framework directive, an employer is required to prevent or reduce, so far as possible and taking into account

technical progress, all of the risks to the safety and health of workers that are actually foreseeable.

112. Translated into terms of liability, the above considerations imply that both the occurrence of foreseeable and preventable risks to the safety and health of workers and the consequences of events which constitute the realisation of such risks will be attributable to the employer, since both are a result of a breach of the general duty to ensure safety as defined above.

113. Conversely, the occurrence of risks that were unforeseeable and/or inevitable and the consequences of events which constitute the realisation of such risks will not be attributable to the employer on that same basis.

114. The situations of non-liability described above cover the cases envisaged in the first subparagraph of Article 5(4) of the framework directive, whereas the situations of liability described at point 112 above correspond to those cases in which that provision, when interpreted *a contrario*, excludes the option of the Member States to exclude or limit the employer's liability.

115. The proposed interpretation set out at point 96 above is therefore confirmed by a systematic interpretation of Article 5(1) of the framework directive.

116. It follows from all of the foregoing considerations that the first subparagraph of Article 5(4) of the framework directive must be interpreted as meaning that that provision defines the extent of the employer's liability if he has failed to discharge the general duty to ensure safety laid down in Article 5(1).

117. Contrary to the Commission's contention, that provision does not therefore substantiate, either if read in isolation or in conjunction with Article 5(1), the contention that the framework directive was designed to introduce strict liability on the part of the employer.

118. Although defined in particularly broad terms, the employer's liability resulting from Article 5(1) and (4) of that directive is in fact *liability based on fault,* which flows from a failure to discharge the duty to ensure safety devolving on the employer.

119. That conclusion is not invalidated by the wording of the first subparagraph of Article 5(4), in terms of the mere option available to the Member States to exclude or

limit the liability of the employer in the cases which that provision envisages. The Community legislature opted for that form of words with the intention of leaving the Member States free to make the employer subject to more extensive liability than that resulting from Article 5(1) and the first subparagraph of Article 5(4) of the framework directive, that is to say, liability which extends to any event detrimental to workers' health, even where no negligence can be attributed to the employer in relation to the adoption of preventive measures. In my view, that is how the further clarification provided by the second subparagraph of Article 5(4) should be construed, according to which 'Member States need not exercise the option referred to in the first subparagraph'.

120. On the basis of the conclusions I have reached on the interpretation of Article 5(1) and (4) of the framework directive, I shall now consider the validity of the complaints which the Commission has raised in its application.

3. The alleged breach of Article 5(1) and (4) of the framework directive by the United Kingdom

121. In the light of the considerations set out above, it is my view that the Commission's arguments are based on an incorrect interpretation of the provisions of the framework directive.

122. Although I regard that finding as sufficient in itself to dismiss the application, it seems to me appropriate to elaborate further in case the Court, while accepting my proposed interpretation of the provisions in question, should consider it necessary to undertake an evaluation of the application and assess, in the light of that interpretation, whether or not the United Kingdom has in fact failed correctly to implement the framework directive.

123. In its statement of defence, the United Kingdom pointed out on several occasions that failure to discharge the obligations which section 2 of the HSW Act imposes on employers is subject to criminal sanctions. According to the United Kingdom, the national legislature's decision to opt for criminal liability where the employer is in breach of his duties of prevention ensures a more efficient system of protection and is entirely compatible with the provisions of the framework directive, since the latter does not require Member States to provide for a specific form of liability in order to deal with such offences. However, the United Kingdom points out that, if approved by the Court, the interpretation of Article 5(1) and (4) of the framework directive which the Commission proposes would require the United Kingdom legislature to abandon that option, since there can be no question of strict criminal liability.

124. In that connection, I consider it necessary to make clear that, as well as not requiring Member States to adopt a specific *form* of liability, as the United Kingdom was

right to point out, the framework directive does not require that the different forms of liability — civil, criminal or other forms of liability — envisaged by each national legal system should be *identical in terms of their extent.*

125. In other words, while, pursuant to the framework directive, Member States are required to provide for a system of employer liability consistent with the model that emerges from the provisions of that directive, they remain free both to choose the form of that liability and to provide for *other* forms of liability which may be less extensive than that laid down by those provisions. For example, in my view, it would be perfectly legitimate for a Member State to provide for civil liability in cases where the employer is in breach of the general duty to ensure safety, as interpreted above, and, at the same time, for a form of criminal liability which is limited, for instance, to breaches of the more specific requirements of the legislation on the prevention of workplace accidents.

126. It follows that the clause at issue in these proceedings would be perfectly legitimate were it to be concluded that, while it provides for employer liability which is less extensive than must be regarded as necessary under the framework directive, it restricts that liability in the criminal field only, and that United Kingdom legislation provides for a form of civil liability for employers the extent of which is entirely commensurate with the liability regime which the framework directive seeks to achieve.

127. It is true that, under the system in force in the United Kingdom, employers are subject to civil liability only in relation to breaches of the specific obligations placed on them by particular provisions of law but not in relation to the failure to discharge the general duty to ensure safety set out in section 2(1) of the HSW Act. [12] However, it appears from the case-file that, in common law, the employer will be subject to a form of civil liability if he is in breach of his duty of care to his workers.

128. This form of liability was not considered in the application, in keeping with the assumption on which the Commission based its view concerning the strict nature of the employer liability required by the framework directive.

129. Should the Court, while accepting the interpretation of Article 5(1) and (4) of the framework directive I have reached in this analysis, not consider the finding that the Commission's interpretation is incorrect to be sufficient in itself to dismiss the application, and, therefore, consider it necessary to continue its evaluation of the application, a proper assessment of the United Kingdom's position must, in my view, include consideration of whether the civil liability to which employers are subject under the common

12 — In respect of which, as we have seen, civil liability is specifically excluded by section 47(1) of the HSW Act.

law is at least as extensive as the form of civil liability which emerges from the provisions of the framework directive. If it is, then the infringement which the Commission alleges will not be substantiated.

130. In point of fact, according to case-law, transposing a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision of national law and the general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner. [13]

131. It should also be borne in mind that, in relation to applications pursuant to Article 226 EC, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose. [14]

132. For all of the reasons set out above, I take the view that, should the Court, while accepting my proposed interpretation of Article 5(1) and (4) of the framework directive, not consider the finding that the Commission's interpretation is incorrect to be sufficient in itself to dismiss the application, the latter must be dismissed because it is based on an inadequate analysis of the system in force in the United Kingdom for the purpose of assessing whether that system meets the requirements of the framework directive.

133. The conclusions I have reached so far are based on the premiss, set out at points 57 to 59 above, that the application seeks to challenge the legitimacy of the SFAIRP clause solely in so far as it restricts the extent of the employer's *liability* for the consequences of events detrimental to workers' health in a manner contrary to the provisions of Article 5(1) and (4) of the framework directive.

134. Consequently, it is purely in the alternative, and only should the Court consider that the application seeks to claim that the SFAIRP clause is also unlawful inasmuch as it may restrict the extent of the employer's *duty* to ensure safety under Article 5(1) of the framework directive, that I shall consider briefly below whether that complaint is well founded.

13 — See, in particular, Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26, and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 21.

14 — See Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27 and the case-law cited therein.

135. The considerations set out at points 102 to 110 above have made it possible to identify the parameters of the general duty to ensure safety, as they emerge from Article 5(1) of the framework directive and from the provisions of that directive which help define that duty in greater detail.

136. I stated, at point 111 above, that, pursuant to the duty of safety laid down in Article 5(1) of the framework directive, an employer is required to prevent or reduce, so far as possible and taking into account technical progress, all of the risks to the safety and health of workers that are actually foreseeable.

137. That means, in particular, that whether it is, objectively speaking, technically feasible to eliminate or reduce a risk to the safety and health of workers is the criterion which must form the basis for assessing whether the employer's conduct actually complies with the requirements of the framework directive.

138. In my view, since it introduces a criterion for assessing the appropriateness of the preventive measures taken which is less rigorous than sheer technical feasibility, the reference in section 2(1) of the HSW Act to the concept of what is 'reasonably practicable' is incompatible with the scope that should attach to the general duty to ensure safety laid down in Article 5(1) of the framework directive.

139. The test which courts in the United Kingdom are required to apply in assessing whether an employer's conduct complies with section 2(1) of the HSW Act involves an evaluation which goes beyond establishing whether it is possible to prevent a risk arising or to reduce the extent of that risk on the basis of the technical possibilities available: even in the case of risks which are actually capable of being eliminated, it permits (or, more accurately, requires) a balancing out between the costs — and not only the financial costs — of the preventive measures, on the one hand, and the seriousness and extent of the harm that could ensue for the workers' health, on the other.

140. Even accepting the United Kingdom's point that a cost-benefit analysis of that nature will rarely, in practice, produce a result favourable to the employer, such an analysis does not seem to me to be permissible under the Community system of protecting the safety and health of workers, which appears to give priority to protecting the individual worker rather than financial enterprise. [15]

15 — Various indications to that effect emerge from the framework directive. As well as the 13th recital in the preamble which the Commission invokes, account should also be taken of Article 6(2)(d), which refers to 'adapting the work to the individual'.

141. It follows that, should the Court interpret the Commission's complaints along the lines set out in point 134 above, the application should, in my view, be upheld.

VI — Costs

142. Pursuant to 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.

143. Since I am proposing that the Court should dismiss the application, and since the United Kingdom has applied for the applicant to be ordered to pay the costs, I consider that the Commission should be ordered to pay the costs.

VII — Conclusion

144. For all of the reasons set out above, I propose that the Court should:

— dismiss the application;

— order the Commission to pay the costs.