OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 30 March 2004 [1]

Table of contents

1 — Original language: German.

I — Introduction

1. These two sets of proceedings concern an action brought by the Kingdom of Spain and an action brought by the Republic of Finland for the full and partial annulment respectively of 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 (hereinafter 'the directive'). [2] In these proceedings, in addition to various pleas in law, the Court must consider a number of, in some cases new, issues concerning the admissibility of the two actions.

II — Legal framework

2. The context for these cases is formed first of all by Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, [3] which essentially governs driving periods and rest periods for wage-earning and other drivers.

3. Reference must also be made to Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. [4] This directive governed inter alia the daily and weekly rest period, breaks, maximum weekly working time, annual leave and the length of night work, although certain sectors of activity such as road transport were excluded. The scope of that directive was extended, inter alia to the road transport sector, by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that directive. [5] However, the provisions on the daily rest period, breaks, the weekly rest period and the length of night work still did not apply to 'mobile workers'.

4. Directive 2002/15 in turn supplements the aforementioned legislation and lays down provisions on maximum weekly working time, breaks, rest periods and night work.

5. Article 1, which sets out the purpose of the directive, reads as follows:

'[t]he purpose of this Directive shall be to establish minimum requirements in relation

2 — OJ 2002 L 80, p. 35.
3 — OJ 1985 L 370, p. 1.
4 — OJ 1993 L 307, p. 18.
5 — OJ 2000 L 195, p. 41.

to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport activities and to improve road safety and align conditions of competition.'

6. Article 2, which sets out the scope of the directive, provides in paragraph 1 that:

'[t]his Directive shall apply to mobile workers employed by undertakings established in a Member State, participating in road transport activities covered by Regulation (EEC) No 820/85 or, failing that, by the AETR Agreement.

Without prejudice to the provisions of the following subparagraph, this Directive shall apply to self-employed drivers from 23 March 2009.

At the latest two years before this date, the Commission shall present a report to the European Parliament and the Council. This report shall analyse the consequences of the exclusion of self-employed drivers from the scope of the Directive in respect of road safety, conditions of competition, the structure of the profession as well as social aspects. The circumstances in each Member State relating to the structure of the transport industry and to the working environment of the road transport profession shall be taken into account. On the basis of this report, the Commission shall submit a proposal, the aim of which may be either, as appropriate

— to set out the modalities for the inclusion of the self-employed drivers within the scope of the Directive in respect of certain self-employed drivers who are not participating in road transport activities in other Member States and who are subject to local constraints for objective reasons, such as peripheral location, long internal distances and a particular competitive environment, or

— not to include self-employed drivers within the scope of the Directive.'

7. Article 3 defines the terms used in the directive. Article 3(a) gives the legal definition of 'working time'. Article 3(a)(2) reads as follows:

'in the case of self-employed drivers, the same definition shall apply to the time from

the beginning to the end of work, during which the self-employed driver is at his workstation, at the disposal of the client and exercising his functions or activities other than general administrative work that is not directly linked to the specific transport operation under way.

The break times referred to in Article 5, the rest times referred to in Article 6 and, without prejudice to the legislation of Member States or agreements between the social partners providing that such periods should be compensated or limited, the periods of availability referred to in (b) of this Article, shall be excluded from working time.'

8. Article 3(e) defines 'self-employed driver' as follows:

'anyone whose main occupation is to transport passengers or goods by road for hire or reward within the meaning of Community legislation under cover of a Community licence or any other professional authorisation to carry out the aforementioned transport, who is entitled to work for himself and who is not tied to an employer by an employment contract or by any other type of working hierarchical relationship, who is free to organise the relevant working activities, whose income depends directly on the profits made and who has the freedom to, individually or through a cooperation between self-employed drivers, have commercial relations with several customers.

For the purposes of this Directive, those drivers who do not satisfy these criteria shall be subject to the same obligations and benefit from the same rights as those provided for mobile workers by this Directive.'

III — Admissibility

A — *Case C-184/02*

9. In the proceedings brought by Spain, the Council and the Parliament dispute the admissibility of the action on the ground that the originating application cites only the Council as defendant. Only by a letter entitled 'fe de erratas' did Spain request that the first page of the application be amended to include the Parliament as defendant as well.

10. First of all, Spain is right to say that the contested legislation was described in the originating application as an act of the

Parliament and of the Council. This submission, however, relates to the description of the subject-matter of the proceedings, that is to say the content of the application as required under Article 38(1)(c) of the Rules of the Procedure of the Court of Justice (hereinafter 'Rules of Procedure').

11. It is true that that requirement is accompanied by the requirement laid down in Article 38(1)(b) of the Rules of Procedure that the application must bear the 'designation of the party against whom the application is made'. However, that provision must not be understood as meaning that only one defendant may be designated. For it is clear from Article 21 of the Protocol on the Statute of the Court of Justice, which states that the application must contain 'the name of the party or names of the parties against whom the application is made', that there may be more than one defendant.

12. The Council and the Parliament are therefore right to point out that the legislation contested by Spain is an act adopted by the Parliament and the Council using the codecision procedure under Article 251 EC and that, in such a case, the application must, inter alia, include the designation as defendants of the two institutions that adopted the act.

13. The originating application clearly does not fulfil that requirement. It remains to be examined whether the letter sent to the Court must be regarded as a mere correction or 'corrigendum' or as a letter curing a defect in the application.

14. First of all, it is necessary to consider whether what is involved here is a mere correction or 'corrigendum' such as the rectification of a spelling mistake. Such rectifications would include, for example, the amendment of incorrect figures in the contested act. This example of an error as to the subject-matter of the proceedings may be supplemented by others relating to the parties. Thus the designation of one party as 'European Commission' may easily be replaced by the correct name 'Commission of the European Communities'. Such corrections, even though they do more than just correct spelling mistakes, are perfectly permissible.

15. In this context, the Parliament and the Council take the view that what is involved here is a correction to the application. In their submission, Article 38(7) of the Rules of Procedure allows a correction to be made, however, only in cases where the application does not comply with the requirements set out in paragraphs 3 to 6 of Article 38. In this case, on the other hand, the application does not comply with one of the requirements laid down in paragraph 1.

16. The Parliament is therefore right to say that the letter concerns the addition of a further defendant. The change made in this case is therefore more than a mere correction. It is an amendment to the originating application itself and not one of the kinds of correction provided for in paragraphs 3 to 6. Indeed, this was confirmed by Spain.

17. After all, classification of the letter from the Spanish Government as a mere 'corrigendum' is precluded by the fact that the letter refers only to amending the coversheet and leaves the rest of the application, in particular the form of order sought, unchanged. The publication in the Official Journal likewise refers only to the Council as defendant.

18. What matters, however, is not what name is given to a letter from the applicant but what that letter contains. If that were not the case, the applicant itself could give the letter a legal classification. It would then be possible to make an amendment to the application 'in the guise of' a spelling correction.

19. In support of the admissibility of the action, it may be argued that the application must be interpreted in the light of the subject-matter of the proceedings. It was clear from the very description of the subject-matter given in the originating application that the proceedings concerned an act of the Parliament and of the Council. Moreover, what we have here is neither the replacement of one defendant with another nor the first citation of a defendant, but merely the citation of a further defendant. Furthermore, that defendant is the second author of the contested act.

20. While Spain's assertion that the application was also served on the Parliament, and that the Parliament's rights of defence were thus protected, allows certain conclusions to be drawn as to how the Court should proceed, it still does not answer the fundamental question of the admissibility of amendments to the application.

21. Another argument against the admissibility of the action brought by Spain could be drawn from the existence of a further provision concerning the rectification of errors. Thus, Article 38(2)(3) provides only for the possibility of curing defects consisting in a failure to comply with the requirements laid down in Article 38(2)(1) and (2).

22. It is therefore clear from an overall assessment of the possibilities for rectifying errors expressly referred to in Article 38 that only the curing of defects in relation to the requirements laid down in paragraphs 2 to 6 is expressly provided for.

23. On the one hand, the conclusion could be drawn from this that other defects cannot be cured. On the other hand, however, the view could equally be taken that the provisions on the rectification of errors must be applied by analogy to circumstances not expressly provided for.

24. Since the letter from the Spanish Government has the intention and was to have the effect of adding a further defendant, it must also be examined, finally, whether what has occurred here could be treated as a supplement to a pleading. Indeed, Article 41 (1) of the Rules of Procedure expressly allows supplements to be made to the application. However, the application of that provision to the circumstances of this case is precluded by the fact that the admissibility of supplements is subject to the condition that the original pleading complies with the minimum requirements of the Rules of Procedure. The supplementing of pleadings must therefore be clearly distinguished from the curing of defects. Furthermore, the proper place for a supplement is in the reply.

25. Consideration of all the relevant factors none the less supports the conclusion that the application, at least in its amended version, complies with the requirements laid down in the Rules of Procedure and that the action is admissible.

B — *Case C-223/02*

26. In the proceedings brought by Finland, the Parliament and the Commission contest the admissibility of the action on the ground that the application does not comply with the requirements laid down in Article 38 of the Rules of Procedure as regards the subject-matter of the proceedings and the forms of order sought by the applicant. For, they contend, Finland claims that the directive should be annulled only in so far as it concerns self-employed drivers, without referring expressly to the provisions which it seeks to have annulled.

27. It must therefore be examined whether or not the application complies in this respect with the requirements laid down in Article 38 of the Rules of Procedure.

28. As regards the requirement of clarity in the application, the Commission submits that the action is unclear as it does not indicate whether only those provisions that expressly refer to 'self-employed drivers' are to be annulled or whether a number of other provisions which apply to such persons are also to be annulled.

29. However, there is nothing in the Statute or in the Rules of Procedure which indicates that the provisions whose annulment is sought must be expressly specified in the application. An application also satisfies the requirement of clarity where the subject-matter of the proceedings is or can be specified in another way.

30. The application lodged by Finland meets that requirement, since the subject-matter of the proceedings is clearly specified in so far as the form of order sought relates to a clearly specified part of the scope of the directive, namely 'self-employed drivers'.

31. The fact that self-employed drivers constitute a clearly specified part of the directive is apparent from the directive itself, which contains a separate provision applicable specifically to that part. Thus the second subparagraph of Article 2(1) provides that the directive is to apply 'to self-employed drivers from 23 March 2009'. The part of the directive referred to in the form of order sought is therefore clearly definable.

32. Moreover, the argument raised by the Parliament and the Commission to the effect that the application leaves it to the Court to determine the provisions to be annulled must also be dismissed. The Court does not have to carry out such a task if it grants the application to the extent of the form of order sought and annuls the directive to the extent specified in the form of order sought.

33. Amendment of the directive by the Court through the kind of partial annulment mentioned above is no different essentially from the annulment of expressly specified articles of a directive. The latter case too amounts to an amendment to the directive.

34. Moreover, granting the application brought by Finland does not interfere with the competence of the Parliament and the Council. For those institutions, as the authors of an act affected by annulment, continue to be bound by the obligation in Article 233 EC 'to take the necessary measures to comply with the judgment of the Court of Justice'.

35. Finally, the argument that granting the application would mean that the directive would never enter into force with respect to self-employed drivers must likewise be dismissed. A judgment in proceedings for the annulment of a directive has such an effect only in the specific situation where the subject-matter of the proceedings concerns provisions that are not yet applicable. Indeed, as a rule, judgments ordering annulment have an even more radical impact in that they have the effect of repealing legislation *ex tunc*.

36. The action brought by Finland is therefore admissible.

IV — Merits

A — *Community competence*

37. Spain and Finland challenge the directive first of all on the ground that the Community is not competent to adopt the rules which the directive lays down in respect of self-employed drivers.

1. The pleas in law concerning the objectives pursued by the directive, the misuse of discretion and the legal bases

a) The objectives pursued by the directive (third plea in law in Case C-184/02)

38. Spain substantiates its submission that the directive is vitiated by an error of law by reference to the fact that, although the directive pursues a two-fold objective, namely the health and safety of drivers and the improvement of road safety, those objectives cannot be achieved by the directive because this consists purely of social legislation, that is to say provisions concerning the living and working conditions of drivers.

39. Spain submits that the directive does not govern drivers' driving time but working time, inter alia maximum weekly working time. Since the regulation lays down stricter rules, with respect inter alia to breaks and weekly working time, the directive cannot contribute towards road safety. Furthermore, the interference associated with the rules on working time is unjustified as regards self-employed drivers.

i) Admissibility

40. As intervener in support of the Council and the Parliament, the Commission raises the issue of the admissibility of this complaint advanced by Spain. Spain, it contends, is not challenging either of the two legal bases, but merely 'criticising' the objectives pursued by the directive. If, as Spain submits, the directive constitutes social legislation, Article 137 EC would have been sufficient as a legal basis. Since, then, the legislation in question did not require a different procedure for its adoption, no procedural defect exists.

41. The Commission is right to say that the addition of a further legal basis would have

to be regarded as an error in the legal basis relied on for a Community measure that does not give rise to irregularity in the procedure applicable to the adoption of that act. [6]

42. The third plea in law raised by Spain may, however, on the basis of the content of the complaints advanced, be understood as meaning that, by that plea, Spain contends that it considers the legal bases of the directive to be incorrect in view of the exclusively social objective pursued by the directive.

ii) Merits

43. At first sight it would seem appropriate to examine the merits of the complaint raised by Spain under the third plea in law together with the plea in law advanced by Finland concerning the misuse of discretion. However, as the Spanish Government expressly pointed out at the hearing, the latter plea does not concern the choice of legal basis but relates to the fundamental right to pursue a trade or profession (see in this respect my comments in section B).

6 — Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 19, and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 98.

b) The question of the misuse of discretion and the lawfulness of the legal bases chosen (first plea in law in Case C-223/02)

44. Finland considers that neither of the two legal bases, that is to say neither Article 71 EC nor Article 137(2) EC, constitutes a sufficient legal basis for the directive. While measures aimed at road safety may indeed be based on Article 71 EC, the directive pursues a different objective, namely the protection of health and safety in the workplace. The correct legal basis for that purpose is Article 137 EC. However, that Article does not permit the adoption of provisions in respect of self-employed persons, as occurs in the case of the directive. The rules on working time for self-employed drivers which it lays down therefore have no legal basis.

45. By reference to the provisions in the directive concerning maximum weekly working time, break times and night work, Finland reaches the conclusion that the directive governs not driving time but working time. However, working time, unlike driving time, bears no relation to road safety. In addition, Finland submits, the directive covers activities which have no connection with road safety.

46. Furthermore, Article 2(1) shows that, at the time when the directive was adopted, the effects of restrictions on working time on road safety had not yet been examined. In addition, there are no studies which show that safety is influenced by factors other than driving time. Nor can the directive prevent tiredness caused by activities which do not form part of working time within the meaning of the directive.

47. The objective of aligning conditions of competition which is purportedly pursued by the directive likewise cannot, in the opinion of Finland, be achieved by measures based on Article 71 EC. After all, that Article provides that the objectives of the common transport policy are to be implemented 'taking into account the distinctive features of transport'.

48. As regards Finland's submissions, it must be pointed out that the issue in these proceedings is not whether or not the Community legislature may pursue a particular objective, but whether the Community legislature has based the contested act on the correct legal basis. In that regard, the objectives pursued by the measure are just one of many considerations.

49. It is settled case-law that, in the context of the organisation of the powers of the Community, the choice of a legal basis for a measure does not depend simply on an institution's convictions as to the objective pursued, but must be based on objective factors which are amenable to judicial review. [7] Those factors include in particular the aim and the content of the measure. [8]

50. The directive at issue pursues several objectives, as Article 1 thereof provides: firstly to protect the health and safety of persons performing mobile road transport activities; secondly to improve road safety; and thirdly to align conditions of competition.

51. Those objectives are to be achieved by establishing minimum requirements in relation to the organisation of working time. The provisions laid down in the directive, and in particular in Articles 4 to 7, with respect to the maximum weekly working time, breaks, rest periods and night work are therefore the means chosen to achieve those objectives.

7 — Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 58, Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43, Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10, and Case C-45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11.

8 — Case C-36/98 (cited in footnote 7), paragraph 58, Case C-269/97 (cited in footnote 7), paragraph 43, and Case C-300/89 (cited in footnote 7), paragraph 10.

52. As a legal basis for the directive, the Community legislature chose Article 71 EC and Article 137(2) EC, thus two legal bases, one relating to transport policy and one relating to social policy.

i) Article 137(2) EC

53. Under Article 137(2) EC, the Council may, for the purposes of Article 137(1) EC, adopt minimum requirements in certain fields. The first indent of Article 137(1) EC mentions, as one such field, the improvement in particular of the working environment to protect workers' health and safety.

54. In these proceedings, it is not in dispute, indeed it is a fact specifically emphasised by the applicants, that the contested directive serves that objective. However, since the directive also applies to self-employed drivers, the question arises whether Article 137 EC may be used as a legal basis only for measures concerning workers or for measures concerning self-employed persons as well.

55. In this regard, the Parliament takes the view that it is permissible to include self-employed persons and supports this by reference to a number of acts applicable to both employed and self-employed persons. The Parliament is right to say that Article 137 EC is a sufficient legal basis for mobile workers.

56. As regards the acts referred to by the Parliament, however, it must be pointed out first of all, as a matter of principle, that the fact that a certain practice was followed in the past does not mean that it is lawful. Moreover, the Parliament has not been able to furnish any evidence from case-law to show that the Court has expressly declared such a practice to be lawful, for example by dismissing a similar action for annulment or by upholding the validity of an act in a reference for a preliminary ruling.

57. As regards Directive 92/29,[9] to which, inter alia, the Parliament refers, it must also be noted that Article 2(1)(b) of that directive states that '[e]ach Member State shall take the measures necessary to ensure that the quantities of medicinal products and medical equipment to be carried depend on ... the number of *workers*'.[10] The recitals of the preamble to that directive likewise make repeated reference to the safety and health of *workers*.

9 — Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels (OJ 1992 L 113, p. 19).

10 — My emphasis.

58. As to the argument that previous practice regarding the adoption of social provisions for self-employed persons also indicates that the legal bases chosen in this case are permissible, it must be remembered that Regulation No 1408/71, [11] in contrast to the practice described by the Parliament, was extended on the legal basis of Article 235 of the EC Treaty (now 308 EC).

59. As far as concerns the scope of Article 137 EC in relation to self-employed persons, regard must be had first of all to the express wording of Article 137(1) EC, which refers expressly to workers. This holds good despite the differences in the various language versions, in particular the Finnish version, to which the Commission rightly draws attention.

60. Since Article 137 EC is aimed at workers, it is subject to the distinction applicable in primary legislation, in particular in Articles 39 EC and 43 EC, between self-employed persons and workers.

61. Finally, as regards the argument as to the lack of relevant scientific studies on the effects of certain activities on the state of drivers, regard must be had to the studies referred to by the Commission. Furthermore, according to the case-law of the Court, 'legislative action by the Community, particularly in the field of social policy, cannot be limited exclusively to circumstances where the justification for such action is scientifically demonstrated'. [12]

62. 'Progress in scientific knowledge is not, however, the only ground on which the Community legislature can decide to adapt Community legislation since it must, in exercising the discretion it possesses in that area, also take into account other considerations ... .' [13]

63. It follows from the foregoing that Article 137 EC is not a suitable legal basis for the adoption of social provisions applicable to self-employed drivers. It must therefore now be examined whether those rules laid down by the directive that are not covered by Article 137 EC could properly be based on Article 71 EC.

11 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1981 L 143, p. 1).

12 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 39.

13 — Case C-491/01 (cited in footnote 6), paragraph 80.

ii) Article 71 EC

64. In terms of content, the directive is not a technical or product-related harmonising provision but an organisational or person-related one.

65. In accordance with the case-law of the Court, the Community legislature, by means of measures based on Article 71 EC, may also regulate matters which concern both social policy and road safety. [14]

66. As the Commission and the Parliament rightly point out, the directive supplements Regulation No 3820/85 inasmuch as the latter is intended to prevent only one of the factors adversely affecting road safety, namely excessively long driving times.

67. The directive, on the other hand, is also intended to cover other adverse effects on road safety. Since these do not result solely from driving vehicles, that is to say that safety is compromised even if the regulation is observed, it was necessary to include other activities which may cause overtiredness in drivers.

68. It is apparent from case-law that working time must be considered to cover not only driving time but also other activities which may have a bearing on driving. [15] The directive thus provides for a restriction on working time outside driving time.

69. In accordance with the case-law of the Court, the existence of such a link between measures relating to working time and the health and safety of workers is established. [16] Thus the 'time spent by a driver to reach the place where he takes over a tachograph vehicle is liable to have a bearing on his driving, in that it will affect his state of tiredness'. [17]

70. The rules on working time provided for in the directive must therefore be regarded as a measure to improve transport safety within the meaning of Article 71(1)(c) EC.

14 — Case 97/78 *Schumalla* [1978] ECR 2311, paragraph 5.

15 — See Case C-394/92 *Michielsen und Geybels Transport Service* [1994] ECR I-2497, paragraphs 14 and 19.

16 — Case C-84/94 (cited in footnote 12), paragraph 38.

17 — Case C-297/99 *Skills Motor Coaches and Others* [2001] ECR I-573, paragraph 25.

71. As is apparent from Article 1 of the directive, the directive applies to 'persons performing mobile road transport activities', without distinguishing between their employment status.

72. The Parliament and the Commission rightly point out that differences of status cannot have any bearing on the objectives pursued by the directive. After all, dangers affecting fitness to drive exist irrespective of whether the driver is an employed or a self-employed person. [18]

73. Measures aimed at achieving the objective of aligning conditions of competition may also be based on Article 71 EC. If Article 71(1)(c) is not considered to be a sufficient legal basis, Article 71(1)(d) is always a possible alternative. For, under that provision, the Community legislature can 'lay down any other appropriate provisions'.

74. The authorisation provided for in Article 71(1)(d) EC is — as a general clause — formulated in such broad terms as to form a suitable basis for adopting the rules laid down in the directive.

75. The fact that a measure such as the directive at issue pursues several objectives that fall under a number of legal bases, namely Article 71(1)(c) and (d) EC, does not preclude the lawfulness of the directive, since it is lawful for several measures to be combined in a single legal act.

iii) Use of an unnecessary legal basis

76. It follows from the foregoing that, in relation to self-employed drivers, the directive could have been based solely on Article 71 EC. According to the case-law of the Court, the use of an unnecessary legal basis may be unlawful. [19] However, as these proceedings are concerned with the legal basis in relation to self-employed drivers, but the legal basis of Article 137 EC, which is unnecessary in relation to self-employed drivers, could be necessary in relation to mobile workers, this question does not need to be examined any further here. For the necessity of Article 137 EC in relation to mobile workers does not form part of the subject-matter of the proceedings.

18 — I shall address this issue in greater detail when examining the other pleas in law.

19 — Case C-211/01 *Commission* v *Council* [2003] ECR I-8913.

2. The provisions concerning small and medium-sized undertakings (fourth plea in law in Case C-223/02)

77. By its fourth plea in law, Finland claims that, by including self-employed drivers, the Community legislature has infringed the provisions contained in the second sentence of Article 137(2) EC and Article 157 EC, which protect small and medium-sized undertakings (SMUs). It bases that claim on the submission that it is primarily that group of undertakings which is affected by the restrictions laid down in the directive because they weaken the competitive position of those undertakings in relation to large undertakings. The latter have employees who can devote all their working time to driving and do not, like self-employed drivers, have to perform other activities as well. Moreover, Finland submits that the directive also holds back the creation of SMUs, thus changing the sector in favour of large undertakings.

a) Second sentence of the first subparagraph of Article 137(2) EC

78. Firstly, it is necessary to draw attention, as the Commission does, to the limited significance of the first subparagraph of Article 137(2) EC for the purposes of the directive at issue. For the requirement contained in the second sentence of that subparagraph relates exclusively to directives which are based only on Article 137 EC. However, since the directive in this case is based on Article 71 EC as well, the second sentence of the first subparagraph of Article 137(2) EC can indeed have only limited effect.

79. In fact, since Finland is challenging only the inclusion of self-employed drivers, but the directive can, in relation to them, be based on Article 71 EC alone, Article 137(2) is not applicable at all in this connection.

80. It would therefore seem unnecessary to examine the legislative significance of the second sentence of the first subparagraph of Article 137(2) EC. However, in the event that the Court should take the view that the directive is to be assessed against Article 137 (2) EC in relation to self-employed drivers also, the legislative significance of that Article too will now have to be considered.

81. The second sentence of the first subparagraph of Article 137(2) EC, in the version applicable here, provides that directives are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

82. In that regard, the question arises whether that provision is merely a statement of principle or whether it can be understood as having a more extensive, legislative content which is binding on the Community legislature.

83. The wording of the German language version of the provision ('sollen keine ... vorschreiben' ['should not provide for ...']) indicates that it does not have legislative effect or, if so, only to a limited extent. Accordingly, the consensus in German legal literature is that the second sentence of the first subparagraph of Article 137(2) EC constitutes a statement of principle.

84. However, the other language versions could be relied on in support of the argument that the provision does have legislative effect. That is true particularly of the Romance languages [20] and the Danish, Swedish and English language versions. [21] The Greek [22] and Finnish [23] language versions too can be understood in that sense because of the now common use in Community law of the indicative mood. However, even if it is assumed that the second sentence of the first subparagraph of Article 137(2) EC has legislative effect, that effect is very limited. Thus, it refers only to certain measures, such as financial or legal constraints, which, depending on how they are framed, could interfere with the freedom of occupation, the reference to the 'creation and development' of SMUs indicating that it applies to that freedom in both its guises, namely the right to take up and the right to pursue an economic activity. It seems highly unlikely that the second sentence of the first subparagraph of Article 137(2) EC has legislative force beyond the general legal principle of freedom of occupation.

85. As is apparent from the case-law of the Court [24] on the predecessor to the second sentence of the first subparagraph of Article 137(2) EC, that is to say the second sentence of Article 118a(2) of the EC Treaty, the former provision does not in any event prevent SMUs from being subject to binding measures. That also applies to the transport sector at issue in this case.

86. Since the directive has taken account of the effects which the organisation of working time for which it provides may have on SMUs, it fulfils a further condition laid down in the abovementioned case-law.

20 — They read: 'évitent', 'evitano', 'evitarán' and 'devem evitar'.

21 — They read: 'skal', 'skall' and 'shall avoid imposing'.

22 — 'Στις οδηγίες αυτές αποφεύγεται η επιβολή διοικητικών, οικονομικών και νομικών εξαναγκασμών, οι οποίοι θα παρεμπόδιζαν τη δημιουργία και την ανάπτυξη των μικρομεσαίων επιχειρήσεων.'

23 — 'Näissä direktiiveissä vältetään säätämästä sellaisia hallinnollisia, taloudellisia tai oikeudellisia rasituksia, jotka vaikeuttaisivat pienten tai keskisuurten yritysten perustamista taikka niiden kehittämistä.'

24 — Judgment in Case C-84/94 (cited in footnote 12), paragraph 44.

87. Thus, it is apparent from the rules on working time contained in Article 3(a)(2) of the directive, to which the Parliament refers, that general administrative work that 'is not directly linked to the specific transport operation under way' is not considered to be working time. That exception relates specifically to self-employed persons, and therefore, also, to the activities typically carried on by SMUs. Other activities performed by both self-employed and employed persons, on the other hand, on account of their effects on the objectives pursued by the directive, were to be included in working time.

88. Moreover, attention should also be drawn to the advantage enjoyed by SMUs to which the Parliament refers. This consists in the fact that, for the purposes of those activities they pursue which are not included in working time, self-employed drivers are not subject to the restrictions under employment law applicable to employed persons, whereas persons employed to perform administrative activities in large undertakings are subject to additional provisions.

89. Lastly, reference should also be made to the Treaty of Amsterdam, which likewise contains a text on SMUs. The 'Declaration on Article 118(2) of the Treaty establishing the European Community', adopted by the Intergovernmental Conference, provides that 'the Community does not intend, in laying down minimum requirements for the protection of the safety and health of employees, to discriminate in a manner unjustified by the circumstances against employees in small and medium-sized undertakings'. On the other hand, however, there is No indication in that text of any legislative limits which would preclude the validity of the directive at issue in this case.

b) Article 157(1) EC

90. The second indent of the second subparagraph of Article 157(1) EC provides that the Community's action in the field of industry is to be aimed at encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings.

91. For the sake of completeness, mention should also be made, in the context of SMUs, of Article 157(3) EC, which provides that the Community is to contribute to the achievement of the objectives set out in Article 157 (1) EC through the policies and activities it pursues under other provisions of that Treaty. It is questionable whether those two provisions actually apply to the directive at issue in this case at all. It is true that, at first sight, Article 157(3) EC can be understood as a crosscutting clause under which other legal

acts adopted outside the 'industry' title must of necessity also contribute to the achievement of the objectives set out in Article 157 (1) EC. However, the effect of the requirement to take those objectives into account is limited.

92. After all, the objectives set out in Article 157(1) EC serve a specific purpose. Thus, the sentence introducing the list of objectives in the second subparagraph of Article 157(1) EC refers ('[f]or that purpose') to the first subparagraph of Article 157(1).

93. However, the first subparagraph of Article 157(1) EC[25] clearly relates only to the competitiveness of industry and not to the competitiveness of other sectors of the economy, such as the transport sector, for example.

94. In this connection, it is necessary to examine the argument advanced by Finland that road transport makes up an essential part of the necessary infrastructure of the activities of undertakings. That contention says something about the economic significance of road transport in general but does not alter the fact that Article 157 EC is not a yardstick against which the directive at issue in this case can be measured.

25 — 'The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.'

3. Conclusion

95. The pleas in law put forward by Spain and Finland with regard to the legal basis of the directive and alleging infringement of the provisions concerning SMUs must therefore be rejected as unfounded.

B — *The fundamental freedom to pursue a trade or profession (first plea in law in Case C-184/02 and third plea in law in Case C-223/02) and the principle of proportionality (second plea in law in Case C-223/02)*

96. The infringement of the fundamental freedom to pursue a trade or profession alleged by Spain and Finland exhibits some similarities to the breach of the principle of proportionality alleged by Finland. In this connection, Finland complains of a breach of the third paragraph of Article 5 EC, under which any action by the Community is not to go beyond what is necessary to achieve the objectives of that Treaty.

1. Preliminary remarks

a) Separate or joint examination?

97. Those pleas in law overlap in so far as the examination as to whether the freedom to pursue a trade or profession has been infringed also requires consideration of the question of proportionality (an incidental or inherent examination of proportionality).

98. The question, therefore, is whether a 'double examination of proportionality' must be carried out, that is to say whether an examination in the light of the separate principle of proportionality is also advisable.

99. It could after all be argued that, in an examination of proportionality as a fundamental right, its function as a right enjoyed by individuals is paramount, that is to say the right to be guaranteed protection under the law, whereas, when examined in isolation, it is considered in its capacity as an element of the legal system. In the latter case, regard is had to the function of proportionality as a restriction on the powers of institutions, which is to say that the examination focuses directly on the extent of the discretion held by the institution adopting the legislation.

100. However, that distinction based on the function of the principle of proportionality finds no expression in the case-law of the Court because, in the context of an alleged infringement of fundamental rights, the Court examines proportionality by reference to its function within the relevant system of legislation, so that no argument in favour of a separate examination can be derived from the Court's case-law.

101. The fact that the arguments advanced by Finland in connection with the infringement of the principle of proportionality differ in some respects from those advanced by Spain likewise cannot be relied on to preclude a joint examination.

102. What matters above all is that the subject-matter of the examination is the same in both cases, that is the inclusion of self-employed drivers in the directive. Since the aim of the contested rules is the same in both instances, and the legal interests involved and the manner of their impairment are also the same, the outcome of the examination with regard to the conditions governing proportionality in each case should likewise be essentially the same.

103. On the basis of the above considerations, a two-fold examination of the substance of the directive in the light of the principle of proportionality does not seem appropriate.

b) The fundamental freedom to pursue a trade or profession

104. With regard to the infringement of the fundamental freedom to pursue a trade or profession alleged by Spain and Finland, reference should be had to the Court's settled case-law to the effect that that fundamental right is one of the general principles of Community law.

105. In addition to the freedom to pursue a trade or profession, Spain also refers to the right to commercial freedom or the freedom to conduct business ('libertad de empresa'). Although the Court has occasionally referred to the 'freedom to carry on a business' [26] or the 'freedom of trade as a fundamental right', [27] these are not to be regarded as designating a right different from the freedom to pursue a trade or profession or the right to pursue an economic activity, [28] but merely reflect the use of different terminology.

c) Burden of proof and its allocation

106. Before examining whether the substance of the directive is consistent with the aforementioned fundamental right, however, it is necessary to address the issue of the allocation of the burden of proof raised by Spain. In that connection, the view expressed by Spain, to the effect that the applicant has only to prove interference and the defendant that it is justified, must be rejected. Community law provides no support for such a division of the burden of proof. In fact, it conflicts with the general principle, which follows from the system of legal protection applicable in the case of actions for annulment established in the Treaty and implemented in the Statute and the Rules of Procedure, that it is for the applicant to prove that his claim that a right has been infringed is well-founded.

107. Since Spain is claiming not only that a fundamental right has been interfered with but also that that right has been infringed, Spain must substantiate its claim in respect of infringement also.

26 — Case C-161/97 P *Kernkraftwerke Lippe-Ems* v *Commission* [1999] ECR I-2057, paragraph 101.

27 — Case 4/73 *Nold* [1974] ECR 491, paragraph 14, and Case 240/83 *ADBHU* [1985] ECR 531, paragraph 9.

28 — Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Others* [1991] ECR I-415, paragraph 77.

108. The same is true of Finland's claim that the directive is disproportionate. Thus, the Court's practice when examining legislation, in particular legislation adopted by the Parliament and the Council, shows that it proceeds on a presumption of proportionality.

109. Lastly, one judgment given by the Court supports the inference applicable to actions for annulment in general that it is for the applicant to prove that the legal classification carried out by the Community institution whose measure has been contested is incorrect. [29]

2. Conditions governing the lawfulness of interference with a fundamental right

a) Proportionality in general

110. According to the settled case-law of the Court, the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [30]

b) The fundamental freedom to pursue a trade or profession in particular

111. Firstly, it must be assumed that the freedom to pursue a trade or profession does 'not constitute an unfettered prerogative', but must 'be viewed in the light of the social function of the activities protected thereunder. Consequently, ... the freedom to pursue a trade or profession may be restricted ... provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'. [31]

29 — Case C-356/01 *Austria* v *Commission* [2003] ECR I-14061, paragraph 52 et seq.

30 — Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-101/98 *UDL* [1999] ECR I-8841, paragraph 30.

31 — Case 4/73 (cited in footnote 27), paragraph 14, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 15, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 16, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 78, Case C-306/93 *SMW Winzersekt* [1994] ECR I-5555, paragraph 22, Case C-44/94 *National Federation of Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 55, and Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraph 21.

112. The first step is to examine whether the directive interferes with the freedom of self-employed drivers to pursue a trade or profession, that is to say with the scope of the protection guaranteed by that fundamental right. If that were the case, the second step would be to examine the justification for such interference. If none exists, the interference is unlawful, that is to say that it infringes the fundamental right.

113. As regards the interference with the freedom to pursue a trade or profession alleged by Spain and Finland, it must be stated that the introduction of rules on working time, in particular maximum weekly working time, do change the competitive position because no such limitation existed previously. For, as Finland rightly submits, 'labour', along with capital, constitutes an essential factor of production for self-employed persons as well. As a result of the rules on working time, the drivers concerned are now restricted by the fact that the driving time available to them is limited.

114. The obligation to keep records of working time is regarded as a further interference. It is questionable whether this does in fact interfere with the scope of the protection afforded by the fundamental freedom to pursue a trade or profession. Even if it were found to constitute interference, that obligation can in any event be classified as proportionate given the relatively minor restrictions it entails.

115. On the other hand, the directive certainly does not interfere with the very substance of the freedom to pursue a trade or profession, since it is concerned only with how such a freedom is to be exercised; it does not jeopardise the very existence of that freedom. After all, the directive does not lead to the exclusion of the economic activity of self-employed drivers.

116. It is apparent from the foregoing that the interference effected by the directive does not infringe upon the very substance of the freedom of self-employed drivers to pursue a trade or profession.

117. In order to achieve the objective of road safety, the Parliament and the Council were entitled to consider it essential that self-employed drivers should also be subject to rules on working time. Consequently, the restrictions on working time laid down in the directive are 'not manifestly inappropriate' [32] in relation to the objective of the measure at issue.

32 — Case C-306/93 (cited in footnote 31), paragraph 27.

118. If, as is not uncommonly the case in the examination of legislative measures, a low level of scrutiny were sufficient, that is to say if the criterion were that interference must not be 'manifestly inappropriate', [33] no further examination of proportionality would be necessary.

119. In my opinion, however, the question of proportionality should be examined in depth in this case. So it was that, in another case, having concluded that the measure at issue did not impair the very substance of the right freely to exercise a trade or profession, the Court continued its assessment and examined whether those provisions pursued objectives of general interest and whether they did not affect the position of the persons concerned, that is to say, in this case, self-employed drivers, in a disproportionate manner. [34]

c) Proportionality of interference

120. Interference with protected legal interests, such as, for example, the freedom to pursue a trade or profession, is justified if it is proportionate. To be proportionate, it must, firstly, pursue an objective of general interest, secondly, be suitable for achieving that objective, thirdly, be necessary in order to do so and, fourthly, be reasonable.

121. It should be recalled here that the directive governs the working time not of all self-employed persons working in the transport sector, but only those self-employed persons who do so as self-employed drivers.

i) Objective of the directive

122. It is therefore necessary first of all to examine whether the provisions of the directive pursue an objective of general interest. In that connection, the Commission, the Council and the Parliament refer to the safety of transport and the protection of health and safety.

123. Those objectives are expressly set out in the fourth recital in the preamble to the directive and, in particular, in Article 1 thereof. In accordance with those provisions, the purpose of the directive is to establish minimum requirements in relation to the organisation of working time in order to

33 — Case C-306/93 (cited in footnote 31), paragraph 27.

34 — Case C-306/93 (cited in footnote 31), paragraph 24. In that judgment, the Court ultimately applied the less strict criterion which I have rejected here.

improve the health and safety protection of persons performing mobile road transport activities and to improve road safety and align conditions of competition.

124. Those objectives which the directive pursues are undoubtedly objectives which are in the general interest or which serve the common good.

ii) Suitability

125. With regard to the suitability of the rules laid down in the directive for achieving the objective set out in Article 1 thereof, it must be assumed that restrictions on the working time of persons performing mobile road transport activities are intended to ensure safety on the roads they use and the health and safety of those persons themselves and other road users.

126. However, what applies to mobile workers cannot but apply to self-employed drivers. For, as far as their 'driving activity' is concerned, those two groups are indistinguishable. The fact that mobile workers have a different legal status is of no significance in the context of road safety.

iii) Necessity

127. For the purposes of assessing the necessity of the rules laid down in the directive, it must be examined whether they are necessary to achieve the objective of the directive or whether there are other, less restrictive measures which are equally effective. The exercise therefore involves seeking and evaluating alternative rules.

128. In that regard, Finland has submitted that a restriction on driving time such as that laid down in Regulation No 3820/85 is sufficient and any restrictions on working time which go beyond that are not necessary. In addition, it contends, compliance with Regulation No 3820/85 should be monitored more closely.

129. In any event, Finland's argument that the directive is not necessary in respect of self-employed drivers because they do not need to be protected in their relationship with an employer must be rejected. That is because, in relation to self-employed drivers, the directive pursues transport policy objectives, not social policy objectives.

130. Although restrictions applicable only to driving time are readily classifiable as a more moderate measure, the question remains whether such limited restrictions, as provided for in Regulation No 3820/85, are as effective as the restrictions on working time laid down in the directive.

131. Since the work of mobile workers and self-employed drivers does not stop at the activities which are subject to Regulation No 3820/85, but those additional duties none the less have effects on the physical state of the driver and therefore on road safety, the restrictions contained in that regulation cannot be sufficient.

132. With regard to the objective of aligning conditions of competition, Finland submits that the directive does not specify how that objective is to be achieved. The Commission rightly points out that what is needed to achieve that objective is precisely the inclusion of self-employed drivers. The application to self-employed drivers of provisions different from those applied to mobile workers would create a danger that the provisions of the directive applicable to mobile workers might be circumvented by means of a change in the legal status of those drivers.

iv) Reasonableness

133. It must be pointed out that establishing whether the rules applicable to self-employed drivers are reasonable is essentially a matter of balancing the restrictions associated with those rules against the benefit gained from them, in other words against the objective pursued. To that end, the legal interests concerned must first be determined and evaluated.

134. The purpose of the directive, apart from the alignment of conditions of competition, is road safety, and thus the protection of the life and health of all road users, not just the drivers concerned.

135. It is the freedom of self-employed drivers to pursue an economic activity, as characterised by the fact that they were previously subject to fewer time limitations, which is restricted. However, as the analysis of interference has shown, that restriction cannot be regarded as particularly extensive. This follows, inter alia, from the fact that not all the activities of a self-employed driver constitute working time and therefore not all are restricted. Thus, Article 3(a)(2) of the directive provides that certain 'general administrative work' is to be excluded from weekly working time. This is the very kind of activity typically carried on by independent economic operators.

136. In the proceedings before the Court, reference has been made in this regard to the different language versions [of the directive] and to the fact that the expression 'under way' qualifying 'operation' is missing in the Dutch, Swedish and Finnish versions. It should be noted in this respect that those language versions are alike in so far as they refer to the transport operations 'in question'. By contrast, most of the language versions refer to transport operations which are 'under way' or words to that effect, that is so say in the course of being carried out. However, the difference is of no legal significance since both sets of language versions contain clarifications which mean the same.

137. There is yet further evidence to support the argument that the rules applicable to self-employed drivers are reasonable. According to case-law, the assessment of the proportionality of a rule turns inter alia on whether that provision takes account of the position of the operators concerned. [35]

138. The directive at issue meets that requirement because the Parliament and the Council took account of the position of self-employed drivers by providing for a later date of entry into force for those persons.

139. As regards the importance of the objective pursued, that is to say the legal interest protected, it is an interest which enjoys the highest status in Community law, namely human life and health. And yet, in the field of health protection, the Court not only affords extensive discretion to the Member States, but also exhibits considerable restraint in its review of Community measures concerning consumer health protection [36] and product safety. [37]

140. The Court exercises limited scrutiny specifically in cases involving the examination of acts of Community law in those fields because the Parliament and the Council have legislative discretion in those areas. [38] That was the Court's express finding in the field of transport policy:

'It is also settled case-law, with respect to judicial review of the conditions mentioned in the preceding paragraph, that the Community legislature has wide legislative powers in the field of the common transport

35 — Case C-306/93 (cited in footnote 31), paragraph 28.

36 — Case C-331/88 (cited in footnote 30).

37 — Case C-359/92 *Germany* v *Council* [1994] ECR I-3681.

38 — See, for example, Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405 and Case C-84/94 (cited in footnote 12).

policy as regards the adoption of appropriate common rules.' [39]

141. Taking into account all the relevant factors, it follows therefore that the rules concerning self-employed drivers are not disproportionate.

3. Conclusion

142. Accordingly, it must be found that, by adopting the directive at issue, the Parliament and the Council have not infringed either the fundamental freedom to pursue a trade or profession or the principle of proportionality. The first plea in law in Case C-184/02 and the second and third pleas in law in Case C-223/02 must therefore be rejected as unfounded.

C — General principle of equality (second plea in law in Case C-184/02)

143. By its second plea in law, Spain complains that the principle of equal treatment, that is to say the general principle of equality, and Article 74 EC have been infringed.

1. General principle of equality

144. With regard to the alleged infringement of the general principle of equality, Spain submits that self-employed drivers are in a different situation from mobile workers because they have to perform additional tasks, such as negotiating contracts, safeguarding financial interests and bookkeeping. Moreover, they have no fixed salary and do not enjoy the same protection as employees. In addition, mobile workers can devote all their working time to driving. The directive therefore merely imposes burdens on self-employed drivers, without at the same time granting them rights. Lastly, Spain argues that the directive acts as a deterrent to the creation of smaller transport undertakings. The inclusion of self-employed drivers in the directive means that they are treated in the same way as mobile workers. Consequently, different situations are treated in the same way when there is no objective justification for doing so.

145. The answer to the question whether the directive infringes the general principle of equality must be based on the Court's settled

39 — Joined Cases C-27/00 and C-122/00 (cited in footnote 30), paragraph 63, and Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23; see Case C-84/94 (cited in footnote 12), paragraph 58, concerning social policy.

case-law to the effect that similar situations should not be treated differently and that different situations should not be treated identically unless such differentiation is objectively justified. [40]

146. The first step must therefore be to examine whether the situation to be assessed falls within the scope of the protection afforded by the general principle of equality. Next, it is necessary to define the groups to be compared and determine the treatment they receive. Lastly, it must be examined whether the equal treatment of different groups is justified.

147. With regard to the scope of the protection, it must be stated that the conditions governing the scope both *ratione personae* — Community economic operators — and *ratione materiae* — matters of Community law — of the protection are fulfilled.

148. As regards the groups to be compared, one comprises self-employed drivers and the other mobile workers.

149. The general principle of equality would be infringed if those two groups, although different, were treated in the same way and that treatment were not objectively justified.

150. However, the decisive factor is that the two groups must be the same not in every respect but in the context of the sphere that forms the subject-matter of the legislation.

151. Self-employed drivers and mobile workers exhibit both similarities and differences. The latter include, for example, their status under employment law and the activities typically carried on by independent economic operators.

152. However, as the Commission and the Council submit, both self-employed drivers and mobile workers are in the same situation in so far as both groups perform mobile road transport activities.

153. It must be emphasised that Spain's argument that this justifies the application of the same provisions concerning driving

40 — Case C-306/93 (cited in footnote 31), paragraph 30, Case C-217/91 *Spain* v *Commission* [1993] ECR I-3923, paragraph 37, and Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39.

times only but not the application of the same provisions concerning working time is based on the incorrect assumption that only certain activities, namely driving, were to be subject to time restrictions. However, the Community legislature set itself the objective of also imposing time restrictions on other activities performed by persons who carry out mobile road transport activities.

154. The fact is that self-employed drivers are comparable with mobile workers not only with regard to driving but also with regard to other activities, such as loading and unloading, cleaning and maintenance.

155. It is true that, so far as concerns the activities which a self-employed driver performs in his capacity as an independent economic operator, he is not in the same situation as a mobile worker. In that regard, however, he is subject to special provisions. The Commission, the Council and the Parliament rightly refer to Article 3(a)(2) of the directive, which states that certain activities are to be excluded from working time.

156. So that the characteristics specific to self-employed drivers can be taken into account, the second and third subparagraphs of Article 2(1) of the directive provide that the Commission is to analyse the consequences of the exclusion of self-employed drivers in respect, inter alia, of road safety, conditions of competition and the structure of the profession. That study is intended to enable the Commission and, subsequently, the Council and the Parliament to establish special provisions for the inclusion of self-employed drivers.

157. Consequently, Spain's submission that the directive treats different situations in the same way is erroneous. Self-employed drivers and mobile workers are treated in the same way only to the extent that they are in a comparable situation.

158. There is therefore no need for a separate examination of the justification for the same treatment of different situations.

159. The fact that self-employed drivers and mobile workers can lawfully be treated differently and, indeed, are now treated differently is corroborated by Spain's reference to the longer weekly hours which self-employed drivers in Spain have to work as a result of the stricter rules applicable to mobile workers under a collective agreement.

2. Article 74 EC

160. As regards the infringement of Article 74 EC alleged by Spain, it is necessary first of all to determine the legislative substance of that article. It provides that any measure taken within the framework of the Treaty in respect of transport rates and conditions is to take account of the economic circumstances of carriers.

161. It is beyond dispute that that provision is directed at the Community institutions, including, therefore, the Parliament and the Council as parts of the Community legislature.

162. Article 74 EC is aimed at ensuring that a measure does not merely serve the interests of road users or other public interests.

163. It is unclear, however, whether the substance of the requirement laid down in Article 74 EC relates only to measures which are concerned with transport rates and conditions directly, or whether it also relates to measures which increase costs and thereby have an effect on the profitability of transport undertakings, thus influencing rates indirectly.

164. Even if that provision is seen, as Spain sees it, as encompassing measures which have indirect effects on transport rates, it must none the less be emphasised that Article 74 EC does not have absolute application, but requires that consideration be given to the objectives pursued by a measure. This is apparent from its very wording, which states that 'account [is to be taken] of the ... circumstances'. It is therefore — merely — a requirement to give due consideration.

165. The directive fulfils that requirement in particular by requiring the Commission to draw up and present a report on the consequences of the exclusion of self-employed persons in respect of road safety, conditions of competition, the structure of the profession as well as social aspects.

166. As the Commission rightly points out, the definition of working time contained in Article 3(a)(2) also confirms that the specific characteristics of carriers were taken into account.

167. The plea in law based on Article 74 EC must therefore be rejected as unfounded.

D — *Obligation to state reasons (fourth plea in law in Case C-184/02 and fifth plea in law in Case C-223/02)*

168. Spain and Finland also complain that there has been a failure to fulfil the obligation to state reasons laid down in Article 253 EC.

169. Spain substantiates the claim that there has been an infringement of essential procedural requirements on the ground that the directive does not give proper reasons for including self-employed drivers. It argues that the eighth recital in the preamble to the directive, concerning the temporary exclusion of self-employed drivers, is unclear and unconvincing in the light of the material circumstances.

170. According to Finland, the directive fails not only to give reasons for including self-employed drivers but also to describe the problems which it is intended to solve, such as the differences in conditions of competition.

171. It is necessary, first of all, to consider the Parliament's submission that the reasons given for the original proposal hold good for the act ultimately adopted as well, in so far as the substance of those two measures is the same.

172. Finland's argument that the statement of reasons must be contained in the final version of the act is to be endorsed. This is apparent from the very wording of Article 253 EC ('directives ... adopted jointly by the European Parliament and the Council ... shall state the reasons on which they are based'). It follows from this that the statement of reasons must be contained in the version adopted by the institutions. As regards the proposals made by the Commission in connection with the act, Article 253 EC requires reference to be made to them in the adopted act. Such a reference does not, however, replace the statement of reasons.

173. The Court has consistently held that the scope of the obligation to state reasons depends on the nature of the measure in question. In the case of measures of general application, as in this case, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. [41]

174. The first two recitals in the preamble to the contested directive contain a description of the general legal situation and the eleventh and twelfth recitals contain a statement of reasons relating specifically to the need to limit night work.

41 — Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62, and Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraphs 25 and 26.

175. Thus, the directive contains a coherent and adequate account of the general situation in which it was adopted. [42]

176. The directive also satisfies the requirement that the objectives pursued by the Community through that measure must be specified. According to the fourth recital in its preamble, those objectives are to ensure the safety of transport and the health and safety of the persons involved. Those persons are then dealt with at greater length in the sixth to eighth recitals, where the two groups, mobile workers and self-employed drivers, are mentioned separately. Although special reasons in relation to the definition of working time are given only in respect of mobile workers, this can be explained by the fact that self-employed drivers are not to be included until later — on the basis of a report by the Commission. Moreover, the same provisions will also apply to self-employed drivers as soon as the directive becomes applicable to them. Accordingly, the fourth recital, which sets out the objectives of the directive, likewise relates to them.

177. In addition, as the Commission rightly points out, any exclusion of self-employed drivers would have had to be the subject of a separate statement of reasons. For, as Regulation No 3820/85 shows, it is the norm in the transport sector for self-employed drivers to be included.

178. A more extensive statement of reasons relating to other aspects of the directive is unnecessary. That is because, according to settled case-law, 'it is not necessary ... for details of all relevant factual and legal aspects to be given'. [43]

179. Since the directive clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons. [44] Moreover, since the legislation at issue is a directive and therefore is an act of general application, the Parliament and the Council were not bound to set out more specific information in the statement of reasons. [45]

180. It cannot be inferred from the requirement, also referred to in settled case-law, that the statement of reasons must show clearly and unequivocally the reasoning of

42 — See Joined Cases C-27/00 and C-122/00 (cited in footnote 30), paragraph 48, and Case C-168/98 (cited in footnote 41), paragraph 63 et seq.

43 — Case C-478/93 *Netherlands* v *Commission* [1995] ECR I-3081, paragraph 49, and Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16 and the cases cited therein.

44 — Joined Cases C-27/00 and C-122/00 (cited in footnote 30), paragraph 47, Case C-168/98 (cited in footnote 41), paragraphs 62 and 66, Case C-150/94 (cited in footnote 41), paragraphs 25 and 26, Joined Cases C-71/95, C-155/95 and C-271/95 *Belgium* v *Commission* [1997] ECR I-687, paragraph 53, and Case 250/84 *Eridania and Others* [1986] ECR 117, paragraph 38.

45 — See Case C-150/94 (cited in footnote 41), paragraph 32, Case C-350/88 (cited in footnote 43), paragraphs 15 and 16, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 70.

the Community institution which adopted the measure so as to inform the persons concerned of the justification for the measure adopted, [46] that self-employed drivers are the criterion for assessing whether or not the statement of reasons is lawful.

181. The objective pursued by the case-law on the obligation to state reasons, that is to say to safeguard legal protection, indicates that, in the case of a directive, individuals cannot be regarded as the 'persons concerned'. The legal remedies made available to individuals by directives are very limited, however. [47]

182. As the Parliament rightly points out, the contested act is a directive addressed to Member States under Article 249 EC. From that point of view, it is the Member States which are the 'persons' concerned by the measure. Self-employed drivers must be regarded as persons concerned only by the implementing measure adopted by each Member State.

183. The fact that Spain and Finland, as Member States, were closely associated with the legislative process is a further argument against the imposition of excessive requirements in respect of the obligation to state reasons. For, in such circumstances, the Court assumes that the Member States 'are aware of the reasons underlying [the] measure'. [48]

184. The plea in law alleging infringement of the obligation to state reasons must therefore be rejected as unfounded.

V — Costs

185. 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 Parliament and the Council have applied for costs and the Kingdom of Spain and the Republic of Finland have been unsuccessful, they must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Commission, which intervened in the proceedings, is to bear its own costs.

46 — Joined Cases C-71/95, C-155/95 and C-271/95 (cited in footnote 44), paragraph 53, Case C-478/93 (cited in footnote 43), paragraph 48, and Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19.

47 — Case C-352/96 *Italy* v *Council* [1998] ECR I-6937, paragraph 40.

48 — Case C-478/93 (cited in footnote 43), paragraph 50, and Case C-54/91 *Germany* v *Commission* [1993] ECR I-3399.

VI — Conclusion

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

(1) dismiss the applications;

(2) order the Kingdom of Spain and the Republic of Finland to bear the costs of the proceedings;

(3) order the Commission to bear its own costs.