ORDER OF THE COURT (Second Chamber)

14 July 2005 *

In Case C-52/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesverwaltungsgericht (Germany), made by decision of 17 December 2003, received at the Court on 10 February 2004, in the proceedings

Personalrat der Feuerwehr Hamburg

v

Leiter der Feuerwehr Hamburg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), J. Makarczyk and J. Klučka, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

the national court having been informed that the Court intends to give its decision by reasoned order in accordance with Article 104(3) of its Rules of Procedure,

the persons referred to in Article 23 of the Statute of the Court of Justice having been invited to submit their observations in this regard,

after hearing the Advocate General,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 2 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 (OJ 1989 L 183, p. 1) and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2 The reference was made in connection with proceedings between the Personalrat der Feuerwehr Hamburg (Staff Committee of the Hamburg Fire Service; 'the Personalrat') and the Leiter der Feuerwehr Hamburg (the Head of that Service; 'the Leiter') concerning the German legislation which establishes a weekly working time of over 48 hours for the Fire Service's operational crews.

Law

Community legislation

3 Directives 89/391 and 93/104 were adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

4 Directive 89/391 is the framework directive which lays down the general principles relating to the health and safety of workers. Those principles were subsequently developed by a series of individual directives, among them Directive 93/104.

5 Article 2 of Directive 89/391 defines the scope of that directive as follows:

'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

6 Article 1 of Directive 93/104, entitled 'Purpose and scope', provides:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.'

7 Under the title 'Definitions', Article 2 of Directive 93/104 provides:

'For the purposes of this Directive, the following definitions shall apply:

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

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

...'

8 Section II of Directive 93/104 lays down the measures which the Member States must take in order to ensure that every worker is entitled inter alia to minimum daily and weekly rest periods, and it also regulates the maximum weekly working time.

9 With regard to the maximum weekly working time, Article 6 of Directive 93/104 provides:

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

...

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

10 Article 15 of Directive 93/104 provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

11 Under Article 16 of Directive 93/104:

'Member States may lay down:

...

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

...'

12 Directive 93/104 provides for a series of derogations from several of its basic rules, in view of the specific characteristics of certain activities and subject to compliance with certain conditions. In that regard, Article 17 provides:

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

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

...

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

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

...

(iii)press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

...

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1. and 2.2. and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

...'

National legislation

13 German labour law distinguishes between duty time ('Arbeitsbereitschaft'), on-call time ('Bereitschaftsdienst') and standby time ('Rufbereitschaft').

14 Those three concepts are not defined in the national legislation but their features derive from case-law.

15 Duty time ('Arbeitsbereitschaft') covers the situation in which the worker must make himself available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to act immediately should the need arise.

16 While a worker is on call ('Bereitschaftsdienst'), he must be present at a place determined by his employer, either on or outside the latter's premises, and must keep himself available to take up his duties if so requested by his employer but he is authorised to rest or occupy himself as he sees fit so long as his services are not required.

17 Standby time ('Rufbereitschaft') is characterised by the fact that the worker is not obliged to remain waiting in a place designated by the employer: it is sufficient for him to be reachable at any time so that the employer may call upon him at short notice to perform his professional duties.

18 Under the German labour law in force at the material time, only duty time ('Arbeitsbereitschaft') was, as a general rule, regarded as constituting full working time in its entirety. Conversely, both on-call time ('Bereitschaftsdienst') and standby time ('Rufbereitschaft') were categorised as rest time, save for the part of the time during which the worker actually performed his professional duties.

19 Paragraph 76 of the Hamburg Law on public servants (Hamburgisches Beamtengesetz), in the version published on 29 November 1977, as amended by the Law of 11 June 1997 ('the HmbBG'), is worded as follows:

'1. The normal working time of public servants is set by regulation of the "Senat" [the governing body of the *Land* of Hamburg] in accordance with the rules established in the second and third sentences. It may not exceed an average of 40 hours per week. In the case of on-call time, the normal working time may be

extended to meet operational requirements; however, it may not exceed an average of 50 hours per week.

...'

20 Under Paragraph 1 of the Regulation on working time for public servants (Verordnung über die Arbeitszeit der Beamtinnen und Beamten) of 12 August 1997 ('the ArbzVO'):

'1. The normal working time for public servants shall be an average of 40 hours per week. So far as concerns the working day, the normal or usual working time for the service is set as the corresponding fraction of the normal weekly time.

2. By derogation from subparagraph 1, the normal weekly time may be extended to an average of 50 hours per week, depending on operational requirements, where that service includes periods on call. The normal weekly working time, including time on call, for fire service personnel on operational duty shall be an average of 48 hours a week.'

21 That provision of the ArbzVO was amended as follows by a regulation of 15 December 1998:

'In the second sentence of Paragraph 1(2) of the Regulation on working time for public servants of 12 August 1997 ..., the figure "48" is replaced by the figure "50".'

The main proceedings and the question referred for a preliminary ruling

22 The documents before the Court show that, on 18 July 1991, the parties in the main action entered into a collective agreement, applicable from 1 April 1990, on the working time of personnel on operational duties and on 'rotating shifts' at fire stations. That collective agreement set the normal weekly working time at an average of 48 hours, including time on call.

23 At the beginning of the year 1999, the Leiter produced a new draft collective agreement, designed to replace the agreement of 18 July 1991 with effect from 1 January 1999, which provided for an increase in the normal working week, including time on call, from 48 to 50 hours.

24 The Personalrat refused to approve the draft. Since the parties in the main action could not reach agreement, the Leiter referred the matter to the settlement board which, on 25 October 1999, gave its consent — in substitution for that of the Personalrat — to the new collective agreement ('the collective agreement at issue').

25 On 12 December 2000, the Personalrat terminated the agreement with immediate effect, on the ground that, in its opinion, it was incompatible with the provisions of Directives 89/391 and 93/104.

26 The Personalrat subsequently brought proceedings before the Verwaltungsgericht Hamburg (Hamburg Administrative Court), which made an order dismissing the action.

27 The Personalrat then brought an appeal before the Oberverwaltungsgericht Hamburg (Higher Administrative Court, Hamburg) which dismissed the principal form of order sought (a declaration that the collective agreement at issue did not apply) but granted the form of order sought in the alternative (a declaration that the ruling of the settlement board of 25 October 1999 was unlawful).

28 The Personalrat and the Leiter both lodged an appeal before the Bundesverwaltungsgericht (Federal Administrative Court) against the ruling of the Oberverwaltungsgericht.

29 The Bundesverwaltungsgericht considers that the outcome of those proceedings depends on the answer to a question of Community law which has not yet been clarified by the case-law of the Court of Justice.

30 If the legal basis for the collective agreement at issue is the HmbBG and the ArbzVO, as amended on 15 December 1998, that national legislation, which authorises a normal working week of up to 50 hours depending on operational requirements, cannot be applied if it is contrary to Article 6(2) of Directive 93/104, which sets the maximum working week at 48 hours. However, in that regard, the question arises whether that directive applies to professional fire service personnel on operational duties.

31 In the light of the fact that Article 1(3) of Directive 93/104 defines the scope of the directive by express reference to Article 2 of Directive 89/391 and that, under the first subparagraph of Article 2(2) of Directive 89/391, that directive is not applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it, it is necessary to establish whether the fire service may be covered by one of those exceptions.

32 Accordingly, since the essential duty of the fire service is to fight fires and it also has the statutory duty of providing assistance in cases of accident or other emergency situations, the fire service may be regarded as forming part of the public security services, to which the armed forces and the police, mentioned as examples in Article 2(2) of Directive 89/391, also belong, or as forming part of the civil protection services, so that it cannot be ruled out that, in one capacity or another, the fire service falls outside the scope of that directive and, consequently, outside the scope of Directive 93/104.

33 However, according to the national court, it is also conceivable that the first subparagraph of Article 2(2) of Directive 89/391 is to be interpreted as meaning that at least the maximum weekly working time specified in Article 6(2) of Directive 93/104 also applies to members of the public service carrying out operational duties in the fire service. Such an interpretation is supported by the wording and by the spirit and purpose of the former of those provisions.

34 Considering that, in those circumstances, the settlement of the case before it requires the interpretation of Community law, the Bundesverwaltungsgericht decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the combined provisions of Article 1(3) of Directive 93/104 ... and Article 2(2) of Directive 89/391 ... to be interpreted as meaning that the first mentioned directive does not apply to the working time of the personnel of a public fire service who carry out operational duties?'

The question referred for a preliminary ruling

35 By that question, the national court is asking, in essence, whether Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 are to be interpreted as meaning that the activities of the operational crews of a public fire service such as that concerned in the main proceedings fall within the scope of those directives, so that Article 6(2) of Directive 93/104 precludes exceeding the maximum weekly working time, including time on call, of 48 hours.

36 Considering that, in the light of the case-law of the Court, the reply to that question leaves no room for reasonable doubt, the Court, in accordance with Article 104(3) of its Rules of Procedure, informed the national court that it intended to give its decision by reasoned order and invited the persons referred to in Article 23 of the Statute of the Court of Justice to submit their observations in this regard.

37 In response to the Court's invitation, the Personalrat and the Commission of the European Communities reiterated the view they had expressed during the written procedure, stating that, having regard particularly to the judgment in Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, the reply to the question raised may be clearly inferred from the case-law and that, therefore, there is justification for using the reasoned order procedure. On the other hand, the Leiter and the Netherlands Government expressed the contrary opinion; however, their arguments did not persuade the Court to abandon the procedure it intended to follow.

38 In order to reply to the question raised, as reformulated in paragraph 35 of this order, it should be pointed out, first, that Article 1(3) of Directive 93/104 defines its

scope by express reference to Article 2 of Directive 89/391. Accordingly, in order to determine whether an activity such as that of the operational crews of a public fire service falls within the scope of Directive 93/104, it is necessary, first, to consider whether that activity comes within the scope of Directive 83/391 (see Case C-303/98 *Simap* [2000] ECR I-7963, paragraphs 30 and 31).

39 By virtue of Article 2(1) thereof, Directive 89/391 applies to 'all sectors of activity, both public and private', including inter alia administrative and service activities in general.

40 However, by virtue of the first subparagraph of Article 2(2), Directive 89/391 does not apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

41 In that regard, the Court has already held that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an emergency service for the injured or sick, run by a body such as the Deutsches Rotes Kreuz (German Red Cross), is not covered by the exclusion referred to in the preceding paragraph (*Pfeiffer and Others*, paragraph 51).

42 The Court considered that it is clear both from the aim of Directive 89/391 — encouraging the improvement of the health and safety of workers at work — and from the wording of Article 2(1) thereof that the scope of that directive must be broadly construed. It follows that the exclusions from that scope, as provided for in the first subparagraph of Article 2(2), must be interpreted restrictively (see *Pfeiffer and Others*, paragraph 52).

43 In paragraph 53 of *Pfeiffer and Others*, the Court stated that the first subparagraph of Article 2(2) of Directive 89/391 excludes from the scope of that directive not the civil protection services as such but solely 'certain specific activities' of those services, the characteristics of which are such as inevitably to conflict with the rules laid down in the directive.

44 The Court inferred from that, in paragraph 54 of *Pfeiffer and Others*, that that exclusion from the scope of Directive 89/391, broadly construed, must therefore be interpreted in such a way that its ambit is confined to what is strictly necessary in order to safeguard the interests which it enables the Member States to protect.

45 In paragraph 55 of *Pfeiffer and Others*, the Court held in that regard that the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 was adopted solely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases — such as a catastrophe — the gravity and scale of which are exceptional and a characteristic of which is the fact that they are liable to expose the health and safety of workers to considerable risk and that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

46 However, the Court maintains that the civil protection service in the strict sense thus defined, at which the provision is aimed, can be clearly distinguished from the activities of emergency workers tending the injured and sick which were at issue in *Pfeiffer and Others*. Even if a service such as the one with which those cases were concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are none the less capable of

being organised in advance, including, in so far as they are concerned, the working hours of its staff and the prevention of risks to safety and/or health (see *Pfeiffer and Others*, paragraphs 56 and 57).

47 The Court therefore concluded, in paragraph 58 of *Pfeiffer and Others*, that that service thus exhibits no characteristic which inevitably conflicts with the application of the Community rules on the protection of the health and safety of workers and therefore is not covered by the exclusion in the first subparagraph of Article 2(2) of Directive 89/391, it being rather the directive itself which applies to such a service.

48 The activities of the operational crews of a public fire service such as that concerned in the main proceedings are not significantly different, as regards the context or nature of such activities, from those in the case in *Pfeiffer and Others* and therefore the Court's interpretation of Directive 89/391 in that judgment is capable of being applied to this case.

49 In that regard, it should be pointed out that, in the light not only of the wording of the first subparagraph of Article 2(2) of Directive 89/391 — which excludes from the scope of the directive only certain specific activities of the public service or civil protection services, on the ground that characteristics peculiar to those activities inevitably preclude its application — but also of the rationale for that exception as it emerges inter alia from paragraphs 55 to 57 of the judgment in *Pfeiffer and Others*, that provision gives no reason for a Member State to consider that as a general rule all the activities carried out in the sectors concerned are covered by that exception.

50 On the contrary, it is clear, both from the wording and the broad logic of the first subparagraph of Article 2(2) of Directive 89/391, that that provision refers only to certain specific activities of the services concerned, continuity of which is essential if people and property are to be protected and which, in view of the need for continuity, are such as to make it impossible in practice to apply the whole of the Community legislation concerning the protection of the health and safety of workers.

51 Indeed, the criterion used by the Community legislature to determine the scope of Directive 89/391 is based not on the workers' membership of the various sectors of activity referred to in the first subparagraph of Article 2(2) of that directive, considered in their entirety, such as the armed forces, the police and the civil protection services, but only on the specific nature of certain individual tasks carried out by the employees in those sectors, which, owing to the absolute necessity to ensure effective protection of the community, justifies an exception to the rules laid down in that directive. Consequently, the activities carried out under normal circumstances by safety and emergency services, for the purposes of that provision, fall within the scope of Directive 89/391.

52 In the present case, Directive 89/391 must therefore apply to the activities of the fire service, even when they are carried out by operational forces and it does not matter whether the object of those activities is to fight a fire or to provide help in another way, so long as they are carried out under normal circumstances, consistent with the task allocated to the service concerned, even though the actions which may be entailed by those activities are inherently unforeseeable and liable to expose the workers carrying them out to certain safety and/or health risks.

53 An exception may be made to that interpretation of the first subparagraph of Article 2(2) of Directive 89/391 only in the case of exceptional events in which the proper

implementation of measures designed to protect the population in situations in which the community at large is at serious risk requires the personnel dealing with a situation of that kind to give absolute priority to the objective of those measures in order that it may be achieved.

54 That must be so in the case of natural or technological disasters, attacks, serious accidents or similar events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures the proper implementation of which would be jeopardised if all the rules laid down in Directives 89/391 and 93/104 were to be observed.

55 In such situations, the need not to undermine the overriding objective of preserving the safety and health of the community at large must, given the particular characteristics of certain specific activities, temporarily prevail over the aim of those directives, which is to guarantee the health and safety of workers. In particular, it is not reasonable to require employers actually to prevent occupational risks or to draw up a work schedule for the staff of emergency services.

56 Nevertheless, even in such exceptional circumstances, the second subparagraph of Article 2(2) of Directive 89/391 requires the competent authorities to ensure the safety and health of workers 'as far as possible'.

57 In the light of the foregoing arguments, it must be held that the activities of a public fire service are not, in principle, covered by the exception provided in the first subparagraph of Article 2(2) of Directive 89/391 but, on the contrary, fall within the scope of the directive to the extent that they are carried out under normal circumstances.

58 As regards, more specifically, Directive 93/104, it is clear from the wording of Article 1(3) that it applies to all sectors of activity, both private and public, referred to in Article 2 of Directive 89/391, with the exception of certain specific activities, which are exhaustively listed.

59 However, none of those activities is relevant to a service such as that at issue in the main proceedings, so an activity like the one referred to by the national court also falls within the scope of Directive 93/104.

60 As the Commission rightly pointed out, further support is lent to that finding by the fact that point 2.1(c)(iii) of Article 17(2) of Directive 93/104 expressly refers to, inter alia, fire services. Such a reference would be redundant if the activity referred to were already excluded from the scope of Directive 93/104 in its entirety by virtue of Article 1(3). Instead, that reference shows that the Community legislature laid down the principle that the directive is applicable to activities of such a kind, whilst providing for the option, in exceptional circumstances, of derogating from certain specific provisions of the directive (see, to that effect, *Pfeiffer and Others*, paragraph 62).

61 In the light of all the foregoing considerations, the reply to the question must therefore be that Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be interpreted as meaning that:

— the activities carried out by the operational crews of a public fire service such as that at issue in the main proceedings normally fall within the scope of those directives so that, in principle, Article 6(2) of Directive 93/104 precludes exceeding the 48-hour ceiling prescribed as the maximum weekly working time, including time on call;

— it is nevertheless possible for that ceiling to be exceeded in exceptional circumstances of such gravity and scale that the aim of ensuring the proper functioning of services essential for the protection of public interests, such as public order, health and safety, must temporarily prevail over the aim of guaranteeing the health and safety of workers assigned to intervention and rescue teams; even in such exceptional situations, however, the aims of Directive 89/391 must be upheld as far as possible.

Costs

62 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby orders:

Article 2 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 and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be interpreted as meaning that:

— **the activities carried out by the operational crews of a public fire service such as that at issue in the main proceedings normally fall within the scope of those directives so that, in principle, Article 6(2) of Directive 93/104 precludes exceeding the 48-hour ceiling prescribed as the maximum weekly working time, including time on call;**

— **it is nevertheless possible for that ceiling to be exceeded in exceptional circumstances of such gravity and scale that the aim of ensuring the proper functioning of services essential for the protection of public interests, such as public order, health and safety, must temporarily prevail over the aim of guaranteeing the health and safety of workers assigned to intervention and rescue teams; even in such exceptional situations, however, the aims of Directive 89/391 must be upheld as far as possible.**

[Signatures]