OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 16 June 2011 [1]

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I — Introduction

1. In this reference for a preliminary ruling under Article 267 TFEU, the Supreme Court of the United Kingdom ('the referring court') has submitted to the Court of Justice a series of questions on the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2] and of Clause 3 of the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) ('the European Agreement'), which is annexed to Council Directive 2000/79/EC of 27 November 2000 [3] for the purpose of its implementation.

2. The reference for a preliminary ruling originates in a dispute between Ms Williams and other pilots employed by the airline British Airways, on the one hand, and their employer, on the other, concerning how exactly the remuneration payable for periods of paid annual leave is to be calculated. Finding a solution to this dispute is made difficult in a number of ways both by the provisions specific to the aviation sector, which take into account air transport safety concerns and must therefore be regarded as mandatory, and by the complex salary structure operated in that industry, which comprises various bonuses and supplements. The legal questions that have been referred to the Court for a ruling relate both to the framework of areas of competence exercised by the European Union and its Member States and to the requirements of European Union ('EU') law which management and labour must observe where they make certain employment rights – in this case, the right to paid annual leave – the subject of binding agreements within the meaning of Article 139 EC or the currently applicable Article 155 TFEU.

II — Legislative context

A — *EU law* [4]

3. Article 139 EC, the provision which preceded Article 155 TFEU, made it possible

2 — OJ 2003 L 299, p. 9.

3 — Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA) (OJ 2000 L 302, p. 57).

4 — In accordance with the designations employed in the TEU and the TFEU, the expression 'EU law' will be used as a generic term for Community law and EU law. Any future references to individual items of primary law will use the names of the provisions applicable *ratione temporis*.

to adopt directives for the purpose of implementing agreements concluded between management and labour:

'(1) Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.

(2) Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas for which unanimity is required pursuant to Article 137(2). In that case it shall act unanimously'.

4. On 2 August 2004, Directive 2003/88 replaced Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time. [5] Its purpose, like that of the directive which preceded it, is to lay down specific minimum safety and health requirements for the organisation of working time. Article 7 thereof, which was taken over unchanged, states as follows:

'Annual leave

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

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

5. Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions. Article 7 is not one of the provisions from which Directive 2003/88/EC permits derogation.

6. Directive 2000/79 implements the European Agreement, Clause 3 of which reads as follows:

'(1) Mobile staff in civil aviation are entitled to paid annual leave of at least four weeks, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

5 — OJ 1993 L 307, p. 18.

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

B — *National law*

7. The United Kingdom adopted the Civil Aviation (Working Time) Regulations 2004 [6] ('the Working Time Regulations') in order to comply with its obligations under Directive 2000/79.

8. Regulation 4 of the Working Time Regulations provides as follows:

'(1) A crew member is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than one year.

(2) Leave to which a crew member is entitled under this regulation –

(a) may be taken in instalments;

(b) may not be replaced by a payment in lieu, except where the crew member's employment is terminated.'

6 — SI 2004 No 756.

9. Regulation 9 of the Working Time Regulations requires every employer to ensure that:

'in any month

(a) no person employed by him shall act as a crew member during the course of his working time, if during the period of 12 months expiring at the end of the month before the month in question the aggregate block flying time of that person exceeds 900 hours; and

(b) no crew member employed by him shall have a total annual working time of more than 2 000 hours during the period of 12 months expiring at the end of the month before the month in question.'

10. The Working Time Regulations contain no provisions establishing the nature and level of holiday pay before annual leave is taken.

III — Facts, main proceedings and questions referred

11. The appellants in the main proceedings are pilots employed by British Airways plc. The terms of their employment are negotiated with British Airways by the British Air

Line Pilots Association ('BALPA'). The current terms of employment are contained in a Memorandum of Agreement ('MOA') of 1 April 2005.

12. Under the MOA, in conjunction with the collectively agreed rules governing monthly flying time, pilots' remuneration comprises three components. The first component is a fixed annual sum. The second and third components are supplementary payments which vary according to time spent flying ('the Flying Pay Supplement' or 'FPS', paid at the rate of GBP 10 per planned flying hour) and time spent away from base ('the Time Away from Base Allowance' or 'TAFB', paid at the rate of GBP 2.73 per hour). The whole of the FPS is remuneration and taxable. In the case of the TAFB, 82% of the time is treated as having been paid on account of expenses, with the result that only 18% is treated as remuneration and taxable.

13. The amount of time a pilot spends flying will depend upon his or her route and roster. According to the information provided by the referring court, it is typically about 15 days a month.

14. According to the MOA, pay in respect of annual leave is based exclusively on the first component of the remuneration, the fixed annual sum. However, the appellants in the main proceedings contend that, under EU and national law, they are entitled to weekly payments based on all three components of the remuneration.

15. Both the Employment Tribunal and the Employment Appeal Tribunal found in favour of the appellants. The Court of Appeal, on the other hand, concurred with British Airways' case and upheld its appeal.

16. The Supreme Court takes the view that, although the Court's more recent case-law may be understood as meaning that Directive 2000/79 requires the payment of 'normal' or 'comparable' remuneration, the meaning of the term 'paid annual leave' must be regarded as requiring further clarification, not least on account of the particular circumstances in the main proceedings. Questions also remain unresolved with respect to the extent of the discretion available to national legislation and/or practice to lay down 'conditions for entitlement to, and granting of, such leave'. In the view of the Supreme Court, the legal position in a case such as the present cannot therefore be said to be beyond doubt.

17. For that reason the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Under (a) Articles 7 of Directive 93/104/EC and Directive 2003/88/EC and (b) Clause 3 of the European Agreement annexed to Directive 2000/79/EC: (1) to what, if any, extent does European law define or lay down any requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave; and (2) to what, if any, extent may Member States

determine how such payments are to be calculated?

(2) In particular, is it sufficient that, under national law and/or practice and/or under the collective agreements and/or contractual arrangements negotiated between employers and workers, the payment made enables and encourages the worker to take and to enjoy, in the fullest sense of these words, his or her annual leave; and does not involve any sensible risk that the worker will not do so?

(3) Or is it required that the pay should either (a) correspond precisely with or (b) be broadly comparable to the worker's 'normal' pay?

Further, in the event of an affirmative answer to Question (3)(a) or (b):

(4) Is the relevant measure or comparison (a) pay that the worker would have earned during the particular leave period if he or she had been working, instead of on leave, or (b) pay which he or she was earning during some other, and if so what, period when he or she was working?

(5) How should 'normal' or 'comparable' pay be assessed in circumstances where (a) a worker's remuneration while working is supplemented if and to the extent that he or she engages in a particular activity, (b) where there is an annual or other limit on the extent to which, or time during which, the worker may engage in that activity, and that limit has been already exceeded or almost exceeded at the time(s) when annual leave is taken, so that the worker would not in fact have been permitted to engage in that activity had he been working, instead of on leave?'

IV — Procedure before the Court

18. The order for reference, dated 24 March 2010, was lodged at the Court Registry on 2 April 2010.

19. Written observations were submitted by the parties to the main proceedings, the Danish Government and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

20. At the hearing on 14 April 2011, oral argument was presented by the representatives of the parties to the main proceedings, the Danish Government and the Commission.

V — Main arguments of the parties

21. The *appellants in the main proceedings* and the *Commission* propose that the answer to the reference for a preliminary ruling should be that, under the relevant provisions of EU law, a worker must continue to be paid his normal remuneration during the period in which he takes his annual leave. It is true that, adopting the practical measures necessary, the Member States have the power, inter alia, to determine the method by which paid annual leave is calculated. However, that method must allow workers to continue to draw their normal pay for the duration of their annual leave.

22. In the view of the *appellants in the main proceedings,* normal remuneration must be calculated on the basis of a representative period. This will usually be a period prior to the period during which the annual leave is actually taken. However, another period may exceptionally be taken into account in order to ensure that normal remuneration continues to be paid. The *Commission* takes the view that 'normal remuneration' must reflect average weekly pay within a representative reference time framework.

23. In the view of the *appellants in the main proceedings,* the supplementary payments which the worker receives for performing a particular activity and which are a component of the worker's normal remuneration must also continue to be paid during the period of annual leave. The *Commission* points out in this respect that all general limitations must be taken into account in the calculation of holiday pay.

24. The *respondent in the main proceedings* proposes that the answer to the reference for a preliminary ruling should be that EU law lays down no requirements with respect to the nature and level of the payments to be made during the period of annual leave. For the sake of completeness, it contends that EU law requires only that the level of holiday pay be established by contract. In any event, holiday pay must be high enough not to deter workers from claiming their entitlement to annual leave.

25. In the view of the respondent in the main proceedings, it is sufficient if, in accordance with the relevant legislation, practice and contractual agreements between employers and workers, the payment made enables the worker to take and enjoy his annual leave in such a way that there is no significant risk of

his not doing so. Consequently, the holiday pay does not necessarily have to correspond exactly to or be comparable to the worker's normal pay.

26. The *Danish Government* proposes that the answer to the reference for a preliminary ruling should be that EU law grants workers the right to paid leave of at least four weeks and to the payment during that period of an amount which corresponds to their normal pay, in accordance with the conditions laid down by the legislation and practice of the Member States.

27. It follows from this that Directive 2003/88 does not preclude the parties to a collective agreement from engaging in negotiations to determine what supplements are to be regarded as forming part of holiday pay, provided that the holiday pay is not set at a level so low as to prevent the worker from claiming his entitlement to paid annual leave.

VI — Legal assessment

A — *The essential issues in the case*

28. The present case offers the Court the opportunity to develop further its case-law on the entitlement of every worker to paid annual leave. It may also serve as a suitable occasion, in the interests of the uniform application of EU law, to extend that case-law to other areas of activity in respect of which the EU has established more specific rules that take into account the requirements of the employment sector concerned.

29. The detailed questions submitted by the referring court can largely be divided into three major subject-areas, although the latter do overlap to some extent. First, the referring court raises the question concerning the competence of the European Union or its Member States to provide a legal definition of the term 'paid annual leave' and to establish the method for calculating holiday pay. Next, it seeks clarification as to the quantitative relationship that must exist between holiday pay and normal remuneration under EU law. Finally, it asks to what extent supplementary payments for particular activities, to which the worker is entitled under a collective agreement, and any limits on working time which management and labour have collectively agreed must also be taken into account in the determination of holiday pay.

30. In the interests of clarity, the questions referred must therefore be reordered and each answered within the context of a comprehensive examination of the subject-area concerned. I shall begin by examining the question as to what extent EU law contains

provisions governing the nature and scope of the right to paid annual leave and what legislative competence the Member States retain. In so doing, I shall clarify how holiday pay is generally to be determined in relation to normal remuneration. Finally, I shall address the question of how to proceed in circumstances, such as those in this case, which involve a complex pay structure.

B — *Provisions of EU law concerning the nature and extent of the right to paid annual leave*

1. Right to paid annual leave in the legal order of the European Union

(a) Principles of EU law

31. As I stated in my Opinion in *Schultz-Hoff,* [7] the fact that the right of every worker to paid annual leave is included in the Charter of Fundamental Rights of the European Union [8] provides the most reliable and definitive confirmation that it constitutes a fundamental right. Article 31(2) of the Charter provides that: '[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.' [9] Although, originally, the Charter was primarily declaratory in nature, in so far as it was to be understood as the expression of the EU's commitment to observe fundamental rights, on the entry into force of the Treaty of Lisbon, [10] that provision acquired the definitive status of primary law within the legal order of the European Union, in accordance with Article 6(1) EU. This means that, by virtue of the commitment to fundamental rights laid down in Article 51(1) of the Charter, legislative acts adopted by the EU institutions in this sphere must now be assessed by reference to that provision. The Member States are henceforth also bound by that provision in so far as they implement EU law. [11]

32. The EU legislature uses the legal instrument of the directive to give legislative effect to the right to paid annual leave. The central provisions which govern that right at EU level

7 — Opinion in Case C-350/06 *Schultz-Hoff,* reported under Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer and Others* [2009] ECR I-179, point 38.

8 — OJ 2007 C 303, p. 1.

9 — According to the Explanations relating to the Charter (OJ 2007 C 303, p. 17), that provision is based on Directive 93/104, Article 2 of the European Social Charter of 1961 and point 8 of the Community Charter on the rights of workers of December 1989.

10 — See Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 22.

11 — See Jarass, H. D., *Charta der Grundrechte der Europäischen Union – Kommentar*, Munich 2010, Article 31, paragraph 3, p. 277, and Article 51, paragraph 6, p. 413.

and which the referring court wishes to have interpreted are contained in Article 7 of Directive 2003/88 concerning certain aspects of the organisation of working time. That article adopted unamended the wording of Article 7 of the preceding Directive 93/104 and has been afforded the same normative value by the Court in its case-law. [12] It provides that Member States are to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice. However, neither it nor Directive 2000/79 contains any express rule concerning the level of holiday pay.

33. Article 14 of each of the aforementioned two directives makes it possible for the EU legislature to adopt more specific provisions for certain occupations or professional activities which take precedence over the provisions of the Working Time Directives, in accordance with a legal rule of primacy. Directive 2000/79, which, in this regard, contains more specific provisions on the organisation of working time of mobile staff in civil aviation, falls into that category of provisions, as Clause 1(2) of the European Agreement expressly indicates. The EU adopted that legislative act in order to implement the European Agreement and in exercise of the regulatory powers conferred on it by Article 139(2) EC (Article 155(2) TFEU). By virtue of its inclusion in it, the Europe Agreement became an integral part of Directive 2000/79. [13] That directive, like any directive, is subject to the interpretative jurisdiction of the Court of Justice, [14] which means that the referring court's request for an interpretation is also admissible in relation to Clause 3 of the European Agreement.

(b) The Member States' competence with respect to transposition

34. National provisions which the Member States have adopted in order to transpose the aforementioned directives, on the other hand, are not subject to the interpretative jurisdiction of the Court of Justice. Use of the directive as the means of legislating allows the Member States to give more detailed statutory expression to the right to paid annual

12 — See Case C-277/08 *Vicente Pereda* [2009] ECR I-8405, paragraph 18.

13 — See Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 58; Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 195; and Case C-537/07 *Gómez-Limón* [2009] ECR I-6525, paragraph 34. Egger, J., 'Rechtswirkungen von Rahmenvereinbarungen im Sozialbereich,' *Neueste Entwicklungen im Zusammenspiel von Europarecht und nationalem Recht der Mitgliedstaaten* (ed. Waldemar Hummer), Vienna 2010, p. 223, points out that the agreements do not yet have any legislative effect in themselves. Not until implemented by a Council decision does the framework agreement become a direct part of EU secondary law and subject to interpretation by the Court of Justice.

14 — See Rebhahn, R., *EU-Kommentar* (ed. Jürgen Schwarze), 2nd ed., Baden-Baden 2009, Article 139 EC, paragraphs 4 and 10, p. 1378 et seq., who points out that the implementation of an agreement between management and labour by a Council decision gives rise to a legislative act of the European Union. Jurisdiction to interpret the directive and the agreement contained in it lies with the Court of Justice.

leave in their respective legal systems. That competence is conferred on them not only in the third paragraph of Article 249 EC (third paragraph of Article 288 TFEU), under which the choice of form and method for achieving the binding objective of the legislation is left to the national authorities, but also, expressly, in the individual directives.

35. Moreover, pursuant to Article 7(1) of Directive 2003/88 and Clause 3 of the European Agreement, in conjunction with recital 11 in the preamble to Directive 2000/79, [15] the EU legislature, which is bound by the principle of subsidiarity in the exercise of its regulatory powers, confined itself to laying down rules governing certain essential matters such as the minimum period of annual leave, whereas, in relation to the conditions for entitlement to, and granting of, such leave, it referred to the 'national legislation and/or practice', as indicated above. That approach, as the Court held in *United Kingdom* v *Council*, [16] is also in accordance with the legislative responsibility imposed by the enabling legal basis in the Treaty, which authorised the EU legislature only to adopt minimum requirements so as to contribute, through harmonisation, to achieving the objective of raising the level of health and safety protection of workers, which is primarily the responsibility of the Member States.

36. As the Court held in that judgment, the Member States have an essential role to play in giving effect to that right, since, pursuant to the requirement in respect of transposition laid down in Article 7(1) of Directive 2003/88, they are under an obligation to adopt the detailed national implementing rules necessary. [17] This includes laying down conditions for the exercise and implementation of the right to paid annual leave, the Member States being free to prescribe the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed. [18]

37. The reference to national legislation contained in Article 7(1) of Directive 2003/88 enables the Member States, in particular, to establish a legislative framework governing the organisational and procedural aspects of the taking of leave, such as, for example, the planning of holiday periods, the obligation, if any, for the worker to give his employer advance notice of when he intends to take leave, the requirement that a minimum period of employment must be completed before leave can be taken, the criteria governing the pro-rata

15 — Recital 11 in the preamble to Directive 2000/79 confirms that the principle of subsidiarity has been observed as follows: 'In view of the highly integrated nature of the civil aviation sector and the conditions of competition prevailing in it, the objectives of this Directive to protect workers' health and safety cannot be sufficiently achieved by the Member States and Community action is therefore required in accordance with the subsidiarity principle laid down in Article 5 of the Treaty. This Directive does not go beyond what is necessary to achieve those objectives'.

16 — See Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 47.

17 — Ibid. (paragraph 47) and Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 57.

18 — Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 53.

calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth. [19] These, however, are all measures intended to determine the conditions for entitlement to, and granting of, leave and are as such allowed by Directive 2003/88.

38. It should be pointed out in this regard that the Court has repeatedly held that the Member States must observe the limits imposed on them by EU law when exercising their implementing powers. [20] It has demonstrated and clarified those limits through interpretation. [21] Moreover, its case-law contains some helpful guidance on how to determine holiday pay in such a way as to ensure that the right to paid annual leave is not divested of its function. It is appropriate, therefore, to analyse that case-law and to draw from it any principles that might be useful in answering the questions referred.

2. Relationship between Directive 2000/79 and the Working Time Directives and the transposability of the principles established by case-law

39. One question which must, however, be clarified first is whether the principles which the Court has so far developed in its case-law on the interpretation of Article 7 of the Working Time Directives – which I shall examine later in my submissions – can also be transposed to Clause 3 of the European Agreement. That question is particularly relevant given that, as already explained, the Court has contributed significantly towards determining the legislative scope of that right. The interpretation given to that provision of the directives in the Court's case-law also makes it possible to ascertain the scope of the regulatory powers exercised by the EU legislature in relation to the calculation of holiday pay. In anticipation of the outcome of my examination, I would point out that, in my view, the wording, meaning and purpose, and drafting history of that provision indicate that the answer to that question is yes.

40. First, it should be pointed out that, despite the fact that they have different legal bases in the Treaty, the purpose both of the Working Time Directives and of Directive 2000/79 is to organise working time in such a way as to impose certain limits on it in the interests of

19 — See, to this effect, the Commission's submissions in *BECTU*, to which Advocate General Tizzano referred in his Opinion in that case (point 34).

20 — See *BECTU* (cited in footnote 18 above), paragraph 53, and *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 46, in which the Court recognised that the Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, but made it clear that they are not entitled to make the existence of that right, which derives directly from Directive 93/104 or Directive 2003/88, subject to any preconditions whatsoever.

21 — On the impact of the case-law on the interpretation of the Working Time Directive, see Nowak, T., 'The Working Time Directive and The European Court of Justice', *Maastricht Journal of European and Comparative Law*, Volume 15 (2008), No. 4, p. 447.

the safety and health of workers. This follows, for example, from recital 11 in the preamble to Directive 2000/79 and from recital 11 in the preamble to Directive 2003/88. Moreover, the wording of Clause 3 is almost identical to that of Article 7 of the Working Time Directives. If the signatory parties to the European Agreement had intended to ascribe a different meaning to Clause 3, they would surely have used different terminology to that contained in the Working Time Directives.

41. Furthermore, the drafting history of the European Agreement [22] shows that the term 'paid annual leave' in Clause 3 was intended to have the same substantive meaning as it has in Directive 93/104. The Commission's original proposal for a working time directive provided that its scope was to extend to all economic sectors and fields of activity. The Council, however, decided to exclude certain areas of activity from the scope of the directive, not because it was of the view that health and safety were sufficiently protected in those areas but because it was aware that workers employed in those fields of activity usually have to work far from home, and so considered it necessary to adopt more specific provisions. In its 'White Paper on sectors and activities excluded from the working time directive', the Commission proposed, inter alia, a differentiated approach under which each area of activity would have its own provisions on working time and rest periods for mobile workers. [23] After gauging the reactions of employers and workers, the Commission decided to propose that approach, which ultimately found expression in EU legislation. [24] Under that differentiated approach, the European Agreement was to apply exclusively to mobile staff in civil aviation and to include unchanged in Clause 3 the right to paid annual leave provided for in Article 7 of Directive 93/104. Finally, the Commission's proposal for a directive [25] shows that the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation was intended, inter alia, to implement the right to paid annual leave guaranteed in Article 8 of the Community Charter of the Fundamental Social Rights of Workers. The drafting history of Directive 2000/79 thus proves that it was the intention of the EU legislature to extend the provisions already in force in relation to that right in order to cover mobile workers in civil aviation without changing the essential content of that right.

22 — See the *White Paper on sectors and activities excluded from the working time directive*, COM(97) 334 final, paragraphs 11 to 13.

23 — Ibid, paragraph 74.

24 — See Barnard, C., *EC Employment Law*, 2nd ed., Oxford 2002, p. 403.

25 — See the Proposal for a Council Directive concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), COM(2000) 382 final.

42. The drafting history of Directive 2003/88 further confirms that the provisions governing the right to paid annual leave were also intended to apply to mobile workers, including those in civil aviation. Directive 93/104 was subsequently amended by Directive 2000/34 and, as part of those amendments, the exceptions in respect of transport which had previously been applicable under the proposed differentiated approach were (other than in relation to seafarers) abolished. As a result, the provisions on annual leave were *extended* to mobile workers in the excluded sectors and activities, as is unambiguously clear from recital 9 in the preamble to Directive 2000/34. [26] The provisions on working time and rest periods, on the other hand, were merely *adapted* for mobile workers, according to recital 10. [27] Moreover, Article 2 of Directive 2000/79 makes it clear that the implementation of that directive is under no circumstances to constitute sufficient grounds for justifying a reduction in the general level of protection of workers in the fields covered by that directive. In other words, that provision prohibits Member States from affording a level of protection below that which has been achieved by Directive 93/104, as amended by Directive 2000/34. This corresponds precisely to the wording contained in recital 16 in the preamble to Directive 2000/79. [28]

43. It follows from all of the foregoing that there is nothing to preclude the principles which the Court has developed in its case-law to date on the interpretation of Article 7 of the Working Time Directives from being transposed to Clause 3 of the European Agreement.

3. Principles established by case-law in relation to the right to paid annual leave

(a) Continued payment of remuneration during the period of leave

44. The importance of the right to paid annual leave has long been recognised in the case-law of the Court. It is settled case-law that that right must be regarded as being a particularly important principle of EU social law from which there can be no derogations and the implementation of which by the

26 — Recital 9 in the preamble to Directive 2000/34 reads: 'The existing provisions concerning annual leave and health assessments for night work and shift work should be *extended* to include mobile workers in the excluded sectors and activities'. See, to this effect, Rofes i Pujol, M.I., 'Comentario de la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas', *Cuadernos Europeos de Deusto*, 2009, No 41, p. 165.

27 — Recital 10 in the preamble to Directive 2000/34 reads: 'The existing provisions on working time and rest need to be *adapted* for mobile workers in the excluded sectors and activities'.

28 — Recital 16 in the preamble to Directive 2000/79 reads: 'Implementation of this Directive should not serve to justify any regression in relation to the situation which already exists in each Member State'.

competent national authorities must be confined within the limits expressly laid down by Directive 93/104 or the successor Directive 2003/88 itself. [29] By enshrining the right to paid annual leave in secondary legislation, the EU legislature sought to make certain that, in all Member States, a worker would actually enjoy periods of rest, 'with a view to ensuring effective protection of his health and safety'. [30] The purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. [31]

45. As for the worker's specific right to the payment of holiday pay, relevant for the purposes of the present reference for a preliminary ruling, it must be stated, as mentioned previously, that neither the Working Time Directives nor Directive 2000/79 contain provisions that expressly determine the level of holiday pay due or the method for calculating it. However, an analysis of the Court's case-law provides important guidance on what requirements must be fulfilled by holiday pay under EU law.

46. Reference must be made, first of all, to the judgment in *Robinson-Steele*, in which the Court held that the Working Time Directives treat entitlement to annual leave and to holiday pay as 'two aspects of a single right'. [32] The first important legal conclusion that can immediately be drawn from that statement is the following: since the Court takes the view that the two rights are to be regarded as being inseparable from each other, the right to the payment of holiday pay must likewise not be derogated from when it comes to implementing EU law at the level of the Member States, unless this is expressly provided for by the Working Time Directives. It must be pointed out in this regard that Article 7 of Directive 2003/88/EC is not one of the provisions from which that directive expressly permits derogation. Since that provision must not be derogated from to the detriment of the worker either in law or in contract, the Danish Government's view [33] to the effect that the right under EU law to

29 — See *BECTU* (cited in footnote 18 above), paragraph 43; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and *Robinson-Steele and Others* (cited in footnote 17 above), paragraph 48; on Directive 2003/88, see *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 22; *Vicente Pereda and Others* (cited in footnote 12 above), paragraph 18; and Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, paragraph 28.

30 — See *BECTU* (cited in footnote 18 above), paragraph 44; *Merino Gómez* (cited in footnote 29 above), paragraph 30; *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 23; and *Vicente Pereda and Others* (cited in footnote 12 above), paragraph 21.

31 — See *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 25, and *Zentralbetriebsrat der Landeskrankenhäuser Tirols and Others* (cited in footnote 29 above), paragraph 30.

32 — *Robinson-Steele and Others* (cited in footnote 17 above), paragraph 58.

33 — See paragraph 16 of the Danish Government's written observations.

the payment of holiday pay is mandatory in character [34] must in principle be endorsed. Furthermore, it must be borne in mind that, in accordance with case-law, that principle of European Union social law, which is regarded as being particularly important, cannot be interpreted restrictively either. [35]

47. In the view of the Court, the purpose of the requirement of payment for annual leave is to put the worker, during such leave, 'in a position which is, as regards remuneration, comparable to periods of work'. In my view, the Court's further findings with respect to the level of holiday pay are sufficiently clear, it having expressly held in paragraph 50 of the judgment in *Robinson-Steele* that the term 'paid annual leave' in Article 7(1) of Directive 93/104 means that, 'for the duration of annual leave within the meaning of the directive, remuneration must be maintained'. Moreover, any remaining doubts as to the interpretation of that sentence should be dispelled by the subsequent clarification ('in other words') to the effect that 'workers must receive their *normal* remuneration for that period of rest'. That clarification must be taken to mean that the level of holiday pay must correspond exactly to that of normal remuneration.

48. The referring court is correct in its assertion that the subject-matter of the dispute in *Robinson-Steele* is different from that in the present case, the former having been concerned essentially with the compatibility with EU law of a certain practice consisting in remunerating minimum annual leave in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period in which the worker actually took leave. That said, the considerations on which the Court based its decision in paragraph 50 of that judgment are framed in general terms and do not by any means relate solely to the particular circumstances of that case. Rather, they are intended to be of general application and must therefore also be taken into account in answering the questions referred. The general validity of those considerations is clear from the fact that the Court restated them in a different context in paragraph 58 of the judgment in *Schultz-Hoff and Stringer and Others*, more specifically in connection with the question of how to calculate the allowance in lieu, provided for in Article 7(2) of Directive 2003/88, which is payable to a worker who, for reasons beyond his control, was not able to exercise his right to paid annual leave before the end of the employment relationship. In that paragraph, the Court confirms its interpretation

34 — An interpretation of Article 12 of ILO Convention No 132 also leads to this conclusion. That provision states that agreements to relinquish the right to the minimum annual holiday with pay prescribed in Article 3, paragraph 3, of that Convention or to forgo such a holiday, for compensation or otherwise, must, as appropriate to national conditions, be null and void or be prohibited. See also Blanpain, R., 'The Holidays With Pay Convention of the ILO (N° 132): a Commentary', *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 16/4, 2000, p. 364.

35 — *Zentralbetriebsrat der Landeskrankenhäuser Tirols* (cited in footnote 29 above), paragraph 29.

to the effect that, 'for the duration of annual leave, … remuneration must be maintained' and that 'workers must receive their normal remuneration'.

49. Moreover, that view is supported by arguments drawn from both a schematic and a grammatical interpretation. In this regard, it is necessary to compare Directive 2003/88 and Directive 2000/79 with other legislative acts of the European Union which make provision for a modified form of continued pay in the event of leave. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [36] with a view to protecting pregnant workers against risks to their safety and health and against any effects on their pregnancy or breastfeeding, provides for the possibility not only of adjusting their working conditions and moving them to another job but also of granting them leave from work, in which connection Article 11(1) of that directive states that 'the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers … must be ensured in accordance with national legislation and/or national practice'. That provision contains an unusual feature to which the Court rightly referred most recently in the judgments in *Parviainen* [37] and *Gassmayr*. [38] In those judgments, the Court drew attention to the fact that that provision, in most of the language versions existing at the time of its adoption, refers to the maintenance only of 'a' payment and not 'the' pay to the worker concerned. [39] From the wording of that provision and from other evidence the Court concluded that, following her temporary transfer to a job other than that which she had occupied before her pregnancy in accordance with Article 5(2) of Directive 92/85, a pregnant worker is not entitled under Article 11(1) thereof to the pay she received on average before that transfer. [40] However, the legal position in relation to the pay provided for in Article 7(1) of Directive 2003/88 and Clause 3 of the European Agreement is not comparable. The wording of those provisions is clear in so far as all the language versions state that annual leave must simply be 'paid', [41] which fact supports the proposition as to the continuation or maintenance of 'normal' remuneration within the meaning of the case-law.

36 — OJ 1992 L 348, p. 1.

37 — Case C-471/08 *Parviainen* [2010] ECR I-6533.

38 — Case C-194/08 *Gassmayr* [2010] ECR I-6281.

39 — *Parviainen* (cited in footnote 37 above), paragraph 50, and *Gassmayr* (cited in footnote 38 above), paragraph 61.

40 — *Parviainen* (cited in footnote 37 above), paragraph 62.

41 — See, for example, the German ('bezahlt'), French ('payé'), Danish ('med løn'), Spanish ('retribuidas'), Portuguese ('remuneradas'), Slovenian ('plačanega'), Italian ('retribuite'), Swedish ('betald') and Dutch ('betaald') language versions.

50. Finally, further evidence for the foregoing view can be found in the principles of the International Labour Organisation (ILO), which, according to recital 6 in the preamble to Directive 2003/88, should be taken into account with regard to the organisation of working time. Within the framework of the ILO, a special agency of the United Nations, the right to a minimum period of paid annual leave has thus far been the subject-matter of two multilateral conventions, Convention No 132, [42] which entered into force on 30 June 1973, having amended the previously applicable Convention No 52. [43] They contain provisions which are binding on the signatory States in relation to the implementation of that fundamental social right within their national legal systems. Convention No 132, the relevance of which to the interpretation of Directive 2003/88 the Court expressly confirmed most recently in *Schultz-Hoff and Stringer and Others*, [44] states in Article 7(1) that every person taking the holiday envisaged in that Convention must receive in respect of the full period of that holiday 'at least his *normal* or average remuneration'.

51. In the light of the foregoing considerations, it seems to me that the presumption expressed by the referring court in paragraph 29 of the order for reference, to the effect that, when the Court used the word 'comparable' in its judgment in *Schultz-Hoff and Stringer and Others* [45] (to describe the position in which the worker must be put during the period of annual leave by the requirement of payment for that leave), it may have had a different meaning in mind, including, where appropriate, the possibility that deductions may lawfully be made from

42 — Convention No 132 concerning Annual Holidays with Pay (Revised), 1970, which was adopted by the General Conference of the International Labour Organisation on 24 June 1970 and came into force on 30 June 1973.

43 — Convention No 52 concerning Annual Holidays with Pay, which was adopted by the General Conference of the International Labour Organisation on 24 June 1936 and came into force on 22 September 1939. That convention was revised by Convention No 132 but still remains open for ratification itself.

44 — *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 38. See the legal commentary concerning the significance attached to ILO conventions in the EU legal order. Korda, M. and Pennings, F., in 'The legal character of international social security standards', *European Journal of Social Security*, Volume 10 (2008), No. 2, p. 132, take the view that the European Union does not have the competence to create legally binding social security standards. For that reason, the conventions signed within the framework of the ILO and the Council of Europe are of central importance to the development of international social security standards. Bercusson, B., in 'The European Court of Justice, Labour Law and ILO Standards', *50 Jahre EU – 50 Jahre Rechtsprechung des Europäischen Gerichtshofs zum Arbeits- und Sozialrecht*, Baden-Baden 2008, p. 58 et seq., advocates a more active role for the Court of Justice in constitutionalising the European social model, being of the view that the Court should take the ILO standards into account when interpreting EU primary and secondary law. Murray, J., in 'The Working Time Directive and Future Prospects for ILO Rules on Working Time', *Transnational Labour Regulation – The ILO and EC compared*, p. 175, expresses the view that there is a significant degree of convergence between the subject-matter and purpose of the provisions of the Working Time Directive and of ILO law respectively.

45 — *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraph 60.

normal remuneration, is probably based on a misunderstanding of the case-law. Moreover, the Court's findings in that judgment are fully consistent with my submissions in *Stringer and Others*[46] to the effect that the allowance in lieu which a worker receives must be 'equivalent' to the amount of his normal pay. Although the choice of word is different, the meaning is ultimately the same, which is to say that it is necessary to ensure, by way of a teleological interpretation of Article 7(1) of the Working Time Directives, that the aims of those directives are not frustrated by improper implementation. In particular, it is necessary to ensure in this regard that the worker does not suffer any disadvantage as a result of deciding to exercise his right to annual leave. A prime example of such a disadvantage is any financial loss which, depending on the initial situation, would deter him from exercising that right.

52. In the light of all the foregoing, it must be concluded that EU law, as interpreted by the Court, contains sufficiently clear provisions on how to determine holiday pay. According to those provisions, holiday pay must in any event correspond to the level of remuneration.

(b) Conclusion: holiday pay may not be calculated by reference to the minimum subsistence requirement

53. The maintenance of remuneration for the duration of annual leave is ultimately intended to give effective protection to the recuperative function of annual leave. In any event, the interpretation of Article 7(1) of the Working Time Directives in accordance with the meaning and purpose of those directives, as established in the Court's case-law, prohibits a calculation of holiday pay based on the minimum subsistence requirement. It would be incompatible with that case-law if, as the respondent in the main proceedings proposes,[47] holiday pay were calculated solely by reference to an amount which is just enough to ensure that the worker is not prevented from exercising his right to paid annual leave. First, such a measure would not constitute 'maintenance of remuneration' for the duration of annual leave. Rather, the proposed interpretation would amount to an *ex post facto* revision of the conditions laid down by the Court as having to be met in order for holiday pay to comply with the directives, to the detriment of workers. Second, the effect of such an interpretation would be to create for workers a legal position which would satisfy neither the requirements of a minimum degree of harmonisation across the European Union nor the requirement of legal certainty.

46 — See my Opinions in Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), point 38.

47 — See paragraphs 41, 43 and 76 of the written observations of the respondent in the main proceedings.

54. A minimum degree of harmonisation, as sought by, inter alia, the European Agreement, pursuant to Article 2(1) of Directive 2000/79, in the area of aviation, does not mean that the action taken by the European Union is confined to the lowest common denominator. It does not therefore by any means equate to minimal harmonisation. Its aim is not to extend across the European Union the lowest level of protection in place in a particular Member State but to formulate the basic protection necessary for the EU policy in question. [48] Anything else would be incompatible with the objectives, laid down in Article 136 EC, of '[improving] living and working conditions' in order thereby to 'make possible their harmonisation while the improvement is being maintained' and to provide 'proper social protection'. A provision which lays down minimum standards for the safety and health of workers must be objectively and clearly formulated so as to ensure that it is effectively and uniformly implemented throughout the territory of the European Union. Any criterion based on the 'financial affordability' of annual leave, as the respondent in the main proceedings effectively proposes, would not be practicable, particularly since its application – as the appellants in the main proceedings rightly point out [49] – would depend on the circumstances involved, in particular the financial burden borne by each individual worker. The application of such a vague criterion would ultimately undermine the entitlement to annual leave.

4. Competence of the Member States to calculate holiday pay

55. In the absence of express provisions in the Working Time Directives or in Directive 2000/79, the task of determining the method for calculating holiday pay itself falls within the competence of the Member States, which, as has already been explained, have an obligation to adopt the detailed national implementing rules necessary. The Court reached a similar conclusion in *Schultz-Hoff and Stringer and Others* [50] in connection with the question, also unregulated by EU law, of how to calculate the allowance in lieu which, under Article 7(2) of Directive 2003/88, may replace the minimum period or periods of paid annual leave where the employment relationship is terminated. That question is governed by the 'national legislation and/or practice' referred to in the Directives. In this connection, the Member States must ensure that the national implementing rules take account of the limits laid down by EU law itself,

48 — See Leible/Streinz, *EUV/EGV*, Munich 2003, Article 95, paragraph 44, p. 1248.

49 — See paragraph 74 of the written observations of the appellants in the main proceedings.

50 — *Schultz-Hoff and Stringer and Others* (cited in footnote 7 above), paragraphs 57 to 62.

including the principles of case-law to which I have referred in my submissions.

5. Interim conclusion

56. In my view, the first question raised by the referring court, which is framed in general terms in so far as it relates to fundamental aspects of the right to receive holiday pay, is answered by my detailed submissions both on the extent of the regulatory powers exercised by the EU legislature and those retained by the Member States and on the requirements of EU law which can be inferred from the Working Time Directives, Directive 2000/79 and the case-law of the Court.

57. The answer to the rather more specifically worded second and third questions referred should be that holiday pay must, in principle, be determined in such a way as to correspond to the worker's 'normal' remuneration. In any event, an allowance granted in lieu of holiday pay does not satisfy the requirements of EU law where it is determined at a level just sufficient to ensure that there is no serious risk that the worker will not take his annual leave.

C — *Procedure in the case of complex pay structures*

1. General

58. The principle that holiday pay must be determined in such a way as to correspond to the worker's 'normal' remuneration needs, of course, to be adapted in cases where the level of remuneration is *not* constant precisely because it is prone to variation from one period to another depending on individual factors considered relevant by the parties to the collective agreement. Such factors may be linked either to a worker's professional position within the undertaking or to the specific services that he performs. The latter category includes supplements in the form of special payments and expense allowances.

59. In essence, the fourth and fifth questions seek a ruling from the Court on the meaning to be given to 'normal remuneration' during a period of leave in circumstances such as those in the main proceedings. It must be pointed out in this regard that that term has a temporal component and a material component. Both questions relate to those components. The fourth question seeks to ascertain whether the period to be taken into account

is the actual period, that is to say the period during which the worker was on leave, or another period. By the fifth question, the referring court wishes to know whether the worker would be entitled to the payment of a supplement if, and to the extent to which, he or she had engaged in a particular activity. In the event of an affirmative answer to that question, the referring court would like to know whether any maximum limits on the extent to which, or time during which, the worker engages in such activities must be taken into account in the calculation of holiday pay.

2. Requirements of EU law and the competence retained by the Member States in matters relating to the laying down of rules governing the details of holiday pay

60. A definitive assessment of what is meant by 'normal remuneration' within the meaning of the Court's case-law is precluded not least by the paucity of EU legislation in this field, which fact necessarily imposes limits on an interpretation by the Court.

61. In support of the proposition that there is no regulatory competence on the part of the EU and hence also no interpretative jurisdiction on the part of the Court, the Danish Government makes reference to Article 137(5) EC, which expressly states that that article does not apply to, inter alia, 'pay'. In my view, however, this is not where the difficulty actually lies, since, as the Court has repeatedly held in its case-law, [51] it is important to bear in mind that that provision of the Treaty must be interpreted strictly so as not to affect unduly the scope of paragraphs 1 to 4, nor to call into question the aims pursued by Article 136 EC. That provision of the Treaty must not therefore be interpreted in such a way as to extend its scope to any question involving any sort of link with pay. As the Court explained in *Impact* with reference to *Del Cerro Alonso*, [52] that exception must rather be interpreted as covering measures – such as the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage – which amount to direct interference by EU law in the determination of pay within the European Union. [53] Accordingly, the establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the EU legislature and is unquestionably a matter for the competent bodies in the various Member States, although those bodies must nevertheless exercise their competence consistently with EU law in the areas in which the European Union does not have competence. [54]

51 — See *Impact* (cited in footnote 13 above), paragraph 125.
52 — Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109.
53 — *Impact* (cited in footnote 13 above), paragraph 124.
54 — Ibid (paragraph 129).

62. However, this says nothing about whether the EU legislature has the power to lay down rules governing the level of holiday pay in the case of complex pay structures. As Advocate General Kokott rightly stated in the abovementioned case, that exception does not prevent the European Union from adopting legislation with financial consequences, such as in relation to working conditions (Article 137(1)(b) EC) or the improvement of the working environment to protect the health and safety of workers (Article 137(1)(a) EC). It does not prevent the EU legislature from imposing requirements on national employment law which give rise to a right on the part of workers to paid annual leave, as Article 7 of Directive 2003/88 did. [55] The same is true of the almost identical provisions in Clause 3 of the European Agreement, attached to Directive 2000/79, particularly since the exception created in Article 137(5) EC also covers the legal basis of that directive, Article 139 EC. [56] In other words, the EU legislature not only has the competence to lay down rules governing the matters covered by Directives 2003/88 and 2000/79, but would also, in principle, have had the power in law to adopt detailed provisions concerning the nature and level of holiday pay.

63. The EU legislature none the less refrained, in the aforementioned provisions, from laying down *the details of how holiday pay is to be constituted*. It referred instead to 'national legislation and/or practice'. The intention of the EU legislature to leave a broad margin of discretion to the Member States and to management and labour is expressed in recital 10 in the preamble to Directive 2000/79, which states that 'the proper instrument for implementing the Agreement is a Directive within the meaning of Article 249 of the Treaty'. In the area of aviation, a further reference is made to national law in so far as recital 12 states that, 'with regard to terms used in the Agreement which are not specifically defined therein', the Directive leaves the Member States free 'to define those terms in accordance with national law and practice, as is the case for other social policy Directives using similar terms, providing that the said definitions are compatible with the Agreement'. Moreover, Article 3 of Directive 2000/79 requires the Member States to ensure that 'management and labour have introduced the necessary measures by agreement'.

64. In essence, the European Union thus takes an approach similar to that adopted in the implementation of ILO Convention No 132, which likewise contains no specific provisions on the calculation of holiday pay and instead leaves a broad margin of discretion to

55 — See point 175 of the Opinion of Advocate General Kokott in *Impact*, cited in footnote 13 above.

56 — See, to this effect, Rebhahn, R., loc. cit., (footnote 14), Article 137, paragraph 56, p. 1363.

the signatory States. [57] Thus, Article 1 of that convention provides that 'the provisions of this Convention, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards, court decisions, statutory wage fixing machinery, or in such other manner consistent with national practice as may be appropriate under national conditions, shall be given effect by national laws or regulations'.

65. Such an approach is consistent both with the subsidiarity principle and with the need to respect the autonomy of management and labour in relation to collective pay negotiations. It should be recalled in this connection that the right of collective bargaining and the autonomy of negotiation inherent in that right constitute fundamental rights which are protected in the legal order of the European Union. [58] The right of collective bargaining is recognised both by various international legal instruments in which the Member States have participated or to which they have acceded – such as the European Social Charter signed in Turin on 18 October 1961, [59] to which, moreover, express reference is made in Article 136 EC – and by instruments developed by the Member States at Community level or within the framework of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council in Strasbourg on 9 December 1989, [60] which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000. [61]

66. Such an approach is also consistent with practical requirements, particularly since it is extremely difficult to adopt uniform provisions applicable to all sectors. [62] Indeed, the observations submitted by the parties to

57 — According to Böhnert, S., *Das Recht der ILO und sein Einfluss auf das deutsche Arbeitsrecht im Zeichen der europäischen Integration*, Baden-Baden 2002, p. 100, the ILO conventions use so-called 'flexibility clauses'. This refers to a variety of measures, including the use of generic terms and the conferral of broad discretion in the discharge of obligations and the setting of the objectives to be achieved.

58 — See my Opinion in Case C-271/08 *Commission* v *Germany* [2010] ECR I-7091, point 77.

59 — Article 6 of the European Social Charter, reproduced verbatim in Article 6 of the revised European Social Charter signed in Strasbourg on 3 May 1996, with a view to ensuring the effective exercise of the right to bargain collectively, requires the contracting parties, inter alia, to promote joint consultation between workers and employers and to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

60 — Point 12 of the Community Charter of the Fundamental Social Rights of Workers states that employers or employers' organisations, on the one hand, and workers' organisations, on the other, are to have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

61 — Pursuant to Article 28 of the Charter of Fundamental Rights of the European Union, workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

62 — See my description, in point 42 of this Opinion, of the differentiated regulatory method which the EU legislature applied and which ultimately led to the adoption of Directive 2000/79 in the specific area of civil aviation.

the main proceedings show just how much the aviation sector *relies* on flexibility. Rules must be established which take into account the particular characteristics of each sector and are accepted by management and labour. Moreover, the Court must also take into account such restraint on the part of the EU legislature when interpreting EU law. On the other hand, it must be borne in mind that the discretion available to Member States, as I have already stated,[63] is not unlimited. Rather, the implementing measures must be consistent with a framework of EU law.

67. It is clear from the foregoing considerations that, in the absence of requirements to the contrary under EU law, the Member States are in principle free to make provision in their national employment law to allow remuneration to be divided into basic pay and a number of supplements which workers receive depending on the work which they perform.

3. Composition of holiday pay

(a) Material component of 'normal remuneration'

68. As regards the material component of 'normal remuneration' in the case of a complex pay structure such as that forming the subject-matter of the fifth question referred, I take the view that it cannot automatically be inferred from recital 12 in the preamble to Directive 2000/79 that the Member States and management and labour have exclusive competence to determine in individual cases which amounts are to be regarded as forming part of 'holiday pay'. In view of the fact that the concept of 'holiday pay' is linked to that of 'pay', the latter must also, correspondingly, in principle be maintained without reduction during the period of leave. The meaning of the latter term has been extensively shaped by EU law.

(i) Pay within the meaning of EU law

69. It is true that there is no definition of the term 'pay' either in the Working Time Directives or in Directive 2000/79. EU law does, however, provide a sufficiently clear definition in Article 141(2) EC, and the Court itself has relied on that definition when interpreting directives which – like Directive 93/104 itself, inter alia at issue here – were adopted on the legal basis of Article 118a EC.[64] Moreover, that definition is consistent with

63 — See points 38, 45, 53, 54 and 55 of this Opinion.

64 — Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 29.

the standards of international employment law, its drafting history making it clear that it is based on Article 1(a) of ILO Convention No 100 [65] [66] Against that background, it seems to me that the definitions provided by primary law may also be relied on in this case for the purpose of interpreting Directive 2000/79.

70. It is thus necessary to consider which payments must be regarded as being components of remuneration in accordance with that definition.

71. According to the legal definition contained in Article 141(2) EC, pay means 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. It makes no difference in this regard whether the payment is received under a contract of employment, by virtue of a legislative provision or on a voluntary basis. [67] By and large, that provision has been interpreted extensively in the Court's case-law. [68] For that reason, the meaning of pay as defined in Article 141(2) EC may, in certain circumstances, extend far beyond a national definition of pay. [69] The remunerative nature of any payment must be determined by individual examination.

72. However, before I examine the remunerative nature of the individual components of the pay at issue, I should like to make brief reference to the need to adhere to the broad interpretation previously given to the meaning of pay in EU law. It is, after all, precisely in cases such as this, in which the remuneration consists of several components, that there is a risk that an excessively narrow interpretation will give the employer an incentive to declare that individual components do not form part of the remuneration and/or even to fragment the remuneration further in order to pay as little as possible by way of holiday pay. However, the effect of such a practice would be to deter the worker from taking paid annual leave and, therefore, to frustrate the recuperative function of that leave. The appellants in the main proceedings refer to this risk, rightly in my view. [70]

65 — Article 1(a) of ILO Convention No 100 reads as follows: 'the term "remuneration" includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment'.

66 — See Krebber, S., *EUV/EGV – Kommentar* (ed. Christian Calliess/Matthias Ruffert), 3rd edition, Munich 2007, Article 141, paragraph 23, p. 1629.

67 — *McKenna* (cited in footnote 64 above), paragraph 29.

68 — See Eichenhofer, E., *EUV/EGV – Kommentar*, Munich 2003, Article 141 EC, paragraph 10, p. 1530.

69 — See Rebhahn, R., loc. cit. (footnote 14), Article 141 EC, paragraph 10, p. 1386.

70 — See paragraph 73 of the written observations of the appellants in the main proceedings.

(ii) Basic pay as an essential part of remuneration

73. In the light of its clear wording, there is no doubt that Article 141(2) EC covers any consideration which a worker receives as 'basic pay'. This was expressly confirmed by the Court most recently in *Parviainen*, concerning an air hostess performing the functions of a purser within the airline. In that case, the Court dealt with the question whether a pregnant worker who, pursuant to Article 5(2) of Directive 92/85, is temporarily transferred to another job on health and safety grounds remains entitled, during that transfer, not only to the basic salary due to her under her contract or her employment relationship but also to the pay components or supplementary allowances linked to her seniority, length of service and professional qualifications. The Court answered that question in the affirmative, having from the outset regarded the applicant's basic pay as falling within the concept of pay within the meaning of Article 141 EC. [71] The fixed amount automatically due to any pilot under the MOA in conjunction with the collectively agreed provisions on monthly flying times also falls into the category of basic pay. That pay is fixed at a precise level which is dictated by specific factors such as the pilot's rank and the aircraft fleet to which the pilot in question belongs. There is no doubt, therefore, that that fixed, invariable component of every pilot's pay forms part of the 'normal remuneration' which, in accordance with the Court's case-law, must continue to be paid to the worker for the duration of the period of leave.

(iii) Classification of the supplements as part of remuneration

74. Rather more difficult to resolve, by contrast, is the question whether the supplements at issue here also come within the meaning of pay as defined in Article 141(2) EC. According to the information provided by the referring court, basic pay also comprises two further components which differ with respect to their function and manner of taxation. The level of the supplements is determined by the time spent flying (FPS) and time away from base (TAFB). The FPS is wholly regarded as remuneration under national law and is taxed accordingly. In the case of the TAFB, 82 % of the time is treated as having been paid on account of expenses, with the result that only 18 % is treated as remuneration and taxable.

75. Regardless of their classification under national law, from the point of view of EU law, it is possible that such supplements are capable of being regarded as 'any

71 — *Parviainen* (cited in footnote 37 above), paragraphs 49 and 50.

other consideration' within the meaning of the aforementioned legal definition. That possibility will be examined below. If the relevant criterion is the function of remuneration as consideration from the employer for work undertaken by the employee, 'any other consideration' would have to mean any monetary benefit which constitutes such consideration in the broad sense of the term and not exclusively on other grounds (e.g. increased productivity, improved working conditions and climate, promotion of health). [72]

76. First of all, however, it is necessary, to limit the scope of the examination to those areas in which the questions referred are relevant to the decision in the main proceedings. In any event, it is clear from the documents before the Court [73] that the appellants in the main proceedings are claiming entitlement to payment of the FPS and the taxable share of the TAFB, which was classified as a component of remuneration under national law. That conclusion is also supported by the submissions advanced by the appellants in the main proceedings, particularly since they refer exclusively to the very same pay components in their written observations in the proceedings before the Court. [74] The questions raised by the referring court must therefore be understood as seeking to ascertain whether the calculation of holiday should take into account supplements, as well as basic pay, only in relation to the FPS and the taxable share of the TAFB. Accordingly, since it is not relevant to the decision in the main proceedings, the examination to be carried out does not need to be extended to that share of the TAFB which is treated as an expense allowance.

77. In principle, the broad definition of pay in Article 141(2) EC covers not only the remuneration payable strictly as consideration for the work undertaken but also any additional components such as bonuses, supplements and allowances, concessions granted by the employer and *ex gratia* payments. [75] The Court has certainly recognised as pay, within the meaning of that provision, allowances based on the criterion of mobility, that is to say, allowances which reward the worker's

72 — See Krebber, S., loc. cit. (footnote 66), paragraph 25, p.1630.

73 — See the judgment of the Employment Tribunal of 11 May 2007, *Mrs S A Williams and Others* v *British Airways Plc* (Case Number: 3314875/2006), paragraphs 27 and 29, p. 8 (Annex 2 to the written observations of the respondent in the main proceedings) and the Agreed Statement of Facts and Issues in the Supreme Court of the United Kingdom, paragraph 8, p. 3 (Annex 1 to the written observations of the respondent in the main proceedings).

74 — See paragraph 11 of the written observations of the appellants in the main proceedings.

75 — Fuchs, M./Marhold, F., *Europäisches Arbeitsrecht*, 2nd ed., Vienna 2006, 123.

readiness to work at different times. [76] Consequently, an allowance for inconvenient working hours, [77] overtime pay [78] and overtime pay for training course attendance, the duration of which exceeds the individual's working hours, [79] have also been regarded as coming within the scope of that definition. Logically, then, that category would necessarily also include pay supplements for overtime, supplements for working on public holidays, shift allowances and any comparable payments. [80]

78. The similarity of the – not exhaustively listed – payments mentioned above to the supplements at issue here is obvious, since they are all ultimately linked to the pilot's readiness to make himself available for work for as long as the employer considers this necessary. However, there is a difference between the two types of supplement at issue in so far as the FPS represents direct consideration for an activity typically carried on by a pilot (namely the flying of an aircraft), whereas the TAFB is more in the nature of compensation for the fact that the pilot necessarily has to be away from his normal base for travel-related reasons. The fact that the potentially compensatory nature of a payment does not automatically preclude its classification as pay within the meaning of Article 141(2) EC is demonstrated not least by the fact that, in accordance with case-law, even statutory compensation for unfair dismissal falls within the scope of that definition. [81] By comparison with payments of this kind, however, the compensatory nature of the TAFB – or at least the non-taxable portion of it at issue here – is clearly less pronounced. It must also be noted in this regard that, unlike the non-taxable share of the TAFB, the taxable share is not an expense allowance but is already classified as pay under national law. In my view, that classification is correct, particularly since the latter constitutes indirect consideration for the activity performed which is compensatory in nature and comparable to an allowance for inconvenient working hours. Irrespective of the foregoing, both supplements are monetary benefits purposely paid by the employer for a specific activity performed by the pilot, meaning that the remunerative nature of both allowances cannot be called into question.

79. Those supplements therefore constitute 'any other consideration' which the worker receives in respect of his employment relationship pursuant to Article 141(2) EC.

76 — See Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 3.

77 — See Case C-236/98 *Jämställdhetsombudsmannen* [2000] ECR I-2189, paragraph 39 et seq.

78 — See Case C-300/06 *Voß* [2007] ECR I-10573, paragraph 12 et seq.

79 — See Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 13, and Case C-457/93 *Lewark* [1996] ECR I-243, paragraph 23.

80 — See Krebber, S., loc. cit. (footnote 66), paragraph 28, p.1631.

81 — See Case C-167/97 *Seymour-Smith* [1999] ECR I-623, paragraph 28.

Accordingly, those pay components also form part of 'normal remuneration' which, in accordance with the Court's case-law, must continue to be paid to the worker during his period of leave. A worker is therefore, in principle, entitled to the supplements normally due to him also in respect of periods of annual leave.

80. The fact that a worker exercises his right to annual leave cannot constitute a legally permissible ground for exceptionally interpreting pay within the meaning of EU law so narrowly as to exclude supplements falling due during that period. The effect of so doing would be to treat a worker differently, from a financial point of view, depending on whether he is working or on leave, which, as I have already explained at length, would be at variance with the Court's case-law.

81. However, the fact that a right to the supplements normally payable is recognised as being enforceable on the merits does not necessarily mean that the worker has an undiminished right to all conceivable supplements. In my view, the Court imposed a limit on that right in so far as the case-law can also be interpreted as meaning that the worker is to be entitled to no more than his 'normal remuneration'. I shall now explain the consequences of that interpretation.

(b) Temporal component of 'normal remuneration'

82. As indicated at the outset, the concept of 'normal remuneration' also has a temporal component. According to the natural meaning of the word, 'normal' can only refer to something which has existed over a certain period of time and can later be used as a point of reference for comparison. As the Commission [82] and the appellants in the main proceedings [83] rightly point out, that expression essentially implies that remuneration which in itself fluctuates at regular intervals is levelled out to an amount representing average earnings. As the parties to the proceedings rightly recognise, the determination of 'normal remuneration' necessarily requires a *sufficiently representative reference period* but there are various different periods capable of being relied on for this purpose in the main proceedings. It is possible to take into account either the specific period in which the worker was on leave, so as to calculate his hypothetical average earnings, or an earlier period in which the worker was continuously active, so as to calculate his actual average earnings. Both possibilities are referred to in the fourth question. It would be just as feasible, on the other hand, to calculate a uniform level of holiday pay for each category of pilot. However, neither of the potential approaches seems more attractive than the other in practice, since

82 — See paragraph 27 of the Commission's written observations.

83 — See paragraphs 55 and 100 of the written observations of the appellants in the main proceedings.

they both have advantages and disadvantages. Thus, for example, the first approach has the disadvantage that it will not always be possible to determine with certainty which tasks the pilot on leave would have been likely to perform in the period in question, in so far as it is safe to assume from the situation in the main proceedings that the task in question could, in principle, have been performed by any other pilot. [84] The second approach, on the other hand, could lead to difficulties when it comes to making new appointments, as there would not be any real reference period to rely on. [85] The fact remains, as the appellants in the main proceedings point out, [86] that there is in any event unlikely to be any significant quantitative difference in practice between the amounts calculated under the first and second approaches.

83. Upon closer examination of the issues raised, it becomes clear that the advantages and disadvantages of each approach, as discussed at length by the parties to the main proceedings, relate predominantly to the practical side of implementing the right to paid annual leave. In other words, what they are actually concerned with is which approach is more appropriate for the purpose of effectively implementing the right conferred by EU law. In the context of a reference for a preliminary ruling, however, the Court is called upon to determine, by giving its interpretation, what legally binding requirements EU law imposes on the relevant national implementing law, [87] and, in the context of judicial cooperation, to give a ruling on the questions of law referred to it by the national court. Against that background, the Court's finding in the present case should be that, as the respondent in the main proceedings itself rightly notes, [88] EU law does not impose any particular approach.

84. In the absence of detailed requirements at the level of EU law, it must be assumed that the competence to establish the reference period in question and to calculate the average remuneration for that period lies at the level of the Member States, 'national legislation and/or practice' being relevant here, pursuant to Clause 3 of the European Agreement and Article 7 of Council Directive 2003/88. It is for the national legislature, in accordance with the relevant legal system, to adopt the necessary implementing provisions and for

84 — See paragraphs 42 and 74 of the written observations of the respondent in the main proceedings.

85 — Ibid, paragraph 42.

86 — Ibid, paragraph 102.

87 — The interpretation which the Court gives to a provision of EU law clarifies and defines the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force (see Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16; Case C-50/96 *Deutsche Telekom* [2000] ECR I-743, paragraph 43; and Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 21.

88 — See paragraph 42 of the written observations of the respondent in the main proceedings.

management and labour to adopt collectively agreed rules which set out the conditions under which such average remuneration can be paid.

85. The same is true of international employment law, from which important principles might have been inferred. The wording of Article 7(1) of ILO Convention No 132 certainly indicates that the determination of average earnings constitutes a principle, in so far as it expressly provides that every person taking the holiday envisaged in that convention is to receive in respect of the full period of that holiday at least his normal or *average remuneration*. That alternative is clearly intended to take into account specific employment relationships in which workers do not receive normal remuneration. On the other hand, that provision says nothing about how such average remuneration is to be calculated or, in particular, what reference period is to be used as the basis for the calculation. Instead, it refers to the competence of the individual States when it asserts that that remuneration must be 'calculated in a manner to be determined by the competent authority or through the appropriate machinery in each country'.

(c) Prohibition of discrimination

86. The foregoing interpretation of the Court's case-law to the effect that the worker's entitlement is not to extend beyond his 'normal remuneration', leads, on the one hand, to a requirement to level out and calculate average earnings. This in turn means that basic pay and any supplements are not to be automatically aggregated where the latter are not usually paid. In this regard, the Danish Government's submission [89] that those supplements must be included in the calculation of an average sum only where they are systematic components of pay must be expressly endorsed.

87. That interpretation also implies, in essence, that a worker who takes leave must not be treated any differently, from a financial point of view, from when he is working. In the light of the regulatory purpose of the right to paid annual leave, that requirement is targeted primarily at financial disadvantages for the worker. However, this does not mean that a worker who takes annual leave should be placed in a better financial position than other workers. After all, the granting of 'normal remuneration' means that the usual restrictions should in principle also be applied. By analogy, the same is true of annual or other maximum limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement. On that basis, those

89 — See paragraph 20 of the Danish Government's written observations.

maximum limits would have to be taken into account in the calculation of holiday pay.

4. Interim conclusion

88. The answer to the fourth question must be that, in a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period.

89. The answer to the fifth question must be that the calculation of that average remuneration must take into account both supplements usually due to the worker as part of his remuneration and any restrictions in respect of annual or other limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement.

VII — Conclusion

90. In the light of the foregoing considerations, I propose that the Court's answer to the questions referred by the Supreme Court should be as follows:

(1) Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and Clause 3 of the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation concluded by the Association of European Airlines (AEA), the European Transport Workers' Federation (ETF), the

European Cockpit Association (ECA), the European Regions Airline Association (ERA) and the International Air Carrier Association (IACA), annexed to Council Directive 2007/79/EC of 27 November 2000, are to be interpreted as meaning that holiday pay must be calculated in accordance with national legislation and/or practice.

(2) In this regard, holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration. In any event, an allowance granted as holiday pay will not satisfy the requirements of EU law if it is determined at a level which is just sufficient to ensure that there is no serious risk that the worker will not take his annual leave.

(3) In a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period.

(4) The calculation of that average remuneration must take into account both supplements usually due to the worker as part of his remuneration and any restrictions in respect of annual or other limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement.