OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 27 October 2005 [1]

I — Introduction

1. In the present cases the Court of Justice is asked for an interpretation of Article 7 of Directive 93/104/EC. [2] The referring court and tribunal seek essentially to know to what extent a national rule which

— permits payment in respect of annual leave to be included in a worker's pay and permits that payment to be made as part of the pay for the working time performed, and hence

— permits the non-payment of that remuneration in respect of a period of leave actually taken ('rolled-up holiday pay')

is compatible with that provision.

1 — Original language: German.

2 — Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18, 'the Directive').

II — Legal context

A — *Community law*

2. Article 7 of Directive 93/104 concerning certain aspects of the organisation of working time provides:

'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.'

B — *National law*

3. The United Kingdom transposed the Directive by the Working Time Regulations 1998.

4. Regulation 13 provides:

'(1) ... [A] worker is entitled to four weeks' annual leave in each leave year.

...

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –

(a) it may only be taken in the leave year in which it is due, and

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

5. Regulation 16 provides:

'(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

...

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration").

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.'

6. Regulation 35 reads:

'(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –

(a) to exclude or limit the operation of any provision of these Regulations, save in so far as these Regulations provide for an agreement to have that effect ...'.

III — Facts and main proceedings and questions referred for a preliminary ruling

A — *Case C-131/04 (Robinson-Steele)*

1. Facts

7. The main proceedings in Case C-131/04 originate in a dispute between Mr C.D. Robinson-Steele as employee and R.D. Retail Services Ltd as his employer.

8. Mr Robinson-Steele worked for R.D. Retail Services from 19 April 2002 to 19 December 2003 on the basis of various contractual terms, in any event finally as a temporary worker. The contract of employment valid from 29 June 2003 provided in particular that the entitlement to payment for leave accrued in proportion to the amount of time worked continuously by the temporary worker on assignment during the corresponding year. The contract further contained the temporary worker's agreement that payment in respect of the entitlement to paid leave would be made together with and in addition to the temporary worker's hourly rate, at 8.33% of the hourly rate.

9. According to the referring tribunal, a holiday pay element of 8.33% leads to the mathematically correct sum to reflect one week's pay after the worker has worked continuously for three months in a system of alternating day and night shifts.

10. Mr Robinson-Steele was paid weekly. The pay slips stated: 'Pay rate includes compensation for hols [holidays] & sick days'. There was no separate indication of the element of pay representing payment for annual leave.

2. National proceedings

11. On 14 January 2004 Mr Robinson-Steele ('the applicant in the main proceedings') made an application to the Employment Tribunal at Leeds. He submitted essentially that he had worked for R.D. Retail Services ('the respondent in the main proceedings') for 20 months and had been paid only 'rolled-up' holiday pay. He had thus not been able to take any leave, especially as the pay in question had not been paid immediately before, after or during leave.

12. The referring tribunal considers that an interpretation of Article 7 of the Directive is needed because on the one hand the English Employment Appeal Tribunal, by whose decisions it is bound, has held that a contractual provision on 'rolled-up holiday pay' which identifies a specified amount or percentage by way of an addition to basic pay is lawful under national law, in particular the above Regulations, [3] and on the other hand the Inner House of the Court of Session in Scotland has held that a corresponding agreement, under which holiday pay is incorporated into another payment which takes place regardless of leave actually being taken, is void. [4]

3 — Employment Appeal Tribunal, *Marshalls Clay Products* v *Caulfield*, (2003) IRLR 552.

4 — Inner House of the Court of Session, *MPS Structure Ltd* v *Munro*, (2003) IRLR 350.

13. The Employment Tribunal, Leeds, accordingly by order of 9 March 2004 referred the following questions to the Court for a preliminary ruling:

1. Is Article 7 of Council Directive 93/104/EC consistent with provisions of national law which allow pay for annual leave to be included in a worker's hourly remuneration and paid as part of remuneration for working time but not paid in respect of a period of leave actually taken by the worker?

2. Does Article 7(2) preclude the national tribunal from giving credit to an employer for such payments when it seeks to give to the applicant an effective remedy according to powers contained in national regulations?

B — *Case C-257/04*

14. Case C-247/04 originates in two appeals bought before the Court of Appeal of England and Wales, which that court heard together.

1. *Caulfield and Others* v *Marshalls Clay Products Ltd*

(a) Facts

15. Marshalls Clay Products Ltd, in order to ensure continuous operation, operates a system of shift working in which each employee works for four days and then has four days off.

16. In order to be able to meet the employees' holiday entitlement despite that system of working time, a collective agreement was entered into between Marshalls Clay Products Ltd and a trade union in July 1984. It is incorporated into each employee's contract of employment, and contains the following provision:

'3. HOLIDAYS

Holiday pay is incorporated in the hourly rate of pay, so there is no accumulation of holiday pay. Holidays are taken during the rest day periods in the rota system. In order that extended periods of leave can be accommodated, each person will be entitled to:–

two 8 consecutive day periods

and

one 16 consecutive day period ...'

17. For determining the amount of holiday pay,[5] there exists a further agreement, concluded between Marshalls Clay Products Ltd and a trade union in May 1984, which provides inter alia as follows:

'Presently, Accrington operatives enjoy 31 days' holiday pay per annum (for 29 days' holiday). As a proportion of the other days worked (232) this is 13.36%. Hourly rates include 13.36% holiday pay.'

5 — The sum which functions as remuneration during periods of leave will be described below as 'holiday pay', without it being intended to suggest thereby that holiday entitlement is being compensated by a monetary payment contrary to Article 7(2) of the Directive.

18. The part of remuneration which functioned as rolled-up holiday pay was not in fact indicated either in the contract of employment or on pay slips; however, the contracts included a reference to all the agreements made between the employer and the trade union.

19. The national court points out that the effect is that leave has to be taken during the rest periods. Employees can take eight consecutive days twice or 16 consecutive days once, without being obliged to do so, but only by combining their rest days and taking on the shifts of fellow employees by means of mutually agreed exchange periods.

20. With 182 working days a year to be worked in the shift system, each employee receives holiday pay for 24.32 days: within each GBP 7.515 paid per hour worked, there is GBP 6.629 for the time actually worked, and GBP 0.886 constitutes the addition to take account of holiday pay.

21. The result is that employees are paid only for the four days on which they work, but not for the four days on which they do not work. The hourly rate that they are paid is increased to include payment for holidays. The hourly rates also apply to overtime, so that if employees work overtime they receive additional amounts in respect of both the basic rate and the holiday pay.

(b) National proceedings

22. By applications of 3 September 2001 Mr J.C. Caulfield, Mr C.F. Caulfield and Mr K.V. Barnes ('the applicants in the main proceedings') applied to the Employment Tribunal at Manchester for an order that Marshalls Clay Products ('the respondent') should pay them for annual leave for the period from 1 October 1998 to 3 September 2001.

23. By decision of 12 December 2002 the Manchester Employment Tribunal found in favour of the three applicants in the main proceedings and ordered compensation to be assessed at a later date.

24. By a notice of appeal to the Employment Appeal Tribunal, the respondent appealed against that decision.

25. The Employment Appeal Tribunal allowed the respondent's appeal on 25 July 2003.

2. *Clarke* v *Frank Staddon Ltd*

(a) Facts

26. According to the national court, Mr M.J. Clarke ('the applicant in the main proceedings') worked for Frank Staddon Ltd ('the respondent') from 2 April 2001 to 23 June 2001, apparently on a self-employed basis under a subcontractor's contract (the construction industry scheme). However, it is evidently common ground that the applicant in the main proceedings enjoys the rights granted by the Directive and the Working Time Regulations 1998.

27. From 24 June 2001 to 24 July 2001 the applicant in the main proceedings was on holiday, during which he was not paid.

28. His contract states:

'All Holiday and Bank Holiday pay is included within the daily rate.'

That contract contains a handwritten annotation against the words 'Rate of Pay':

'Basic 8.689 Holiday .756 = £ 85 per day.'

29. The same breakdown was shown on the pay slip for August 2001. The rate of GBP 85 relates only to the period after 24 June 2001, however. For the period before them, the respondent did not therefore determine the proportion of rolled-up holiday pay in the daily rate.

(b) National proceedings

30. By application received by the Employment Tribunal on 20 November 2001, the applicant in the main proceedings sought an order that the respondent should pay him for the annual leave which had accrued to him as a result of his work for the respondent in the period from 2 April 2001 to 16 November 2001.

31. By decision of 19 April 2002, the Employment Tribunal dismissed his claim.

32. By a notice of appeal to the Employment Appeal Tribunal, the applicant in the main proceedings appealed against that decision.

33. The Employment Appeal Tribunal dismissed his appeal on 25 July 2003.

3. The questions referred for a preliminary ruling in Case C-257/04

34. The applicants in both national proceedings appealed to the Court of Appeal against the decisions of the Employment Appeal Tribunal. The Court of Appeal decided, in view of the manifest differences of opinion between the Employment Appeal Tribunal in England and the Inner House of the Court of Session in Scotland, and in view of the *Robinson-Steele* case already pending before the Court of Justice, to make a reference.

35. The Court of Appeal therefore, by order of 25 June 2004, referred the following questions to the Court for a preliminary ruling:

1. Does a contractually binding arrangement between an employer and a worker, which provides that a specific part of the wages paid to the worker represents that worker's 'holiday pay' (an arrangement known as rolled-up holiday pay), involve a violation of the worker's right to be paid for his annual leave under Article 7 of the Working Time Directive 93/104/EEC?

2. Would the answer to Question 1 be different if the worker was paid the same before and after the binding arrangement in question coming into force so that the effect of the arrangement was not to provide for additional pay, but, rather, to attribute part of the wages payable to the worker to holiday pay?

3. If the answer to Question 1 is yes, is it a violation of the right to paid annual leave under Article 7 for credit to be given for that payment so as to set this off against the entitlement afforded under the Directive?

4. In order to comply with the obligation under Article 7 of Directive 93/104/EC to ensure that a worker is entitled to paid annual leave of at least four weeks, is it necessary for the payment to be made to the worker in the pay period in

which he takes his annual leave, or is it sufficient to comply with Article 7 that the payment is made throughout the year in instalments?

IV — The questions referred for a preliminary ruling

A — *Introductory remarks*

36. I should begin by observing that, according to settled case-law, it is for the court making the reference to decide on the relevance of the request for a preliminary ruling. [6] Where it is doubtful whether the questions have been formulated correctly from the point of view of assessing the case in the light of Community law, the Court can reformulate them if necessary. [7]

37. In the context of the preliminary ruling procedure under Article 234 EC, the interpretation of Community law is one of the tasks of the Court. With respect to the first question referred in Case C-131/04, it must be stated that, in that context, the question cannot be whether a provision of secondary law is compatible with national legislation but, rather, whether the relevant provision of secondary law precludes certain provisions of national legislation.

38. A comparison with the first question referred in Case C-257/04 and the explanations given by the referring court in that case make it clear, however, that in that case — and hence also in Case C-131/04 — the issue is presumably not so much whether Community law precludes certain national provisions as whether an interpretation of those national provisions in conformity with the Directive must, in view of the normative content of Article 7 of the Directive, lead to the conclusion that certain clauses in contracts of employment or collective agreements which incorporate holiday pay into the worker's ordinary remuneration ('rolled-up holiday pay') are void.

39. The first question referred in Case C-131/04 must thus be reformulated in the light of the first, second and fourth questions referred in Case C-257/04 and understood as meaning that the national tribunal essentially wishes to know whether the entitlement an individual worker may have under Article 7 of the Directive to paid annual leave

6 — Case C-472/99 *Clean Car Autoservice* [2001] ECR I-9687, paragraph 13, and Case C-306/99 *Banque internationale pour l'Afrique occidentale (BIAO)* [2003] ECR I-1, paragraph 88.

7 — The Court, according to settled case-law, attempts in all cases to provide the referring court with information which will be of use to it in deciding the case before it. See in this respect, for example, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 58, and Case C-366/98 *Geffroy* [2000] ECR I-6579, paragraph 20.

precludes payment for the periods of leave being made together with payment of remuneration, in accordance with an individual or collective agreement.

40. The referring court in Case C-257/04 emphasises, however, not incorrectly, that neither the Directive nor national transposing provisions contain any express rules on such clauses. In this connection, it should be recalled that the national court is under an obligation to interpret provisions of national law, particularly those which have been enacted in order to transpose a directive, in conformity with Community law and hence with the Directive.

41. Starting from the premiss, identifiable from both orders for reference, that the national court considers that national provisions are open to interpretation, [8] the Court will ultimately in the present cases not have to rule on the transposition of Directive 93/104 in the United Kingdom, but will have to provide the national court and tribunal with an interpretation of the relevant provisions of Community law which will in turn enable them to interpret the national provisions in a way which is as consistent as possible with the Directive when they assess the agreements at issue on rolled-up holiday pay.

42. The Court's settled case-law states that when a national court 'applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, [it] is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC'. [9]

43. It is of particular importance that this principle that national law is to be interpreted in conformity with Community law was confirmed in *Pfeiffer and Others* in connection with the regulation of maximum working time in the Directive. The Court held in particular that 'the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way

8 — It follows from the observations of both referring courts that the courts in England on the one hand and Scotland on the other have interpreted the transposing provisions differently with respect to the agreements mentioned.

9 — Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113. See also, inter alia, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26. See in addition Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30, and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537, paragraph 21.

that they are applied in conformity with the objectives of the directive'. [10]

44. Precisely in disputes between individuals, as in the present cases, the principle that national law is to be interpreted in conformity with Community law constitutes an indispensable principle for ensuring the full effectiveness of Community law. [11]

45. In summary, then, the national court and tribunal both essentially seek by their first questions [12] to know whether the entitlement to paid annual leave under Article 7 of the Directive precludes in principle agreements for rolled-up holiday pay.

To answer that question, the content and extent of the entitlement to paid annual leave under Article 7 of the Directive should be examined first. A further stage will be to consider to what extent private contractual agreements may run counter to that entitlement.

B — *Paid annual leave under Article 7 of Directive 93/104*

1. Subject-matter of the entitlement to paid annual leave

(a) Wording and scheme of Article 7(1) of the Directive

46. Article 7(1) of the Directive guarantees the worker's unconditional entitlement to four weeks' paid annual leave. The Court has already recognised this in its judgment of 26 June 2001 in *BECTU*, [13] in which it held that 'Article 7(1) of Directive 93/104 imposes a clear and precise obligation on Member States to achieve a specific result' [14] and that this is an 'individual right' [15] of the worker. [16]

47. Beyond this recognition of an entitlement in principle, the wording of Article 7(1) of the Directive contains only little indication

10 — *Pfeiffer and Others*, paragraph 117.

11 — See also *Pfeiffer and Others*, paragraph 114: 'The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.'

12 — There is also the fourth question in Case C-257/04, which will be discussed together with those questions.

13 — Case C-173/99 *BECTU* [2001] ECR I-4881.

14 — *BECTU*, paragraph 34.

15 — *BECTU*, paragraph 35.

16 — See also paragraph 43: 'It follows that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law ...'. See also Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 31: 'Article 7(1) of Directive 93/104 ... must be understood as meaning that the national implementing rules must in any event take account of the right to paid annual leave of at least four weeks.'

of how the employer's corresponding obligations are to be fulfilled. With respect to the 'conditions for entitlement ... and granting', there is merely a reference to 'national legislation and/or practice'.

48. It follows from the wording of Article 7 (1) of the Directive that the employee is entitled to 'actual rest' [17] during which he continues to be paid. [18] However, it is left open what principles are to be used for remuneration of the period of leave. From this point of view, it is open whether a corresponding payment must be made during the leave, or whether it may be made in advance or afterwards. It might even be concluded from the reference to national laws and/or practice that the Directive leaves it as far as possible to the Member States to fill in the gap in the legislation.

49. With respect to the scheme, it must then be observed that the Directive does not contain any further provisions that address the point in question. Moreover, Article 15 of the Directive permits generally the application or introduction of national rules that are more favourable to the protection of the safety and health of workers. Article 17 provides, however, that the Member States or the two sides of industry may derogate only from certain exhaustively listed provisions of the Directive under certain conditions. Article 7 of the Directive is not one of the provisions in respect of which the Directive expressly allows a derogation, however, as the Court already said in *BECTU*. [19]

(b) Spirit and purpose of minimum annual leave

50. The Court also already had occasion in the *BECTU* judgment [20] to consider the *ratio legis* of Article 7(1) of the Directive.

51. The aim of the Directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions, in particular on working time. [21] The Court deduces this, first, from the legal basis of the Directive — Article 138 EC (formerly Article 118a of the EC Treaty), which aims at improved protection of the safety and health of workers — and, second, from the wording of the first, fourth, seventh and eighth recitals in the preamble to the Directive and the wording of Article 1(1).

17 — See *Merino Gómez*, paragraph 30

18 — Article 7(2) of Directive 93/104 further makes it clear that the entitlement to minimum paid annual leave cannot be replaced by a payment in money.

19 — *BECTU*, paragraph 41

20 — Cited in footnote 13.

21 — *BECTU*, cited in footnote 13, paragraph 37.

52. According to those provisions, Community-wide harmonisation of the organisation of working time is to ensure better protection of the safety and health of workers by guaranteeing minimum rest periods and adequate breaks. [22]

53. But for increased protection of the safety and health of workers actually to be achieved, it is necessary that the worker is actually granted the rest periods prescribed, and hence also annual leave. [23] For that reason Article 7(2) of the Directive prohibits replacing the minimum annual leave by a money payment, except where the employment relationship is terminated.

54. Effective grant of the entitlement to leave thus also means that the worker is put in a position actually to take the leave that is due to him and is not, for example, deterred from doing so by factual pressures. That is the purpose of the continuation of pay during the leave, in other words, the guarantee of minimum paid annual leave.

22 — The eighth recital appears of particular interest, and reads as follows, in extract: '... in order to ensure the safety and health of Community workers, the latter must be granted minimum daily, weekly and annual periods of rest and adequate breaks ...'.

23 — Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 70.

55. Consequently, with the entitlement to minimum paid annual leave under Article 7 of the Directive, what is in the foreground is not so much the payment for the periods concerned as the effective possibility of taking the leave in question. In the light of the main proceedings — and their differing facts — it must now be examined how far the methods of remuneration of annual leave at issue affect this effective possibility of taking leave.

2. To what extent might the entitlement to paid annual leave under Article 7 of the Directive preclude 'rolled-up holiday pay'?

(a) Essential submissions of the parties

(i) Observations of the applicants in the main proceedings

56. Mr Robinson-Steele did not submit any observations to the Court in Case C-131/04.

57. The applicants in the main proceedings in Case C-257/04 take the view that Article 7 of the Directive requires payment to take place in the period in which the worker would have been paid if he had continued to work. If payment does not take place within that period, then there is either a payment in

lieu contrary to Article 7(2) of the Directive or a mechanism which entails obstructions or restrictions on taking leave and is prohibited for that reason. In particular, the 'rolled-up holiday pay' system discourages workers from taking their annual leave. Since a worker earns more if he works every week, this is a substantial incitement for low-paid workers in particular not to take any leave.

58. The need to 'save up' pay for one's annual holiday is also a deterrent to taking leave in the earlier part of the year.

59. Moreover, it is unlikely, especially in the case of low-paid workers, that the sums paid each week as holiday pay will be saved and not spent. That results in it being financially impossible to take leave, especially if the period worked in the year concerned has not yet been long enough.

(ii) Observations of the respondents in the main proceedings

60. The respondents in the main proceedings, R.D. Retail Services (Case C-31/04) and Marshalls Clay Products and Frank Staddon (Case C-257/04), take the view that it is not contrary to the Directive to pay annual holiday pay in instalments together with the basic pay, if this integrated payment has been contractually agreed. They observe that Article 7 of the Directive gives an absolute and unconditional right only to a minimum of four weeks' paid holiday. Neither the wording nor the purpose of Article 7, however, requires payment for annual leave to be made in a particular manner or at a particular time. The 'conditions for entitlement to, and granting of,' leave are, under Article 7(1) of the Directive, left to national law. Provided that national law does not effectively prevent the exercise of the right, it is in harmony with the requirements of Community law.

61. Moreover, the protection conferred by the Directive must take account of the need to avoid unreasonable administrative, financial and legal obstacles and enable flexibility. As regards the differentiation between the right itself and the conditions of its exercise, which reflects the balance aimed at by the Directive between the protection of the safety and health of workers and the need for flexibility in application, both respondents refer to the Court's judgment in Case C-173/99 and Advocate General Tizzano's Opinion in that case.

62. In any case, a worker cannot be compelled to take leave. The worker can also always decide for himself what he will do during the leave he is entitled to. So he is free

to work for another employer during his leave, for instance. That alone cannot be regarded as undermining the rule in Article 7 of the Directive. Moreover, workers are capable of handling their financial resources in such a way that they can cope with the system of integrated payment.

(iii) Observations of the United Kingdom Government

63. The United Kingdom Government is also of the opinion that a system of rolled-up holiday pay is permissible. In particular, neither the wording nor the purpose of Article 7(1) of the Directive requires payment at a specified time. Rather, the wording of Article 7 of the Directive — as also its preamble — shows by its reference to national law and practice that a certain degree of flexibility in the transposition may be necessary. This is moreover an expression of the principle of subsidiarity. The United Kingdom Government too refers in this connection to the Opinion and judgment in Case C-173/99.

64. Regulation 16 transposes Article 7 of the Directive adequately by granting workers the requisite period of annual leave and a payment in respect of that period. Provided that national laws and practice do not make the right to paid annual leave illusory, the requirements of Article 7 are satisfied.

65. Nor does the proposed interpretation lead to workers being dissuaded from taking their annual leave. Since the employer cannot impose rolled-up payment unilaterally, and instead an agreement between employer and employee is needed, such an agreement will be possible only if the worker is actually paid and the payment is correctly calculated.

66. An agreement on rolled-up payment has the effect, moreover, that the worker is paid in advance for his annual leave if the leave is taken at a later stage of the period of employment. Workers can be expected to take steps to make sure that the payment of holiday pay in instalments does not discourage them from taking leave. Rolled-up holiday pay is also the fairest and least complicated method in the case of short-term workers whose employment relationship may end before they are able to claim any holiday or payment. There is therefore no reason why Article 7 should require a specific time for payment for annual leave.

67. Moreover, payment at the time when the holiday is taken would — contrary to the preamble to the Directive — lead to considerable administrative difficulties for employers, in particular in the case of casual or temporary workers. Payment in instalments makes it unnecessary to calculate the holiday pay owed in each individual case when leave is taken. Difficulties would also arise often because of the nature of the work if the employee insisted on taking leave during a period of work.

(iv) Observations of Ireland

68. In Ireland's written observations in Case C-257/04 the Chief State Solicitor puts forward the view that it follows from the words 'paid annual leave' in Article 7(1) of the Directive that the worker must be paid during or immediately before the leave period. In the system of rolled-up holiday pay, however, he is not paid during his leave.

69. The Directive's purpose of protecting the health and safety of workers also means that it must be ensured that the worker is not only entitled to leave but can also actually take that leave. Rolled-up holiday pay, by contrast, militates against taking leave, since workers are then required to take leave during which they are not paid, whereas if they work they are paid regularly every week or month. That runs counter to the aims of the Directive, which is intended precisely to prevent workers receiving money instead of their annual holiday.

(v) Observations of the Commission

70. On the assumption that the continued payment of remuneration during annual leave is a means to an end, not an end in itself, in order to ensure that the minimum period of leave can in fact be taken without financial constraints, an agreement on holiday pay is compatible with the Directive if it ensures that the worker actually enjoys minimum annual leave of four weeks and is paid in relation to that period as if he were working.

71. As the Directive does not prescribe how that aim is to be achieved, it is for the Member States to shape the arrangements for holiday pay. But this must not undermine the fundamental right to annual leave itself.

72. Since, where holiday pay is incorporated into hourly pay, payment takes place regardless of whether the corresponding leave is taken by the worker or not, and there is no measure to ensure that the worker actually takes his four weeks' holiday, the effect is that the fundamental requirement of ensuring a minimum of four weeks of annual leave is circumvented, contrary to both the wording and the purpose of the Directive.

73. Rolled-up holiday pay may in particular discourage workers from taking leave. Moreover, such a system may lead to abuse on the part of employers who do not want their employees actually to take their leave.

74. The Commission therefore regards the system of rolled-up holiday pay as incompatible with Article 7 of the Directive in so far as it does not also ensure that the minimum four weeks' annual leave can actually be taken.

(b) Legal assessment

75. In view of the essential content of Article 7 of the Directive, described above,[24] incorporated holiday pay — such as that in the agreements at issue in the main proceedings — appears in any event to be compatible with the aims of the Directive only if the contractual agreement on which it is based ensures that the worker can actually take the leave he is entitled to. Whether a particular agreement such as the agreements in question on rolled-up holiday pay precludes the effective possibility of taking paid annual leave is something on which ultimately only the national court, taking account of all the circumstances of the individual case — in particular all the contractual documents — can reach a final decision.

76. It will be possible below, therefore, only to examine generally to what extent the agreements in question might appear problematic in connection with making use of the entitlement guaranteed by Article 7 of the Directive, or whether any infringement of the entitlement under Article 7 of the Directive could be justified on grounds of flexibility.

(i) Rolled-up holiday pay as an obstacle to claiming paid annual leave?

77. In a system of rolled-up holiday pay it is still open in principle to workers to take

24 — See point 46 et seq. above.

leave. It is doubtful, however, whether spreading payment in respect of minimum leave over the period of employment does not create pressure in practice which leads to workers not making use of their entitlement to leave. That would not meet the Directive's aim of effective protection of the safety and health of workers. As the Court has already stated with respect to rest periods, the periods guaranteed by the Directive are intended as far as possible to avert the risk of the safety and health of workers being affected, which could happen with successive periods of work without the necessary intervals. [25]

78. The United Kingdom Government starts from the assumption, in principle correct, that workers are in principle in a position to handle their finances in such a way that the part of their pay which is paid as holiday pay is available to them at the time of taking leave. However, that assumption is based on premisses which appear open to discussion at least. First, it should be observed that freedom of disposition for low-paid workers, which probably in general include temporary and shift workers, does not exist to the same extent as in the case of other workers: low-paid workers will mostly be forced to use most if not all of their pay for subsistence, so that the risk of holiday pay being diverted for other purposes appears inevitable. Also, precisely for such workers with low incomes, the possibility of earning more money by doing more work is a substantial encouragement not to take any leave. If they work continuously instead of taking leave, they not only continue to be paid for the period of leave, they also receive the regular pay for the period in which they additionally work, even though that period (four weeks a year) has already been compensated by the rolled-up holiday pay. As a separate point, it should also be observed that the possibility of 'personal holiday provision' postulated by the United Kingdom Government presupposes in any event that the worker is made aware of how much of his remuneration is intended to be used for financing his holiday. In other words, such a financial provision for holidays presupposes transparency of the agreement for rolled-up holiday pay. [26]

79. There are other grounds too for regarding agreements on rolled-up holiday pay as not unproblematic from the point of view of the aims of Article 7(1) of the Directive. That it cannot be left solely to the responsibility of the worker to recognise the remuneration paid to him in respect of his entitlement to leave but not necessarily designated as such and to use it accordingly follows simply from the consideration that the protection of the health and safety of workers is not only in the interest of the individual worker but also in

25 — *Jaeger*, cited in footnote 23, paragraph 92.

26 — On this requirement of transparency, see also the observations below on the second question referred in Case C-257/04, point 101 et seq.

the general interest. It is true that the worker is not obliged to take his leave or use it for recreational purposes. But in the interests of an interpretation in line with the aims of the Directive, it is surely scarcely possible to approve of agreements which are liable to encourage workers to work continuously without taking their minimum leave. [27] That effect, detrimental to the objectives of the Directive, of the agreements on rolled-up holiday pay at issue is no doubt also acknowledged by the United Kingdom Government, when it submits that practical difficulties arise if a temporary worker insists on taking the leave he is due during the period of work instead of at the end of his assignment.

80. It follows from all the above, taking account of the purpose of the entitlement to minimum paid annual leave, that an interpretation in conformity with Community law of national provisions transposing the Directive must be to the effect that private contractual agreements on rolled-up holiday pay can be legally valid only if the effective possibility for the worker of taking minimum annual leave is at the same time ensured in some other way.

(ii) Examination of the 'requirement of flexibility'

81. The Directive itself states, however, in the 17th recital in its preamble, that 'in view of the question[s] likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions ... whilst ensuring compliance with the principles of protecting the safety and health of workers'.

82. Once more, the importance must be recalled of the entitlement to paid annual leave, as enshrined in points 8 and 19 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989, cited in the fourth recital in the preamble to the Directive. According to the Court's case-law, that entitlement constitutes a particularly important principle of Community social law. [28] Since the Directive accordingly does not provide for any exceptions to that entitlement, [29] it follows that even something that merely affects that entitlement must be based on serious grounds.

27 — Contrary to the view of the respondents in the main proceedings and to the oral submissions of the Netherlands Government, which probably had another pending case (Case C-124/05 *Federatie Nederlands Vakbeweging* v *Netherlands*) in mind, the present cases concern only the issue of the interpretation of national law in conformity with a directive, not the question whether a correct transposition of Directive 93/104 should include a duty on employees to take their leave, perhaps for recreational purposes. The Community law problem in connection with rolled-up holiday pay is not, for instance, that the worker is not obliged actually to take leave, but that he receives a financial incitement not to claim his 'recreational entitlement' under Article 7(1) of the Directive.

28 — *BECTU*, cited in footnote 13, paragraph 43, and *Merino Gómez*, cited in footnote 16, paragraph 29.

29 — See Articles 17 and 18 of the Directive.

83. A mere reduction of the administrative burden is therefore in any event not a sufficient ground, since that would amount to a justification on economic grounds: that the improvement of the protection of safety and health of workers may not be subject to purely economic considerations follows already from the fifth recital in the preamble to the Directive. [30] The Directive must already have taken account of the effects which the organisation of working time for which it provides may have on small and medium-sized undertakings, in so far as Article 118a of the EC Treaty (now Article 138 EC) as its legal basis makes measures based on that article subject inter alia to the condition that they do not hold back the creation and development of such undertakings. [31]

84. It could, however, be questionable whether the agreements at issue might not be permissible in certain circumstances on serious grounds of practicability. To assess such grounds, however, it is necessary to differentiate between the two forms of organisation of working time concerned in the main proceedings, namely shift working and temporary working.

— Shift working by workers employed for an indefinite duration

85. In such a shift-working operation there is a permanent employment relationship. [32] Accordingly, here too it is foreseeable how much leave an employee is entitled to take. The amount to be paid is therefore also certain. On the basis of this regularity — in the case in the main proceedings, four days of work and four days off — it is not evident at first sight why there should be any need for an exception to the principle that pay continues to be paid during leave.

86. In the case of *Caulfield and Others* v *Marshalls Clay*, a further doubtful point is that the agreed rolled-up holiday pay is linked to an — also disputed — system of leave in which leave arises only by combining rest periods. Rest periods and periods of leave both serve the purpose of achieving the Directive's aims of protection of the safety and health of workers, but differ in that rest periods are to be granted on the basis of a separate organisation of working time, and accordingly leave the entitlement to minimum paid annual leave under Article 7(1) of the Directive unaffected. The collective agreement at issue does not appear to distinguish clearly between periods of rest and periods of leave.

30 — As said in *BECTU*, cited in footnote 13, paragraph 59, and *Jaeger*, cited in footnote 23, paragraph 67.

31 — *BECTU*, cited in footnote 13, paragraph 60, referring to Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 44.

32 — The observations in points 85 to 87 do not therefore concern any employment in a shift system of a temporary worker as in Case C-131/04.

87. If, however, the employer can show that the rest periods provided for — by agreement — are calculated in such a way that they also include a proportion of leave, and a longer period of leave is to be taken if appropriate by exchanging working shifts, the (additional) agreement on rolled-up holiday pay appears to be no longer harmful, in so far as — subject to the taking into account by the national court of further circumstances of the individual case — it does not affect the effective possibility of taking the minimum annual leave.

— Temporary work

88. In the case of temporary work, by contrast, it is often not foreseeable for what periods a worker will work for the employer in question. The transition from periods of work to periods of non-working therefore resembles a termination of the employment relationship. But in the case of the termination of an employment relationship, Article 7 (2) of the Directive even allows the entitlement to leave to be compensated in money. However, instead of calculating the existing entitlement at the end of each period of work, it appears more sensible in fact to provide for continuing payment in instalments, so that the employer always compensates in each case for that part of the entitlement to paid annual leave which the temporary worker has acquired in that employment in the current year. [33] It cannot be ignored, however, that temporary workers have a relatively insecure status in the labour market. A watering down of the principle of the prohibition of financial compensation for the entitlement to leave in Article 7(2) means an additional weakening of their position, which — without corresponding countermeasures — could scarcely be harmonised with the purpose of the Directive.

89. It is therefore proposed that the answer to the first question referred in Case C-131/04 and the first and fourth questions referred in Case C-257/04 should be that it is for the national court, when assessing individual or collective agreements on rolled-up holiday pay, to examine to what extent workers have an effective possibility of actually taking the minimum annual leave to which they are entitled. Such a possibility will probably be excluded as a rule where the agreement is confined to providing for payment for minimum annual leave to be made together with payment of the basic pay

33 — In several Member States the difficulty described has been solved by the establishment of holiday or pay settlement funds. In the Belgian and French systems of Caisses de congés payés, employers pay contributions to the fund concerned, which in turn proceeds to make payment for the annual leave, so that the employer pays only the proportion of pay for annual leave which the employee has acquired when working for him, while the employee receives his pay at the time of taking leave. The holiday and pay settlement fund for the building trade in Germany (Urlaubs- und Lohnausgleichskasse der Bauwirtschaft) appears to be comparable, with the entitlement to holiday pay being directed primarily against the employer.

without regulating — possibly in a further agreement — the taking of leave itself.

C — Second and third questions in Case C-257/04 and second question in Case C-131/04

90. If an agreement on rolled-up holiday pay is permissible in principle, the referring court seeks to know, by its second question in Case C-257/04, whether it would then nevertheless be precluded by Article 7 of the Directive if the employee's pay were the same before and after the coming into effect of the agreement, so that the agreement did not bring about any additional remuneration, but led rather to part of the remuneration payable to the employee being attributed to holiday pay.

91. Should the agreements at issue on rolled-up holiday pay not be permitted, the referring court and tribunal, by the second question in Case C-131/04 and the third question in Case C-257/04, seek essentially to know whether the remuneration already paid in accordance with the agreements may be set against the continuing entitlement under Article 7 of the Directive to payment for the annual leave in question.

1. The need for holiday pay to be paid in addition to the remuneration for work

(a) Essential submissions of the parties

92. Mr Clarke as applicant in the main proceedings in Case C-257/04 is of the view that the arrangement prevailing before August 2001 was incompatible with the Directive because the holiday pay — that is, the proportion of holiday pay in wages — could not be determined. Since it was only after conclusion of the agreement in question on rolled-up holiday pay that the respondent concerned, Frank Staddon, began indicating separately on the pay slips the proportion of holiday pay in wages, and no pay increase took place in that connection, the separate indication amounted to a reduction in the hourly rate of pay.

93. The respondent Frank Staddon, the only one of the respondents in these main proceedings to be affected directly by this issue, has made no observations on this point.

94. The United Kingdom Government submits that it is for the national court to ascertain whether the fact that the amount of

remuneration remains the same before and after the separate indication of holiday pay suggests that the worker is in reality not in receipt of any holiday pay.

95. In the Commission's view, payment for annual leave must, in the rolled-up holiday pay system, actually be added to the normal hourly rate (before the agreement) in the form of a specified percentage or a specified amount.

96. Ireland does not consider it necessary to address this question, since it regards the system of rolled-up holiday pay as incompatible with Community law in any case.

(b) Legal assessment

97. It should be noted to begin with that the referring court clearly does not refer in its question to the time of the separate indication of holiday pay but rather to the coming into force of the agreement on rolled-up holiday pay itself.

98. To fulfil the purpose of enabling the worker to take his leave and encouraging him to do so, the application of Article 7 of the Directive must effectively lead to holiday pay being paid in addition to the wages paid in respect of working time. This additional payment may in principle be effected by means of a single additional payment to account for the entire entitlement, or by adding the corresponding amount to the hourly, daily or weekly pay. The latter method means that from the coming into effect of an agreement for rolled-up holiday pay — provided always that such an agreement is to be regarded as compatible with Article 7(1) of the Directive at all — increased pay must be paid.

99. Where, then, the amount of a worker's pay remains the same before and after the coming into effect of the binding agreement, the only change effected by the agreement consists in the attribution of part of the remuneration paid to the entitlement to leave. It is thus obvious that, after the coming into force of the agreement, the employer is fulfilling the entitlement to paid leave only in appearance. The objective of guaranteeing minimum paid leave would thus be missed. The employee in that case would precisely not have payment for his period of leave to enable him actually to use his leave as free time.

100. In the *Clarke* v *Staddon* case which forms part of Case C-257/04, however, it was already agreed in the contract of employ-

ment that the pay included holiday pay. The precise proportion was fixed subsequently, by a later agreement. The danger of fulfilment in appearance only presumably does not exist to the same extent in such situations, since the remuneration in question is included from the first agreement, but stated separately only as a result of the second agreement.

101. In this case, however, the problem is one of transparency. If it is not visible to the employee what proportion of his pay is intended for meeting his living costs and what proportion is intended to enable him to use his holiday entitlement, it will be difficult for a worker with a low income in particular actually to save that — unidentifiable — financial proportion for his period of leave. The lack of transparency thus contributes here to deterring him from taking his minimum annual leave. That is all the more so if — as may be seen from the *Caulfield and Others* v *Marshalls Clay* case which also forms part of Case C-257/04 — the rate of pay which has been increased by holiday pay is also used as a basis for calculating pay for overtime. That pay then appears to the worker to be entirely pay for work, not (also) holiday pay.

102. This transparency — and the consequent making the worker aware [34] — is also clearly absent if it is not evident from the contract of employment that holiday pay is included in the remuneration paid. The situation then appears to the employee as if he were entitled only to unpaid leave.

34 — See point 78 above.

2. The question whether sums already paid may be set off

(a) Essential submissions of the parties

103. The applicants in the main proceedings in Case C-257/04 consider that the entitlement to paid annual leave under Article 7 of the Directive is infringed if, on the basis of an agreement on rolled-up holiday pay, sums already paid are set off against their entitlement to payment for annual leave.

104. The respondents in those main proceedings, on the other hand, are of the view that, even if an agreement on rolled-up holiday pay is in conflict with Article 7 of the Directive, it must be possible to set off sums already paid. Otherwise the employer would effectively have to pay holiday pay twice.

105. The United Kingdom Government considers that there is no reason not to take into account the holiday proportion of the remuneration paid, if that proportion has actually been paid in addition to the pay for work. After all, the employee will have been entitled to that sum only in respect of his entitlement to leave, and the intention of the contracting parties was thereby to pay holiday pay.

106. The Commission too considers that neither the wording nor the purpose of Article 7(2) prevents giving credit for sums already paid, where the payment which has already taken place and is included in wages has in fact been paid in addition to the basic pay. Article 7(2) merely emphasises that the actual taking of the guaranteed annual leave is the central requirement.

107. Ireland considers, by contrast, that giving credit for the sums already paid infringes the right to paid annual leave laid down by Article 7.

(b) Legal assessment

108. The answer to this question too depends decisively on the aim pursued by Article 7 of the Directive. The aim of an effective possibility of taking the minimum annual leave [35] cannot be achieved retrospectively, that is, at the time when the employee brings a claim for payment of his period of leave, since the year in question will usually be over. A subsequent order that the employer (again) pay the holiday pay without setting off the amounts already paid would thus be of a purely punitive nature.

109. It might, however, be appropriate, in the interests of effective legal protection, not to regard the payment made in instalments as the holiday pay required by Article 7 of the Directive, if the employer has chosen a model which does not comply with the requirement of transparency mentioned above [36] with respect to safeguarding the entitlement to minimum leave. In that case the risk of having to pay twice might deter employers at the outset from introducing agreements that are not permitted. A contrary argument is, however, that the employee would then receive a further financial incentive not to take the minimum leave which is to be allowed.

110. Subject again to the condition that the necessary transparency is observed, therefore, no reason can be seen why Article 7 of the Directive should preclude giving credit for sums already paid pursuant to an agreement on rolled-up holiday pay.

35 — See point 55 above.

36 — See point 101 et seq. above.

V — Conclusion

111. On the basis of the above considerations, I propose that the questions referred to the Court should be answered as follows:

(1) It is for the national court, when assessing individual or collective agreements on rolled-up holiday pay in the light of the legislation implementing Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, to examine to what extent workers have an effective possibility of actually taking the minimum annual leave to which they are entitled under Article 7. Such a possibility will probably be excluded as a rule where the agreement is confined to providing for payment for minimum annual leave to be made together with payment of the basic pay without regulating — possibly in a further agreement — the taking of leave itself.

Such an agreement will in any event not meet the requirements of Article 7 of Directive 93/104/EC if the precise proportion of holiday pay in the remuneration is not shown in transparent fashion, or if such information is only provided subsequently without the total amount paid being increased thereby.

(2) Even if an agreement on rolled-up holiday pay, contrary to Article 7 of Directive 93/104/EC, does not guarantee the effective possibility of taking the leave owing to the worker, Article 7 of Directive 93/104/EC does not preclude sums which can be shown to have been paid as holiday pay in a way which is clear to the worker from being set off against any claims the worker may have.