OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 8 April 2003 [1]

1. The Landesarbeitsgericht (Higher Labour Court), Schleswig-Holstein, Germany, has referred to the Court of Justice for a preliminary ruling four questions regarding the interpretation of certain provisions of Directive 93/104/EC concerning certain aspects of the organisation of working time. [2]

In particular, the Landesarbeitsgericht, Schleswig-Holstein, asks whether, in general, time spent on call by a doctor in a hospital [3] constitutes working time in cases where the doctor is permitted to sleep in the hospital at times when he is not required to work.

I — The facts of the main proceedings

2. Mr Jaeger, the claimant in the main proceedings and the respondent before the referring court, the Landesarbeitsgericht, has worked as a doctor in the surgical department of a hospital in Kiel since 1 May 1992. Under an ancillary arrangement, he undertook to carry out on-call duty, which is classified at scale D in No 8(2) of Schedule 2c to the Bundesangestelltentarifvertrag, the collective agreement governing federal employees, which the parties agreed should apply to the contract. Since April 1998, Mr Jaeger has spent three-quarters of his normal working hours on call, which equates to almost 29 hours per week.

3. Generally, the claimant carries out six periods of on-call duty each month. From Monday to Thursday, the length of each

1 — Original language: Spanish.

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).

3 — For the purpose of clarifying the terminology used, I should like to point out that, under Spanish law, on-call services may be carried out either by being physically present or by being contactable. In Royal Decree 137/1984 of 11 January (BOE, 1 February 1984) and in the Order of 24 September 1984 (BOE, 26 September 1984), the term 'guardias' was still used to refer to the organisation of shifts outside normal working hours in certain professions. With effect from the Order of 9 October 1985 (BOE, 16 October 1985), the name changed and thereafter such shifts were referred to as 'periods of continuous duty', the intention of which is to provide uninterrupted care to users of medical services, rather than, as some of the participants at the hearing claimed, that health professionals must be alert and active while they are on such duty. The same change of terminology can be witnessed in the sphere of justice administration. Until Royal Decree 3233/1983 of 21 December (BOE, 31 December 1983), public employees who provided 'an uninterrupted on-call service' in the courts on a 24-hour basis received extra pay, whereas, under Royal Decree 351/1985 of 20 March (BOE, 21 March 1985), employees who 'are on duty continuously' in the courts on a 24-hour basis are compensated.

period is 16 hours; on Fridays, it is 18½ hours; on Saturdays, it is 25 hours (from 08.30 hrs to 09.30 hrs on Sunday); and on Sundays it is 22 hours 45 minutes (from 08.30 hrs to 07.15 hrs on Monday). That makes a total of 114 hours per month. From Monday to Friday, on-call duty begins at the end of a normal eight-hour working day.

4. When the claimant is on call, he stays at the clinic and carries out the work that is assigned to him. He is provided with a room, shared with two colleagues, where he may sleep when his services are not required. Under the applicable collective agreement, the average time spent actually working during such periods does not exceed 49% over several months. [4] The claimant is compensated partly by free time [5] and partly by extra pay.

5. Mr Jaeger claims that time spent on call at the hospital is working time. However, the Landeshauptstadt Kiel, the administrative body which runs the hospital and the defendant and appellant in the main proceedings, contends that, according to the settled case-law of German courts and to prevailing academic opinion in Germany, periods of time where doctors are on call but are inactive should be regarded as rest periods rather than working time.

6. The action was upheld at first instance but the Landeshauptstadt Kiel appealed against that judgment.

II — The German legislation

7. The national court states that working time and rest time are governed by the Law on working time (Arbeitszeitgesetz) of 6 June 1994, which was enacted in order to transpose Directive 93/104 into German law.

8. Under Article 2(1), working time is defined as the time from the commencement of work to the end of work, excluding rest breaks. In accordance with Article 3,

4 — The Landeshauptstadt Kiel states in its written observations that, where there is an average workload of in excess of 49% during on-call duty, the on-call service is organised on a full-time basis. At the hearing, Mr Jaeger's representative stated that, in fact, the claimant's working time exceeds that percentage because he also carries out administrative duties.

5 — It appears that he is entitled to two seven-hour periods and to one five-and-a-half-hour period for time spent on call during the week and to one additional period of seven hours for time spent on call on Sundays, but that compensatory rest periods are not provided in respect of time spent on call on Fridays or Saturdays because the next day is, in any event, a day off. According to Mr Jaeger's calculations, taking those periods into account, he is on call for a total of nearly 88 hours per month, or 22 hours per week which, added to his contracted weekly hours, amounts to nearly 51 hours.

working time must not exceed 8 hours per working day, although it may be increased to 10 hours if the average duration over six calendar months, or 24 weeks, does not exceed 8 hours per working day.

9. Employees' rest time is governed by Article 5, which provides that at the end of their daily working time employees must have a minimum uninterrupted rest period of 11 hours.

However, under Article 5(2), in hospitals and other establishments for the treatment, care and supervision of people, the length of rest time may be reduced by a maximum of one hour, provided that it is compensated for by an increase in another rest period to at least 12 hours during the same month or four-week period.

Article 5(3) stipulates that, in such medical establishments, periods of activity during time spent on call (Bereitschaftsdienst) or on stand-by[6] (Rufbereitschaft), which do not exceed one-half of the rest time, may be compensated for at other times.

6 — Defined as a period during which an employee is not obliged to stay in the workplace but must be prepared to go there in a short space of time.

10. Under Article 7(2), provided that the health protection of employees is guaranteed by means of the equivalent periods of compensatory rest, it may be agreed in a collective agreement or a works agreement that:

— By way of derogation from Article 5(1), in the case of time spent on call and on stand-by, rest time may be adapted to meet the special circumstances of such duties, and reductions in rest time due to work actually being carried out during such periods may be compensated for at other times;

— In the case of medical treatment, the provisions of Articles 3, 4, 5(1), and 6(2) may be adapted in line with the particular features of that activity and the well-being of the people concerned;

— In the case of the administrative authorities and federal, state and municipal concerns, and other public corporations, institutions and foundations, and in the case of other undertakings which are bound by collective agreements governing the public service or collective agreements with essentially

the same content, the rules in Articles 3, 4, 5(1), and 6(2) may be adapted to the particular features of the activity carried out by those bodies.

11. Under Article 15 of the collective agreement for federal employees, the average working week is made up of 38½ hours, calculated over an eight-week period. Working time may be increased to an average of 10 hours per day or 49 hours per week, if it includes time where the employee is required to remain at work (Arbeitsbereitschaft) for an average of at least 2 hours per day; or, in the case of a three-hour shift, for an average of 11 hours per day or 54 hours per week; or for an average of 12 hours per day or 60 hours per week, if the employee stays in the workplace but only works when he is asked to do so.

When asked to do so by their employer, employees must be present outside normal working hours at a designated location where they may be required to work as and when necessary. Employees may only be required to spend time on call when there is expected to be a certain volume of activity and, in the light of experience, the duration of that activity will not exceed the duration of quiet periods.

The German Government stated in its written observations that, under the collective agreement, doctors' rest time may be reduced to 8 hours. The two sides of industry have agreed that the minimum rest period after time spent on call over the weekend shall be 12 hours, but, where a 12-hour shift is completed following a 7½ working day, the rest period may be reduced to 8 hours.

III — The questions referred for a preliminary ruling

12. The Landesarbeitsgericht states that the concept of on-call duty is not governed by the Law on working time. Duty on call entails an obligation to be present at a designated place combined with the availability to work immediately if necessary. An employee may rest or occupy himself in some other way according to the circumstances. When the employee carries out his activity, he does so not on his own initiative but because he has been instructed to do so by the employer. The periods of time spent on call by Mr Jaeger come within the meaning of that definition.

The Landesarbeitsgericht points out that, under German law, time spent on call constitutes rest time, not working time, in accordance with Article 5(3) and Article 7(2) of the Law on working time. The fact that reductions in rest time owing to periods of activity may be made up at

other times proves that on call-duty is counted as rest time when an employee has not actually carried out any work.

The national court goes on to say that, in recent years, the Bundesarbeitsgericht has consistently upheld that view, albeit in cases dealing with the issue of remuneration. In the opinion of the national court, it is not appropriate to state that an employee who sleeps provides a lesser service compared with the service he provides during full-time work because he is not providing any service at all. Transferring that reasoning to the present case would necessitate a ruling that, while an employee is asleep, he is not at the employer's disposal within the meaning of Directive 93/104.

13. With a view to ruling on the substantive issue of the case, the German court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does time spent on call by an employee in a hospital, in general, constitute working time within the meaning of Article 2(1) of Directive 93/104/EC even where the employee is permitted to sleep at times when he is not required to work?

(2) Is it in breach of Article 3 of Directive 93/104/EC for a rule of national law to classify time spent on call as a rest period unless work is actually carried out, where the employee stays in a room provided in a hospital and works as and when required to do so?

(3) Is it in breach of Directive 93/104/EC for a rule of national law to permit a reduction in the daily rest period of 11 hours in hospitals and other medical establishments, where the amount of time actually worked during time spent on call or stand-by, not exceeding one half of the rest period, is compensated for at other times?

(4) Is it in breach of Directive 93/104/EC for a rule of national law to permit a collective agreement or a works agreement based on a collective agreement to allow rest periods, where time is spent on call or stand-by, to be adapted to the special circumstances of such duties, so that reductions in rest periods due to time spent on call or stand-by are compensated for by other rest periods?'

IV — The Community legislation

14. In order to answer the questions referred by the Landesarbeitsgericht, the Court of Justice must interpret the following provisions of Directive 93/104:

Article 2

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

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

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

...'

Article 3

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

Article 6

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

...

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

Article 17

'...

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

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

...

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

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

...'

V — The procedure before the Court of Justice

15. Written observations in these proceedings were submitted, within the period laid down for that purpose by Article 20 of the EC Statute of the Court of Justice, by the Landeshauptstadt Kiel, Mr Jaeger, the governments of Denmark, Germany, the Netherlands and the United Kingdom, and the Commission.

At the hearing, which was held on 25 February 2003, oral argument was presented by the representatives of the Landeshauptstadt Kiel and Mr Jaeger, and by the agents of the German, French, Netherlands and United Kingdom Governments, and of the Commission.

VI — The observations submitted

16. Mr Jaeger argues that the time he spends on call at the hospital should be classified, in its entirety, as working time, without reference to the frequency with which his services are required, because he is obliged to remain at the hospital, at the disposal of the employer, so that he can carry out his duties when necessary. In Germany, the protection of the health and safety of workers is not ensured, since compensation for time spent on call is restricted to periods of activity. If it were permitted to require a doctor to work for

up to 30 hours continuously, compensating him subsequently by means of rest time would not protect that doctor from the tension he had undergone or from mistakes he had made in the performance of his duties, and he would not, therefore, have been granted the equivalent period of rest referred to in Article 17(2) of Directive 93/104.

17. The Landeshauptstadt Kiel and the five governments which have submitted observations in these proceedings are of the view that time spent on call by an employee in a hospital does not, in general, constitute working time within the meaning of Article 2(1) of Directive 93/104. More particularly, if an employee is permitted to sleep at the hospital, the periods during which his services are not required should not be classified as working time. The Landeshauptstadt Kiel and the governments concerned contend that the three criteria for defining working time, which are set out in Article 2(1) of Directive 93/104, are cumulative. Accordingly, it cannot be claimed that periods of rest taken while on call meet those criteria, since while the employee is asleep or resting he is not at the disposal of the employer, nor is he performing any of the duties stipulated in his contract. The obligation to remain at the establishment only amounts to a restriction of the employee's freedom of movement, and the fact that an employee is available to work cannot be likened to the situation where the employee is actually carrying out work. The protection of employees who spend time on call is guaranteed through the restarting of the 11-hour rest period each time an employee is interrupted because his services are required. If the employee is not disturbed and is able to sleep for up to 11 hours, that period should be regarded as compensatory rest. Where, owing to exceptional circumstances, a hospital's workload exceeds 50% while the employee is on call the employee should have the next day free which would guarantee him the rest which is vital for the protection of his health.

18. The Commission, however, maintains that time spent on call is, in general, working time, since doctors are required to stay at the hospital, at the disposal of the employer, in order to practise their profession. In addition, the time which a doctor spends on call does not form part of the minimum rest period of 11 consecutive hours to which employees must be entitled in respect of each 24-hour period, in accordance with Article 3 of Directive 93/104.

VII — Analysis of the questions referred for a preliminary ruling

A. *The first question*

19. By this question, the German court asks whether time spent on call by a doctor, where that is required to be present in the

hospital, constitutes, in its entirety, working time within the meaning of Article 2(1) of Directive 93/104, taking into account the fact that the doctor is permitted to sleep during periods of inactivity.

20. The Court ruled on the aim of Directive 93/104 in *BECTU*,[7] noting that it is clear both from Article 118a of the Treaty,[8] which is its legal basis, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that its purpose is to lay down minimum requirements intended to improve living and working conditions through approximation of national provisions concerning, in particular, the duration of working time. The Court went on to state that, according to those same provisions, harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the health and safety of workers by ensuring that they are entitled to minimum rest periods and adequate breaks.

21. Directive 93/104, therefore, lays down minimum safety and health requirements for the organisation of working time, which apply to minimum daily and weekly rest periods, annual leave, breaks, maximum weekly working time, and to certain aspects of night work, shift work and patterns of work.

22. The concept of working time is defined in Article 2(1) of Directive 93/104, which provides that working time means 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'. By way of an exclusion, Article 2(2) classifies as a rest period any period 'which is not working time'.

23. In *SIMAP*,[9] the Court found that the characteristic features of working time were present in the case of time spent on call by doctors in primary care teams[10] where their presence at the health centre is required and during which periods the first two conditions are fulfilled. The Court went on to point out that, even if the activity actually performed varies accord-

7 — Case C-173/99 [2001] ECR I-4881, paragraphs 37 and 38.

8 — Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.

9 — Judgment in Case C-303/98 [2000] ECR I-7963, paragraph 48.

10 — In Spain, Article 56 of the General Law on medical care (Law 14/1986) of 25 April (BOE, 29 April 1986) distinguishes primary care, which fulfils the aims of promoting health, and of prevention, cure, and rehabilitation, using basic methods and support teams, from specialist care provided in hospitals and specialist clinics, which combines the more complex treatment of medical problems with the other roles of a hospital. In accordance with Article 3 of Royal Decree 137/1984 of 11 January on basic healthcare structures (BOE, 1 February 1984), primary care teams are composed of general and childcare practitioners, paediatricians, nursing staff, midwives, and auxiliary nurses.

ing to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance.

24. The referring court is aware of that case-law. However, it believes that on this occasion the answer could be different because the doctor is permitted to sleep at times when his services are not required, a circumstance which has not been examined previously.

25. Looking at the specific case of a doctor who spends periods of duty on call in a German hospital, I note that the doctor concerned is required to be physically present at the hospital in accordance with a pre-arranged timetable, during which he must be available to carry out his activity as and when the need arises, upon the instructions of his employer. Even where the average amount of time actually worked, calculated over a period of several months, amounts to 49%, the fact is that while the doctor is on call his services can be called upon as many times as are necessary, without limitation.

26. As happened in *SIMAP*, [11] the first two requirements of Article 2(1) of Directive 93/104 are fulfilled, in that the doctor is in the workplace and at the disposal of the employer. [12] The uncertainty arises because, when the claimant is on call, he is permitted to sleep when his services are not required, from which it follows that he does not carry out his activity continuously.

27. In my view, the fact that the employee is able to sleep does not mean that those periods should be excluded from the notion of working time, for a number of reasons.

28. First, the three criteria referred to in Article 2(1) of Directive 93/104 are autonomous. As Advocate General Saggio indicated in the Opinion he delivered in *SIMAP*, [13] a view which the Court subsequently upheld at paragraph 48 of the judgment, [14] there is no need for all the criteria to be met in order to classify a specified period as working time. It is important not to overlook that the purpose of Directive 93/104 is to lay down mini-

11 — Cited above.

12 — There is no doubt that he is at the employer's disposal, since he is obliged to remain at a place which the latter has designated.

13 — [2000] ECR I-7968 et seq, paragraph 36.

14 — There are, however, some authors who take the opposite view. Fairhurst, J., 'SIMAP — Interpreting the Working Time Directive', *Industrial Law Journal*, Vol. 30, June 2001, pp. 236 to 243, in particular p. 240: 'By asserting that the three "working time" criteria are cumulative, the ECJ has cleared up any possible doubt on this issue'. Baron, F., 'La notion de temps de travail en droit communautaire', *Droit social*, 2001, pp. 1097 to 1102, in particular p. 1098: 'L'avocat général Saggio, soulignant le caractère peu clair de la formule employée, avait considéré que trois critères posés par la texte... étaient autonomes, avec des arguments très pertinents.... Malgré la force de cette analyse, la Cour de Justice a considéré, semble-t-il, que les trois conditions étaient cumulatives'.

mum safety and health requirements for the organisation of working time in all the Member States. Accordingly, the concepts included in Article 2 are defined very broadly in order to encompass all the situations which can arise in practice.

30. To my mind, periods of time when an employee is in the workplace and at the employer's disposal constitute working time even if the employee is not carrying out his duties, since the employer has the power to assign tasks to the staff at any time. The same can be said of times when an employee is at work and carrying out his activity but is not at the employer's disposal because he has a wide autonomy to obtain a specific result, and of times when he is at the employer's disposal and is carrying out his duties, but is not in the workplace.

29. Naturally, it will not be sufficient if only one of the criteria is met. Not all the time which a person spends in the workplace counts as working time. For example, lunch breaks may be excluded. In addition, being at the employer's disposal for a specified number of hours each day or on certain days of the week does not necessarily mean that the time concerned amounts to working time; [15] nor does the fact that an employee is carrying out his activity if one of the other criteria is not met, since that employee might be doing so on his own initiative, altruistically, and outside the employer's sphere of influence.

Therefore, it is a necessary precondition that two of the requirements are met and, in the majority of cases, that will be sufficient for such periods to count as working time within the meaning of Article 2(1) of Directive 93/104.

31. As the representative of the United Kingdom pointed out at the hearing, the first criterion is expressed differently depending on the language. For example, whereas in Spanish, [16] French, [17] and Italian, [18] the worker is required to be at work, in English, [19] German, [20] and Dutch, [21] the worker must be working. However, this comparative exercise leads

15 — Supoit, A., *Au delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe*, Flammarion, Paris, 1999, pp. 122 et seq.: '... la pratique des "astreintes" (travail au sifflet: *on call*)... met à mal la définition traditionnelle du temps de travail. Comment qualifier ce temps où le salarié ne travaille pas pour le compte de son employeur, mais doit se tenir prêt à répondre à toute réquisition de sa part? Le temps ainsi assujetti n'est du temps libre ni du temps de travail. C'est un temps d'un troisième type... dont la qualification et le régime restent à définir en droit du travail'. Meulders, D., Plasman, O. and Plasman, R., 'Unsocial, Rotating & Split Working Hours', *Atypical Employment in the EC*, Dartmouth, 1994, p. 80: 'These forms of working constitute the different formulae for flexible time management. They include shift work, night work, flexitime, module base working, block working, and on call working (... with workers having to be available when their firms require them)...'. Hakim, C., 'Working Time in Britain: Non-regulation and "Laissez Faire" Policies', *The Regulation of Working Time in the European Union. Gender Approach*, P.I.E., Brussels, 1999, p. 284: '*Reservism* and *on-call* work are done by 5% of the workforce'.

16 — '... el trabajador permanezca en el trabajo'.

17 — '... le travailleur soit au travail'.

18 — '... il lavoratore sia al lavoro'.

19 — '... the worker is working'.

20 — '... ein Arbeitnehmer... arbeitet'.

21 — '... de werknemer werkzaam is'.

nowhere because if the wording used in the latter three languages were to take precedence there would be no distinction between the first and the third requirements, with the result that one of them would be redundant. In addition to that, the Portuguese version differs yet again from the versions referred to above because it appears to separate the criteria into two groups: either the worker is working or he is at the employer's disposal and is carrying out his activity or duties. [22]

32. At the hearing, the representative of the Landeshauptstadt Kiel drew attention to the evolution of Community law since the adoption of Directive 93/104, stating that such evolution must be borne in mind when interpreting the definition of working time in Article 2(1).

33. The scope of Directive 93/104 has in fact changed greatly in recent years. Sectors and activities which were initially excluded were included following the entry into force of Directive 2000/34/EC, [23] with the proviso that its provisions shall not apply where other Community instruments contain more specific requirements relating to the organisation of working time for certain occupations or occupational activities.

34. That is the case with mobile workers employed in the road transport sector, whose working time is governed by Directive 2002/15/EC. [24] As the representative of the defendant and appellant in the main proceedings pointed out, Article 3 of Directive 2002/15 differentiates between 'working time' and 'periods of availability', the latter being defined, in the case of mobile workers driving in a team, as the time spent sitting next to the driver or on the couchette while the vehicle is in motion. Such time is excluded from the notion of working time, without prejudice to the legislation of the Member States or to agreements negotiated between the social partners.

In my opinion, it is not appropriate to draw a parallel between 'periods of availability' for lorry drivers and time spent on call by doctors, however tempting the comparison may be. The fact is that the purpose of Directive 2002/15 is not only to establish minimum requirements in relation to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport

22 — '... o trabalhador está a trabalhar ou se encontra à disposição da entidade patronal e no exercício da sua actividade ou das suas funções'.

23 — Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC to cover sectors and activities excluded from that Directive (OJ 2000 L 195, p. 41). The Member States have until 1 August 2003 to implement the Directive 2000/34.

24 — Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35).

activities, but also to improve road safety and align conditions of competition. In addition, Directive 2002/15 is a specific directive, whose individual scope is restricted and clearly delimited, whose aim differs from that of Directive 93/104, and which, as concerns rest periods, refers to the provisions of Regulation (EEC) No 3820/85 [25] or, failing that, to the AETR Agreement. Furthermore, workers know in advance how long they will be required to be available, which means that they know that when they are asleep they will not be woken up before that time has elapsed, which is not the case with doctors who are on call.

35. Second, although the intensity and extent of activities carried out while on call are not the same as during normal working hours, it does not mean that time spent on call becomes rest time for the employee. In addition, Directive 93/104 does not envisage an intermediate category between working time and rest periods.

36. Third, despite the fact that Article 2(1) of Directive 93/104 provides that the three criteria used to define working time are to be specifically delimited in accordance with national laws and/or practice, that stipulation does not mean that Member States may refrain from applying those criteria and rely on rules of national law. In order to calculate an employee's working time, it is necessary to ascertain whether, under national law or a collective agreement, that employee is entitled to take a break every certain number of hours. However, a Member State may not rely on its own legislation to support the view that a doctor who carries out periods of duty on call in a hospital is not at the employer's disposal at times when he is inactive but is waiting for his services to be called upon again.

37. Finally, the fact that the doctor is able to sleep when his services are not required stems from the very nature of time spent on call, a service which responds to the need for medical care to be available at all times, although the conditions in which it is provided differ from those which are present during daytime working hours from Monday to Friday. Nevertheless, doctors on call do not merely act punctually when required to do so, since their duties also include monitoring, on their own initiative, the condition and the progress of the patients in their care.

38. How would one regard an employer who, instead of providing the doctor with a bed to rest on at times when he is not working, provides only a chair for the

25 — Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport (OJ 1985 L 370, p. 1).

doctor to sit on while he waits to be called to duty? I wonder if the referring court would feel that time spent by the doctor sitting on a chair is closer to the concept of working time than time he spends lying down on a bed.

39. It seems clear that doctors who are on call must also be in a position to provide the highest standard of service. A doctor who has a bed in which to rest at times when he is not working contributes to the protection of his health and to ensuring that adequate care is provided to patients. It is important to remember that from Monday to Friday the length of periods of duty on call is 16 hours and begins after a normal eight-hour working day, that on Saturdays it is 25 hours, that on Sundays it is 22 hours 45 minutes, and that the claimant carries out a total of six periods of duty on call per month.

40. The Landeshauptstadt Kiel and the five governments which submitted written observations in these proceedings have repeatedly stated that the on-call services provided by doctors in Spain and in Germany are different, in that in Germany doctors are permitted to sleep, whereas in Spain they are continuously active for more than thirty hours. In support of that assertion they rely on paragraph 23 of the judgment in *SIMAP*. [26]

41. I should like to make a few observations in that regard. It is true that the working conditions of primary care doctors in Spain, which are referred to in that passage of the judgment, are not the same as those of doctors in Germany. However, it is important not to lose sight of the fact that, in the paragraph in question, the Court merely sets out the information which is contained in the order for reference, an order which, in turn, reproduces word for word the claims of the claimant in the main proceedings, namely the Sindicato de Médicos de Asistencia Pública. It is not, therefore, an account of the facts as verified by the national court.

42. In addition, the working conditions of Spanish doctors are not worse than those provided to German doctors in every case. In fact, at paragraph 24 of the same judgment it states that in certain specified towns doctors carry out a period of on-call duty every 11 days, while it appears that Mr Jaeger is required to do so six times per month.

43. In any event, it is public knowledge that in Spain, like other countries around it with similar standards of medical care, the need for treatment diminishes at night. Accordingly, it is difficult to accept that doctors may be obliged to work for an uninterrupted period of more than thirty hours on alternate days, as it states at paragraph 23 of the judgment in *SIMAP*.

26 — Cited above.

The matter of how doctors who are on call spend the time in between periods when they are required to work was not addressed during the preliminary ruling proceedings in *SIMAP*. The fact that the matter was not discussed does not imply, however, that at times when they have nothing to do, doctors are not permitted to go to bed, to read or to watch television. Moreover, the Court demonstrated its awareness of the issue by stating, at paragraph 48 of the judgment, that, '*even if the activity actually performed varies according to the circumstances*,[27] the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance'.

44. At the hearing, the German Government's agent drew the Court's attention to the serious consequences which application of the *SIMAP* case-law would have on the German health service. The German Government's agent pointed out, for example, that staffing needs would increase by 24% and that between 15 000 and 27 000 additional doctors would be required, whereas there are only 7 000 unemployed doctors in Germany.

In that regard, I must point out, first, that the fifth recital in the preamble to Directive 93/104 states that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations. Second, the German labour market is not restricted in such a way that it may only rely on German doctors, since it is open to qualified doctors from the other Member States who wish to practise their profession in Germany.[28]

45. That the doctor is able to rest when his services are not required is not, therefore, capable of altering the fact that, while he is on call, he must remain at the hospital, at the disposal of the employer, in order to carry out his activity, albeit in an interrupted manner. Since two of the requirements set out in Article 2(1) of Directive 93/104 have been met, periods of on-call duty carried out in the conditions described must be found to constitute, in their entirety, working time.

B. *The second question*

46. By this question, the referring court asks whether Article 3 of Directive 93/104 precludes a rule of national law under which the periods when a doctor is inactive during on-call duty in a hospital are

27 — Emphasis added.

28 — Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (OJ 1993 L 165, p. 1), as amended by Directive 97/50/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 291, p. 35).

classified as rest periods, because the doctor stays in a room in the hospital and only works when his services are called upon.

The answer to this question is implicit in the answer I have proposed to the previous question. Since Article 2(2) of Directive 93/104 defines as a rest period any period which is not working time, on-call duty where physical presence in the hospital is required cannot be counted as rest time, even in part, because it is, in its entirety, working time.

47. Article 3 of Directive 93/104 provides that workers must be entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.

48. Using a dubious legislative technique,[29] Article 17(2)(2.1)(c)(i) of Directive 93/104 permits, by means of laws, regulations or administrative provisions, or by means of collective agreements, the adoption of derogations from, *inter alia*, Article 3, in the case of activities involving the need for continuity of service in hospitals or similar establishments, provided that the workers concerned are granted an equivalent period of compensatory rest, or similar protection.

49. Nevertheless, as the Commission rightly points out, Article 17 does not cite Article 2, which contains the definitions of working time and rest periods, as one of the rules from which the Member States may derogate, from which it follows that those two concepts must be applied uniformly in all the countries of the European Union.

50. Should it be necessary, there is another reason why periods of inactivity during on-call duty are not regarded as rest periods. While the duration of the daily rest period may be shortened in accordance with Article 17, it is my understanding that the rest time to which employees are entitled in this regard must be uninterrupted, taking into account the fact that the aim pursued by Article 3 is to guarantee the health and safety of workers.

29 — Supiot, A., 'À la recherce de la concordance des temps (à propos de la Directive européenne "Temps de travail" n° 93/104 du 23 novembre 1993)', *The Regulation of Working Time in the European Union, Gender Approach*, op. cit., p. 108: '... la Directive 93/104... est un texte du plus grand intérêt. Non pas qu'il s'agisse d'un modèle d'art législatif! Bien au contraire, il exprime toutes les contradictions et difficultés qui parcourent la question de l'organisation du temps dans la société européenne en cette fin de siècle. C'est un texte schizophrène, dont la première partie (articles 1à 16) pose des règles que la seconde (articles 17 et 18) s'emploie à priver de tout effet impératif'.

Owing to the very nature of the service, it is impossible to predict in advance the times when, or for how long, an employee will be inactive during a particular period of on-call duty where physical presence is required. In such circumstances, the employee is not guaranteed a specific period of continuous rest, even where he is entitled to a bed, and for that reason it is also contrary to Article 3 of Directive 93/104 to consider that such periods of time form part of the uninterrupted rest to which a worker is entitled in each 24-hour period.

52. Accordingly, Articles 2 and 3 of Directive 93/104 preclude a rule of national law which classifies as rest periods the periods when a doctor is inactive during on-call duty in a hospital and stays in a room in the hospital while his services are not required.

C. *The third and fourth questions*

51. The Landeshauptstadt Kiel also maintains that, as concerns an employee, rest is not the same as freedom to use his time as he wishes.

I broadly agree with that assessment. However, I disagree in so far as it relates to interpreting a measure which lays down minimum health and safety requirements for the organisation of working time. To be able to rest, an employee must have the opportunity to switch off from his working environment for a specified uninterrupted period of time, and that may only be achieved where the employee can remove himself from the tension of being in the workplace and being available to work.

53. By these two questions, which are closely linked and which I believe should be examined together, the German court asks whether Directive 93/104 precludes a rule of national law, such as that contained in Article 5(3) and in Article 7(2) of the Law on working time, having regard to the fact that, in the case of time spent on call in a hospital or on stand-by, the first provision permits that reductions in the 11-hour daily rest period, which are attributable to periods of activity by doctors and which do not exceed one half of the rest time, may be compensated for at other times, while the second provision permits a collective agreement or a works agreement to provide that rest periods may be adapted to the special circumstances of such periods of duty, and in particular that such reductions may be compensated for at other times.

54. In order to answer the question as reworded above, it is important to differentiate between the duties performed by a doctor while he is on call and required to be physically present in the hospital and those he performs while on stand-by.

55. In the first situation, as I pointed out in my reasoning prior to answering the first question, the whole period of time which a doctor spends on call is working time within the meaning of Article 2(1) of Directive 93/104. Therefore, it cannot be said that periods of activity during on-call duty reduce the daily rest period because a doctor who is on call is working rather than resting.

Consequently, as concerns time spent on call where physical presence in a hospital is required, Article 2(1) of Directive 93/104 precludes a rule of national law under which reductions in the 11-hour daily rest period, which are attributable to periods of activity by doctors and which do not exceed one half of the rest time, may be compensated for at other times. Article 2(1) also precludes a rule of national law under which a collective agreement or a works agreement may provide that rest periods may by adapted to the special circumstances of such periods of duty, and in particular that such reductions may be compensated for at other times.

56. I find it surprising that the German court included the issue of time spent by doctors on stand-by in the third and fourth questions. The reasons why the national court was moved to enquire about this situation are not explained in the order for reference. The order does, however, state that the activity carried out by Mr Jaeger, which is the subject of this dispute, involves providing an on-call service by being physically present in the hospital. [30]

The hypothetical situation concerned has no connection to the main proceedings. In the circumstances, the Court may not give a sufficiently useful response. [31] It is, nevertheless, appropriate to make some observations on the matter.

57. The situation of doctors who are on stand-by is very different from that of doctors who provide on-call services. That was noted by the Court at paragraph 50 of

30 — In reply to a question put to them at the hearing, the representatives of the parties to the main proceedings confirmed that Mr Jaeger only carries out on-call duty by being physically present in the hospital.

31 — Barav, A., 'Le renvoi préjudiciel', *Justices*, N° 6, avril/juin 1997, p. 1 et seq., and in particular p. 9.

the *SIMAP* judgment,[32] in which it held that where doctors are on call by being contactable at all times without having to be at the health centre, they are at the disposal of their employer, in that it must be possible to contact them, but that such doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances, only time linked to the actual provision of services must be regarded as working time within the meaning of Directive 93/104.

There can be no doubt that, by application of that rule, the duration of the minimum daily rest period for a doctor may be shortened or adapted to particular circumstances, if the aforementioned condition is fulfilled, provided that the doctor is granted an equivalent period of compensatory rest or that, in exceptional cases where that is not possible, he is afforded the necessary protection.

59. For those reasons, it is appropriate to declare that it may be lawful, under Article 17(2)(2.1)(c)(i) of Directive 93/104, to compensate at other times for reductions in the 11-hour daily rest period, which are attributable to periods of activity by doctors who are on stand-by and which do not exceed one half of the rest time, and to adapt rest periods to the special circumstances of such periods of duty, in particular by compensating for such reductions at other times.

58. Under Article 17(2)(2.1)(c)(i) of Directive 93/104, Member States may derogate from the requirement of a minimum daily rest period of 11 consecutive hours, laid down in Article 3, 'in the case of activities involving the need for continuity of service... relating to the reception, treatment and/or care provided by hospitals or similar establishments...'. However, Member States may only do so subject to the condition that derogations must be adopted by means of laws, regulations or administrative provisions, or by means of collective agreements or agreements between the two sides of industry.

D. *Maximum weekly working time*

60. The German court has not sought guidance on the interpretation of Article 6 of Directive 93/104, under which the average working time, including overtime, must not exceed 48 hours per week. However, it is interesting to examine that provision in view of the fact that Article 15 of the collective agreement for federal employees permits that, in certain cases, weekly work-

32 — Cited above.

ing time may be extended to an average of 60 hours and that, according to Mr Jaeger's own calculations, he works almost 51 hours per week, including periods of on-call duty.

61. In accordance with Article 17 of Directive 93/104, Member States may derogate from Article 6 only in the circumstances referred to in Paragraph (1), namely where, 'on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of: (a) managing executives or other persons with autonomous decision-taking powers; (b) family workers; or (c) workers officiating at religious ceremonies in churches and religious communities'.

Since Article 6 is not included among the provisions listed in Paragraph (2), which refers to activities involving the need for the continuity of services provided in hospitals and similar establishments, the Member States may not rely on Article 17 to permit the extension of the weekly working time on account of services provided while on call.

62. Article 18 of the directive grants Member States the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided that they adopt the necessary measures to ensure that certain requirements are fulfilled, a list of which is contained at Article 18(1)(b)(i). However, it is not the case that the German legislature applied that rule in order to extend the weekly working time in the health care sector [33] or that it adopted the measures concerned.

63. In those circumstances, I, like the Commission, am of the view that Article 6(2) of Directive 93/104 precludes the rule referred to in the collective agreement concerning on-call duty carried out by doctors in German hospitals, since that rule permits the weekly working time to exceed 48 hours.

33 — This point was confirmed by the German Government's representative at the hearing. The Commission stated that the United Kingdom was the only Member State which had exercised the options granted in Article 18 of Directive 93/104.

VIII — Conclusion

64. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the questions referred by the Landesarbeitsgericht Schleswig-Holstein as follows:

(1) Time spent on call by a doctor, where that doctor is required to be physically present in a hospital, constitutes, in its entirety, working time, within the meaning of Article 2(1) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, including where the doctor is permitted to sleep during periods of inactivity.

(2) Articles 2 and 3 of Directive 93/104 preclude a rule of national law which defines as rest periods the periods when a doctor is inactive during on-call duty in a hospital and stays in a room provided for him by the hospital while his services are not required.

(3) As concerns time spent on call where physical presence in a hospital is required, Article 2(1) of Directive 93/104 precludes a rule of national law under which reductions in the 11-hour daily rest period, which are attributable to periods of activity by doctors and which do not exceed one half of the rest time, may be compensated for at other times. Article 2(1) also precludes a rule of national law under which a collective agreement or a works agreement may provide that rest periods may by adapted to the special circumstances of such periods of duty, and in particular that such reductions may be compensated for at other times.

However, under Article 17(2)(2.1)(c)(i) of Directive 93/104, it is permissible, in certain circumstances, to compensate at other times for reductions in the 11-hour daily rest period which are attributable to periods of activity by doctors who are on stand-by and which do not exceed one half of the rest time, and to adapt rest periods to the special circumstances of such periods of duty, in particular by compensating for such reductions at other times.

65. Should the Court deem it appropriate to examine Article 6 of Directive 93/104, I propose the following interpretation:

Article 6(2) of Directive 93/104 precludes a Member State which has not applied Article 18(1)(b)(i) from permitting that the weekly working time exceeds 48 hours, by counting as rest periods the periods when a doctor is inactive during on-call duty where he is required to be physically present in the hospital.