OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 8 February 2001 [1]

Introduction

1. The High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), (hereinafter 'the High Court'), has submitted two questions for a preliminary ruling under Article 234 EC on the interpretation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ('the Working Time Directive' or 'the Directive'). [2] In essence, it wishes to ascertain whether, in the light of Article 7 of the Directive, the legislation of a Member State may lawfully provide that a worker's entitlement to paid annual leave (or to the advantages associated with it) will start to accrue only after completion of a minimum period of employment with the same employer.

The legal context

The Community legislation

2. In order to answer the High Court's questions, I shall first refer to Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is the legal basis for the Working Time Directive and provides:

'1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.

2. In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

1 — Original language: Italian.
2 — OJ 1993 L 307, p. 18.

3. The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty.'

3. As we know, a number of directives have been adopted to implement that provision. In particular, regard should be had to the basic directive in this field, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [3] ('the Framework Directive'). That directive laid down the general principles concerning the health and safety of workers which were then developed in a series of specific directives, including the Working Time Directive with which this case is concerned. In examining the latter directive, it is therefore necessary to take account of the legislative background to it.

4. It will then be remembered that, by virtue of Article 1(1) thereof, the purpose of the Working Time Directive is to lay down 'minimum safety and health requirements for the organisation of working time'. To that end, its scope is twofold, covering on the one hand minimum periods of daily rest, weekly rest and annual leave, breaks and maximum weekly working time; and, on the other, certain aspects of night work, shift work and patterns of work (Article 1(2)).

5. However, the Directive does not directly define the terms 'worker' and 'employer': Article 1(4) refers in that regard to Article 3(a) of the Framework Directive. According to the latter provision, a worker is any person employed by an employer, including trainees and apprentices but excluding domestic servants; and an employer is any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment.

6. With regard specifically to the rules on annual leave, with which this case is concerned, Article 7 of the Directive provides:

'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.

3 — OJ 1989 L 183, p. 1.

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

7. Furthermore, having regard to the particular features of certain activities, Article 17 of the Directive provides for a number of exceptional cases in which certain of its provisions do not apply. A particular exception, under Article 17(2.1)(c), relates to activities involving the need for continuity of service or production, including, in particular, 'press, radio, television [and] cinematographic production'. However, no limitation is imposed on the application of Article 7 concerning entitlement to annual leave.

8. Finally, Article 18(1)(a) provides that the Directive must be implemented in the Member States by 23 November 1996. However, Article 18(b)(ii) provides:

'Member States shall have the option, as regards the application of Article 7, of making use of a transitional period of not more than three years from the date referred to in (a), provided that during that transitional period:

— every worker receives three weeks' paid annual leave in accordance with the conditions for the entitlement to, and granting of, such leave laid down by national legislation and/or practice, and

— the three-week period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

The United Kingdom, as we shall see shortly, availed itself of that option.

The judgment of 12 November 1996 in United Kingdom *v* Council

9. Before the relevant legislation is considered, it should be remembered that the United Kingdom not only abstained when the Council adopted the Directive but also quickly took action, once the measure had

been adopted, to seek its annulment by the Court of Justice under Article 173 of the EC Treaty (now Article 230 EC). It contended that the main purpose of the Directive was not to ensure the observance of minimum conditions regarding the health and safety of workers but rather to adopt social policy measures; accordingly, the proper legal basis of the Directive should have been not Article 118a, which provides for adoption by a qualified majority, but Article 100 or Article 235 of the EC Treaty (now, respectively, Articles 94 EC and 308 EC), which require unanimity. The United Kingdom also alleged breach of the principle of proportionality in that the 'minimum requirements' laid down by the Directive were, in its opinion, excessively restrictive.

10. As we know, the Court dismissed the application by judgment of 12 November 1996. [4] In particular, as we shall see in more detail, the Court held that the measures provided for by the Directive, *inter alia* because they were undeniably flexible, did not go further than was necessary to achieve the objective of better protection of the health and safety of workers and that it did not therefore infringe the principle of proportionality.

4 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755.

The national legislation

11. Having failed to secure annulment of the Directive, on 30 July 1998 the United Kingdom implemented it by adopting the Working Time Regulations 1998 [5] (hereinafter 'the regulations' or 'the implementing regulations'). Presented to Parliament on the same day, the regulations entered into force on 1 October 1998; they took advantage of all the exceptions and restrictions allowed by the Directive, including the possibility of limiting, until 23 November 1999, annual paid leave entitlement to three weeks.

12. The specific rules on annual leave are contained in Regulation 13, paragraph 1 of which provides that a worker is entitled, in any leave year, to a period of leave determined in accordance with the rules in paragraph 2, namely:

'(a) in any leave year beginning on or before 23 November 1998, three weeks;

(b) in any leave year beginning after 23 November 1998 but before 23 November 1999, three weeks and a proportion of a fourth week equiva-

5 — Statutory instrument 1998, No 1833.

lent to the proportion of the year beginning on 23 November 1998 which has elapsed at the start of that leave year, and

(c) in any leave year beginning after 23 November 1999, four weeks'.

13. Regulation 13(7) makes acquisition of entitlement to leave conditional upon the person concerned having been continuously employed for 13 weeks by the same employer ('The entitlement conferred by paragraph (1) does not arise until a worker has been continuously employed for 13 weeks'). To that end, as made clear by Regulation 13(8), a worker is deemed to have been continuously employed for 13 weeks 'if his relations with his employer have been governed by a contract during the whole or part of each of those weeks'.

14. Finally, Regulation 13(9) provides that annual leave may be taken in instalments, but may be taken only in the leave year in respect of which it is due. Moreover, it may not be replaced by a payment in lieu except where the employment is terminated.

The facts and the questions referred to the Court

15. The action before the national court in which the questions submitted have arisen has been brought by the Broadcasting, Entertainment, Cinematographic and Theatre Union ('BECTU') against the Secretary of State for Trade and Industry ('the defendant').

16. BECTU is a union with about 30 000 members in the broadcasting, film, theatre, cinema and related sectors, who are sound recordists, cameramen, special effects technicians, projectionists, editors, researchers, hairdressers, make-up artistes and the like. When they are employed for a specific period in producing a television programme, a film, a video or a commercial, such workers are employed under short-term contracts. As a result, they work regularly but under a series of separate contracts of a specified duration, either with the same employer or with different employers. Most such workers therefore do not ultimately satisfy the condition as to length of employment laid down by Regulation 13 and thus do not become entitled to paid annual leave.

17. In BECTU's opinion, that result derives from incorrect implementation of the Community legislation, particularly the fact that the implementing regulations imposed the

condition, for which there is no justification in the Directive, that workers may become entitled to paid annual leave only if they have completed a minimum period of 13 weeks' employment with the same employer. BECTU therefore brought an action against the Secretary of State for Trade and Industry for the annulment of Regulation 13(7) of the implementing regulations. The High Court granted leave to move for judicial review on 18 January 1999.

18. In order to determine whether the implementing regulations are compatible with the Directive and whether the annulment sought should be granted, the High Court considered it necessary to seek a preliminary ruling from the Court of Justice under Article 234 EC on the following questions:

'(1) Is the expression "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice" in Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time ... to be interpreted as permitting a Member State to enact national legislation under which:

(a) a worker does not begin to accrue rights to the paid annual leave specified in Article 7 (or to derive any benefits consequent thereon) until he has completed a qualifying period of employment with the same employer; but

(b) once that qualifying period has been completed, his employment during the qualifying period is taken into account for the purposes of computing his leave entitlement?

(2) If the answer to question 1 is yes, what are the factors that the national court should take into account in order to determine whether a particular qualifying period of employment with the same employer is lawful and proportionate? In particular, is it legitimate for a Member State to take into account the cost for employers of conferring those rights on workers who are employed for less than the qualifying period?'

The first question

Preliminary observations

19. By its first question, the High Court raises a question of interpretation of Article 7 of the Directive and in particular of the expression 'in accordance with the

conditions for entitlement to, and granting of... leave laid down by national legislation and/or practice'. Essentially, it wishes to ascertain whether that expression allows a Member State to prescribe, in measures adopted by it in implementation of Article 7 of the Directive, that a worker's entitlement to paid annual leave does not begin to accrue until the worker has completed a qualifying period with the same employer.

20. It is specifically in reliance on that expression, and on the reference therein to national legislation and practice, that the United Kingdom contends before the national court that the legislation at issue is lawful. According to the United Kingdom Government, the wording of Article 7 of the Directive leaves to the Member States the task of determining both the arrangements for taking leave and the conditions for acquiring entitlement to it, thus allowing them to strike a balance between the requirements of protecting the well-being of workers and those of the national economy and of the undertakings involved, particularly small and medium-sized undertakings.

21. An entirely different view, however, is taken by BECTU, as we shall see, and by the Commission, according to which the latitude granted to the Member States by Article 7 is much more limited.

Entitlement to paid annual leave as a fundamental social right

22. I consider that, in order to give a helpful answer to the national court, it is appropriate to step back and, above all, place entitlement to paid annual leave in the wider context of fundamental social rights. The right at issue was not upheld for the first time in the Working Time Directive: it has long been included, together with an indication of the period of leave guaranteed, amongst fundamental social rights.

23. As early as 1948, the Universal Declaration of Human Rights recognised the right to rest, including reasonable limitations on working time and periodic holidays with pay (Article 24). [6] Subsequently, both the European Social Charter approved in 1961 by the Council of Europe (Article 2(3)), [7] and the United Nations Charter of 1966 on economic, social and cultural rights (Article 7(d)), [8] specifically upheld the right to paid leave as a manifestation of the right to fair and equitable working conditions.

6 — According to Article 24, '[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'.

7 — The European Social Charter was promoted by the Council of Europe and adopted in Turin on 18 October 1961; in Article 2(3) thereof, the parties undertake 'to provide for a minimum of two weeks annual holiday with pay'. On 3 May 1996 the Charter was revised in Strasbourg and Article 2(3) was amended so as to provide that the minimum paid annual leave should be not less than four weeks. The United Kingdom ratified the Charter on 11 November 1962 but has not yet ratified the amended text.

8 — Article 7(d) recognises every person's right to 'rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

24. In the Community context, it will be remembered that the Heads of State or Government enshrined that same right in paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers adopted by the European Council in Strasbourg in 1989 [9] which is referred to in the fourth recital in the preamble to the Working Time Directive itself. [10]

25. The instruments to which I have so far referred collectively and in general terms are certainly distinct from each other in certain respects. As has been seen, their substantive content is not the same in all cases, nor is their legislative scope, since in some cases they are international conventions, in others solemn declarations; and of course the persons to whom they apply differ. However, it is significant that in all those instruments the right to a period of paid leave is unequivocally included among workers' fundamental rights.

26. Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States, often on the basis of an express and specific mandate from the national parliaments. [11] Article 31(2) of the Charter declares that: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. And that statement, as expressly declared by the Presidium of the Convention which drew up the Charter, is inspired precisely by Article 2 of the European Social Charter and by paragraph 8 of the Community Charter of Workers' Rights, and also took due account 'of Directive 93/104/EC concerning certain aspects of the organisation of working time'. [12]

27. Admittedly, like some of the instruments cited above, the Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that

9 — In particular, according to the Community Charter of the fundamental social rights of workers: 'The completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community. This process must result from an approximation of these conditions while the improvement is being maintained, as regards in particular the duration and organisation of working time and forms of employment other than open-ended contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work' (point 7). In paragraph 8, the Charter states: 'Every worker in the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be progressively harmonised in accordance with national practices.'

10 — It should also be remembered that both that Charter and the abovementioned European Social Charter are referred to in the preamble to the EU Treaty and in Article 136 EC.

11 — OJ 2000 C 364, p. 1.

12 — Text of the comments on the complete text of the Charter, as recorded in the document entitled CHARTE 4487/00 CONVENT 50, of 10 October 2000.

it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. In its preamble, it is moreover stated that 'this Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights'.

28. I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved — Member States, institutions, natural and legal persons — in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.

Scope of the right to paid leave

29. In the light of the foregoing, it is easier to apprehend the meaning and scope of the principle laid down in Article 7 of the Directive according to which every worker covered by it is entitled to paid annual leave of at least four weeks; it is also easier to understand why the Directive is designed to ensure full and effective implementation of that right. As a fundamental social right, the right to paid leave is characterised also in the Directive as — to use the Commission's words — an automatic and unconditional right granted to every worker.

30. Precisely because of that nature, moreover, that right does not fall within the derogations allowed in other circumstances under the same Directive. With regard to other aspects of the organisation of working time, the Directive allows account to be taken of the special features of certain situations in determining rest periods and the maximum length of working time. For example, under Article 17, for certain groups of workers or for certain sectors of activity, the Member States may derogate from certain provisions of the Directive, which are indicated exhaustively. However, the latter provisions do not include Article 7 concerning annual leave, nor, of course, can that article be brought into that category by means of an extensive interpretation of Article 17 because, according to settled case-law of the Court, any derogation from a Community provision must be expressly provided for and

strictly interpreted. In this case, therefore, the derogations provided for in Article 17 are intrinsically such that they must be applied restrictively, since Article 17(3) expressly allows them only if the workers concerned are granted equivalent compensating rest periods or, where that is not possible, they are afforded appropriate protection.

31. Of similar importance in fully apprehending the scope of the right to paid leave granted by Article 7 of the Directive is, it seems to me, the fact that Article 7(2) prohibits, unless the employment relationship is terminated, payment in lieu of holidays. In other words the minimum period of annual holidays may not be replaced by a pecuniary allowance; and the clear purpose of this is to ensure that a worker, motivated by the desire to earn more or by pressure from the employer, does not waive his entitlement. This, among other things, confirms — and the point deserves to be emphasised — that, in accordance with its aim 'to ensure a better level of protection of safety and health of workers' (first recital), the Directive seeks to protect not only the interests of individuals but also a wider social interest: the health and safety of workers.

Possible limitations of the right to leave

32. We now come to the question referred to us by the national court, namely the interpretation of Article 7(1) of the Directive, where it provides that workers' entitlement to paid annual leave of at least four weeks is to be granted 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice'. As has been seen, it is precisely in reliance on that phrase that the United Kingdom considers to be lawful the limitations on the right in question introduced by its legislation implementing the Directive.

33. Let me say straight away that, in my opinion, the United Kingdom Government is interpreting the scope of that expression too widely and that the limitations which it imposes on entitlement to leave go beyond what the Directive allows, since they go so far as to preclude entirely, in certain cases, any accrual of that right.

34. It is not of course my intention to deny that the expression in question means that reference must be made to national legislation and therefore that the Member States enjoy some latitude in defining the arrangements for enjoyment of the right to leave. In particular, as the Commission also points out, the reference is intended to allow the Member States to provide a legislative framework governing the organisational and procedural aspects of the taking of leave, such as: planning holiday periods, the possibility that a worker may have to give advance notice to the employer of the period in which he intends to take leave, the requirement of a minimum period of employment before leave can be taken, the

criteria for proportional calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth. But these are precisely measures intended to determine the 'conditions for entitlement to, and granting of' leave and as such are allowed by the Directive. What, on the other hand, does not seem to be allowed by the Directive is for national legislation and/or practice to operate with absolutely (or almost) no restrictions and to go so far as to prevent that right from even arising in certain cases.

35. However, that is precisely the effect of the United Kingdom legislation at issue. It expressly provides that 'entitlement [to leave] does not arise until a worker has been continuously employed for 13 weeks' (Regulation 13(7) of the implementing regulations); as a result, workers whose contract of employment is for less than 13 weeks — and many BECTU members have such contracts — could never, or only rarely, acquire any entitlement to leave.

36. A number of considerations militate against allowing such a result. First and foremost, it appears to run counter to the sense and scope of the Directive and of the principle which the Directive clearly lays down and upholds. Entitlement to leave, as we have seen, is in the nature of a fundamental right and, as such, is also upheld by the Directive. To interpret the reference to national legislation as being capable of allowing limitations which ultimately negate such a right entirely would, in the absence of a precise and unequivocal legislative direction to that effect, certainly conflict with the purposes of the Directive and the nature of the right which it embodies. It would be tantamount to subjecting to the legislation of each individual Member State not only the specific arrangements for the exercise of a right granted by a directive, and therefore protected at Community level, but also the very grant of such a right.

37. But, although important, that is not the only implication of the United Kingdom legislation which appears not to be consistent with the system created by the Directive. That legislation also surreptitiously introduces, in the area with which we are concerned here, a distinction between employment relationships of a specific duration and those of an unspecified duration, which does not appear in the Directive and certainly cannot be inferred from it, in view of the nature of the right in question to which I have several times drawn attention and the restrictive rules to be observed for any limitation thereof.

38. Furthermore, it is clear that the United Kingdom legislation at issue also ultimately negates the provisions of Article 7(2). If in fact the entitlement to leave does not arise where contracts are for less than 13 weeks, workers in such circumstances, having no

leave entitlement, will not even be able to claim payment of the allowance which, under that provision, must be paid in lieu of leave to a worker who is entitled to leave in the event of premature termination of the employment relationship. The result is that a worker who terminates his employment relationship before the prescribed period of 13 weeks will be granted neither the period of leave so far accrued (on a *pro rata* basis) nor the allowance in lieu which, in principle, would enable him in any event to take a period of paid rest before embarking on a new employment relationship. And of course, all of those factors undermine the Directive's objectives of protecting the health and safety of workers and guaranteeing them a high level of protection. Not to mention, as the Commission also points out, the abuses to which a system like that provided for by the United Kingdom legislation might lend itself, encouraging employers to offer contracts of less than 13 weeks in order to evade the general legislation.

'Flexibility' in the implementation of the Directive

39. Notwithstanding the foregoing, the United Kingdom Government insists upon a broad interpretation of the latitude granted to the Member States by Article 7 of the Directive, relying to that end on certain arguments which I shall now consider.

40. First, it points out that the Directive itself, in the 17th recital in its preamble, states that 'it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers'.

41. It seems to me, however, that that recital neither adds to nor subtracts from what I have said earlier. That is so not only, of course, because, like all preambles to legislative instruments, it merely serves the purpose of giving reasons for the substantive provisions which follow, not to lay down legislative rules of their own, but above all because it does not, so far as is relevant here, entail any consequences different from those which I inferred above from the terms used in Article 7 to which the question refers (see point 34 et seq.). It is undeniable that a degree of flexibility is appropriate, particularly since that is in some way implicit in the provision itself. Furthermore, the flexibility referred to in the 17th recital is ensured more generally by the provisions of the Directive which allow for multiple combinations of reference periods, derogations and exemptions. The real problem arises, however, when it is

sought to determine the absolute limits of such flexibility and in that regard it does not seem to me that the recital in question provides a basis for any conclusions other than the ones which I indicated earlier. Moreover, in the past Advocate General Léger has rightly spoken of the 'very high degree of flexibility' of the Directive, emphasising at the same time that 'an inherent feature of legislation on safety and health is [however] that the degree of flexibility in its application should not be infinite, since it will otherwise cease to serve any purpose having regard to the objective for which it was adopted'. [13]

42. Nor can any confirmation of the greater flexibility of Article 7 contended for by the United Kingdom Government be found in the fact that the Community legislation on annual leave has been implemented in different ways by the Member States. That argument should, in my opinion, be disregarded, for two reasons.

43. First, there is no indication that diversity necessarily results in divergence of national rules from the Community rules. Even if it were conceded that the legislation or practices of a Member State were not in conformity with the Directive, that does not mean, by virtue of a well-known fundamental principle of Community law, that the other Member States are released from the duty of properly discharging their obligations under Community law.

44. Quite apart from that, I must then observe that the existence of any differences between Member States is, within certain limits, even inherent in directives like the one at issue, that is to say directives which, as observed by the Commission and by BECTU as well, under Article 118a of the EC Treaty, have as their 'objective the harmonisation of conditions in [the working environment], while maintaining the improvements made'. As the Court held in *United Kingdom* v *Council*, cited above, 'achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States'. [14]

45. But what we are concerned with is 'arrangements for implementation', not definition of the actual scope of Community action. If every Member State were free to determine such scope, it would be materially impossible to ensure comparable levels of protection and therefore to achieve

13 — Opinion in Case C-84/94, cited above, point 142.

14 — Case C-84/94, cited above, paragraph 47. See also Case C-303/98 *Simap* [2000] ECR I-7963, paragraph 68.

the very aim of harmonisation. That is why, in accordance with Article 118a of the EC Treaty, the Directive lays down 'minimum requirements'; in other words, it imposes a binding standard on the Member States, and they may go beyond that standard only if they do so in a manner more favourable to the beneficiary. This, moreover, is an approach widely adopted in legislation on social matters and, more generally, in international instruments for the protection of human rights, an approach whose very *raison d'être* lies in its purpose of improving conditions for workers, but which is not precluded from pursuing a different aim as well. The objective of ensuring a comparable minimal level of protection as between the various Member States also meets the requirement, dictated by the need to prevent distortion of competition, of avoiding any type of social dumping, that is to say, in the last analysis, ensuring that the economy of one Member State cannot derive any advantage from adopting legislation which provides less protection than that of the other Member States.

46. Thus, apart from mere 'arrangements for implementation' of the right to leave, the freedom (or flexibility) left to the Member States is only the freedom to add to the protection of workers, and certainly not reduce it below the prescribed levels. As stated earlier, Article 118a lays down 'minimum requirements', 'while maintaining the improvements made'; and that, as the Court observes in *United Kingdom* v *Council*, cited above, does not mean that Community action is to be limited 'to the lowest common denominator, or even to the lowest level of protection established by the various Member States', but means that 'Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be' (paragraph 56). In other words, derogations from the minimum standard laid down by the Directive may go in one direction only: and it does not seem to me that the course taken by the United Kingdom legislation is the right one.

The right to leave and the requirements of undertakings

47. Having set out the foregoing considerations regarding the interpretation of Article 7 of the Directive, I must now observe that the United Kingdom legislation at issue is likewise in my opinion not justified by another important argument put forward by the defendant in the main proceedings.

48. According to the United Kingdom Government, the exclusion of workers with a contract of employment for less than 13 weeks from the opportunity of progressively acquiring proportional entitlement to annual leave (Regulation 13(7) of the implementing regulations) strikes a balance between, on the one hand, the legitimate claims of workers to paid annual leave in order to guarantee a particular standard of health and safety conditions for them and, on the other, the need for undertakings, in particular small and medium-sized undertakings, not to be subjected to excessive administrative and financial constraints (as

recommended, *inter alia,* by the second subparagraph of Article 118a(2) of the EC Treaty). In that sense, in the United Kingdom's view, the limitation provided for by its legislation is appropriate and proportionate to the Directive's aim of guaranteeing protection of the health and safety of workers. According to the defendant, it is not necessary for a worker to become entitled to annual leave as from the first day of employment, because it is only after a certain uninterrupted period of work that leave becomes really necessary to offset any fatigue arising from the work done; and, in any event, during the first weeks a worker is able to restore his energies through daily and weekly rests.

49. As I said above, I am not convinced by that argument. I shall examine it in relation to both the aspects mentioned: workers' health and safety conditions and the constraints which annual leave imposes upon undertakings, in particular small and medium-sized undertakings.

50. As regards the first point, I fear that the United Kingdom Government's argument is based on a misconception. Whilst it is true that the requirement of prolonged rest, such as that enjoyed when leave is taken, arises only after employment of a certain duration, that does not mean that it is lawful to deprive a worker of the progressive accrual of leave entitlement as from the first day of employment. In other words, it is one thing to limit the possibility of taking leave before a certain period has elapsed since commencement of the employment relationship, without however preventing that period from being taken into account for the acquisition of proportional entitlement to leave which may be taken later; but it is quite another thing to impose a minimum period of employment — in this case, 13 weeks — as a precondition for the very acquisition of entitlement to leave. Quite apart from the fact that, as I have pointed out, the second course of action would lead to a paradoxical and unacceptable result, in that a worker who habitually works under contracts for less than 13 weeks would not only never accrue any leave entitlement but likewise could never receive the allowance in lieu referred to in Article 7(2) of the Directive.

51. As regards the other factor to be considered, namely the excessive constraints which more generous rules on leave entitlement would create for undertakings, I must say first of all in general terms that the Directive itself emphasises, in the fifth recital, that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'.[15] I would also point out, specifically with regard to the possible consequences of such constraints for small and medium-sized undertakings, that the United Kingdom

15 — On this point, see also *United Kingdom* v *Council,* cited above, paragraph 28.

legislation is general in scope, in that it does not provide for any difference of rules according to whether the employer is a small, medium-sized or large undertaking.

52. That said, I would point out that the Court of Justice made it clear, in its judgment in *United Kingdom* v *Commission,* cited above (paragraph 44), that the second subparagraph of Article 118a(2) of the EC Treaty does not impose any absolute prohibition of adopting binding measures applicable to small and medium-sized undertakings. [16] And even more specifically, in that same judgment, the Court emphasised that, in adopting the Directive in question, the Community legislature already took into account the possible consequences for small and medium-sized undertakings of the organisation of working time provided for by the Directive. In other words, it already assessed the various requirements at stake and saw no need to provide for derogations or special provisions other than those already referred to (for example, the transitional period for full application of entitlement to leave, in Article 18(1)(b)) (paragraphs 44 and 64). It need hardly be emphasised that the Community legislature's assessment to that effect outweighed in the eyes of the Court of Justice the objections levelled against it by the United Kingdom Government.

53. For all the foregoing reasons, in my opinion it may be concluded that the national legislation at issue does not conform with Article 7 of the Working Time Directive, which guarantees every worker covered by it the right to a minimum period of four weeks' paid leave for every year of work. National laws or practices may regulate the exercise of that right by laying down the conditions and arrangements for the accrual and taking of leave on a basis commensurate with the work actually done; but they may not go so far as to stop any entitlement from arising, by making it conditional upon completion of a minimum qualifying period of employment with the same employer.

The second question

54. The second question was submitted only in the event of an affirmative answer to the first, that is to say in the event of the limitation on leave entitlement imposed by the United Kingdom legislation being considered lawful. Should that be the case, the High Court wishes to ascertain what factors the national court should take into consideration in determining whether a particular minimum period of employment with the same employer is lawful and proportionate; in particular, whether a Member State may lawfully take into account the cost for the employer of granting paid annual leave entitlement to workers who are employed for less than 13 weeks.

55. Since I proposed that the first question be answered in the negative, I shall consider only very briefly the question just outlined. In particular, I shall merely observe that in

16 — To that effect, see also Case C-189/91 *Kirsmmer-Hack* [1993] ECR I-6185, paragraph 34.

its submissions on this question, the United Kingdom Government identifies the factors to be taken into account to justify any limitations on the right to leave as being the duration of the minimum period, the harmful effect which the limitation might have on the health of the worker and the (minor) costs which might be incurred by the undertaking. In short, it relies on the same factors as those considered in relation to various aspects of the first question, and I can see no reason for departing from the interpretation which I expounded earlier.

56. All that I can add, merely for the sake of completeness, is that if the Member States were allowed to impose limitations not provided for in the Directive upon acquisition of the right to annual leave as provided for in Article 7, such limitations could be justified only if it was proved that they were strictly necessary in order to attain the objective of the Directive; in any event, such limitations could not in any circumstances be justified solely by reference to the costs which their absence would cause an employer to incur.

Conclusion

57. In view of the foregoing considerations, I propose that the Court give the following answer to the question from the national court:

The expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' contained in Article 7 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time precludes national legislation under which a worker does not begin to accrue rights to the paid annual leave specified in Article 7 (or to derive any benefits consequent thereon) until he has completed a qualifying period of employment with the same employer even if, once that qualifying period has been completed, his employment during the qualifying period is taken into account for the purpose of computing his leave entitlement.