OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 24 January 2008 [1]

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I — Introduction

1. By its request for a preliminary ruling under Article 234 EC, the Landesarbeitsgericht (Higher Labour Court) Düsseldorf asks the Court to provide an interpretation of Article 7(1) and (2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2] ('Directive 2003/88' or 'the working time directive').

2. The questions referred to the Court have been raised in a dispute between Gerhard Schultz-Hoff (the appellant) and his former employer, Deutsche Rentenversicherung Bund (the respondent), in which the Landesarbeitsgericht is called on to rule whether or not the appellant has rights against the respondent to an allowance in lieu of leave after the end of the employment relationship.

3. The Landesarbeitsgericht Düsseldorf essentially seeks to ascertain whether it is compatible with Article 7 of Directive 2003/88 for a worker's entitlement to paid leave of at least four weeks to the end of the leave year to be lost at the end of the leave year or at the latest at the end of the carry-over period and for that leave not to be compensated on termination of the employment relationship by a financial allowance in lieu if the worker was ill and incapacitated for work up to the end of the carry-over period.

2 — OJ 2003 L 299, p. 9.

II — Legal framework

A — *Community law*

4. Directive 2003/88 replaced Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [3] on 2 August 2004. Its purpose, like that of the directive which preceded it, is to lay down specific minimum safety and health requirements for the organisation of working time. Article 7 thereof, which was taken over unchanged, states as follows:

'Annual leave

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

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

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

B — *National law*

1. Statute law

6. The Bundesurlaubsgesetz (Federal Law on leave) (BUrlG) of 8 January 1963, in the version of 7 May 2002, provides inter alia as follows:

'*Paragraph 1: Entitlement to leave*

Every worker shall be entitled to paid recuperative leave in each calendar year.

...

3 — OJ 1993 L 307, p. 18.

Paragraph 3: Duration of leave

(1) Leave shall amount to at least 24 working days each year.

…

Paragraph 7: Timing, carrying-over and allowances in lieu of leave

(1) In timing leave consideration shall be given to a worker's wishes, save where consideration thereof is precluded by imperative operational interests or the wishes of other workers who deserve to be given priority for social reasons.

…

(3) Leave must be authorised and taken in the current year. Carrying-over of leave to the next calendar year shall be permitted only if justified on imperative operational grounds or reasons connected to the worker himself. In the event of carrying-over, the leave must be authorised and taken within the first three months of the following calendar year.

(4) If, because of the termination of the employment relationship, the leave cannot be authorised either wholly or in part, an allowance in lieu thereof shall be paid.'

7. Paragraph 13 of the BUrlG provides that derogations may be made in collective agreements from the above provisions, including Paragraph 7(3) of the BUrlG, provided that these are not detrimental to the employee.

2. Applicable collective agreements

8. The framework collective agreement for employees of the Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Clerical Staff) (MTAng-BfA) provides as follows:

'*Paragraph 47: Recuperative leave*

(1) The employee shall receive recuperative leave with holiday pay in each leave year. The leave year shall be the calendar year.

…

(7) Leave is to be commenced at the latest by the end of the leave year. If leave cannot be commenced by the end of the leave year, it must be commenced before 30 April of the following leave year. If for reasons of service or because of incapacity for work or periods of protection pursuant to the Mutterschutzgesetz (Law on the protection of working mothers) the leave cannot be commenced before 30 April, it must be commenced before 30 June. Where leave fixed within the leave year in respect of this leave year has been moved at the request of the Bundesversicherungsanstalt für Angestellte to the period after 31 December of the leave year and could not be commenced by 30 June because of incapacity for work such as referred to in the second sentence, it is to be commenced by 30 September.

…

Leave not taken within the periods indicated shall be lost.

…

Paragraph 51: Allowance in lieu of leave

(1) If at the time of the termination of the employment relationship the entitlement to leave has not yet been exercised, the leave shall, in so far as possible in the interests of the service or organisation, be authorised and taken during the notice period. If the leave cannot be authorised or the notice period is too short, an allowance in lieu of the leave shall be paid. The same applies if the employment relationship ends through the cancellation of a contract (Paragraph 58) or due to reduced working capacity (Paragraph 59) or if the employment relationship is suspended pursuant to the fifth sentence of Paragraph 59(1)(1).

…'

III — Facts, main proceedings and questions referred

9. Following the termination of an employment relationship on 30 September 2005, the parties to the main proceedings disagree as to whether the appellant is entitled to an allowance in lieu of leave in respect of 2004 and 2005.

10. The appellant, who was born on 14 January 1949, worked from 1 April 1971 for the respondent and its predecessor in law. The MTAng-BfA applied to the employment relationship. The appellant most recently received remuneration in accordance with Salary Group 11. The appellant worked from 1985 in the Düsseldorf branch office as a field worker. As part of his work he had to carry out tax field audits and audits of collecting agencies; he relied on a car to do so.

11. The appellant is classified under German law as severely disabled (GdB 60 'G' [4]) and because of a serious problem with an invertebral disc has had a total of 16 operations since 1995. Periods of capacity for work alternated with periods of incapacity for work due to illness. In 2004 the appellant was able to work until the beginning of September. From 8 September 2004 — then continuously until 30 September 2005 — he was on medical sick leave. The constant use of morphine-based painkillers has prevented the appellant, from then until now, from driving a car.

12. By a letter of 13 May 2005, the appellant requested that his leave for 2004 be authorised from 1 June 2005. The respondent refused the request for leave on 25 May 2005 on the ground that the staff medical service had first to establish whether he was able to work, pursuant to Paragraph 7(2) of the MTAng-BfA. By letter of 10 August 2005, the appellant asked to be sent a proposal for homeworking as part of a reintegration measure. On 6 September 2005 the respondent replied, stating that following the application for an invalidity pension submitted by the appellant at short notice it wished to await the outcome of the invalidity pension procedure.

13. In its capacity as the invalidity pension institution, the respondent found, by a decision of September 2005, that the appellant's ability to work was reduced and granted, retroactively from 1 March 2005, an unlimited invalidity pension on the ground of permanently reduced working capacity. On the basis of that finding, the employment relationship between the parties ended on 30 September 2005 in accordance with Paragraph 59 of the MTAng-BfA.

14. In November 2005 the appellant brought an action before the Arbeitsgericht (Labour Court) Düsseldorf for an allowance in lieu of the leave for 2004 and 2005. By judgment of 7 March 2006, the Arbeitsgericht dismissed the action. The appellant appealed against that judgment to the referring Landesarbeitsgericht on 27 April 2006.

4 — *Grad der Behinderung* (GdB) (degree of disability) is a term derived from German law on severe disability. It is a measure of the degree of impairment caused by a disability. The term is used in Book IX of the Social Security Code — Rehabilitation and Participation of Disabled People. The GdB can range from 20 to 100. It is graduated in steps of 10. All persons with a degree of disability of at least GdB 50, which is determined by the Pensions and Benefits Office or the Office for Social Affairs, are regarded as severely disabled. Categories are entered on a person's severe disability card and indicate particular impairments. Category 'G' denotes impairment of mobility in road transport.

15. On the basis of 35 days of leave per year and monthly earnings of EUR 4 362.67 gross, the appellant puts his entitlement to payment at a total of EUR 14 094.78 gross. He submits that he wished to use the leave requested from 1 June 2005 in order to take part at a later date in a reintegration measure. He further submits that he is capable of light office work on a part-time basis.

16. The respondent counters by arguing that the part-time office work suggested by the appellant does not fulfil the contractual requirements of his employment. If the appellant's incapacity for work therefore continues to this day, the entitlements to leave could not have been exercised by the end of the carry-over period and are lost. Accordingly, the appellant is likewise not entitled to the allowance in lieu requested.

17. The referring court takes the view that the resolution of the dispute depends on the interpretation of Directive 2003/88. It has therefore stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 7(1) of Directive 2003/88/EC (= Article 7 of Directive 93/104/EC) to be understood as meaning that workers must in any event receive minimum annual paid leave of four weeks [and that] in particular leave not taken by a worker because of illness during the leave year must be authorised at a later date, or can national legal provisions and/or national practice stipulate that an entitlement to annual paid leave is extinguished if workers become incapacitated for work during the leave year before leave is authorised and do not recover their capacity for work before the end of the leave year or the carry-over period laid down by statute, collective agreement or individual agreement?

(2) Is Article 7(2) of Directive 2003/88/EC to be understood as meaning that at the end of the employment relationship workers have, in any event, a claim to financial compensation in respect of leave accrued but not taken (an allowance in lieu of leave), or can national legislation and/or national practice stipulate that workers will not receive an allowance in lieu of leave if, up to the end of the leave year or the relevant carry-over period, they are incapacitated for work and/or if after the ending of the employment relationship they draw a disability or invalidity pension?

(3) In the event that the Court of Justice answers Questions 1 and 2 in the affirmative:

Is Article 7 of Directive 2003/88/EC to be understood as meaning that the entitlement to annual leave or an allowance in lieu requires the worker actually to have worked during the leave year, or does the entitlement arise also in the case of excusable absence (by reason of illness) or inexcusable absence in the same leave year?'

IV — Proceedings before the Court of Justice

18. The order for reference, dated 2 August 2006, was lodged at the Registry of the Court of Justice on 21 August 2006.

19. Written observations were lodged by the appellant in the main proceedings, the Governments of the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the Italian Republic, and by the Commission of the European Communities, within the period laid down in Article 23 of the Statute of the Court.

20. At the hearing on 20 November 2007 oral argument was presented by the agents of the Governments of the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands, and by the Commission.

V — Main arguments of the parties

21. The *respondent* submits that unrestricted carrying-over of entitlements to leave by workers capable of working is diametrically at odds with the objective of protection pursued by Directive 2003/88 (granting of minimum rest periods for the protection of workers' health and safety). In the case of workers incapable of work, carrying-over without any time-limit could even result in a temptation on the part of the employers to make workers on long-term sick leave redundant earlier. Otherwise they would run the risk of having to make an allowance in lieu of considerable leave entitlements accumulated over several years when the employment relationship is terminated, which could have a serious adverse effect on their business interests.

22. The *German Government* takes the view that Article 7(1) of the working time directive merely stipulates that a worker is entitled to a minimum period of paid annual leave of four weeks. The regulatory subject-matter of this provision is solely the minimum period of annual leave. The directive leaves the detailed

rules relating to the grant of leave, which include the loss of entitlement to leave, to the Member States and the interpretation of national law by judicial decision.

23. With regard to the second question referred, the German Government submits that it is left to the Member States and their institutions to determine whether and under what circumstances they wish to provide for an allowance in lieu of leave at the end of the employment relationship.

24. In the view of the *United Kingdom Government*, the appellant was not working whilst on sick leave and therefore had no need for 'actual rest' from work. The United Kingdom Government takes the view that the purpose of Article 7 is to protect the safety and health of those who are actually working by providing for a rest from work. In the present case, however, the granting of leave would have provided no such safety or health benefit. The leave could not have been taken before the employment relationship terminated. If the appellant was entitled to annual leave in the present case, the question might be asked: leave from what? It is simply unintelligible to refer to the appellant taking 'annual leave' during his period of 'sick leave'.

25. The United Kingdom Government points out that the answer to the second question follows from its answer to the first. As such a worker has no entitlement to annual leave under Article 7(1), he can also have no entitlement to pay in lieu of such leave under Article 7(2). Moreover, Article 7(2) permits, but does not require, a payment in lieu of leave at the end of an employment relationship. Such a payment cannot, therefore, be mandatory in the case of a person who has been absent from work on long-term sick leave.

26. The *Italian Government* refers both to Conventions No 52 and No 132 of the International Labour Organisation (ILO) and to the Court's case-law concerning the interpretation of Article 7 of the directive. In the view of the Italian Government, it is not possible, having regard to the principles developed by the Court, to conclude that the entitlement to the actual grant of leave on the part of the appellant in the main proceedings would be lost if the different purposes of recuperative leave and sick leave were called into question.

27. From the foregoing considerations, the Italian Government concludes that at the end of the employment relationship a worker has, in any event, a claim to financial compensation in respect of leave accrued but not taken. Therefore, a provision of national law under which workers will not receive an allowance in

lieu of leave if, up to the end of the leave year or the relevant carry-over period, they are incapacitated for work would appear to be at variance with the principles of Community law.

28. The *Commission* takes the view that the objection that a worker who has been absent on sick leave and not working does not require rest is incompatible with the approach expressed in the Court's case-law. Where a worker is absent on sick leave the entitlement to annual leave cannot be regarded as fulfilled since the sick leave is a consequence of the worker's incapacity for work and is not for the purpose of rest, time to recover and recuperation but rather recovery and the restoration of health and capacity for work. In the view of the Commission, the Member States must respect the limits which the directive places on them. Therefore, measures by the Member States may not go so far as to require a worker to take his annual leave within a limited carry-over period in the following year and to penalise failure to satisfy these conditions with the automatic loss of the entitlement to leave. Therefore, the loss of entitlement without compensation is contrary to the objective pursued by the directive.

29. With regard to the second question referred, the Commission submits that the argument underlying the Court's case-law that the possibility of replacing entitlement to annual leave with an allowance in lieu is in principle incompatible with Directive 2003/88 is a fortiori also applicable to national law under which failure to take annual leave means that it is automatically lost.

30. In its oral observations, the *Netherlands Government* questions the applicability in principle of Directive 2003/88 to cases in which workers are absent on sick leave on the ground that this is not the regulatory subject-matter of that measure. The scope of Directive 2003/88, it argues, is limited exclusively to active workers, with the result that national law alone applies in the present case. However, the wide variety of national rules in the Member States does not allow generally valid conclusions to be drawn with regard to the rights of sick workers.

VI — Legal assessment

A — *The first question*

1. Preliminary remarks

31. By the first question, the Landesarbeitsgericht Düsseldorf raises a problem in the interpretation of Article 7(1) of Directive 2003/88, in particular of the phrase 'in accordance with the conditions for entitle-

ment to, and granting of, such leave laid down by national legislation and/or practice'. From a legal point of view, this problem concerns whether and, if so, to what extent the Member States are competent to lay down the statutory requirements for loss of the entitlement to a minimum period of paid annual leave.

2. The entitlement to paid annual leave as a fundamental social right

33. I take the view that, in order to be able to give a meaningful answer to the national court, it is necessary to step back and view the entitlement to paid annual leave both as implemented in secondary law within the Community legal system and in the wider context of fundamental social rights.

32. As regards the division of legislative powers between the Community and its Member States in connection with the grant of the right to paid annual leave, it should first be pointed out that in adopting Directive 2003/88 the Community legislature availed itself of a legal instrument which, under the third paragraph of Article 249 EC, grants the national authorities a degree of discretion as regards the choice of form and methods of transposition but at the same time imposes requirements in so far as the directive is binding, as to the result to be achieved, upon each Member State. [5] Consequently, with regard to the transposition of the right to paid annual leave the national legal systems are given considerable, but not unlimited, options. [6] Therefore, in fulfilling the obligation, laid down in Article 7, to take the necessary measures, the Member States must always take account of the objectives of Directive 2003/88.

34. As regards the purpose of Directive 2003/88, it is clear both from Article 137 EC, which is its legal basis, and from recitals 1, 4, 7 and 8 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 the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. [7] The harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of

5 — See the leading judgment in Case 48/75 *Royer* [1976] ECR 497, paragraphs 69 and 73, according to which '[t]he Member States are … obliged to choose, within the bounds of the freedom left to them by Article [249 EC], the most appropriate forms and methods to ensure the effective functioning of the directives, account being taken of their aims'.

6 — See L. Stärker, *Kommentar zur EU-Arbeitszeit-Richtlinie*, Vienna, 2006, p. 81.

7 — Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37; Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraphs 45 and 47; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 91; and Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraph 40.

workers by ensuring that they are entitled to daily, weekly and annual minimum rest periods and adequate breaks and by providing for a ceiling on the average duration of the working week. [8]

35. However, in interpreting Article 7 of Directive 2003/88 it should be borne in mind that the right to minimum paid annual leave 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 recognised by international law. [9] At international level this fundamental right is mentioned, for example, in Article 24 of the Universal Declaration of Human Rights, [10] which confers on everyone 'the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. It is also upheld in Article 2(3) of the European Social Charter of the Council of Europe [11] and in Article 7(d) of the International Covenant on Economic, Social and Cultural Rights [12] as a manifestation of the right of everyone to fair and equitable working conditions.

36. Within the framework of the International Labour Organisation, which is a special agency of the United Nations, the right to a minimum period of paid annual leave has thus far been the subject-matter of two multilateral conventions. In this respect, Convention No 132, [13] which entered into force on 30 June 1973, amended Convention No 52, [14] which was previously in force. They place mandatory requirements on the signatory States with regard to the implementation of this fundamental social right within their national legal systems.

37. However, these varied international instruments are distinct from one another both in terms of their substantive regulatory

8 — Case C-303/98 *Simap* [2000] ECR I-7963, paragraph 49; *BECTU*, cited in footnote 7, paragraph 38; *Jaeger*, cited in footnote 7, paragraph 46; Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 47; and *Dellas and Others*, cited in footnote 7, paragraph 41.

9 — As Advocate General Tizzano states in his Opinion in *BECTU*, cited in footnote 7, point 22, entitlement to paid annual leave has long been included amongst the fundamental social rights.

10 — Universal Declaration of Human Rights, which the United Nations General Assembly adopted on 10 December 1948 by Resolution 217 A (III).

11 — The European Social Charter was opened for signature by the Member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965. Article 2(3) thereof states that, with a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake to provide for a minimum of two weeks' annual holiday with pay.

12 — The International Covenant on Economic, Social and Cultural Rights was adopted unanimously by the United Nations General Assembly on 19 December 1966. Article 7 (d) thereof states that '[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: … [r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

13 — Convention No 132 concerning Annual Holidays with Pay (revised 1970), adopted by the General Conference of the International Labour Organisation on 24 June 1970, which entered into force on 30 June 1973.

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

content and their legislative scope since in some cases they are international law conventions, in others merely solemn declarations with no legal force. [15] The persons to whom they apply are also different, with the result that the class of persons covered is by no means identical. In addition, the signatory States, as the addressees of these instruments, are generally granted broad discretion with regard to implementation and therefore the beneficiaries are unable to rely directly on their rights. However, it is significant that in all those international instruments the right to a period of paid leave is unequivocally included among workers' fundamental rights.

38. Even more significant, in my view, is the fact that the inclusion of this right in the Charter of Fundamental Rights of the European Union [16] appears to provide the most reliable and definitive confirmation that it constitutes a fundamental right. [17]

Article 31(2) of the Charter declares that '[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. Historically, this provision is modelled on Article 2(3) of the European Social Charter of the Council of Europe and point 8 of the Community Charter of the Fundamental Social Rights of Workers. [18] According to the explanatory notes of the Praesidium Secretariat, Directive 93/104, as the predecessor directive to the present Directive 2003/88, was decisive in this respect. [19]

39. Consequently, Article 31(2) of the Charter of Fundamental Rights establishes the right to annual paid leave as a human right available to all. [20] Admittedly, like some of the international instruments cited above, the Charter of Fundamental Rights of the

15 — M. Zuleeg,'Der Schutz sozialer Rechte in der Rechtsordnung der Europäischen Gemeinschaft', *Europäische Grundrechte-Zeitschrift*, 1992, Issue 15/16, p. 331, points out that instruments having no binding legal effect, such as the Community Charter of the Fundamental Social Rights of Workers, serve primarily as a road map. At most, they acquire legal relevance where courts of law cite them for the purpose of interpreting or further developing the law. W. Balze, 'Überblick zum sozialen Arbeitsschutz in der EU', *Europäisches Arbeits- und Sozialrecht*, 38, 1998 Supplement, paragraph 4, correctly states that, although the Community Charter of the Fundamental Social Rights of Workers, as a solemn declaration, itself produces no binding legal effects, it was a significant catalyst for the Commission action programme for implementing the Community Charter of the Fundamental Social Rights of Workers of 28 November 1989, which was adopted at the end of 1989. The action programme provided for a total of 23 specific proposals for directives, inter alia in the field of the health and safety of workers, most of which were implemented by 1993. It thus follows that even solemn declarations can, as a source of inspiration for legislative activity, ultimately acquire relevance in the implementation of the fundamental social rights proclaimed therein.

16 — Charter of Fundamental Rights of the European Union promulgated on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

17 — Advocate General Tizzano reaches the same conclusion in his Opinion in *BECTU*, cited in footnote 7, point 26.

18 — The Community Charter of the Fundamental Social Rights of Workers was adopted in Strasbourg on 9 December 1989 by the Heads of State or Government of the Member States of the European Community. Point 8 of the Community Charter states that '[e]very worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonised in accordance with national practices while the improvement is being maintained'. E. Eichenhofer, *Handbuch des EU-Wirtschaftsrechts* (edited by M.A. Dauses), Munich, 2004, Volume 1, D. III., paragraphs 38 and 39, speaks in this context expressly of the right to paid annual leave as a 'fundamental social right' contained in the Community Charter.

19 — See, to this effect, H.-W. Rengeling, *Grundrechte in der Europäischen Union*, Cologne, 2004, paragraph 1016, p. 812.

20 — E. Riedel, *Charta der Grundrechte der Europäischen Union* (edited by Jürgen Meyer), 2nd edition, Baden-Baden, 2006, Article 31, paragraph 20, takes the view that the relevance of Article 31(2) of the Charter of Fundamental Rights lies primarily in its having indisputably established, as a social minimum, the principles of limitation of maximum working hours, of daily rest periods and of weekly rest periods, even in the case of employment relationships involving shifts or variable working hours, and of paid annual leave as rights available universally as human rights.

European Union has not been recognised as having genuine legislative scope and therefore it primarily constitutes a political declaration. However, I take the view that it would be wrong to deny the Charter any relevance in interpreting Community law. [21] Irrespective of the question of the definitive legal status of the Charter within the legal system of the European Union, which will have to be clarified in future, it already constitutes a concrete expression of shared fundamental European values. [22]

40. Furthermore, it also reflects constitutional traditions common to the Member States to a substantial degree. So far as I can see, this conclusion can indeed be drawn in relation to the right to a minimum period of paid annual leave since Article 31(2) of the Charter is modelled on the constitutions of a large number of Member States. [23] Consequently, it is perfectly reasonable to refer to the principle underpinning Article 31(2) of

21 — I expressed this view most recently in my Opinion in Case C-62/06 *Zefeser*, point 54 and footnote 43, in connection with the right to a fair trial guaranteed in Article 47 of the Charter of Fundamental Rights, as did previously Advocate General Tizzano in his Opinion in *BECTU*, cited in footnote 7, point 28, and Advocate General Léger in his Opinion in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, points 73 to 86. The Court of Justice too is increasingly relying on the provisions of the Charter of Fundamental Rights. See most recently Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38, with reference to the reference to the Charter in the preamble to the directive at issue; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; and Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 46.

22 — See, to this effect, M. Poiares Maduro, 'The double constitutional life of the Charter of Fundamental Rights', *Unión Europea y derechos fundamentales en perspectiva constitucional*, Madrid, 2004, p. 306; T. Schmitz, 'Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte', *Die Europäische Union als Wertegemeinschaft*, Berlin, 2005, p. 85; and U. Beyer, C. Oehme and F. Karmrodt, 'Der Einfluss der Europäischen Grundrechtecharta auf die Verfahrensgarantien im Unionsrecht', *Beiträge zum Transnationalen Wirtschaftsrecht*, Issue 34, November 2004, p. 14. I. García Perrote Escartín, 'Sobre el derecho de vacaciones', *Scritti in memoria di Massimo D'Antona*, Volume 4 (2004), p. 3586, assumes that the right to paid annual leave, as enshrined in Article 40(2) of the Spanish Constitution, is a product of all international instruments relating to the protection of fundamental rights. He takes the view that these instruments together have contributed to the emergence of a universal or even specifically European awareness of the existence of that fundamental social right.

23 — Under Community law, it is primarily for the Member States to lay down rules on working conditions. Several constitutions contain safeguards relating to working conditions which include the right of workers to rest. For example, Article 11(5) of the Constitution of *Luxembourg* and Article 40(2) of the Constitution of *Spain* require the State to create healthy working conditions and to provide or ensure rest for workers (see S. González Ortega, 'El disfrute efectivo de la vacaciones anuales retribuidas: una cuestión de derecho y de libertad personal, de seguridad en el trabajo y de igualdad', *Revista española de derecho europeo*, No 11 [2004], p. 423 et seq.). A much more comprehensive rule, which is much closer to the wording in Article 31 of the Charter, is to be found in Article 36 of the Constitution of *Italy*, which provides inter alia for a right to a weekly rest day and paid annual leave. The Constitution of *Portugal* would appear to have been one of the models for the rules of the Charter since Article 59(1)(d) thereof establishes the right to rest and leisure, an upper limit on daily working hours, a weekly rest period and regular paid leave (see J.C. Vieira De Andrade, 'La protection des droits sociaux fondamentaux dans l'ordre juridique du Portugal', *La protection des droits sociaux fondamentaux dans les États membres de l'Union européenne — Étude de droit comparé*, Athens/Brussels/Baden-Baden, 2000, p. 677). In the majority of the old Member States of the European Union, the right to a minimum period of paid annual leave is based on ordinary legislation which mirrors the secondary legislation requirements of the directive, in so far as ambits of Community law are concerned. By contrast, the new Member States, other than *Cyprus*, have very comprehensive codification of this right. This is the case, for example, with regard to Article 36(f) of the *Slovak*, Article 66(2) of the *Polish*, Article 70/B(4) of the *Hungarian*, Article 107 of the *Latvian* and Article 49(1) of the *Lithuanian* Constitutions, which guarantee a minimum period of paid annual leave. Working conditions in general are addressed in the Constitutions of *Slovenia* (Article 66), the *Czech Republic* (Article 28) and *Estonia* (Article 29(4)) (see E. Riedel, loc. cit., footnote 20, Article 31, paragraphs 3 and 4).

the Charter in interpreting Article 7 of Directive 2003/88 in a legal dispute concerning the nature and scope of a fundamental right such as that at issue in the present case. [24]

3. The entitlement to a minimum period of paid annual leave in Community law

(a) The Member States' competence with regard to implementation

41. The Court has upheld the scope of the right to paid annual leave and found that '[t]he entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 itself'. [25] The provisions in Article 7 of Directive 2003/88 are drawn up as a rule that a worker must be entitled to actual rest, with a view to ensuring effective protection of his health and safety. [26]

42. In order to attain the objectives of the directive, it must be assumed, as the case-law does, that Article 7(1) of Directive 2003/88 has a broad scope *ratione temporis* and therefore the following comments apply also to leave which is taken not in the current year but at a later date. In this regard, the Court has stated that the positive effect which that leave has for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year. However, the significance of that rest period in that regard remains if it is taken during a later period. Since leave may, when taken during a later year, still contribute to the safety and health of the worker, it continues to fall in that case also within the scope of the directive. [27]

24 — In the view of S. Smismans, 'The Open Method of Coordination and Fundamental Social Rights', *Social Rights in Europe* (edited by Gráinne de Búrca and Bruno de Witte), Oxford, 2005, p. 229, the question of the relationship between Article 7 of Directive 2003/88 and the fundamental rights, particularly Article 31(2) of the Charter of Fundamental Rights of the European Union, will inevitably arise in proceedings before the Court of Justice. According to S. Krebber, *Kommentar zu EU-Vertrag und EG-Vertrag* (edited by Christian Calliess and Matthias Ruffert), 1st edition, Neuwied, 1999, Article 136 EC, paragraph 35, p. 1365, the European Social Charter and the Community Charter provide significant aids for interpreting the meaning of concepts of employment law at Community level. L. Stärker, *Kommentar zur EU-Arbeitszeit-Richtlinie*, Vienna, 2006, p. 81, appears even to attribute legislative character to Article 31(2) of the Charter of Fundamental Rights by pointing out that this provision prescribes the establishment of paid annual leave. In the view of G. Benedetti, 'La rilevanza giuridica della Carta Europea innanzi alla Corte di Giustizia: il problema delle ferie annuali retribuite', *Carta Europea e diritti dei privati*, 2000, p. 128, at p. 129, in a legal dispute concerning the scope of the right to a minimum period of paid annual leave the Charter of Fundamental Rights cannot be ignored, despite the fact that it is not legally binding, since it contains statements which mirror the constitutional traditions common to the Member States. It therefore functions as a reference point or aid for interpreting Community law.

25 — Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 28; *Dellas and Others*, cited in footnote 7, paragraph 49; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and *BECTU*, cited in footnote 7, paragraph 43.

26 — *BECTU*, cited in footnote 7, paragraph 44.

27 — *Federatie Nederlandse Vakbeweging*, cited in footnote 25, paragraphs 30 and 31.

43. According to case-law, the Member States have an essential role to play in implementing this right since the obligation, contained in Article 7(1) of Directive 2003/88, to take the necessary measures requires them to lay down the requisite detailed national implementing rules. [28] This includes laying down conditions for the exercise and implementation of the right to paid annual leave, the Member States being free to prescribe the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed. [29]

44. The reference to national legislation contained in Article 7(1) of Directive 2003/88 is intended in particular to allow the Member States to provide a legislative framework governing the organisational and procedural aspects of the taking of leave, such as, for instance, the planning of holiday periods, the possibility that a worker may be required 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. [30] These are, however, always precisely measures intended to determine the conditions for entitlement to, and granting of, leave and as such are allowed by Directive 2003/88.

45. On the other hand, the Community law obligation on the Member State to refrain, in transposing Article 7(1) of Directive 2003/88 into national law, from any act or omission which could stand in the way of this objective stems from the principle of sincere cooperation resulting from Article 10 EC. [31] This concerns in particular the adoption of measures which could jeopardise the very existence of the right to a minimum period of paid leave. [32] Accordingly, in its judgment in *BECTU* [33] the Court ruled that national legislation which imposes a precondition for entitlement to paid annual leave, which has the effect of preventing certain workers from any such entitlement, is incompatible with Community law on the grounds that it not only negates an individual right expressly granted by Directive 93/104 but is also contrary to its objective.

46. In my view, in *BECTU* the Court applied the principle of the practical effectiveness of Community law and in so doing correctly acknowledged that a Member State which is permitted to decide on the acquisition of an entitlement may undermine or even frustrate that entitlement by making the exercise

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

29 — *BECTU*, cited in footnote 7, paragraph 53.

30 — As listed in the Commission's observations in *BECTU*, which Advocate General Tizzano addressed in his Opinion in that case, cited in footnote 7, point 34.

31 — According to established case-law, the requirement on the Member States to transpose a directive in such a way that full application thereof is in fact ensured follows from Article 10 EC (Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraphs 24 to 26; Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; and Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 31). Therefore, the national legislature must amend, rescind or supplement national law in such a way that the requirements of Community law have complete practical effect (see Case 30/72 *Commission* v *Italy* [1973] ECR 161, paragraph 11; W. Kahl, *Kommentar zu EUI-Vertrag und EG-Vertrag* (edited by Christian Calliess and Matthias Ruffert), 1st edition, Neuwied, 1999, Article 10 EC, paragraph 19, p. 374).

32 — See, to this effect, A.L. Bogg, 'The right to paid annual leave in the Court of Justice: the eclipse of functionalism', *European Law Review*, Volume 31 (2006), No 6, p. 897, who takes the view that national legislation cannot go as far as to deny the existence of the right to a minimum period of paid annual leave.

33 — *BECTU*, cited in footnote 7, paragraph 48.

thereof subject to requirements which are difficult to fulfil. I take the view that this entitlement can be likewise undermined if a Member State is permitted to lay down the preconditions for the loss of an entitlement since both cases concern the very existence of this right.

47. The same danger exists with regard to the right to paid annual leave if a Member State is granted the power to lay down the circumstances under which a worker loses this right on the expiry of a particular period. This case relates not to a decision on the way in which paid annual leave is implemented, [34] that is to say, the specific transposition of that right, but to the definition of the scope of a provision of Community law, namely Article 7(1) of Directive 2003/88.

48. To interpret this provision as meaning that annual leave is lost on the expiry of a particular period even though workers have been unable to take it because they were rendered incapable of work through illness would be tantamount to excluding certain workers from this entitlement by restricting its protective scope *ratione personae*. [35]

49. However, as a consequence of the harmonisation in this field of social employment law, which is sought under Article 137(2)(b) EC as the legal basis for Directive 2003/88, the Community now has the competence to define the scope of this entitlement. [36] If that competence were available to the Member States, it would be impossible in practice to ensure a comparable level of protection across the Community and thus guarantee the objective of harmonisation. For this reason, it is necessary to reject the German Government's argument that the loss of the entitlement to leave features among the details relating to the granting of leave and is subject to the regulatory power of the Member States.

(b) The level of protection guaranteed by Community law

50. I also consider it important to recall that the freedom of Member States in laying down national implementing measures is restricted

34 — In *BECTU*, cited in footnote 7, paragraph 61, the Court ruled that Directive 93/104 did not prevent the Member States from 'organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment'.

35 — However, this is precisely what the Member States are not permitted to do (see *BECTU*, cited in footnote 7, paragraph 52). Accordingly, Member States are precluded from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

36 — Article 137 EC is the most important basis for adopting directives in the chapter concerning social policy. It requires a certain objective in harmonisation, as is clear from the linking of paragraph 2 to paragraph 1. Accordingly, harmonisation must be effected in order to promote the supporting and supplementing function of the Community's activities in the areas referred to in paragraph 1(a) to (i). According to paragraph 1(a), this includes protection of workers' health and safety. Until recently the basis was Article 118 of the EC Treaty, which also had a primarily social policy orientation and consequently differed from the other provision defining competence in Article 100a of the EC Treaty (Article 95 EC) with its internal market function (see S. Krebber, loc. cit., footnote 24, Article 137 EC, paragraph 18, p. 1373).

by the fact that Article 137(2)(b) EC seeks, by adopting minimum requirements, to guarantee a certain level of protection established by Community law below which the Member States must not fall. As the Court stated in its judgment in *United Kingdom* v *Council* [37] in relation to the concept of 'minimum requirements' within the meaning of the previous legal basis in Article 118a of the EC Treaty, that provision does not limit Community action to the lowest common denominator, that is to say, the lowest level of protection established in a Member State. This concept must instead be construed as meaning that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.

51. This interpretation is confirmed by the wording of Article 136 EC, which lays down 'improved living and working conditions' as an objective of social policy. This objective is expressly to be attained through harmonisation 'while the improvement is being maintained'. [38] In order to attain this objective of primary law, Article 15 of Directive 2003/88 authorises Member States to apply, or facilitate the application of, measures which are more favourable to the protection of the health and safety of workers. Similarly, Article 23 of Directive 2003/88 states in respect of the level of protection for workers that, whilst Member States may provide for different measures in the field of working time, subject to compliance with the minimum requirements it lays down, implementation of the directive does not constitute a valid ground for reducing the general level of protection afforded to workers. [39]

52. The minimum level of protection which the Community legislature has laid down in respect of the right to leave can be ascertained from reading Directive 2003/88. In this regard, it should be noted that Article 7(1) of Directive 2003/88 contains no restriction on the entitlement to leave. The directive makes no provision for the condition that the worker must request and actually take leave in due time by a particular date, that is to say, by the end of the leave year or of the carry-over period, or for loss of the entitlement. Moreover, Article 7(1) is not one of the provisions from which Article 17 of Directive 2003/88 expressly allows derogations. [40]

37 — Case C-84/94 [1996] ECR I-5755, paragraph 56.

38 — W. Balze, loc. cit., footnote 15, p. 38, 1998 Supplement, paragraph 3.

39 — *United Kingdom* v *Council*, cited in footnote 37, paragraph 42. W. Balze, 'Arbeitszeit, Urlaub und Teilzeitarbeit', *Europäisches Arbeits- und Sozialrecht*, 79, Supplement (October 2002), B 3100, paragraph 6, p. 9, construes the rules contained in the working time directive as minimum provisions in accordance with the rationale underlying Article 137 EC and therefore the Member States may introduce or maintain more stringent rules on working time. However, under Article 14 of Directive 2003/88 specific Community provisions take precedence over the provisions of the directive, irrespective of whether or not the level of protection afforded by them falls below that afforded by the working time directive.

40 — See *Robinson-Steele and Others*, cited in footnote 28, paragraph 62, and *BECTU*, cited in footnote 7, paragraph 41. To this effect, see also W. Balze, 'Die Richtlinie über die Arbeitszeitgestaltung', *Europäische Zeitschrift für Wirtschaftsrecht*, No 7 (1994), p. 207, who sees no substantive power to derogate from these rules.

53. The Community legislature thus consciously seeks to establish a higher minimum standard than ILO Convention No 132. [41] Whilst Article 9 of ILO Convention No 132 lays down a time-limit of one year or 18 months from the end of the year in respect of which the holiday entitlement has arisen, [42] a similar rule is completely absent from Article 7(1) of Directive 2003/88. This leads to the conclusion that the protection which Community law seeks to guarantee for workers is more extensive than the level of protection afforded by the employment law rules contained in the law of international agreements. [43]

54. Consequently, an interpretation of Article 7(1) of Directive 2003/88 as meaning that the entitlement to paid annual leave is lost after a particular period if it is not taken in due time neither is compatible with the Community legislature's objective of guaranteeing a higher level of protection than ILO Convention No 132 nor has any basis in the wording of that provision.

(c) Linking the entitlement to leave to capacity for work

(i) Applicability of the principles developed in case-law

55. Contrary to the view of the United Kingdom and Netherlands Governments,

41 — It must be remembered in this respect that, according to recital 6 in the preamble to Directive 2003/88, account should be taken of the principles of the ILO with regard to the organisation of working time. This is also pointed out by Advocate General Kokott in footnote 8 of her Opinion in *Federatie Nederlandse Vakbeweging*, cited in footnote 25. An interpretation of Directive 2003/88 which takes account of the essential principles laid down in ILO Convention No 132 would appear to me essential in view of the fact that the law of the ILO has set the relevant international standards in the field of employment law. Viewed broadly, there is a large degree of convergence between the two legal instruments. However, on closer inspection it is evident that some of the rules contained in Directive 2003/88 go beyond the provisions of ILO Convention No 132. For this reason it can rightly be said of Directive 2003/88 that it constitutes a further development of this convention which is specific to the Community (see J. Murray, *Transnational Labour Regulation: The ILO and EC Compared*, The Hague, 2001, p. 185).

42 — Article 9 of ILO Convention No 132 is a particular provision on the right to leave which refers to the possibility of dividing paid annual leave into parts provided for in Article 8. Such division of annual leave into parts may be authorised by the competent authority, but a worker is entitled to at least two uninterrupted working weeks, unless the employer and the employed person have agreed otherwise. Article 9 provides that this uninterrupted part of the annual holiday with pay is to be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than 18 months, from the end of the year in respect of which the holiday entitlement has arisen. Any part which exceeds a stated minimum may be postponed, with the consent of the employed person concerned, beyond these specific periods and up to a further specified time-limit. The time-limit is to be determined after consultation with the organisations of employers and workers concerned at national level (see, to this effect, S. Böhmert, *Das Recht der ILO und sein Einfluss auf das deutsche Arbeitsrecht im Zeichen der europäischen Integration*, Baden-Baden, 2002, p. 128).

43 — Nor do the rules on time-limits contained in Article 9 of ILO Convention No 132 contain anything which could indicate a loss of rights on the part of the worker since those rules themselves lay down no legal consequences in the event that leave is not taken or granted before the end of the period concerned. Rather, it is clear from Article 12 of that convention that the entitlement to a minimum period of paid annual leave is not available to a worker to do with as he wishes and therefore any agreement to relinquish the entitlement to leave or to not take such leave is, depending on the situation in the country concerned, to be regarded as null and void or to be prohibited. I. García Perrote Escartín, loc. cit., footnote 22, p. 3602, also takes the view that a rule under which entitlement to a minimum period of paid leave is lost has no legal basis in either ILO Convention No 132 or Directive 2003/88. Rather, it is clear from Article 12 of ILO Convention No 132 that this entitlement is inalienable.

there is also no evidence that Article 7(1) of Directive 2003/88 links the entitlement to a minimum period of paid leave with the worker's capacity for work in the leave year or the carry-over period. It is true that in principle it is possible to object that a worker who has been absent on sick leave and not working does not require corresponding rest. However, as the Commission correctly points out, this approach is not compatible with that of the Court as expressed in its judgments in *Merino Gómez* [44] and *Federatie Nederlandse Vakbeweging*. [45]

56. In *Merino Gómez*, the Court considered the relationship under Community law between annual leave and maternity leave. The case specifically concerned the question whether under Article 7(1) of Directive 2003/88, Article 11(2)(a) of Directive 92/85/EEC [46] and Article 5(1) of Directive 76/207/EEC [47] a worker has, in cases where collective agreements between an employer and workers' representatives fix the timing of leave for the entire workforce, and where the dates concerned coincide with those of maternity leave, an entitlement to take annual leave during a period other than the period agreed, which does not coincide with her period of maternity leave. In this respect, the Court found that the purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth. [48] The Court therefore ruled that a worker must be able to take her annual leave during a period other than the period of her maternity leave. [49]

57. The Court upheld this principle in *Federatie Nederlandse Vakbeweging* and clarified it as meaning that in the event of the aggregation of several periods of leave guaranteed by Community law at the end of a year, the carrying-forward of annual leave or part thereof to the following year may be inevitable [50] because a period of leave guaranteed by Community law may not affect the right to take another period of leave guaranteed by that law. [51]

44 — Cited in footnote 25.

45 — Cited in footnote 25.

46 — Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

47 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

48 — *Merino Gómez*, cited in footnote 25, paragraph 32; Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 41; Case C-136/95 *Thibaut* [1998] ECR I-2011, paragraph 25; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 20; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 21; and Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25.

49 — *Merino Gómez*, cited in footnote 25, paragraph 38.

50 — *Federatie Nederlandse Vakbeweging*, cited in footnote 25, paragraph 24, and Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraph 33.

51 — *Federatie Nederlandse Vakbeweging*, cited in footnote 25, paragraph 24; *Commission* v *Luxembourg*, cited in footnote 50, paragraph 33; and *Merino Gómez*, cited in footnote 25, paragraph 41.

58. Although pregnancy certainly cannot be equated with a pathological condition, several grounds can be adduced for applying this case-law mutatis mutandis to the relationship between annual leave and sick leave. Like maternity leave, sick leave is intended to safeguard the physical and psychological integrity of the worker by giving him or her an opportunity, through exemption from work and the grant of a period of rest, to recover physically and reintegrate into the workplace. Unlike annual leave, which serves to provide rest, time to recover, and recuperation, sick leave is therefore intended solely to provide convalescence and healing, that is to say, to cure a pathological condition the causes of which, moreover, lie outside the sphere of influence of the worker concerned. [52]

59. In this respect, it is necessary to concur with the view taken by the Italian Government and state that, having regard to the principles developed by the Court, it is not possible to conclude that the entitlement of the appellant in the main proceedings to the actual grant of leave is lost if the different purposes of recuperative leave and sick leave are not brought into question. On the basis of the principle underpinning the abovementioned case-law, the grant of sick leave to the detriment of paid annual leave must be prohibited since otherwise this fundamental right could be deprived of its substance.

(ii) Failure to comply with the spirit and purpose of Article 7(1) of Directive 2003/88

— Danger of an interpretation contrary to the intended purpose

60. In addition to the doubts expressed concerning an interpretation of Article 7(1) of Directive 2003/88 which grants a worker an opportunity to take his annual leave while on sick leave, it can further be argued that such an interpretation would be incompatible with the purpose of Directive 2003/88 to improve workers' health and safety.

61. The original spirit and purpose of the employment law prohibition on accumulating days of untaken leave, as previously provided for by certain national legal systems, including the German legal system, appears to consist in ensuring that leave is actually taken within the

52 — S. González Ortega, loc. cit., footnote 23, p. 432, states that the first stage of maternity leave is intended to allow the mother to recover physically and to protect her biological condition following the birth. It therefore serves a different purpose from the second stage of this leave, which is to allow the mother to care for her child and to promote the relationship which exists between a mother and her child. The author draws parallels between this first stage of maternity leave and sick leave and therefore advocates the application mutatis mutandis of case-law on the relationship between maternity and annual leave to the relationship between sick leave and annual leave.

current year by placing on the worker himself responsibility for exercising his entitlement to leave in a particular case. Under this approach, it would clearly appear logical to make the worker bear the consequences of his inaction or late exercise through forfeiture of that right. [53]

62. However, it should be borne in mind that the original purpose of social protection for workers, which lies behind this rule and as such is identical to that of Directive 2003/88, is transformed into its opposite if an employee is unable to exercise his entitlement to annual leave for reasons beyond his control. Circumstances beyond an employee's control include the possibility of intentional failure to comply on the part of the employer in respect of which such a rule provides for additional benefit. However, they also include natural unforeseen circumstances which lie outside the sphere of influence of the person concerned, such as illness.

63. In both cases, the loss of the entitlement to leave not only results in a failure to attain the objective sought but also has the effect of penalising the worker in a manner which cannot be objectively justified. Such a legal consequence is clearly incompatible with the spirit and purpose of Directive 2003/88. Accordingly, Article 7(1) of Directive 2003/88 cannot be interpreted as meaning that a worker's incapacity for work due to illness can lead to a loss of the entitlement to a minimum period of annual leave which is guaranteed as a fundamental right.

— Interpretation guided by the interests of the parties to the employment contract

64. Contrary to the submission of the respondent in the main proceedings, an interpretation of Article 7(1) of Directive 2003/88

53 — R. Glaser and H. Lüders, '§ 7 BUrlG auf dem Prüfstand des EuGH — Anmerkungen zum Vorlagebeschluss des LAG Düsseldorf', *Betriebs-Berater*, 61st year (2006), Issue 49, p. 2692, take the view that precisely the imminent loss of an entitlement to leave ensures that leave is actually taken in due time. I. García Perrote Escartín, loc. cit., footnote 22, p. 3593, at p. 3600, points out that this prohibition on accumulating leave is intended to enable the worker actually to enjoy annual leave. Under this approach, the worker bears the 'burden' of defending consistently his right to leave. However, the author does draw attention to the fact that this prohibition brings with it significant disadvantages. It can have a 'boomerang effect', not unfamiliar to specialists in employment law, in so far as it is entirely possible for the worker ultimately to lose his right to leave entirely, thereby encouraging a possible breach of the law by the employer. The author takes the view that such a rule provides reasons to infringe the law and an opportunity for unjustified enrichment on the part of the employer. The employer can sit back and watch the employee lose his annual leave without being required to provide financial compensation. This means that it is not the person responsible for the infringement of the law (the employer) but the person who is unable to exercise his right (the employee) who is penalised.

which takes account of the employer's interests and at the same time restricts the fundamental right to a minimum period of annual leave to a lesser extent than the German rule at issue is indeed possible. As the Commission rightly submits, it would appear appropriate for a Member State to lay down conditions to ensure that, in the interests of health and safety, entitlements to leave, for example, are carried over only where it appears necessary to do so. It would also be feasible to create incentives to encourage workers to take their annual leave within a reasonable period in the following year.

65. Responsibility for the specific implementation of these measures at the level of an individual undertaking lies with the employer who, by virtue of his comprehensive powers of organisation and coordination, [54] is able to make them as far as possible compatible with relevant commercial needs.

54 — The provisions of Community law concerning technical and social employment protection take account of the employer's comprehensive powers of organisation and coordination by imposing on him, for example under Article 5(1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1), the duty to ensure the safety and health of workers in every aspect related to the work. See most recently Case C-127/05 *Commission* v *United Kingdom* [2007] ECR I-4619, paragraphs 40 and 41, in which the Court confirmed the employer's duty to ensure that workers have a safe working environment.

(iii) Comparison with the rules in ILO Convention No 132

66. The fact that according to the unequivocal wording of Article 5(4) of ILO Convention No 132 'absence from work for such reasons beyond the control of the employed person concerned as illness, injury or maternity shall be counted as part of the period of service' also militates against linking the entitlement to leave to the worker's capacity for work. [55] Moreover, Article 6(2) of the Convention specifically stipulates that 'periods of incapacity for work resulting from sickness or injury may not be counted as part of the minimum annual holiday with pay prescribed'.

67. Consequently, these provisions must be construed, in accordance with their objective, as meaning that leave taken previously due to illness may not adversely affect the entitlement to a minimum period of paid annual leave. [56] Although the signatory States, which

55 — The equivalence of illness and motherhood in relation to the legal consequence in Article 5(4) of ILO Convention No 132 also confirms the view, expressed in point 58, that the worker's eligibility for protection is the same in both cases.

56 — See, to this effect, also I. García Perrote Escartín, loc. cit., footnote 22, p. 3584, at p. 3595.

include most of the Member States of the European Union,[57] are to do so '[u]nder conditions to be determined by the competent authority or through the appropriate machinery in each country', the Member States' competence is limited in this case to adopting implementing measures and therefore they would appear to be barred by law from not treating such absences from work as periods of service.

68. Consequently, the rules of ILO Convention No 132 and of Directive 2003/88 are essentially the same in terms of their basic legal content.[58] Accordingly, the Member States are required to interpret these rules and organise their national legal systems in such a way that absence from work due to illness does not prejudice the right to a minimum period of paid annual leave.

B — *The second question*

69. The second question referred concerns the legislative scope of the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88. An allowance in lieu, that is to say, payment for untaken annual leave, replaces time off work where leave can no longer be granted on the ground that the employment relationship concerned has been terminated. This entitlement constitutes the only derogation from the fundamental prohibition of compensation laid down by the directive which otherwise categorically prohibits the parties to an employment contract from replacing annual leave by an allowance in lieu, irrespective of whether it is to be taken in the current year or in the carry-over period.

70. According to the Court's case-law, that prohibition is intended to ensure that a

57 — All Member States of the European Union are members of the ILO. Although the European Community is not a member, the two organisations have, according to a previous exchange of letters between the European Commission and the Director-General of the ILO on 14 May 2001, a shared commitment to social and economic progress, to improving living and working conditions, and to promoting employment (OJ 2001 C 165, p. 23). Since the first agreement between the ILO and the European Community in 1958, the two organisations have progressively developed their co-operation to further these aims. At institutional level the European Commission has observer status. It participates in the coordination of the position of the Member States of the European Community within the ILO in order to ensure consistency between the ILO rules and the legal provisions of the Community and thereby to facilitate ratification of the ILO rules. To date ILO Convention No 132 has been ratified by Belgium (2 June 2003), the Czech Republic (23 August 1996), Finland (15 January 1990), Germany (1 October 1975), Hungary (19 August 1998), Ireland (20 June 1974), Italy (28 July 1981), Latvia (10 June 1994), Luxembourg (1 October 1979), Malta (9 June 1988), Portugal (17 March 1981), Slovenia (29 May 1992), Spain (30 June 1972) and Sweden (7 June 1978). Other Member States such as Bulgaria (29 December 1949), Denmark (22 June 1939), France (23 August 1939), Greece (13 June 1952) and Slovakia (1 January 1993) are for the time being signatory States to the earlier ILO Convention No 52. It should further be recalled that quite often the ILO conventions also have practical effect inasmuch as they influence the development of the legal systems of a large number of States by serving as a model even where they have not been formally ratified (see, to this effect, J.-M. Verdier, 'L'apport des normes de l'OIT au droit français du travail', *Revue internationale du Travail*, Volume 132, 1993, No 5-6, p. 474, at p. 478; H. Kohl, 'Pas de paix possible sans une politique sociale internationale', *Regards sur l'avenir de la justice sociale — Mélanges à l'occasion du 75e anniversaire de l'OIT*, Geneva, 1994, p. 177).

58 — Consequently, there is no need to examine the extent to which the Member States are bound by substantively different obligations stemming from ILO Convention No 132 and Directive 2003/88. See, to this effect, the comments by Advocate General Tesauro in his Opinion in Case C-345/89 *Stöckel* [1991] ECR I-4047, point 11.

worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety. [59] This is intended to prevent the abusive 'redemption' of the right to leave by the employer or the waiver thereof by the employee for purely financial reasons. [60]

71. Article 7(2) of Directive 2003/88 underlines the function of maintaining pay during a period of leave, which consists in putting the worker, during that period, in a position which is, as regards remuneration, comparable to periods of work. [61] In other words, the requirement to make this payment for leave ensures that the worker is financially capable of actually taking his annual leave. [62] The allowance in lieu has no other purpose. The allowance in lieu is intended, in principle, to enable a worker, even following termination of the employment relationship, to take a period of paid rest before embarking on a new employment relationship. [63] The withdrawal of this allowance would thus mean that the objective, pursued by Directive 2003/88, of allowing employees to recover could not be attained.

72. In *Robinson-Steele and Others*, [64] the Court ruled that Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. In my view, precisely this identical function of the entitlement to pay and of an allowance in lieu militates in favour of treating the latter as an inseparable aspect of the entitlement to a minimum period of paid annual leave.

73. In that respect, the answer to the second question follows from the answer to the first question. If the automatic loss of the entitlement to paid annual leave at the end of a particular period is, as I stated above, contrary to the objective of Directive 2003/88, then the same must apply to the entitlement to an allowance in lieu linked to the entitlement to leave as a secondary entitlement.

74. On the other hand, it is not possible to accept the argument, put forward by the respondent in the main proceedings, that the prospect of having to pay an allowance in lieu

59 — *BECTU*, cited in footnote 7, paragraph 44; *Merino Gómez*, cited in footnote 25, paragraph 30; and *Robinson-Steele and Others*, cited in footnote 28, paragraph 60.

60 — In *Federatie Nederlandse Vakbeweging*, cited in footnote 25, paragraph 32, the Court ruled that the possibility of financial compensation in respect of the minimum period of annual leave would create an incentive, incompatible with the objectives of the directive, not to take leave or to encourage employees not to do so. M. Fenski, 'Urlaubsrecht im Umbruch?', *Der Betrieb*, Issue 12 (2007), p. 688, and K. Jacobsen, *Münchener Anwaltshandbuch Arbeitsrecht* (edited by Wilhelm Moll), 1st edition 2005, § 25, paragraph 102, refer to the unlawful practice of 'redeeming' leave during an existing employment relationship.

61 — *Robinson-Steele and Others*, cited in footnote 28, paragraph 58.

62 — A.L. Bogg, loc. cit., footnote 32, p. 899.

63 — See also, to this effect, Advocate General Tizzano's Opinion in *BECTU*, cited in footnote 7, point 38.

64 — Cited in footnote 28, paragraph 58.

of considerable entitlements to leave which may have been accumulated over several years could tempt employers to make workers on long-term sick leave redundant earlier. To this argument it may be objected that it is precisely the absence of a requirement on the employer to make a payment in lieu of untaken leave that might encourage him to dismiss workers before granting them annual leave since otherwise he would be required under Article 7(1) of Directive 2003/88 to fulfil the workers' entitlement to a minimum period of annual leave. If the abusive use of the right to terminate an employment contract with a view to circumventing this fundamental right guaranteed by Community law is to be avoided, at the end of the employment relationship a worker must have, in any event, a claim to financial compensation in respect of leave accrued but not taken.

75. Nor does a comparative study of the relevant provisions of ILO Convention No 132 lead to any different conclusion. Article 11 of the Convention lays down a worker's entitlement in principle to a holiday with pay proportionate to the length of service for which he has not received such a holiday. Since in this case too the entitlement to an allowance in lieu is linked to the entitlement to a minimum period of paid annual leave as a primary entitlement, it is necessary to refer to Article 5(4) of the Convention, under which absence from work for such reasons beyond the control of the employed person concerned as illness, injury or maternity is to be counted as part of the period of service. [65] Consequently, incapacity for work due to illness cannot have an adverse effect on the entitlement to an allowance in lieu.

76. In the light of the foregoing, Article 7(2) of Directive 2003/88 must be understood as meaning that at the end of the employment relationship workers have, in any event, a claim to financial compensation in respect of leave accrued but not taken.

C — *The third question*

77. As has already been established, it follows both from a teleological interpretation of Article 7 of Directive 2003/88 [66] and from the rationale underlying Article 5(4) of ILO Convention No 132 [67] that a period of illness must be equated with a period of service since the absence is due to reasons beyond the control of the worker and is therefore justified.

78. Therefore, all of the worker's entitlements arise during the same period, including the entitlement to paid annual leave, which can be

65 — See point 66.

66 — See points 55 to 65.

67 — See points 66 to 68.

taken when capacity for work is restored or which — if the employment relationship is terminated — is replaced by a payment in lieu even where complete incapacity for work has occurred.

79. In principle, the acquisition of an entitlement to annual leave or to an allowance in lieu is not linked to the condition that effective work has been performed beforehand and therefore a worker has these entitlements even if he is absent for health reasons during the entire leave year.

80. As regards the broader subsidiary question whether these entitlements arise also in the case of unexcused absence during the entire leave year, I wish to point out that, according to settled case-law, the preliminary ruling procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. [68]

81. In the context of that cooperation, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [69]

82. However, the Court has also held that in exceptional circumstances it can examine the conditions in which the case was referred to it by the national court in order to assess whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [70]

83. The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. [71]

68 — See, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20.

69 — *Schneider*, cited in footnote 68, paragraph 21 and the case-law cited therein.

70 — See, inter alia, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29; Case C-314/96 *Djabali* [1998] ECR I-1149, paragraph 19; and *Schneider*, cited in footnote 68, paragraph 22. See most recently the Opinion of Advocate General Tizzano in Case C-165/03 *Längst* [2005] ECR I-5637, point 45, and the judgment in the same case, paragraphs 30 to 35.

71 — *Schneider*, cited in footnote 68, paragraph 23.

84. It appears from the order for reference that the appellant in the main proceedings was on medical sick leave continuously from 8 September 2004 until 30 September 2005, that is to say, until the time at which the employment relationship was terminated. Consequently, his absence was unambiguously excused and the Court is therefore not required to take a position on the subsidiary question whether entitlement to annual leave or an allowance in lieu arises also in the case of unexcused absence as this is not material to the resolution of the dispute in the main proceedings.

VII — Conclusion

85. In view of all the foregoing considerations, I propose that the Court reply as follows to the questions submitted to it by the Landesarbeitsgericht Düsseldorf for a preliminary ruling:

(1) Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time is to be understood as meaning that workers must in any event receive minimum paid annual leave of four weeks. In particular, leave not taken by a worker because of illness during the leave year must be granted at a later date.

(2) Article 7(2) of Directive 2003/88/EC is to be understood as meaning that at the end of the employment relationship workers have, in any event, a claim to financial compensation in respect of leave accrued but not taken (an allowance in lieu of leave).

(3) Article 7 of Directive 2003/88/EC is to be understood as meaning that the entitlement to annual leave or to an allowance in lieu arises also in the case of excused absence (by reason of illness) during the entire leave year.