OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 16 December 1999 *

Subject of the questions referred for a preliminary ruling

1. The Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Valencia Autonomous Community) has referred several questions to the Court for a preliminary ruling on the interpretation of Council Directive 93/104/EC of 23 November 1993, concerning certain aspects of the organisation of working time [1] (hereinafter 'Directive 93/104' or 'the Directive').

The questions from the national court are concerned with the work of medical practitioners in the Equipos de Atención Primaria (Primary Care Teams – hereinafter 'EAPs'). The national court wishes to know in particular whether time spent on call, either at medical centres or under the contact system, should be regarded as 'working time' within the meaning of the Directive and therefore whether that time should be included in the calculation of working hours for the application of the provision which sets the maximum weekly working time at 48 hours (Article 6 of the Directive) and whether, to raise that maximum, the consent of trade-union representatives in a collective or other agreement can override the prohibition contained in the first indent of Article 18(1)(b) of the Directive whereby an employer may not ask a worker to work for more than 48 hours per week without obtaining his 'agreement'.

Legal background

Community law

2. Article 118a of the EC Treaty gives the Council the power to establish, by means of a directive, the minimum requirements to 'encourage improvements especially in the working environment, to protect the health and safety of workers' (paragraphs 1 and 2).

3. The basic directive is Council Directive 89/391/EEC of 12 June 1989, which concerns the introduction of measures to encourage improvements in the safety and

* Original language: Italian.

1 — OJ 1993 L 307, p. 18.

health of workers at work [2] (hereinafter 'the basic directive') and defines the general principles for the safety and health of workers, which have been developed in a series of specific directives, including Directive 93/104.

4. That directive lays down, as stated in Article 1(1), 'minimum safety and health requirements for the organisation of working time'.

5. In addition, it states that, within the meaning of the directive, 'working time' is to mean 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties in accordance with national laws and/or practice', and 'rest period' is to mean 'any period which is not working time'.

6. The directive then lays down a series of rules concerning maximum weekly working time (Article 6), minimum daily rest periods (Article 3), weekly rest periods (Article 5) and annual leave (Article 7) and the length and conditions of night work (Articles 8, 9, 10, 11 and 12).

With regard to maximum weekly working time, in particular, Article 6 provides that 'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers ..., the average working time for each seven-day period, including overtime, does not exceed 48 hours' (Article 6(2)).

7. Article 16 lays down the reference periods which must be taken into consideration for the application of the aforementioned provisions and states that, for application of Article 6, the 'reference period' should not 'exceed four months'.

8. The directive also provides that the national authorities may derogate from the provisions on working time. In particular, Article 17 gives Member States the power to derogate (by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry) from Articles 3, 4, 5, 8 and 16 of the directive 'in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms'; and also 'for activities involving the need for continuity of service or production, particularly: i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons.' In addition, Article 18 provides

2 — OJ 1989 L 183, p. 1.

that each Member State shall have the option not to require compliance with the maximum of 48 hours per week, provided that it makes that derogation subject to specific conditions, including an obligation on the employer to ask for and obtain the worker's agreement (Article 17(1)(b)(i), first indent).

9. Article 18 provides that Member States must implement the Directive by 23 November 1996. That provision also states that, by then at the latest, 'the two sides of industry [shall] establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this directive are fulfilled.'

National law

10. Article 6 of Royal Decree No 137/84 of 11 January 1984[3] provides as follows under the heading 'Working time': 'The working time of staff forming part of primary care teams shall be 40 hours a week, without prejudice to work which they may be required to undertake as a result of being on call, such staff being obliged to respond to requests for home visits and urgent requests, in accordance with the provisions of the statutory staff regulations applicable to medical and auxiliary health staff employed by the social security authorities and the rules for the implementation thereof ...'

11. The Resolution of 15 January 1993[4] contains the decision of the Council of Ministers approving the agreement reached on 3 July 1992 between the State Health Administration and the main trade union organisations in the primary care sector in Spain. The annex to that decision states, under B, entitled 'Duty on call': 'In general, the maximum number of hours of duty on call shall be 425 per year. In the case of primary care teams in rural districts, which are inevitably on call in excess of the limit of 425 hours per year laid down as a general rule, the maximum shall be 850 hours per year, the aim being progressively to reduce the number of hours of duty on call ...'

12. On 7 May 1993 the administration of the Región Autónoma de Valencia also reached an agreement with the trades unions,[5] which, among other things, fixed

3 — BOE of 1 February 1984, No 27.

4 — BOE of 2 February 1993, No 28.

5 — That agreement was reached in accordance with Law No 7/90 of 19 July 1990, relating to collective agreements and participation in determining the working conditions of public service employees (BOE of 20 July 1990).

the maximum number of working hours based on the model established in the general agreement of 1992. [6]

Facts of the case and the questions referred for a preliminary ruling

13. The Sindicato de Médicos de Asistencia Pública de la Comunidad Valenciana (Union of Doctors in the Public Health Service, hereinafter 'Simap') brought a collective action against the administration of the Generalidad Valenciana — Conselleria de Sanidad y Consumo (Ministry of Health of the Valencia Region) on behalf of all the medical staff (general practitioners and doctors specialising in family medicine and paediatrics) assigned to EAPs in the Centros de Salud (Health Centres) in the Valencia Community. In that action Simap, relying on the provisions of the directive, sought a declaration that those medical practitioners' working time should not exceed 40 hours, or, in the alternative, 48 hours including overtime, in each seven-day period, in addition to their being accorded the status of night workers (with consequent application of the provisions of the directive) and of shift workers, and that the length of their night work should not exceed 8 hours in any 24-hour period or, where that limit is exceeded, equivalent compensatory rest periods should be granted.

14. According to the order for reference, Simap claims essentially that, under Article 17(3) of the regulation governing the organisation and operation of the EAPs of the Valencia Autonomous Community (that regulation was repealed following judgment No 1323/93 of the Tribunal Superior de Justicia de la Comunidad Valenciana), which reproduced Article 6 of the aforementioned Royal Decree No 137/84, practitioners working in the EAPs were forced to work an indefinite number of hours with no daily, weekly, monthly or annual maximum, so that the ordinary working day ran into the on-call shift, which in turn ran into the following working day.

15. The national court also states that, according to national practice in interpreting the staff regulations (constituting public law) applicable to the aforementioned doctors, time spent on call at medical establishments or on standby under the contact system does not constitute ordinary working hours or overtime, but has a special status. The latter type of work, under the Spanish regulations, is remunerated on a flat-rate basis, irrespective of the

6 — Following that agreement, two joint directions were adopted on 12 May and 8 July 1993 by the administration of the Región Autónoma de Valencia, giving effect to certain provisions of the agreement concerning various aspects of on-call duty. On 25 March 1998 the Dirección General de Atención Primaria y Farmacia de la Conselleria de Sanidad de la Generalidad Valenciana adopted new directions supplementing those of 8 July 1993, on various aspects of on-call duty. They state that on-call duty does not give rise to a rest period the following day and thus to a reduction of the ordinary working period; 'none the less, a practitioner who has been on call may request, by complete monthly periods, that the morning working period following the on-call duty be exchanged for an afternoon period, to be authorised by the EAP co-ordinator following approval by the area manager, provided that in his view the requirements for the provision of the EAP's services are fulfilled.'

amount of work done, and this means that, for that category of practitioners, only the hours of actual attendance, during periods when they are on call or must be contactable, are counted as working time.

16. Finally, according to the national court, the directive has not been transposed or at least not in full. Royal Decree No 1561 of 21 September 1995,[7] concerning the duration of special work, is in fact restricted to employment relationships under private law and does not contain any provisions relating to the health sector.

17. Having regard to those legal and factual premises, the national court seeks a preliminary ruling from the Court in order to ascertain whether the directive applies to medical practitioners who work in EAPs and, if so, how a number of its provisions are to be interpreted. The following questions are asked:

'1. Questions on the general application of the Directive:

(a) In view of Article 118a of the EC Treaty and the reference in Article 1(3) of the Directive to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, which states that it is not applicable "where characteristics peculiar to certain specific public service activities ... inevitably conflict with it", must it be understood that the work of the doctors in the Equipos de Atención Primaria (Primary Health Care Teams) affected by the dispute is covered by the exception referred to?

(b) Article 1(3) of the Directive also refers to Article 17, using the phrase "without prejudice". Despite the fact that, as stated above, no harmonising legislation has been adopted by the State or the Autonomous Regions, must this silence be taken as a derogation from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined?

(c) Does the exemption, in Article 1(3) *in fine* of the Directive, in respect of "the activities of doctors in training" lead, rather, to the conclusion that the activities of other doctors are in fact covered by the Directive?

7 — BOE of 25 and 26 September 1995 (No 229 and 230).

(d) Does the reference to the fact that the provisions of Directive 89/391/EEC are "fully" applicable to the matters referred to in paragraph 2 have any particular implications with regard to reliance being placed upon it and its application?

2. Questions on working time

(a) Article 2(1) of the Directive defines working time as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice". In view of the national practice referred to above at paragraph 8 of this order and in view of the absence of harmonising legislation, must the national practice of excluding from the 40 hours per week the time spent on call continue to be applied, or must the general and specific provisions of Spanish legislation on working time relating to private law employment relationships be applied by analogy?

(b) Where the doctors concerned are on call without having to be present at the Centre, must the whole of that time be regarded as working time or only such time as is actually spent in carrying out the activity for which they are called out, as is the national practice referred to at paragraph 8 of the facts (in the order for reference)?

(c) Where the doctors concerned are on call at the Centre, must the whole of that time be regarded as ordinary working time or unsocial hours, according to the national practice referred to at paragraph 8 of the facts?

3. Average working time

(a) Must the working time spent on call be included when determining the average working time for each seven-day period, pursuant to Article 6(2) of the Directive?

(b) Must the time spent on call be regarded as overtime?

(c) Despite the absence of harmonising legislation, can the reference period mentioned in Article 16(2) of the Directive be understood to be applicable, including, if so, the derogations therefrom laid down in Article 17(2) and (3) in conjunction with paragraph (4)?

(d) If, as a result of the option provided for in Article 18(1)(b), Article 6 of the Directive is not applied, and despite the absence of harmonising legislation, may Article 6 be considered inapplicable on the ground that the worker's agreement to perform such work has been obtained? Is the agreement of the two sides of industry as expressed in a collective agreement or agreement between them tantamount to the worker's agreement in this respect?

4. Night work

(a) In view of the fact that normal working time is not at night, since only part of the time to be spent periodically on call by some of the doctors concerned is at night, and in the absence of harmonising legislation, are those doctors to be regarded as night workers pursuant to Article 2(4)(b) of the Directive?

(b) For the purposes of the option provided for in Article 2(4)(b)(i) of the Directive, could national legislation on night work by workers subject to private law be applied to the doctors concerned whose employment relationship is governed by public law?

(c) Do the "normal" hours of work referred to in Article 8(1) of the Directive also include time on call, whether or not their physical presence is required?

5. Shift work and shift workers

In view of the fact that the working time at issue is shift work only in relation to time on call, and in the absence of harmonising legislation, can the work of the doctors concerned be regarded as shift work and must they be regarded as shift workers in accordance with the definition contained in Article 2(5) and (6) of the Directive?'

Admissibility

18. The Commission disputes, as a preliminary issue, the admissibility of the reference for a preliminary ruling on two grounds. First, it states that the order from the national court does not describe the factual and legislative background to the main proceedings, and second, that Simap's application and the order for reference refer not to the relevant national legislation currently in force but to the repealed legislation (and, it must be emphasised, it was repealed fully five years before the action was brought). On this point the Commission observes that, while the national court mentions that fact in the order for reference, it only refers to the agreement reached on 7 May 1993 between the unions and the administration and the directions of the administration of the Community of Valencia which implemented it, but does not refer to that legislation specifically in the questions, merely emphasising the absence of national rules applicable to this case.

19. Both those objections of inadmissibility are without foundation. Concerning the first, I consider that the national court described the context of fact and law affecting the questions submitted sufficiently clearly and that therefore the order contains all the information needed to allow the Court to give a ruling on the questions contained therein.

Concerning the second aspect, it should be borne in mind that the national court states, in paragraph four of the order for reference, that the questions substantially refer to application of the national system which distinguishes the weekly working time (equal to 40 hours) from on-call duty and that the system described here is as laid down by the local agreement of 7 May 1993, which is still in force. The national court also mentions the national practice relating to the interpretation and application of the statutory staff regulations which govern relations between the medical practitioners involved and the administration, a practice which has not yet been changed. The fact that in the action by Simap (that is in submissions in the main proceedings) only the repealed legislation is referred to [8] cannot mean that the reference is inadmissible: according to settled case-law, 'Article 177 of the Treaty establishes a procedure of direct cooperation between the Court of Justice and the national courts in the course of which the parties concerned are merely invited to submit observations within the legal framework set out by the court making the reference', with the consequence that 'within the limits established by Article 177 of the Treaty it is ... for the national courts alone to decide on

8 — In addition, that fact did not cause the proceedings before the national court to be curtailed.

the principle and purpose of any reference to the Court.' [9]

For those reasons I suggest that the objection of inadmissibility raised by the Commission should be dismissed.

Substance

Scope of Directive 93/104 (Questions 1(a) to 1(d))

20. The national court wonders, and asks the Court, whether the provisions of the Directive are applicable to the 'anti-social hours' of doctors on call.

— Arguments of the parties

21. According to the Consellería de Sanidad de la Generalidad Valenciana (the defendant in the main proceedings), the work of doctors in EAPs is outside the scope of Directive 93/104 (defined by reference to the basic directive), in so far as it falls within the exception provided for in Article 2(2) of the basic directive. They base that assumption on the fact that the work in question displays certain special characteristics, such as the fact that the service must be provided without interruption, and that it is a traditional type of service within the medical profession.

22. The Spanish Government argues, however, that doctors' work does fall within the scope of the basic directive. However, given the specific nature of such work and in particular the fact that its duration is not predetermined, the exceptions permitted by Article 17 of the directive apply (such work is covered by the exception provided for in Article 17, point 2.1(c)(i)). [10]

23. The Finnish Government excludes the possibility of medical practitioners in EAPs being covered by the exclusions from the scope of both Directive 93/103 and the basic directive. As regards the former, that Government considers that the exclusions relating to some sectors, provided for in Article 1(3), are exhaustive, as shown by the fact that only doctors 'in training' are specifically excluded. With regard to the basic directive, the same Government argues that the exclusion provided for in Article 2(2) concerns only certain specific

9 — Order of 29 April 1998 in Case C-116/96 REV *Reiseburo Binder* [1998] ECR I-1889, at paragraphs 7 and 8.

10 — Article 17(2.1)(c)(i) of the 1993 directive provides that derogation is possible 'in the case of activities involving the need for continuity of service or production, particularly: (i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons'.

public service activities, with the aim of preserving public order and public safety. This purpose does not extend — at least not under normal circumstances — to the activity of the category of doctors in question.

24. The Commission also submits that the activity of doctors in EAPs does not fall within the scope of the exclusions laid down in the aforementioned directives. In particular, the fact that staff in the armed forces and police are mentioned in Article 2(2) of the basic directive as an example, in addition to staff employed in specific activities of civil protection, shows that the exclusions apply only to those activities which, by reason of their nature or their objectives, present a risk factor; that explains why they are subject to a specific rules.

— Assessment of the Advocate General

25. In order to establish whether or not the work of doctors in EAPs falls within the scope of the legislation adopted under the Treaty, which is the subject of the question referred to the Court, we must begin by examining the basic directive of 1989. In fact, to indicate its scope, Directive 93/104 merely refers to the basic directive. This means that the scope of both directives is the same, the only difference being that Directive 93/104 provides for a series of exceptions for specific activities, which are not found in the basic directive.

26. The basic directive is very broad in its scope since it applies without distinction to all sectors of activity, both private and public (Article 2(1)). However, the Community legislature stated that some activities can be excluded from it; it is not applicable 'where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it' (Article 2(2)).

27. To answer Question 1(a) we must establish whether or not the medical activity referred to in this case falls within the scope of the exclusions laid down in the basic directive. The reference to the basic directive, by which Directive 93/103 identifies its own scope, must extend to the exclusions concerned in the directive referred to.

I consider first of all that the exclusions indicated above cannot be interpreted extensively, otherwise there would be a risk of compromising the objective which the Community legislature wishes to achieve, in accordance with Article 118a of the EC Treaty, by adopting the regulations for the protection of workers now under discussion. [11] I therefore agree with the Commission's view, namely that only those public service activities can be included in those exclusions which, by virtue of their nature or their objectives, relate to situations where it is impossible to exclude risks to the health and safety of workers, in the sense that the application of the provisions of the directive, which concerns health and safety, would compromise their work. [12] That view is confirmed by Community legislature's choice of the activities which are specifically excluded from the scope of the basic directive. The activities concerned are the responsibility of the armed forces, police and civil protection services and therefore they inherently involve activities in which there is a high degree of risk, relating as they do to human or natural factors which are not foreseeable. It should be added that some activities, such as for example emergency care, if carried out under normal conditions, fall within the scope of the basic directive; however, if they are carried out when exceptional situations arise, such as earthquakes, natural disasters or technological catastrophes, they may form part of civil protection and therefore fall outside the scope of the basic directive. Where that is the case and the provisions of the basic directive are liable to hamper the performance of such activities, the latter can be excluded from its scope.

In view of the foregoing, I would suggest that the answer to Question 1(a) should be that when the doctors in the EAPs carry out their work in normal situations, they are subject to the provisions of the basic directive.

28. I shall now examine the possibility that the activity of doctors in EAPs falls within one of the specific exclusions provided for in Directive 93/104, which, with reference to the organisation of working time, supplement those of a general nature contained in the basic directive which have been examined above (Question 1(c)).

As noted, Article 1(3) of Directive 93/104 excludes a number of sectors of activity: these are air, rail, road, sea, inland waterway and lake transport, fishing, other work at sea and the activities of doctors in

11 — On this point, it will be remembered that in case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 15, the Court stated that the terms used in this article favour a broad interpretation of the competence attributed to the Council in matters of the protection of the safety and health of workers. At paragraph 17 of the judgment, the Court states that 'in conferring on the Council power to lay down minimum requirements, Article 118a does not prejudge the extent of the action which that institution may consider necessary in order to carry out the task which the provision in question assigns to it, namely to work in favour of improved conditions as regards the health and safety of workers.'

12 — Suffice it to consider the employer's obligation to deal with the risks at source (Article 6(2)(b) of the basic directive). It is clear that such an obligation may be difficult to discharge, for example, in relation to police activities.

training. From the wording of this provision it is clear that these exclusions, unlike those provided for in the basic directive, are exhaustive. [13]

It is obvious that the activity of doctors in EAPs does not fall within any of the sectors indicated above. In fact, the inclusion in Article 1(3) of Directive 93/104 of the activity of doctors in training among those excluded from its scope implies *a contrario* that the work of other doctors, including those in EAPs, must be taken to be included within the scope of the directive. In the same way, I should add that neither in the proposal to extend the scope of the directive to other sectors of activity, presented by the Commission on 24 November 1998, [14] nor in the common position [15] is there any reference in the excluded categories to doctors other than those in training. [16]

I therefore suggest that the answer to Question 1(c) should be that the reference to doctors in training in Directive 93/104 implies that the activities of doctors in EAPs are included in the scope of the directive.

29. Concerning the problem of interpretation raised in Question 1(b), with regard to the possibility of applying the system of derogation described in Article 17 of Directive 93/104 to the doctors in question, particularly in consideration of the specific nature of their activity, it is noteworthy that under that provision Member States may derogate from the provisions of Articles 3, 4, 5, 6, 8 and 16. It is only where national legislation specifically derogates from those provisions, by one of the means indicated (by laws, regulations, or administrative provisions or through collective agreements) and under the conditions laid down in Article 17, that the applicability of national provisions different from those of the directive under examination must be accepted. The absence of national legislation applicable generally or to a specific sector cannot affect the scope and applicability of the Community legislation under review here.

30. Still with regard to the definition of the scope *ratione materiae* of the directive, Article 1(4) provides that 'the provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2' of the same Article 1 (daily rest, weekly rest, annual leave, breaks, maximum weekly

13 — In confirmation of this interpretation, as stated by the Court in the *United Kingdom* v *Council* case cited above, the directive considers 'the organisation of work essential in view of its possible favourable effect on the safety and health of workers'.

14 — OJ 1999 C 43, p. 1. The proposed changes aim to extend the scope of the directive to all categories of workers who are not covered by it at present. Only 'seafarers' will remain outside its scope. With regard to that category, the Council adopted Directive 99/63/EC on 21 June 1999, relating to the agreement on the organisation of working time for seafarers, between the European Community Shipowners Association (ECSA) and the Federation of Transport Workers Unions in the European Union (FST) (OJ 1999 L 167, p. 3).

15 — Common position (EC) no 33/1999 of 12 July 1999 (OJ 1999 C 249, p. 17).

16 — For example, the following text will be inserted in Article 17(2)(2.1)(c)(i) of the directive: 'including the activity of doctors in training' (Article 1(5) of the proposal).

working time, night work, shift work and patterns of work), 'without prejudice to more stringent and/or specific provisions contained in this Directive.'

In Question 1(d) the Spanish court asks whether the reference to the basic directive contained in the provision just referred to has any particular implications with regard to the effects and application of that directive.

In my opinion, in enacting that provision the Community legislature simply wished to state that the rules of the basic directive apply in conjunction with those on working time contained in Directive 93/104, whilst according priority to the provisions of the latter directive where it contains more stringent or specific provisions than the basic directive. It follows that, in principle, the application of Directive 93/104 is not excluded where, as in this case, the national court is asked to decide on the legality of the working time arrangements laid down in a national collective agreement.

The meaning of working time and the calculation of working hours (Questions 2(a)–2(c) and 3(a))

31. In Question 2(a) the national court asks, first, whether, taking into account the definition of working time in Article 2(1) of Directive 93/104, the national practice of excluding from the 40 hours per week time spent on call should be applied and, second, whether the provisions of Spanish legislation on working time relating to employment relationships under private law should be applied by analogy.

I should make it clear straight away that the Court can only answer the first part of the question, since the second concerns the interpretation of national legislation, which is clearly not within the jurisdiction of the Court.

The first part of the question concerns the obligation to include in working time hours spent by members of EAPs on call at a medical establishment and on call under the contact system, a matter which is governed by the Spanish legislation with which this case is concerned. It is clear from the order for reference that, according to national practice, hours spent on call from home are considered to be 'anti-social hours': they do not therefore constitute overtime and are paid on a flat-rate basis, irrespective of how much work is actually done. In particular, on-call shifts when the doctor is present at the workplace are considered to be ordinary hours and not overtime, even if the work is carried out under conditions which are different from those which apply during ordinary working

time. To calculate working time, only hours of actual attendance, when the doctor is on call or must be contactable, are taken into consideration.

This question covers the matters raised in Questions 2(b), 2(c) and 3(a). By Question 2(b), the national court seeks to ascertain whether working time should include all hours on call under the contact system or whether working time should be considered only as the time actually spent carrying out the activities to which primary care doctors are assigned. In Question 2(c) the Spanish court asks whether on-call shifts while the doctor is physically present at the health centre should be taken into consideration in the calculation of ordinary working time or unsocial hours. Finally, Question 3(a) concerns the possibility of including working time spent on call when determining the average working time for each 7-day period, in accordance with Article 6(2) of the directive.

32. The four questions can be reformulated together as a general question, namely: can time when the doctor must be contactable and time when he is present at the health centre fall within the definition of working time given in Article 2(1) of the directive, and how should it be calculated for the purpose of determining the number of working hours?

— Arguments of the parties

33. All the States involved, and the Commission, submit that, even when a doctor is at the health centre, periods on call should not be part of working time as defined in Article 2 of the directive. Only periods of actual work during on-call duty can be taken into account in determining the maximum working time. Essentially, the parties, including the Commission, take the view that Spanish law or practice, whereby on-call duty of doctors in EAPs is not taken into account as working time, with the exception of time spent actually carrying out an activity, is compatible with the directive.

In particular, the United Kingdom Government considers that Article 2(1) must be interpreted as meaning that, to be able to apply the 'working time' system to a given activity, three cumulative requirements must be fulfilled: the worker is working, he is at his employer's disposal and he is carrying out his activities or duties. According to that government, in view of the aims of the directive, as indicated in its preamble, especially the eighth recital, working time must be understood to be a period which is limited in such a way as to ensure the safety and health of the worker. On-call shifts do not fall within that definition since during them the worker is able to rest. The

United Kingdom Government also argues that the reference to national courts and/or practices which appears in the definition of 'working time' in Article 2(1), precludes any interpretation of that provision which excessively restricts the scope of State regulation in this sphere.

According to the Commission, the doctors' on-call service, upon which the questions referred for a preliminary ruling are focused, is essentially characterised by the fact that the doctors concerned must be available in case their intervention should be required, and that is so whether they are on call at a health centre or are contactable elsewhere. According to the Commission, that type of activity meets only the second requirement laid down in Article 2(1) (that the worker must be at his employer's disposal) but certainly not the remaining two requirements. It follows that the meaning of 'working time' cannot be applied to on-call duty, even if the Member States may include it in working time in order to ensure greater protection for the worker.

In support of its argument that the activity of doctors in EAPs must be treated as 'working time', Simap states that the opposite view would result in the worker's having to work for 30 hours consecutively.

— Assessment of the Advocate General

34. The starting point for answering the questions must be the interpretation of Article 2(1) of the directive, which defines 'working time', a concept which is closely associated, as far as this case is concerned, with the provisions which lay down the minimum rest periods that every worker must be granted and with the rule on the maximum weekly working time.

Article 2 states that in the directive working time means 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'.

That wording, which is certainly less than totally clear, is conducive to the assumption, as evidenced by the view taken by the Member States which have lodged submissions and the Commission, that in calculating working hours, only time in respect of which all the criteria indicated in that article are fulfilled should be taken into consideration, so that working time should be taken to mean the period when the worker is present at his workplace, at his employer's disposal, and actually carrying out his activities and duties. The absence of any disjunctive in the text of the article means that the list of the three criteria is cumulative. However, consideration of the

imprecise expressions used in Article 2(1) leads in my opinion to the opposite conclusion, namely that the three criteria indicated must be regarded as autonomous aspects of the work performed.

The first uncertainty becomes evident if the two terms 'disposal' and 'carrying out his activities' are compared and, above all, viewed as being applied in conjunction with each other (the second and third criteria respectively in Article 2(1)): they are *in antithesis* to each other and therefore cannot be cumulative.

It should also be noted that application of the three criteria together is difficult to reconcile with the aims and, therefore, the rationale of the directive, which is to ensure that workers have reasonable rest time. If it were considered that, for calculation of the number of working hours, the worker has to be at work (this wording is ambiguous as, in view of the other criteria, it would appear to require that the worker is physically at his workplace), is carrying out his activities and is at the disposal of his employer, the result would be to exclude from working time all those periods when the worker is carrying out his activities but is not present at his workplace, or all hours when — and this is what is important in this case — the worker is at his workplace but is not carrying out his activities but is at the disposal of his employer. To consider that the directive excludes from working time the hours when the worker has to be present at his workplace and at the disposal of his employer would in my opinion be tantamount to admitting that, by means of this directive, the Council intentionally decided to let Community social policy fall behind the progress achieved though the internal policies of the Member States.

It should be borne in mind that in some national legislation working time is defined as actual work, or in any event a definition is used which is associated with only one of the criteria indicated in Article 2(1), of the directive. [17] The ILO Convention of 28 August 1930 on the duration of work (commercial companies and offices) also

17 — In French law working time is defined in Article L.212-4 of the Labour Code (L. No 82-957 of 13 November 1982, Article 28) according to which: 'la durée du travail ci-dessus fixée s'entend du travail effectif à l'exclusion du temps nécessaire à l'habillage et au casse-croûte ainsi que des périodes d'inaction dans les industries et commerces déterminés par décret. Ces temps pourront toutefois être rémunérés conformément aux usages et aux conventions ou accords collectifs de travail.' In Italian law, the same definition is given in Article 1 of R.D.L. 15 March 1963, No 692 (GU 10 April 1923, No 84, converted into Law No 473 of 17 April 1925), concerning limitations applicable to work by workers and other employees in industrial or commercial companies of any kind. According to Article 1, 'the maximum normal working day for workers and other employees in industrial and commercial companies of any kind... shall not exceed 8 hours per day or 48 hours per week of actual work'. In German law, Article 2(1) of the Arbeitszeitgesetz (Law on working time) of 6 June 1994, Bundesgesetzblatt 1, p.1242 gives the following definition: 'working time means the hours between the commencement and termantion of work regardless of rest periods ... '. In the United Kingdom, The Working Time Regulations 1998 (Statutory Instruments 1998, No 1833) provide in Article 2 that working time means: 'a) any period during which he is working, at his employer's disposal and carrying out his activities or duties; b) any period during which he is receiving relevant training ...; c) any additional period which is to be treated as working time for the purpose of these regulations under a relevant agreement ...'. In Swedish law, the Arbetstidslag, (Law relating to working time) No 673 of 1982, in Svensk forfattningssamling, 6 July 1982, provides in Article 6 that: 'If, because of the nature of the activity it is necessary that a worker be at the disposal of the employer at the place of work to carry out work activities, such availability (*jourtid*) may increase working time to 48 hours per worker over a period of 4 weeks or 50 hours per calendar month. The time during which the worker is carrying out work activities for the employer is not considered as being at the employer's disposal.'

confirms this interpretation, in which Article 2 refers to 'le temps pendant lequel le personnel *est à la disposition* de l'employeur' and provides: 'seront exclus les repos pendant lesquels le personnel n'est pas à la disposition de l'employeur'.[18] According to the ILO Convention, therefore, a worker who is entirely at the disposal of his employer should not be considered to be resting: in other words, the time when he is at the disposal of his employer must be counted as working hours.

35. Let us consider the practical consequences of the cumulative effect of the three criteria with regard to the applicability of the two provisions with which we are concerned in this case, that is Article 3 of the directive, concerning daily rest, and Article 6 (in particular paragraph 2), concerning the maximum weekly working time. It is clear that if we accept that a national system may provide that, for the purposes of calculating working time, only hours when the worker is actually carrying out his activity and is at the disposal of the employer are to be taken into consideration, it will not be possible to ensure compliance with the obligation to guarantee that worker a daily rest period of 11 consecutive hours and a maximum weekly working time within the limit of 48 hours, since the calculation does not include all those periods when the worker is not carrying out his work activity but is 'at the employer's disposal', and therefore not resting, with the result that actual breaks will be less than the minimum imposed by the directive.

36. I therefore consider that Article 2(1) of the directive should be interpreted as meaning that the three criteria given in it to define 'working time' are autonomous and need not be met concurrently, with the consequence that time when a worker is available and physically present at the workplace, such as the time on call at issue here, must be considered as working time and therefore should be included in the calculation of daily and weekly working time.

37. The position is different when the worker is at the disposal of his employer under the contact system. In this case, the commitment is contingent and discontinuous, and the worker can, if only in a limited way, manage his own time since he is not obliged to be present at his workplace. Accordingly, it is not possible to regard a worker under the contact system as being equivalent to a worker who is at his employer's disposal, as the latter is present continuously at the workplace. It therefore follows that the hours when the employee is merely on call under the contact system cannot be taken into consideration in calculating his working time, in the sense that only hours of actual work (third criterion in Article 2(2)) performed during

18 — Emphasis added.

the period when the worker is on call under the contact system are counted as working time. [19]

In my opinion, that interpretation is called for by virtue of the fact that a worker's obligation to be on call under the contact system and to be available to take any requisite action is clearly much more limited than that of a worker who must be available at his workplace. While the former can devote himself to his own interests and family, even during the time he is on call, and in some cases, also rest, the latter is separated from his family, and cannot pursue his own interests since he has to remain in the health centre where he may have to provide his professional services. The marked difference between the two situations excludes the possibility of treating them in the same way for the purposes of calculating hours of work. However, as explained in more detail below, a correct and balanced interpretation of the system requires account to be taken of time spent on call under the contact system for other purposes, specifically in order to determine rest periods.

38. The difference between being available and being contactable does not, however, mean that time which a worker spends under the contact system without carrying out any work activity can be regarded as rest time. The fact that a worker under the contact system cannot use his own time totally freely rules out any interpretation of the provisions under examination whereby periods on call under the contact system are counted as rest time.

It could be argued in reply that, according to Article 2(2) of the directive, a rest period is to mean 'any period which is not working time' and that therefore, if the time spent merely on call under the contact system is not taken into account to calculate hours of work, it must be considered as a rest period. In my opinion, this interpretation is unfounded. The concepts of working time and rest periods cannot be interpreted in such a way that contactability must come within the concept of rest. Account must be taken of the fact that Article 2(1), in defining working time, in addition to indicating the three general criteria commented on above, refers to national laws (using the general expression 'in accordance with national laws and/or practice'), thus allowing the Member States, subject to compliance with the general criteria indicated in that provision, to define the actual working arrangements. It follows that, where an individual provides his services under the contact system, it is not possible to exclude time when he is contactable from the concept of 'work', even if, for the general reasons stated above, in calculating working hours only actual working hours are taken into consideration and not time when the worker is merely on call under the contact system. I therefore believe that we should consider that hours on call under the contact system when the worker does not carry out any

19 — This interpretation has no effect on the obligation of the State to pay the worker for the whole period during which he is on call under the contact system; the directive concerns only the safety and health of workers and its aim is to limit their working time without regulating the calculation of the worker's hours for the purposes of remuneration.

activity do not form part of rest time, with the result that workers subject to that system, such as the members of an EAP, are entitled, at the end of that period, to the minimum rest time provided for in Title II of the directive (which I shall discuss below).

In any case, on the basis of Article 17 of the directive, by means of internal laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry, it is possible to derogate from the provisions of the directive which concern daily rest (Article 3), weekly rest (Article 5), length of night work (Article 8) and the duration of the reference period to be taken into consideration to calculate the average working week (Article 16), and that also applies to periods when workers are on call under the contact system.

39. On the basis of the above considerations I therefore consider that time when a doctor is on call in a hospital should be considered to be working hours within the meaning and for the purposes of the directive. If, on the other hand,. the worker is on call under the contact system, only time spent actually carrying out activities should be included in the calculation of the working hours, but the remaining hours cannot be considered to be rest periods.

40. The directive therefore precludes a national practice, such as that described in the order for reference, which excludes the time spent by doctors on call from the 40 hours per week. [20]

The meaning of ordinary working time and overtime (Question 3(b))

41. Question 3(b) concerns the classification of hours on call (when a doctor is at the disposal of his employer and when he is on call under the contact system) as ordinary working time or overtime. I consider

20 — In the grounds of its order for reference, the national court seems to query (and above all to entertain doubts as to) the applicability, in the main proceedings, of national provisions contrary to Directive 93/104 — in particular the agreement reached on 7 May 1993 between the trade unions and the administration of the Generalidad Valenciana — or of the Community legislation which is the subject of the request for a preliminary ruling. It is not clear from the order for reference or the statements of the parties whether the directive has been implemented within the Spanish legal system in full or only in part. There is no need to repeat that only in the event of non-transposition or partial transposition will it be necessary to take a position on the problem of the applicability of the Community legislation. I shall therefore merely point out here that according to the case-law of the Court on the effectiveness of unimplemented directives, starting with Case 148/78 *Ratti* [1979] ECR 1629, 'a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State must uphold that request, if the obligation in question is unconditional and sufficiently precise' (paragraph 23). An individual can therefore invoke, before the national court and for the purposes of securing non-application of internal provisions conflicting with a directive, provisions of a directive which are precise and unconditional. The provisions of Directive 93/104 that are relevant to this case meet that requirement in my opinion; I refer in particular to Articles 3, 5(1), 6(2), 8(1), and 16(1) and (2). In addition, I would point out that a person may invoke the provisions of such a measure of secondary legislation against the State and all agencies of the public administration, including territorial bodies, a category into which the defendant in the main proceedings may be said to fall (see, in particular Case 103/88 *Fratelli Costanzo* [1989] ECR 1839).

that, since it imposes a single limit for working time, precluding any distinction between the various types of 'working hours', the directive's parameters relating to maximum time (in particular those relating to the working day and the working week) cannot be changed (except within the limits allowed by Articles 17 and 18 of the directive) by recourse to overtime.

It follows that the Member States are free to determine the limits of ordinary working time, for the purposes of defining working time and calculating remuneration for services. However, the total working time, comprising both ordinary time and overtime, must not exceed the maximum time laid down in the directive unless derogating rules have been adopted at national level in accordance with the conditions laid down in the directive (Articles 17 and 18).

The derogations provided for in Articles 17 and 18 of the directive (Questions 3(c) and (d))

42. With regard to national derogations allowed by the directive, the Spanish court asks whether, in the absence of specific Community legislation relating to the calculation of working hours, the criterion in Article 16(2) should be considered applicable, or the criteria defined on the basis of national derogations such as that specifically provided for in Article 17 (Question 3(c)) and whether, for the application of Article 18(1)(b), it is sufficient to obtain the agreement of the trade-union representatives in a collective or other agreement (Question 3(d)).

43. Article 16 sets at four months the reference period for the calculation of weekly working time and therefore for the application of the maximum of 48 hours indicated in Article 6. Article 17 defines the conditions and sectors in which the national authorities can derogate from that reference period; in particular it provides that 'derogations [from Articles 3, 4, 5, 8 and 16] may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection ...'. The various areas in which it is possible to introduce derogations at national level include 'services relating to the reception, treatment and/or care provided by hospitals or similar establishments' (Article 17(2), point 2.1(c)(i)) and 'ambulance services' (Article 17(2), point 2.1(c)(iii)).

It is clear from the terms of that article that the rules concerning the calculation of hours for the purpose of ensuring compliance with the maximum weekly working time referred to in Article 6(2) must in principle be taken into account in determining working hours by reference to a total period of four months. If, in a sector such as this, which is one of those in which it is possible to adopt a national derogation, the national legislation has, in accordance with Article 17, laid down conditions that are different from those of the directive, the national authorities may observe the internal legislation, but must nevertheless keep within the limits imposed by Article 17(4). [21]

44. Article 18(1)(b) of the directive, with which Question 3(d) is concerned, provides that 'a Member State shall have the option not to apply Article 6 [and therefore to derogate from the provision on maximum weekly working time] while respecting the general principles of the protection of the safety and health of workers and provided it takes the necessary measures to ensure that ... no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, *unless he has first obtained the worker's agreement to perform such work*' (see in particular subparagraph (i)).

The national court asks whether, for the purposes of that derogation, consent given by trade-union representatives in a collective or other agreement is equivalent to a worker's agreement.

45. The Spanish Government and the Consellería de Sanidad de la Generalidad Valenciana suggest that this question should be answered in the affirmative. The Spanish Government refers to the Spanish legislation on the representation of workers through trade-union organisations. The Finnish Government and United Kingdom Government incline towards the opposite view, however. They consider that the text of Article 18(1)(b)(i) of the directive implies that, for application of the derogation, the employer must obtain the worker's express consent to work for more than the maximum 48 hours. A collective agreement, therefore, could not replace this consent.

46. In my view the argument of the Finnish Government and the United Kingdom Government should be upheld. The wording of the relevant provision does not leave

21 — Article 17(4) states, in the first two subparagraphs, that 'the option to derogate from point 2 of Article 16' may not result in the establishment of a reference period exceeding six months, and also that 'the Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months'.

room for any doubt. Also, as stated by the representative of the United Kingdom, if the intention of the Community legislature had been to allow collective agreements to derogate from Article 6(2) of the directive, that article would have been included in the list, in Article 17(3), of those which can be derogated from by collective agreements. It must be considered that, under Article 18, the power of the Member States 'not to apply Article 6' can only be exercised if they take the 'necessary measures' to guarantee the fulfilment of various conditions, including the obligation of the employer to ask for and obtain the worker's agreement and to adopt measures to ensure that no worker will be adversely affected if he is not prepared to accept the conditions imposed by his employer.

In short, I consider that the possibility of derogating from Article 6 should be subject to the worker's express consent and to the adoption of appropriate legislative or administrative measures to protect the worker's freedom to refuse to have his weekly working time increased (above the maximum).

Night work (Questions 4(a) to 4(c))

47. By Question 4(a) the national court seeks to ascertain whether doctors on call can be regarded as 'night workers'. This problem of interpretation arises from the fact that the normal working time of this category falls only partially within the night. In Question 4(b) the court asks whether the provisions on night working also apply to the private sector and finally, in Question 4(c), whether the limit of 8 hours set by Article 8(1) also includes work performed by doctors who are on call under the contact system or are physically present in the hospital.

48. The Conselleria de Sanidad de la Generalidad Valenciana, the Spanish Government, the Finnish Government and the Commission submit that those doctors cannot be considered to be night workers since they do not carry out night work on a daily basis and consequently cannot fall within the scope of Article 2(4)(a) of the directive. The Conselleria also argues that such work cannot be brought within the definition of night work because under Article 2(4)(b) 'night work' may be defined in collective agreements concluded at national or regional level.

49. To answer these questions, it should be remembered first of all that the directive uses two terms, 'night working' (or 'night time') and 'night worker'. 'Night time' is defined in Article 2(3) as 'any period of not less than seven hours, as defined by

national law, and which must include in any case the period between midnight and 5 a.m.' Article 2(4)(a) then defines a night worker as 'any worker who, during night time, works at least three hours of his daily working time as a normal course' and, then in (b), 'any worker who is likely during night time to work a certain proportion of his annual working time', as defined by the Member States in collective agreements or legislation.

To establish whether doctors in the EAPs who work in shifts which may include periods 'at night' can be described as night workers, we must look at the answer to Question 4(a), taking into account the actual arrangements for on-call service. In other words, to assess the nocturnal nature of the work, we must establish whether the worker's activity is carried out during 'night time' and whether, given the terms of Article 2(4), the worker is (or is *inter alia*) a night worker.

50. On the basis of the above remarks concerning the interpretation of the term 'working time' used in Article 2(1) and in particular the possibility of including those periods when the worker is at the disposal of the hospital, either being physically present or on call under the contact system, I consider that if the doctor is at the disposal of the hospital, in the sense that he is present, the calculation of his working hours, in terms of night work, must include all the time he is on call, including the (night) hours when he has not carried out any activity. Therefore, under Article 2(4), a doctor who every day, between the hours of midnight and 5 a.m., works an on-call shift of at least three hours (subparagraph (a)) or, again between midnight and 5 a.m., shifts representing a total number of hours, on an annual basis, which is equivalent to that set nationally for a worker to be considered to be a night worker (subparagraph (b)), should be considered to be a night worker.

51. Thus, in answer to Question 4(c), night time work on call should not exceed 8 hours per day (Article 8(1)). I do not consider that the reference to 'normal hours of work' which appears in that provision can rule out the possibility that a worker who is 'at the employer's disposal' in accordance with Article 2(1) may be excluded from the scope of the regulation which sets the maximum night time working per day. In fact, such an exclusion should have appeared specifically in the provisions on the protection of night work as it involves a considerable limitation of their scope. In my opinion, the concept of 'normality' of night work, as embodied in Article 8(1),

must be interpreted in the sense that States may derogate from the provision of the directive concerning the maximum duration of night work for specific categories of work. That possibility is expressly provided for and governed by Article 17 of the same directive.

52. However, where a doctor has spent time on call under the contact system outside the hospital, it must be considered that only the hours actually worked fall to be included in the calculation and that therefore the rules on night work can only be applied where such work totals three hours or more and if the total night time hours worked over a period of a year reach the total number set nationally for a worker to be considered a night worker. It follows that the prohibition of requiring a worker to work at night in excess of an average of eight hours applies only if the work actually performed represents a total number of hours corresponding to that indicated in Article 2(4).

53. In addition, with regard to Article 2(4)(b), which allows Member States to take a different approach in defining night time working on the basis of a calculation of hours of work carried out annually during the night, it should be noted that the provisions adopted on that legal basis cannot derogate from the three-hours rule in Article 2(4)(a). The provision granting that competence to Member States does not appear in the part of the directive which concerns the areas and the circumstances in which derogations at national level are permissible. This means that action by a Member State regarding the procedures for calculating night time working on an annual basis cannot exclude application of the relevant provisions of the directive, relating to night workers, if three hours per day of their daily work fall between midnight and 5 a.m.

54. The national court asks in Question 4(b) whether, for the purposes of Articles 8 to 13 of the directive, the provisions of private law on night work are applicable to public employees. That question, like question 2(a), concerns the interpretation of internal rules and therefore does not fall within the jurisdiction of the Court. However, it is clear that application of the directive is compatible with that of national provisions intended to govern employment relationships under private law. In fact, Article 1(3) provides specifically for its applicability 'to all sectors of activity, both public and private.'

The meaning of shift work (Question 5)

55. In its fifth question, the national court asks whether the on-call work of the

Spanish EAPs should be considered to be 'shift work' and whether therefore those doctors are 'shift workers', as defined in Article 2(5) and (6) of the directive.

According to Article 2(5), *shift work* means 'any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks'. According to Article 2(6) a *shift worker* is 'any worker whose work schedule is part of shift work'.

56. The Conselleria, the Spanish Government, the Finnish Government and the Commission suggest giving a negative answer to the question as the time spent on call in shifts does not constitute actual 'working time' according to national practice. The Conselleria also states, as support for a negative answer to the question, that the on-call duty of doctors in EAPs is always carried out at the same times and that their 'ordinary' working time is organised according to a fixed schedule, while 'shift work', as defined in the directive, presupposes an activity carried out at different times over a given period of days or weeks.

57. In my opinion, the members of an EAP, such as those in the present case, may be shift workers, given that it is clear from the order for reference that their work is allocated on a rotational basis. It is of no importance that the work of every team member is performed at fixed times or that in some cases it simply involves the doctors being contactable. In fact, it is clear from the wording of the abovementioned provision of the directive that the basis on which the work is performed has no bearing on the concept of shift work and, in addition, that work may be continuous or discontinuous.

I am therefore of the opinion that the members of the Spanish EAPs should be considered to be shift workers and that therefore their activity falls within the definition contained in Article 2(5) of the directive.

Conclusion

58. In view of the foregoing, I propose that the Court give in the following answers to the questions referred for a preliminary ruling by the Tribunal Superior de Justicia de la Comunidad Valenciana:

(1) With regard to the applicability of the directive in general (Questions 1(a) to 1(d))

(i) The activity of doctors in primary care teams falls within the scope of Council Directive 93/104/EC of 23 November 1993 concerning some aspects of the organisation of working time, in particular:

— Article 1(1) of Council Directive 89/391/EEC of 12 June 1989, to which Article 2(1) of Directive 93/104 refers, must be interpreted as meaning that the nature of such activities does not constitute an obstacle to application of the directive;

— Article 1(3) of Directive 93/104 must be interpreted as meaning that such activities are not included among those of 'doctors in training';

— for such activities, Directive 89/391 does not lay down any specific rules for calculating limits on working time.

(ii) Articles 3, 4, 5, 6, 8, and 16 of Directive 93/104 do not apply solely where a derogation has been adopted under national law within the limits and under the conditions laid down in Article 17 thereof.

(2) With regard to the concept of working time and the calculation of working hours (Questions 2(a) to 2(c) and 3(a) and 3(b))

Article 2(1) of Directive 93/104 must be interpreted as meaning that the following should be included in working time: (a) time when doctors are at the employer's disposal and are physically present at health centres; (b) periods of time when doctors are contactable, that is to say available to perform their duties, but are not present at the health centres, such periods being limited to time when they are actually engaged in activities. All the periods which fall within working time must be taken into account in calculating the total duration of work for the purposes of Directive 93/104.

Therefore, the directive precludes a national practice which excludes time spent on call from the 40 hours of work per week.

The directive must be interpreted as meaning that the Member States may draw a distinction between ordinary work and overtime, provided that the total number of working hours does not exceed the maximum times set by the directive.

(3) With regard to the derogations provided for by Directive 93/104 (Questions 3(c) and 3(d))

Article 17 of Directive 93/104 must be interpreted as meaning that it is possible to derogate from Article 16(2) by laws, regulations or administrative provisions and by means of collective agreements or agreements between the two sides of industry, subject to the limits and conditions laid down in that article.

Article 18 of Directive 93/104 must be interpreted as not allowing a national derogation from the provisions on maximum weekly working time contained in Article 6(2) thereof in cases where the employer is not obliged to ask for and obtain the worker's agreement but the agreement expressed by the trade-union representatives in a collective or other agreement is considered to be sufficient.

(4) With regard to the questions on the nocturnal nature of the work of doctors in EAPs (Questions 4(a) to 4(c))

Article 2(4) of Directive 93/104 must be interpreted as meaning that a member of a primary care team can be considered to be a night worker if he works under the conditions indicated in that provision and, in particular, if he spends certain periods on call whilst present in the hospital or carries out his

activities under the contact system (not remaining at the hospital) for a total number of hours equivalent to that indicated in Article 2(4)(a) and (b).

For the purposes of Article 8(1) of the directive, that is with regard to determining in concrete terms the maximum duration of night work of members of a primary care team who are at the employer's disposal or are contactable, only time that can be regarded as working time within the meaning of Article 2(1), as interpreted under 2 above, should be included in the calculation.

(5) With regard to the classification of doctors in primary care teams as shift workers (Question 5)

Article 2(5) and (6) must be interpreted as meaning that the members of a primary care team who work on a rotational basis can be considered to be shift workers irrespective of the continuous or discontinuous nature of their work.