OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 27 April 2004 [1]

I — Background

1. This is the second Opinion I have delivered in these proceedings, [2] commenced in 2001 to obtain a preliminary ruling on three questions [3] referred by the Arbeitsgericht (Labour Court), Lörrach, Germany, the court which rules at first instance on employment matters.

2. The Court of Justice initially ruled that these cases, which address technical issues, [4] should be assigned to a Chamber of five judges [5] and should be determined without a hearing. However, although the replies to the first two questions seem obvious, the third presents greater difficulty.

The last question is intended to ascertain whether, where a Member State has not properly transposed Directive 93/104/EC concerning certain aspects of the organisation of working time [6] into national law, Article 6(2), under which the national authorities must ensure that average weekly working time does not exceed 48 hours, including overtime, is sufficiently precise and unconditional to be capable of being relied on by individuals before national courts.

3. According to the order of the Grand Chamber of the Court [7] of 13 January 2004, reopening the oral procedure, that chamber took the view that, if the provision at issue fulfilled the criteria for direct effect, it would be called upon to determine, in a dispute between individuals, the consequences of the incompatibility of a national provision implementing a directive with a sufficiently precise

1 — Original language: English.

2 — The first Opinion was published on 6 May 2003, on closure of the oral procedure.

3 — These concern seven orders of 26 September 2001, relating to seven disputes being heard by that court. The seven cases were joined during the written procedure by order of 7 November 2001 of the President of the Court of Justice.

4 — Only the plaintiffs in the main proceedings and the Commission filed observations during the written procedure.

5 — Specifically, to the Sixth Chamber.

6 — Council Directive of 23 November 1993 (OJ 1993 L 307, p. 18).

7 — As stated in paragraph 6 of that Order.

and unconditional rule of Community law. The Sixth Chamber therefore referred the cases back to the full Court under Article 44(4) of the Rules of Procedure.

4. A hearing was arranged to discuss that point, to which the Member States, the Council and the Commission as well as the parties to the main proceedings were invited.

In this Opinion I shall confine myself to addressing that question, and shall, in all other respects, treat my previous Opinion as being reproduced here.

5. The representatives of the plaintiffs in the main proceedings and the agents of the German, French, Italian and United Kingdom Governments and of the Commission attended the hearing of 9 March 2004.

II — Legal and factual context

6. Working time and rest periods are regulated in Germany by the Arbeitszeitgesetz (Law on working time) of 6 June 1994, adopted in order to transpose Directive 93/104 into national law.

7. Under Paragraph 2(1), working time is defined as the time between the beginning and the end of the working day, excluding breaks. According to Paragraph 3, that time must not exceed eight hours, although it may be increased to 10 hours, if the average working time over six calendar months or 24 weeks does not exceed eight hours per working day.

8. However, under Paragraph 7(1)(i), by way of derogation from Article 3, under a collective or works agreement:

(a) the working day may be extended beyond 10 hours, even without compensation, where working time regularly includes a significant period of duty time;

...

9. According to Paragraph 14(1) of the Tarifvertrag über Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes (collective agreement on working conditions for Ger-

man Red Cross employees, workers and trainees), 'the Red Cross collective agreement', based on Paragraph 7(1)(i)(a) of the German law, weekly working time, exclusive of breaks, may not exceed 39 hours (from 1 April 1990, 38 1/2 hours) per week. The average is, as a rule, to be calculated on the basis of a 26-week period.

According to Article 14(2), normal working time may be increased to:

(a) an average of 10 hours per day or 49 hours per week, if it includes a period of duty time of at least two hours per day on average;

(b) an average of 11 hours per day or 54 hours per week, if the period of duty time is three hours; and

(c) an average of 12 hours per day or 60 hours per week, if the employee remains in the workplace but only works when asked to.

10. The plaintiffs, who are all rescue workers qualified to provide emergency medical assistance and ambulance transport and are employees or former employees of the German Red Cross, are claiming, in two cases, payment for overtime and, in the others, confirmation of their right not to work more than 48 hours per week. The defendant operates, inter alia, land-based emergency medical services, manages several 24-hour rescue posts and uses ambulances to carry out its work.

11. The contracts of employment are governed by the Red Cross collective agreement. It is common ground that the substantive requirements for extending working hours, which are set out in Paragraph 14(2)(b), and entail the performance of duty time (Arbeitsbereitschaft) of at least three hours per day, are met.

12. According to the wording of that agreement, which was in force at the material time, the maximum weekly working time set by Article 6(2) of Directive 93/104 could be exceeded on a continuous basis, since Paragraph 7(1)(i)(a) of the Arbeitszeitgesetz permitted extension of working time beyond

10 hours, by means of a collective agreement, without compensation, where it regularly included a significant period of duty time. [8]

III — Analysis of the question

13. In my previous Opinion I expressed the view, with a number of citations from the case-law and legal writings, that this was a dispute between individuals, and that therefore, according to the settled case-law of the Court of Justice on the direct effect of directives not properly implemented by Member States, the workers could not rely on Article 6(2) of Directive 93/104.

14. I also pointed out that, in such circumstances, a court, when it interprets national law, must do so as far as possible, in the light of the wording and the purpose of the directive, so as to achieve the result it has in view, and thereby comply with the third paragraph of Article 249 EC.

15. I noted, lastly, that, where it is impossible to provide an 'interpretation in conformity with a directive', the case-law of this Court requires the national court to give full effect to Community law, if necessary refusing of its own motion to apply any conflicting provision of national legislation, and it is not necessary for the Court to request or await the prior setting aside of such provision by legislative or other constitutional means.

16. I understand and share the concern of those who perceive an obstacle to this logic in the fact that directives have not been recognised as having horizontal direct, but reconciling that line of case-law, which runs counter to the view of a number of Advocates General and much academic thinking, with the requirement for 'interpretation in conformity with directives' is one of the most complex dilemmas in Community law, not easily amenable to general resolution. It is worthwhile, none the less, analysing the situation further, if only to seek a solution appropriate to the particular facts of the present cases, one based on the primacy of Community law, the Member States' duty of cooperation in good faith under Article 10 EC and the legislative nature of the directive and its effects on the legal system established by the Treaty.

8 — The German Government, in its response to this Court's question, states that, from 1 January 2004, the entry into force of an amendment to the Law on working time has meant that workers must be compensated for any extension of working time over 10 hours. The Law was amended as a result of the judgment of this Court in Case C-151/02 *Jaeger* [2003] ECR I-8389, which holds at paragraph 71 that on-call duty performed by a doctor where he is required to be physically present in the hospital is in its totality working time for the purposes of Directive 93/104, with the result the Community provision precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

I can say at this stage that I have not found any of the arguments expounded in the course of the proceedings to be entirely persuasive.

17. The Court of Justice seeks clarification of the applicability of the notion of 'interpretation in conformity with directives', in view of the circumstances of these cases: (1) Paragraph 7(1)(i)(a) of the German law on working time is an exception to more general rules contained in that statute which are perfectly in line with the wording and purpose of the Community provision; (2) Directive 93/104 is intended to protect workers as the weaker party in the employment relationship; and (3) the action brought by the majority of the plaintiffs seeks confirmation of the right not to work more than 48 hours per week, a non-financial and not easily quantifiable claim, making it very unlikely that they will obtain reparation from the public authorities for breach of Community law.

18. The facts of these cases distinguish them from other situations previously examined by this Court, where the legislation of a Member State had not been amended to comply with a directive within the prescribed period or had not been properly amended. Here, conversely, Germany has passed a law to transpose the letter and the spirit of Directive 93/104 into its domestic law. I presume that it intended to act properly, since there is nothing to suggest a deliberate intention to circumvent its duty of good faith under Article 10 EC. Evidence of its willingness to comply is to be found in the fact that, in less than four months, it amended its legislation to bring it into line with this Court's interpretation in *Jaeger*. [9] In addition, according to the case-law, every court must presume that the State had the intention of fulfilling entirely the obligations under a directive. [10]

19. One must take the view, therefore, that the intention of the German Law on working time is to include the entirety of the provisions of Directive 93/104. It has, however, erred in one respect. It has gone beyond the limits imposed by the proper distinction between the principles (Articles 1 to 16) and the exceptions (Articles 17 and 18) around which the provisions of the directive have been structured: Paragraph 7(1)(i)(a) of the Law, is presented as an exception, since all the other provisions include definitions of working time and breaks which scrupulously comply with the Community rules.

20. That provision of the German Law, on which Paragraph 14 of the Red Cross

9 — *Jaeger*, cited above.

10 — Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20.

collective agreement relies to extend weekly working time, has been drafted as an exception to Paragraph 3, according to which it cannot be more than eight hours per day.

21. If one interprets the latter provision in conjunction with Paragraph 9 of that Law, which sets aside Sunday as rest time, this gives weekly working time of 48 hours, consistent with the requirement in Article 6(2) of Directive 93/104. Merely by applying those two provisions of national law one could find in favour of the majority of the plaintiffs in the main proceedings since, as observed, two of the seven are seeking payment of overtime, but the other five have applied for confirmation of the right not to work more than 48 hours per week.

Should the German court so find, would that mean that, contrary to established case-law, it was upholding the direct effect of a provision in a directive which cannot, as is well-known, of itself impose obligations on an individual? [11]

11 — Judgments in Case 152/84 *Marshall* [1986] ECR 723, paragraph 48 and Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 6.

22. The Member States who have taken part in these proceedings for a preliminary ruling have, quite openly, shown their dismay at the possibility of a change of direction in the case-law to give direct effect to a directive not incorporated into national law within the period prescribed or not correctly implemented. I do not share those fears, since I do not think the issue arises in relation to Article 6(2) of Directive 93/104, even though it does fulfil the requirements of being sufficiently precise and unconditional. [12] Nor do I agree with those who have contended that failure to apply in the main proceedings the German provision which is contrary to the Community rule in issue would amount to giving it direct effect, despite the many rulings of this Court which preclude direct effect between private parties.

Rather, I agree with the Italian Government when it finds it less problematic, as well as more effective, given the objectives which the Treaty seeks to achieve by means of directives, to uphold the solution formulated by the Court of Justice, favouring the interpretation of the national provision which best conforms to Community law.

12 — Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29; Joined Cases C-246/94 to C-249/94 *Cooperativa Agricola Zootecnica S. Antonio and Others* [1996] ECR I-4373, paragraph 17; Case C-319/97 *Kortas* [1999] ECR I-3143, paragraph 21; and Case C-157/02 *Reiser Internationale Transporte* [2004] ECR I-1477, paragraph 22.

23. I do not need to point out that the obligation on Member States to achieve the results envisaged in directives and their duty, under Article 10 EC, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, are binding on all national authorities including the courts. [13]

24. In order to mitigate the consequences of refusing to give direct effect to a particular provision in a directive in proceedings between individuals, this Court has developed a principle known as 'the principle of interpretation in conformity with directives', according to which, in applying national law, whether adopted before or after the directive, the court, is required to do so, so far as possible to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC. [14] The principle must be followed by a national court, in particular where a Member State has taken the view, as in the present instance, that the provisions it has adopted satisfied the requirements of the directive. [15]

25. Indeed, in a good number of the cases in which it has recommended that type of interpretation, because the disputes are between individuals, this Court has not confined itself merely to so stating, but has gone further, telling the court which has referred the matter to it the specific outcome it should achieve on each occasion. It is useful to point to a few examples by way of illustration. [16]

13 — Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26 and Case 222/84 *Johnston* [1986] ECR 1651, paragraph 53.

14 — Judgments in *Marleasing*, paragraph 8 and *Wagner Miret*, paragraph 20; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 26; and Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraph 16.

15 — *Wagner Miret*, paragraph 21. See Bernardeau, L.: 'Clauses abusives: illicéité des clauses attributives de compétence et l'autonomie de leur contrôle judiciaire', in *Revue européenne de droit de la consommation*, 2000, pp. 261 to 281, in particular p. 270: 'L'obligation d'interprétation conforme qui découle du principe de la primauté du droit communautaire s'applique a fortiori lorsque la directive a été transposée'.

16 — Some German legal thinking regards the national court as having jurisdiction, in order to comply with the aims of the Community directive, to overcome deficiencies in national law or even incompatibility between national and Community law, using an interpretation in conformity with directives. See Götz, V.: 'Europaische Gesetzgebung durch Richtlinien — Zusammenwirken von Gemeinschaft und Staat' in *Neue Juristische Wochenschrift*, 1992, p. 1854: 'Über die Auslegung von Begriffen und Normen, die eine offensichtliche Kongruenz zwischen Richtlinie und staatlichem Umsetzungsrecht aufweisen, hinaus, kann richtlinienkonforme Auslegung in begrenztem Umfange die weitergehende Funktion erfüllen, Unzulanglichkeiten der staatlichen Gesetzgebung zu überbrücken oder der Richtlinie zu einem Anwendungsvorrang gegenuber solchen Bestimmungen des nationalen Rechts zu verhelfen, die nicht direkt umsetzungsbedingt sind, deren Anwendung aber im Bereich der Richtlinie mit dieser nicht zu vereinbaren wäre'. According to that line of thinking, the primacy of Community law extends to its interpretation, with the effect that the meaning given by the Court of Justice prevails over any other which may be given to the national provisions intended to implement the Community directive, which, it is argued, leads to a situation in which the national court could have to find national law to be contra legem, in order to ensure the effectiveness of the Community provision. One can cite, by way of example, Dendrinos, A., *Rechtsprobleme der Direktwirkung von EWG-Richtlinien*, pp. 290 292, in particular, p. 290: 'In diesem Punkt muss hervorgehoben werden, dass die Richtlinienbestimmungen Vorrang in der Auslegung haben. Dies bedeutet, dass den durch den EuGH ausgelegten Richtlinienvorschriften des Gemeinschaftsrechts für den Ausgangsfall Vorrang gegenuber der gegenteiligen einheimischen Interpretation einer mehrdeutigen zur Ausführung der Richtlinien ergangenen nationalen Norm gebuhrt. Hier spricht man von der unmittelbar wirkenden Auslegung. Aufgrund dieser Erkenntnis kommt man der Anerkennung der horizontalen unmittelbaren Wirkung ein Stuck naher, da der nationale Richter wegen der vorrangigen Auslegung des EuGH gegebenenfalls nationales Recht contra legem auslegen muss, welches zur Umsetzung der Richtlinie ergangen ist und zugleich private Rechtsverhaltnisse regelt', and Brechmann, W.: *Die Richtlinienkonforme Auslegung*, pp. 160-166, in particular, p. 163, who refers to this view endorsed by several writers: 'Die These von Dendrinos, dass eine richtlinienkonforme Auslegung auch eine Auslegung contra legem erlaube, ist jedoch keineswegs eine vereinzelte Sondermeinung, sondern sie wird von anderen Autoren der volkerrechtlichen Theorie vertreten'.

26. Interpretation of Directive 68/151/EEC, [17] which has not been implemented in Spanish law, and which is intended to limit the cases in which the nullity of public limited liability companies can arise in order to ensure certainty in the law as regards relations between the company and third parties, and also between members, led the Court of Justice to advise the national court that it was obliged to interpret its domestic law in the light of the wording and purpose of that directive *in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.* [18]

Marleasing SA had applied for a declaration that the founders' contract of a company was void on the ground that the establishment of the company lacked cause, was a sham transaction and had been carried out in order to defraud creditors. The defendant refuted the claim, asserting that Article 11 of the directive in question lists exhaustively the cases in which the nullity of a company may be ordered, which do not include lack of cause. In order to adopt the suggestion of the Court of Justice, Articles 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, should not be applied. That is exactly what the Tribunal de Primera Instancia (Court of First Instance) No 1, Oviedo, did in its ruling of 23 February 1991, dismissing the claim, in so far as it was based on lack of cause, a ground for nullity not envisaged by Directive 68/151. [19] The judgment, which drew unanimous praise for its Community spirit, did not question whether application of the 'interpretation in conformity with directives' principle could have an effect equivalent to recognition of horizontal direct effect of directives.

27. The *Wagner Miret* [20] judgment concluded from the order for reference that the Spanish provisions could not be interpreted so as to conform with Directive 80/987/EEC [21] and therefore *did not permit higher management staff to obtain the benefit of the guaranteesprovided by the Community provision*, holding that the Member State was obliged to make good the loss caused to those affected by the failure to comply.

It emerged in the proceedings for a preliminary ruling that Spain had established no

17 — First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (1), p. 41).

18 — Judgment in *Marleasing*, cited above, paragraph 13. Curtin, D.: 'Directives: the effectiveness of judicial protection of individual rights', *Common Market Law Review*, 1990, pp. 709 to 739, in particular p. 724: 'In Marleasing, the end result was that the Spanish tribunal was obliged to interpret the provisions of the Spanish Civil Code in a manner so as to preclude a declaration of nullity of a public limited company based on a ground different from those set out in Article 11 of the (unimplemented) first Company Directive. This means in effect that the obligation contained in a directive is placed on *private parties*, albeit after having been transformed, via judicial interpretation, into one of national law. In practice, this clever judicial strategy achieves, where the national law is at all open to interpretation, the same result as if a particular provision of that directive could be recognized as enjoying horizontal direct effects. In this manner, "horizontal" rights which are enshrined in directives can have the force of law as between individuals without a specific domestic legislative process and the primacy of Community law is assured'.

19 — See the DEC-NAT database of the Court of Justice, II-Cour QP/01853-P1.

20 — *Wagner Miret*, cited above, paragraph 22.

21 — Council Directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1987 L 283, p. 23), as amended by Council Directive 87/164/EEC of 2 March 1987 (OJ 1980 L 66, p. 11).

guarantee institution other than the Fondo de Garantía Salarial, which did not cover that category of employee in relation to a claim for unpaid salary as a result of the employer's insolvency. In view of the discretion which Directive 80/987 allows to Member States, the Court of Justice held that the category of employees in question could not rely on Directive 80/987 in order to request the payment of amounts owing to them by way of salary from the guarantee institution established for the other categories of employee. In its judgment of 16 February 1994 the Tribunal Superior de Justicia (High Court of Justice), Catalonia, dismissed the claim, absolving the Fondo de Garantía Salarial from liability, but found that the plaintiff did have an action against the State for the loss suffered, which it should bring before the competent court. [22]

28. In *Océano Grupo Editorial and Salvat Editores* [23] it was necessary to determine whether, where national law had not been adapted within the prescribed period in line with Directive 93/13/EEC, [24] it was possible for the court to find, of its own motion, that a Barcelona civil court lacked jurisdiction, on the grounds that jurisdiction had been conferred on it in a contractual term which the same court found to be unfair within the meaning of the Directive. The Court of Justice, adopting the suggestion of Advocate General Saggio in his excellent Opinion, paragraphs 27 to 37 of which exhaustively analysed this delicate issue, answered in the affirmative, holding that the requirement for an 'interpretation in conformity with directives' requires the national court, in particular, to *favour the interpretation that would allow it to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.*

The term at issue gave the court where the company was domiciled exclusive jurisdiction to hear disputes relating to the enforcement of a sale and purchase agreement. Directive 93/13 was transposed out of time into national law and, in the meantime, the consumer protection provisions then in force were applied, which did not expressly regulate whether the court could of its own motion invoke the nullity of the unfair terms, and nor was there, in Spanish law, any legal basis for the court's jurisdiction to rule on nullity, unless on application by a party. However, this Court advised the Spanish court that it should, of its own motion, decline jurisdiction to hear a dispute referred to it under those circumstances. [25]

22 — See the DEC-NAT database of the Court of Justice, II-Cour QP/02395-P1.

23 — Judgment in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 32.

24 — Council Directive of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

25 — Craig, P. and Búrca, G.: *EU Law. Text, cases and materials*, Third Edition, Oxford University Press, p. 219: 'This ruling does not declare that the Spanish court must decline jurisdiction by reading national law in the light of the Directive's requirements, but it certainly encourages the national court to do this, by indicating that it should "favour" that interpretation if it is possible. And while such an interpretation of national law would not impose any legal obligation on Océano, it would deprive that company of any possible existing right under national law to enforce the consumer contract before the Barcelona court. While the defendant would not himself or herself have to "invoke" the right (since the defendant might well not appear before a court outside his or her domicile) that party would benefit from the terms of the directive even though it was not implemented, and the plaintiff company would suffer a legal disadvantage'; and Stuyck, J.: *Common Market Law Review*, 38, pp. 719 to 737, in particular, p. 737: 'Océano means a further step in the Court's case law on the role of the national judge in applying Community law, by construing a duty for the national courts to invoke of their own motion the unfair character ... of a jurisdiction clause'.

In its order of 14 July 2000 the Spanish first instance court applied, to the letter, the judgment of the Court of Justice and exercised its powers to review of its own motion the unfair nature of a term and to find that the claim should not be allowed to proceed on the grounds that the term relating to submission of the action to the Barcelona courts was unfair, adding that such nullity conferred jurisdiction to hear the case on the courts where the defendant had its domicile. [26]

29. The obligation to interpret in conformity with directives arises not only in references for preliminary rulings, as the examples given might suggest. The judgment in *Commission* v *Italy* [27] made it clear that a finding that a Member State has failed to fulfil its obligations under Community law *entails an automatic prohibition on the application, by both the judicial and administrative authorities of that Member State, of the incompatible tax exemption scheme and, secondly, an obligation on the part of those authorities to take all appropriate measures to facilitate the full application of Community law.*

30. In other instances, without telling the national court quite so specifically what it had to achieve, the Court of Justice has intimated to it the best route to achieve the purpose of the directive.

31. In *Pafitis and Others*, [28] the Court ruled that Article 25 of Directive 77/91/EEC, [29] intended to ensure a minimum degree of protection for shareholders in all Member States, precludes a national provision under which the capital of a bank constituted in the form of a public limited liability company which, as a result of its debt burden, is in exceptional circumstances, may be increased by an administrative measure, without a resolution of the general meeting.

The main proceedings were between, on the one hand, a bank constituted in the form of a public limited liability company and its new shareholders and, on the other, the former shareholders who were challenging both the amendment of the articles of association which had enabled an increase in capital, claiming that it was a decision taken by the temporary administrator without a general meeting having been called, and the allotment of the shares. They were also applying for the three later capital increases to be declared void. The subsequent vicissitudes of the proceedings have made it impossible to discern what the outcome of the Court's ruling might have been. [30]

26 — See the DEC-NAT database of the Court of Justice, II-Cour QP/03748-P1.

27 — Case C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 24. See also Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7.

28 — Case C-441/93 *Pafitis and Others* [1996] ECR I-1347, paragraph 60.

29 — Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1976 L 26, p. 1).

30 — On that occasion, the national court which had referred the question for a preliminary ruling rejected the interpretation of the Court of Justice and dismissed the action (DEC-NAT database of the Court of Justice, II-Cour QP/02610-P1). On appeal, the Greek court referred a new question for a preliminary ruling (II-Cour QP/03745-P1), which was withdrawn when the parties discontinued the case. This Court was thus denied the opportunity to rule on the refusal by the first instance court to apply its interpretation.

32. In *Ruiz Bernáldez*, [31] the questions arose in criminal proceedings against an intoxicated driver who had caused a road traffic accident. The national court ordered the driver to pay for the damage to property and personal injuries caused, but found his insurance company not liable to pay any indemnity whatsoever, basing its view on the national rules relating to insurance against civil liability in respect of the use of motor vehicles, under which loss and damage was not covered if the party causing the damage was driving whilst intoxicated.

On that occasion the Court of Justice interpreted Directives 72/166/EEC [32] and 84/5/EEC [33] as meaning that, in view of the aim of ensuring protection, compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained, and that the compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is absolved from paying compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. It was, then, suggesting to the national court that the company should have to give satisfaction to the victims, even though the national legislation did not provide for it. [34] In its judgment of 30 April 1996, the Audiencia Provincial (Provincial Court), Seville, in line with the preliminary ruling of the Court of Justice, ordered the insurer to compensate the party injured by the accident caused by the intoxicated Mr Ruiz Bernáldez. [35]

33. In *Draehmpaehl* [36] it was held that Directive 76/207/EEC [37] precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, prescribe an upper limit of three months' salary for the amount of damages which may be claimed by an applicant discriminated against on grounds of sex in the making of an appointment where it is shown that that applicant would otherwise have obtained the vacant position, or of six months' salary where there are several applicants. The worker had responded to an employment advertisement addressed to women published in a newspaper, and the company had neither replied to him nor returned the

31 — Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 24.

32 — Council Directive of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972 (II), p. 360).

33 — Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1983 L 8, p. 17).

34 — Tridimas, T.: 'Black, white and shades of grey: horizontality of directives revisited', in *Yearbook of European Law*, 21, 2001-2002, pp. 327 to 354, in particular, p. 352: 'Bernáldez causes problems. It is clear that the insurance directives were relied upon to impose an obligation on a third party, i.e. the insurance company, which was not represented in the proceedings. The Court expressly held that Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle. How can this be distinguished from horizontal direct effect? The answer is with difficulty'.

35 — See the DEC-NAT database of the Court of Justice, II-Cour QP/02722-P1.

36 — Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraphs 37 and 43.

37 — Council Directive 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).

documents submitted. He sought a judicial remedy, pleading that he was the best qualified applicant for the position and that he had suffered discrimination. Here again, the clarity of the preliminary ruling left the Arbeitsgericht (Labour Court), Hamburg, with few alternatives. [38]

34. Ruling on Directive 86/653/EEC [39] in *Bellone*, [40] this Court held that it did preclude a national rule which made the validity of an agency contract conditional upon the commercial agent being entered in a register. The Italian legislation, in addition to requiring such registration in the Chambers of Commerce, made the validity of the contract conditional upon registration, with the result that any person not satisfying that requirement was deprived of any legal protection, in particular on termination of the relationship between the parties. Indeed, the dispute concerned a claim for damages by an agent, after termination of an agency contract entered into with a company. Advocate General Saggio, in paragraph 35 of his Opinion delivered in *Océano Grupo Editorial*, asserted that in *Bellone* the Court of Justice had identified an incurable incompatibility between the provision of national law and the directive in question which precluded any attempt at an 'interpretation in conformity', and therefore required the referring court not to apply the provision of its own law. [41]

35. In the judgment in *Centrosteel*, [42] the Court determined a case regarded as a continuation of *Bellone*. A different Italian court, taking the view that, since directives do not have direct effect under the case-law, it was obliged to apply domestic law, enquired of this Court whether the provisions of the Treaty relating to freedom of establishment and freedom to provide services, the direct applicability of which was not in doubt, precluded the Italian law under which it was compulsory to register anyone acting as a commercial agent, on pain of any contracts to which such a person was a party being void. This Court gave a preliminary ruling pointing the referring court to the well-known principle of the interpretation of national law in conformity with directives, in order to achieve the purpose of Directive

38 — See the DEC-NAT database of the Court of Justice (II-Cour QP/02961 P1). The Arbeitsgericht, Hamburg ordered the defendant company, in default of appearance in any stage of the proceedings, to pay the applicant DEM 11 100. Although the German decision of 29 April 1998 does not state reasons, as appears customary in this type of proceedings, one can assume that the amount relates to the three and a half months' salary claimed by the plaintiff. According to information provided by the referring court, the judgment was not appealed.

39 — Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17).

40 — Case C-215/97 *Bellone* [1998] ECR I-2191, paragraph 18.

41 — When it delivered judgment on 5 May 1999, the Tribunale Civile (District Civil Court), Bologna, took the view that the agency contract was valid and enforceable between the parties, upheld Mrs Bellone's claim and ordered the company to pay her the amounts owing. In its statement of reasons it declared that the penalty established by the domestic regulations, consisting of the invalidity of the agency contract on the grounds of non-registration of the agent, was incompatible with Community law, that, in the event of incompatibility, the latter prevails over the law of Member States, and that judgments of the Court of Justice have direct effect, with the result that, in its view, the national legislation which made the validity of the contract conditional upon prior registration of the agent was not applicable (II-Cour QP/03475-P1). I can point out, furthermore, that the DEC-NAT database of the Court of Justice contains several rulings of the Corte di Cassazione (Court of Cassation) which overturn decisions of the lower courts which had dismissed claims by commercial agents seeking payment of sums owed in performance of an agency contract on the grounds that they were not registered. See II-Cour IA/18784-A, II-Cour IA-22741-A and II-Cour IA/22749-A.

42 — Cited above.

86/653, and did not address interpretation of the primary legislation. Advocate General Jacobs, in paragraph 5 of his Opinion, and this Court, in paragraph 17 of the judgment, concurred in noting that, as a result of the judgment in *Bellone*, the Corte di Cassazione had changed its case-law so that failure to comply with the legal obligation to be entered in the register no longer entailed the nullity of agency contracts.

36. To disregard those developments in the case-law would entail a serious set-back for respect for the principle of the primacy of Community law, would compromise the authority of the Court of Justice to impose a uniform interpretation of that law throughout the territory of the European Union and would demoralise national courts in the exercise of their function as Community courts, in particular those which have followed the recommendations of preliminary rulings relevant for the 'interpretation in conformity' of their legal provisions.

Because, as Cicero said,[43] we are led by a powerful urge to increase the wealth of the human race; we are keen to make men's lives safer and richer by our policies and efforts; we are spurred on by nature herself to fulfil this purpose. Therefore, let us hold that course which has always been followed by the best men, ignoring the bugle for retreat, which tries to recall those who have already advanced.

37. However, it was conceded in *Arcaro*,[44] in another Italian reference for a preliminary ruling, that Community law has no method of procedure able to eliminate a national provision contrary to a provision in a directive which cannot be relied upon. It was also recognised that the obligation on the national court to have regard for the content of the directive when interpreting the relevant rules of its own national law reaches a limit, where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed into domestic law or, more particularly, where it entails the liability in criminal law of persons who act in contravention of the provisions of the directive.

38. Those findings in *Arcaro*, nevertheless, cannot, of themselves, be extended to cover the cases now under examination, as contended by some of the Member States who have made representations, for several reasons:

First, the proceedings involving Mr Arcaro were not between two individuals, since he was the defendant in criminal proceedings.

43 — Cicero, *The Republic*, translation by Niall Rudd, Oxford World's Classics, 1988, Book one, 3, p. 2.

44 — Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraphs 42 and 43.

What was sought, therefore, was to prevent the Member State, which had not complied with its obligation to adapt its legislation in line with Directives 76/464/EEC [45] and 83/513/EEC, [46] from deriving an advantage from its failure and from imposing a criminal penalty on a businessman who had infringed some of the provisions of those directives. This Court has in any event held that the obligation on the national court to refer to the content of the directive, when it interprets a national provision, is limited by the general principles of law which form part of Community law and in particular those of legal certainty and non-retroactivity, especially if that obligation could give rise to criminal liability. [47]

Second, the circumstances of *Arcaro* are very different from those of the actions brought by the Red Cross employees, since in the former the Italian legislature had only incompletely transposed Community law, whereas Germany has adopted a specific law to implement Directive 93/104 in its entirety, Article 3 of which properly reproduced the terms of Article 6(2) of the Community provision, when it set maximum weekly working time at 48 hours.

39. The position, then, is not, as the German Government argues, that if Paragraph 7(1)(i)(a) of the Law on working time were disregarded the domestic court would encounter a legal vacuum which would oblige it to impose penalties on an employer under Directive 93/104, since it could, quite simply, resort to another national rule, belonging to the same statute, adopted in order to transpose the Community provisions [48] and which does comply with the

45 — Council Directive of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23).

46 — Council Directive of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

47 — Case 14/86 *Pretore de Salò* [1987] ECR 2545, paragraph 20; and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13.

48 — There is a body of legal thinking which takes the same view. See, by way of example, Faro, S: 'la Cassazione torna a pronunciarsi sull'efficacia diretta "orizzontale" delle direttive comunitarie', in *Rivista italiana di diritto pubblico comunitario*, 1998 pp. 1398-1407, in particular, pp. 1403 and 1404: 'la previsione di questo obbligo [interpretare la norma nazionale in coerenza con quella contenuta in una directiva comunitaria] comporta, di fatto, il riconoscimento di un effetto orizzonntle "indiretto" delle direttive, indiretto in quanto la norma che trova applicazione al rapporto tra i privati è, in ogni caso, la norma nazionale'; Tesauro, G.: *Diritto Comunitario, terza edizione*, CEDAM, 2003, pp. 162 to 184, in particular, p. 180: 'I risultati pratici cui si previene con l'obbligo di interpretare il diritto nazionale in modo conforme alla norma di una directiva ... non sono molto diversi da quelli che si realizzerebbero con l'affermazione pura e semplice dell'effetto orizzontale e verticale. Non e caso, dunque, la Corte ha talvolta trasformato il problema della portata dell'effetto directto della directiva in un problema di interpretazione conforme'; Rodiere, P.: 'Sur les effets directifs du droit (social) communautaire', in *Revue trimestrielle de droit européen*, 27 (4), 1994, pp. 565-586, in particular, p. 577: 'L'opération consiste, donc, à substituer une norme de droit national conforme au droit communautaire à celle qui ne l'était pas. La norme à appliquer a un caractère national, le rôle du droit communautaire se borne à en opérer la désignation. Double avantage: peu importe qu'une directive communautaire ne puisse créer directement des obligations pesant sur les particuliers, puisque on le demande au droit national'; Timmermans, C.W.A.: 'Directives: their effect within the national legal systems', in *Common Market Law Review*, 16, 1979, pp. 533 to 555, in particular, p. 551: 'I do not exclude the possibility that, once the process of legal review of national law with regard to directives has become common practice, the Court of Justice will accept and even require such review also with regard to directives relating to horizontal relationships'; and Bach, A.: *Juristenzeitung*, 1990, p. 1113: 'Die richtlinienkonforme Auslegung ebenso wie die Nichtanwendung gemeinschaftswidriger Normen können dabei erhebliche Auswirkungen auf die Rechte und Pflichten einzelner haben. Objektive Wirkungen sind durchaus auch zu Lasten Privater möglich'.

general requirement imposed by the European legislature [49] that working time in Member States should not exceed that number of hours. [50]

In that regard I share the view of Advocate General Van Gerven in point 7, second paragraph, of his Opinion in *Marleasing*, [51] that the obligation on the part of the national courts to interpret their national law in conformity with a directive does not mean that the directive has direct effect as between individuals. On the contrary, it is the national provisions themselves, interpreted in a manner consistent with the directive, which apply.

40. I should also mention two judgments abundantly cited by the parties at this stage of the proceedings, both for and against their various arguments. I refer to *CIA Security International* [52] and *Unilever*, [53] which may be landmarks in the development of this Court's case-law on the application by national courts of directives not complied with by Member States, but are not overly useful in anwering the question now raised. [54]

In both cases the reply to the national court was that, in proceedings between individuals, it should decline to apply a national technical regulation approved without prior notification to the Commission, in clear breach of Articles 8 and 9 of Directive 83/189/EEC, [55] but the Court of Justice took pains to point out that its case-law in *Faccini Dori* [56] was not relevant to the matter, because non-

49 — Advocate General Alber favoured a solution of this nature in paragraphs 25 to 31 of his Opinion in *Collino and Chiappero* (Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659), were the national court to take the view that the dispute was between private persons. In replying to the questions referred for a preliminary ruling, the Court of Justice left it to the national court to determine whether the workers could rely on the provisions of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26), against a company which had been charged, by concession, with providing public telecommunications services, as successor to a public body which had previously provided those services.

50 — See also the Opinion of Advocate General Jacobs in *Centrosteel*, cited above, paragraph 35, and that of Advocate General Geelhoed in Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 42.

51 — Cited above.

52 — Case C-194/94 *CIA Security International* [1996] ECR I-2201.

53 — Case C-443/98 *Unilever* [2000] ECR I-7535.

54 — López Escudero, M.: 'Efectos del incumplimiento del procedimiento de información aplicable a las reglamentaciones técnicas (Directiva 83/189/CEE)', in *Revista de Instituciones Europeas*, 1996, pp 839 to 861, in particular, p. 861: 'los particulares no pueden deducir derecho alguno de actos normativos comunitarios que, como la Directiva 83/189, establecen un procedimiento de información en el seno del cual las Instituciones comunitarias carecen de poder para determinar la compatibilidad con el derecho comunitario de las reglamentaciones nacionales notificadas. Por ello, considero que la utilización del principio del efecto directo para garantizar la efectividad de este tipo de normas comunitarias no es conveniente. El efecto directo no debe ser utilizado jurisprudencialmente para "enmendar" las deficiencias surgidas en la aplicación de cualquier tipo de normativa comunitaria'.

55 — Council Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

56 — Cited above.

compliance with the provisions of that directive constituted a substantial procedural defect and its provisions created neither rights nor obligations for individuals. [57]

41. Nor has the fact that the direct effect of a rule in a directive may affect the rights of individuals, who do not form part of the vertical relationship, prevented the Court of Justice from finding that there is direct effect. This is well illustrated in the following judgments: *Fratelli Costanzo,* [58] which interprets Directive 71/305/EEC [59] in proceedings for annulment of the decision to award a public works contract; [60] *World Wildlife Fund and Others,* [61] in other proceedings for annulment brought by various individuals living near an airport and two environmental associations, contesting the decision to approve a project for the restructuring of the airport's facilities; *Smith & Nephew and Primecrown* [62] which permitted the holder of a marketing authorisation issued under Directive 65/65/EEC [63] to rely on the provisions of that directive in proceedings before a national court, in order to challenge the validity of an authorisation issued by the competent authority on the basis of that directive to one of its competitors for a proprietary medicinal product bearing the same name; and the recent judgment in *Wells,* [64] in which it was stated *obiter* that mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State.

42. I also disagree with those who have maintained that primacy can only be attributed to primary Community law or, at the very most, to regulations, because it was a regulation which was at issue in *Simmenthal,* [65] an artificial and inaccurate distinction given that, [66] in the ruling referred to, the Court of Justice confirmed the primacy of both the Treaty and of the directly applicable measures of the institutions. Furthermore, every time a Community provision is believed to preclude a provision of a Member State, the principle of primacy

57 — *Unilever,* also cited above, paragraphs 50 and 51.

58 — Cited above.

59 — Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682).

60 — Tridimas, T., op. cit., p. 334: 'Although [the Court] did not examine specifically the implications of allowing reliance on the directive, it did not consider as impermissible horizontal effect the adverse legal implications that would inevitably flow for the successful tenderer by the annulment of the tendering authority's decision'.

61 — Case C-435/97 *World Wildlife Fund and Others* [1999] ECR I-5613, paragraphs 69 to 71.

62 — Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819, paragraph 39.

63 — Council Directive of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products (OJ, English Special Edition, 1965-1966 p. 24).

64 — Case C-201/02 *Wells* [2004] ECR I-723, paragraph 57.

65 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 17.

66 — See Simon, D. 'La directive européenne', Dalloz 1997, p. 95: 'l'obligation d'écarter les règles nationales contraires au droit communautaire s'impose au juge national en vertu du principe de primauté, y compris si la norme en cause est dépourvue d'effet direct'.

established nearly 40 years ago must be reiterated, irrespective of the Community source: the Treaty,[67] a regulation or a directive.[68]

43. It is not my intention, at this juncture, to argue for the direct horizontal effect of untransposed directives which satisfy the requirements laid down by the case-law. I am not seeking, far from it, to encourage national courts to apply such rules and encroach on the functions of the national legislature.

However, nor can I concur with those who argue that, in a case such as that under examination, individuals are only entitled to hold the State liable for loss and damage caused in breach of its obligations under Community law since, as this Court has held, that solution is a remedy in the alternative and would only come into operation in this situation if none of the other national provisions adopted to implement Directive 93/104 could be interpreted in conformity with its wording and purpose.

44. In the circumstances of these cases, the Court of Justice's role as guarantor of the uniform interpretation of Community law, incumbent upon it particularly in its jurisdiction in preliminary rulings, means that it cannot leave the national court with no option but to apply a provision of domestic law[69] which is contrary to the wording of Article 6(2) of Directive 93/104 and to its purpose of improving the health and safety of workers.[70]

45. In view, then, of the fact that Article 6(2) of Directive 93/104 is a clear, precise and unconditional provision, not requiring any implementation by the national legislature,[71] and that the German court can avail itself of different provisions of the Law on working

67 — See Case 6/64 *Costa* v *ENEL* [1964] ECR 1141, in particular pp. 1158 to 1160.

68 — Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 20 to 24. In paragraph 9 of his Opinion in *Marleasing*, Advocate General Van Gerven stated that: 'Furthermore, as part of Community law, the directive ... in principle takes precedence over all provisions of national law. That is true in particular in the case of national provisions which ... relate to the branch of the law covered by the directive'.

69 — Prechal, S.: *Directives in European Community Law. A Study of Directives and Their Enforcement in National Courts*, Clarendon Press Oxford, 1995, p. 229: 'The domestic courts are here operating within the context of Community law. For this very reason Community law and, specially Article 5 of the Treaty, may not only require them to do something positive but may also stop them if they should transcend the limits of what is considered as acceptable under Community law'.

70 — Lenaerts, K.: 'L'égalité de traitement en droit communautaire. Un principe unique aux apparences multiples', in *Cahiers de droit européen*, 1991, pp. 3 to 41, in particular, p. 38: 'Le juge aura généralement tendance à interpréter la norme nationale concernée dans le sens de la directive et de garantir de la sorte l'effet utile de la directive dans les relations entre particuliers'; Morris, P.E.: 'The direct effect of directives — some recent developments in the European Court' — in *The journal of business law*, 1989, May, pp. 233 to 245, in particular, p. 241: 'if national judiciaries respond positively to this exhortation something approaching horizontal direct effect may be achieved by a circuitous route. The substantive contents of directives could gradually percolate into private legal relationships without the problems which investing directives with horizontal direct effect would bring in its train, most notably the erosion of legal certainty, the risk of a national judicial revolt and the distortion of article 189'.

71 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame and Others* [1996] ECR I-1029, paragraph 22.

time, other than Paragraph 7(1)(i)(a), it is inappropriate to invite the workers to bring an action for damages against the State.

46. I would add that the national court must, in interpreting the domestic implementing legislation, [72] take into account the concern in Directive 93/104 to protect workers, as the more vulnerable party in the employment relationship. This Court itself, in *Unilever*, [73] was at pains to distinguish between directives which create rights and obligations for individuals and those which do not.

47. It seems advisable, therefore, to recommend that the Arbeitsgericht, Lörrach should, in compliance with its responsibilities under Community law, follow the path mapped out by the Juzgado de Primera Instancia, Oviedo, the Tribunal Superior de Justicia, Catalonia, the Juzgado de Primera Instancia No 35, Barcelona, the Audiencia Provincial, Seville, the Tribunale Civile, Bologna, the Corte di Cassazione and the Pretore (Magistrate), Brescia.

48. For the reasons set out above I have to propose, provided the State has not availed itself of the option in Paragraph 18(1)(b)(i), that the Court of Justice should find that Article 6(2) of Directive 93/104 does preclude a provision such as Article 7(1)(i)(a) of the German Law on working time which, in a collective or works agreement, allows daily working time to be extended beyond 10 hours, if working time regularly includes significant periods of duty time.

In consequence, since it is based on Paragraph 7, Paragraph 14 of the German Red Cross collective agreement must be interpreted as meaning that the workers affected are not obliged to work more than an average of 48 hours per week, having regard for Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculating the average.

72 — A number of writers stress that certain areas of law, including employment and consumer law, which govern relations between individuals, display a degree of flexibility such as to allow, without difficulty, an interpretation of national provisions in the light of Community law which can contribute to their development. See Rodríguez Iglesias, G. C. and Riechenberg, K.: 'Zur richtlinienkonformen Auslegung (Ein Ersatz für die fehlende horizontale Wirkung?)', *Festschrift für Ulrich Everling*, vol. II, p. 1229: 'Es gibt Rechtsgebiete, die so flexibel ausgestaltet sind, dass eine Auslegung der einschlägigen innerstaatlichen Vorschriften im Lichte des Gemeinschaftsrechts ohne größere Schwierigkeiten möglich ist. Ein gutes Beispiel für eine Rechtsgebiet, das in allen Mitgliedstaaten in den letzten Jahren tiefgreifende Änderungen erfahren hat, ist das Arbeitsrecht. Auch jüngere Rechtsgebiete, wie das Verbraucherschutzrecht, dürften für eine solche Rechtsfortbildung offen sein'.

73 — Cited above.

IV — Conclusion

49. In accordance with the foregoing considerations, I again suggest to the Court of Justice that it reply as follows to the third question raised in this case by the Arbeitsgericht, Lörrach:

Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time, as well as conferring rights on individuals, is, even where Member States lay down exceptions to the reference period set in Article 16(2), clear, precise and unconditional, and therefore can be relied upon before the national courts, when the Member State has failed properly to transpose that provision within the prescribed period. However, since the main actions are proceedings between individuals, the workers cannot rely on the direct effect of that provision.

Provided the State has not availed itself of the option in Article 18(1)(b)(i), Article 6(2) of Directive 93/104 does preclude a provision such as Paragraph 7(1)(i)(a) of the German Law on working time which, in a collective or works agreement, allows daily working time to be extended beyond 10 hours if working time regularly includes significant periods of duty time. Paragraph 14 of the collective agreement concerning working conditions for German Red Cross employees, workers and trainees, since it is based on Paragraph 7, must be interpreted with the effect that the workers affected are not obliged to work more than an average of 48 hours per week, having regard for Article 16(2) and Article 17(4) of Directive 93/104 on the setting of the reference period for calculating the average.