Judgment of the Court of Justice, United Kingdom v Council, Case C-84/94 (12 November 1996)

Caption: In its judgment of 12 November 1996, in Case C-84/94, United Kingdom v Council, in response to an action for the annulment of the directive concerning certain aspects of the organisation of working time, the Court of Justice rejects the United Kingdom's argument of non-compliance with the principle of subsidiarity. That argument claims that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level.

Source: CVRIA. Case-law: Numerical access to the case-law. [ON-LINE]. [Luxembourg]: Court of Jusitce of the European Communities, [16.05.2006]. C-84/94. Available on http://curia.eu.int/en/content/juris/index.htm.

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Judgment of the Court of 12 November 1996
United Kingdom of Great Britain and Northern Ireland v Council of the European Union

Council Directive 93/104/EC concerning certain aspects of the organization of working time - Action for annulment

Case C-84/94

Summary

1. Social policy - Protection of workers' health and safety - Directive 93/104 concerning certain aspects of the organization of working time - Legal basis - Article 118a of the Treaty - Limits - Fixing of Sunday as the weekly rest day - Annulment of the second paragraph of Article 5 of the directive

(EC Treaty, Arts 100, 100a and 118a; Council Directive 93/104, Art. 5, second para.)

2. Acts of the institutions - Choice of legal basis - Criteria - Practice of an institution - Irrelevant with regard to Treaty rules

3. EC Treaty - Article 235 - Scope

4. Community law - Principles - Proportionality - Scope - Infringement by Directive 93/104 concerning certain aspects of the organization of working time - None

(Council Directive 93/104)

5. Actions for annulment - Pleas in law - Misuse of powers - Definition - Council Directive 93/104 - Legality

(Council Directive 93/104)

6. Acts of the institutions - Statement of reasons - Duty - Scope

(EC Treaty, Art. 190)

1. Article 118a of the Treaty is the appropriate legal basis for the adoption by the Community of measures whose principal aim is the protection of the health and safety of workers, notwithstanding the ancillary effects which such measures may have on the establishment and functioning of the internal market. Since its aim is to ensure that protection, Article 118a constitutes a more specific rule than Articles 100 and 100a, the existence of which does not have the effect of restricting its scope, and must be widely interpreted as regards the scope it gives for Community legislative action regarding the health and safety of workers. Such action may comprise measures which are of general application, not merely measures specific to certain categories of workers, and which have to be in the nature of minimum requirements only in the sense that Member States remain at liberty to adopt more protective measures.

It is for that reason that, in terms of both its aim and its content, Directive 93/104 concerning certain aspects of the organization of working time could, save for the provisions in the second paragraph of Article 5 giving priority to Sunday as the weekly rest day which must therefore be annulled, be adopted on the basis of Article 118a.

2. As part of the system of Community competence, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure.

A mere Council practice cannot derogate from the rules laid down in the Treaty, and cannot therefore create a precedent binding on the Community institutions where, prior to the adoption of a measure, they have to determine the correct legal basis for it.

3. Article 235 of the Treaty may be used as the legal basis for a measure only where no other Treaty provision confers on the Community institutions the necessary power to adopt it.

4. The adoption by the Council of Directive 93/104 concerning certain aspects of the organization of working time did not constitute an infringement of the principle of proportionality.

The limited power of review which the Community judicature has over the Council' s exercise of its wide discretion in the area of the protection of workers' health and safety, where social policy choices and complex assessments are involved, has not revealed either that the measures forming the subject-matter of the directive, save for that contained in the second paragraph of Article 5, were unsuited to achieving the aim pursued, namely workers' health and safety, or that those measures, which have a degree of flexibility,

went beyond what was necessary to attain their objective.

5. An act of a Community institution is vitiated by a misuse of powers if it has been adopted with the exclusive or main purpose of achieving ends other than those stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

That is not the case with Council Directive 93/104 concerning certain aspects of the organization of working time, since it has not been established that it was adopted with the exclusive or main purpose of achieving an end other than the protection of the health and safety of workers envisaged by Article 118a of the Treaty which constitutes its legal basis.

6. Whilst the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, the authority is not required to go into every relevant point of fact and law.

Where a contested measure clearly discloses the essential objective pursued by the institution, it would be pointless to require a specific statement of reasons for each of the technical choices made by it.

In Case C-84/94,

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by Michael J. Beloff QC, and Eleanor Sharpston, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

applicant,

v

Council of the European Union, represented by Antonio Sacchettini, a Director in the Legal Service, Jill Aussant, Legal Adviser, and Sophia Kyriakopoulou, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Kingdom of Spain, represented by Alberto Navarro González, Director General for Commumity Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, of the State Legal Service, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and by

Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

and by

Kingdom of Belgium, represented by Jan Devadder, Director of Administration, Legal Service of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent,

with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

interveners,

APPLICATION for the annulment of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ 1993 L 307, p. 18) and, in the alternative, of Article 4, the first and second sentences of Article 5, Article 6(2) and Article 7 of that directive,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, G.F. Mancini, J.C. Moitinho de Almeida (Rapporteur), J.L. Murray and L. Sevón (Presidents of Chambers), C.N. Kakouris, P.J.G. Kapteyn, C. Gulmann, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 January 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 March 1994, the United Kingdom of Great Britain and Northern Ireland brought an action under Article 173 of the EC Treaty for the annulment of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (OJ 1993 L 307, p. 18, hereinafter "the directive") and, in the alternative, of Article 4, the first and second sentences of Article 5, Article 6(2) and Article 7 of the directive.

2 The directive was adopted on the basis of Article 118a of the Treaty, which provides as follows:

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

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

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

3. The provisions adopted pursuant to this article shall not prevent any Member State from maintaining or

introducing more stringent measures for the protection of working conditions compatible with this Treaty."

3 The directive, in accordance with Article 1 thereof, lays down minimum health and safety requirements for the organization of working time, and applies to all sectors of activity, both public and private, within the meaning of Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1), with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

4 Section II of the directive regulates minimum periods of daily rest, weekly rest and annual leave, as well as rest breaks and maximum weekly working time. Member States are thus obliged to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of eleven consecutive hours per twenty-four hour period (Article 3), to a rest break where the working day is longer than six hours, the details of such break to be determined by the two sides of industry or by national legislation (Article 4), to a minimum uninterrupted rest period of twenty-four hours in each seven-day period, plus the eleven hours daily rest referred to in Article 3 (Article 5, first sentence), such period in principle to include Sunday (Article 5, second sentence), and, finally, to four weeks' paid annual leave (Article 7).

5 Furthermore, Article 6 requires Member States to take the measures necessary to ensure that, in keeping with the need to protect the health and safety of workers, the period of weekly working time is determined by the two sides of industry or by national legislation, provided that the average working time for each seven-day period, including overtime, does not exceed forty-eight hours.

6 Section III of the directive contains various requirements concerning night work, shift work and patterns of work. Member States are accordingly obliged to take the measures necessary to ensure that normal hours of work for night workers do not exceed an average of eight hours in any twenty-four hour period, and that, where the work involves special hazards or heavy physical or mental strain, they do not work more than eight hours in any twenty-four hour period during which they perform night work (Article 8). Night workers must also be entitled to a free health assessment before their assignment and thereafter at regular intervals, and, where they suffer from health problems linked to night work, must be transferred whenever possible to day work to which they are suited (Article 9). Article 10 authorizes Member States to make the work of certain categories of night workers subject to certain guarantees, in the case of workers who incur risks to their health or safety linked to night-time working, and Article 12 obliges Member States, in particular, to take the measures necessary to ensure that night workers and shift workers have health and safety protection appropriate to the nature of their work.

7 Member States are also to take measures to ensure that an employer who regularly uses night workers brings that information to the attention of the competent authorities if they so request (Article 11). Finally, where work is organized according to a certain pattern, employers are to take account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate, depending on the type of activity, and also of health and safety requirements (Article 13).

8 Section IV of the directive contains miscellaneous provisions. Article 14 provides that the directive is not to apply where there are other more specific Community provisions concerning certain occupations or occupational activities. Article 15 provides that Member States may apply, or permit the application of, provisions which are more favourable than those contained in the directive. Article 16 empowers Member States to lay down reference periods for the application of the provisions on the weekly rest period, maximum weekly working time and the length of night work. Finally, Article 17 lists the derogations which may be made from certain provisions, while Article 18 lays down various periods for transposition of the directive into national law.

9 In support of its action, the applicant relies on four pleas, alleging, respectively, that the legal base of the directive is defective, breach of the principle of proportionality, misuse of powers, and infringement of essential procedural requirements.

The plea that the legal base of the directive is defective

10 The applicant contends that the directive should have been adopted on the basis of Article 100 of the EC Treaty, or Article 235 of the Treaty, which require unanimity within the Council.

The scope of Article 118a

11 The applicant observes in the first place that, because Article 118a of the Treaty must be regarded as an exception to Article 100 - which, pursuant to Article 100a(2), is the article that covers provisions "relating to the rights and interests of employed persons" - it must be strictly interpreted.

12 As the Court pointed out in Opinion 2/91 of 19 March 1993 ([1993] ECR I-1061, paragraph 17), Article 118a confers upon the Community internal legislative competence in the area of social policy. The existence of other provisions in the Treaty does not have the effect of restricting the scope of Article 118a. Appearing as it does in the chapter of the Treaty which deals with "Social Provisions", Article 118a relates only to measures concerning the protection of the health and safety of workers. It therefore constitutes a more specific rule than Articles 100 and 100a. That interpretation is confirmed by the actual wording of Article 100a(1) itself, which states that its provisions are to apply "save where otherwise provided in this Treaty". The applicant’s argument cannot therefore be accepted.

13 Second, referring to the actual wording of Article 118a, the applicant argues first that that provision permits the adoption only of directives which have a genuine and objective link to the "health and safety" of workers. That does not apply to measures concerning, in particular, weekly working time, paid annual leave and rest periods, whose connection with the health and safety of workers is too tenuous. That interpretation is borne out by the expression "working environment" used in Article 118a, which implies that directives based on that provision must be concerned only with physical conditions and risks at the workplace.

14 In that respect, it should be noted that Article 118a(2), read in conjunction with Article 118a(1), empowers the Council to adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States, with a view to "encouraging improvements, especially in the working environment, as regards the health and safety of workers" by harmonizing conditions in this area, while maintaining the improvements made.

15 There is nothing in the wording of Article 118a to indicate that the concepts of "working environment", "safety" and "health" as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organization of working time. On the contrary, the words "especially in the working environment" militate in favour of a broad interpretation of the powers which Article 118a confers upon the Council for the protection of the health and safety of workers. Moreover, such an interpretation of the words "safety" and "health" derives support in particular from the preamble to the Constitution of the World Health Organization to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.

16 The applicant further argues that under Article 118a(2) the Council may adopt only "minimum requirements" for gradual implementation, having regard to the conditions and technical rules obtaining in the Member States. That provision therefore empowers the Council to adopt harmonization measures only at a level acceptable to all Member States and constituting a minimum benchmark.

17 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 expressly assigns to it - namely, to work in favour of improved conditions, as regards the health and safety of workers, while maintaining the improvements made. The significance of the expression "minimum requirements" in Article 118a is simply, as indeed Article 118a(3) confirms, that the

provision authorizes Member States to adopt more stringent measures than those which form the subject-matter of Community action (see, in particular, Opinion 2/91, cited above, paragraph 18).

18 Third, the applicant argues that, in the light of previous directives based on Article 118a, that provision does not authorize the Council to adopt directives, such as that in dispute here, which deal with the question of health and safety in a generalized, unspecific and unscientific manner. Thus, Directive 89/391 established a risk assessment procedure designed to pinpoint specific areas in which action was required to safeguard the health and safety of workers. Similarly, the other directives based on Article 118a fall into two categories, namely "individual" directives within the meaning of Article 16 of Directive 89/391 (concerning, in particular, the provision of safety and health signs at work or the regulation of risks connected with exposure to carcinogens), and directives which, whilst not based on Directive 89/391, clearly focus upon a specific health or safety problem in a specific situation.

19 It is settled case-law that what is merely Council practice cannot derogate from the rules laid down in the Treaty, and cannot therefore create a precedent binding on the Community institutions with regard to the correct legal basis (see, in particular, Case 68/86 United Kingdom v Council [1988] ECR 855, paragraph 24, and Case C-271/94 Parliament v Council [1996] ECR I-1705, paragraph 24). Moreover, measures having a general scope have been adopted on the basis of Article 118a of the Treaty, as is demonstrated in particular by Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1989 L 393, p. 1).

20 Furthermore, there is no support in the wording of Article 118a for the argument that Community action should be restricted to specific measures applicable to given groups of workers in particular situations, whilst measures for wider purposes should be adopted on the basis of Article 100 of the Treaty. Article 118a refers to "workers" generally and states that the objective which it pursues is to be achieved by the harmonization of "conditions" in general existing in the area of the health and safety of those workers.

21 In addition, the delimitation of the respective fields of application of Articles 100 and 100a, on the one hand, and Article 118a, on the other, rests not upon a distinction between the possibility of adopting general measures in the former case and particular measures in the latter, but upon the principal aim of the measure envisaged.

22 It follows that, where the principal aim of the measure in question is the protection of the health and safety of workers, Article 118a must be used, albeit such a measure may have ancillary effects on the establishment and functioning of the internal market (see, in particular, Parliament v Council, cited above, paragraph 32).

23 Finally, it is to be remembered that it is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercised under Article 173 must be limited to the legality of the disputed measure.

24 It is in the light of those considerations that the Court must examine whether the directive was properly adopted on the basis of Article 118a of the Treaty.

The choice of legal basis for the directive

25 As part of the system of Community competence, the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review (see, in particular, Case 45/86 Commission v Council [1987] ECR 1493, paragraph 11). Those factors include, in particular, the aim and content of the measure (see, in particular, Case C-300/89 Commission v Council [1991] ECR I-2867, paragraph 10).

26 As regards the aim of the directive, the applicant argues that it represents a continuation of the Community' s earlier thinking and of a series of earlier initiatives at Community level concerned with the organization of working time in the interests of job creation and reduced unemployment. It is in reality a

measure concerned with the overall improvement of the living and working conditions of employees and with their general protection, and is so broad in its scope and coverage as to be capable of classification as a social policy measure, for the adoption of which other legal bases exist.

27 It is to be noted in that respect that, according to the sixth recital in its preamble, the directive constitutes a practical contribution towards creating the social dimension of the internal market. However, it does not follow from the fact that the directive falls within the scope of Community social policy that it cannot properly be based on Article 118a, so long as it contributes to encouraging improvements as regards the health and safety of workers. Indeed, Article 118a forms part of Chapter 1, headed "Social Provisions", of Title VIII of the Treaty, which deals in particular with "Social Policy". This led the Court to conclude that that provision conferred on the Community internal legislative competence in the area of social policy (Opinion 2/91, cited above, paragraph 17).

28 Furthermore, as the Advocate General has demonstrated in points 85 to 90 of his Opinion, the organization of working time is not necessarily conceived as an instrument of employment policy. In this case, the fifth recital in the preamble to the directive states that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to "purely economic considerations". Were the organization of working time to be viewed as a means of combating unemployment, a number of economic factors would have to be taken into account, such as, for example, its impact on the productivity of undertakings and on workers' salaries.

29 The approach taken by the directive, viewing the organization of working time essentially in terms of the favourable impact it may have on the health and safety of workers, is apparent from several recitals in its preamble. Thus, for example, the eighth recital states that, in order to ensure the safety and health of Community workers, they must be granted minimum rest periods and adequate breaks and that it is also necessary in that context to place a maximum limit on weekly working hours. In addition, the eleventh recital states that "research has shown that ... long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace", while the fifteenth recital states that specific working conditions may have detrimental effects on the safety and health of workers and that the organization of work according to a certain pattern must take account of the general principle of adapting work to the worker.

30 While, in the light of those considerations, it cannot be excluded that the directive may affect employment, that is clearly not its essential objective.

31 As regards the content of the directive, the applicant argues that the connection between the measures it lays down, on the one hand, and health and safety, on the other, is too tenuous for the directive to be based on Article 118a of the Treaty.

32 In that respect, it argues that no adequate scientific evidence exists to justify the imposition of a general requirement to provide for breaks where the working day is longer than six hours (Article 4), a general requirement to provide for a minimum uninterrupted weekly rest period of twenty-four hours in addition to the usual eleven hours' daily rest (Article 5, first sentence), a requirement that the minimum rest period must, in principle, include Sunday (Article 5, second sentence), a general requirement to ensure that the average working time for each seven-day period, including overtime, does not exceed forty-eight hours (Article 6(2)), and a general requirement that every worker is to have a minimum of four weeks' paid annual leave (Article 7).

33 The applicant points out in that connection that Directive 89/391 provides for employers to carry out assessments to evaluate specific risks to the health and safety of workers, taking into account the nature of the activities of the undertaking. The risk assessment procedure laid down by Directive 89/391 could not apply to the restrictions on working time contained in Section II of the contested directive (and is applicable only to a very limited extent in Section III), the provisions in question being quite simply mandatory and leaving no scope for such an assessment in order to determine whether they are to apply.

34 The applicant maintains, moreover, that unlike other provisions based on Article 118a of the Treaty, the contested measures were not referred to the Advisory Committee on Safety, Hygiene and Health Protection at Work for an opinion (on the role of such committees, it cites Case C-212/91 Angelopharm [1994] ECR I-171, paragraphs 31 and 32). Although consultation of that committee is not expressly provided for in cases such as this, the fact that the Council did not call on the Commission to undertake such consultation casts further doubt on the link between the directive and the health and safety of workers.

35 Finally, in the applicant’s view, contrary to the requirements of Article 118a(2), the provisions of the directive do not constitute "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States" and do not take account of their effects on "the creation and development of small and medium-sized undertakings".

36 In order to deal with those arguments, a distinction must be drawn between the second sentence of Article 5 of the directive and its other provisions.

37 As to the second sentence of Article 5, whilst the question whether to include Sunday in the weekly rest period is ultimately left to the assessment of Member States, having regard, in particular, to the diversity of cultural, ethnic and religious factors in those States (second sentence of Article 5, read in conjunction with the tenth recital), the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week. In those circumstances, the applicant' s alternative claim must be upheld and the second sentence of Article 5, which is severable from the other provisions of the directive, must be annulled.

38 The other measures laid down by the directive, which refer to minimum rest periods, length of work, night work, shift work and the pattern of work, relate to the "working environment" and reflect concern for the protection of "the health and safety of workers". The scope of those terms has been explained in paragraph 15 of this judgment. Moreover, as the Belgian Government has pointed out, the evolution of social legislation at both national and international level confirms the existence of a link between measures relating to working time and the health and safety of workers.

39 Legislative action by the Community, particularly in the field of social policy, cannot be limited exclusively to circumstances where the justification for such action is scientifically demonstrated (see points 165 to 167 of the Advocate General' s Opinion).

40 Similarly, the applicant' s argument that the directive precludes any assessment of the risks involved for certain workers or for those working in a particular sector cannot be regarded as well founded. The Community legislature did take certain special situations into account, as is demonstrated by Article 1 of the directive, which excludes certain sectors or activities from its scope; by Article 14, which excludes occupations and occupational activities where more specific Community provisions apply; and by Article 17(1) and (2) which allow derogations from Articles 3, 4, 5, 6 and 8 in respect of certain groups of workers or certain sectors of activity (see points 114 to 117 of the Advocate General' s Opinion).

41 It is true that the Council did not consult the Advisory Committee on Safety, Hygiene and Health Protection at Work established by Council Decision 74/325/EEC of 27 June 1974 (OJ 1974 L 185, p. 15) with regard to the measures envisaged by the directive. However, under Article 2(1) of that decision, such consultation is intended only "[to assist] the Commission in the preparation and implementation of activities in the fields of safety, hygiene and health protection at work", and does not therefore constitute a condition precedent for action by the Council. In those circumstances, failure to consult that committee cannot be relied on to cast doubt on the link between the measures laid down by the directive and the protection of the health and safety of workers.

42 Furthermore, the provisions of the directive are "minimum requirements" within the meaning of Article 118a of the Treaty. Whilst ensuring a certain level of protection for workers, the directive authorizes Member States in Article 15 to apply, or facilitate the application of, measures which are more favourable to the protection of the health and safety of workers, thereby guaranteeing them a more stringent level of

protection, in accordance with Article 118a(3). Similarly, Article 18(3) of the directive states that, whilst Member States may provide for different measures in the field of working time, subject to compliance with the minimum requirements it lays down, implementation of the directive does not constitute valid grounds for reducing the general level of protection afforded to workers.

43 The measures laid down by the directive are also, in accordance with Article 118a, "for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States". In the first place, it is not in dispute that legislation in all the Member States includes measures on the organization of working time. Furthermore, Article 18 of the directive authorizes Member States, subject to certain conditions, not to apply, after the expiry of the time-limit for implementing the directive (23 November 1996), the provisions of Article 6 on weekly working time or, for a three-year transitional period, the provisions of Article 7 on paid annual leave, which may during that period be limited to three weeks.

44 Finally, the directive has taken account of the effects which the organization of working time for which it provides may have on small and medium-sized undertakings. Thus, the second recital in the preamble to the directive refers to the overriding requirement not to hold back the development of such undertakings. Moreover, as the Court held in its judgment in Case C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-6185, paragraph 34, by providing that directives adopted in the field of health and safety of workers are to avoid imposing administrative, financial and legal constraints such as to hold back the creation and development of small and medium-sized undertakings, the second sentence of Article 118a(2) indicates that such undertakings may be the subject of special economic measures. Contrary to the view taken by the applicant, however, that provision does not prevent those undertakings from being subject to binding measures.

45 Since it is clear from the above considerations that, in terms of its aim and content, the directive has as its principal objective the protection of the health and safety of workers by the imposition of minimum requirements for gradual implementation, neither Article 100 nor Article 100a could have constituted the appropriate legal basis for its adoption.

46 The applicant further maintains that the Community legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the EC Treaty or significantly damage the interests of Member States or, finally, whether action at Community level would provide clear benefits compared with action at national level. In its submission, Article 118a should be interpreted in the light of the principle of subsidiarity, which does not allow adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely between Member States. The applicant explains in this context, however, that it does not rely upon infringement of the principle of subsidiarity as a separate plea.

47 In that respect, it should be noted that it is the responsibility of the Council, under Article 118a, to adopt minimum requirements so as to contribute, through harmonization, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1), is primarily the responsibility of the Member States. Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality.

48 Finally, as regards Article 235 of the Treaty, it is sufficient to point to the Court’s case-law, which holds that that article may be used as the legal basis for a measure only where no other Treaty provision confers on the Community institutions the necessary power to adopt it (see, in particular, Parliament v Council, cited above, paragraph 13).

49 It must therefore be held that the directive was properly adopted on the basis of Article 118a, save for the second sentence of Article 5, which must accordingly be annulled.

The plea of breach of the principle of proportionality

50 The applicant points out that the Council may adopt on the basis of Article 118a of the Treaty only "minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States", and that those requirements must avoid "imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings". In its submission, four broad principles are relevant in assessing whether or not the requirements imposed by the contested directive are minimum requirements within the meaning of Article 118a.

51 First, it argues, not all measures which may "improve" the level of health and safety protection of workers constitute minimum requirements. In particular, those consisting in global reductions in working time or global increases in rest periods, whilst having a certain beneficial effect on the health or safety of workers, do not constitute "minimum requirements" within the meaning of Article 118a.

52 Second, a provision cannot be regarded as a "minimum requirement" if the level of health and safety protection of workers which it establishes can be attained by measures that are less restrictive and involve fewer obstacles to the competitiveness of industry and the earning capacity of individuals. In the applicant' s submission, neither the Commission' s proposals nor the directive provide any explanation as to why the desired level of protection could not have been achieved by less restrictive measures, such as, for example, the use of risk assessments if working hours exceeded particular norms.

53 Third, the conclusion that the measures envisaged will in fact improve the level of health or safety protection of workers must be based on reasonable grounds. In its view, the present state of scientific research in the area concerned falls far short of justifying the contested measures.

54 Fourth, a measure will be proportionate only if it is consistent with the principle of subsidiarity. The applicant argues that it is for the Community institutions to demonstrate that the aims of the directive could better be achieved at Community level than by action on the part of the Member States. There has been no such demonstration in this case.

55 The argument of non-compliance with the principle of subsidiarity can be rejected at the outset. It is said that the Community legislature has not established that the aims of the directive would be better served at Community level than at national level. But that argument, as so formulated, really concerns the need for Community action, which has already been examined in paragraph 47 of this judgment.

56 Furthermore, as is clear from paragraph 17 of this judgment, the applicant bases its argument on a conception of "minimum requirements" which differs from that in Article 118a. That provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.

57 As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, in particular, Case C-426/93 Germany v Council [1995] ECR I-3723, paragraph 42).

58 As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution

concerned has manifestly exceeded the limits of its discretion.

59 So far as concerns the first condition, it is sufficient that, as follows from paragraphs 36 to 39 of this judgment, the measures on the organization of working time which form the subject-matter of the directive, save for that contained in the second sentence of Article 5, contribute directly to the improvement of health and safety protection for workers within the meaning of Article 118a, and cannot therefore be regarded as unsuited to the purpose of achieving the objective pursued.

60 The second condition is also fulfilled. Contrary to the view taken by the applicant, the Council did not commit any manifest error in concluding that the contested measures were necessary to achieve the objective of protecting the health and safety of workers.

61 In the first place, Article 4, which concerns the mandatory rest break, applies only if the working day is longer than six hours. Moreover, the relevant details, particularly the duration of the break and the terms on which it is granted, are to be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation. Finally, that provision may be the subject of several derogations, relating either to the status of the worker (Article 17(1)) or to the nature or characteristics of the activity pursued (Article 17(2), points 2.1 and 2.2), to be implemented by means of collective agreements or agreements concluded between the two sides of industry at national or regional level (Article 17(3)).

62 Second, the minimum uninterrupted weekly rest period of twenty-four hours provided for by the first sentence of Article 5, plus the eleven hours' daily rest referred to in Article 3, may be the subject of the same derogations as those authorized in relation to Article 4, referred to above. Further derogations relate to shift work activities and activities involving periods of work split up over the day (Article 17(2), point 2.3). In addition, the reference period of seven days may be extended to fourteen days (Article 16(1)).

63 Third, as regards Article 6(2), which provides that the average working time for each seven-day period is not to exceed forty-eight hours, Member States may lay down a reference period not exceeding four months (Article 16(2)), which may in certain cases be extended to six months for the application of Article 17(2), points 2.1 and 2.2, and 17(3) (Article 17(4), first sentence), or even to twelve months (Article 17(4), second sentence). Article 18(1)(b)(i) even authorizes Member States, under certain conditions, not to apply Article 6.

64 Fourth, in relation to Article 7 concerning paid annual leave of four weeks, Article 18(1)(b)(ii) authorizes Member States to allow a transitional period of three years, during which workers must be entitled to three weeks' paid annual leave.

65 Finally, as to the applicant' s argument that adoption of the contested directive was unnecessary since Directive 89/391 already applies to the areas covered by the contested directive, it is sufficient to note that Directive 89/391, as stated in Article 1 thereof, merely lays down, in order to encourage improvements in the health and safety of workers at work, general principles, as well as general guidelines for their implementation, concerning the prevention of occupational risks, the protection of health and safety, the elimination of risk and accident factors, and the provision of information to, consultation, participation and training of workers and their representatives. It is not therefore apt to achieve the objective of harmonizing minimum rest periods, rest breaks and a maximum limit to weekly working time, which form the subject-matter of the contested directive.

66 It follows that, in taking the view that the objective of harmonizing national legislation on the health and safety of workers, while maintaining the improvements made, could not be achieved by measures less restrictive than those that are the subject-matter of the directive, the Council did not commit any manifest error.

67 In the light of all the foregoing considerations, the plea of breach of the principle of proportionality must also be rejected.

The plea of misuse of powers

68 According to the applicant, the directive encompasses a number of measures that have no objective connection with its purported aims, and must therefore be annulled in its entirety. Those measures overshadow the very small elements - minimum daily rest periods, restrictions on maximum duration of night work - where scientific evidence indicates that there may be some causal connection with health and safety. Those two elements, in respect of which limited and specific action might have been justifiable, have instead been addressed in an unspecific, generalized, and thus unlawful manner.

69 The Court's case-law (see, in particular, Case C-156/93 Parliament v Commission [1995] ECR I-2019, paragraph 31) defines misuse of powers as the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

70 As is apparent from the Court' s examination of the plea of defective legal base, the Council could properly found the directive on Article 118a of the Treaty. The applicant has failed to establish that the directive was adopted with the exclusive or main purpose of achieving an end other than the protection of the health and safety of workers.

71 In those circumstances, the plea of misuse of powers must be rejected.

The plea of infringement of essential procedural requirements

72 The applicant's primary submission is that the directive is inadequately reasoned. It does not clearly and unequivocally disclose the reasoning of the Community authority which adopted it, because it fails to demonstrate the causal connection relied on by the Community legislature between health and safety, on the one hand, and most of the measures it contains concerning working time (Articles 3, 4, 5, 6(2), 7 and 8), on the other. Nor, moreover, does the preamble to the directive explain why Community action was necessary.

73 In the alternative, the applicant submits that the directive is defectively reasoned, in that the legislature should have explained that many of its elements were concerned with the improvement of the living and working conditions of employees or with the social dimension of the internal market, rather than referring, as it did, to the health and safety of workers.

74 As to those arguments, whilst the reasoning required by Article 190 of the EC Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, the authority is not required to go into every relevant point of fact and law (see Case C-122/94 Commission v Council [1996] ECR I-881, paragraph 29).

75 In the case of the directive, the preamble clearly shows that the measures introduced are intended to harmonize the protection of the health and safety of workers.

76 Thus, the first, third, fourth and ninth recitals in the preamble refer respectively to Article 118a of the Treaty, to Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work, to the Community Charter of the Fundamental Social Rights of Workers, and to the principles of the International Labour Organization with regard to the organization of working time.

77 So, too the fifth, seventh, eighth and eleventh to fifteenth recitals point to a direct link between the various measures on the organization of work laid down by the directive and the protection of the health and safety of workers.

78 The argument that the Council should have included in the preamble to the directive specific references to scientific material justifying the adoption of the various measures which it contains must be rejected.

79 As stated in paragraph 39 of this judgment, Article 118a does not require scientific proof to be produced for every measure adopted on the basis of that provision. Moreover, the Court has held that, where a contested measure clearly discloses the essential objective pursued by the institution, it would be pointless to require a specific statement of reasons for each of the technical choices made by it (see Case C-122/94 Commission v Council, cited above, paragraph 29).

80 Nor can the argument to the effect that the preamble to the directive fails to explain the need for Community action be accepted as well founded.

81 As has been pointed out in paragraphs 75 to 77 of this judgment, the preamble to the directive shows that the Council considered it necessary, in order to ensure an improved level of health and safety protection of workers, to take action to harmonize the national legislation of the Member States on the organization of working time. As stated in paragraph 47, the pursuit of such an objective, laid down in Article 118a itself, through harmonization by means of minimum requirements, necessarily presupposes Community-wide action.

82 Finally, as regards the arguments concerning alleged errors of assessment in the preamble to the directive, it is sufficient to refer to the Court' s case-law to the effect that such questions relate not to the issue of infringement of essential procedural requirements but to the substance of the case (see, in particular, Joined Cases C-296/93 and C-307/93 France and Ireland v Commission [1996] ECR I-795, paragraph 76), and to recall that those questions have been examined in the context of the plea of defective legal base.

83 It follows that the plea of infringement of essential procedural requirements must also be rejected.

84 The application must accordingly be dismissed, save as regards the second sentence of Article 5 of the directive, which is to be annulled.

Costs

85 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party' s pleadings. Since the Council of the European Union has applied for costs, and the United Kingdom of Great Britain and Northern Ireland has been essentially unsuccessful, the latter must be ordered to pay the costs. Pursuant to the first sentence of Article 69(4) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of Spain and the Commission of the European Communities, which have intervened in the proceedings, are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Annuls the second sentence of Article 5 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time;

2. Dismisses the remainder of the application;

3. Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;

4. Orders the Kingdom of Belgium, the Kingdom of Spain and the Commission of the European Communities to bear their own costs.