JUDGMENT OF THE COURT

3 October 2000 *

In Case C-303/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Superior de Justicia de la Comunidad Valenciana, Spain, for a preliminary ruling in the proceedings pending before that court between

Sindicato de Médicos de Asistencia Pública (Simap)

and

Conselleria de Sanidad y Consumo de la Generalidad Valenciana,

on the interpretation 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) and Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18),

* Language of the case: Spanish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Sindicato de Médicos de Asistencia Pública (Simap), by D. Rivera Auñón, Abogado,

— the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, by J. Pla Gimeno, of the Legal Service of the Generalidad Valenciana, acting as Agent,

— the Spanish Government, by M. López-Monís Gallego, Abogado del Estado, acting as Agent,

— the Finnish Government, by T. Pynnä, Valtionasiamies, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and D. Anderson, Barrister,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and I. Martínez del Peral, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Sindicato de Médicos de Asistencia Pública (Simap), represented by D. Rivera Auñón, of the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, represented by J. Pla Gimeno, of the Spanish Government, represented by N. Díaz Abad, Abogado del Estado, acting as Agent, of the Finnish Government, represented by T. Pynnä, and of the Commission, represented by D. Gouloussis and I. Martínez del Peral, at the hearing on 28 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By order of 10 July 1998, received at the Court on 3 August 1998, the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Valencia Autonomous Community) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation 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, hereinafter 'the basic Directive') and Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2 Those questions were raised in proceedings between the Sindicato de Médicos de Sanidad de Asistencia Pública (Union of Doctors in the Public Health Service, hereinafter 'Simap') and the Conselleria de Sanidad y Consumo de la Generalidad Valenciana (Ministry of Health of the Valencia Region), Simap having brought a collective action against the latter on behalf of medical staff providing primary care at health centres in that region.

Legal background

The Community legislation

The basic Directive

3 The basic Directive provides the background to this case. It lays down general principles which have been developed by a series of specific directives, including Directive 93/104.

4 Article 2 of the basic Directive defines its scope in the following terms:

'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

Directive 93/104

5 Directive 93/104 seeks to encourage improvements in the safety and health of workers at work. It was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

6 The first two articles of Directive 93/104 define its purpose and ambit and the scope and meaning of the terms used in it.

7 Article 1 of that directive, entitled 'Purpose and scope', states:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, 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. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.'

8 Under the heading 'Definitions', Article 2 of that directive provides:

'For the purposes of this Directive, the following definitions shall apply:

1. *working time* shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. *rest period* shall mean any period which is not working time;

3. *night time* shall mean any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.;

4. *night worker* shall mean:

(a) on the one hand, any worker who, during night time, works at least three hours of his daily working time as a normal course; and

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) by national legislation, following consultation with the two sides of industry; or

(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;

5. *shift work* shall mean any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or

discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

6. *shift worker* shall mean any worker whose work schedule is part of shift work.'

9 Directive 93/104 lays down a set of rules concerning the maximum duration of the working week, minimum daily and weekly rest periods, annual leave and the duration and conditions of night work and shift work.

10 With regard to maximum weekly working time, Article 6 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

11 With regard to the length of night work, Article 8 provides:

'Member States shall take the measures necessary to ensure that:

1. normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

2. night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of the aforementioned, work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

12 Article 15 provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

13 Article 16 lays down the reference periods to be taken into account for application of the rules mentioned in paragraphs 9 to 12 of this judgment. It states:

'Member States may lay down:

1. for the application of Article 5 (weekly rest period), a reference period not exceeding 14 days;

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average.

3. for the application of Article 8 (length of night work), a reference period defined after consultation of the two sides of industry or by collective agreements or agreements concluded between the two sides of industry at national or regional level.

If the minimum weekly rest period of 24 hours required by Article 5 falls within that reference period, it shall not be included in the calculation of the average.'

14 Directive 93/104 also provides for a number of derogations from its basic rules, having regard to particular features of certain activities, and imposes certain conditions. Thus, Article 17 provides:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent

periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

(a) in the case of activities where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another;

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1. and 2.2. and in paragraph 3 of this article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

...'

15 Article 18 of Directive 93/104 provides:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to

take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

— no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

— no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

— the employer keeps up-to-date records of all workers who carry out such work,

— the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

— the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

...'

The national legislation

16 Under the heading 'Working time', Article 6 of Royal Decree No 137/84 of 11 January 1984 (BOE No 27 of 1 February 1984, p. 2627) provides:

'1. The working time of staff forming part of primary care teams shall be 40 hours a week, without prejudice to work which they may be required to undertake as a result of being on call, such staff being obliged to respond to requests for home visits and urgent requests, in accordance with the provisions of the statutory staff regulations applicable to medical and auxiliary health staff employed by the social security authorities and the rules for the implementation thereof ...

2. In rural districts, care shall be provided for specified periods in the morning and afternoon at the health centre, local surgeries and at home, whether on an ordinary basis or by way of emergency.

Shift-work arrangements shall be made between members of teams in order to provide urgent assistance on a rotational basis, the services being centralised at the health centre every day of the week.'

17 By decision of 20 November 1992, published as an annex to the Resolution of 15 January 1993 (BOE No 28 of 2 February 1993, p. 2864), the Council of Ministers approved the agreement concluded on 3 July 1992 between the State health administration and the most representative trade-union organisations in the primary health care sector in Spain. The annex to that decision concerning agreements relating to primary care provides, under the heading 'B. Duty on call':

'... In general, the maximum number of hours of duty on call shall be 425 per year. In the case of primary care teams in rural districts, which are inevitably on call in excess of the limit of 425 hours per year laid down as a general rule, the maximum shall be 850 hours per year, the aim being progressively to reduce the number of hours of duty on call ...'

18 For the Valencia Autonomous Community, an agreement was also concluded on 7 May 1993 between the most representative trade unions and the regional administration in terms similar to those set out in the foregoing paragraph. That agreement provides *inter alia* as follows:

'... The staff shall be on call for a maximum of 425 hours per year. For primary care teams in rural districts, which are inevitably on call in excess of the 425 hours per year laid down as a general rule, it is agreed, with a view to progressively reducing the number of hours of duty on call, to apply a ceiling of 850 hours per year and to that end to engage additional doctors and specialised health assistants, at the same time complying with the budgetary limit imposed ...'

19 A regulation governing the organisation and operation of the primary care teams in the Valencia Autonomous Community (hereinafter 'the Regulation') was adopted by decision of 20 November 1991 of the Conselleria de Sanidad y Consumo de la Generalidad Valenciana. Article 17(3) of the Regulation reproduces Article 6 of Royal Decree No 137/84.

20 By judgment of 15 December 1993, the Administrative Chamber of the Tribunal Superior de Justicia of the Comunidad Valenciana annulled the decision approving the Regulation.

21 On 21 September 1995, Royal Decree No 1561/95 concerning the duration of special work was adopted (BOE No 230 of 26 September 1995, p. 28606). Its scope is limited to ordinary employment relationships governed by private law and it contains no provision concerning the health sector.

The main proceedings and the questions referred to the Court

22 By a collective action brought against the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, Simap sought a declaration that all doctors working in primary care teams in the Valencia region enjoy the following rights:

— Article 17(3) of the regulations should be interpreted in the light of Articles 6, 8, 15 and 17 of Directive 93/104;

— their working time should not exceed 40 hours, including overtime, in any period of seven days (over a total of four months) and night work should not exceed eight hours in any period of 24 hours or, if that limit is exceeded, equivalent compensatory rest periods should be granted to them;

— or, in the alternative, their working time should not exceed 48 hours, including overtime, in any period of seven days (over a total of four months) and night work should not exceed eight hours in any period of 24 hours or, if that limit is exceeded, equivalent compensatory rest periods should be granted to them;

— their status as night workers and shift workers should be recognised and, accordingly, the special protection measures provided for in Articles 9 to 13 of Directive 93/104 should be implemented before they are required to undertake such work and periodically thereafter.

23 According to the national court, the action is based on the allegation that under Article 17(3) of the Regulation, which reproduces Article 6 of Royal Decree No 137/84, doctors who work in primary care teams are required to work without the benefit of any time-limit and without the duration of their work being subject to any daily, weekly, monthly or annual limits; moreover, the normal working period is followed by a period of duty on call, followed, in turn, by the normal working period for the next day, and that work pattern is applied in the manner required by the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, on the basis of requirements which are determined unilaterally. Simap also contends that 'in fact, a doctor in a primary care team is obliged to work for an uninterrupted period of 31 hours, without night rest, whenever the programme for the week or the month so provides, sometimes at

the rate of one day in every two; he must make his own eating arrangements; he must go out on house calls during the night, when there is no public transport, alone and without any security arrangements, travelling as best he can'.

24 The national court states that doctors in primary care teams at Puerto de Sagunto and Burjassot work from 8 a.m. to 3 p.m., to which period is added, every 11 days, a period of duty on call extending from the end of the working day until 8 o'clock the following morning, subject to exceptional unforeseen requirements, such as, in particular, standing in for colleagues who are ill. The weekly working time of the doctors concerned is 40 hours, to which must be added, where appropriate, duty on call, which forms part of the legal working time according to national practice in interpreting their staff regulations and the applicable internal rules.

25 The national court also observes that, in accordance with national practice for doctors whose links with the administration are governed by staff regulations, time on call has a special status, not qualifying as overtime, and is paid on a flat-rate basis, without the actual work performed being taken into consideration.

26 Moreover, where duty on call or stand-by duty is worked under the regime which requires the doctor to be contactable, only actual working hours have to be taken into account in determining the maximum working time. According to the national court, service on call in health establishments is never permitted to be regarded as overtime; overtime constitutes an extension of the normal working hours, with the same workload, whereas duty on call is carried out under conditions different from those under which work within the normal working hours is performed.

27 The national court also states that Directive 93/104 was not correctly transposed into Spanish law. Royal Decree No 1561/95 was the only measure adopted, its

scope being limited to ordinary employment relationships governed by private law, and no provision of that decree is concerned with the health sector.

28 It was in those circumstances that the Tribunal Superior de Justicia de la Comunidad Valenciana decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following questions:

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

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

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

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

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

2. Questions on working time

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

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

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

3. Average working time

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

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

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

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

4. Night work

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

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

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

5. Shift work and shift workers

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

The questions referred to the Court for a preliminary ruling

The scope of Directive 93/104 (Questions 1(a), (c) and (d))

29 By Questions 1(a), (c) and (d) the national court seeks essentially to ascertain whether the activity of doctors in primary health care teams comes within the scope of the basic Directive and Directive 93/104.

30 Article 1(3) of Directive 93/104 defines its scope first by referring expressly to Article 2 of the basic Directive and, second, by providing for a number of exceptions in relation to certain specified activities.

31 Accordingly, in order to determine whether an activity such as that of doctors in primary care teams falls within the scope of Directive 93/104, it is necessary first to consider whether that activity comes within the scope of the basic Directive.

32 By virtue of Article 2(1) thereof, the basic Directive applies to all sectors of activity, both public and private, including industrial, agricultural, commercial, administrative, service, educational, cultural and leisure activities. However, by virtue of Article 2(2), the basic Directive is not to apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

33 Since doctors in primary care teams perform their activities in a context which links them to the public sector, it is necessary to consider whether such activities come within the scope of the exclusion mentioned in the foregoing paragraph.

34 It is important to note, first, that it is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope.

35 It follows that the exceptions to the scope of the basic Directive, including that provided for in Article 2(2), must be interpreted restrictively.

36 In addition, Article 2(2) of the basic Directive refers to certain specific public service activities intended to uphold public order and security, which are essential for the proper functioning of society.

37 It is clear that, under normal circumstances, the activity of primary care teams cannot be assimilated to such activities.

38 The activity of primary care teams falls therefore within the scope of the basic Directive.

39 Accordingly, it is necessary to consider whether such an activity comes within the scope of any of the exceptions provided for in Article 1(3) of Directive 93/104.

40 It does not. According to that provision, only the activities of doctors in training come within the exceptions to the scope of that directive.

41 Accordingly, the answer to Questions 1(a), (c) and (d) is that an activity such as that of doctors in primary health care teams falls within the scope of the basic Directive and of Directive 93/104.

The application of Article 17 of Directive 93/104 (Question 1(b))

42 The essential aim of Question 1(b) is to ascertain whether the national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the features of the activity of doctors in primary care teams, such activity falls within the derogations mentioned in Article 17 of that directive.

43 Article 17 of Directive 93/104 permits derogations from Articles 3, 4, 5, 6, 8 and 16 by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry, provided that certain conditions are met. In the case of derogations provided for in Article 17(1), only laws, regulations or administrative provisions are permitted.

44 It follows that, provided that, even in the absence of express measures transposing Directive 93/104, the national law applicable to a given activity observes the conditions laid down in Article 17 thereof, that law conforms to the directive and there is nothing to prevent national courts from applying it.

45 Consequently, the answer to Question 1(b) is that the national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the characteristics of the activity of doctors in primary health care teams, that law meets the conditions laid down in Article 17 of that directive.

The concept of working time (Questions 2(a) to 2(c), 3(a), 3(b) and 4(c))

46 By Questions 2(a) to 2(c), 3(a), 3(b) and 4(c), which it is appropriate to consider together, the national court seeks essentially to determine whether time spent on call by doctors in primary care teams, whether they are required to be present in the health centre or merely contactable, must be regarded as working time or as overtime within the meaning of Directive 93/104.

47 It must be borne in mind that that directive defines working time as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. Moreover, in the scheme of the directive, it is placed in opposition to rest periods, the two being mutually exclusive.

48 In the main proceedings, the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under those rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance.

49 That interpretation is also in conformity with the objective of Directive 93/104, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks (eighth recital in the preamble to the directive). It is clear, as the Advocate General emphasises in point 35 of his Opinion, that to exclude duty on call from working time if physical presence is required would seriously undermine that objective.

50 As the Advocate General also states in point 37 of his Opinion, the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances, only time linked to the actual provision of primary care services must be regarded as working time within the meaning of Directive 93/104.

51 As regards the question whether time spent on call may be regarded as overtime, although Directive 93/104 does not define overtime, which is mentioned only in Article 6, relating to the maximum length of the working week, the fact remains that overtime falls within the concept of working time for the purposes of the directive, which draws no distinction according to whether or not such time is spent within normal hours of work.

52 The answer to Questions 2(a) to 2(c), 3(a), 3(b) and 4(c) is therefore that time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be present at the health centre. If they

must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time.

Whether the work is night work (Questions 4(a) and 4(b))

53 By Questions 4(a) and 4(b) the national court seeks essentially to ascertain whether certain doctors who are regularly on call at night are to be regarded as night workers within the meaning of Article 2(4)(b) of Directive 93/104 and whether, for the purposes of the choice left to the Member State by that provision, the national legislation applicable to employment relationships governed by private law may be applied to doctors whose employment is governed by public law.

54 It appears from the order for reference that doctors in primary care teams at Puerto de Sagunto and Burjassot provide their services from 8 a.m. to 3 p.m., to which period is added, every 11 days, duty on call extending from the end of the working day until 8 o'clock the following morning, subject to exceptional unforeseen requirements such as, in particular, the need to replace colleagues who are ill. The working time of other primary care teams in the Valencia Region is not indicated in the file, but the national court starts from the premiss that in those cases duty on call occurs only periodically.

55 It must be borne in mind that Article 2(4)(a) of Directive 93/104 defines a night worker as 'any worker who, during night time, works at least three hours of his

daily working time as a normal course'. Article 2(4)(b) also permits the national legislature or, at the option of the Member State concerned, the two sides of industry at national or regional level to treat as night workers other workers who work during night time a certain proportion of their annual working time.

56 Since no measure has been adopted by the Kingdom of Spain under Article 2(4)(b) of the directive regarding workers whose employment is governed by public law, doctors in primary care teams who are regularly on call at night may not be regarded as night workers by virtue of that provision alone.

57 Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary care teams whose employment is governed by public law, for the purposes of the choice referred to in Article 2(4)(b)(i) of the said directive, is a question which the national court must resolve in accordance with domestic law.

58 The answer to Questions 4(a) and 4(b) is therefore that doctors in primary health care teams who are regularly on call at night may not be regarded as night workers by virtue of Article 2(4)(b) of the directive alone. Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary health care teams, whose employment is governed by public law, is a question to be resolved by the national court in accordance with its domestic law.

Shift work and shift workers (Question 5)

59 By Question 5, the national court seeks essentially to ascertain whether the work performed by doctors in primary care teams whilst on call constitutes shift work and whether such doctors are shift workers within the meaning of Directive 93/104.

60 Doctors in primary care teams in Puerto de Sagunto and Burjassot provide their services from 8 a.m. to 3 p.m., to which period is added, every 11 days, a period of duty on call extending from the end of the working day until 8 o'clock the next morning, subject to unforeseen exceptional requirements; as regards the working time of other primary care teams in the Valencia Region, the national court starts from the premiss that such duty occurs only periodically.

61 Working time spent both on call where doctors in primary care teams are required to be present at health centres and on the actual provision of primary care services when doctors are on call by having merely to be contactable at all times fulfils all the requirements of the definition of shift work in Article 2(5).

62 The work of doctors in primary care teams is organised in such a way that workers are assigned successively to the same work posts on a rotational basis, which makes it necessary for them to perform work at different hours over a given period of days or weeks.

63 As regards the latter condition in particular, it must be noted that, notwithstanding the fact that duty on call is performed at regular intervals, the doctors concerned are called upon to perform their work at different times over a given period of days or weeks.

64 The answer to the fifth question is therefore that work performed by doctors in primary health care teams whilst on call constitutes shift work and that such doctors are shift workers within the meaning of Article 2(5) and (6) of Directive 93/104.

The applicability of the derogations provided for in Article 17(2), (3) and (4) of Directive 93/104 (Question 3(c))

65 By Question 3(c), the national court seeks essentially to ascertain whether, in the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions can be interpreted as having direct effect.

66 Article 16(2) of that directive allows the Member States to lay down, for the application of Article 6, which is concerned with maximum weekly working time, a reference period not exceeding four months.

67 However, Article 17(2), point 2.1(c)(i), of Directive 93/104 provides that the Member States may derogate from Article 16(2) thereof in the case of activities

involving the need for continuity of service or production, particularly services relating to the reception, treatment and/or care provided by hospitals or similar establishments.

68 Even if those provisions of Directive 93/104 leave the Member States a degree of latitude regarding the reference period to be fixed for the purposes of applying Article 6 of that directive, that does not alter the precise and unconditional nature of the provisions of the directive at issue in the main proceedings. The latitude allowed does not make it impossible to determine minimum rights (see, to that effect, Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 17).

69 It is clear from the terms of Article 17(4) of that directive that the reference period may in no circumstances exceed 12 months. It is therefore possible to determine the minimum protection which must be provided in any event.

70 Consequently, the answer to Question 3(c) is that in the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions may be interpreted as having direct effect, and therefore they confer on individuals a right whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months.

The applicability of Article 18(1)(b) of Directive 93/104 (Question 3(d))

71 By Question 3(d) the national court seeks essentially to ascertain whether consent given by the trade-union representatives in the context of a collective or other agreement is equivalent to that given by a worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

72 That provision allows the Member States not to apply Article 6 of that directive, relating to maximum weekly working time, whilst ensuring that the general principles relating to the protection of the safety and health of workers are observed, provided that the working time does not exceed 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16. A worker may, however, agree to work for a longer period.

73 It is clear from its wording that the first indent of Article 18(1)(b)(i) requires the consent of the individual worker. Moreover, as has been rightly pointed out by the United Kingdom Government, if the intention of the Community legislature had been to allow the worker's consent to be replaced by that of a trade union in the context of a collective or other agreement, Article 6 of that directive would have been included in the list in Article 17(3) of the directive of those from which derogations may be made by a collective agreement or agreement between the two sides of industry.

74 Consequently, the answer to Question 3(d) is that the consent given by trade-union representatives in the context of a collective or other agreement is not

equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

Costs

75 The costs incurred by the Spanish, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Superior de Justicia de la Comunidad Valenciana by order of 10 July 1998, hereby rules:

1. **An activity such as that of doctors in primary health care teams falls within the scope 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 and Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time.

2. The national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the characteristics of the activity of doctors in primary health care teams, that law meets the conditions laid down in Article 17 of that directive.

3. Time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time.

4. Doctors in primary health care teams who are regularly on call at night may not be regarded as night workers by virtue of Article 2(4)(b) of Directive 93/104 alone. Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary health care teams, whose employment is governed by public law, is a question to be resolved by the national court in accordance with its domestic law.

5. Work performed by doctors in primary health care teams whilst on call constitutes shift work and such doctors are shift workers within the meaning of Article 2(5) and (6) of Directive 93/104.

6. In the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions may be interpreted as having direct effect, and therefore they confer on individuals a right whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months.

7. The consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

Rodríguez Iglesias Moitinho de Almeida Edward

Sevón Schintgen Kapteyn Gulmann

Puissochet Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 3 October 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President