Case C-227/09

Antonino Accardo and Others

v

Comune di Torino

(Reference for a preliminary ruling from the Tribunale ordinario di Torino)

(Social policy – Protection of the safety and health of workers – Organisation of working time – Municipal police officers – Directive 93/104/EC – Directive 93/104/EC as amended by Directive 2000/34/EC – Directive 2003/88/EC – Articles 5, 17 and 18 – Maximum weekly working time – Collective agreements or agreements concluded between the two sides of industry at national or regional level – Derogations relating to deferred weekly rest periods and compensatory rest – Direct effect – Interpretation in conformity with European Union law)

Summary of the Judgment

1. *Social policy – Protection of the safety and health of workers – Directive 93/104 concerning certain aspects of the organisation of working time*

(Directive 2000/34 of the European Parliament and of the Council; Council Directive 93/104, Art. 17(3))

2. *Social policy – Protection of the safety and health of workers – Directives 93/104 and 2003/88 concerning certain aspects of the organisation of working time*

(Directives 2000/34 and 2003/88 of the European Parliament and of the Council, Arts 17 and 18; Council Directive 93/104, Art. 17)

3. *Social policy – Protection of the safety and health of workers – Directives 93/104 and 2003/88 concerning certain aspects of the organisation of working time*

(Directives 2000/34 and 2003/88 of the European Parliament and of the Council, Arts 17 and 18; Council Directive 93/104, Art. 17)

1. Article 17(3) of Directive 93/104 concerning certain aspects of the organisation of working time, in both its original version and in the version amended by Directive 2000/34, is independent in scope in relation to Article 17(2) thereof, so that the fact that a profession is not listed in Article 17(2) does not mean that it may not be covered by the derogation provided for in Article 17(3) in either of those versions of Directive 93/104.

(see para. 36, operative part 1)

2. The optional derogations provided for in Article 17 of Directive 93/104 concerning certain aspects of the organisation of working time, in both its original version and in the version amended by Directive 2000/34, and, where relevant, Articles 17 and/or 18 of Directive 2003/88 concerning certain aspects of the organisation of working time, may not be relied on against individuals. Moreover, those provisions may not be interpreted as permitting directly or precluding the application of collective agreements derogating from the rules transposing Article 5 of the Directive, for whether such agreements apply is a matter for domestic law.

(see paras 47, 53-54, 59, operative part 2)

3. The derogations available under Article 17 of Directive 93/104 concerning certain aspects of the organisation of working time, in both its original version and in the version amended by Directive 2000/34, and, where relevant, Articles 17 and/or 18 of Directive 2003/88 concerning certain aspects of the organisation of working time, being optional, European Union law does not require Member States to implement them in domestic law. In order to exercise the option provided for by those provisions to derogate, in certain circumstances, from the requirements laid down in, inter alia, Article 5 of those directives, the Member States are required to make a choice to rely on it.

For that purpose, it is for the Member States to choose the normative technique which they regard as the most appropriate, given that, under the derogating provisions in question themselves, such derogations can be made, inter alia, by collective agreements or agreements concluded by both sides of industry.

Where European Union law gives to Member States the option to derogate from certain provisions of a directive, those States are required to exercise their discretion in a manner consistent with general principles of European Union law, which include the principle of legal certainty. To that end, provisions which permit optional derogations from the rules laid down by a directive must be implemented with the requisite precision and clarity necessary to satisfy the requirements flowing from that principle.

(see paras 51-52, 55)

JUDGMENT OF THE COURT (Second Chamber)

21 October 2010 (*)

(Social policy – Protection of the safety and health of workers – Organisation of working time – Municipal police officers – Directive 93/104/EC – Directive 93/104/EC as amended by Directive 2000/34/EC – Directive 2003/88/EC – Articles 5, 17 and 18 – Maximum weekly working time – Collective agreements or agreements concluded between the two sides of industry at national or regional level – Derogations relating to deferred weekly rest periods and compensatory rest – Direct effect – Interpretation in conformity with European Union law)

In Case C-227/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale ordinario di Torino, Sezione Lavoro (Italy), made by decision of 3 June 2009, received at the Court on 22 June 2009, in the proceedings

Antonino Accardo,

Viola Acella,

Antonio Acuto,

Domenico Ambrisi,

Paolo Battaglino,

Riccardo Bevilacqua,

Fabrizio Bolla,

Daniela Bottazzi,

Roberto Brossa,

Luigi Calabro,

Roberto Cammardella,

Michelangelo Capaldi,

Giorgio Castellaro,

Davide Cauda,

Tatiana Chiampo,

Alessia Ciaravino,

Alessandro Cicero,

Paolo Curtabbi,

Paolo Dabbene,

Mauro D’Angelo,

Giancarlo Destefanis,

Mario Di Brita,

Bianca Di Capua,

Michele Di Chio,

Marina Ferrero,

Gino Forlani,

Giovanni Galvagno,

Sonia Genisio,

Laura Dora Genovese,

Sonia Gili,

Maria Gualtieri,

Gaetano La Spina,

Maurizio Loggia,

Giovanni Lucchetta,

Sandra Magoga,

Manuela Manfredi,

Fabrizio Maschio,

Sonia Mignone,

Daniela Minissale,

Domenico Mondello,

Veronnica Mossa,

Plinio Paduano,

Barbaro Pallavidino,

Monica Palumbo,

Michele Paschetto,

Frederica Peinetti,

Nadia Pizzimenti,

Gianluca Ponzo,

Enrico Pozzato,

Gaetano Puccio,

Danilo Ranzani,

Pergianni Risso,

Luisa Rossi,

Paola Sabia,

Renzo Sangiano,

Davide Scagno,

Paola Settia,

Raffaella Sottoriva,

Rossana Trancuccio,

Fulvia Varotto,

Giampiero Zucca,

Fabrizio Lacognata,

Guido Mandia,

Luigi Rigon,

Daniele Sgavetti

v

Comune di Torino,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Lõhmus, A. Ó Caoimh (Rapporteur) and P. Lindh, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 24 June 2010,

after considering the observations submitted on behalf of:

– Mr Accardo and others, by R. Lamacchia, avvocato,

– Mr Lacognata and others, by A. Grespan, avvocatessa,

– the Comune di Torino, by M. Li Volti, S. Tuccari and A. Melidoro, avvocatesse,

– the Italian Government, by G. Palmieri, acting as Agent, and W. Ferrante and L. Ventrella, avvocati dello Stato,

– the Czech Government, by M. Smolek and D. Hadrouška, acting as Agents,

– the European Commission, by M. van Beek and C. Cattabriga, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 5, 17 and 18 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).

2 The reference was made in proceedings between Mr Accardo and others and Mr Lacognata and others (collectively, 'the applicants in the main proceedings') and the Comune di Torino (Turin Municipal Council) (Italy) concerning a claim for compensation for harm allegedly suffered during the period 1998-2007 as a result of failure to comply with requirements pertaining to weekly rest periods which, it is alleged, should have been granted to officers of the municipal police employed by the Comune di Torino.

Legal context

European Union legislation

3 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) is the framework directive which lays down the general principles concerning the safety and health of workers. Those principles were subsequently developed in a series of separate directives. Those directives include Directive 93/104, Directive 93/104 as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41) ('amended Directive 93/104') and Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) (collectively, 'the Working Time Directives').

4 Article 2 of Directive 89/391 defines the scope of the directive as follows:

'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.'

5 Directive 93/104 was amended initially by Directive 2000/34. Subsequently, with effect from 2 August 2004, Directive 2003/88 repealed and replaced Directive 93/104, as thus amended, and codified it.

6 Article 1 of the Working Time Directives, entitled ‘Purpose and scope’, provides as follows:

‘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 …

…

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.’

7 Article 2 of the Working Time Directives, entitled ‘Definitions’, is worded as follows:

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

(1) “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

(2) “rest period” means any period which is not working time;

…’.

8 Articles 3 to 7 of the Working Time Directives set out the measures which the Member States are required to take in order to ensure every worker is entitled to minimum daily and weekly rest periods and paid annual leave. Those provisions also regulate breaks and maximum weekly working time.

9 According to Article 3 of the Working Time Directives, entitled ‘Daily rest’, ‘Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period’.

10 With regard to weekly rest periods, the first subparagraph of Article 5 of the Working Time Directives provides that the Member States are to ‘take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours’ daily rest referred to in Article 3’. It is also apparent from Article 5 that if objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.

11 Article 16 of the Working Time Directives lays down a reference period for the application of Article 5 of those directives not exceeding 14 days.

12 The Working Time Directives provide for various derogations to some of the basic rules laid down therein on account of the specific characteristics of certain activities, provided that certain conditions are met.

13 In that connection, Article 17 of Directive 93/104 and amended Directive 93/104 provides as follows:

‘...

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:

...

(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:

...

(iii) ... ambulance, fire and civil protection services;

...

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.

Member States in which there is no statutory system ensuring the conclusion of collective agreements or agreements concluded between the two sides of industry at national or regional level, on the matters covered by this Directive, or those Member States in which there is a specific legislative framework for this purpose and within the limits thereof, may, in accordance with national legislation and/or practice, allow derogations from Articles 3, 4, 5, 8 and 16 by way of collective agreements or agreements concluded between the two sides of industry at the appropriate collective level.

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

Member States may lay down rules:

– for the application of this paragraph by the two sides of industry, and

– for the extension of the provisions of collective agreements or agreements concluded in conformity with this paragraph to other workers in accordance with national legislation and/or practice.

...’

14 Article 18(1)(a) of Directive 93/104 and amended Directive 93/104 provided that Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 23 November 1996, or to ensure by that date that the two sides of industry had established the necessary measures by agreement and Member States were obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by the directive were fulfilled.

15 As is apparent from paragraph 5 above, amended Directive 93/104 was repealed and replaced, with effect from 2 August 2004, by Directive 2003/88. According to recital 1 in the preamble to Directive 2003/88, the purpose of the directive is to codify the provisions of amended Directive 93/104 in order to clarify matters. Accordingly, the content and numbering of, inter alia, Articles 1 to 3, 5 and 16 are repeated verbatim in Directive 2003/88. The content of subparagraphs 2.1 and 2.2 of Article 17(2) of amended Directive 93/104 is now divided between paragraphs 2 and 3 of Article 17 of Directive 2003/88. Article 17(3) of amended Directive 93/104 is now reproduced in Article 18 of Directive 2003/88.

National legislation

16 It is apparent from the order for reference that the period at issue in the main proceedings, namely from 1998 to 2007, can be divided into three separate parts as regards the national legislation applicable.

17 Initially, until 29 April 2003, a worker's right to a weekly rest period was based on, first, the third paragraph of Article 36 of the Constitution, which provides that '[w]orkers have the right to a weekly rest day … and cannot waive that right', and, second, the first paragraph of Article 2109 of the Civil Code, according to which 'employees have the right to a day of rest each week, which shall normally fall on Sunday'. It is apparent from the written observations submitted to the Court on behalf of Mr Accardo and others that both of those provisions were enacted long before Directive 93/104 was adopted.

18 Next, from 29 April 2003, the date of entry into force of Legislative Decree No 66 of 8 April 2003 implementing Directive 93/104/EC and Directive 2000/34/EC concerning certain aspects of the organization of working time (Ordinary Supplement to GURI No 87 of 14 April 2003) ('Legislative Decree No 66/2003'), the general rules governing weekly rest periods have been based on Article 9(1) of that decree, which provides that a worker is entitled to a rest period of at least 24 consecutive hours every seven days, normally falling on Sunday, to which are to be added the daily rest periods referred to in Article 7 of the decree. Under Article 9(2)(b) and Article 17(4) of the decree, derogations may be made from that right by collective agreements, provided that equivalent compensatory rest periods are granted.

19 Lastly, since 1 September 2004, following an amendment introduced by Article 1(1)(b) of Legislative Decree No 213 of 19 July 2004 amending and supplementing Legislative Decree No 66 of 8 April 2003 introducing a system of penalties in relation to working time (GURI, No 192, of 17 August 2004) ('Legislative Decree No 213/2004'), the provisions of Legislative Decree No 66/2003 have ceased to be applicable to municipal police officers.

20 Both before the entry into force of Legislative Decree No 66/2003 and after the adoption of Legislative Decree No 213/2004, derogations from the ordinary rules governing weekly rest periods applicable to municipal police officers were established by three 'National Collective Labour Agreements' for the local authorities sector, which were concluded in 1987, 2000 and 2001 respectively (together, 'the collective agreements at issue in the main proceedings'). Each of those agreements provided, inter alia, that 'employees who, because of particular needs of the service', were unable to take the weekly rest period were 'entitled to compensatory rest, to be taken as a rule within 15 days and, in any event, within the following two months'. Moreover, the collective agreement signed in 1987 provided that such employees were entitled to an increase of 20% of their standard daily rate, the corresponding increase provided for in the collective agreements concluded in 2000 and 2001 being 50%.

21 It is apparent from the order for reference that the applicants in the main proceedings rely on Articles 1418 and 1419 of the Civil Code, which are said to render null and void any term of an agreement which 'contrary to rules of law having overriding authority' and to provide that such a term is to be 'replaced, by operation of law, by such rules having overriding authority'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 The applicants in the main proceedings are municipal police officers employed by the Comune di Torino with a 35-hour working week. Between 1998 and 2007, they worked shifts which involved working seven consecutive days once every five weeks, followed, according to the order for reference, by a compensatory rest period, which meant that rest periods were not lost but simply deferred.

23 That shift system and the deferral of the rest period on the seventh day of the fifth week arose from a collective agreement concluded on 2 July 1986 between the municipal authorities and the local representatives of the principal Italian trade unions ('the 1986 agreement').

24 In an action lodged before the Tribunale ordinario di Torino, Sezione Lavoro, the applicants in the main proceedings brought proceedings against the Comune di Torino seeking compensation for psychological and physical harm which they claim to have suffered as a result of failure to comply with the requirement to grant a weekly rest period, to which they claim nevertheless to be entitled under domestic law, since they worked seven consecutive days and were then granted only one day's rest by way of compensatory rest. In support of their claim, they submit that, since the third paragraph of Article 36 of the Constitution and the first paragraph of Article 2109 of the Civil Code contain rules of overriding authority, the relevant terms in the 1986 agreement and the collective agreements at issue in the main proceedings must, in the absence of appropriate statutory measures, be regarded as unlawful.

25 The Comune di Torino contended, in response, that, under Article 17(3) of Directive 93/104, derogations from the requirement to provide a weekly rest period in Article 5 of Directive 93/104 can be introduced by collective agreements or agreements concluded between the two sides of industry at national or regional level, provided that the workers concerned are afforded equivalent periods of compensatory rest.

26 However, the applicants in the main proceedings do not accept either that Article 17 of Directive 93/104 was directly applicable before the adoption of Legislative Decree No 66/2003 or that Article 17(3) of the directive was applicable to municipal police officers. According to them, that sector is not expressly mentioned in the list in Article 17(2)(2.1) of Directive 93/104 and the power of derogation conferred by Article 17(3) is therefore not applicable to it either. The latter provision is said not to be autonomous, but simply a more specific expression of the provision in Article 17(2).

27 Moreover, according to the applicants in the main proceedings, following the amendment introduced by Legislative Decree No 213/2004, Legislative Decree No 66/2003 in its entirety was, in any event, no longer applicable to municipal police officers, which meant that Article 17 of Directive 93/104 was no longer applicable to their situation and that Article 36 of the Constitution and Article 2109 of the Civil Code were once again applicable.

28 Those were the circumstances in which the Tribunale ordinario di Torino, Sezione Lavoro, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) On a proper construction of Articles 5, 17 and 18 of Directive 93/104 …, are those provisions capable of being applied directly in the legal order of a Member State, irrespective of whether formal transposition has taken place and irrespective of national rules which restrict their applicability to certain occupations, in a dispute in which reference is made to collective measures adopted by both sides of industry which are in conformity with that directive?

(2) Are the courts of that Member State in any event under a duty, irrespective of whether the directive in question is directly applicable, to use a directive which has not yet been transposed into national law or the operation of which, following transposition, appears to be precluded by national rules, as an aid to construction of the national law and thus as a basis for resolving possible doubts as to interpretation?

(3) Are the courts of that Member State precluded from declaring conduct unlawful, and on that basis awarding damages on grounds of unfairness and unlawfulness, where the conduct in question appears to be authorised by both sides of industry and such authorisation is

consistent with Community law, albeit in the form of the directive which has not yet been transposed into national law?

(4) Should Article 17(3) of Directive [93/104] be construed as permitting – on its own terms, and thus wholly independently of Article 17(2) thereof and the occupations and professions listed therein – the collective measures adopted by both sides of industry and the provision made thereunder for derogations in relation to weekly rest periods?'

The questions referred for a preliminary ruling

29 First, it should be pointed out that, while the order for reference expressly refers only to the original version of Directive 93/104, it is apparent from the case-file that, during the period relevant to the dispute in the main proceedings, the Working Time Directives were in force in succession. Where necessary, account must be taken of that fact in giving answers to the questions referred.

Question 4

30 By its fourth question, which it is appropriate to consider first, the Tribunale ordinario di Torino, Sezione Lavoro, asks, in essence, whether Article 17(3) of Directive 93/104 is independent in scope in relation to Article 17(2), so that the fact that an occupation is not listed in Article 17(2) does not does not mean that it may not be covered by the derogation provided for in Article 17(3) of Directive 93/104.

31 As is apparent in particular from paragraph 26 above, that question arises from the argument of the applicants in the main proceedings to the effect that Article 17(3) of Directive 93/104 cannot be construed or applied separately from Article 17(2). In their view, it is not possible to interpret Article 17(3) of Directive 93/104 as permitting derogations that are broader in scope than those permitted under Article 17(2) and therefore establishing an independent and separate system of derogations.

32 Such an argument cannot be accepted, however.

33 As submitted in essence by the Comune di Torino, the Italian and Czech Governments and the European Commission, there is nothing in the structure or wording of Article 17 of Directive 93/104 or amended Directive 93/104 to suggest that the scope of Article 17(3) is determined by the scope of Article 17(2).

34 Moreover, as submitted by the Commission, first, paragraphs 2 and 3 of Article 17 do not refer to each other and, second, for each category of derogation permitted, those paragraphs repeat the same conditions under which, in all cases, it is possible to defer weekly rest periods.

35 Furthermore, as is apparent from paragraph 15 above, when Directive 2003/88 was codified, the wording of Article 17(3) of Directive 93/104 and amended Directive 93/104 was repeated in identical terms in a new Article 18, whereas the provisions contained in Article 17(2) of Directive 93/104 and amended Directive 93/104 were divided between paragraphs 2 and 3 of Article 17 of Directive 2003/88. It follows that the European Union legislature considered that it was possible, even necessary, to read paragraphs 2 and 3 of Article 17 of Directive 93/104 and amended Directive 93/104 separately, thus making it possible for them to be separated upon codification.

36 The answer to question 4 is therefore that Article 17(3) of Directive 93/104 and amended Directive 93/104 is independent in scope in relation to Article 17(2) thereof, so that the fact that an occupation is not listed in Article 17(2) does not mean that it may not be covered by the derogation provided for in Article 17(3) of Directive 93/104 and amended Directive 93/104.

Questions 1 to 3

37 As is apparent from, inter alia, the order for reference, it is not disputed in the main proceedings that, during the period from 29 April 2003 to 29 August 2004, it was possible in principle under Legislative Decree No 66/2003, in accordance with Article 17 of Directive 93/104 and amended Directive 93/104, to derogate, on the basis of the collective agreement signed in 2001, from the

requirement to grant a weekly rest period in the third paragraph of Article 36 of the Constitution and the first paragraph of Article 2109 of the Civil Code.

38 However, it is also apparent from the order for reference that, outside that period, those provisions of the Constitution and the Civil Code appear capable of precluding the Comune di Torino, under domestic law, from legitimately relying, in its defence, on the collective agreements at issue in the main proceedings in order to justify the shift system in question in the main proceedings under which, pursuant to the 1986 agreement, the rest period on the seventh day of the fifth week was deferred.

39 As submitted by the Commission in its written observations, the activities of municipal police services fall, under normal circumstances, within the scope of Directive 89/391 and, as a result of the reference to Article 2 of that directive in Article 1(3) of the Working Time Directives, also within the scope of those directives (see, by analogy, inter alia, the order in Case C-52/04 *Personalrat der Feuerwehr Hamburg* [2005] ECR I-7111, paragraphs 51 to 61 and the case-law cited).

40 It appears from the file submitted to the Court that the third paragraph of Article 36 of the Constitution and the first paragraph of Article 2109 of the Civil Code are, on the face of it, capable of amounting to the transposition into Italian law of Article 5 of the Working Time Directives, provided, in particular, they are applied in accordance with the requirements laid down in Articles 3 and 16 of Directive 93/104, which is a matter for the referring court to verify, to the extent necessary. In any event, it has not been suggested before the Court that those national provisions are in breach of the requirements laid down in Article 5 of the Working Time Directives.

41 On the other hand, while, in the order for reference, the national court starts from the premiss that the system of weekly rest periods established by the 1986 agreement is, in principle, permissible under the optional derogations provided for in Article 17 of Directive 93/104 and amended Directive 93/104 or Articles 17 and 18 of Directive 2003/88 (collectively, 'the derogating provisions in question'), which it is for that court to verify, it is uncertain whether that agreement and the collective agreements at issue in the main proceedings can derogate from the third paragraph of Article 36 of the Constitution or the first paragraph of Article 2109 of the Civil Code.

42 Essentially, therefore, the referring court is unsure as to what recourse may be had, directly or indirectly, to the derogating provisions in question in order to overcome any obstacles under domestic law to applying the collective agreements at issue in the main proceedings.

43 The first three questions, which it is appropriate to consider together, are therefore to be understood as asking essentially whether the derogating provisions in question can be applied directly to facts such as those in the main proceedings or whether, if those provisions are not directly applicable, the national court must or may interpret the provisions of domestic law at issue in the main proceedings as permitting a derogation from the requirement to grant a weekly rest period laid down in the third paragraph of Article 36 of the Constitution and the first paragraph of Article 2109 of the Civil Code.

Whether the derogation provisions in question are directly applicable

44 While it is true that the first question referred by the Tribunale ordinario di Torino, Sezione Lavoro, refers inter alia to Article 5 of the Working Time Directives, it is clear, as can be seen in particular from paragraph 42 above, that, by that question, the referring court seeks above all to ascertain whether the defendant in the main proceedings can rely directly on the derogating provisions in question against the applicants in the main proceedings in order to dismiss the claims on which the dispute is based.

45 However, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108; and Case C-555/07 *Kücükdeveci*

[2010] ECR I-0000, paragraph 46).

46 Thus, in so far as the derogation provisions in question may not have been validly transposed, which is a matter for the referring court to ascertain in this case, the authorities of a Member State which has not exercised that option cannot rely on that State's own failure to do so in order to refuse individuals, such as the applicants in the main proceedings, entitlement to a weekly rest period which is, in principle, subject to verification to be carried out by the referring court, in compliance with the requirements laid down in Article 5 of the Working Time Directives (see, by analogy, Case C-226/07 *Flughafen Köln/Bonn* [2008] ECR I-5999, paragraph 32 and the case-law cited).

47 It follows that, in circumstances such as those in the main proceedings, the derogating provisions in question cannot be relied on directly against individuals such as the applicants in the main proceedings.

Whether domestic law must or may be interpreted in conformity with European Union law

48 As is apparent from the order for reference, by its second and third questions, the Tribunale ordinario di Torino, Sezione Lavoro, asks whether it is none the less necessary to interpret domestic law in the light of the derogation provisions in question in order to determine whether the Comune di Torino could properly rely on the collective agreements at issue in the main proceedings in order to derogate from the requirements laid down in the third paragraph of Article 36 of the Constitution and the first paragraph of Article 2109 of the Civil Code.

49 It is true that the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (see, inter alia, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26, and *Kücükdeveci*, paragraph 47 and the case-law cited).

50 However, there can be no obligation arising from the Working Time Directives to interpret domestic law in such a way as to favour the application of collective agreements derogating from the rules transposing Article 5 of those directives.

51 Since the derogations available under the derogating provisions in question are optional, European Union law does not require Member States to implement them in domestic law. In order to exercise the option provided for by those provisions to derogate, in certain circumstances, from the requirements laid down, inter alia, in Article 5 of the Working Time Directives, the Member States are required to make a choice to rely on it (see, by analogy, Case C-102/08 *SALIX Grundstücks-Vermietungsgesellschaft* [2009] ECR I-4629, paragraphs 51, 52 and 55).

52 For that purpose, it is for the Member States to choose the normative technique which they regard as the most appropriate (see, by analogy, *SALIX Grundstücks-Vermietungsgesellschaft*, paragraph 56), given that, under the derogating provisions in question themselves, such derogations can be made, inter alia, by collective agreements or agreements concluded by both sides of industry.

53 As such, the Working Time Directives cannot be interpreted as precluding the applicability of collective agreements such as those at issue in the main proceedings or, conversely, as requiring, notwithstanding other relevant provisions of domestic law, the applicability of such agreements.

54 Accordingly, the question whether the Comune di Torino can properly rely, in the dispute in the main proceedings, on the 1986 agreement and the collective agreements at issue in the main proceedings is primarily a question to be resolved by the referring court in accordance with the rules of domestic law (see, by analogy, Case C-303/98 *Simap* [2000] ECR I-7963, paragraphs 55 to 57).

55 However, it should be noted that, where European Union law gives to Member States the option to derogate from certain provisions of a directive, those States are required to exercise their

discretion in a manner that is consistent with general principles of European Union law, which include the principle of legal certainty. To that end, provisions which permit optional derogations from the rules laid down by a directive must be implemented with the requisite precision and clarity necessary to satisfy the requirements flowing from that principle.

56 In that context, the Tribunale ordinario di Torino, Sezione Lavoro, will be faced with two alternative possibilities: either the collective agreements at issue in the main proceedings do not comply with the general principle of legal certainty or the requirements under domestic law for the correct implementation of the derogating provisions in question, or those agreements constitute the implementation, in accordance with Italian law and in compliance with the general principle of legal certainty, of the derogations that are permitted from those European Union law provisions.

57 In the first of those cases, as submitted by the Czech Government and is apparent from the case-law cited at paragraph 45 above, if Italian domestic law precludes the application of the 1986 agreement and the collective agreements at issue in the main proceedings, the Working Time Directives cannot, in themselves, be relied on against individuals to ensure such application (see also, by analogy, Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraphs 19 and 20; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 73 and 74; and Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 42 and the case-law cited).

58 In the second case referred to at paragraph 56 above, the Working Time Directives do not preclude an interpretation of domestic law to the effect that the Comune di Torino is entitled to rely on the collective agreements at issue in the main proceedings, provided that the relevant provisions of those agreements fully comply with the conditions laid down in the derogating provisions in question, which is for the referring court to verify. On that point, it should be borne in mind that, since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the derogating provisions in question must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those provisions enable to be protected (see Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 89).

59 In the light of the foregoing, the answer to the first three questions is that, in circumstances such as those in the main proceedings, the derogating provisions in question cannot be relied on against individuals such as the applicants in the main proceedings. Moreover, those provisions cannot be interpreted as permitting or precluding the application of collective agreements such as those at issue in the main proceedings, since whether such agreements apply is a matter for domestic law.

Costs

60 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 17(3) of Council Directive 93/104/EC of 23 November 2003 concerning certain aspects of the organization of working time, in both its original version and in the version amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000, is independent in scope in relation to Article 17(2) thereof, so that the fact that a profession is not listed in Article 17(2) does not mean that it may not be covered by the derogation provided for in Article 17(3) in either of those versions of Directive 93/104.**

2. **In circumstances such as those in the main proceedings, the optional derogations provided for in Article 17 of Directive 93/104 and Directive 93/104 as amended by Directive 2000/34 and, where relevant,**

Articles 17 and/or 18 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time, cannot be relied on against individuals such as the applicants in the main proceedings. Moreover, those provisions cannot be interpreted as permitting or precluding the application of collective agreements such as those at issue in the main proceedings, since whether such agreements apply is a matter for domestic law.

[Signatures]

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* Language of the case: Italian.