Owing to the duties assigned to it by the Treaty of Rome and the various types of remedy which it handles, the Court of Justice of the European Communities (ECJ) came to play a constitutional role. Because the treaties founding the Communities assigned various areas of competence to them and allocated powers between the different institutions, it was to fall to the Court to monitor both compliance with the division of responsibilities between the Community and the Member States, and compliance with the power structure within the institutions. Accessible to individuals, the Court also had to develop its role as the guardian of their rights. It therefore had to endow itself with the means of doing so. The definition of general principles of law would enable the Court not only to identify protective rules but also to place them high up in the hierarchy of norms. The Court would then apply itself to reinforcing the legal safeguards offered to individuals in the interests of the proper implementation of Community law. Lastly, it was to afford those individuals the opportunity to assert the rights conferred on them as citizens of the Union. The most significant function of the Court of Justice lies in this dual role as both the driving force and regulator of a Community of law (Mouton and Soulard, 2004).

The number of judgments delivered each year amply illustrates, on the one hand, the need for such an institution and, on the other, the real difficulties which national courts experience in applying Community law. To realise this, one only needs to look at the number of questions referred to the Court for preliminary rulings. Community law, in whatever field, has been and remains complex. Since this is a review of...
Social Developments in the European Union, we will allude only to a number of judgments made in the various areas of European social policy. In fact, certain cases have particularly caught our attention. We will follow the three-part structure used for this section since 2001. We will explore in turn the notion of disability within the meaning of Directive 2000/78/EC and the pensionable age for transsexuals in the context of equal treatment and non-discrimination, and the reimbursement of the costs of healthcare provided free of charge in a different Member State under Regulation No. 1408/71, concluding with a number of cases on the organisation of working time.

1. The principles of equal treatment and non-discrimination

1.1 The concept of disability within the meaning of Directive 2000/78/EC: Chacon Navas v Eurest Colectividades, 11 July 2006

The principle of equal treatment in respect of employment and occupation is safeguarded at European level in the overall context of a Directive of 27 November 2000 (Council of the European Union, 2000). This Directive seeks to establish a general framework for combating discrimination in relation to employment and occupation based on religion or belief, disability, age or sexual orientation, with a view to putting the principle of equal treatment into effect in the Member States. The Directive requires Member States to adopt measures promoting the employment of disabled workers and bars them from discriminating in relation to employment and working conditions, remuneration or dismissal. The wording of the Directive does not, however, give any definition of the concept of disability or make any reference to the powers of national legislatures. According to settled case law of the ECJ, a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an independent and uniform interpretation throughout the Union (1). Accordingly, when a Spanish court brought a case before it to ascertain whether the general framework laid down by the Directive could provide protection for a

---

person dismissed on the grounds of sickness, the Court of Justice had to rule on the notion of ‘disability’, and defined the mechanisms for protecting disabled persons in relation to dismissal (2).

Ms Chacón Navas was employed by Eurest, an undertaking specialising in catering. In October 2003 she was certified as unfit to work on grounds of sickness which would prevent her from returning to work in the short term. In May 2004 Eurest informed Ms Chacón Navas of her dismissal and offered her compensation.

Ms Chacón Navas brought proceedings against Eurest. Since sickness is often capable of causing an irreversible disability, the Spanish court took the view that workers must be protected in a timely manner under the prohibition of discrimination on grounds of disability. It therefore referred to the Court of Justice for a ruling on the interpretation of Directive 2000/78/EC. The Court finds first of all that the framework established by the Directive to combat discrimination on the grounds of disability does apply to dismissal.

Since the Directive does not define ‘disability’ or refer to the laws of the Member States for a definition, the concept must be given an autonomous and uniform interpretation. ‘Disability’ within the meaning of the Directive must be understood as a limitation, which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. However, by using the concept of ‘disability’ in the Directive, the legislature has deliberately chosen a term which differs from ‘sickness’. The two concepts therefore cannot simply be treated as being the same.

The Court notes that the importance which the Community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.

2 ECJ, Case C-13/05, Chacon Navas v Eurest Colectividades, 11 July 2006, not yet published.
There is nothing in the Directive to suggest that workers are protected by the prohibition of discrimination on grounds of disability as soon as they develop any type of sickness.

A person who has been dismissed by an employer solely on account of sickness therefore does not fall within the general framework laid down by the Directive in order to combat discrimination on grounds of disability.

Then, as regards the protection of disabled persons against dismissal, the Court points out that the Directive precludes dismissal on grounds of disability which, bearing in mind the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.

Lastly, the Court holds that sickness as such cannot be regarded as an additional ground in relation to which the Directive prohibits any discrimination.

1.2 Pensionable age for transsexuals: Richards v Secretary of State for Work and Pensions, 27 April 2006

It is only since 1996 that issues of discrimination associated with sexual preference or identity have come before the ECJ, whereas the European Court of Human Rights has been addressing these matters since 1955 (Waaldijk et al., 2004). In P. v S. (3), the Court had held that the dismissal of a transsexual woman amounted to discrimination on grounds of sex in breach of Directive 76/207/EEC (Council of the European Communities, 1976). More recently, in K.B., the Court had occasion to rule on the survivor’s pension for an employee’s unmarried transsexual partner. It held that Article 141 EC precluded national legislation which, by denying transsexuals the right to marry in their new identity, denied them the benefit of a widow(er)’s pension (4). In the judgment in Richards, delivered this year, the Court reviewed a


4 ECJ, Case C-117/01, K.B., 7 January 2004, ECR 2004, I-541.
refusal to award a pension to a male-to-female transsexual at the same age as to a woman.

Under United Kingdom legislation prior to April 2005, a person’s sex for the purposes of the Social Security rules is that indicated on their birth certificate. That certificate can only be modified to rectify clerical or material errors. Transsexuals who have undergone gender reassignment surgery therefore cannot change the sex shown on their birth certificate.

The Gender Recognition Act 2004 which came into force on 4 April 2005 allows transsexuals, under certain circumstances, to be issued with a Gender Recognition Certificate. Where such a certificate is issued, the sexual identity of the person concerned is altered for practically all official purposes, although it does not have retroactive effect.

In the United Kingdom men can receive a retirement pension at 65 and women at 60. Sarah Margaret Richards (5) was registered at birth, in 1942, as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery in 2001. In February 2002 she applied for a retirement pension to be paid as from her sixtieth birthday. The Secretary of State for Work and Pensions refused the application on the ground that it had been made more than four months before the claimant reached age 65. Ms Richards appealed that decision and the Social Security Commissioner, hearing the matter on appeal from the Social Security Appeal Tribunal, enquired of the Court of Justice whether such a refusal infringes the Community Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Council of the European Communities, 1979). That Directive opens by pointing out that the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure. The scope of the Directive therefore cannot be confined simply to discrimination based on belonging to one or other sex. The Directive is in fact designed to apply also to discrimination arising from the gender reassignment of the person concerned.

5 ECJ, Case C-423/04, Richards, 27 April 2006, not yet published.
The Court then finds that the unequal treatment in this case lay in Ms Richards’ inability to obtain recognition of the new gender which she acquired following surgery. Unlike women whose gender is not the result of such surgery, and who are able to receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age. As it arises from her gender reassignment, that unequal treatment must therefore be regarded as discrimination precluded by the Directive.

The Court rejects the United Kingdom’s argument that this situation falls within the exception to the Directive under which a Member State can set different retirement ages for men and women. It finds that this exception, which must be interpreted strictly, does not cover the question at issue in the case under analysis.

Under those circumstances, the Directive does preclude legislation which denies entitlement to a retirement pension to a person who has undergone male-to-female gender reassignment on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

To round off this section, we shall allude briefly to the *Cadman* case. This case raised the question of whether the criterion of length of service, to the extent that it gives rise to disparities in remuneration to the detriment of women, is contrary to the principle of equal pay established by Article 141 EC.

Over the financial year 2000/2001 Ms Cadman (6), an employee of the Health and Safety Executive – HSE, saw her pay rise to GBP 35,219. For four of her colleagues with the same grade, their pay was set at between GBP 39,125 and GBP 44,183, that is to say, a differential of between GBP 4,000 and 9,000 (the difference in the latter case amounting to a quarter of Ms Cadman’s pay). She brought the matter before the competent authority claiming that the HSE’s remuneration system had ‘a disproportionately detrimental impact upon women’. The

---

(6) ECJ, Case C-17/05, *Cadman*, 3 October 2006, not yet published.
referring court therefore enquired of the Court of Justice whether, where use of the criterion leads to disparities in pay between the men and women concerned, Article 141 EC requires an employer to provide justification for recourse to that criterion.

Article 141(1) EC lays down the principle that a male or female worker must receive equal pay for equal work or work of equal value. Article 1(1) of Directive 75/117/EEC (Council of the European Communities, 1975) on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women prescribes the elimination of discrimination on grounds of sex for the same work or for work to which equal value is attributed. Where there is evidence of discrimination, it is for the employer to prove that it is justified by 'objective factors unrelated to any discrimination on grounds of sex'. An employer who has recourse to the criterion of length of service to determine pay does not have to justify its use unless the aggrieved worker provides 'evidence capable of raising serious doubts in that regard'. Where there is a job classification system (by grade or category, for example) based on an evaluation of the work to be carried out, the employer does not need to show that a worker has acquired experience during the relevant period which has enabled him to perform his duties better (7).

2. The social security of migrant workers

The articles of the Treaty of Rome which enshrine the freedom of movement for employed workers were very swiftly given practical expression by the adoption of Regulations Nos. 3 and 4 of 1958, passed as emergency measures, which were to be replaced in 1971 by Regulations Nos. 1408/71 (Council of the European Communities, 1971) and 574/72 (Council of the European Communities, 1972) on the application of social security schemes to employed persons and their families moving within the Community. To these should be added Regulation No. 1612/68 (Council of the European Communities, 1968),

7 See also the judgment in Herrero, ECJ, Case C-294/04, 16 February 2006, ECR 2006, I-1513.
adopted three years earlier, on freedom of movement for employed workers, which provides for the right of residence, the right to take up employment and above all equal treatment. However, it has frequently been the judgments of the Court of Justice, giving generous or extensive interpretation to the Regulations, which have been the driving force behind real change in the national provisions of the Member States.

2.1 Reimbursement of the costs of hospital care provided free of charge in a different Member State: The Queen v Bedford Primary Care, 16 May 2006

The rules applicable where a European Union national goes to a Member State other than their own to receive treatment are laid down by Regulation No. 1408/71 on the harmonisation of social security schemes and by the case law of the Court of Justice (8). The Court has progressively expanded the principle of the freedom for individuals to receive treatment in the country of their choice with reimbursement of the costs by the insurance scheme to which they belong. It has in particular reduced the effect of Article 22 of the Regulation according to which, before going to another country for treatment, the individual must obtain authorisation from their own insurance scheme (E112), the agreement giving rise to reimbursement of the costs of the treatment. The Court of Justice has ruled again on this point in the context of the Watts case.

In order to be entitled to refuse authorisation for treatment abroad on the ground of a waiting time for hospital treatment in the State of residence, the NHS (National Health Service) must establish that the waiting time in question does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned.

Under Community law, the E112 form arrangements allow a person to request authorisation to go abroad for treatment. That authorisation cannot be refused when the treatment in question is normally available

---

in the Member State of residence, but in the particular instance cannot be provided without undue delay. The health insurance fund is then obliged to reimburse the cost of the treatment to the patient.

Suffering from arthritis of the hips, Mrs Watts asked the Bedford PCT (Bedford Primary Care Trust) for authorisation to undergo surgery abroad under an E112 form. As part of the processing of that request, in October 2002 she was seen by a consultant who classified her case as ‘routine’, which meant a one year wait for an operation. Bedford PCT refused to issue Mrs Watts with an E112 form on the ground that she could receive treatment ‘within the government’s NHS Plan targets’ and therefore ‘without undue delay’. Mrs Watts issued proceedings before the High Court of Justice seeking to have the refusal set aside. Following a deterioration in her state of health, Mrs Watts was re-examined in January 2003, and it was envisaged that she should be operated on within three or four months. Bedford PCT repeated its refusal. In March 2003, Mrs Watts underwent a hip replacement operation in France at a cost of GBP 3,900, which she paid. She therefore pursued the proceedings before the High Court of Justice, claiming in addition reimbursement of the medical fees incurred in France. The High Court of Justice dismissed the application on the ground that Mrs Watts had not had to face undue delay after her case was reassessed in January 2003. Mrs Watts and the Secretary of State for Health appealed against that judgment. Under those circumstances, the Court of Appeal referred to the Court of Justice of the European Communities questions on the scope of Regulation No. 1408/71 and of the EC Treaty provisions on the freedom to provide services.

2.1.1 The scope of Regulation No. 1408/71

The Court of Justice points out that under Regulation No. 1408/71 the competent institution only issues the prior authorisation assuming the costs of treatment abroad if that treatment cannot be provided within the time normally necessary for obtaining the treatment in question in the Member State of residence. In order to be entitled to refuse the

---

authorisation on the ground of waiting time, that institution must establish that the waiting time, arising from objectives relating to the planning and management of the supply of hospital care, does not exceed the period which is acceptable in the light of an objective medical assessment of the clinical needs of the person concerned in the light of his medical condition and the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the authorisation is sought. Furthermore, the setting of waiting times should be done flexibly and dynamically, so that the period initially notified to the person concerned may be reconsidered in the light of any deterioration in his state of health occurring after the first request for authorisation.

In the present case, it is for the referring court to ascertain whether the waiting time invoked by the competent body of the NHS exceeded a medically acceptable period in the light of the particular condition and clinical needs of the person concerned.

2.1.2 Scope of the freedom to provide services

The Court takes the view that such a situation, where a patient whose state of health requires hospital treatment goes to another Member State where they receive the medical services in question, falls within the scope of the provisions on the freedom to provide services, regardless of the way in which the national system with which that person is registered and from which reimbursement of the cost of those services is subsequently sought operates.

The Court points out that the system of prior authorisation governing payment by the NHS for hospital care available in a different Member State deters, or even prevents, the patients concerned from applying to providers of hospital services established in another Member State and constitutes, both for those patients and for service providers, an obstacle to the freedom to provide services.

However, the Court is of the opinion that a restriction of that nature can be justified by overriding reasons. In order to ensure that there is sufficient and permanent access to high-quality hospital treatment, to control costs and to prevent any wastage of financial, technical and human resources, the requirement that the assumption by the national
system of the costs of hospital treatment provided in another Member State be subject to prior authorisation appears to be a measure which is both necessary and reasonable.

Nevertheless, the conditions attaching to the grant of such authorisation must be justified in the light of the overriding considerations mentioned above and must satisfy the requirement of proportionality. The regulations governing the NHS do not set out the criteria for the grant or refusal of the prior authorisation necessary for reimbursement of the cost of hospital treatment provided in another Member State. They therefore do not circumscribe the exercise of the discretionary power of the national competent authorities in that context. This lack of a legal framework also makes it difficult to exercise judicial review of decisions refusing to grant authorisation.

On this point the Court rules that where the delay arising from such waiting lists exceeds an acceptable period having regard to an objective medical assessment of the clinical needs of the person concerned, the competent institution may not refuse the authorisation on the grounds of the existence of those waiting lists, of a distortion of the normal order of priorities linked to the relative urgency of the cases to be treated, the fact that the hospital treatment is free of charge, the duty to make available specific funds to reimburse the cost of treatment provided in another Member State and/or a comparison between the cost of that treatment and that of equivalent treatment in the Member State of residence.

The competent authorities of a national health service such as the NHS therefore have a duty to provide mechanisms for the reimbursement of the cost of hospital treatment in another Member State to patients to whom that service is not able to provide the treatment required within a medically acceptable period.

2.1.3 Arrangements for reimbursement

The Court finds that a patient who has been authorised to receive hospital treatment in a different Member State, or who received an unfounded refusal to authorise, is entitled have the cost of the treatment reimbursed by the competent institution in accordance with
the provisions of the legislation of the host State, as if they were a national of that State.

Where the reimbursement is not in full, the requirement to place the patient in the position he would have been in had the national health service with which he was registered been able to provide him free of charge, within a medically acceptable period, with treatment equivalent to that which he received in the host Member State, places a duty on the competent institution to make additional reimbursement to the person concerned of the difference between, on the one hand, the cost of that equivalent treatment in the State of residence, to a maximum of the amount invoiced for the treatment received in the host Member State and, on the other, the amount reimbursed by the institution of that State pursuant to the legislation of that State, where the first amount is greater than the second.

Where the cost invoiced in the host State is greater than the cost of equivalent treatment in the Member State of residence, the competent institution is required to cover the difference in the cost of the hospital treatment between the two Member States only to the extent of the cost of the equivalent treatment in the State of residence. As regards travel and accommodation costs, these are not reimbursed unless the legislation of the competent Member State imposes a corresponding obligation on the national system in respect of treatment provided in a local hospital covered by that system.

The case law of the Court, of which the Watts ruling is the most recent development, raises a number of issues as to its practical implications. The decisions give the principle of freedom to provide services priority over the right of Member States freely to organise their health systems. In view of the potential liability which this interpretation implies for social security funds, European governments and Members of Parliament have asked the Commission for a legislative proposal. Numerous questions emerge. Is it necessary to define minimum common standards or rights on which citizens can rely in relation to healthcare, whatever the EU country where that care is provided? What are the conditions for granting or refusing authorisations? How can individual entitlements and collective constraints be reconciled for
patients and practitioners? How should harm caused by medical error be given medical follow-up or compensated? (10)

On 26 September 2006 the European Commission issued a communication intended to be the basis for a wide public consultation on how to ensure legal certainty in relation to cross-border healthcare in the context of Community law on the one hand and, on the other, how to support cooperation between the health systems of Member States (CEC, 2006) (11). The consultation aims to gather views on the situations where it is necessary to increase legal certainty in order to facilitate cross-border healthcare in practice, the areas in which European action can help support the health systems of the Member States (such as networks of centres of reference and realising the potential of health innovation), the appropriate tools to address these various issues at European Union level (be they binding or other legal instruments or other means), the current impact of cross-border healthcare on the accessibility of health systems and on the quality and financial sustainability of those systems for both the sending and the host countries. The deadline for response is 31 January 2007. The Commission then expects to put forward proposals in the course of 2007.

Readers interested in the issues raised by the application of Regulation No. 1408/71 are referred to the following cases: Silvia Hosse (care allowance granted to the family members of a frontier worker), Herbst/Hosse (determination of the legislation applicable to posted workers), Piatkowski (activity by a person simultaneously employed in one

---


11 To recap, healthcare services had initially been included in the proposal for a directive on the liberalisation of services in the internal market (based on the Bolkestein proposal). Following the vehement opposition to this proposal, significant amendments were made to the text, one of which was to remove healthcare from its scope. The Commission then announced that it would issue a specific communication on social services of general interest, which it did on 26 April 2006, taking the view that there was no urgency to pass European rules in that field nor on healthcare services.
Member State and self-employed in another Member State) and Dams-Schipper (exportability of special non-contributory benefits) (12).

3. Rights and obligations of employers and workers

3.1 The organisation of working time: Federatie Nederlandse Vakbeweging, Robinson-Steel and Commission v United Kingdom

According to the working time Directive (Council of the European Union, 1993), Member States must take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. Financial compensation in respect of the minimum period of annual leave carried over would create an incentive for workers not to take leave. It is immaterial in this regard whether such financial compensation is or is not based on a contractual arrangement.

The Netherlands Ministry of Social Affairs and Employment, (13) in a brochure, interpreted the Dutch rules on leave as meaning that employers and workers can, during a contract of employment, agree in writing that an employee who, in one year, has not taken his minimum annual leave (in full or in part), may receive financial compensation in respect of that leave in a subsequent year. According to the Ministry, days’ leave, statutory as well as non-statutory, saved up from previous years, exceed the minimum leave entitlement and can in principle be eligible for redemption.

The Federatie Nederlandse Vakbeweging (FNV) brought an action before the Rechtbank te 's-Gravenhage seeking a declaration that the foregoing interpretation is incompatible with the ‘working time’ Directive.


13 ECJ, Case C-124/05, Federatie Nederlandse Vakbeweging, 6 April 2006, ECR 2006, I-3423.
Hearing the matter on appeal, the Netherlands Gerechtshof te ’s-Gravenhage referred the matter to the Court of Justice of the European Communities. That Court notes that entitlement to paid annual leave is an important principle of Community social law. Workers must enjoy actual rest, with a view to ensuring effective protection of their safety and health. It is only where the employment relationship is terminated that an allowance can be paid in lieu of paid annual leave. The Court goes on to say that the positive effect of that leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose. However, it does not lose its significance, for the purposes of the protection of workers, if it is taken during a later period. In any event, the possibility of financial compensation in respect of the minimum period of annual leave carried over would create an incentive, incompatible with the objectives of the Directive, not to take leave or to encourage employees not to do so. Consequently, the Directive precludes the replacement, by an allowance in lieu, of the minimum period of paid annual leave, in the case where it is carried over to a subsequent year. It is immaterial in that regard whether financial compensation for paid annual leave is or is not based on a contractual arrangement.

In Robinson-Steele (14), the Court of Justice holds that payment for annual leave included in hourly or daily remuneration was contrary to the ‘working time’ Directive. Such a regime, known as ‘rolled-up holiday pay’ may lead to situations in which the minimum period of paid annual leave is replaced by financial compensation.

Under the United Kingdom rules transposing the ‘working time’ Directive, any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period.

Messrs Robinson-Steele, Clarke, J.C. Caulfield, C.F. Caulfield and Barnes, who worked for various undertakings, received payment for annual leave in the form of inclusion of the remuneration for that leave

14 ECJ, Cases C-131/04 and C-257/04, Robinson-Steele, 16 March 2006, not yet published.
Those workers applied to the Employment Tribunal claiming payment for annual leave. The Leeds Employment Tribunal, in the action brought by Mr Robinson-Steele, and the Court of Appeal, hearing on appeal the applications of Messrs Clarke, Caulfield, Caulfield and Barnes, enquired of the Court of Justice whether the ‘rolled-up holiday pay’ arrangements are compatible with the ‘working time’ Directive.

The Court of Justice observes that the entitlement of every worker to paid annual leave is a particularly important principle of Community social law from which there can be no derogations. Holiday pay is intended to enable the worker actually to take the leave to which he is entitled. The Court notes that the term ‘paid annual leave’ means that remuneration must be maintained for the duration of annual leave within the meaning of the Directive and workers must receive their normal remuneration for that period of rest. It finds that the Directive precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done. What is more, there can be no derogation from that entitlement by contractual arrangement.

As regards the point at which the payment for annual leave must be made, in the view of the Court there is no provision in the Directive which expressly prescribes that moment. However, the purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work. Accordingly, the point at which the payment for annual leave is made must, as a rule, be fixed in such a way that, during that leave, the worker is, as regards remuneration, put in a position comparable to periods of work.

In addition, the Court finds that ‘rolled-up holiday pay’ arrangements may lead to situations in which the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu, which the Directive prohibits, save where the employment relationship is terminated, in order to ensure that a worker is normally entitled to actual rest. It
follows that payment in respect of minimal annual leave by means of a system of ‘rolled-up holiday pay’, instead of payment in respect of a specific period during which the worker actually takes leave, contravenes the ‘working time’ Directive. As regards sums already paid to workers in respect of leave under the ‘rolled-up holiday pay’ regime, the Court is of the view that sums paid transparently and comprehensibly can, as a rule, be set off against the payment for specific leave. Conversely, such set-off is excluded where there is no transparency or comprehensibility. The burden of proof in that respect is on the employer. The Court holds that Member States are required to take measures appropriate to ensuring that practices incompatible with the provisions of the Directive on entitlement to annual leave are not continued.

In Commission v United Kingdom (15), the Court held that the United Kingdom guidelines on working time were in breach of Community law.

These guidelines are liable to render meaningless workers’ entitlement to daily and weekly rest periods because they do not require employers to ensure that workers actually take the minimum rest periods.

Under the ‘working time’ Directive, Member States are required to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of eleven consecutive hours per 24-hour period and, for each seven-day period, to a minimum uninterrupted rest period of 24 hours plus the eleven hours’ daily rest.

The Directive was transposed into United Kingdom law by regulation (Working Time Regulations 1998 – WTR). To assist understanding of the WTR, the Department of Trade and Industry published a set of guidelines. According to those guidelines, ‘employers must make sure that workers can take their rest, but are not required to make sure they do take their rest’. Taking the view that the guidelines endorse and encourage a practice of non-compliance with the requirements of the Directive, the Commission brought an action before the Court of Justice. The Court points out, first of all, that the purpose of the

15 ECJ, Case C-484/04, Commission v United Kingdom, 7 September 2006, not yet published.
Directive is to lay down minimum requirements intended to improve the living and working conditions of workers by ensuring that they are entitled to minimum rest periods. These principles are rules of Community social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health.

Ensuring that the rights conferred on workers are effective necessarily means that Member States must guarantee compliance with the entitlement to effective rest periods. A Member State which indicates that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with either the minimum requirements nor the essential objective of the Directive.

By providing that employers must merely give workers the opportunity to take the prescribed minimum rest periods without imposing on them a duty to ensure that those periods are actually taken, the guidelines are clearly liable to render meaningless the rights enshrined in the Directive and are incompatible with its objective. The Court therefore holds that the United Kingdom failed to fulfil its obligations under the ‘working time’ Directive.

3.2 Successive fixed-term employment contracts: Konstantinos Adeneler, 4 July 2006

The Court of Justice has interpreted the framework agreement on fixed-term work by strengthening the protection for workers.

Directive 1999/70 is intended to put into effect the framework agreement on fixed-term work concluded between the general cross-industry organisations (ETUC, UNICE and CEEP) (Council of the European Union, 1999). The agreement aims to establish a general framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, and provides that ‘objective reasons’ may justify the renewal of such contracts or relationships. Member States must also determine under what conditions fixed-term employment relationships are regarded as ‘successive’ and are deemed to be of indefinite duration. The time-limit for transposition of the
Directive expired on 10 July 2001, with an option to extend that period by a maximum of one year.

The Greek legislation transposing the Directive into national law was passed belatedly, during April 2003. For workers in the private sector, it establishes that unlimited renewal of fixed-term employment contracts is permitted if justified by an objective reason, and specifies that such an objective reason exists where, inter alia, the conclusion of a fixed-term contract is required by a provision of statute or secondary legislation. Further, the Greek legislation treats as 'successive' any fixed-term employment relationships concluded between the same employer and worker under the same or similar terms of employment, if the contracts are not separated by a period of time longer than 20 working days. The provisions applicable to public sector workers prohibit absolutely the conversion of a fixed-term contract into a contract of indefinite duration.

Mr Adeneler (16) and 17 other employees entered into a number of successive fixed-term employment contracts with ELOG, a legal person governed by private law and falling within the public sector, the last of which came to an end without being renewed. Each of those contracts was concluded for a period of eight months and the various contracts were separated by a period of time ranging from a minimum of 22 days to a maximum of 10 months and 26 days. Seeking a declaration that those contracts had to be regarded as employment contracts of indefinite duration, the workers brought proceedings before the Monomeles Protodikia, which referred four questions to the European Court of Justice for a preliminary ruling.

The Court of Justice first observed that Directive 1999/70 and the framework agreement are intended to apply also to fixed-term employment contracts and relationships entered into with public sector authorities and other entities, and that the framework agreement proceeds on the premiss that employment contracts of indefinite duration are the general form of employment relationship. It therefore seeks to circumscribe the

16 ECJ, Case C-212/04, Adeneler, 4 July 2006, not yet published.
use of successive recourse to fixed-term employment contracts, regarded as a potential source of abuse to the disadvantage of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure.

According to the framework agreement, the use of such contracts founded on objective reasons is a way to prevent abuse. Conversely, the use of successive fixed-term employment contracts where such use is based solely on the fact that it is provided for by a general provision of statute or secondary legislation of a Member State is not in line with the protective purpose of the framework agreement. The concept of 'objective reasons' in fact presumes there to be specific factors relating in particular to the activity in question and the conditions under which it is carried out.

The Court then finds that, although under the framework agreement it is left to the Member States to determine whether the contracts are 'successive', their margin of appreciation is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the framework agreement. The Court holds that a national provision under which only fixed-term contracts that are separated by a period of time shorter than or equal to 20 working days are regarded as successive must be considered to be such as to compromise the object, the aim and the practical effect of the framework agreement. So inflexible and restrictive a definition is liable to have the effect not only of in fact excluding a large number of fixed-term employment relationships from the benefit of the protection of workers sought by the Directive and the framework agreement, but also of permitting the misuse of such relationships by employers.

In the view of the Court, the framework agreement precludes application of a national rule which, in the public sector alone, prohibits absolutely the conversion into an employment contract of indefinite duration of a succession of fixed-term contracts that, in fact, have been intended to cover fixed and permanent needs of the employer and must be regarded as constituting an abuse, to the extent that the domestic law of the Member State does not include, in the sector under consideration, any other effective measure to prevent and, where relevant, punish the misuse of successive fixed-term contracts.
Lastly, the Court points out that, where a directive is transposed belatedly into a Member State’s domestic law and the relevant provisions of the directive do not have direct effect, the national courts are bound to interpret domestic law so far as possible, once the period for transposition has expired, in the light of the wording and the purpose of the directive concerned with a view to achieving the results sought by it, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive. The Court nevertheless adds that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

The curious reader will also look at the rulings in Marrosu (17) and Vassallo (18) in which the Court held that Directive 1999/70 did not preclude national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, prohibits their being converted into contracts or relationships of indeterminate duration, where that legislation includes another effective measure to prevent and punish the abuse of successive fixed-term contracts by a public-sector employer (19).

Conclusion
The Court’s activity in 2006 was intense. The questions referred to it for preliminary rulings enable it to fulfil its role as interpreter of Community law. That interpretation ensures uniform application of European texts

17 ECJ, Case C-53/04, Marrosu, 7 September 2006, not yet published.
18 ECJ, Case C-180/04, Vassallo, 7 September 2006, not yet published.
19 For issues concerning the protection of workers in the event of redundancy, the reader is referred to the Alonso case, ECJ, Case C-81/05, Cordero Alonso, 7 September 2006 and Werhof, as regards the safeguarding of employees’ rights on a transfer of undertakings, ECJ, Case C-499/04, Werhof, 9 March 2006, ECR 2006, I-2397.
Dalila Ghailani

across all the Member States of the European Union. The Court has defined the concept of disability (Chacon Navas), established the pensionable age for transsexuals (Richards) and explored the issues associated with healthcare provided in a different Member State (Watts). The questions relating to the organisation of working time have been examined afresh (Robinson-Steel, Commission v United Kingdom, etc.).

Within the case law, the protection of workers’ rights is fundamental and will hold centre ground in 2007. The Viking case will in that regard be a crucial test of Europe’s commitment to workers’ rights. The outcome of this case, currently being heard before the Court (20), will have a decisive impact on workers’ rights and the ability of trade unions effectively to negotiate for the protection of workers and to defend social rights. According to the European Trade Union Confederation (ETUC), whilst this dispute has arisen in the context of the maritime industry, its resolution will have consequences throughout Europe, and not merely in the maritime sector or the EU Member States most closely concerned (ETUC, 2006).

The case addresses whether a company can deprive workers of the basic right to collective action, by formally relocating its employees in a country where wages and benefits are lower. In 2003, the Finnish Viking shipping line decided that it could gain a competitive advantage by re-flagging its passenger and cargo ferry Rosella, operating between Helsinki and Tallinn in the Baltic Sea, as an Estonian vessel, and replacing the crew with lower-paid seafarers. Dissatisfied with how the situation was resolved in Finland, Viking subsequently went to court in England seeking an injunction to prevent the Finnish Seamen’s Union (FSU) from taking industrial action at some time in the future in order to protect its members’ jobs. Viking also sought to prevent the International Transport Workers’ Federation (ITF) from in the future calling on its affiliate members to show solidarity with the FSU. Viking was able to bring its action in the English court only because the ITF has its Secretariat in London.

20 ECJ, Case C-438/05, Viking, pending.
This case is a mirror image of the *Laval* case in Sweden (21), which has attracted a lot of public attention and concern. The potential legal, political and social repercussions of these cases go far beyond the Finnish and Swedish social models and will affect labour relations throughout Europe.

The aim of the employers in both these cases was to undermine successful social models and shift the balance of power between the social partners in countries where trade unions have a recognised role in defending workers' interests. The right to collective action lies at the heart of the Nordic social model, a model shared by some of the most competitive economies in the world. A finding in favour of the employers would have a damaging impact in parallel circumstances in Germany, France and many other EU Member States.

The European Commission has endorsed the essential tenets of the Swedish social model against pressure from undertakings based in the enlargement countries. In an opinion sent to the European Court of Justice in the night of Tuesday 31 January and Wednesday 1 February in connection with the *Vaxholm* case, the Commission stated that Sweden was perfectly entitled, within its territory, to require compliance with collective agreements negotiated between employers and trades unions. In the view of the Commission’s legal service, a foreign undertaking cannot disregard local collective agreements, since they afford satisfactory transposition of the Directive on the posting of workers, under which the foreign workers used by a non-resident employer must be employed in accordance with local conditions as regards working hours, leave and minimum wages. The Commission nevertheless nuances this view to the effect that there is nothing permitting Sweden to impose constraints which, by virtue of existing collective agreements, go beyond the standards set by the Directive on the posting of workers. This means that collective agreements cannot force employees to belong to a trade union, or their employers to contribute to a training fund (22). The Commission’s opinion was not unexpected, given that in

21 ECJ, Case C-341/05, *Laval un Partenari*, pending.

October 2005 the Commissioner for the internal market, the Irishman Charlie McGreevy, had taken the liberty of upholding the position of the Latvians. Thomas Ostros, the Swedish Economy Minister, expressed the view at the time that his comments were unacceptable, and threatened to block the forthcoming ‘services’ Directive. In response to the ensuing uproar, the Commission President, José Manuel Barroso, had to distance himself from his Commissioner, explaining that his remarks had been misinterpreted (Ghailani, 2006).

The judgments to be delivered by the Court in both these cases in the course of 2007 will without the slightest doubt arouse enormous interest in the world of labour relations.

References


