INTERIM MEASURES IN EC LAW: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?

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Abstract

Two situations can be distinguished in the case law of the European Court of Justice on interim relief granted by national judges: (i) a Factortame-type situation (after the name of the case known as Factortame), concerning the suspension of enforcement of national legal provisions incompatible with Community law, and (ii) a Z.A.P.-type situation (after the initials of Zuckerfabrik, Atlanta and Port), dealing with the suspension of enforcement of national measures implementing Community Regulations and positive interim orders disapplying such regulations.

Factortame ratifies the idea that compliance with the principle of effective judicial protection of Community law rights requires immediate availability of a remedy, pending the determination of the substance of a case. Factortame recognizes a Community law right to interim legal protection, regardless of the authority against which the relief is granted and the means through which such protection is provided. Z.A.P. provide the foundations of a Community law right to interim legal protection where the validity of Community regulations is challenged.

In Factortame, national courts' jurisdiction to grant interim measures is based directly on Community law. The same applies to a Z.A.P.-type situation where the validity of a Community act is in issue.

So far as the exercise of the power to grant interim measures is concerned, under a Factortame-type situation, national courts apply domestic law requirements and conditions. Under a Z.A.P.-type situation, minimum uniform Community law conditions (such as the existence of serious doubts as to the validity of the Community measure, the urgency and threat of serious and irreparable damage, and the consideration of the interest of the Community) are applicable.

There is not a truly complete Community law system of provisional judicial protection before national courts. However, the gaps left by the Court's case law allow the anticipation of further developments.

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Hereinafter the ‘Treaty’.


1. Introduction

The existence of judicial control mechanisms is one of the main features of any community based on the rule of law. In the framework of the EC Treaty, which is regarded as the constitutional charter of the European Community, national and Community acts are equally subject to such judicial control mechanisms. Under Article 226 of the Treaty, national law provisions deemed to be contrary to Community law may be challenged before the Court of Justice. On the other hand, the validity of Community acts alleged to be incompatible with superior Community law may be contested under Article 230 of the Treaty. Furthermore, if Community institutions, in infringement of the Treaty, fail to act, an action may be brought against such institutions under Article 232 of the Treaty. In all cases, the enforcement of any act which is being challenged may be provisionally suspended and, as the case may be, any necessary interim measures can be ordered pursuant to Articles 242 and 243 of the Treaty until a judgment is rendered on its merits.

However, access to the remedies referred to above for natural persons and corporate bodies is certainly restricted. Individuals may not bring an action under Article 226 of the Treaty at all, and only in a limited number of cases they may begin annulment and failure to act proceedings under Articles 230 and 232 of the Treaty. In any event, taking into account that under Article 234 of the Treaty national judges may request a preliminary ruling by the
European Court of Justice on the interpretation of Community law and on the validity of Community measures, natural persons and corporate bodies find sufficient possibilities of indirectly challenging before domestic courts both the compatibility between national law provisions and Community law and the validity of Community acts implemented at the national level. Despite the absence of an express Treaty provision on the matter, the Court of Justice has indicated that national judges must be able to ensure provisional legal protection through interim measures until such time as a preliminary ruling is rendered.

The purpose of this article is to explore, in the light of the case law of the European Court of Justice, the domain of interim relief in EC law matters related disputes between individuals and Member States pending before national courts, with a view to inquire from a procedural law perspective whether it is possible to conceive a complete and autonomous Community law system of interim judicial protection before such courts.

Two different situations can be distinguished in the case law of the European Court of Justice on interim relief granted by national judges. The first one concerns the suspension of the enforcement of national legal provisions alleged to be incompatible with Community law, and will be called a *Factortame*\(^3\)-type situation. The second one deals with the suspension of enforcement of national measures implementing Community Regulations and positive interim orders disapplying such regulations in disputes where the applicants contest the validity of the latter. This will be designated as a *Z.A.P.*\(^4\)-type situation.\(^5\)

A brief description of the facts, issues and outcomes of the cases covered by both types of situation is appropriate at this point, in order to set most clearly the object and focus of the research.

In *Factortame*, the model case for the approach of the first type of situation, several persons engaged in fishing activities resulted affected by requirements as regards nationality, residence and domicile, in the framework of a new system of registration of fishing vessels in the United Kingdom. The plaintiffs applied for judicial review of the Merchant Shipping Act 1988 establishing such a new registration system, claiming that the requirements contained in it were incompatible with Community law. Simultaneously, they lodged applications for interlocutory injunctions, seeking suspension of the enforcement of the newly enacted provisions until a final decision was rendered on their main actions.

Although the Divisional Court hearing the case granted the interim relief sought by the applicants, the decision was quashed by the Court of Appeal. The case ultimately reached the House of Lords, which held that under English law, judges have no jurisdiction to grant interim relief against the Crown, and that on the basis of the presumption of validity of national legislation, such judges could not set aside an Act of Parliament so long as a finding that it is invalid has not been made. Nevertheless, the House of Lords submitted a preliminary question to the European Court of Justice under Article 234 (ex Article 177) of the Treaty, in

\(^3\) Case C-213/89, R. v. Secretary of State for Transport, ex parte Factortame (1990) ECR I-2433, hereinafter *Factortame*.


order to ascertain (i) whether Community law obliged or gave national courts the power to grant interim protection of Community law rights, and (ii) what criteria were to be applied in deciding whether or not to grant such interim protection.

Despite the specificity and clarity of the questions referred by the House of Lords, the Court of Justice confined itself to answering that ‘Community law must be interpreted as meaning that where a national court, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule’. Upon delivery of the ruling, the House of Lords awarded the interlocutory injunctions sought by the plaintiffs.

The first case dealt with under a Z.A.P.-type situation was Zuckerfabrik. The applicants were sugar manufacturers who sought the suspension of a payment demand by German administrative authorities concerning a special sugar levy imposed by Council Regulation 1914/87, which they considered incompatible with superior Community law. The German court hearing the case granted the suspension and made a preliminary reference to the Court of Justice on the question of validity of the regulation and the lawfulness of the interim relief awarded. As regards the latter aspect, the national court intended to ascertain whether the suspension ordered would be compatible with the full effectiveness of Community Regulations in all Member States under Article 249 of the Treaty.

The Court ruled that Article 249 (ex Article 189) of the Treaty does not preclude national courts from suspending the application of a national measure implementing a Community regulation. However, it established certain conditions which have to be fulfilled for the granting such a suspension, namely (i) the national court must have serious doubts as to the validity of the contested regulation; (ii) where the validity of such an act is not already in issue before the Court, the national court must itself refer such a question to the Court; (iii) there must be urgency and a threat of serious and irreparable damage to the applicant; and (iv) the national court must take due account of the Community interest.

The Atlanta case concerned the validity of Council Regulation 404/93, establishing a common market organization for bananas and a common import regime replacing the existing national arrangements. The said regulation had introduced a quota to be allocated to fruit traders within the European Community for the importation of bananas from third countries and ACP countries. Bananas coming from third countries were subject to a levy, whereas fruit from the ACP area was duty free. Imports exceeding the quota were subject to a different tariff depending on their origin.

The plaintiffs were importers of third-country bananas, who brought an appeal against a decision by the German authorities granting them provisional licenses to import significantly lower quantities than they had imported in previous years. The applicants contested the validity of the regulation discontinuing the duty-free import quota which had been allocated to them until then, on the grounds that the introduction of import quotas and their allocation among operators within the Community were discriminatory and violated their right to property and the principles of legitimate expectations and proportionality.

At the same time, the importers applied for interim relief in the form of an order for the issuance of additional import licenses at a reduced rate of customs duty. The national court awarded such an order, not without referring to the European Court of Justice a preliminary question on whether and under what conditions a national judge may grant interim measures intended to create a new legal position.

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6 OJ 1987, L 183/5.
7 OJ 1993, L 47.
Relying on its previous Zuckerfabrik ruling, the Court extended the applicability of the principles governing the suspension of enforcement of a domestic measure implementing Community legislation to interim relief in the form of a positive order to settle or regulate disputed legal positions or relationships. In other words, interim measures provisionally disapplying Community legislation could also be ordered by national judges. Furthermore, the Court clarified the conditions laid down in Zuckerfabrik for granting interim relief.

The Port case also related to Council Regulation 404/93, but the litigation matter was different from that in Atlanta. The applicant company claimed that the licenses it had obtained to import third-country bananas, issued on the basis of its sales figures corresponding to the reference years of 1989, 1990 and 1991, were insufficient. It was argued that during the reference period established as a basis for fixing the quota allocated, Port had been able to import an unusually small quantity of fruit due to the breach of contract by a Colombian supplier. The plaintiff further maintained that it was affected by circumstances of exceptional hardship and that a dismissal of its request of additional licenses was likely to lead the company to bankruptcy.

The matter reached the Bundesverfassungsgericht (German Federal Constitutional Court), which considered that since hardship cases were contemplated in the regulation in issue, additional import licenses should be provisionally granted to the plaintiff in order to avoid an irreparable infringement of its right to property. However, the Court of Appeal making the award ordered by Germany’s highest tribunal referred three questions to the European Court of Justice, one of them concerning the conditions under which a national court is authorized to grant interim relief.

The Court ratified its Zuckerfabrik and Atlanta case law as regards the power conferred on national courts to grant interim measures and the conditions under which this can be done in disputes where the validity of Community legislation is in issue. However, it ruled that the case under consideration fell outside the scope of the said judgments. The Court stated that, given the existence of a special procedure established by Article 30 of Council Regulation 404/93 for dealing with hardship cases - under which it was for the European Commission to take the necessary transitional measures in order to address the difficulties threatening the existence of importers when an exceptionally low quota was allocated to them - national judges were not authorized to grant interim relief until such time as the Commission has adopted the said measures. If the Commission did not adopt the relevant decision following the filing of a request to do so, or expressly refused to act, or adopted a measure different from that which the trader sought or considered to be necessary, then an action for failure to act or an action for annulment, as the case may be, could be brought before the Community judicature, which has exclusive jurisdiction to order the necessary interim measures pending a final decision.

Unlike Zuckerfabrik and Atlanta, Port does not involve a challenge of the validity of Community legislation. Yet, it will be considered among the Z.A.P.-type situation cases for systemic purposes, namely only insofar as it sets the outer limit of the jurisdiction conferred on national courts to grant interim relief. After Port, such power remains confined to those disputes where the validity of Community legislation is contested.

Common features and differences as regards the task assigned to national judges to grant interim relief arise between the two types of situation represented by Factortame and the set of German cases, respectively. An attempt to identify such differences will be made in a comparative perspective, within the framework of the three fundamental elements dealt with in procedural law analysis, namely ‘action’, ‘jurisdiction’, and ‘process’. The substantial aspects of the cases will be touched upon only incidentally.

The contents of the article will therefore be divided into three sections, corresponding
to each of the aforementioned elements of procedural law analysis. In order to address the particular characteristics of the field in issue, the said elements have been translated into Community law terminology as the ‘right of the individual to obtain interim relief’, the ‘power of national courts to grant interim measures’, and the ‘exercise’ of such jurisdiction, respectively.

Section 2 deals with an aspect of interim relief directly related to the principle of due process, including the right to bring an action and the access to a judge. The starting point of analysis will be the concept of judicial protection in the case law of the European Court of Justice, which provides the appropriate framework for addressing the rationale behind the judgments representing our two types of situation. The questions on whether that rationale is the same in both types of situation, whether Community law imposes upon national courts the duty to grant interim measures in all cases, and above all, whether individuals enjoy an autonomous Community law right to obtain interim legal protection before national courts remain to be answered.

So far as the jurisdiction conferred upon national courts to grant interim measures in litigation involving EC law is concerned, the main thrust of the analysis will be focused on the source from which such power emanates and the grounds relied upon by the Court of Justice in order to define it. In addition, the said jurisdiction will be addressed from a procedural law perspective, on the basis of the relationship and interplay between the award of interim relief and the decision of a case on the substance, and within the particular context of the Community law preliminary rulings mechanism under Article 234 of the Treaty, in order to determine how and to what extent such power is exclusive or concurrent vis-à-vis the jurisdiction of the Court of Justice and the Court of First Instance under Articles 242 and 243 of the Treaty.

Four aspects will be covered by section 4 on the exercise of the power conferred upon national judges to grant interim relief, namely (i) the availability of remedies and the procedural rules applicable to interlocutory proceedings, (ii) the conditions and requirements under which interim measures may be ordered, (iii) the discretion reserved to national courts for the evaluation of the fulfilment of such conditions and for the adoption of a decision on whether to make an award in a particular case, and (iv) the possibility of judicial review of the decision adopted by a national court. Perhaps the most significant issues to be discussed here will be the extent to which national procedural autonomy is affected by the requirements laid down by the Court of Justice in the Z.A.P. litigation and, on the other hand, whether the conditions applicable to the award of interim measures under a Factortame-type situation should be left entirely to the different procedural law systems of the Member States.

It should be noted that the normative aspect of interim relief before national courts has been progressively developed through case law only. Although the judgments rendered by the European Court of Justice allow the elaboration of somewhat general principles governing the award of interim measures under the two types of situation, the lack of a systematic procedural law approach, not only on the part of the Court but also in legal literature, entails intrinsic difficulties in drawing the lines among the three elements on the basis of which the research will be conducted. In these circumstances, some occasional overlaps will be unavoidable.

After the issues presented in this introductory section have been fully discussed, the possibilities of discovering whether a complete and autonomous system of interim judicial protection of Community law rights before national courts is emerging will hopefully be much greater.
2. The right to obtain interim relief before national courts

2.1 Direct, immediate and effective judicial protection

The importance attributed to the role of individuals in the European integration process led the Court of Justice to point out already at an early stage that the rights conferred by Community law are directly enforceable before national courts. National judges have been entrusted with the major task of ensuring legal protection of rights natural persons and corporate bodies derive from Community law. Through the recognition of the direct enforceability of substantive Community law rights, individuals have also been afforded a procedural Community law right to judicial protection before national courts.

In \emph{Salgoil}, the Court established the type of judicial protection to which individuals are entitled, ruling that Community law requires national courts not only to protect the interests of those persons subject to their jurisdiction who may be affected by any possible infringement of Treaty provisions, but to do so \emph{directly} and \emph{immediately}. In \emph{Bozzetti}, the Court further stated that national judges are responsible for ensuring that rights derived from Community law are \emph{effectively} protected.

Upon the recognition and development of the concepts of direct effect and the supremacy of Community law, many judgments following the same doctrine of the cases cited above have been rendered by the Court as a result of the more frequent and extended recourse to Article 234 of the Treaty in disputes pending before domestic courts, where individuals claimed to benefit from the rights granted to them by the Treaty.

‘Judicial protection’ comprises both access to a judge and the availability of remedies. The right to a remedy before courts of law, as a general principle of Community law, reflects the constitutional traditions of the Member States and entails a ratification of the legal standards contained in Articles 6 and 13 of the European Convention of Human Rights.

In summary, national judges must guarantee the legal protection of rights individuals derive from Community law. Such protection encompasses the right to direct, effective, and immediate legal coverage and the consequent availability of appropriate judicial remedies.

2.2 Rationale behind the case law of the European Court of Justice

2.2.1 Factortame-type situation

In \emph{Factortame}, the question submitted by the House of Lords and the answer of the European

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9 Case 13/68, Salgoil SpA v. Italian Ministry for Foreign Trade (1968) ECR 453.

10 Case 179/84, Bozzetti v. Lutermizzzi Spa and Ministero del Tesoro (1985) ECR 2301.


Court of Justice dealt with aspects, the analysis of which rather corresponds to the next sections of this article, namely the jurisdiction to grant interim measures and the exercise of such jurisdiction. In fact, the Court did not expressly refer to a right to obtain interim relief before national courts. However, the twofold reasoning contained in its landmark ruling entails an implicit recognition of the existence of such a right.

Firstly, the Court stated that, in accordance with its case law, ‘it is for the national courts, in application of the principle of co-operation laid down in Article 5 of the EC Treaty [now Article 10; SA], to ensure the legal protection which persons derive from the direct effect of provisions of Community law’, and relying on Simmenthal, further instructed the House of Lords on setting aside the national provision preventing Community rules from having full effectiveness. Taking into account that the interim relief sought by the applicants was intended to ensure the full effectiveness of a prospect judgment on the existence of rights claimed under Community law, the Court concluded that ‘a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule’.

As a reinforcing ground, the Court pointed out that the effectiveness of the system established by Article 234 (ex Article 177) of the Treaty would be impaired if national judges who submitted a question for a preliminary ruling and stayed the proceedings were not able to grant interim relief until a judgment was rendered on the main action.

The idea behind the reasoning of the Court can be summarized as follows: if provisional judicial protection of Community law rights is not available, the full efficacy of a judgment to be rendered on the merits of the case could be endangered during the period of time elapsing until such a judicial decision is delivered.

Regardless of the - merely reinforcing - status the Court attributed to the ground relating to the need to preserve the effectiveness of the system established by Article 234 of the Treaty, its importance cannot be underestimated. In some cases, the considerable length of time needed by the Court to render a preliminary ruling may itself constitute a valid reason to believe that individuals should enjoy a Community law right to obtain interim relief before national courts. Among such cases are those in which a prompt judicial decision would be normally available and irreparable damage thus avoided, if no recourse to Article 234 of the Treaty were necessary.

Full compliance with the principle of effective judicial protection requires immediate availability of a remedy to protect Community law rights, pending determination of the substance of the relevant case. The Factortame judgment ratifies this idea, extending the principles of the Court’s previous case law on legal protection of Community law rights to the field of interim measures.

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13 Factortame, para. 19.

14 In Case 106/77, Administrazione delle Finanze dello Stato v. Simmenthal (1978) ECR 629, the Court had stated that Community law provisions and measures ‘must be fully and uniformly applied in all the Member States . . .’, and that as from their entry into force, they ‘render automatically inapplicable’ any conflicting provision of national law.

15 See Factortame, para. 22.

Lambros Papadias\textsuperscript{17} states that ‘according to the Court of Justice there should be continuous and coherent protection between the coming into being and the establishment of the existence of directly applicable Community law rights’, and ‘whenever the retroactive effect of a ruling risks being deprived of any meaning for the parties concerned, interim relief must be available to ensure that the final judgment will indeed be effective and operative’. It can be said in this regard that in \textit{Factortame}, the Court of Justice recognized the right to obtain interim measures before national courts as an integral part of the Community law concept of direct, immediate and effective judicial protection.

Beyond the issue whether \textit{Factortame} made available an additional ‘remedy’ for the protection of putative rights,\textsuperscript{18} a matter which will be discussed below, it is worth noting that, above all, the most important contribution of the Court’s ruling is the recognition of a Community law right to obtain interim legal protection, regardless of the authority against which the interim relief is granted and irrespective of the means or remedies through which such protection is provided. Taking into account that the right to obtain provisional suspension of enforcement of an Act of Parliament against the Crown did not exist under English law for purely domestic disputes, by instructing the House of Lords on setting aside the national law provision preventing the award of the injunctions, the Court implicitly recognized an autonomous right to obtain interim relief in order to safeguard the effectiveness of a decision to be rendered on the existence of the rights claimed under Community law.\textsuperscript{19}

\textbf{2.2.2 Z.A.P-type situation}

In \textit{Zuckerfabrik}, a Community law right to obtain interim relief before national courts was recognized in more straightforward terms. Here, such a right was in fact considered to be an ancillary aspect of the right to challenge the validity of Community legislation.

The reasoning of the European Court of Justice departs from the concept of legal protection, which includes - for those cases where national authorities are responsible for the administrative implementation of Community regulations - the right of individuals to challenge the validity of such regulations before national courts and to induce those courts to make a preliminary reference to the Court of Justice. As a consequence of the long time which elapses from the moment a case is brought before a national judge until a preliminary ruling on the validity of the contested measure is rendered, individuals should be provisionally protected through the suspension of enforcement of the said measure.\textsuperscript{20}

Referring to its statement in \textit{Factortame} as to the suspension of the application of disputed domestic legislation \textit{prima facie} incompatible with Community law until such time

\textsuperscript{17} Lambros Papadias (1994) ‘Interim Protection under Community Law before the National Courts: The Right to a Judge with Jurisdiction to Grant Interim Relief’, \textit{LIEI} 1994/2, 153-193, p. 172.


\textsuperscript{19} See Lambros Papadias, loc. cit., pp. 177-178; ‘Community citizens not only have a right to enforce the Community rights conferred upon them, but they are also, after Factortame, entitled to a judge with a jurisdiction to grant, where necessary, interim relief.’ See also Ami Barav, loc. cit., p. 369: ‘The availability of adequate judicial remedies in the national courts in relation to claims arising under the EEC Treaty constitutes an essential requirement of Community law.’ Although using different terminology, both authors seem to favour the same underlying idea of our proposition.

\textsuperscript{20} See \textit{Zuckerfabrik}, paras. 16-17.
as the national court could deliver a judgment on the merits following a preliminary ruling under Article 234, the Court concluded that Community law interim legal protection must remain the same, since in both Factortame and Zuckerfabrik the relevant disputes were based on Community law.\textsuperscript{21}

The Court confirmed this reasoning in Atlanta, extending the Zuckerfabrik rule on the suspension of enforcement of national acts implementing Community legislation to positive interim orders provisionally disapplying such legislation.\textsuperscript{22}

Although in Port the Court dismissed the possibility of obtaining interim relief before the national court, it ratified the principles established in its previous case law. The Court stated that unlike in Zuckerfabrik and Atlanta, the applicant company Port was not in fact challenging the validity of the regulation in issue, but rather seeking at the domestic level a ruling substituting a decision which was only for the European Commission to adopt under the special procedure provided for by the said regulation for dealing with hardship cases. However, if the Commission did not adopt the relevant decision upon the applicant’s request, or expressly refused to act, or adopted a measure different from that sought or considered by the plaintiff to be necessary, then an action for failure to act or an action for annulment could be brought before the Community judicature, whose exclusive competence on the matter also includes securing the applicant’s right to obtain provisional legal protection through the award of the necessary interim measures pending a final decision. In such cases, the right to interim relief would be based directly on Article 243 of the Treaty.\textsuperscript{23}

To summarize, the Z.A.P. case law provides the foundations of a Community law right to obtain interim legal protection where the validity of Community regulations implemented at the national level is challenged before the domestic courts.

\textbf{2.2.3 Factortame and Z.A.P.: Common features}

The first common element arising from reading the judgments representing our two types of situation is that the right to obtain interim relief before national courts forms an indissoluble part of the Community law concept of direct, immediate, and effective judicial protection. Legal protection guaranteed by Community law before national courts extends to both established and putative or merely claimed Community law rights.\textsuperscript{24} In other words, it covers the entirety of a judicial action intended to establish the existence of Community law rights and the enforcement thereof, including its main aspect - and ultimate purpose - , namely the delivery of a decision on the substance, and also its ancillary aspect, namely the adoption of all the necessary provisional protective measures to ensure the efficacy of a final judgment.

In Z.A.P., the Court goes back to its merely ‘reinforcing’ argument in Factortame as to the need to safeguard the effectiveness of the preliminary rulings system set forth in Article 234 (ex Article 177) of the Treaty, and considers that the interim legal protection which Community law ensures for individuals before national courts must remain the same in both types of situation.\textsuperscript{25} This statement confirms the hypothesis that, even though in Factortame

\textsuperscript{21} See Zuckerfabrik, paras. 16, 17, 19 and 20.

\textsuperscript{22} See Atlanta, para. 28.

\textsuperscript{23} See Port, paras. 52-60.


\textsuperscript{25} See Factortame, para. 22; Zuckerfabrik, para. 20; Atlanta, para. 24; and Port, para. 51.
the Court had not dealt specifically with the right to obtain interim judicial protection, it had implicitly recognized such a right. Secondly, it is made clear that the right to ‘interim legal protection before national courts’ Community law ensures for individuals may equally be invoked in cases where the compatibility of a national measure with Community law is in issue, as well as where the validity of Community regulations implemented in the Member States is contested.

Sharpston states: ‘The position of the European Court can be stated quite briefly if a Community law right exists, it is necessary to have some mechanism to protect it pending determination of the substance of the case.’ The rationale behind the judgments discussed is thus a somewhat pragmatic one. Where a matter of Community law arises in litigation before national courts, and a preliminary question is submitted to the Court of Justice under Article 234 of the Treaty, it will take a particularly long period of time until a ruling is rendered27 and the national court is therefore able to deliver a decision on the merits of the case. During such a lengthy period of time, the applicant may well suffer irreparable damage, rendering completely useless its recourse to legal action.28

The reverse side of the Community law right to interim legal protection before national courts is the duty imposed on those courts to consider granting interim measures if requested by a party to do so.29 However, individuals do not enjoy an unqualified right to obtain interim relief. At this point of the analysis, it will suffice to say that interim measures should be made available only in appropriate cases.30 The issue is closely related to the conditions under which such measures may be ordered, and will therefore be fully addressed in the next section, which deals with the exercise of the power to grant interim relief.

3. The power of national courts to grant interim relief

3.1 The jurisdiction to grant interim relief from a substantive perspective

3.1.1 Factortame-type situation

The first part of the preliminary question referred by the House of Lords in Factortame was


27 See Eleanor Sharpston, loc. cit., p. 26, whose statistics indicate that the average duration of preliminary ruling proceedings is 18 to 19 months, and not less than 11 to 12 months for urgent matters.

28 See Gerhard Bebr (1996) ‘Comment on Atlanta’, CMLRev. 33, 795-809, p. 805. ‘The considerable length of time the Court at present needs to render a preliminary ruling underlines the growing importance of interim protection of individuals’.

29 Although presented in a different context, this idea has been borrowed from Peter Oliver, loc. cit., p. 23.

30 In Factortame, Advocate General Tesauro held: ‘The obligation imposed by Community law on the national court to ensure the effective judicial protection of rights directly conferred on the individual by provisions of Community law includes the obligation, if the need arises and where the factual and legal preconditions are met, to afford interim and urgent protection to rights claimed on the basis of such provisions of Community law, pending a final determination and any interpretation by way of a preliminary ruling given by the Court of Justice.’
very specific as to the purpose of knowing whether Community law either obliges or empowers national courts to grant interim measures.\textsuperscript{31} The Court of Justice, however, disregarded the wording of the question and reduced its scope, availing itself to answer: ‘... whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.’ The explanation given by the Court for adopting such changes lacks originality and the arguments are not very convincing.\textsuperscript{32} But leaving aside such an explanation and whatever other unexpressed reasons or constraints the Court may have had or encountered, it is obvious that the Court placed the question in a different framework and approached the matter in its own terms.

In these circumstances, the Court achieved a significant degree of simplification of the issues raised by the House of Lords, which led it to conclude that a domestic law provision standing as an obstacle to the granting of interim protection by national courts must be set aside, instead of openly stating whether Community law obliges or empowers such courts to grant interim relief. The lack of a definition of the nature and scope of such jurisdiction prompted part of the doctrine to criticize the judgment.\textsuperscript{33} Perhaps it will be worth reviewing the reasoning of the Court from a different perspective, in order to ascertain whether such a criticism remains as wise as it may seem at first sight.

Most of the academic attention devoted to \textit{Factortame} has been mainly concentrated on the section of the judgment dealing with the setting aside of the conflicting national legislation preventing the award of the injunctions sought by the applicants. The essence of the problem raised by the House of Lords - as concluded categorically by some authors - was merely reduced to an already traditional supremacy issue.\textsuperscript{34} Departing from such an assumption, the matter was taken even further, as serious efforts have been made to elucidate the Court’s sources of confusion.\textsuperscript{35} Moreover, it has been suggested that if under domestic law national courts lack the jurisdiction to grant interim measures, such courts would neither be empowered to provide provisional judicial protection of Community law rights, taking into

\textsuperscript{31} The first part of the question was drafted as follows: ‘Where - (i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law (“the rights claimed”), (ii) a national measure in clear terms will, if applied, automatically deprive the party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under Article 177 (now Article 234) as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favor of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed?’

\textsuperscript{32} Para. 17 of the judgment reads: ‘It is clear from the information before the Court, and in particular from the Judgment making the reference and, as described above, the course taken by the proceedings in the national courts before which the same case came at first and second instance . . .’

\textsuperscript{33} See A. G. Toth, loc. cit., p. 585, and Eleanor Sharpston op. cit., p. 36.

\textsuperscript{34} See D. Simon and A. Barav (1990) \textit{Le droit communautaire et la suspension provisoire des mesures nationales. Les enjeux de l’affaire Factortame, RFDA} 920, p. 594.

account that in such a case, there would be no national legal obstacle to remove.\textsuperscript{36}

It is respectfully submitted that the Court’s pronouncement should not be read so narrowly. The Court had stated in paragraph 19 of its ruling that ‘it is for the national courts, in application of the principle of co-operation laid down in Article 5 of the EC Treaty [now Article 10; SA], to ensure the legal protection which persons derive from the direct effect of provisions of Community law’. Thus, the setting aside of the conflicting national legislation preventing the award of interim relief contained in the remaining paragraphs of the judgment only becomes of secondary importance insofar as such setting aside merely constitutes a necessary step which has to be taken in order to allow the full realization of the power conferred upon national courts to ensure the legal protection of Community law rights. It is worth noting that, as has been established in the previous section of this article, interim measures form an indissoluble part of the Community law concept of effective judicial protection.

The Court may have deliberately modified the drafting of the first part of the question referred by the House of Lords. Furthermore, the lack of an express statement on whether Community law itself provides the legal foundations for the jurisdiction to grant interim relief, should not be so readily confused with plain avoidance of the problem. After having acknowledged that national judges bear the duty to ensure legal protection of Community law rights, which includes the award of interim measures, any further clarification by the Court was in fact redundant. And the House of Lords perfectly understood the subtlety of the Court’s language and silences. Taking into account that under English law national courts simply lacked jurisdiction, the interlocutory injunctions awarded upon delivery of the preliminary ruling could never have been ordered if the Court had not established, at least implicitly, that Community law directly confers upon domestic courts the power to do so.

The obstacle the Court instructed the House of Lords to remove was not preventing the exercise of power that existed under English law. On the contrary, the said obstacle was the very negation of the jurisdiction to grant interim relief. The obligation to set aside the national law rule was imposed on ‘a court which in those circumstances would grant interim relief’,\textsuperscript{37} meaning that the House of Lords, as any other Community law court in a Member State, ‘entrusted with the task of ensuring legal protection’\textsuperscript{38} and, therefore, also obliged to guarantee the full effectiveness of the judgment to be rendered on the existence of the rights claimed under Community law,\textsuperscript{39} was empowered by Community law itself to award interim measures. The only remaining step which had to be taken was to eliminate the national law obstacle denying the court such power for merely domestic law related disputes.

In summary, national courts have a power based directly on Community law to grant interim relief in disputes pending before them, where the compatibility of national law with Community law is contested, regardless of the jurisdiction such courts may or may not have under domestic law for the granting of the said measures.

\textit{3.1.2 Z.A.P.-type situation}


\textsuperscript{37} \textit{Factoriame}, para. 21.

\textsuperscript{38} \textit{Factoriame}, para. 19.

\textsuperscript{39} \textit{Factoriame}, para. 20.
The first preliminary question in Zuckerfabrik related to the possible conflict between (i) the award of interim relief to suspend the enforcement of a national measure implementing a Community regulation, and (ii) the principle of full effectiveness of Community secondary legislation in all Member States, as provided in Article 249 (ex Article 189) of the Treaty. The content of the question can be summarized as follows: Do I (the national court) not have the power to grant interim measures?

Unlike the English judges in Factortame, their German colleagues did have jurisdiction under national law to suspend temporarily the enforcement of purely domestic legal provisions. According to Article 80 of the Verwaltungsgerichtsordnung, the introduction of a complaint and the institution of an action for annulment render the contested act automatically suspended, unless national administrative authorities expressly oppose such a suspension in the public interest, in which case it is for the competent court to make a decision.40

A brief reference to Case C-217/88 Commission v. Germany will provide an illustration for a better understanding of the Zuckerfabrik litigation and the essence of the preliminary question submitted in connection therewith. In accordance with Council Regulations 337/79 and 822/87 establishing the common market organization for wine,41 the Commission had adopted Regulation 148/85,42 stipulating the quantities of table wine to be distilled in Germany in the 1984/1985 marketing year. In compliance with such provisions, the German authorities issued a number of orders requiring local producers to present specific quantities of wine for compulsory distillation. Some of these orders, however, were challenged by a number of producers and, in the absence of an express opposition on the part of the German authorities, the contested orders became automatically suspended pursuant to Article 80 of the Verwaltungsgerichtsordnung.

The Commission considered that by suspending the enforcement of Community legislation, Germany had breached its obligations under Community law. Thus, it brought a case before the Court of Justice, which ultimately ruled that there had been an infringement of Article 10 (ex Article 5) of the Treaty and of the Council Regulation setting up the common organization for wine. The Court considered that Member States may not rely on national law provisions such as Article 80 of the Verwaltungsgerichtsordnung to justify a failure to comply with their Community law obligation as regards the effective enforcement of the regulation in issue.43

Facing a similar situation, the referring court in Zuckerfabrik insisted on its power under domestic law to suspend the enforcement of a national measure merely implementing a Community regulation, but wished to ascertain whether an interim relief order could constitute an obstacle to the full effectiveness of Community secondary legislation in all Member States as provided in Article 249 (ex Article 189) of the Treaty, in which case Community law could deprive national judges from such domestic jurisdiction.44

The only difference between Zuckerfabrik and Atlanta in this respect is that in the latter case the referring court derived its power to grant positive interim measures from the

40 See Peter Oliver, loc. cit., pp. 21-22.
41 OJ 1979, L 54/1 and OJ 1987, L 84/1.
42 OJ 1985, L 16/32.
43 See Peter Oliver, loc. cit., pp. 21-22.
44 See Zuckerfabrik, para. 15.
guarantee of legal protection enshrined in Article 19(4) of the German Grundgesetz (Basic Law).\textsuperscript{45} The other elements and issues were identical in both cases.

In both Zuckerfabrik and Atlanta, the Court of Justice ruled that Article 249 (ex Article 189) of the Treaty ‘cannot constitute an obstacle to the legal protection which Community law confers on individuals’ and that ‘the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling’.\textsuperscript{46} From the moment such a right is exercised and until such time as the Court renders its ruling, national judges must provide provisional legal protection to applicants, including the suspension of enforcement of national measures implementing Community legislation as well as positive orders provisionally disapplying Community regulations.\textsuperscript{47}

Similarly, the referring court in Port took account of the Bundesverfassungsgericht’s reliance on the right to property guaranteed by Article 14 of the Grundgesetz as the basis for granting interim measures,\textsuperscript{48} but was still uncertain as to whether Atlanta would be good case law to support the award of positive interim relief where a Commission decision under Article 30 of Council Regulation 404/93 as regards a hardship case allegedly affecting the plaintiff had not yet been adopted. This time, the preliminary question was drafted in straightforward terms: Do I (the national court) have the power to grant interim measures?\textsuperscript{49}

The Court’s answer categorically expressed that the situation in Port was different from the situations dealt with in previous case law. Unlike in Zuckerfabrik and Atlanta, where the applicants had challenged the validity of Community regulations implemented through national measures, in Port there was ‘a situation where, by virtue of a Community regulation, the existence and scope of traders’ rights must be established by a Commission measure which the Commission has not yet taken’.\textsuperscript{50} In other words, the applicant had to refer to the Commission in order to request the adoption of the relevant transitional measure concerning the alleged hardship case. If the Commission failed to act upon such a request, or expressly refused to act, or adopted a measure different from that sought or considered by the applicant trader to be necessary, then an action under Article 175 (ex Article 130s) or an action for annulment under Article 173 of the Treaty (ex Article 130p), as the case may be, could be brought before the Court of First Instance, which is also competent to order the necessary interim measures.\textsuperscript{51}

\textsuperscript{45} See Atlanta, para. 16.

\textsuperscript{46} Zuckerfabrik, para. 16; Atlanta, para. 20.

\textsuperscript{47} Zuckerfabrik, para. 17; Atlanta, para. 21.

\textsuperscript{48} See Port, para. 19.

\textsuperscript{49} Port, para. 52.

\textsuperscript{50} See Port, paras. 57-60. Although the Court referred to the possibility of obtaining interim measures only in the context of an action for failure to act, and did not expressly mention such a possibility as regards an action for annulment, we assume that provisional legal protection would also be available in the latter case under Article 243 of the Treaty. Petra Foubert (1997) ‘Comment on T. Port’, CJEL Vol. 3, No. 1, has suggested that if the Commission acts, and the applicant does not agree with the transitional measures adopted, the national courts too would be able to grant positive interim relief until such time as the Court of Justice adjudicates on the validity of the Commission’s decision. It should be noted, however, that this would be possible only if the said decision is somehow implemented at the national level.
The referring court could neither request a preliminary ruling on an alleged failure to act by a Community institution nor grant interim relief somehow substituting the Commission in the adoption of transitional measures. It was only for the Court of Justice or the Court of First Instance to review a failure to act as well as to ensure legal protection through interim measures.51

In these circumstances, Port comes to set the outer limits of the jurisdiction conferred on national courts to grant interim relief, confining such power to disputes in which the validity of Community acts implemented at the domestic level is in issue.

Leaving aside for the moment the consideration of the distinctiveness of Port, so far as the above-mentioned jurisdiction in its substantive aspect is concerned, the Court of Justice made clear in Z.A.P. that as soon as the validity of Community legislation implemented at the national level is contested, the power to provisionally suspend its enforcement and to award positive interim orders disapplying such legislation, is based directly on Community law, regardless of the domestic legal provisions which may be invoked by the referring courts.52

The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of a national legal provision with Community law or the validity of secondary Community legislation, in view of the fact that the dispute in both cases is based on Community law itself.53

Even though certain elements appealing to autonomy may be drawn from the reference of the Court to a ‘Community law legal protection before national courts’, in a Z.A.P.-type situation, the power conferred on national judges to grant interim relief is closely connected to the legal protection available before the Community judicature. Certainly, it was ‘the coherence of the system of interim legal protection’ which required that national courts be able to grant interim measures parallel with the jurisdiction of the Court of Justice under Articles 242 and 243 of the Treaty, given the similarities between the purpose of an action for annulment (Article 230 of the Treaty) and that of a preliminary reference made in the framework of an action pending before domestic courts, where the validity of Community secondary legislation is contested.54

Nonetheless, where the validity of Community legislation is challenged, the source of the power conferred on national courts to grant interim relief is not to be found in Articles 242 and 243 of the Treaty. The jurisdiction national judges have derives, as in Factortame, from the case law of Court of Justice on the need to provide legal protection to individuals under Article 234 of the Treaty, in compliance with the duties imposed on the authorities of Member States by Article 10 of the Treaty. In other words, this Community law power pre-existed, not in the letter but in the spirit of the Treaty. The ‘coherence of the global

51 See Port, paras. 53-54.
52 E. García de Enterria (1989) ‘El problema de los poderes del juez nacional para suspender cautelarmente la ejecución de las leyes nacionales en consideración al Derecho Comunitario Europeo’, REDA p. 420. Similarly, although referring to the prerogatives of the Court to set the conditions for the exercise of the power conferred on national courts to grant interim relief, Advocate General Elmer had indicated in his Opinion in Atlanta, that such jurisdiction is based on Community law and not on national law.
53 See Zuckerfabrik, para. 15; Atlanta, para. 16; and Port, para. 19.
54 Zuckerfabrik, para. 20. See also Atlanta, para. 28; and Port, para. 51.
55 See Zuckerfabrik, para. 18; Atlanta, para. 22; and Port, para. 49.
Community law system of interim legal protection’ remains in any case a leading principle for the allocation of the powers to grant interim relief by the Community judicature and the national courts whenever the need arises.

To conclude, under a Z.A.P.-type situation national courts have the power to grant interim relief in the form of suspension of enforcement of a national measure implementing Community regulations, as well as in the form of positive interim orders disapplying such legislation, only in disputes pending before them where the validity of a Community act is in issue. Such power is based on Community law alone, regardless of any equivalent jurisdiction judges may have under national law for purely domestic cases.

3.2 The jurisdiction to grant interim relief from a procedural perspective

It is generally accepted that the Court of Justice has no jurisdiction to grant interim measures in cases referred to it for a preliminary ruling. The preliminary rulings system laid down in Article 234 of the Treaty is non-contentious in nature and is based on the principle of cooperation between national courts and the European Court of Justice. Peter Oliver states: ‘Under Article 177 [now Article 234; SA], the Court is not seized of cases in their entirety but only of references requesting a ruling on specific points of law. Regardless of whether a given dispute concerns a Factortame-type situation or a Z.A.P.-type situation, from a procedural law point of view national courts have exclusive power to grant interim relief in cases pending before them. Such power is not distinct or autonomous from the jurisdiction to settle the relevant dispute on the merits, but merely ancillary thereto. If the term ‘jurisdiction’ is understood stricto sensu as the power to decide a given lawsuit on the substance, it would be even more accurate to regard the power to grant interim relief as an ancillary aspect of the said ‘jurisdiction’ rather than as ancillary jurisdiction as such.

Whenever national courts do not have the jurisdiction to render a decision on the main action, they equally lack the power to order interim measures. However unmistakable this assertion may appear in general procedural law language, additional efforts are required in order to find its concrete manifestation in the context of the Community system of legal protection, taking into account that within such a system, national and supranational judicial bodies operate simultaneously.

Although not yet completely clear in plain procedural law terminology, an example of the concrete manifestation referred to above is present in Port, where the Court stated that ‘the Treaty makes no provision for a preliminary ruling by which a national court asks the Court of Justice to rule that an institution has failed to act. Consequently, national courts have no jurisdiction to order interim measures pending action on the part of the institution. Judicial

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58 Peter Oliver, loc. cit., pp. 9-10.
review of an alleged failure to act can be exercised only by the Community judicature’. 60 In fact, the underlying idea behind this statement is that the national courts’ lack of power to grant interim measures derives from the lack of jurisdiction to rule on the substance of a failure to act by a Community institution.

4. The exercise of the power to grant interim relief

4.1 National procedural autonomy

National judges do not cease to be national judges while performing their task as Community judges dealing with interim measures under EC law. However obvious this assertion may appear, the importance of its legal implications cannot be underestimated. National judges are assigned a role in Community law, but they have to perform such a role within the context of their own domestic legal systems. 61

The Court has consistently held that remedies and procedures for the enforcement of Community law rights belong to an area reserved for national legislation. In the absence of Community rules applicable in all the Member States, ‘it is for the domestic legal systems of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights citizens have from the direct effect of Community law’. 62 Furthermore, as a matter of principle, national judges have a certain margin of discretion for the interpretation and application of the relevant rules of procedure, such a margin of discretion being inherent in any adjudicative power (‘juris’ - ‘dictio’).

The autonomy Member States have for the enactment and application of domestic procedural rules in EC law disputes is nevertheless subject to minimum requirements imposed by Community law. First, remedies and procedures available in the Member States for the enforcement of directly applicable Community law rights must be effective. The direct enforceability of Community law rights before national courts (direct effect), accepted as a leading principle already at an early stage, 63 would be undermined if national rules of procedure were so stringent that it would become virtually impossible or extremely difficult to allow the admission of an action. This requirement has been designated as the principle of effectiveness or non-impossibility.

The Court of Justice initially elaborated the principle of effectiveness or non-impossibility in Comet, 64 where it stated that, as a consequence of the direct effect of Community law and of the protection to which individuals are entitled, limitation periods for bringing an action established at the national level must not make ‘impossible in practice to exercise rights which the national courts have a duty to protect’. Furthermore, in San

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60 Port, para. 53.


64 Case 45/76, Comet v. Produktschap voor Siergewassen (1976) ECR 2043.
Giorgio the Court deemed incompatible with Community law any requirement of proof provided for by domestic rules of procedure, which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law.

The second limitation on national procedural autonomy is imposed by the principle of non-discrimination, which precludes domestic remedies and procedures applicable to the enforcement of Community law rights being less favourable than those relating to similar actions concerning purely national law disputes. If under domestic rules of procedure, individuals have a certain power to enforce rights based on domestic law, such power must be equally available for the enforcement of Community law rights.

Notwithstanding all of the above, national procedural autonomy still remains the rule; therefore, the evaluation as to the compatibility of specific domestic procedural law provisions with the aforementioned requirements will normally be decided according to the circumstances on a case-by-case basis. Furthermore, national judges do not necessarily have to set aside domestic rules of procedure, so long as it is possible to interpret such rules in conformity with the principles of effectiveness and non-discrimination. Indeed, in Mary Murphy, the Court stated that ‘it is for the national court, within the limits of its jurisdiction under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law and, to the extent that this is not possible, to hold such law inapplicable’.

4.2 Factortame-type situation

In Factortame, the European Court of Justice did not answer the second part of the preliminary question submitted by the House of Lords as regards the criteria to be applied in deciding whether or not to grant interim relief. Even though important issues such as the procedural rules applicable to the award of interim relief and the discretion reserved to national courts in deciding whether or not to make such an award, had been raised, the Court confined itself to indicating that a domestic law provision standing as the sole obstacle to the granting of interim measures for the protection of Community law rights, must be disapplied.

The purpose of this article, as presented in the introductory section, includes drawing the lines among the three main procedural law aspects of interim relief before national courts. This proposition compels us to avoid reading the Factortame ruling exclusively in the light of the case law cited in the previous heading.

66 Also known as the principle of comparability, assimilation or equality.
69 The second part of the question had been drafted as follows: ‘If question (a) is answered in the negative and question (b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?’
70 See Eleanor Sharpston, op. cit., p. 36; also A. G. Toth, loc. cit., p. 585.
The specific obstacle the Court of Justice instructed the House of Lords to remove cannot be regarded as a mere domestic procedural rule incompatible with the principle of effectiveness. The national rule preventing English courts from granting interim relief constituted a hindrance to the very existence of the jurisdiction to make such an award rather than to the exercise of the said power.\textsuperscript{71}

Even though the Court remained silent as to the procedural rules and conditions under which national courts should exercise the power conferred by Community law to award interim measures and the discretion reserved to such courts in deciding whether or not to make an award, the House of Lords granted the injunctions sought by the plaintiffs under English law conditions applicable to ordinary interim orders.\textsuperscript{72}

Perhaps because it was to some extent implicit in the first part of the House of Lords’ preliminary question that English law conditions would normally be favourable to the granting of interim measures, the Court did not deem it necessary to deal with the issue of the applicable procedural rules nor with the discretion reserved to national courts in deciding whether or not to order the injunctions sought by the plaintiffs. The Court may have assumed that once the removal of the rule depriving national courts of jurisdiction was secured, interim relief could not be denied.

The lack of an express answer from the Court in this respect generated a great deal of speculation among authors. Some attention was devoted for instance, to the issue whether the Court of Justice had imposed on the House of Lords the creation of a new remedy, which allegedly did not exist under English law.\textsuperscript{73} If the Court had done so, then it would have reversed its own \textit{Rewe} (butterboats)\textsuperscript{74} case law, in which it was held that Community law ‘was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law’.

For several reasons, however, the issue referred to above remains purely theoretical. From a procedural law point of view, interim measures did exist as a remedy under English law and in fact, in \textit{Factortame}, such a remedy was made available to the applicants once the relevant national legal obstacle preventing the award was removed. On the other hand, ‘interim orders are a familiar part of the legal systems of all Member States’\textsuperscript{75} and, therefore, the matter is unlikely to arise in future litigation. The \textit{Rewe} rule remains unaffected: national remedies are to be used - and adapted, if necessary - for the granting of interim relief in Community-law-related disputes.

In general terms, \textit{Factortame} appears to confirm by omission the principle of national procedural autonomy in the field of interim measures granted by national courts, where

\textsuperscript{71} For a different view, see Peter Oliver, loc. cit., pp. 7-27.

\textsuperscript{72} The applicants, the Commission and Advocate General Tesauro had indicated in their submissions during the preliminary proceedings that the conditions applicable to the award of interim measures should be determined by the Member States.

\textsuperscript{73} See Peter Oliver, loc. cit., p. 16; A. G. Toth, loc. cit, p. 585; and Lambros Papadias, loc. cit., p. 173.


\textsuperscript{75} Peter Oliver, loc. cit., p. 16, who refers to the availability of interim remedies in all Member States and further points out that precautionary measures ‘may be granted against the central government in many types of proceedings in all of them except Denmark and the United Kingdom; even in Denmark they may be granted in exceptional cases and in the United Kingdom they are available against public authorities not part of the central government’. Also, Advocate General Tesauro had considered in his Opinion in \textit{Factortame} that interim relief was a ‘fundamental and indispensable instrument of any judicial system’.
national law is alleged to be contrary to Community law. In principle, in the absence of common rules, domestic procedural provisions are applicable\textsuperscript{76} although the possibility of further rulings on the compatibility of such provisions with Community law requirements cannot be excluded.\textsuperscript{77} Moreover, it has been suggested that the Court might even refer to its own remedies and procedures under Articles 242 and 243 of the Treaty as a ‘yardstick’ for evaluating the achievement of minimum standards the application of the principle of effectiveness requires.\textsuperscript{78}

On the other hand, in \textit{Factortame} the Court of Justice neither laid down specific criteria to be applied when weighing up the balance of convenience as to whether it is appropriate to grant interim relief in a particular case.\textsuperscript{79} In principle, this is a matter left to the discretion of the national courts through the application of domestic law standards. However, the Community law nature attributed to the jurisdiction conferred on national judges allows us to envisage that on a later occasion, if the need arises, the Court might take the opportunity to give some indications as to the appropriate criteria to be applied and the weight to be accorded to such criteria.\textsuperscript{80}

Regardless of whether any of the prospect developments referred to above takes place, it must be noted that the Court of Justice has no jurisdiction to review the legality of, nor to set aside, a decision adopted by national courts on the granting or denial of interim relief in a given dispute.

4.3 Z.A.P.-type situation

\subsection*{4.3.1 The procedural conditions laid down by the Court of Justice}

In \textit{Z.A.P.}, the Court of Justice laid down the procedural conditions applicable to the award of interim relief by national courts.\textsuperscript{81} Most of the said conditions are related to the weighing up of the ‘balance of convenience’, namely (i) the existence of serious doubts as to the validity of the contested Community measure (\textit{prima facie} case), (ii) the urgency and threat of serious and irreparable damage (\textit{periculum in mora}) and (iii) the consideration of the interest of the Community.

The Court pointed out that different conditions provided for under national law for the

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\textsuperscript{77} See Clive Lewis, op. cit., pp. 72-73.

\textsuperscript{78} See Peter Oliver, loc. cit., p. 17: ‘While the Court has never explicitly followed this approach, it was arguably done so tacitly. Thus there can be little doubt that in \textit{Factortame} the circumstance that all types of Community legislation may be, and not infrequently are, suspended pursuant to Article 185 (now Article 242) must have weighed with the Court.’ It is respectfully submitted that in \textit{Factortame} the Court did not use such a method even tacitly, since the domestic law rule in issue was not a mere procedural rule but one precluding the very existence of the power to grant interim relief.

\textsuperscript{79} For a critique of the Court’s approach, see A. G. Toth, loc. cit., p. 585; and Eleanor Sharpston, op. cit., p. 36.

\textsuperscript{80} See Clive Lewis, op. cit., pp. 72-73.

granting of interim measures may jeopardize the uniform application of Community legislation in all Member States; therefore, it was necessary to lay down uniform conditions,\(^{82}\) equivalent to those applied by the Court when dealing with interim measures under Articles 242 and 243 of the Treaty.\(^{83}\)

Even though an assessment of the conditions is to be made according to further detailed evaluation guidelines and criteria also laid down by the Court itself, the filing and examination of an application for interim relief remains governed by domestic procedural law.\(^{84}\)

4.3.1.1 Serious doubts about the validity of the contested measure and statement of grounds (prima facie case or \textit{fiumus boni juris})

Firstly, the Court established that prior to granting any interim measures, the national court must entertain serious doubts as to the validity of the Community regulation on which the contested national administrative measure is based, and further set out the reasons why it considers such a regulation to be invalid.\(^{85}\)

The origin of the requirement referred to above may be found in Germany, where the courts are used to the obligation of stating the reasons for their doubts whenever they request a ruling of the German Constitutional Court on whether an act is valid under the German Constitution.\(^{86}\)

The Court did not express what the nature of the doubt entertained by the judge should be. Instead, it limited itself to indicating that only the possibility of a finding of invalidity can justify the granting\(^ {87}\) a statement which has been interpreted as meaning that the competent national judge has to envisage a ‘probability’ or a ‘reasonable prospect’ that the Community measure will be nullified by the Court.\(^ {88}\) In this regard, the opinion of Advocate General Tesauro in \textit{Factortame}, in the sense that there must be ‘a suspicion (the degree of which must be established) that the final determination may entail that the statute or administrative act in question is invalid’, may be considered an additional guideline.

The precise degree of possibility that the Community measure would be held invalid was not established and would probably not be established by the Court in the future, due to the difficulties which may be encountered in defining a concept based on somewhat subjective factors. However, the Court pointed out that when assessing the issue, it is for the

\(^{82}\) See Zuckerfabrik, paras. 25-26.

\(^{83}\) See Zuckerfabrik, para. 27; Atlanta, para. 39.

\(^{84}\) See Zuckerfabrik, para. 26. In Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba (2000) ECR I-675, the European Court of Justice indicated that although the interim measures would be ordered \textit{in accordance with domestic law}, when the dispute concerns a matter of Community law, the conditions (laid down by the Court) under which temporary protection must be ensured should not affected.

\(^{85}\) See Zuckerfabrik, paras. 23-24; Atlanta, paras. 35-36; and Port, para. 48.

\(^{86}\) For further details, see H. G. Schermers (1992) \textit{Comment on Zuckerfabrik}, CMLRev. 29, 133-139, p. 139; Lambros Papadias, loc. cit., p. 180; and Peter Oliver, loc. cit., p. 24.

\(^{87}\) See Zuckerfabrik, para. 23; and Atlanta, para. 35.

national courts to take into account the extent of discretion Community institutions must be allowed, in the light of the case law of the Court of Justice.\textsuperscript{89} This indication reduces to some extent the uncertainty with which the national judge may be faced in a given case, but at the same time puts some limitations to its discretion when evaluating the possible invalidity of Community legislation.

National courts must respect any pronouncement of the European Court of Justice or any final and binding judgment of the Court of First Instance on the question of validity of the Community legislation concerned.\textsuperscript{90} If a pronouncement of the kind has confirmed the validity of the act, the national court can no longer order interim measures, or must revoke those measures already ordered, unless the grounds of illegality relied upon by the national court differ from those already examined and found unsubstantiated in previous judgments of the Luxembourg Courts.\textsuperscript{91}

The introduction of the criterion referred to above in Atlanta is explained by the fact that the Court had dealt with practically the same situation on a previous occasion, viz. when it dismissed Germany’s request to suspend the application of the contested Regulation and ultimately rejected on the merits a concomitant action for annulment of the said regulation.

The obligation imposed on the national judge comprises the consideration of both the legal aspects and the factual findings\textsuperscript{92} of ‘any’ pronouncement ratifying the validity of the relevant Community act, namely judgments rendered in actions for annulment under Article 230, decisions dismissing an application for interim measures under Articles 242 or 243, and even preliminary rulings under Article 234 of the Treaty. Those decisions by the Community judicature involving a declaration of inadmissibility should not in principle be taken into account.\textsuperscript{93}

4.3.1.2 Reference to the Court of Justice of the question of validity

As a consequence of the Court’s exclusive jurisdiction to declare Community acts invalid,\textsuperscript{94} should the question of validity not yet have been referred to the Court, the national judge must himself refer such a question under Article 234 of the Treaty.\textsuperscript{95}

The requirement under analysis introduces some interpretative difficulties,\textsuperscript{96} contrasting the obligation imposed on national courts with the previous case law of the Court

\textsuperscript{89} See Atlanta, para. 37.

\textsuperscript{90} In Atlanta, Advocate General Elmer interpreted that in the light of Article 5 (now Article 10) of the Treaty, this obligation includes seeking \textit{ex officio} the necessary information from the Community judicature.

\textsuperscript{91} See Atlanta, paras. 38 and 46-50.

\textsuperscript{92} National courts must particularly take into account the Community judicature’s assessment of the balance between the Community interest and the interest of the sector concerned.

\textsuperscript{93} See Gerhard Bebr, loc. cit, p. 807, who draws our attention to an important detail, namely that the application for interim measures lodged by Germany prior to the Atlanta ruling had been dismissed by the Court on the formal ground of lack of a right to bring an action; therefore, no ruling on the merits had been rendered.


\textsuperscript{95} See Zuckerfabrik, para. 24; Atlanta, para. 38; and Port, para. 48.

\textsuperscript{96} See Lambros Papadias, loc. cit., pp. 182-183.
of Justice as regards such disputes in which national courts may refer a preliminary question and those cases in which they are obliged to do so.97

The Court had held in Pardini98 that a national court is not empowered to request a preliminary ruling unless a dispute is pending before such a court, in the context of which it is called upon to give a decision that can take into account the preliminary ruling to be rendered. On the other hand, the Hoffmann-La Roche and Morson99 judgments established that national courts are not obliged to submit a question in interlocutory proceedings such as those concerning the award of interim measures, provided that each of the parties involved in the relevant dispute are entitled to institute proceedings or to require proceedings to be instituted on the substance of the case, thereby allowing the Community law issue to be re-examined and eventually referred to the Court of Justice under Article 234 of the Treaty.

However relevant the alleged interpretative difficulties may be, it is worth noting that, unlike the Z.A.P. litigation, none of the cases mentioned above related to the validity of Community measures.100 Moreover, in Z.A.P. the preliminary rulings requested were necessary also for deciding each of the disputes on the substance.101

4.3.1.3 Urgency and threat of serious and irreparable damage (periculum in mora)

The Court stated that there must be urgency and a threat of serious and irreparable damage liable to materialize before a preliminary ruling is rendered.102 Purely financial damage is not to be regarded as irreparable in principle, unless such damage becomes irreversible upon immediate enforcement of the relevant Community measure, according to the circumstances of the case.103 It has been suggested that payment of Community taxes or levies, for example, would be considered as a source of reparable, purely economic loss, unless failure to insulate the applicant from the effects of such a loss could be fatal.104

The requirement under analysis is in fact the same one the Court of Justice applies when dealing with interim measures under Articles 242 and 243 of the Treaty. Even though it has not been expressly indicated that national judges must refer to the case law of the Court of Justice in order to evaluate the compliance with such a requirement, a brief overview of the Court’s jurisprudence will be helpful to understanding its scope.105

Interim measures are granted by the Court of Justice under Articles 242 and 243 of the

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100 See Peter Oliver, loc. cit., p. 24.
101 As suggested by Advocate General Lenz in Zuckerfabrik.
102 See Zuckerfabrik, paras. 28-29; Atlanta, para. 40; and Port, para. 48.
103 See Zuckerfabrik, para. 29; Atlanta, para. 41.
104 See Peter Oliver, loc. cit., pp. 24-25.
105 For an exhaustive analysis of this topic, see M. Brealey and Mark Hoskins, op. cit.; H. G. Schermers and D. Waelbroeck, op. cit.
Treaty only if the matter is urgent, or else if ‘irreversible damage would be caused which could not be made good even if the contested decision were annulled, or if it would be disproportionate to the Community’s interest not to allow suspension of the decision during the Court’s proceedings’.\(^\text{106}\) In principle, purely financial loss is not considered irreparable, unless (i) it threatens the very existence of the plaintiff,\(^\text{107}\) (ii) damage could not be quantified,\(^\text{108}\) or (iii) compensation could not restore the position the plaintiff had before the damage was caused.\(^\text{109}\) The burden of proof is imposed on the applicant\(^\text{110}\) and such a burden includes furnishing proof ‘that he cannot wait until the conclusion of the main action without personally suffering damage which would have serious and irreparable effects for him’.\(^\text{111}\)

4.3.1.4 The interest of the Community to be taken into account

Among the uniform conditions to be applied by national judges considering the award of interim measures, the Court also imposed the obligation to take account of the interest of the Community. National courts bear the duty (i) to examine whether the Community measure in issue would be deprived of all effectiveness if not immediately implemented, and (ii) not to set aside temporarily the contested Community act without proper guarantees - including money deposits - especially in the case of a financial risk for the Community.\(^\text{112}\)

As regards the first of the aspects referred to above, namely the examination of the extent to which the effectiveness of Community legislation would be affected, the national judge must take account of the damage the interim measure may cause to the Community legal regime established by the regulation in issue. To that end, it has to consider not only the cumulative effect which would arise if a large number of courts were to adopt the same interim measures, but also the special features of the applicant’s situation distinguishing him from the other operators concerned.\(^\text{113}\)

The purpose of the Court in imposing an assessment of the possible consequences


\(^\text{112}\) See Zuckerfabrik, paras. 30-32; Atlanta, paras. 42, 43, 45; and Port, para. 48.

\(^\text{113}\) See Atlanta, para. 44.
interim measures may have for the effectiveness of the legal regime the contested act purports to establish, can be summarized as follows: if the award of interim relief by one court were to be followed by numerous similar awards in ‘domino effect’, the consequences for the effective operation of the legal regime introduced by the act challenged could be fatal. Nonetheless, it is difficult to imagine that the national judge would in practice be capable of properly appraising this tremendously complex matter and further envisaging the possibility of such a ‘domino effect’ taking place. Moreover, it is not clear whether in proceeding with such an assessment the judge should bear in mind the situation only in the Member State concerned or in the whole territory of the European Community.\textsuperscript{114}

On the other hand, by imposing the consideration of the special features of the applicant’s situation distinguishing him from the rest of the operators, the Court intends to avoid a widespread challenge of the relevant act, restricting the availability of the remedy for truly exceptional situations. It is not clear however, what criteria should be applied for making such a distinction.\textsuperscript{115}

The bond the judge must be able to require from the plaintiff prior to the award appears as an instrument to dissuade abuses by applicants rather than as a real safeguard for the Community interest. In fact, it is hardly imaginable ‘whether any individual applicant, no matter how opulent, could provide sufficient security to offset the potentially far-reaching effects that the nationwide suspension of a regulation would have’.\textsuperscript{116}

Although the national judge has a certain degree of discretion for fixing the amount of the security he deems ‘appropriate’, the apparent compulsory nature of the guarantee as such has been criticized by some authors, who maintain that in similar actions under domestic law, the provision of such a guarantee is not a \textit{sine qua non} requirement. From a Community law point of view - it is argued - the exercise of the rights conferred on individuals would be rendered less favourable than in actions concerning national law issues, it being difficult to reconcile such a situation with the \textit{Rewe} doctrine.\textsuperscript{117}

The statement of the Court, however, was not so conclusive as to regard the posting of a bond as a \textit{sine qua non} requirement. In principle, the fact that national courts ‘must have the power’ to demand from applicants ‘appropriate’ guarantees does not amount to an obligation to do so in every case irrespective of its circumstances. But even if it does, it must be noted that the situation would fall outside the scope of the \textit{Rewe} doctrine,\textsuperscript{118} which by no means precludes Community law rules like the one in issue being less favourable than national rules applicable to purely domestic cases.\textsuperscript{119}

In addition to all of the above, the European Court of Justice has indicated that ‘in

\begin{itemize}
  \item \textsuperscript{114} See Gerhard Bebr, loc. cit., pp. 802-803, who considers that the requirement is largely theoretical.
  \item \textsuperscript{115} See Gerhard Bebr, loc. cit., p. 803.
  \item \textsuperscript{116} See Ian Hardcastle, loc. cit., p. 98.
  \item \textsuperscript{117} See Lambros Papadias, loc. cit., p. 183.
  \item \textsuperscript{119} The \textit{Rewe} doctrine would apply only in the absence of common rules, which is not the case in \textit{Z.A.P.} since the Court laid down uniform Community law conditions. On the other hand, the \textit{Rewe} doctrine precludes the relevant domestic remedies and procedures applicable to the enforcement of Community law rights being less favourable than those relating to similar actions concerning disputes based exclusively on national law. However, it does not preclude Community rules being more stringent than national procedural law provisions.
\end{itemize}
taking due account of the Community interest, the national court must, where it is minded to
grant interim relief, give the Community institution which adopted the act whose validity is in
doubt an opportunity to express its views’. 120

4.3.2 Why did the Court of Justice lay down uniform conditions?

Some authors have argued that by laying down the conditions applicable to the granting of
interim relief at the national level, the Court of Justice seized legislative powers the Treaty
confers exclusively upon the Council. 121 In purely theoretical terms, this opinion may be
considered accurate from an institutional perspective, 122 but in our view, the Court did no
more than filling a gap left by the Treaty, as it has traditionally done since its landmark Van
Gend en Loos judgment.

It may be reasoned that the power conferred on national courts to grant interim relief
under a Z.A.P.-type situation is based on Community law and, therefore, the Court is
sufficiently legitimized to lay down the conditions to be fulfilled by the applicants. 123 Such an
argument does not seem to suffice, taking into account that the nature of the jurisdiction is the
same under a Factortame-type situation and no uniform conditions have yet been established
in connection thereto.

As a matter of principle, the European Court of Justice is the guardian of the
effectiveness of Community law. In that capacity, the Court is not only empowered but also
obliged to instruct national courts on how the operation of Community legislation must be
adequately safeguarded whenever individuals demand provisional judicial protection of rights
they derive from the Community legal order. The core of the Court’s legitimacy for laying
down uniform conditions for the exercise of the power to grant interim relief at the national
level is to be found in the very nature of the relevant dispute in the context of which an award
is made.

It is vested case law that the Court of Justice has exclusive jurisdiction to declare
Community acts invalid. Regardless of the locus standi individuals may or may not have for
bringing before the Court of First Instance a direct action for annulment of a given measure
under Article 230 of the Treaty, they should be able to challenge before national courts
domestic measures which merely implement Community regulations. 124 Although the


121 See for example, Wolfgang Dänzer-Vanotti (1991) ‘Der Gerichtshof der Europäischen Gemeinschaften
beschränkt vorläufigen Rechtsschutz’, cited by Lambros Papadias, loc. cit., p183-184. For an opinion endorsing
the Court’s approach, see F. Schockweiler (1992) ‘La responsabilité de l’autorité nationale en cas de violation
du droit communautaire’, RTDE 27.

122 The Court modified its own position as regards its lack of competence to lay down procedural rules
applicable in the Member States. In Case 130/79, Express Dairy Foods Ltd. v. Intervention Board for
Agricultural Produce (1980) ECR 1987, for example, the Court had stated that ‘in the regrettable absence of
Community provisions harmonizing procedure and time limits, the Court finds that this situation entails
differences in treatment on a Community scale. It is not for the Court to issue general rules of substance or
procedural provisions which only the competent institutions may adopt.’

123 In Atlanta, Advocate General Elmer had indicated that the power of national courts to grant interim
measures is based on Community law and not on national law; therefore, the power of the Court to set the
conditions applicable to the award of interim relief cannot be challenged.

124 See Zuckerfabrik, para. 16; and Atlanta, para. 20.
pertinent action before the national court would directly attack the domestic implementing measure, it must not be overlooked that such a measure ‘is the product of the exercise of a subordinate competence (‘compétence liée’) in the sense that the said administrative intervention is prescribed and predetermined by the Regulation itself, the latter being the exclusive normative source for the measure’s adoption’.

In fact, behind such an action lies a challenge of the relevant Community regulation and, therefore, the dispute becomes more or less equivalent to a direct action under Article 230 of the Treaty.

The similarities and parallels between the purpose of an action for annulment and that of a preliminary reference made in the framework of an action pending before a national court impose the transposition of the conditions applied by the Court under Articles 242 and 243 of the Treaty to the award of interim measures at the national level, since such an award entails a provisional suspension or disapplication of the regulation contested. The coherence of the Community law system of judicial protection and the need to safeguard uniform application of Community legislation in all Member States largely justify this approach.

4.3.3 The Z.A.P. conditions and national procedural autonomy

The Court of Justice clearly placed outside the scope of the Rewe doctrine the procedural conditions applicable to the award of interim measures under a Z.A.P.-type situation. Instead of testing the compatibility of the relevant domestic requirements and the principles of effectiveness and non-discrimination, in Z.A.P. the Court itself laid down uniform Community law conditions. Although such conditions allow the Court to some extent to control the exercise of the jurisdiction conferred upon national judges to grant interim relief, the significance of the limitation of national procedural autonomy proper should not be overestimated.

The Court confined itself to establishing minimum uniform conditions. It is true that, to a greater or lesser extent, the very existence of such conditions implies by definition an intrinsic reduction of the autonomy enjoyed by national procedural rules. However, the making and examination of an application for interim measures are still governed by domestic procedural law. In other words, it is for the Member States alone to regulate the remedies and all other instrumental aspects of interlocutory proceedings. Furthermore, the determination of the courts having jurisdiction to hear a case is equally left to the discretion of national authorities.

Leaving aside for the moment the obligation to refer the question of validity for a preliminary ruling, whose rationale is closely connected to the Court’s exclusive jurisdiction

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125 Lambros Papadias, loc. cit., p. 184.


127 Reading Z.A.P. together with the Court’s ruling in C-217/88, Commission v. Germany (table wine), it is clear that the uniform conditions mainly aim at preventing permissive suspensions of Community legislation.


to declare Community acts invalid, it has been suggested that the uniform conditions, equivalent to those applied by the Court itself under Articles 242 and 243 of the Treaty, are ‘visibly drawn from principles common to the law of the Member States’. Indeed, already in Factortame, Advocate General Tesauro had ‘emphasized the similarity of the criteria for interim relief in the various Community systems, identifying the two basic preconditions as the *prima facie case* (however designated) and the *periculum in mora*. The discretion of national courts for deciding whether it is appropriate to grant interim relief in a particular case is undoubtedly reduced by the additional guidelines and criteria laid down by the Court for the evaluation of the basic requirements and preconditions. Yet, in spite of the undeniable stringency of such an evaluation guidelines and criteria, the national judge still retains a certain margin of discretion, taking into account that in practice it is only for him to evaluate and, foremost, to make a decision as to whether the conditions are sufficiently fulfilled. In that sense, national courts remain the ‘masters’ of the Community law jurisdiction conferred upon them to grant interim relief. Moreover, once they have finally decided that the conditions are fulfilled and have ordered interim measures accordingly, it is impossible for the Court of Justice to change such a decision, however wrongful the granting may be considered. The Court could only give the national courts some guidance by ruling after the event whether they have acted properly, as in fact it did in Z.A.P.

4.4 *Factortame* and Z.A.P.: Differences and common features

In the light of the case law of the European Court of Justice, the exercise of the power conferred on national courts to grant interim legal protection under a *Factortame*-type situation appears to be different from that under a Z.A.P.-type situation. Whereas in the former, national courts would in principle grant interim measures according to the requirements and conditions established by domestic rules of procedure and utilize national law standards, in the latter they would apply, above all, minimum uniform Community law conditions and guidelines.

It has been suggested that the conditions laid down in Z.A.P. would also be applicable in a *Factortame*-type situation. The similarities between the House of Lords’ decision in *Factortame* and the Court’s ruling in *Zuckerfabrik* and, on the other hand, the fact that the conditions laid down by the Court in the latter are drawn from principles common to the laws of the Member States have been pointed to as sufficient reasons to accept that the conditions for granting interim relief should be identical in both situations. Furthermore, the need to impair Community legislation as little as possible referred to in Z.A.P. would be equivalent to that in regard of national legislation, which also benefits from a presumption of validity in the

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131 See *Zuckerfabrik*, para. 27; and *Atlanta*, para. 39.
134 See H. G. Schermers, loc. cit., p. 139.
135 It does not appear to be accurate to regard the imposition of uniform conditions as a veritable restriction of the *jurisdiction proper* conferred on national judges, as suggested by David W. K. Anderson, op. cit., p. 197.
136 See Peter Oliver, loc. cit., pp. 9-10.
The previous proposition does not remain immune to criticism. The conditions and guidelines imposed by the Court are in fact stricter than the minimum common requirements among the Member States. Even though the general conditions relating to the ‘serious doubts’ on the validity of the contested Community measure and to the risk of imminent and irreparable damage constitute common features, the obligation to take due account of the interest of the Community - including the lodging of a guarantee - as well as the remaining conditions, evaluation guidelines and criteria, seem to be more stringent than those already prescribed by national law.

In the author’s view, the transposition in toto of the Z.A.P. conditions to a Factortame-type situation does not appear a priori to be a very reasonable option. The Community provisional legal protection of individuals should not be left entirely to the different procedural law systems of the Member States. However, there is no logic reason for imposing the strict Z.A.P. conditions, evaluation guidelines, and criteria where the need to avoid ‘over-enthusiastic’ suspension of enforcement of uniformly applicable norms (Article 249 of the Treaty), whose validity is contested like in an action for annulment under Article 230, does not exist.\(^\text{138}\)

In support of this position, though from a different perspective, it has been said that ‘to preclude a national court from suspending a national measure merely because such a relief would be unavailable before the Court of Justice in similar circumstances would scarcely serve the interests of Community law and would, it is respectfully suggested, constitute an unwarranted interference by the Community in national law’.\(^\text{139}\)

\[\text{5. Conclusions}\]

Despite the criticism its judicial activism often generates, the European Court of Justice plays a decisive role in making Community law a unique legal experience, where the common traditions as well as the encounter of the diverse legal systems of the Member States become an extraordinary source of possibilities.

In this context, the lack of ‘Continental law style’ written Community rules in the field of interim measures granted by national judges, has not prevented the Court from setting the first ‘Common law style’ rules of what could be an emerging Community system of provisional judicial protection before domestic courts.

Even though ‘hidden’ types of situation other than Factortame and Z.A.P., not yet unveiled by the Court, may arise in the future with the coming onto the scene of different kind of applicants and parties to a dispute (individuals versus individuals, Member States versus individuals, etc.),\(^\text{140}\) and of different kind of norms subject to challenge (Directives, domestic legal order).\(^\text{137}\)

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\(^{137}\) See Walter van Gerven, loc. cit., p. 688.


\(^{139}\) Peter Oliver, loc. cit., p. 17.

\(^{140}\) Interestingly, Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba (2000) ECR I-675, relates to a dispute between a company and a non-Community authority (authorities of the overseas territory of Aruba).
Decisions,\textsuperscript{141} etc.), some basic principles may certainly be drawn and further elaborated on the basis of the two types of situation with which the Court of Justice has dealt in its case law for the time being.

The ‘Common law style’ principles referred to above governing the award of Community law interim relief by national courts under \textit{Factortame}-type situations and \textit{Z.A.P.}-type situations enjoy certain autonomy \textit{vis-à-vis} those principles applicable to purely domestic disputes. Such apparent autonomy, however, cannot be conceived outside the preliminary rulings mechanism provided by Article 234 of the Treaty and the ‘coherence of the global Community system of legal protection’.

In this framework, the Court of Justice’s case law trend seems to indicate that interim relief should be available at the national level whenever the Community judicature does not have exclusive power to make an award under Articles 242 and 243 of the Treaty, provided that the national court hearing a case has itself jurisdiction to render a decision on the merits without substituting actions by Community institutions,\textsuperscript{142} and provided further that such a court is authorized to submit a question for a preliminary ruling. According to these guidelines, national judges would not be empowered to grant interim measures, at least, in the following cases: (i) failure to act by a Community institution,\textsuperscript{143} (ii) failure by a Member State to fulfill an obligation under the Treaty,\textsuperscript{144} (iii) challenge of the validity of a Directive not transposed into national law,\textsuperscript{145} and (iv) challenge of directly applicable Regulations\textsuperscript{146} and Decisions not implemented in any form at the domestic level.\textsuperscript{147}

From a normative (procedural) perspective, it cannot be said that there is a truly complete Community law system of provisional judicial protection before national courts. However, the gaps unintentionally left by the Court’s case law allow the anticipation of further developments. It seems reasonable to think of the \textit{Factortame}-type situation covering positive interim measures provisionally disapplying national law provisions alleged to be

\textsuperscript{141} In Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba (2000) ECR I-675, the applicant company challenged the validity of a Council Decision.

\textsuperscript{142} Including the Court of Justice and the Court of First Instance.

\textsuperscript{143} \textit{See} \textit{Port}.

\textsuperscript{144} It is difficult to accept that interim relief compelling Member States to implement provisionally Community Directives should be available. See Peter Oliver, loc. cit., p. 18.

\textsuperscript{145} However, see Case C-74/99, The Queen v. Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd. and Others (2000) ECR I-8599, and Case C-491/01, The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd., judgment of the Court of Justice of 10 December 2002, not yet reported, in which a directive not transposed into national law was contested.

\textsuperscript{146} \textit{See} Ian Hardcastle, loc. cit., p. 97.

\textsuperscript{147} It should be noted that Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba (2000) ECR I-675, concerns a Decision which had not been fully implemented at the local level. However, the European Court of Justice issued its preliminary ruling as though such a decision had been implemented (refusal by the authorities of Aruba to grant movement certificates for sugar produced in such a territory), perhaps because an infringement of Community law derived from such an implementation could have been regarded as imminent, situation not dealt with by the Court in its previous case law. In the light of Case C-50/00, Unión de Pequeños Agricultores v. Council of the European Union (2002) ECR I-6677, national judges might be empowered to grant interim measures where the invalidity of a Community act of general application has not been implemented at the national level.
incompatible with Community law, as well as interim relief in any form granted in disputes where the applicants claim that domestic measures are contrary to the Community Directives, Regulations or Decisions such domestic measures wrongfully transpose or implement. Similarly, actions in which Directives or Decisions transposed or merely implemented at the national level are considered to be incompatible with superior Community law, should be regarded as Z.A.P.-type situations.

Bibliography


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148 Case C-334/95, Krüger GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas (1997) ECR I-4517, concerned a national administrative decision based on a Regulation alleged to be contrary to superior Community law. It should be noted that the applicants did not claim that such an administrative decision wrongfully implemented said Regulation (although such an assertion was implicitly confirmed by the Court), and therefore the case was dealt with as a Z.A.P.-type situation.

149 See Gerhard Bebr, loc. cit., p. 808; and Lambros Papadias, loc. cit., p. 186.

150 See Lambros Papadias, loc. cit., p. 186; Peter Oliver, loc. cit., p. 23; and Petra Foubert, loc. cit.

151 See note 146 above.


