OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 17 May 1990 *

Mr President,
Members of the Court,

1. The reply which the Court is called upon to give to two questions referred to it by the House of Lords for a preliminary ruling in the *Factortame* case certainly will rank amongst those which help to define the context of relations between national courts and Community law. And, I would add, on a point of unquestionable importance.

The questions are clear. Pending a ruling by the Court of Justice on the interpretation of provisions of Community law having direct effect, and where United Kingdom law does not permit the national court to suspend, by way of interim relief, the application of the allegedly conflicting national measure and thus, provisionally, to acknowledge an individual's right claimed under Community law but denied by national law: (1) must (or may) the national court grant such relief on the basis of Community law, and (2) if so, applying what criteria?

2. The dispute which gave rise to the reference for a preliminary ruling concerns a considerable number of companies operating in the fisheries sector, which are incorporated under the laws of the United Kingdom but represent Spanish interests. These undertakings contest the validity under Community law of a United Kingdom statute of 1988 which altered the requirements for registration in the register of fishing vessels, in particular as regards nationality and residence of the beneficial ownership, deliberately strengthening those requirements in the case of foreign interests (including Community interests). Relying on certain provisions of the Treaty having direct effect, Factortame Limited and others instituted proceedings for judicial review of the Act in question, seeking a declaration that the Act should not apply to them on the ground that such application would be contrary to Community law, an order prohibiting the authorities from treating the registration of the vessels under the old Act as having ceased, and interim relief pending final judgment.

3. At first instance, the Divisional Court of the Queen's Bench Division made a reference to the Court of Justice for a preliminary ruling on the interpretation of the provisions of Community law raised and, as an interim measure, ordered the Secretary of State for Transport not to apply the new Act to the applicants pending final judgment or further order of the court.

4. The Secretary of State for Transport appealed against the order for interim relief which was set aside by the Court of Appeal on the ground that United Kingdom courts do not have the power to suspend, by way of interim relief, the application of statutes or to grant an injunction against the Crown.

5. The House of Lords, before which the matter was brought, confirmed that as a matter of English law the courts have no power to suspend the application of an Act of Parliament on the ground of its alleged,

* Original language: Italian.

but unproven, incompatibility with Community law, and referred to the Court of Justice for a preliminary ruling the questions mentioned above, in order essentially to ascertain whether that which is not permitted by English law is required or permitted by Community law.

6. It should be stated by way of a preliminary observation that the House of Lords acknowledges that it has the power and the duty to give preference over the conflicting national statute to a provision of the Treaty or a provision of secondary Community law having direct effect in the United Kingdom legal order, and that this is so when the conflict is immediately and readily discernible, either by virtue of an already existing interpretation of the Community provision by the Court of Justice or by virtue of the fact that the provision itself is sufficiently 'clear' in its content. The problem arose, however, because there was no certainty as to the interpretation of the Community provisions relevant to the circumstances, but rather there were 'serious arguments both for and against the existence of the rights claimed', which prompted the Divisional Court to ask the Court of Justice to give a preliminary ruling on the interpretation of those provisions. The questions raised form the subject-matter of different proceedings (Case 221/89) which are separate from the present proceedings. Moreover, to complete the picture, I would recall that, as regards the alleged incompatibility with Community law of the same United Kingdom statute in point, the Commission brought proceedings under Article 169 against the United Kingdom, but solely on the nationality aspects, likewise seeking, by way of an interim measure, the suspension of application of the Act. The Court has already made an order granting such a measure and the Act has also been amended in that respect. [1]

1 — Order of 10 October 1989 in Case 246/89 R *Commission v United Kingdom* [1989] ECR 3125.

7. As a further preliminary matter, I think it is appropriate to point out that the problem has arisen in the context of the special proceedings by way of application for judicial review provided for by English law which were brought by the parties concerned even before the new Act on the register of shipping entered into force. On this point both the House of Lords in its order for reference and the United Kingdom in its written observations have stressed that, had the question of a conflict with Community law arisen in the course of criminal or administrative proceedings brought against those same parties for contravention of the Act on the register of shipping, the national court could well have stayed the proceedings (and even any forfeiture proceedings in respect of vessels) pending the outcome of the request for a preliminary ruling by the Court of Justice on the interpretation of the relevant Community provisions. The consequences of the Court's ruling, whether favourable or unfavourable as regards the claim made by the parties concerned, would then have been applied to them retroactively. The House of Lords infers therefrom that, in such a case, 'the prosecution or forfeiture proceedings would not be frustrated but suspended' (page 13 of the order for reference).

It is not wholly clear in what perspective attention was drawn to the difference between the situation in this case (proceedings for judicial review) and that which might have arisen in ordinary proceedings of a criminal or other type instituted following the contravention of the Act. What is true, it seems to me, is that, for present purposes, the difference is not of any great importance. The mere stay of proceedings as a result of a reference to the Court of Justice pursuant to Article 177 of the EEC Treaty is not an interim measure

and does not satisfy any requirements of interim protection of the rights claimed. On the contrary, it unquestionably poses in more acute terms the very problem which necessitates interim protection: whether, if stayed, the proceedings may, precisely, be 'frustrated' by the delay in giving final judgment.

Thus the question raised by the House of Lords is according of importance in the same way and in the same terms with regard to either of the procedural situations indicated to the Court. It would only be otherwise if, whatever the type of proceedings, the national court were entitled, where proceedings are stayed and a reference is made to the Court of Justice under Article 177, also to grant an interim measure of the type requested by the appellants in this case and if, accordingly, it had the power provisionally to allow the ships to be registered on the basis of the old Act pending final judgment; as became clear also at the hearing, this is plainly precluded whether in judicial review proceedings or any other type of proceeding.

8. On the other hand, I do attach importance to the fact, stressed by the national court, that in a situation such as the one now before this Court, that is to say in the absence of interim measures, the economic damage suffered by the appellants in the course of the proceedings would remain irreparable, an action for damages being precluded by settled national case-law (see order for reference, p. 6). It follows that, even were an interpretative ruling to be given by the Court, upholding the arguments of the appellants in the main proceedings, the subsequent judgment by the national court could not award compensation for the damage suffered and the proceedings might in any event be 'frustrated'.

That is not to say that compensation for loss suffered is a decisive factor and constitutes a real alternative to interim protection, in view of the fact that, even were it provided for, it would not always and in any event be sufficient in itself to satisfy the requirement of interim protection, a requirement which arises precisely out of the inadequacy of monetary compensation from the point of view of the 'utility' of the future judgment.[2] Rather the fact that compensation for damages is precluded makes it by definition impossible to make good the losses suffered pending judgment in the proceedings.

9. The national court has specifically identified the principles of Community law whose interpretation by way of a preliminary ruling by the Court would enable it to resolve the problem, in one way or another: the direct effect of the Community provisions relied on, the obligation to provide direct and immediate protection of individual rights, the practical efficacy of judicial remedies, the obligation to refrain from applying national measures and/or practices which render the exercise of such rights and the protection afforded to them impossible.

Similarly, the formal obstacles to the exercise by the English courts of the power to grant interim protection in proceedings of the type in question have been made clear: the presumption of validity that attaches to a statute until a final determination is made, a process which may include a ruling by the Court of Justice, and the impossibility of granting an injunction against the Crown, an impossibility which moreover relates not only to interim

2 — See for example the order of the Court of 21 August 1981 in Case 232/81 R *Agricola Commerciale Olio* [1981] ECR 2193, paragraph 9.

measures but also to final determinations (see observations of the United Kingdom, at pp. 13 and 20).

10. The principles of Community law which the House of Lords has stated to be relevant and on whose interpretation its decision will depend are fundamental principles enshrined in numerous judgments of the Court. Those principles are however observed — and without difficulty — by the United Kingdom courts, with the sole reservation which constitutes at once the reason for and the subject of these proceedings. Are such principles also to be interpreted as meaning that the national court must (or may) grant an interim measure requiring the Crown to refrain from applying, during the proceedings on the substance of the case, a 'measure' (in this case an Act of Parliament) in respect of which there is no certainty but merely a suspicion, however serious, that it is incompatible with Community law? In other words, do the obligations which Community law imposes on the national courts concerning the protection of rights conferred directly on individuals also include the requirement to order the suspension, by way of interim protection, of the application of a national law which is alleged to be in conflict with Community law?

11. In addition to a rapid survey of the relevant principles of Community law, which are well known to the national court, the reply to this question calls for an identification of the requirement which is at the origin and is also the *raison d'être* of interim protection, a concept long anchored in jurisprudence and in the legal systems of the Member States.

12. The starting point for the appraisal of the problem is that, as is accepted in this case, directly effective Community provisions are involved in the now uncontested sense of measures immediately conferring on individuals enforceable legal rights which, as such, may be relied upon before national courts. It is scarcely necessary to emphasize that it is on that assumption that the questions have been referred to the Court for a preliminary ruling, irrespective of which Community provisions are involved and the correct interpretation thereof. In fact, it is not the interpretation of the individual Treaty provisions relied on by the appellants in the dispute before the national court which is requested in these proceedings (merely for the sake of clarity, I would remind the Court that Articles 7, 52, 58 and 221 of the Treaty are involved), but rather the interpretation of the principles of Community law mentioned above. In other words, the Court is not requested to embark upon an examination of the substance of the provisions relied on by the appellants, which is the subject of other, and separate, proceedings for a preliminary ruling, which are, I repeat, also pending before the Court (Case 221/89), but rather to give a general reply with regard to the interim protection of rights claimed by individuals by virtue of directly effective Community provisions.

13. That being so, I would recall that provisions of Community law having direct effect 'must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'[3] and that 'this consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon indi-

3 — Among other authorities, see judgments of 9 March 1978 in Case 106/77 *Simmenthal* [1977] ECR 629, paragraph 14, and of 10 July 1980 in Case 811/79 *Ariete* [1980] ECR 2545, paragraph 5.

viduals by Community law' (judgment in *Simmenthal*, paragraph 16). And again in that judgment the Court affirmed that, in view of the supremacy of Community law, the relevant provisions having direct effect 'not only by their entry into force, render automatically inapplicable any conflicting provision of current national law,' but also 'preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions' (judgment in *Simmenthal*, paragraph 17).

It is quite clear, therefore, that a Community provision having immediate effect within the Member States confers enforceable legal rights on the individual from its entry into force and for so long as it continues in force, irrespective and even in spite of a prior or subsequent national provision which might negate those same rights. I do not consider it useful, and even less so in this context, to enter into a sterile dialectical discussion on the theoretical basis of such a firmly established principle. What matters, in so far as is relevant in this case, is that the national court is obliged to afford judicial protection to the rights conferred by a Community provision as from the entry into force of that provision and for so long as it continues in force.

14. Equally beyond dispute, and in harmony with the principle of collaboration enshrined in Article 5 of the Treaty, which is the real key to the interpretation of the whole system, is the fact that the methods and the machinery for protecting rights conferred on individuals by provisions of Community law are and remain, in the absence of a harmonized system of procedure, those provided for in the domestic legal systems of the Member States. That principle, which recurs in the Court's case-law, is nevertheless based on a fundamental pre-condition, which is also derived from the second paragraph of Article 5, namely that the methods and national procedures must be no less favourable than those applying to like remedies for the protection of rights founded on national provisions and must also not be such as to render impossible in practice 'the exercise of rights which the national courts are obliged to protect'. [4]

Moreover, in its judgment in *Simmenthal*, the Court had affirmed, at paragraph 22, that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law'; [5] in other words, the national court is to apply Community law either through the means provided for under the national legal system or, failing that, 'of its own motion' (judgment in *Simmenthal*, paragraph 24).

4 — Judgments of 16 December 1976 in Case 33/76 *Rewe* v *Landwirtschaftkammer Saarland* [1976] ECR 1989, paragraph 5, of 16 December 1975 in Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1975] ECR 2043, paragraphs 15 and 16, of 10 July 1980 in Case 811/79 *Amministrazione delle finanze dello Stato* v *Ariete* [1980] ECR 2545, paragraph 12, of 12 June 1980 in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887, paragraph 12, of 27 March 1980 in Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 25, of 27 February 1980 in Case 68/79 *Just* v *Ministry of Fiscal Affairs* [1980] ECR 501, paragraph 25 and of 9 November 1983 in Case 199/82 *San Giorgio* [1983] ECR 3595, paragraphs 12 *et seq.*

5 — I would also cite the recent judgment of 21 September 1989 in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, in which the Court reaffirms that 'Article 5 of the Treaty requires Member States to take all measures appropriate to ensure the application and effectiveness of Community law' (paragraph 23, provisional translation).

15. It is therefore firmly established, in the light of the Court's well-settled case-law, which has moreover been pertinently cited by the House of Lords, that national courts are required to afford complete and effective judicial protection to individuals on whom enforceable legal rights are conferred under a directly effective Community provision, on condition that the Community provision governs the matter in question from the moment of its entry into force, and that from this it follows that any national provision or practice which precludes those courts from giving 'full effect' to the Community provision is incompatible with Community law.

The emphasis of this point should not appear superfluous merely because it recurs in the Court's case-law, since it is precisely from this observation that I shall derive the reply which I propose that the Court should give in this case.

16. The problem which the national court has raised is a general one and is not new, even though, although it has been implicitly overcome by other courts,[6] it is submitted for the first time for the judgment of the Court, perhaps not by chance in the context of the somewhat special situation represented by the procedure for judicial review of laws provided for in the United Kingdom. The question, therefore, does not concern solely the English legal system,[7] nor does it relate solely to the relationship between a national law and a Community provision, but rather it relates to the requirement for, and the very existence of, the interim protection of a right which is not certain but whose existence is in the course of being determined in a situation where there is a conflict between legal rules of differing rank. This is a conflict which, as regards the relationship between a national provision and a Community provision, quite apart from the theoretical or terminological choices and methods applied in the individual Member States, finds effective expression the concept of 'primauté', that is to say the 'precedence' of the latter provision over the former.

The problem arises from the fact that in a structured and intricate context which a modern system of judicial protection demands there is a lack of contemporaneity

6 — On more than one occasion on which a reference has been made to the Court in the context of an alleged conflict between a national provision (law or administrative act) and Community law, the national court without hesitation granted interim measures as well, which in substance amounted to a provisional suspension of the application of the instrument in question. For example, a stay of execution of an expulsion order from the Netherlands was ordered in the judgment of 17 April 1986 in Case 59/85 *Reed* [1986] ECR 1283; again, an employment relationship with the University of Venice was ordered to be maintained (judgment of 30 May 1989 in Case 33/88 *Allué* [1989] ECR 1591); in another case a provisional residence permit was ordered to be issued in Belgium (Case 363/89, pending).

7 — An analogous problem to the one before the Court was raised before numerous French courts when a new law on minimum prices for petrol (and also for books) was introduced which was not observed by some distributors who alleged that it was incompatible with Community law. Other traders objected to that attitude and sought interim prohibitory measures on the basis of the new law. Not a few courts granted the orders requested, basing their decision on the presumption of the validity of the law when confronted with a mere suspicion that it was incompatible with the Treaty (for example judgment of the tribunal de grande instance, Le Mans, 11.7.1983, *Gazette du Palais*, 1984, 1, summary, p. 121); other courts refused to grant the interim measures precisely on the ground that the infringement of the law suspected of being incompatible with Community law was not a 'trouble manifestement illicite' (Cour d'appel, Paris, 4.7.1984, *Gazette du Palais*, 1984, 2, p. 658, note by Fourgoix; tribunal de grande instance, Pontoise, 22.2.1984, ibid., p. 296; see Bertin, 'Un trouble manifestement illicite: la lutte contre la vie chère', *Gazette du Palais*, 1983, doct., p. 419; also 'Le juge des référés et le droit communautaire', ibid, 1984, doct. 48). The French Court of Cassation has given its formal approval to this second approach (chambre commerciale, 15.5.1985, *Gazette du Palais*, 1985, 2, panor., pp. 346 and 347), basing itself however on the judgment of the Court of Justice delivered in the meantime to the effect that the contested law was incompatible (judgments of 10 January 1985 in Case 229/83 *Leclerc* v *Au Blé Vert* [1985] ECR 1 and of 29 January 1985 in Case 231/83 *Callet and Another* v *Leclerc* [1985] ECR 305). Subsequently, the Court of Cassation, again as a result of a decision by the Court (judgment of 4 May 1988 in Case 30/87 *Bodson* [1988] ECR 2479), but in more general terms, affirmed that it was for the judge hearing the application for interim relief to verify 'whether the "trouble" relied on was manifestly unlawful under the Treaty of Rome' (Commercial Chamber, 10.7.1989, Dalloz 1989, p. 243). See also Court of Cassation, 22.4.1986, Dalloz 1986, p. 242.

between the two points in time which mark the course of the law, namely the point when the right comes into existence and the point (later on) when the existence of the right is (definitively) established.

17. To compensate for the fact that these two points in time do not coincide there is a first and general remedy. It is indeed true that only the definitive establishment of the existence of the right confers on the right fullness and certainty of content in the sense of placing the right itself, and the means whereby it may be exercised, finally beyond dispute (*res judicata* in the substantive sense); but it is also true that that effect is carried back to the point in time when the right was invoked by initiating the procedure for judicial review. The effect of the establishment of the existence of the right, inappropriately but significantly described as retroactive effect, is merely the consequence of the function of the provision and of its nature and *modus operandi* which in fact gives rise to an enforceable legal right from the moment when the provision enters into force and for so long as it continues in force. The only possible delay is that which may occur before the right becomes fully effective and operational in cases where application to a court is needed in order to establish the existence of the right, and in particular in cases of prior review of the validity of the provision which is alleged to be applicable. And it is scarcely necessary to add that the situation would be no different if the question were examined from the opposite point of view and one were to consider the non-existence of the right and the finding to that effect.

What is important to stress is that at the time when an application is made the right already exists (or does not) and the provision which confers that right on (or denies it to) the individual is lawful or unlawful. The procedure for judicial review merely postpones the establishment of the existence of the right, that is to say its full and effective operation, to a later point in time and subject to the 'retroactivity' of the effects of the actual establishment of the right. That is plainly true both where the establishment of the right entails an appraisal of the link between the factual situation and the provision relied upon and where the national court is called upon to determine the provision applicable from between two or more provisions, which may even be in confict. In the latter situation, too, where the existence of the right may also be established by means of a review of validity, the provision which will be determined as the one applicable (in place of another declared to be invalid or incompatible) was in reality so applicable at the time when the application was made, inasmuch as at that time what was lacking was only the establishment of the right's existence and not also its actual existence. That has been specifically emphasized also by the Court, when it held that 'the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force'. [8]

18. The abovementioned general remedy for the lack of contemporaneity between the establishment of the right's existence and its actual existence does not always succeed in achieving the main objective of judicial protection. Sometimes the right's existence is established too late for the right claimed to be fully and usefully exercised, which is the more likely to be the case the more structured and complex, and the more probably rich in safeguards is the procedure culminating in the definitive establishment of the right. The result is that in such a case the utility as well as the effectiveness of judicial protection may be lost and there could be a betrayal of the principle, long established in jurisprudence, according to which *the need to have recourse to legal proceedings to enforce a right should not occasion damage to the party in the right.*

8 — Judgment of 10 July 1980 in Case 826/79 *Mireco* [1980] ECR 2559, paragraph 7.

Interim protection has precisely that objective purpose, namely to ensure that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it; in brief, the purpose of interim protection is to achieve that fundamental objective of every legal system, the effectiveness of judicial protection. Interim protection is intended to prevent so far as possible the damage occasioned by the fact that the establishment and the existence of the right are not fully contemporaneous from prejudicing the effectiveness and the very purpose of establishing the right, which was also specifically affirmed by the Court when it linked interim protection to a requirement that, when delivered, the judgment will be fully effective;[9] or to the need to 'preserve the existing position pending a decision on the substance of the case'.[10]

19. Now that the function of interim protection has been brought into focus, such protection can be seen to be a fundamental and indispensable instrument of any judicial system, which seeks to achieve, in the particular case and always in an effective manner, the objective of determining the existence of a right and more generally of giving effect to the relevant legal provision, whenever the duration of the proceedings is likely to prejudice the attainment of this objective and therefore to nullify the effectiveness of the judgment.

The requirement for interim protection, moreover, as has already been noted, arises in the same terms, both where the establishment of the right's existence involves the facts and, consequently, the determination of the correct provision to be applied, that is to say where the uncertainty as to the outcome of the application involves — although the expression is not perhaps a happy one — 'the facts', and where it is a question of choosing between two or more provisions which may be applicable (for example, a classification problem), irrespective of whether both are presumed to be valid or whether one is presumed to be incompatible with the other, which is of a higher order or in any event has precedence.

In particular, where, as in the case now before the Court, the determination as to the existence of the right not only involves a choice between two or more provisions which may be applicable but also involves a prior review of the validity or compatibility of one provision *vis-à-vis* another of a higher order or in any event having

9 — See for example the order of 12 December 1968 in Case 27/68 *Renkens* [1969] ECR 274. See also the Opinion of Mr Advocate General Capotorti in Joined Cases 24/80 and 97/80 R *Commission* v *France* [1980] ECR 1319, at p. 1337. In substantially the same terms are the orders of 8 April 1965 in Case 18/65 R *Gutmann* v *Commission* [1966] ECR 135, of 14 December 1982 in Case 260/82 R *NSO* v *Commission* [1982] ECR 4371, of 13 December 1984 in Case 269/84 R *Fabbro* v *Commission* [1984] ECR 4333, and of 16 March 1988 in Case 44/88 R *de Compte* [1988] ECR 1669. The necessary link between the effectiveness of judicial protection and interim relief was brought into focus, as is known, by Italian doctrine (Choivenda, *Istituzioni di diritto processuale civile*, I, Naples, 1933, No 12; also *Principi di diritto processuale civile*, Naples, 1906, pp. 137 *et seq*; Calamandrei, *Introduzione allo studio sistematico dei provvedimenti cautelari*, Padua, 1936) and by German academic legal literature (Heliwig, *System des deutschen Zivilprozeßrechts*, Leipzig, 1913, II, pp. 22 *et seq*). The principle that the duration of the proceedings must not cause damage to the party in the right is to be found in a different formulation in a judgment of the German/Polish Mixed Arbitration Tribunal of 29.7.1924: 'Par les mesures conservatoires, les tribunaux cherchent à remédier aux lenteurs de la justice, de manière qu'autant que possible l'issue du procès soit la même que s'il pouvait se terminer en un jour'. ('By means of interim measures the courts seek to make up for the law's delays in such a way that as far as possible the outcome of the proceedings is the same as if they could have been completed in one day'); Decisions of the Tribunal, V, 455. See also the decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 19.6.1973 commented on in NJW 1973, 34, pp. 1491 *et seq* ('Der Sinn dieses besonderen Verfahrens besteht darin, einen effektiven Gerichtsschutz gegenüber Maßnahmen der Exekutive zu sichern and durchzusetzen. ... Das Verfahrensgrundrecht des Art. 19 Abs. 4 bb garantiert nicht nur das formelle Recht und die theoretische Möglichkeit, die Gerichte anzurufen, sondern auch die Effektivität des Rechtsschutzes; der Bürger hat einen substantiellen Anspruch auf eine tatsächlich wirksame gerichtliche Kontrolle' ('The purpose of this special procedure is to secure the effective protection of the court against measures taken by the executive. ... The procedural fundamental right contained in Article 19(4)(bb) of the Basic Law guarantees not only the formal right and the theoretical possibility of applying to the courts, but also the effectiveness of legal protection. The citizen has a substantive right to judicial review which is in fact effective'). See, finally, Corte Costituzionale No 190 of 28.6.1985 to the effect that 'the principle must be respected whereby the duration of the proceedings should not occasion damage to the party who is right, the validity of which principle has been demonstrated from the beginning of this century not only in Italian academic literature' (*Foro italiano*, 1985, I, 1881). On the origins and foundations of interim protection in France, see Debbasch, *Procédure administrative contentieuse et procédure civile*, Paris, 1962, pp. 300 *et seq*.

10 — Order of 5 August 1983 in Case 118/83 R *CMC and Others* [1983] ECR 2583, paragraph 37.

precedence, the difference is merely one of appearance, particularly when that review is entrusted to a court on which special jurisdiction has been conferred for the purpose. This situation, too, is fully covered by the typical function of judicial proceedings, which seek to establish the existence of and hence to give effect to the right, so that the requirement that the individual's position be protected on a provisional basis remains the same, inasmuch as it is a question of determining, interpreting and applying to the case in question the relevant (and valid) legal rules.

20. It follows that what is commonly called the presumption of validity, which attaches to laws or administrative acts no less than it does to Community acts, until such time as it is established by judicial determination that the measure in question is incompatible with a rule of law of a higher order or in any event having precedence, *to the extent that such a procedure is provided for*, does not constitute a formal obstacle to the interim protection of enforceable legal rights. In fact, precisely because what is concerned is a presumption, which as such may be rebutted by the final determination, it remains necessary to provide a remedy to compensate for the fact that the final ruling establishing the existence of the right may come too late and therefore be of no use to the successful party.

In fact, it is certain and undeniable that a provision, whether it is contained in an Act of Parliament or a Community act, or in an administrative act, must be presumed to be valid. But that cannot and must not mean that the courts are precluded from temporarily paralysing its effects with regard to the concrete case before them where, pending a final determination on its validity *vis-à-vis* or compatibility with a provision of a higher order or having precedence, one or other of the legal rights in question is likely to be irremediably impaired and there is a suspicion (the degree of which must be established) that the final determination may entail a finding that the statute or administrative act in question is invalid.

21. In brief, the presumption that a law or an administrative act is valid may not and must not mean that the very possibility of interim protection is precluded *where the measure in question may form the subject of a final judicial review of its validity.*

Far from running counter to the principle of the validity of laws or administrative acts, which finds expression in a presumption that may always be rebutted by a final determination, interim protection in fact removes the risk that that presumption may lead to the perverse result, certainly not desired by any legal system, negating the function of judicial review and, in particular, of the review of the validity of laws. To take a different view would amount to radically denying the possibility of interim protection, not only in relation to laws, but absolutely, given that any act of a public authority, whether it is a rule-making instrument properly so called or an individual decision, is presumed to be valid until the outcome of the judicial review of its validity.

22. In a procedural situation of the type with which we are concerned here, in which one provision is alleged to be incompatible with another of a higher order or having precedence, *it is essential*, as has already been stressed, *to bear in mind the fact that both provisions hypothetically apply to the case in question from the moment when the application is made.* That is especially so since the final determination, whose consequences are made to take effect from the time of the application, creates nothing new

as regards the existence (or the non-existence) of the right claimed because the provisions in point are hypothetically valid and operative in the alternative (or invalid and inoperative) and to both is attached what is commonly called a presumption of validity, whilst what is postponed, owing to the time taken by the proceedings, is merely the point in time at which the final determination is made. In the meantime, a situation prevails which may be defined precisely in terms of *'apparent law'* and which is the very reason for interim measures, *neither of the provisions in point giving rise to rights which are more than putative.* It is therefore not a case of there being certainty (with the corresponding presumption of validity) *as to one provision and uncertainty as to the other but the putative existence of both provisions.* It is for the courts to assess whether the putative nature of the right claimed is such that interim protection must be granted or refused, on the basis of substantive criteria linked to the greater or lesser extent to which provision at issue appears to be valid (prima-facie case (*fumus boni juris*), however designated) and to the possibility or otherwise that one or other of the interests in question may be prejudiced pending the final outcome of the proceedings.

23. The foregoing observations are amply confirmed by the fact that in all the legal systems of the Member States (the Danish system constitutes a partial exception), however diverse may be the forms and requirements connected with the duration of the proceedings, there is provision for the interim protection of rights denied under a lower ranking provision but claimed on the basis of a provision of a higher order.

First of all, it is beyond dispute that the application of an administrative act, which however benefits from a presumption of validity in the same way as a law, so that the bringing of an action does not suspend its operation (except in certain rare cases), may be nevertheless suspended by way of interim relief pending a definitive ruling on validity.

The provisional disapplication of primary legislation, in legal systems in which judicial review of the validity thereof is provided for, is certainly rarer.

Often the problem of the constitutionality of primary legislation is raised in the context of proceedings brought against an administrative act adopted in pursuance of the legislation in question so that the question of disapplying the legislation as such does not arise: in some systems this is the only situation possible.

In other countries, on the other hand, and in particular in those where judicial review of the (constitutional) legality of primary legislation is not generally available but is confined to a specific judicial body, provision is made, or the practice is, for provisional suspension to be ordered. For example, in Germany, the Federal Constitutional Court may provisionally suspend the application of primary legislation in a context (Verfassungsbeschwerde) not dissimilar to that of the English procedure for judicial review;[11] so, too, may the ordinary courts, which must then refer the matter to the Constitutional Court.[12]

Of particular relevance, moreover, is the case in Italy, inasmuch as not only do the ordinary courts not have the power to determine the unconstitutionality of laws and must therefore refer the matter to the Constitutional Court, but no power is

11 — Bundesverfassungsgericht, 16.10.1977, Schleyer, in *Foro italiano*, 1978, IV, p. 222; Bundesverfassungsgericht, 19.6.1962, in BVerfGE, Vol. 14, p. 153.

12 — Bundesverfassungsgericht, 5.10.1977, BVerfGE, Vol. 46, p. 43.

expressly conferred either on the Constitutional Court or on the ordinary courts (or administrative courts) to grant interim measures (by way of suspension of the application of a law) pending the outcome of review proceedings. Notwithstanding this, many ordinary courts,[13] with the support of the majority view in academic literature,[14] have taken the view that it is possible to issue interim measures suspending the application of primary legislation — obviously with regard only to the parties to the proceedings — pending a ruling by the Constitutional Court. That court, although it has never decided the specific point which is before this Court,[15] has not failed to affirm, on the one hand, the essential role played by interim relief in ensuring the effectiveness of the system of judicial protection[16] and, on the other hand, the existence of a general principle and of a 'rule of rationality' underlying the legal system according to which it is for the courts, where the necessary pre-conditions are fulfilled (prima-facie case and *periculum in mora*), to adopt such urgent measures as are appropriate for ensuring, on a provisional basis, the effects of the final decision on the merits.[17]

Albeit in a different context, it is also significant that the French conseil constitutionnel declared to be unconstitutional a law which did not provide for the possibility for the courts to suspend, by way of interim relief, the application of an administrative decision, and moreover described such suspension as a 'garantie essentielle des droits de la défense'.[18]

24. If attention is now turned to the relationship between national provisions and Community provisions, there is no doubt that, by means of preliminary rulings given by the Court of Justice and the 'direct' competence of national courts, machinery has been introduced which essentially consists of the review of the validity (or of compatibility, if this is preferred) of a national provision in relation to a Community provision, given that the national courts have jurisdiction to rule definitively that the former is incompatible with the latter. And if therefore the national courts may, indeed must, disapply a national law which conflicts with a Community provision having direct effect, once a definitive finding has been made to that effect (or, at any rate, must achieve that substantive result), they must also be able to disapply that law provisionally, provided that the pre-conditions are satisfied, where the incompatibility is not entirely certain or 'established' but may call for a preliminary ruling by the Court of Justice. Otherwise, that judicial protection of the rights conferred on individuals by the Community provision which, as has been affirmed by the Court on numerous occasions and also specifically pointed out by the House of Lords, is the subject of a precise obligation on the part of the national courts, might be nullified.

13 — Pretore, Bari, order of 4.2.1978, *Foro italiano*, 1978, I, 1807; Pretore, La Spezia, order of 29.3.1978, *Foro italiano*, 1979, I, 285; Pretore, Pisa, order of 30.7.1977, *Foro italiano*, 1977, I, 2354; Pretore, Pavia, order of 14.3.1977, *Riv. giur. lav.* 1977, II, 640; Pretore, Voltri, order of 1.9.1977, *Riv. giur. lav.* 1977, II, 639; Pretore, La Spezia, order of 23.11.1978, *Foro italiano*, 1979, I, 1921 *et seq.*

14 — Verde, 'Considerazioni sul procedimento d'urgenza', in *Studi Andrioli*, Naples, 1979, pp. 446 *et seq*; Mortati, *Istituzioni di diritto pubblico*, 1976, II, p. 1391; Campanile, *Procedimento d'urgenza e incidente di legittimità costituzionale*, Riv. dir. proc. 1985, pp. 124 *et seq*; Zagrebelsky, 'La tutela d'urgenza', in *Le garanzie giurisdizionali dei diritti fondamentali*, Padua, 1988, pp. 27 *et seq*; Sandulli, *Manuale di diritto amministrativo*, Naples, 1984, II, p. 1408.

15 — But see, with regard to the permissibility of interim protection pending settlement of jurisdictional questions, Corte costituzionale No 73 of 6.6.1973, *Foro italiano*, 1973, I, 1657; also Corte di Cassazione, Sezioni Unite, 1.12.1978, No 5678, *Foro italiano*, 1978, I, 2704.

16 — Corte costituzionale, 27.12.1974, No 284, *Foro italiano*, 1975, I, 263.

17 — Corte costituzionale, 28.6.1985, No 190, *Foro italiano*, 1985, I, 1881. See also, for some points of interest, Corte di cassazione, Sez. Unite Civili, 1.12.1978, No 5678, *Foro italiano*, 1978, I, 2704; Consiglio di Stato, Ad. plen., 14.4.1972, No 5, *Foro italiano*, 1972, III, 105; *idem*, 8.10.1982, No 17, *Foro italiano*, 1983, II, 41.

18 — Decision 86-224 DC, 23.1.1987, *Journal officiel de la République française* of 25.1.1987, p. 925.

25. This brings me back to the concrete case submitted for the consideration of the Court by way of the questions referred to it by the House of Lords. The right of the appellants in the main proceedings, which is denied by the national statute, is claimed on the basis of certain Treaty provisions having direct effect, that is to say provisions which prevail over domestic law but whose interpretation in the sense contended for is not free from doubt and, consequently, requires a preliminary ruling by the Court. In the meantime, the national court finds a bar to interim protection of the rights claimed in the presumption of validity which attaches to the statute until a final determination is made.

Inasmuch as the English court, as is undisputed and as it has itself underlined, can and must give precedence, once the final determination is made, by virtue of the review which can be carried out of the compatibility of the English statute with Community law, to the 'certain' Community rule having direct effect, it must also be able, where the necessary pre-conditions are satisfied, to grant interim protection to the rights claimed on the basis of 'uncertain' Community rules and denied by the provisions of national law.

The problem is not one of form but of substance. The presumption of validity does not have preclusive effect in view of the fact that it may be rebutted by the final determination, as is the case in the English legal system also by virtue of the European Communities Act 1972, just as the presumption of the validity of any provision subordinate to a provision of a higher order does not preclude interim relief. And it is the national court itself which points this out in the order for reference in relation to the possibility of suspending the application of a subordinate measure which is suspected of being in conflict with a statute.

26. What I mean to say, therefore, is that this assessment must be carried out on the basis of substantive criteria and not, as suggested by the United Kingdom, on the basis of a formal criterion such as the presumption of the validity of a statute.

To give priority to the national legislation merely because it has not yet been definitively established as incompatible with Community law — and thus to proceed on the basis merely of a putative compatibility — may amount to depriving the Community rules of the effective judicial protection which is to be afforded to them 'from the date of their entry into force and for so long as they continue in force'. Paradoxically, the right conferred (putatively) by the provision of Community law would as a general rule receive less, or less effective, protection than rights conferred (also putatively) by the provision of national law. That would be tantamount to saying that the right conferred by ordinary legislation may receive interim protection, whereas protection is denied to the right conferred by the Community, or in any event higher-ranking, provision, on the basis of the presumption of validity in favour of that legislation; as if the same presumption, which after all is nothing other than 'putative', did not also avail the provision having precedence.

Let me be quite clear. I do not mean by this that the national court must always and in any event give priority to a right putatively conferred by Community law as opposed to a right putatively conferred by national law, but merely that it must have the possibility

of doing so where the factual and legal circumstances so require; in other words it may and must not find formal obstacles to any application for interim measures based on directly effective Community provisions.

27. Nor does it avail to put forward as a counter argument the presumption of validity which attaches to Community measures, a presumption stressed many times by the Court. That is an argument which ends up by demonstrating the contrary. It is scarcely necessary to recall to mind Article 185 of the Treaty which expressly provides that the Court may 'if it considers that circumstances so require, order that application of the contested act be suspended'.

But that is not all. Even in regard to a system for the review of the validity of Community measures which is rigorously centred on the Court of Justice (also as regards the preliminary rulings procedure under Article 177), the Court itself has not failed to stress that 'the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures'. [19]

28. Similarly, it is not at the formal but rather on the substantive level that it is necessary to assess the possibility that interim protection may be obtained (also) by way of an injunction against the Crown. By way of example, I would consider it unreasonable to think in terms of an injunction (to adopt a measure or enact primary legislation) which would amount to an interference with the discretionary powers enjoyed by the Crown or even by Parliament, whilst on the other hand I would regard it as being entirely reasonable and 'orthodox' to order concrete non-discretionary action to be taken or, as in this case, the temporary suspension of application of the statute or administrative act, solely with regard to the parties to the proceedings, until such time as the court is in a position definitively to apply or to disapply one or the other.

29. In conclusion, the reply which I propose should be given by the Court to the first question put to it by the House of Lords is affirmative in the sense that, under Community law, the national court must be able to afford interim protection, where the pre-conditions are met, to rights claimed by an individual on the basis of provisions of Community law having direct effect, pending the final outcome of the proceedings, including proceedings on a reference to the Court of Justice for a preliminary ruling. And I also suggest that the Court should expressly link this power and duty of the national court to the requirement for effective judicial protection which applies in relation to provisions of Community law just as much as it does in relation to provisions of national law.

30. I need hardly add that such a reply does not amount to imposing remedies or judicial procedures different from those already provided for in the domestic law of the Member States but merely implies that such remedies or procedures must be used 'for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning admissibility and procedure as would apply were it a question of ensuring observance of national law'. [20] But I would recall once again that the principle in question, according to which the means of affording judicial protection to rights conferred by provisions of Community law remain exclu-

19 — Judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 19.

20 — Judgment of 7 July 1981 in Case 158/80 *Rewe* ('butter cruises') [1981] ECR 1805.

sively those provided for by domestic law, does not apply if 'those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect'. [21]

31. In fact, as is made clear also by the order for reference and the observations of the United Kingdom, provision is made in the United Kingdom procedural system for the interim protection of a right, pending the final determination, whenever a danger would be caused by delay (*periculum in mora*) and a prima-facie case is made out (the Divisional Court did grant the interim relief requested). Consequently, it is not a question here of a procedure which is not provided for by the national legal system, rather it is simply a question of using the already existing procedure in order to protect a right claimed on the basis of a provision of Community law having direct effect. The same may be said of the impossibility, to which reference has been made, of obtaining an injunction against the Crown, when in reality it is merely a case of ordering the provisional suspension of the application of a statute to the parties concerned, it being clearly understood that it may be the latter who will bear the risk of a final determination unfavourable to them.

If that were not the case, on the other hand, there would in any event still be a specific obligation, where the appropriate preconditions are satisfied, to afford interim protection, since otherwise we would find ourselves confronted precisely with the situation (I would again mention the *Simmenthal* case) of a procedural system which makes it impossible in practice 'to exercise rights which the national courts have a duty to protect'. That would be all the more serious if regard is had to the fact, also mentioned in the order for reference, that under the English legal system the definitive establishment of the right claimed never entails the recovery of losses suffered in the course of the proceedings by those claiming the legal right at issue. That is something which, let me be clear, is in itself a matter for concern in the light of the obligation of national courts to give full effect to the provisions of Community law.

32. Nor does there seem to me to be any justified basis for arguing *a contrario* (as in the observations of Ireland and the United Kingdom) that individuals are already afforded sufficient protection by virtue of the possibility open to the Commission, in the context of infringement proceedings brought under Article 169, to apply to the Court of Justice for interim measures, a situation which in fact also occurred in this instance in regard to the nationality requirements of the United Kingdom legislation now before the Court, as I have already indicated. In this respect may it suffice to recall the judgment in *Van Gend & Loos*, in which the Court affirmed that a restriction of the guarantees against an infringement by Member States of a Community provision having direct effect to the procedures under Articles 169 and 170 'would remove all direct legal protection of the individual rights of their nationals'. [22]

33. The reply to the first question raised by the House of Lords, therefore, can only be in the affirmative, in the sense that the national court's duty to afford effective judicial protection to rights conferred on the individual by Community law, where the relevant requirements are satisfied, cannot

21 — Judgments in Case 45/76 *Comet*, *supra*, paragraph 16, in Case 33/76 *Rewe*, *supra*, paragraph 15, of 12 June 1980 in Case 130/79 *Express Dairy Foods*, *supra*, [1980] ECR 1887, paragraph 12, of 27 March 1980 in Case 61/79 *Denkavit italiano*, *supra*, [1980] ECR 1205, paragraph 25 and of 10 July 1980 in Case 826/79 *Mireco*, *supra*, [1980] ECR 2559, paragraph 13.

22 — Judgment of 5 February 1963 in Case 26/62 *Van Gend & Loos* [1963] ECR 1.

fail to include the provision of interim protection for the rights claimed, pending a final determination.

Moreover, the first question is whether Community law obliges the national court to grant such interim protection or gives it the power to grant such protection, so that the second question as to the criteria which the national court should apply is dependent on a negative reply as to the obligation and an affirmative reply as to the power.

Over and above the literal formulation of the questions and the corresponding replies to be given by the Court, I consider that it is necessary to be very clear as to the substance. In the first place, it does not seem to me that we are concerned with an alternative, in the proper sense of the term, between an 'obligation' and a 'power', regard being had to the fact that what is involved is a judicial activity which the national court is called upon to carry out and which, by its very nature, is an activity involving an assessment of the factual and legal elements presented by the specific case before the national court at any given time. Consequently, it is possible to use the expression 'obligation', in accordance with the Court's case-law, in the sense that the national court performs that obligation by means of an assessment on a case-by-case basis of the pre-conditions on which generally the adoption of an interim measure depends.

In this connection, I consider not only that it is for the national court, obviously, to determine whether the pre-conditions for interim protection are met, but also that, in the absence of Community harmonization, those pre-conditions must be and must remain those provided for by the individual, national legal systems. Further, it does not seem to me that the subject-matter allows much room for imagination or offers scope for revolutionary discoveries, since legal theory and positive law, including that of the United Kingdom, have long specified the prima-facie case (however designated) and the *periculum in mora* as the two basic pre-conditions for interim protection. The accent may be placed on one or the other according to the legal system in question, or what is a prima-facie case may or may not perfectly coincide with the not manifestly ill-founded or the prima-facie well-founded nature of the claim and so on, or it may be that in the assessment of the *periculum in mora*, apart from the traditional and necessary balancing of the respective interests of the parties (it must be ensured that the same interim measure does not in its turn cause irreparable damage to the other party), express consideration is also given to the public interest. All that forms part of the prudent appreciation by the national courts which, case by case, will carry out a just appraisal of the appropriateness or necessity of granting or refusing an interim measure for the interim protection of the rights claimed. And there is scarcely any need to point out that in considering whether there is a prima-facie case the courts will take account of the possibility that the national provision may be declared incompatible with Community law.

In the result, as regards the second question in particular, I suggest that the Court should give a reply which is in conformity with the judgment in *Comet* in the sense that 'the methods and time-limits' of the interim protection are and remain, in the absence of harmonization, those provided for by the national legal systems, provided that they are not such as to make it impossible in practice 'to exercise rights which the national courts have a duty to protect'.

Consequently, it is for the national court to draw from the above the necessary inferences as to the determination of the dispute before it on the basis of the factors set out in the statement of the grounds on which the questions are based; the Court of Justice clearly cannot make any assessment of the merits of those factors.

34. On the basis of the foregoing considerations, I therefore propose that the Court should reply as follows to the questions formulated by the House of Lords:

'(1) 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 pre-conditions 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.

(2) In the absence of Community harmonization, it is the legal system of each Member State which determines the procedural methods and the pre-conditions for the interim protection of rights vested in individuals by virtue of provisions of Community law having direct effect, on condition that those methods and pre-conditions do not make it impossible to exercise on an interim basis the rights claimed and are not less favourable than those provided for in order to afford protection to rights founded on national provisions, any provision of national law or any national practice having such an effect being incompatible with Community law.'