OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 30 November 2006 [1]

1. Does Community law require a Member State's legal order to provide for, first, a self-standing action for a declaration that a provision of its national law conflicts with Community law and, second, interim suspension of that national provision pending determination of its legality? That, essentially, is the question which has been put to the Court by the Swedish Supreme Court (Högsta Domstolen).

National legislation

2. The order for reference provides the following information about the national legislation governing, on the one hand, the jurisdiction and procedural rules of its domestic courts and, on the other hand, the organisation of lotteries.

3. First, Chapter 11, Section 14, of the Instrument of Government (Regeringsformen) lays down rules governing reviews of legality. Where a court or other public body finds that a provision conflicts with a rule of constitutional law or other superior statute, the provision may not be applied. Review and possible disapplication under Chapter 11, Section 14, of the Instrument of Government require the matter to be raised as a preliminary issue in a substantive action. It is not possible under national rules to bring a separate court action seeking only a declaration that a certain statute is invalid. If the provision in question was adopted by the Riksdag or by the Government, it may be disapplied only if the error is manifest. That requirement is not however considered to apply where the provision conflicts with Community law. [2]

4. Second, under Chapter 13, Section 2, of the Code of Judicial Procedure (Rättegångsbalken), an action for a declaration whether or not a certain legal relationship exists is admissible if there is uncertainty as to the

1 — Original language: English.

2 — Government Bill 1993/94:114, Constitutional amendments before Swedish membership of the European Union, p. 27.

legal relationship and the uncertainty exposes the applicant to detriment.

5. Third, Chapter 15 of the Code of Judicial Procedure concerns interim measures in civil actions. Under Section 3, if a person demonstrates that he has probable cause to believe that he has a claim against another that is or can be made the basis of judicial proceedings or determined by another similar procedure, and if it is reasonable to suspect that the opposing party, by carrying on a certain activity, by performing or failing to perform a certain act or by other conduct, will hinder or render more difficult the exercise of the applicant's right or substantially reduce the value of that right, the court may order measures to secure the applicant's right. Such measures may include prohibition, under penalty of a fine, on carrying on a certain activity or performing a certain act, or an order, under penalty of a fine, to observe the applicant's claim, or the appointment of an administrator, or the issue of a direction capable in some other way of safeguarding the applicant's right.

6. Both the referring court and the Swedish Government indicate that interim measures under Chapter 15 must be appropriate to secure the principal claim. Thus, suspension of an allegedly invalid law will not normally be granted in the context of a claim for damages. It also appears (perhaps unsurprisingly) that where the principal claim is inadmissible, interim measures will not be granted.

7. Fourth, under Section 38 of the Law on Lotteries (Lotterilagen, 1994:1000) it is not permitted, without express consent, in commercial operations or otherwise for the purpose of profit, to promote participation in unlawful lotteries organised domestically or in lotteries organised abroad. I shall refer to that provision as the prohibition on promotion. Exceptions to the prohibition on promotion may be granted. Under Section 45, application may be made for a permit to organise a lottery. Section 48 provides for monitoring of compliance with the Law and Section 52 for the issue of orders and prohibitions required for compliance, breach of which may be subject to a fine. Under Section 54, criminal penalties may also be imposed on persons who, in the course of business or otherwise for the purpose of profit, unlawfully promote participation in a lottery organised abroad, if the promotion particularly relates to participation from Sweden. Section 59 provides for judicial review of decisions concerning permits.

Background to the main proceedings

8. The facts leading to the main proceedings are, according to the order for reference and

the applicant's written observations, as follows.

9. Unibet (London) Ltd and Unibet (International) Ltd are two companies based in the United Kingdom and Malta respectively. They organise gaming activities, in particular betting on sporting events, poker, casino and other games of chance, in accordance with permits granted in those jurisdictions which authorise the organisation of gaming for, inter alios, clients resident outside those jurisdictions. I shall refer to those companies jointly as Unibet.

10. Unibet offers its gaming primarily on the internet. It has no plans to establish a base in Sweden or to organise gaming there. It merely wishes to promote its services in Sweden.

11. On 6 November 2003 the Court of Justice delivered judgment in *Gambelli*,[3] ruling that national legislation prohibiting the pursuit of certain gaming activities without authorisation from the Member State concerned was contrary to Articles 43 and 49 EC. In reliance on that judgment, Unibet bought advertising space in a number of daily newspapers in Sweden. The Swedish Inspectorate of Lotteries and Gaming (Lotteriinspektionen) indicated that it had brought proceedings against those newspapers on the basis that they had infringed the Law on Lotteries by publishing advertisements for a foreign gaming company. Subsequently Unibet tried to purchase further advertising space in newspapers and on radio and television, but was refused on the basis of the prohibition on promotion and the position adopted by the Inspectorate on Lotteries and Gaming. The Swedish State has apparently since obtained injunctions and commenced criminal proceedings against the newspapers which had published advertisements for Unibet. No action has been brought against Unibet itself.

12. Unibet brought an action against the Swedish State in the District Court (Tingsrätten). It claimed, essentially, that that court should (i) declare that Unibet has the right, notwithstanding the prohibition on promotion, to market its gaming services in Sweden, (ii) declare that the Swedish State is liable to compensate Unibet for the damage which it has suffered and continues to suffer as a consequence of the prohibition on promotion and (iii) immediately order that the prohibition on promotion and the sanctions for breach thereof be disapplied in relation to it.

13. Unibet's action is based on the claim that the Swedish lottery legislation conflicts with Article 49 EC and that under Community law Unibet has the right to market its gaming services in Sweden. If the application under point (i) is regarded as inadmissible because it does not fall within Chapter 13, Section 2, of the Code of Judicial Procedure, Unibet claims that Community law gives it the right

3 — Case C-243/01 [2003] ECR I-13031.

to bring that application and requires national rules limiting that right to be disapplied. With regard to the application under point (iii), Unibet claims that Community law requires national courts to grant interim protection in order to secure an individual's rights under Community law.

14. Before the District Court the State argued that the conditions for an action for a declaration under Chapter 13, Section 2, of the Code of Judicial Procedure had not been met, since no specific legal relationship existed between Unibet and the State.

15. The District Court ruled that Unibet's application for a declaration under point (i) sought an abstract review of legality and was as such inadmissible, as was the form of order sought under point (iii). The application for damages (point (ii)) was declared admissible and is currently pending. Unibet's appeal to the Court of Appeal (Hovrätten) in respect of points (i) and (iii) was dismissed. Unibet appealed to the Supreme Court.

16. Shortly after the Court of Appeal had dismissed the appeal, Unibet made a fresh application for interim relief to the District Court. Unibet claimed that that court should immediately order that, notwithstanding the prohibition on promotion and the sanctions for breach thereof, Unibet has the right, pending a final judgment, to take specified marketing measures, alternatively that the court should immediately order measures to prevent Unibet's activity from continuing to be damaged as a consequence of the prohibition on promotion and the sanctions for breach thereof. Unibet stated that its fresh application for interim relief was linked directly to the infringement of its rights under Community law and thus to its claim for compensation under point (ii) of its original action, pending before the District Court.

17. The District Court declared that the second application for interim measures was admissible. However, it ruled that Unibet had not shown either that the prohibition on promotion conflicted with Community law or that there were serious doubts as to such conflict. It therefore dismissed the application on the merits. The Court of Appeal dismissed Unibet's appeal. Unibet appealed to the Supreme Court, which has made the present reference.

18. In its order for reference the Supreme Court confirms that under national rules [4] Unibet does not have the right to bring the action for a declaration originally sought under point (i). Consequently, it questions whether the national rules satisfy the requirements laid down by Community law

4 — I.e. Chapter 13, Section 2, of the Code of Judicial Procedure: see points 13 and 14 above.

for the effective judicial protection of individuals.

19. The Supreme Court considers that Unibet's applications for interim relief also raise questions of Community law. As regards its original application for interim relief (point (iii)), which was dismissed by the lower courts, it follows from national law inter alia that if an applicant's main claim cannot be examined, an application for interim measures cannot be granted either. Similar questions of Community law therefore arise with regard to that application for interim relief as were raised with regard to Unibet's main claim. Unibet has maintained that its second application for interim relief is linked directly to the infringement of its rights under Community law, on which it relies in the present case, and thus to its action for a declaration of liability to pay damages (point (ii) of its original action), which is currently pending before the District Court. The question therefore arises whether, under Community law, national provisions or Community law criteria govern the conditions for granting interim relief in cases where the compatibility of national provisions with Community law is being challenged. If Community law criteria apply, questions arise as to the precise nature of those criteria.

20. The Supreme Court has accordingly stayed the proceedings before it and referred the following questions for a preliminary ruling:

'(1) Is the requirement of Community law that national procedural rules must provide effective protection of an individual's rights under Community law to be interpreted as meaning that an action for a declaration that certain national substantive provisions conflict with Article 49 EC must be permitted to be brought in a case where the compatibility of the substantive provisions with that article may otherwise be examined only as a preliminary issue in, for example, an action for damages, proceedings concerning infringement of the national substantive provisions or judicial review proceedings?

(2) Does the requirement of effective legal protection under Community law mean that the national legal order must provide interim protection, through which national rules which prevent the exercise of an alleged right based on Community law may be disapplied in relation to an individual so that he is able to exercise that right until the question of the existence of the right has been finally settled by a national court?

(3) If the answer to Question 2 is in the affirmative:

Does it follow from Community law that, where the compatibility of national

provisions with Community law is being challenged, in its substantive examination of an application for interim protection of rights under Community law a national court must apply national provisions governing the conditions for interim protection, or in such a situation must the national court apply Community law criteria for interim protection?

(4) If the answer to Question 3 is that Community law criteria must be applied, what are those criteria?'

21. Written observations have been submitted by Unibet, by the Austrian, Belgian, Czech, Finnish, German, Greek, Italian, Netherlands, Portuguese, Swedish and United Kingdom Governments and by the Commission. Further observations were made at the hearing by Unibet, the Belgian, Greek, Swedish and United Kingdom Governments and the Commission.

Admissibility

22. The Belgian Government submits as a preliminary point that the reference is artificial and hypothetical and hence inadmissible: Unibet's action before the national court seeks merely to obtain a declaration of incompatibility; and there is no genuine dispute underlying that action. That situation falls directly within the ambit of *Foglia*, [5] in which the Court ruled that it had no jurisdiction to deliver 'advisory opinions on general or hypothetical questions' or to reply to 'questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its view on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute'.

23. I cannot agree with the Belgian Government's submission. There clearly is a very real dispute requiring resolution. Unibet considers that the prohibition on promotion is incompatible with Article 49 EC. It wishes that prohibition to be ruled unlawful so that it can lawfully promote its lottery business in Sweden. The fact that it may be described as using a 'procedural device' in the sense of seeking to bring a form of action not available as a matter of Swedish procedural rules does not detract from the reality of that underlying issue.

24. Accordingly, I consider that the reference is admissible.

5 — Case 244/80 [1981] ECR 3045, paragraph 18.

The first question

25. By its first question, the referring court asks whether the requirement of Community law that national procedural rules must provide effective protection of an individual's rights under Community law means that an action for a declaration that certain national substantive provisions conflict with Article 49 EC must be available where the compatibility of the substantive provisions with that article may otherwise be examined only as a preliminary issue in, for example, an action for damages, proceedings concerning infringement of the national substantive provisions or judicial review proceedings. [6]

26. Unibet submits that that question should be answered in the affirmative. All the governments submitting observations, together with the Commission, take the contrary view.

27. Unibet submits, first, that it follows from the principle of the primacy of Community law over national law and the principle of the protection of Community law rights that an individual must always have an effective right of action to protect those rights. [7] Unibet has a right derived from the EC Treaty to market its games in Sweden and is unlawfully prevented from doing so by the prohibition on promotion. It therefore has a right of action for a declaration that it has the right to market its games in Sweden without hindrance or, put differently, that Sweden is prohibited from applying the prohibition on promotion.

28. Unibet refers in particular to *Muñoz and Superior Fruiticola,* [8] in which the Court ruled that the full effectiveness of a Community legislative prohibition on offering fruit and vegetables for sale otherwise than in conformity with prescribed quality standards implied that it must be possible for a trader to enforce compliance with that prohibition by means of civil proceedings against a competitor, even though national law did not give such a trader the right to bring a civil action based on non-compliance with the legislation.

29. Unibet submits, second, that the national court must, by virtue of its obliga-

6 — Although the question gives the three types of proceedings as examples, it appears that they are the only ones which might be available in the circumstances of the present case (although see point 46 with regard to judicial review proceedings).

7 — Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 *Factortame* [1990] ECR I-2433 (*'Factortame I'*); Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen* [1991] ECR I-3757, paragraph 24, and Case C-185/97 *Coote* [1998] ECR I-5199.

8 — Case C-253/00 [2002] ECR I-7289.

tion to interpret national law in conformity with Community law, [9] extend the national law right to seek a declaratory judgment [10] to applicants such as itself.

30. Unibet submits, third, that the other remedies available to it under Swedish rules are not effective rights of action. Damages are not an adequate substitution for a declaration that Sweden cannot apply the prohibition on promotion, since it is often very difficult to calculate them so as wholly to provide full compensation for the harm suffered. Moreover, the fact that an action for such a declaration is unavailable means that the individual concerned must bring a fresh action for damages if the infringements continue. Nor is it reasonable to require an individual to break the law in order to establish his rights. The provision for judicial review of administrative decisions applies only to decisions adopted by the government or by an administrative authority. It would apply only if Unibet sought, and was refused, authorisation to organise a lottery in Sweden, which is not its commercial intention. Finally, if a Swedish court decided, as a preliminary point, that the prohibition on promotion is contrary to Community law, that decision would have no legal effect for other Swedish courts or authorities if the same question arose in another context, even involving Unibet, for example in criminal proceedings or in a case concerning the imposition of a fine under the Law on Lotteries. It would not amount to a declaration of illegality in a broad sense, even vis-à-vis Unibet, and would not require Sweden to repeal or suspend the promotion on prohibition. In contrast, a judgment prohibiting the Swedish State from applying the prohibition on promotion to Unibet would be binding in all the situations in which the question could arise, for example in proceedings concerning breach of the Law on Lotteries.

31. The governments submitting observations and the Commission all take the view that the national court's first question should be answered in the negative. For the reasons that follow, all of which are advanced by some or all of those parties, I am also of that view, subject to an important qualification.

32. The starting point to my mind must be the principle, first laid down in *Rewe I*, [11] that it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of Community law

9 — Case C-106/89 *Marleasing* [1990] ECR I-4135.

10 — Under Chapter 13, Section 2, of the Code of Judicial Procedure: see points 4 and 13 above.

11 — Case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 5.

rights, provided that those conditions are not less favourable than those relating to similar actions of a domestic nature (principle of equivalence) and do not make it impossible in practice to exercise those rights (principle of effectiveness). That approach was confirmed in *Rewe II*, [12] where the Court stated that the Treaty 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 and that the system of legal protection established by the Treaty implies that it must be possible for *every type of action provided for by national law* to be available for the purpose of ensuring observance of Community provisions having direct effect.

33. Similarly *Simmenthal*, [13] which established the duty of national courts to set aside national rules which conflict with Community law, expressly limits that duty to cases *within the jurisdiction* of the national court concerned, or to courts *having jurisdiction to apply* the Community law concerned.

34. Those principles have been constantly reiterated by the Court; see for example *Peterbroeck*, [14] where it was stated that, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, subject to the proviso that such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

35. It is implicit in those formulations that national legal systems are not immune from Community judicial oversight. First, domestic rules must observe the principles of equivalence and effectiveness. Second, although it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. [15] Thus, in certain circumstances Community law *may* require a new remedy where that is the only way to ensure that a Community law right can be protected. [16] In *Heylens*, for example, the Court stated that, since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, '*the existence of a remedy of a judicial nature against any*

12 — Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805, paragraph 44, emphasis added.

13 — Cited in footnote 7, paragraphs 21 and 22, emphasis added.

14 — Case C-312/93 [1995] ECR I-4599, paragraph 12.

15 — *Verholen*, cited in footnote 7, paragraph 24.

16 — As was de facto the case in *Factortame I*.

decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right'. [17] Similarly in *Vlassopoulou* the Court stated that 'any decision [on recognition of professional diplomas] taken must be capable of being made the subject of judicial proceedings in which its legality under Community law can be reviewed'. [18]

36. It is essential therefore that, when assessing whether national procedural rules satisfy the criteria developed by the Court, the overall judicial context is examined. As the Court stated in *Peterbroeck*, 'each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances'. [19] The mere fact that a specific right of action is not available in a given legal system for the assertion of a Community law right will not necessarily mean that the principle of effective protection is infringed.

37. An example of the application of that principle is *Safalero*. [20] That case concerned an administrative measure authorising the seizure of goods sold to a retailer on the basis that they did not bear a national type-approval mark required by national legislation. It was clear that that requirement of national law was incompatible with Community law. The importer sought return of the goods seized from the retailer; but the national court ruled that it had no standing to challenge the decision, which was addressed to the retailer. The Court ruled that the importer's interest in not having its trade impeded because of a national provision which was contrary to Community law was sufficiently protected where it could obtain a court decision establishing the incompatibility of that provision with Community law. In that case, the importer was able to raise that issue in proceedings against the public authorities contesting the legality of a fine imposed on it because the goods did not bear the type-approval mark in question. The Court concluded that in such circumstances the principle of effective judicial protection of the rights which the Community legal order confers on individuals does not preclude national legislation under which an importer cannot bring court proceedings to challenge a measure adopted by the public authorities under which goods sold to a retailer are seized, where there is available to that importer a legal remedy which ensures respect for the rights conferred on it by Community law.

17 — Case 222/86 [1987] ECR 4097, paragraph 14, emphasis added.

18 — Case C-340/89 [1991] ECR I-2357, paragraph 22.

19 — Cited in footnote 14, paragraph 14.

20 — Case C-13/01 [2003] ECR I-8679.

38. That approach reflects the fact that the principle of effective legal protection itself reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle, the right to a fair trial, is enshrined in Article 6(1) of the European Convention on Human Rights and is now recognised as a general principle of Community law by virtue of Article 6(2) EU. In embodying the 'right to a court', of which the non-absolute right of access is one aspect, Article 6(1) of the Convention impliedly requires access for the purpose of review in the context of a specific case. Limitations to such access are compatible with Article 6(1) only where they do not impair the essence of that right, where they pursue a legitimate aim, and where a reasonable relationship of proportionality exists between the means employed and the aim sought to be achieved. [21]

39. Against that background, I turn to the specific issue raised by the referring court's first question.

40. In the present case it is clear, first, that Swedish procedural rules for a declaration of incompatibility with a higher-ranking national law are not more favourable than those applicable to a declaration of incompatibility with Community law; in fact it appears that the converse is true. [22]

41. Second, it also appears from the order for reference [23] that, in practice, it is not impossible for an individual in Unibet's situation to assert its Community law rights.

42. I should stress at this point that the Court is bound to accept the analysis of national procedural rules provided by the referring court. Thus I must proceed on the basis that as a matter of national procedural rules it is not open to Unibet to bring an action seeking solely a declaration that the prohibition on promotion is incompatible with Community law, even though Unibet has sought to contest that proposition. [24]

43. The referring court further explains that although national rules do not permit Unibet to bring a separate action on the validity of

21 — See generally *Golder* v *United Kingdom* (1979-1980) 1 EHRR 524, paragraph 36; *Klass and others* v *Germany* (1994) 18 EHRR 305, paragraph 49, *Ashingdane* v *the United Kingdom* (1985) 7 EHRR 528, paragraphs 55 and 57, and *Lithgow and others* v *United Kingdom* (1986) 8 EHRR 329, paragraph 194.

22 — See point 3 above.

23 — Qualified by submissions made at the hearing: see point 46 below.

24 — See Case 116/84 *Roelstraete* [1985] ECR 1705, paragraph 10; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 22; and Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 51.

the promotion of prohibition, there are three other routes by which it may raise that question before a court. First, if Unibet should act in contravention of the prohibition on promotion and action is taken by a Swedish authority, it may have the compatibility of that prohibition with Community law examined by the courts. Second, Unibet may have the same issue of compatibility examined by the courts in the action for damages currently pending before the District Court. Third, the referring court states: 'Regard should also be had in this connection to the possibility of obtaining judicial review along the lines mentioned above', an apparent reference to the Law on Lotteries.

44. With regard to the first possibility, I do not consider that a national legal order would satisfy the requirements of effective protection of Community law rights if the only way in which an individual could assert such rights before a domestic court were by first breaching national law. An individual cannot be placed in the position of being able to test the lawfulness of a law only by breaking it. In particular, I do not agree with the argument, advanced by several governments, that one can apply by analogy the limits on admissibility of direct actions imposed by Community law, namely that an individual cannot bring an action for annulment of a Community measure of general application before the Community judicature even if national rules mean that he must first infringe the Community measure before he can bring the question of its validity before a national court. [25]

45. Accordingly I cannot agree with the referring court that Unibet's Community law rights are effectively protected by virtue of the fact that, if it breaches the prohibition on promotion and action is taken by a Swedish authority, it may then have the compatibility of that prohibition with Community law examined by the courts.

46. Nor am I convinced that the third possibility mentioned by the referring court, namely judicial review in the context of the Law on Lotteries, is a satisfactory means by which Unibet could assert its rights before a court. The order for reference is rather vague about what the statutory exceptions to the prohibition on promotion are and how they may be invoked. At the hearing, the Swedish Government conceded that those exceptions were not designed to accommodate situations such as that in the main proceedings; and it could not say whether in such a situation an exception would have been granted had a request to that effect been

25 — Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraphs 33 and 34.

made. Moreover, the information elicited from the Swedish Government in response to tenacious questioning from the Court does not persuade me that, had Unibet applied to have an exception granted in its favour, that application would necessarily have led to an administrative decision susceptible to judicial review.

47. That leaves the question whether the application for damages (point (ii) of Unibet's original application) provides a satisfactory vehicle for Unibet to test its Community law claim before the Swedish courts. That application was indeed declared admissible. It is still pending, and forms the basis for Unibet's second application for interim relief.

48. The referring court, Unibet and the Swedish Government appear to agree that the court hearing that action must examine Unibet's claim that the prohibition on promotion is incompatible with Community law and that, if it accepted that argument, that court would be bound to disapply the prohibition pursuant to Chapter 11, Section 14, of the Instrument of Government.

49. Unibet objects that a damages action is awkward to run because quantification of economic loss is uncertain and difficult. Applying the principle of procedural autonomy, however, the test is not whether it is awkward (damages claims are generically awkward), but whether it nevertheless satisfies the twin conditions of equivalence and effectiveness. In my view, it does. In particular, on the basis of the material present before the Court in this reference, I cannot accept that practical problems of quantification are sufficient to make a damages claim 'virtually impossible or excessively difficult'. [26] If that were the case as a matter of principle, moreover, it would radically undermine the case-law of the Court to the effect that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible and that that obligation provides effective protection for the individual concerned. [27]

50. What of Unibet's argument that, even if it were to succeed in its damages claim, the nature of that action is such that the result would be binding only in the instant case — it would neither have an erga omnes effect nor, indeed, assist Unibet for the future, so that it would be obliged to bring a continuous stream of actions?

26 — *Peterbroeck*, cited in footnote 14, paragraph 12.

27 — Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 37. In Case C-91/92 *Faccini Dori* [1994] ECR I-3325, the Court refused to extend the direct effect of directives 'horizontally', holding instead that effective protection could be guaranteed by the principle of consistent interpretation backed up by the availability of a claim for damages (see paragraph 27).

51. It is not my function to speculate on the precise effects in Swedish law of a particular ruling by a particular court — that is a matter within the knowledge and competence of the national court. At the hearing, the Swedish Government suggested that, irrespective of its legal effect, a decision by a national court that the prohibition on promotion ran counter to a superior rule of Community law would inevitably be examined closely by the government and would, in all likelihood, lead to a change in the law. Whether that is so or not, it seems to me that — as a matter of Community law — if Unibet once obtained a favourable decision in a damages claim but no legislative change followed, so that it was obliged to bring a second (or a third) damages claim, it would have a strong case for saying that Sweden was gravely and manifestly disregarding its Community law obligations and that Unibet was entitled to further damages without more ado. In such circumstances, it seems to me that Unibet might well also be entitled to interim relief, within the context of that claim, to secure the effective protection of its Community law rights. [28]

52. On that basis, I am of the view that the availability to Unibet of an action for damages in the context of which its claim that the prohibition on promotion is incompatible with Community law *will necessarily* be examined means that its Community law rights are adequately protected even though national procedural rules mean that it cannot bring a separate action for a declaration of incompatibility.

53. I am not persuaded that the judgment in *Muñoz and Superior Fruiticola*, [29] on which Unibet relies, points to a different conclusion. In that case, the Court found that the applicants, fruit traders, had a right to enforce the obligation imposed by directly applicable Community legislation [30] not to offer for sale fruit not conforming to established quality standards by means of civil proceedings against a competitor. It appears however that, in the absence of such a right of action, there would have been *no possibility* for the applicants to assert that right. [31] In the present case, as discussed above, that is not the situation.

54. Nor am I persuaded by Unibet's argument that by virtue of its obligation to

28 — See point 85 below.

29 — Cited in footnote 8.

30 — Regulation (EEC) No 1035/72 of the Council of 18 May 1972 (OJ, English Special Edition 1972(II), p. 437) and Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1).

31 — Although the judgment is laconic, it may be assumed from the facts as described by the Court that causation would have been too remote for a damages claim.

interpret national law in conformity with Community law, the national court must extend the right under national law to seek a declaratory judgment [32] to applicants such as itself.

55. Unibet refers to *Marleasing* [33] as authority for that proposition. In that case the Court ruled that, in applying national law, 'the national court called upon to interpret it is required to do so, *as far as possible*, in the light of wording and the purpose of the' Community legislation. [34] That caveat is in my view critical. [35] The Court does not require national courts to impose an artificial or strained interpretation of national law. As the Court stated in *Murphy*, [36] the duty applies 'within the limits of [the national court's] discretion under national law'. It is clear that the Court envisages that in some circumstances it may not be possible to achieve by way of interpretation the result prescribed by the applicable Community law. [37] In the present case, the Swedish Government explicitly and emphatically denies that there is any scope as a matter of national law for the interpretation advocated by Unibet. That understanding is consistent with the view of the referring court, [38] citing several academic writings, as set out in the order for reference.

56. In the light of all the above considerations I therefore consider that the first question referred should be answered in the negative. In so saying, I proceed on the twin premisses that, if the national court decides the preliminary issue as to the compatibility with Community law of the prohibition on promotion in Unibet's favour, it *will* grant Unibet some form of substantive relief and that that relief *will* be effective. [39] The material placed before the Court in the context of this reference suggests that that is probably the case, but neither element is entirely beyond doubt. I stress that, if the damages route does *not* in fact afford protection that, in practical terms, allows Unibet to enforce its rights under Community law once they are recognised by the national court, a new remedy must necessarily be created if Sweden is to respect its obligations under Community law. [40]

32 — I.e. the action specified in Chapter 13, Section 2, of the Code of Judicial Procedure: see points 4 and 13 above.

33 — Cited in footnote 9.

34 — Paragraph 8, emphasis added. Although *Marleasing* concerned the duty to interpret national legislation in the light of a directive, the Court has applied the same principle to Treaty provisions: Case 157/86 *Murphy* [1988] ECR 673.

35 — Although the caveat is not included in the operative part of the judgment, it is settled case-law that the operative part of a judgment must be understood in the light of an earlier paragraph of the decision (Case 135/77 *Bosch* [1978] ECR 855, paragraph 4). In any event, the caveat is reflected in the operative part of several subsequent judgments: see *Faccini Dori*. cited in footnote 27, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941 and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835.

36 — Cited in footnote 34.

37 — See for example Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 22 and point 2(b) of the operative part, *Faccini Dori*, cited in footnote 27, paragraph 27, and Case C-462/99 *Connect Austria* [2003] ECR I-5197, point 1 of the operative part.

38 — And indeed of the two courts below.

39 — See point 51 above.

40 — See *Factortame I.*

57. Finally, I note that, as put, that question asks whether the requirement of Community law that national procedural rules must provide effective protection of an individual's rights under Community law means that an action for a declaration that certain national substantive provisions conflict with Article 49 EC must be permitted to be brought in a case where the compatibility of the substantive provisions with that article may otherwise be examined only as a preliminary issue in, for example, an action for damages, *proceedings concerning infringement of the national substantive provisions or judicial review proceedings.* [41]

58. I have explained above that I do not consider that a national legal order would satisfy the requirements of effective protection of Community law rights if the only way in which an individual could assert such rights before a domestic court were by first breaching national law.

59. Nor am I confident, from the information which has been provided to the Court, that judicial review proceedings would be available in the circumstances of the present case.

41 — Emphasis added.

60. I would therefore reformulate the first question in framing an answer to it. On that basis, I consider that the answer should be that Community law does not require that it must be possible to bring a separate action for a declaration that certain national substantive provisions conflict with Article 49 EC where it can be shown that that issue will be examined as a preliminary issue in an action for damages on conditions which are not less favourable than those governing similar domestic actions and which do not render it impossible or excessively difficult for the claimant to enforce its Community law rights.

The second question

61. By its second question, the referring court asks whether the requirement of effective legal protection under Community law means that the national legal order must provide interim protection, through which national rules which prevent the exercise of an alleged right based on Community law may be disapplied in relation to an individual so that he is able to exercise that right until the question of the existence of the right has been finally settled by a national court.

62. Unibet considers that that question should be answered in the affirmative. Community law gives it the absolute right to have its application for interim measures examined by a national court since it is for national courts to give individuals an effective right of action if their Community law rights are infringed. The Court ruled in *Factortame I*[42] and *Zuckerfabrik*[43] that the principle of effective judicial protection of Community law rights confers a right to interim relief.

63. The governments which have submitted observations and the Commission essentially take the view that the second question should be answered in the negative. All concede that it follows from *Factortame I* that there may be an obligation to grant interim protection, but they do not consider that an affirmative answer to the second question necessarily follows from that proposition. I agree. Community law does not confer on an applicant an absolute right to have its application for interim relief considered by a national court, irrespective of the circumstances.

64. The starting point is, of course, *Factortame I*. In that case, the applicants sought, first, a declaration that certain provisions of a national statute were contrary to the EC Treaty, second, damages, and third, interim relief pending final determination of the issues. It was accepted that national courts had jurisdiction in principle to make the declaration sought; a preliminary ruling was however sought on the question whether the relevant provisions were in fact contrary to the EC Treaty.[44] With regard to the issue of interim relief, in contrast, under national law the national courts had no power to grant temporary suspension of the operation of a statute. A separate reference was therefore made on the question whether Community law required that there should be the possibility for the national court to grant such relief in an appropriate case.

65. The Court stated that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment yet to be given on the existence of the rights claimed under Community law. It followed that a court which in those circumstances *would* grant interim relief, if it were not for a rule of national law, was obliged to set aside

42 — Cited in footnote 7.

43 — Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415.

44 — In Case C-221/89 *Factortame* [1991] ECR I-3905 (*Factortame II*) the Court ruled that certain of the substantive provisions were contrary to Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

that rule. The Court accordingly ruled that 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 set aside that rule.

66. In contrast to *Factortame I*, which concerned a national law allegedly incompatible with Treaty rights, *Zuckerfabrik*[45] concerned a national measure based on a Community regulation[46] whose validity was then questioned before a national court. That court asked whether the second paragraph of what is now Article 249 EC, which provides that a regulation is to have general application and to be binding in its entirety and directly applicable in all Member States, denied to national courts the power to suspend enforcement of a national measure adopted on the basis of a Community regulation.

67. The Court referred to the decision in *Factortame I* and stated that 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 national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself. It followed that Article 249 EC does not preclude the power of national courts to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation.

68. Two situations may thus be distinguished. In the first, as in *Zuckerfabrik*, a Community measure is challenged and the applicant seeks interim suspension of the national measure implementing it. In the second, as in *Factortame I*, a national law is challenged on the basis that it is incompatible with Community law and the applicant seeks interim suspension of that national law. Clearly the present case falls into the latter category.

69. As the Commission notes, Unibet has made two applications for interim measures: the first in connection with its principal action seeking a declaration that it has the right to market its services without being hindered by the prohibition on promotion, and the second in connection with its claim for damages for breach of Community law.

70. With regard to the first application, it appears from the order for reference that the

45 — Cited in footnote 43.

46 — Council Regulation (EEC) No 1914/87 of 2 July 1987 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year (OJ 1987 L 183, p. 5).

national court wishes to know in particular whether Community law requires that a national court must grant interim suspension of the prohibition on promotion in circumstances where the principal action is for a declaration of incompatibility which is inadmissible as a matter of national law.

71. Given that I do not consider that, in the circumstances of the present case, Community law requires that such a (separate) principal action should be admissible, I also consider that Community law clearly does not require that interim relief should be available in such a context. That view is shared by the Belgian, Finnish, German, Greek and Swedish Governments and the Commission.

72. That conclusion to my mind follows from the very nature of interim relief. It is also reflected in the Court's case-law. In *Factortame I*, which like the present case concerned an application for interim suspension of national legislation, the Court stated that 'the full effectiveness of Community law would be ... impaired if a rule of national law could prevent *a court seised of a dispute* governed by Community law from granting interim relief' [47] 'in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law'. [48] I do not consider that a court can be regarded as 'seised of a dispute' in circumstances where the main application is a form of action neither recognised by national law nor required to be available as a matter of Community law.

73. With regard to the second application, the opposite is true. The claim for damages for breach of Community law (within which the compatibility of the prohibition on promotion with Community law will be examined) is admissible as a matter of national law.

74. It is clear that in such circumstances the national court seised of that claim must be *able* to grant interim relief.

75. That does not however mean that a national court seised of a given claim must necessarily be able to grant (still less *is required* to grant) all conceivable forms of interim relief. On the contrary, it follows from the formulation adopted by the Court that the relief which a national court must be able to grant must be relief that is apt to ensure the full effectiveness of the final judgment sought.

47 — Paragraph 21; emphasis added. The operative part is also framed in terms of the duty of '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' (emphasis added). A case is only 'before' a court if it is, as a condition precedent, admissible. That approach is also borne out by the French text of the judgment, which refers to 'le juge saisi d'un litige' (paragraph 21) and 'la juridiction nationale ... saisie d'un litige' (operative part).

48 — *Factortame I*, paragraph 21.

76. Unibet asserted at the hearing that the present case is a 'Swedish *Factortame I*' and that the basic question is identical. There is however in my view a crucial difference between the two cases. Although in *Factortame I*, as in the present case, the applicants sought damages and interim suspension of the impugned national legislation, their *principal* claim was for a declaration that that legislation should be disapplied. [49] That action was admissible as a matter of national law. [50] Thus the interim relief sought was directly linked to the main relief sought. The national court found, moreover, that the applicants' claims that they would suffer irreparable damage if the interim relief which they sought was not granted and they were successful in the main proceedings were well founded. [51]

77. In the present case, in contrast, the second question essentially concerns Unibet's claim for interim relief made in the context of its claim for *damages* from the State to compensate it for the effects of the prohibition on promotion (point (ii) of its original action). It is not clear how a final judgment granting damages would be rendered fully effective by the interim relief sought by Unibet, namely an order that, notwithstanding the prohibition on promotion and the sanctions for breach thereof, Unibet has the right, pending a final judgment, to take specified marketing measures. The application for interim measures does not, therefore, correspond to the principal action. In such a case, I do not consider that Community law requires that such interim measures should be granted.

78. Furthermore, in the present case the full effectiveness of the final judgment on the *damages* claim does not 'need' preserving. If in that judgment the Supreme Court rules that Unibet's Community law rights have been infringed so that the Swedish State is liable to pay damages, one may assume that the Swedish State will satisfy that judgment.

79. Unibet submits that, in accordance with *ABNA*, [52] an individual must have access to the same interim protection where the conformity of national rules with Community law is in question as where the validity of a Community act is contested. Since individuals are entitled to interim relief where the legality of a Community measure is contested by means of Article 234 EC, the

49 — See paragraph 7 of the Report for the Hearing and paragraph 10 of the judgment.

50 — See paragraph 23 of the Report for the Hearing. English administrative law allows an action for a declaration to be brought as the principal claim. Swedish administrative law does not.

51 — Ibid., paragraph 10.

52 — Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 [2005] ECR I-10423.

same judicial protection must be guaranteed where national measures are challenged on the basis that they are incompatible with Community law.

80. That statement in fact derives from *Zuckerfabrik.*[53] In that case, the national court was seised of an application for annulment of the national measure implementing the Community regulation whose validity was challenged. There is nothing to suggest that there was any problem with the admissibility of that application. The interim relief was therefore wholly appropriate for preserving the effect of the final judgment. As I have indicated, I do not consider that the same can be said where — as in the present case — the final judgment sought is an award of damages.

81. Finally, Unibet submits that it is clear from *Antonissen*[54] that the objective of the judicial protection conferred by Community law is to put an end to a continuing infringement which causes harm to an individual. The court hearing an application for interim relief has a broad discretion concerning the examination of the application and the measures which should be granted to guarantee the individual's right to judicial protection. It follows therefore from *Factortame I* and *Antonissen* that an individual who suffers continuing harm always has a right of action for interim relief; and the judge hearing that application has a broad discretion as to the conditions and nature of such relief. In the present case, an interim order prohibiting the Swedish State from applying the prohibition on promotion to Unibet would be the most effective remedy.

82. It is true that *Antonissen* concerned an application for damages. The interim relief sought in that case was the payment of an advance on the damages principally claimed. The measures sought in the interlocutory application therefore corresponded to part of the measures sought in the main application.[55] It is also true that the Court concluded that the judge dealing with an application for interim relief enjoys a broad discretion when examining the conditions for the grant of such relief.

83. What the Court actually held in *Antonissen* was that 'an absolute prohibition on obtaining [interim measures], irrespective of

53 — Cited in footnote 43.

54 — Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441.

55 — See paragraph 7 of the judgment. An application for interim financial payments ancillary to a damages claim raises its own problems, not in issue in the present case.

the circumstances of the case, would not be compatible with the right of individuals to complete and effective judicial protection under Community law, which implies in particular that interim protection be available to them if it is necessary for the full effectiveness of the definitive future decision ... . It is therefore not possible to rule out in advance, in a general and abstract manner, that payment, by way of an advance, ... may be necessary ... and may, in certain cases, appear justified with regard to the interests involved.' [56]

84. *Antonissen* thus corrected an erroneous assessment of the law as including an absolute prohibition on the grant of interim relief where the principal claim is for damages. The Court's order makes it clear, however, that the grant of such interim relief is both unusual and, above all, discretionary. The second question in the present case asks essentially whether the national legal order *must* provide for interim suspension of national legislation when the principal claim is for damages. I see nothing in *Antonissen* which assists with that question — if anything, it points to the opposite conclusion.

85. For the sake of completeness, however, I add that if Unibet were to succeed in its present damages claim, but then found itself obliged to bring a second claim in order to enforce its Community law rights, interim relief might indeed then be necessary in order to afford it effective protection. [57] In this (exceptional) context, such interim relief would, I think, necessarily consist in the suspension of the relevant sections of a national law which (ex hypothesi) had already been declared to be incompatible with a directly effective Community law right. [58]

86. I accordingly consider that the answer to the second question should be that, first, Community law does not require a Member State to provide for interim suspension or disapplication of national rules which prevent the exercise of an alleged right based on Community law where the applicant's principal claim is inadmissible as a matter of national law. Second, where the principal claim is admissible but seeks compensation by way of damages for harm suffered as a result of those national rules, Community law requires that the national court should have the discretion, in an appropriate case, to grant such interim relief.

56 — Paragraphs 36 and 37. At paragraphs 38 to 43, the Court proceeded to examine carefully the parameters within which the judge hearing the application for interim relief should exercise his broad discretion.

57 — See point 51 above.

58 — See point 6 above.

The third and fourth questions

87. The third question arises only if the answer to the second question is to the effect that Member States must provide for interim suspension or disapplication of national rules which prevent the exercise of an alleged right based on Community law. By it, the national court asks whether it follows from Community law that, where the compatibility of national provisions with Community law is being challenged, a national court must apply national criteria or Community law criteria in its substantive examination of an application for interim protection of rights under Community law. By its fourth question, which arises only if the answer to the third question is that Community law criteria should be applied, it asks what those criteria are.

88. Although the answer I suggest should be given to the second question would mean that the third and fourth questions would not arise, I will none the less briefly consider those questions.

89. Unibet and the Portuguese Government submit that Community law criteria apply. Unibet considers that it is very important that interim protection is available, in so far as possible, uniformly throughout the Community. The Court should therefore lay down the necessary fundamental conditions. In Unibet's view, the appropriate criteria are that there should exist serious doubts as to the conformity of a national measure with Community law and that the applicant suffers damage as a result. The Community law requirement that the damage should be 'irreparable' is unclear; if it is to be applied, the Court must clarify it. The Portuguese Government cites *Zuckerfabrik* and *Atlanta* [59] and submits that the unity of interpretation and application which underlie Community law suggest that the criteria governing the grant of interim measures should be those followed by the Community judicature, namely fumus boni juris, urgency, balance of interests and relationship between the relief sought and the object of the main proceedings. [60]

90. The Austrian, Czech, Finnish, German, Italian and Swedish Governments and the Commission make no submissions on the third and fourth questions. The Belgian, Greek, Netherlands and United Kingdom Governments submit that national provisions apply. I share that view.

91. That approach follows from the basic rule laid down by the Court and discussed in

59 — Case C-465/93 *Atlanta Fruchthandelsgesellschaft* [1995] ECR I-3761.

60 — See *Antonissen* v *Council and Commission*, cited in footnote 54.

the context of the first question that, in the absence of Community rules, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding Community law rights, subject to the principles of effectiveness and equivalence.

92. It is also suggested by the fact that in *Factortame I* itself the Court did not lay down specific conditions for the grant of interim measures. In his Opinion in that case, Advocate General Tesauro expressed the view that the methods and time-limits of interim protection are and remain, in the absence of harmonisation, 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. [61]

93. It is true that in *Zuckerfabrik* and *Atlanta* the Court laid down Community law conditions for the grant of interim relief by national courts, including the suspension of a national measure based on a Community measure. Those cases concerned the alleged invalidity of the underlying Community legislation. In such cases, of course, only the Court has jurisdiction to declare the Community measure invalid. [62] In such a context there is a clear Community interest in having uniform strict criteria. [63] In contrast, the present case is concerned with the validity of a national measure which by definition applies in only one Member State. In such a case, I see no reason to depart from the general rule of procedural autonomy. [64] Indeed it would seem more logical for the procedure governing interim suspension of a national law on grounds of alleged incompatibility with Community law to be the same as that governing interim suspension of a national law on other, purely domestic, grounds (in application of the principle of equivalence), provided always that the principle of effectiveness is also satisfied.

94. Moreover in *Zuckerfabrik* the Court observed that the power of the national courts to grant the suspension of a Community measure corresponds to the jurisdiction reserved to the Court of Justice by Article 242 EC. It accordingly ruled that the national courts could grant such relief only on the same conditions as must be satisfied for the

61 — Point 33 of the Opinion; see also point 30.

62 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20.

63 — Recently affirmed in Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27, where the Court stated that the requirement of uniform application of Community law by national courts 'is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty'.

64 — *Factortame I*, paragraph 19.

Court of Justice to grant an application for interim measures.[65] That approach ensures consistency in the rules governing the grant of interim relief, irrespective of whether a challenge is brought under Article 230 or by way of Article 234 EC. In the present case, in contrast, there is no such analogy with the jurisdiction of the Court. As the United Kingdom submits, the closest parallel lies in the power of the courts of the Member States to determine substantive questions of incompatibility. There, procedure is governed by national rules, subject to the principles of equivalence and effectiveness.

95. I do of course bear in mind that the Court stated in *Zuckerfabrik* that 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 national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself'.[66] That dictum does not, in my view, decide the issue raised by the third question in the present case. In *Zuckerfabrik*, the issue before the Court was whether interim relief — which, in accordance with *Factortame I*, a national court must be able to grant pending a ruling by the Court on the question of compatibility — should be available where the validity of a Community regulation underlying a national measure was being challenged. The Court was not however asked to determine the criteria for the grant of interim relief by a national court in proceedings concerning a national measure allegedly incompatible with Community law.

96. For the above reasons I am of the view that the answer to the third question referred is that, where the compatibility of national provisions with Community law is being challenged, a national court must apply national provisions governing interim relief in its substantive examination of an application for interim protection of rights under Community law, provided always that the principle of effectiveness is also satisfied.

97. On that basis, the fourth question does not arise. If, however, the Court were to take the view that Community criteria applied in such circumstances, it seems to me that the criteria set out in *Zuckerfabrik*[67] would be clearly appropriate.

65 — Paragraph 27.

66 — Paragraph 20; see also paragraph 24 of the judgment in *Atlanta*.

67 — See paragraph 33 and the operative part of the judgment.

Conclusion

98. I am accordingly of the view that the questions referred by the Swedish Supreme Court (Högsta Domstolen) should be answered as follows:

(1) Community law does not require that it must be possible to bring a separate action for a declaration that certain national substantive provisions conflict with Article 49 EC where it can be shown that that issue will be examined as a preliminary issue in an action for damages on conditions which are not less favourable than those governing similar domestic actions and which do not render it impossible or excessively difficult for the claimant to enforce its Community law rights.

(2) Community law does not require a Member State to provide for interim suspension or disapplication of national rules which prevent the exercise of an alleged right based on Community law where the applicant's principal claim is inadmissible as a matter of national law. Where the principal claim is admissible but seeks compensation by way of damages for harm suffered as a result of those national rules, Community law requires that the national court should have the discretion, in an appropriate case, to grant such interim relief.

(3) Where the compatibility of national provisions with Community law is being challenged, a national court must apply national provisions governing interim relief in its substantive examination of an application for interim protection of rights under Community law, provided always that the principle of effectiveness is also satisfied.