

everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with the requirements inherent in the very nature of Community law.

The full effectiveness of Community law would be just as much 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 to be given on the existence of the rights claimed under Community law. It follows that a

court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

That interpretation is reinforced by the system established by Article 177 of the EEC Treaty whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.

## REPORT FOR THE HEARING delivered in Case C-213/89 \*

### I — Background to the dispute

1. The appellants in the main proceedings, including Factortame Ltd, are a number of companies incorporated under the laws of the United Kingdom and also the directors and shareholders of those companies, most of whom are Spanish nationals. Those companies between them own or manage 95 fishing vessels which were until 31 March 1989 registered as British fishing vessels under the Merchant Shipping Act 1894. Of those vessels, 53 were originally registered

in Spain and flew the Spanish flag. Those 53 vessels were registered under the 1894 Act at various dates from 1980 onwards. The remaining 42 vessels had always been British. They were purchased by the appellants at various dates mainly since 1983.

2. The statutory system governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels)

\* Language of the case: English.

Regulations 1988 (SI 1988, No 1926). It is common ground that the United Kingdom amended the previous legislation in order to put a stop to the practice known as 'quota hopping' whereby—according to that State—its fishing quotas are 'plundered' by fishing vessels flying the British flag but lacking any genuine link with the United Kingdom.

3. The 1988 Act provided for the establishment of a new register of all British fishing vessels including those registered in the old register maintained under the 1894 Act. However, only fishing vessels fulfilling the conditions laid down in Section 14 of the 1988 Act may be registered in the new register.

4. Briefly, the conditions laid down in Section 14 of the new Act, which must be fulfilled cumulatively, are as follows:

(a) *Nationality*

The legal title to the vessel must be vested wholly in qualified British citizens or companies.

At least 75% of the beneficial ownership of the vessel must be vested in qualified British citizens or companies.

A company is 'qualified' if it is incorporated in the United Kingdom and has its principal place of business there, and if at least 75%

of its shares are held by legal owners and beneficial owners who are British citizens. Furthermore, at least 75% of its directors must be British citizens.

The figure of 75% may be raised provisionally to 100%, pursuant to regulations adopted under the 1988 Act. The United Kingdom has not yet availed itself of this possibility.

That nationality requirement also applies to a charterer or operator of the vessel, whether he be a natural person or a company.

(b) *Residence and domicile*

This is a further requirement along with nationality.

(c) *Direction and control*

The vessel must be managed, and its operations directed and controlled, from the United Kingdom.

5. The 1988 Act and the 1988 Regulations came into force on 1 December 1988. However, under Section 13 of the 1988 Act, the validity of registrations made under the previous Act has been extended for a transitional period until 31 March 1989.

6. At the time of the institution of the proceedings in which the appeal arises, the 95 fishing vessels of the appellants failed to satisfy one or more of the conditions for

registration under Section 14(1) of the 1988 Act and thus failed to qualify for registration. Since those vessels could no longer engage in fishing as from 1 April 1989, the companies in question sought by means of an application for judicial review to challenge the compatibility of Part II of the 1988 Act with Community law.

7. In particular, in their application of 16 December 1988 to the High Court of Justice, Queen's Bench Division, the applicants sought:

- (i) a declaration that the provisions of Part II of the 1988 Act should not apply to them on the grounds that such application would be contrary to Community law, in particular Articles 7, 52, 58 and 221 of the EEC Treaty;
- (ii) an order prohibiting the Secretary of State from treating the existing registration of their vessels (under the 1894 Act) as having ceased from 1 April 1989;
- (iii) damages;
- (iv) interim relief pending final determination of the issues.

8. The Divisional Court of the Queen's Bench Division gave judgment on 10 March 1989, in which it:

- (i) decided that it was unable to determine the issues of Community law raised in

the proceedings without making a reference under Article 177 of the EEC Treaty (now Case C-221/89, currently pending before the Court); and

- (ii) ordered that, pending final judgment or further order by the court, the operation of Part II of the 1988 Act and of the 1988 Regulations be disapplied and the Secretary of State be restrained from enforcing it in respect of any of the applicants and any vessel owned (in whole or in part), managed, operated or chartered by any of them so as to enable registration of any such vessel under the 1894 Act to continue in being.

9. On 13 March 1989 the Secretary of State appealed against the Divisional Court's order for interim relief. By judgment of 22 March 1989 the Court of Appeal held unanimously that under the British constitution the courts had no power to disapply Acts of Parliament on a temporary basis. It therefore set aside the Divisional Court's order and granted leave to appeal to the House of Lords.

## II — The House of Lords' judgment of 18 May 1989

10. In its judgment of 18 May 1989 the House of Lords finds in the first place that the appellants' claims that they will suffer irreparable damage if the interim relief which they seek is not granted and they are successful in the main proceedings are well founded.

11. With regard to the question whether the British courts are empowered to suspend on a temporary basis the operation of an Act and to issue an interim injunction to that effect against the Secretary of State so as to protect the rights claimed by a party under directly enforceable provisions of Community law, the House of Lords finds in the first place that, under national law, the British courts have no power to grant interim relief in a case such as this. The considerations on which that finding of the House of Lords is based may be summarized as follows.

12. In the first place, the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible does not permit the British courts to grant interim relief which consists in suspending the operation of the Act in question. In this connection the House of Lords points out that an order granting the appellants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law not to be the law until some uncertain future date. Any such order would irreversibly determine in the appellants' favour for a period of some two years rights which are necessarily uncertain until a preliminary ruling has been given by the Court of Justice.

13. Secondly, the old common-law rule that a court has no jurisdiction to grant an interlocutory injunction against the Crown, that is to say against the government, also precludes the grant of interim relief in the main proceedings. The House of Lords points out in that connection that in *Regina v Secretary of State for the Home Department, ex parte: Herbage* [1987] QB 782, the Divisional Court of the Queen's Bench Division took the view that Article 31 of the

Supreme Court Act 1981 (which provides that the High Court of Justice may grant interim relief, where it would be just and convenient to do so, in all cases in which an application for judicial review has been made) had removed the Crown's immunity from interim relief and this was subsequently affirmed by the Court of Appeal in *Regina v Licensing Authority established under Medicines Act 1968, ex parte: Smith, Kline & French Laboratories Ltd* (No 2) [1989] 2 WLR 378. According to the House of Lords, however, those judgments were based on an erroneous construction of the Supreme Court Act 1981. It therefore overruled them in its judgment in the present case and came to the conclusion that, as a matter of English law, the courts have no jurisdiction to grant interim injunctions against the Crown.

14. Next, the House of Lords turns to the question whether Community law empowers the national courts to grant interim relief of the kind forming the subject-matter of the main proceedings, regardless of what is laid down by national law, in order to protect rights which are indeed defensible on serious grounds but whose existence has yet to be established and which are claimed by a party under Community law.

15. After setting out the position of the parties on that point, the House of Lords points out that 'Community law embodies a principle which appears closely analogous to the principle of English law that delegated legislation must be presumed to be valid unless and until declared invalid' and refers to the Court's judgment of 13 February 1979 in Case 101/78 *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten* [1979] ECR 623. Next, it refers to

paragraph 19 of the judgment of 22 October 1987 in Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, in which the Court stated 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 . . . '.

16. In those circumstances, the House of Lords considered that the dispute raised an issue concerning the interpretation of Community law and it therefore decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Where:

- (i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ("the rights claimed"),
- (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed,
- (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under Article 177 as to whether or not the rights claimed exist,

(iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible,

(v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling,

(vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection,

does Community law either

(a) oblige the national court to grant such interim protection of the rights claimed; or

(b) give the court power to grant such interim protection of the rights claimed?

(2) If Question 1(a) is answered in the negative and Question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?

### III — Course of the procedure

17. The judgment of the House of Lords was received at the Court Registry on 10 July 1989.

18. On 4 August 1989, that is to say while the written procedure in this case was in progress, the Commission brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by imposing the nationality requirements laid down in Section 14 of the 1988 Act, the United Kingdom had failed to fulfil its obligations under Articles 7, 52 and 221 of the EEC Treaty (Case 246/89, now pending before the Court). In a separate document, lodged at the Court Registry on the same date, the Commission applied to the Court for an interim order requiring the United Kingdom to suspend the application of those nationality requirements as regards the nationals of other Member States and in respect of fishing vessels which until 31 March 1989 were pursuing a fishing activity under the British flag and under a British fishing licence. By order of 10 October 1989, the President of the Court granted that application. Pursuant to that order, the United Kingdom made an order in Council amending Section 14 of the 1988 Act with effect from 2 November 1989.

19. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were lodged on 26 October 1989 by the Commission of the European Communities, represented by Götz zur Hausen, Legal Adviser, and Peter Oliver, a member of its Legal Department, acting as Agents, on 8 November 1989 by Ireland, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted by James O'Reilly, Senior Counsel at the Bar of Ireland, on 9 November 1989

by the United Kingdom, represented by T. J. G. Pratt, Treasury Solicitor, acting as Agent, assisted by Sir Nicholas Lyell QC, Solicitor General, Christopher Bellamy QC and Christopher Vajda, barrister-at-law, and on 9 November 1989 by Factortame Ltd and Others, being the appellants in the main proceedings, represented by David Vaughan QC, Gerald Barling, barrister-at-law, David Anderson, barrister-at-law, and Stephen Swabey, solicitor, of Thomas Cooper & Stibbard.

20. In its order for reference, the House of Lords expressed the wish that the Court should give priority to the case. The President of the Court decided, in accordance with the second paragraph of Article 55(1) of the Rules of Procedure, that this case should be given priority.

21. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

### IV — Written observations

#### *First question*

22. The United Kingdom begins by describing the judicial remedies available in the United Kingdom. It points out that in proceedings for judicial review, the British courts are empowered to quash the acts of public authorities on grounds including illegality arising from a breach of Community law. The effectiveness of such jurisdiction is enhanced by liberal rules as to *locus standi* and by the fact that such proceedings can be conducted expeditiously.

23. With regard to legislation, the courts do not have the right, under the British constitution, to nullify an Act of Parliament or to treat it as void or unconstitutional. It is otherwise in the case of legislation which is contrary to Community law since Article 2(1) and (4) of the European Communities Act 1972 empower the courts to uphold the primacy of rights arising from Community law. However, Parliament confers that power on the courts only at the stage when the matter is finally determined and not for the grant of interim relief.

24. The rules of English law which in this case preclude the grant of interim relief, namely the presumption that an Act of Parliament is compatible with Community law and the immunity of the Crown from interim relief are not discriminatory because they do not draw any distinction between rights arising under domestic law and those arising under Community law.

25. With regard to the argument put forward by the appellants in the main proceedings to the effect that, in a criminal prosecution against them, those proceedings and consequently the application of the relevant legislation are suspended in the event of a reference being made for a preliminary ruling, the United Kingdom points out that in those circumstances it is the proceedings initiated before the national court that are suspended and not the application of the law.

26. The impossibility of securing interim relief of the kind sought in this case is justified by important considerations of public policy such as compliance with the

fundamental limits of the judicial function and the need for legal certainty.

27. Furthermore, in terms of Community law, individuals do not normally have *locus standi* under Article 173 of the Treaty to challenge Community legislation. It follows that they cannot obtain from the Court the suspension of Community legislative measures, however serious the effects of such measures on their business may be. Admittedly, Community legislation can also be challenged in the national courts, but the Court has held that every regulation which is brought into force in accordance with the Treaty must be presumed to be valid as long as a competent court has not made a finding that it is invalid (*Granaria*, cited above). Although the Court has not ruled out the possibility that a national court may have jurisdiction temporarily to suspend a provision of Community law (*Foto-Frost*, cited above; see also Case C-143/88 *Zuckerfabrik Süderdithmarschen AG*, judgment of 21 February 1991, [1991] ECR I-415), the United Kingdom doubts whether it would be consistent with the principle of legal certainty to give the national courts such interim jurisdiction.

28. Following a brief survey of the laws of other Member States on interim relief, the United Kingdom finds that in the majority of those countries it would not seem possible to secure, by means of an application for the grant of interim measures, an order suspending the operation of primary legislation. In the Federal Republic of Germany, the Netherlands and Portugal, where there appear to be certain wider procedures for challenging legislation and granting interim relief, it is not clear that the courts would

have jurisdiction to grant a mandatory order of the kind sought in the main proceedings.

29. Next, the United Kingdom deals with the Court's case-law on national remedies for the infringement of Community law. It points out that, according to the Court's judgments of 16 December 1976 in Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043 and in Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, in the absence of Community harmonization such remedies are a matter for the national legal system provided that (a) such remedies are no less favourable than those governing domestic disputes of the same type (principle of non-discrimination) and (b) national rules of procedure do not make it impossible in practice to exercise the rights which the national courts have a duty to protect (principle of effectiveness). Furthermore, it is apparent from the judgment of 12 June 1980 in Case 130/79 *Express Dairy Foods v Intervention Board for Agricultural Products* [1980] ECR 1887, paragraph 12 that it is not for the Court to lay down general rules of substance or procedural provisions which only the competent institutions may adopt.

30. According to the United Kingdom, the concept of the direct effect of certain Treaty provisions cannot create new remedies in national law. It emphasizes that this position was confirmed by the Court in its judgment of 7 July 1981 in Case 158/80 *Rewe v Hauptzollamt Kiel* — 'Butter cruises' — [1981] ECR 1805, paragraph 44, according to which 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'.

31. The Court therefore acknowledges by implication that the scope of the protection of directly effective rights will vary from

one Member State to another pending harmonization by Community legislation. The only requirement of Community law is that existing remedies should not be emasculated to the point at which there is, in practice, no remedy at all. That was the effect of national legislation particularly in the judgment of 9 November 1983 in Case 199/82 *Amministrazione delle finanze dello Stato v San Giorgio* [1983] ECR 3595 and of 25 February 1988 in Joined Cases 331, 376 and 378/85 *Bianco and Girard v Director-General for Customs* [1988] ECR 1099.

32. Finally, the principle laid down by the Court in its judgment of 9 March 1978 in Case 106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECR 629, according to which a national court is under a duty to give full effect to provisions of Community law and to protect the rights which those provisions confer on individuals, if necessary refusing of its own motion to apply any conflicting provision of national legislation, is fully recognized in United Kingdom law. In *Simmenthal* the rights in question were not theoretical, because they had already been established by the Court in a previous judgment (judgment of 15 December 1976 in Case 35/76 *Simmenthal v Italian Minister for Finance* [1976] ECR 1871); furthermore, the action brought by *Simmenthal* before an Italian court was a well-established remedy in the national legal order. The contrast with the present case is therefore striking.

33. It follows from the foregoing that the United Kingdom's position with regard to remedies is fully in accordance with Community law. None of those remedies has been withheld or fettered in this case. In an exceptional case such as this, the protection of individuals may be ensured by the Court's ability to expedite any reference for a preliminary ruling submitted by a national court (Article 55 of the Rules of

Procedure) and by the Commission's ability to obtain interim measures under Articles 169 and 186 of the EEC Treaty, as in this case.

34. In conclusion, the United Kingdom submits that the answer to Question 1(b) should be as follows: 'Community law does not itself confer on a national court a jurisdiction to grant an interim order to suspend national legislative measures on the basis of claimed or putative rights under Community law having direct effect, if no such remedy exists as a matter of national law'.

35. Ireland points out, as a preliminary remark, that what is at issue in this case is not the enforcement of established rights enjoyed by the appellants in the main proceedings under provisions of Community law which have direct effect, but whether interim protection may or must be granted before the national court decides whether the appellants enjoy those rights and, if so, whether such rights have been infringed.

36. Ireland goes on to state that the Court has consistently been reluctant to intervene in the sphere of national remedies for the enforcement of rights conferred on individuals by Community law, even where such rights (or their infringement) have been established. Ireland refers in that regard to the judgment of 16 December 1976 in Case 33/76 *Rewe*, cited above, in which the Court ruled that, in the absence of Community rules on remedies in the national courts, it is for the domestic legal system of each Member State to ensure the

protection of the rights arising from the direct effect of Community law.

37. Furthermore, the Court ruled in its judgment of 7 July 1981 in Case 158/80 *Rewe*, 'butter cruises', cited above, that the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law. The Irish Government emphasizes that, if it were otherwise, there would be an unwarranted interference by the Court in the manner in which national courts apply Community law according to internal procedures.

38. According to Ireland, it does not follow from the case-law of the Court concerning the principle of effectiveness (*Comet*, cited above; judgment of 10 July 1980 in Case 826/79 *Amministrazione delle finanze dello Stato v Mireco* [1980] ECR 2559) that there is a right to interim protection.

39. Finally, Ireland submits that it would be wholly inappropriate to require the creation of new remedies in national law. Divergences between the national systems as to the right to interim protection can be removed only by legislation on the part of the Council. In the absence of a Community measure of that kind, any problem raised in that regard by national law may be dealt with in the context of a direct action brought by the Commission against the Member State in question.

40. In conclusion, Ireland submits that the answer to Question 1 should be as follows: '(a) Community law does not in the circumstances described in this question oblige the national courts to grant interim protection

of the rights claimed where the national court has no obligation or power under national law to grant such protection; (b) Community law does not in such circumstances give the national court power to grant interim protection of the rights claimed if the national court has no power to grant such interim protection under national law'.

41. The appellants in the main proceedings point out, as a preliminary remark, that they have never suggested that in the ordinary event the grant of interim protection should be mandatory. However, in the light of the specific circumstances of this case, they contend that the national court is obliged in the present case to make an appropriate protection order.

42. The appellants go on to survey the Court's case-law concerning 'directly effective' provisions of Community law and the role of the national courts with regard to the rights conferred on individuals by those provisions.

43. The appellants point out that, according to that case-law, rules of Community law which are of 'direct effect' must be uniformly applied in all the Member States from the date of their entry into force and for as long as they continue in force (judgments of 10 July 1980 in Case 811/79 *Amministrazione delle finanze dello Stato v Ariete* [1980] ECR 2545 and in Case 826/79 *Mireco*, cited above; and judgment of 9 March 1978 in Case 106/77 *Simmenthal*, cited above). Those rules constitute a direct source of rights and duties for all those affected thereby (judgment of 9 March 1978 in *Simmenthal*, cited above) and form part of the citizens' legal heritage (judgment of 5 February 1963 in Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 1). The rights arising therefrom for individual citizens are created by the provisions of Community law themselves and not by decisions of the Court of Justice which interprets those provisions (judgment of 14 December 1982 in Joined

Cases 314/81, 315/81 and 316/81 and 83/82 *Procureur de la République v Waterkeyn* [1982] ECR 4337).

44. It is upon the national courts that the obligation of ensuring the legal protection which individuals derive from directly effective provisions of Community law is imposed (judgments of 16 December 1976 in Case 33/76 *Rewe*, and Case 45/76 *Comet*, cited above; judgment of 27 March 1980 in Case 61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana* [1980] ECR 1205). That obligation on the part of the national courts cannot be diminished or avoided on the ground that the Commission is empowered to take action against a Member State under Article 169 of the Treaty or that it may within the framework of such proceedings obtain interim measures from the Court pursuant to Article 186 of the Treaty. That follows from the Court's judgment of 5 February 1963 in Case 26/62 *Van Gend en Loos*, cited above, and its judgment of 3 April 1968 in Case 28/67 *Molkerei-Zentrale Westfalen v Hauptzollamt Paderborn* [1969] ECR 143.

45. The appellants emphasize that the protection afforded to individuals by the national courts must be effective (judgment of 9 July 1985 in Case 179/84 *Bozzetti v Invernizzi* [1985] ECR 2301, paragraph 17) and not merely symbolic. Such protection must also be 'direct and immediate' (judgment of 19 December 1968 in Case 13/68 *Salgoil v Italy* [1968] ECR 453, at pp. 462 and 463). A temporary impediment to the full effectiveness of Community law is not permitted (judgment of 9 March 1978 in *Simmenthal*, cited above, at paragraph 23). Consequently, any provision of a national legal system and any legislative, administrative or judicial practice which may impair the effectiveness of Community law by withholding from the national courts the power to give appropriate protection is itself incompatible with Community law (judgment of 9 March 1978 in *Simmenthal*,

cited above; judgments of 10 April 1984 in Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 and of 15 May 1986 in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651).

46. That is the case with regard to two rules of English law which preclude the grant of the interim relief sought by the appellants.

47. In particular, a reference for a preliminary ruling on the substance of the case is rendered pointless by the presumption of compatibility because that presumption prevents the national court from safeguarding the position until such time as the Court gives judgment. Since that presumption restricts the freedom of the national courts to refer to the Court any question of Community law which needs to be resolved in order to enable them to give judgment, it is incompatible with the principle of 'effective protection' and with the second paragraph of Article 177 of the EEC Treaty.

48. The paramount importance attributed by Community law to the protection of rights conferred on individuals by its provisions in the period between the submission of a reference for a preliminary ruling and the decision of the Court is confirmed by the judgment of 22 October 1987 in Case 314/85 *Foto-Frost*, cited above, paragraph 19.

49. With regard to the rule concerning the Crown's immunity from interim relief, the

appellants point out that this obstacle is artificial because, if they disregarded the 1988 Act and were prosecuted by the Crown for infringing it, the Crown would be unable to enforce that Act since the national court, by making a reference to the Court pursuant to Article 177 of the Treaty, would suspend the proceedings and protect the rights claimed by the appellants.

50. In any event, the rule concerning the immunity of the Crown constitutes an anomaly as regards the exercise of rights arising from provisions of Community law in that: (a) interim relief is available against all other defendants, with the exception of the Crown, although more often than not it is in fact against the authorities of the State, namely the Crown, that rights conferred by Community law have to be enforced, and (b) final relief is available against the Crown.

51. According to the appellants, Community law renders inapplicable the two rules of English law which remove the possibility of obtaining interim relief of the kind sought in the main proceedings. They emphasize that, if it were otherwise, the United Kingdom would be able flagrantly to disregard Community law in cases such as this, whilst at the same time taking advantage of the fact that, since a reference was likely to be made to the Court for a preliminary ruling, holders of rights conferred by Community law would be deprived of the possibility of exercising them in the interim period. Such deprivation of rights would in practice be permanent in cases where, as in the main proceedings, an action for damages is not available (since, as English law at present stands on the authority of *Bourgoin v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, no action for damages lies against the

Crown for infringing a Treaty provision, unless bad faith on the part of the Crown is established) and where the rights of applicants could never be given full retro-active protection in any other way when the final decision actually came to be made. All those considerations reveal the extent of the need, particularly in cases such as the main proceedings, for effective protection to be made available by way of interim relief.

the circumstances referred to therein, 'Community law requires the courts of the Member States to have the duty (or at least the power) to grant such interim protection as is appropriate and to disapply to the extent necessary all national legislative measures, rules and judicial practices which constitute obstacles to the grant of effective protection to those such as the applicants in the present case, who rely on directly effective Community law rights'.

52. Finally, the appellants point out that there are a number of reasons why it is entirely misplaced for the respondent to rely on the Court's judgment of 7 July 1981 in Case 158/80 *Rewe*, cited above, in order to justify the impossibility of obtaining interim relief. In the first place, there is no question of there being any need to create new remedies in the national courts in order to provide appropriate interim relief since the remedies which already exist under English law are perfectly adequate; it is sufficient for the two rules concerning the presumption of compatibility and Crown immunity to be disappplied. Secondly, and in any event, the dicta in the aforesaid judgment are subject to the proviso, laid down by the Court in its judgments of 16 December 1976 in *Comet* and *Rewe* and reiterated in its judgment of 9 November 1983 in *San Giorgio* and elsewhere, that in no circumstances may national measures be such as to render it impossible in practice or excessively difficult for the rights conferred on individuals by Community law to be protected. It is inconceivable that the Court would apply that proviso to cases of procedural, evidential and limitation rules, but not to a rule of *locus standi* such as that which was in issue in Case 158/80 *Rewe*.

54. The Commission begins with a comparative survey of Community legislation and the national legislation of the Member States on interim relief.

55. It points out that in so far as Community law is concerned, Article 185 of the EEC Treaty provides, in proceedings for annulment, for the possibility of suspending a Community measure 'even with respect to primary legislation'.

56. On the basis of its survey of national legislation, the Commission comes to the conclusion that the laws of all the Member States other than Denmark and the United Kingdom empower the courts to suspend measures which are open to challenge before them. Even in Denmark the courts have jurisdiction to grant such interim relief in certain limited classes of public law proceedings.

53. In conclusion, the appellants submit that the answer to Question 1 should be that, in

57. Next, the Commission refers to the case-law of the Court on protection by the national courts of the rights which Community law confers on individuals.

58. In the first place, the Court has emphasized the need for a remedy of a judicial nature against any decision of a national authority refusing to grant an individual the benefit of a right conferred by Community law (judgments of 15 October 1987 in Case 222/86 *Unectef v Heylens* [1987] ECR 4097 and of 15 May 1986 in Case 222/84 *Johnston*, cited above).

59. Furthermore, it follows from the case-law of the Court on actions brought by individuals in a national court in order to protect the rights conferred upon them by Community law (judgments of 16 December 1976 in *Comet* and *Rewe*) that, in the absence of Community rules, the procedures relating to such actions are governed by national law, subject to compliance with the principles of non-discrimination and effectiveness.

60. The principle of non-discrimination is not directly applicable to this case since the British courts have no jurisdiction to grant interim relief against the Crown even in cases involving English law alone. In contrast, the principle of effectiveness is directly relevant to this case. The Member States are bound to observe that principle quite independently of the principle of non-discrimination. Accordingly, when a rule contravenes the principle of effectiveness, it is no answer to argue that in equivalent cases involving national law alone the rule applies in exactly the same way (judgment of 9 November 1983 in Case 199/82 *San Giorgio*, cited above).

61. According to the Commission, the most important judgment ever delivered on the scope of the principle of effectiveness is that of 9 March 1978 in Case 106/77 *Simmenthal*, cited above, paragraphs 15, 16 and 21 to 23. That ruling makes it abundantly clear that the principle of effectiveness is an immediate and inevitable consequence of the concept of direct applicability. It would be nonsense to state that certain provisions of Community law may be relied upon before the national courts if any attempts to rely on them could in fact be thwarted by national rules on remedies or procedure.

62. It follows that the national courts are required to ensure that the parties who rely in proceedings before them on provisions of Community law having direct effect have an effective remedy in national law whereby effect may be given to their rights under those provisions. According to the Commission, the national courts must be empowered to grant interim relief, but without being required to do so in every case in which a plaintiff relies on a directly applicable provision of Community law.

63. The fact that in national law the contested national measure is presumed to be compatible with Community law unless and until it is declared incompatible constitutes no logical obstacle to the grant of interim relief suspending its application. The same presumption exists in Community law (*Granaria*, cited above) but that does not prevent the Court from suspending pursuant to Article 185 of the Treaty the application of Community measures by way

of interim relief. In English law as well there is a presumption that measures adopted by local authorities are lawful, but that does not prevent the courts from suspending their application by the grant of interim injunctions (see *De Falco v Crawley BC* [1980] All ER 913 (CA); also *Regina v Kensington and Chelsea Royal LBC, ex parte: Hammel* [1989] All ER 1202 (CA)).

confers on individuals includes the obligation to consider whether interim protection of the rights claimed against the authorities of a Member State should be granted in order to avoid irremediable damage and, where appropriate, to grant such interim relief.

### *Second question*

64. The Commission points out that, according to the House of Lords, the damage suffered by the appellants is likely to be irremediable unless they are granted the interim protection sought and they are successful in their main action, since they will probably have no remedy in damages in view of the aforesaid judgment of the Court of Appeal in *Bourgoin*.

67. The United Kingdom points out that in view of the proposed answer to Question 1(b) there is no need to answer the other questions submitted by the House of Lords.

65. According to the Commission, it could be argued that the likelihood of irremediable damage necessarily implies that the only effective remedy is interim relief. If a party can neither obtain interim relief in order to prevent the damage from occurring nor recover damages *ex post facto*, the Commission submits that on any view he is deprived of any effective remedy whereby effect may be given to his rights. That situation cannot be justified by the fact that the absence of any remedy is only temporary since, according to paragraph 23 of the judgment in *Simmenthal*, even the temporary absence of an effective remedy is contrary to the principle of effectiveness.

68. Ireland submits that the second question need not be answered in the light of the answer proposed to the first question. However, if the Court of Justice were to give an answer to that question, Ireland suggests that it should be as follows: 'the conditions for the granting by a national court of such interim relief are a matter solely for national law, subject only to the qualifications that such conditions must not discriminate against Community law by comparison with national law, and must not infringe the prohibition of discrimination on grounds of nationality contained in Article 7 of the EEC Treaty'.

66. In conclusion, the Commission submits that Question 1 should be answered as follows: 'the obligation on national courts to apply Community law having direct effect and to protect rights which the latter

69. The appellants in the main proceedings point out that if the Court's answer to the first question were that the national courts are empowered to grant interim relief, the answer to the second question should be that Community law leaves the Member States free to determine the criteria upon which that power is to be exercised, provided always that the criteria are not

defined or applied in any respect: (a) less favourably than would be the case if rights under Community law were not involved, or in any event (b) so as to render protection of the rights impossible in practice or excessively difficult to achieve.

70. On that basis the appropriate criteria would be those which the English courts currently apply with regard to interim relief and which involve the court asking itself (a) whether there is a serious issue to be tried, or, in other words, whether the action has a 'real prospect of success' (in that regard the appellants refer, in particular, to the decision of the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396); (b) if so, whether damages are obtainable and, if they are, whether they constitute an adequate remedy for one side or the other; (c) if not, where the balance of convenience lies as between the parties. In considering the latter question, the court should, in particular, weigh the consequences for the applicant if interim relief is not granted against the consequences for the defendant if interim relief is granted. It could also take into account any other relevant factors such as, for example, the applicant's delay in seeking an interim remedy, or the interaction of private rights with public interests, which is pertinent to this case.

71. Next, the appellants explain in detail the reasons why they satisfy all the aforesaid criteria.

72. The Commission points out, as a preliminary remark, that the criteria for the grant of interim relief by the Court in accordance with Article 83(2) of the Rules of Procedure, as interpreted by the Court, are that the applicant must make out a prima-facie case and show the existence of urgency such that interim measures are necessary to avoid serious and irreparable harm. Although Article 86(2) of the Rules of Procedure provides that the Court may require the applicant to lodge a security as a condition for enforcing the order, the Court rarely imposes such a requirement.

73. Under English law, the criteria to be applied for the grant of interim protection were laid down in (a) the aforesaid judgments in *Falco* and *Hammel* concerning the grant of interim relief against public bodies other than the Crown, such as local authorities, and (b) the judgment of the House of Lords in *American Cyanamid* concerning the grant of interim relief in proceedings between private individuals. The Commission states that, according to the latter judgment, the court must first be satisfied that the applicant's claim is neither frivolous nor vexatious. If that condition is fulfilled, then the matter is to be determined on a balance of convenience. Finally, if the court decides to grant the interim relief sought, the applicant is required to give a cross-undertaking as to damages.

74. Next, the Commission points out that there is nothing to prevent the English courts from applying the criterion already

established by their case-law for the grant of interim relief against local authorities.

75. In any case, the Commission submits that, in accordance with general principles, the following matters are to be weighed up by the national courts: (i) the apparent strength of the applicant's case; it is not for Community law to determine whether the applicant must show a serious issue to be tried (*American Cyanamid*) or make out a simple prima-facie case (Article 83(2) of the Court's Rules of Procedure) or make out a strong prima-facie case (*De Falco* and *Hammel*); (ii) the balance of convenience, which includes considerations of urgency, the risk of irreparable damage and the public interest. Where, as in this case, the applicant is deprived of his right to carry on his economic activity until the outcome of the main proceedings, great weight must be given to that factor. That is all the more so where, as in this case, he is likely to go bankrupt as a result.

76. According to the Commission, the fact that a cross-undertaking cannot be required in a particular case need not constitute an obstacle to the grant of interim relief.

77. Finally, the Commission emphasizes that in no case can any of the circumstances which may militate against the grant of interim relief, whether taken alone or with other such circumstances, operate as an absolute bar to such relief, since the person concerned would then be denied an effective remedy. For instance, the fact that the impugned measure constitutes the straightforward application of an Act of Parliament cannot automatically preclude its suspension.

78. In conclusion, the Commission submits that Question 2 should be answered as follows: 'in deciding whether to grant interim relief national courts must weigh up the interests involved in each case, without considering any particular circumstance or set of circumstances as constituting generally an absolute bar to such relief. Moreover, the criteria to be applied by national courts may not be less favourable to the individual than those applying to similar cases relating to national law alone'.

C. N. Kakouris  
Judge-Rapporteur