INTERIM MEASURES BEFORE NATIONAL COURTS IN THE CONTEXT OF EU AND CZECH LAW¹

Václav Stehlík²

Faculty of Law, Palacký University Olomouc, Czech Republic
email: vaclav.stehlik@upol.cz

STEHLÍK, Václav. Interim measures before national courts in the context of EU and Czech law. *International and Comparative Law Review*, 2012, Vol. 12., No. 2, pp. 7–42. DOI: 10.1515/iclr-2016-0084.

Abstract: The article deals with the rules for a grant of interim measures in the context of EU law and its application in national judicial proceedings. It covers the key case-law of the Court of Justice of the EU related to the regime, conditions and limits of the interim measures and adds a reflection of practice of Czech courts. Article pays particular attention to the conditions for suspension of the application of national law measures.

Keywords: EU Law, national courts, national procedural rules, interim measures

1. Basic framework

In the decisions in cases *Rewe*³ and *Comet*⁴ the Court of Justice of the European Union (further only "Court") made it clear that the proper application of EU substantive law is primarily based on the use of national procedural rules. However, these rules may be corrected by principles of equivalence and effectiveness. After *Rewe/Comet* cases the Court used these corrections only exceptionally; its approach turned into more rigorous scrutiny especially at the end of 80s and beginning of 90s starting with *Peterbroeck/van Schijndel*⁵ line of case-law. This

1 The article is based on the research partially published in Stehlík, V.: *Aplikace národních procesních předpisů v kontextu práva EU*, Leges, Praha 2012, s. 264, and on further research supported by the Czech Grant Agency project No. P408/12/1003 "European Union law before Czech courts: theory and practice"; this concerns especially the last chapter of this paper.

2 Department of European Union Law, Faculty of Law, Palacký University in Olomouc, Czech Republic; e-mail: vaclav.stehlik@upol.cz.

3 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirthschaftskammer für das Saarland* [1976] ECR 1989.

4 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.

5 Comp. especially cases C-312/93 *Peterbroeck, van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599 and C-430-431/93 *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

new development brought in more confusion about the question what national procedures or institutes will not stand the equivalence or effectiveness scrutiny.

The following analysis will focus on the impact of Court's case-law on the powers of national courts to issue interim measures and provisionally suspend the application of the EU law or national law with consequences for the EU law. A typical **feature** of these measures is their **temporary nature**: they are limited, on one end, by the initiation of the proceedings and, on the other, by the final decision on the matter. In many cases, without these powers the final decision of national courts on the substance of the dispute would be deprived of its necessary effect. Consequently, particular controversy may concern provisions which do not give national courts the power to adopt interim measures or limit this power to specific conditions. From a different perspective, the diversity of procedural regulations of the Member States may weaken the effective and uniform application of the EU law in Member States.

Generally speaking, in terms of the EU law the availability of an interim measure is desirable at least for two reasons:

- it contributes to the protection of individual rights which can be threatened by incorrect implementation;
- it gives a protection to the EU law itself since an incorrect implementation can compromise the fulfilment of objectives for which it was adopted.

Since no harmonized EU based legislative rules on interim measures before national courts have been adopted, the basic rules have been formulated by the Court. In the case-law it is possible to distinguish **two variations**:

1. interim suspension of **national law** in case that there is an alleged breach of the EU law;
2. interim suspension of the **EU law** or national implementing regulations if national courts have doubts about the validity of the EU law.

In the following both these alternatives will be analysed with respect to the basic case-law and subsequent cases, including the limits on the application of the EU standards in this area.

2. *Factortame I* case: interim measures against national law

The first situation was covered in the famous case *C-213/89 Factortame I*⁶ which is often mentioned with regard to the establishment of the principle of primacy of the EU law over national constitutional rules. At this point it may be recalled that the dispute before the national court concerned British fishing quotas which were used by ships with Spanish crew, however, flying the British flag. It was regarded as an infringement, or as a circumvention of the pro-

6 *C-213/89 R. v Secretary of State for Transport, ex parte Factortame Ltd. and Others* [1990] ECR I-2433.

visions concerning fishing quotas for the UK. Therefore, the British regulation conditioned the “law of the flag” by a minimum percentage of persons with British nationality within the crew. It was likely that it was a restriction on the free movement of workers and discrimination on grounds of nationality.⁷ However, the question was whether the British courts may, until the question is resolved in a preliminary ruling, temporarily suspend the application of the contested regulation. This was not possible due to the constitutional doctrine of absolute sovereignty of the British Parliament. Basically, under the British law, an act of the Parliament has to be fully applied until its abolition by the Parliament itself. According to the *House of Lords*, this presumption of validity was also used in the context of the *Factortame I* case,⁸ although at the same time the *House of Lords* admitted that the Spanish sailors would suffer irreparable harm if it was not possible to apply an interim measure.⁹

However, the Court was of a different opinion. Referring to 106/77 *Simmenthal*¹⁰ case it emphasized the requirement for full and uniform application of the EU law in all Member States and the consequent obligation of national courts to preferentially apply the EU law. In this context it may be noted that according to Italian national constitutional provisions in *Simmenthal* the national court itself could not disapply Italian law in case of its conflict with the EU law. The contradiction of Italian and European law was perceived by the Italian *Corte Costituzionale* as a constitutional-level issue. Therefore, according to the procedures in case of an alleged non-compliance, the court first had to refer the case to the constitutional court which would then decide with regard to the principle of the primacy of the European law about non-application of the relevant Italian legislation. But these powers did not belong to the court deciding the dispute. According to the Court, these procedural regulations prevented application of the EU law and violated the principle of primacy, according to which any national court has the right to directly decide on preferential application of the EU law. Any elimination of conflicting laws is a matter of national procedures that the EU law does not take into consideration.

Similarly, in *Factortame I* case there was a national-law based obstacle for the national court to fully apply the EU law. Until the authoritative interpretation of the Court and the subsequent priority application in the case concerned, the provisions of constitutional law prevented it from using certain procedural institute: to suspend the application of the national law and provide preliminary or interim primacy to the potentially directly effective EU law. Both cases concerned a procedure that prevented or hindered a prompt enforcement of the EU

7 As later stated by the Court in a preliminary ruling procedure.

8 It is interesting that *Divisional Court* met the request of applicants to issue interim measure; *Court of Appeal* and then *House of Lords* did not.

9 For more see e.g. Schermers, H., G., Waelbroeck, D., F.: *Judicial Protection in the European Union*, Kluwer Law International, 6th edition, Hague/London/New York 2001, p. 208.

10 106/77 *Simmenthal SpA v Ministero delle Finanze* [1977] ECR 629, paras. 14 and 17.

law. The difference was that in one case the existing procedural steps were found superfluous; in the second case they were missing.

The parallel between the two cases was also reflected in the reasoning in *Factortame I* case where the Court referred to the conclusions in *Simmenthal* case and reiterated that:

*“any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.”*¹¹

In relation to the assessment of the application of national procedural rules, it is interesting that in *Simmenthal* case the Court quite emphatically demanded priority application of the EU law, without leaving room for national procedures, even though these procedures ultimately always led to the recognition of the primacy of the EU law – we could say that enforcement of the EU law within the framework of national procedures was ensured. As was noted by *Dougan*, in *Simmenthal* case the Court did not work with the space given by *Comet/Rewe* case-law which in principle accepts the national procedural steps leading to the enforcement of the EU law. The Court primarily placed emphasis on full application of the EU law by the court which directly decides the dispute.¹²

A similar starting position was chosen by the Court in *Factortame I* case when assessing the powers of the national court to grant an interim measure. In this latter case it also did not refer to the application of the *Comet/Rewe* principles. With respect to the above findings, the Court stated that:

*“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.”*¹³

According to the Court, this interpretation is confirmed by the system introduced by the then Article 177 of the Treaty (now Article 267 TFEU) governing preliminary rulings:

11 Comp. *Factortame I*, (emphasis added), paras. 18–19 with reference to *Simmenthal* case, paras. 22 and 23.

12 For more see *Dougan*, M.: National remedies before the Court, Hart Publishing, Oxford and Portland Oregon, 2004, pp. 125–126.

13 See *Factortame I*, point 21, (emphasis added).

“whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court 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.”¹⁴

To summarize the aforementioned, according to the Court **the effectiveness of the EU law** would be impaired if the national court would not have the power to suspend the application of the contested regulation in relation to the judgment it is to issue in the given case. If in the absence of restrictive national law it would issue this interim measure, it must have the power to do so. In other words, the national court has this **power directly under the EU law**. This power is, therefore, autonomous and independent on national law.¹⁵ That conclusion follows also from the system of legal remedies to protect rights in the EU law which also includes a preliminary ruling. It would be against the effectiveness of this procedure and proper application of the EU law, if the national court which initiates a preliminary ruling in a concrete case, could not simultaneously suspend the application of the contested regulation and adjust the position of the parties until the Court considers the matter. The time aspect plays a significant role here. In this context it may be noted that the time gap between the start of the preliminary ruling and the response of the Court is not negligible¹⁶ and after its expiration without issuing an interim measure, securing the rights under the EU law could be very difficult, or even impossible.

However, despite the relatively strict formulation of the decision, the *Factortame I* case may be read with certain **ambivalence** as far as the Court's reasoning and the possible impact of its decisions are concerned.

On the one hand, the decision of the Court is formulated strictly towards the national law. With regard to the reference to *Simmenthal* case and the requirement of primacy of the EU law over national procedural rules which make full application of the EU law unnecessarily difficult or postpone it in time it would be possible to argue that the interim measure which restricts the application of potentially conflicting national law must be available; the opposite rule of national law which in *Factortame I* case did not allow for interim measure to be issued cannot be applied. In this perspective, the national judges would have **an obligation to create a new judicial remedy** which did not exist in the national

14 Comp. *ibid*, point 22, (emphasis added).

15 Comp. Apter, S., A.: *Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?*, vol. 7.2, Electronic Journal of Comparative Law, (June 2003), available at <http://www.ejcl.org/72/art72-1.html>, p 9.

16 Length of preliminary ruling procedure is currently about 16 months; expedited and accelerated procedures from 2 to 6 months, urgent preliminary ruling procedure a little over 2 months. Current information at http://curia.europa.eu/jcms/jcms/Jo2_7032/; for details on accelerated and urgent procedures see Stehlík, V.: *Zrychlená a naléhavá řízení před Soudním dvorem EU – teorie a praxe*, Právník, no 5, 2011, pp. 448–468.

law before. This is in contrast with the earlier rhetoric of the Court in *Nord*¹⁷ that the EU law creates no new remedies¹⁸ and is dependent on national law.

It is evident that this interpretation of the Court's decision is **highly intrusive** both in relation to the national law and to the position of national courts and judges deciding the matter. It requires that the courts become active "makers" of law, both in the absence of codification in a certain area, and in case of (explicit) opposite national rules applied under British law. It does not represent a situation when there is a discrepancy between the written rules of national and EU law (e.g. directly effective prohibition of restrictions to the free movement of goods versus its restrictions by the national law) but creating new rules justified by an undefined general principle of effectiveness. Generally speaking, the position of the courts as "co-makers" of law is more common in Anglo-Saxon legal system which is essentially based on the precedential nature of the decisions of the courts, but it is perceived to be considerably less legitimate in the continental system of law where the courts are strongly linked with the application of statutory law.

From this perspective *Factortame I* case had a **potential to differentiate itself from the earlier line of case-law** in the area of primacy of the EU law and attitude of the Court to national procedural rules. In previous cases, national courts were encouraged not to apply national law which was contrary to the EU law or to apply written provisions of the EU law instead of national law. The cases were related to both substantive¹⁹ and procedural aspects of national law.²⁰ It did not concern any creation of new procedures but "only" non-application of the existing ones. In *Factortame I* case, there were no written rules in the British law concerning the powers and procedures of courts neither on national nor on European level. If the Court were to stay with this strict approach which it indicated in *Factortame I* case, it would lead a significant strengthening of the powers of national courts in the enforcement of the EU law.

But **on the other hand** – as comments in literature indicate²¹ – the Court did not strictly follow that line of reasoning. We cannot overlook the **contradiction** in its decision. Although it formulated the power of national courts to issue interim measures, it did not further specify **conditions** under which such measures may be issued, despite the fact that the *House of Lords* specifically asked

17 158/80 *Rewe-Handelsgesellschaft Nord mbH v Hauptzollamt Kiel* [1980] ECR 1805.

18 Ibid, point 44.

19 See f.e. famous cases 6/64 *Costa v E.N.E.L.* [1964] ECR 585 (prohibition of increasing tariffs during transition period) or 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 (application of secondary legislation in common agricultural policy).

20 See above *Simmenthal* case.

21 Comp. f.e. Dougan, quoted at footnote 12, p. 320 or Ward, A.: *Judicial Review and the Rights of Private Parties in EU law*, 2nd completely revised ed., Oxford University Press, Oxford 2007, s. 96–101.

about them.²² Thus, the Court left their formulation to the national law, more precisely to the application of the principle of equivalence and – in the context of the absence of an equivalent means in British law – to a great extent to the application of the principle of effectiveness.²³ The ambiguity of the decision can be seen in the fact that the Court did not refer directly to the application of *Comet/Rewe* principles; their relevance was confirmed in later decisions.²⁴

From the aforementioned it is clear that the Court's decision in *Factortame I* case was not unequivocal and its impact was not as major as might be deduced from above.²⁵ The Court incorrectly interpreted British law and it seems that the rather austere decision²⁶ was based mainly on the presumption that the remedy concerned was available in British law. Perhaps that is why the Court did not define more detailed rules, leaving the procedures of national courts upon the application of principles of equivalence and effectiveness.

It should be added that subsequently **British courts** dealt with *Factortame I* case in this way. The strict requirement of the Court for the existence of power to issue an interim measure was interpreted narrowly. In *Factortame I* decision itself, the *House of Lords* followed the premises of the Court and permitted issuing an interim measure. However, under the instructions of the *House of Lords*, in other proceedings before British courts when the direct effect of the EU law was not entirely clear, interim measures were to be applied only in exceptional cases. As a result of this process, those who applied for this procedural institute were not usually successful.²⁷ This ambivalence required further explanation and it was the Court's motive to further specify the conditions for the issuance of an interim measure in the subsequent case-law.²⁸

Despite the limited interpretation of the findings in *Factortame I* by British courts, this case may be considered as an **important stone in the mosaic of the application principle of the primacy** of the EU law, the status or the obligations of national courts in its enforcement, providing protection to individual rights and ensuring their effective judicial protection. The importance of the case is emphasised for example by *Craig* and *de Búrca*; they state that although *Factortame I* case does not differ from the previous case-law in purely legal sense, its

22 See *Factortame I*, point 15.

23 Comp. Dougan, quoted at footnote 12, p. 320.

24 Explicitly see later case *Unibet*, point 43, which is discussed in the text below.

25 Their opinions and development after *Factortame I* case is summarized by Ward, quoted at footnote 21, pp. 96–101.

26 Overall the decision has 24 paragraphs, including the legal and factual questions, preliminary rulings and decision on the costs; the Court's reasoning itself is elaborated only in 6 paragraphs (17–22).

27 See Ward, quoted at footnote 21, p. 171.

28 See below the discussion on *Zuckerfabrik* and *Atlanta* cases and especially the aforementioned *Unibet* case.

impacts in the national law are rather dramatic.²⁹ The Court refuted earlier theses that the EU law does not create any new remedies and in the absence of EU harmonization it is dependent on national law. We may remind the aforementioned, purely practical reason for this Court's decision: if it was not possible to issue an interim measure and the rights of the parties would be determined only in the final decision of a national court, in practice this time delay could mean that the final judgment would not be able to ensure proper application of the EU law, it would be useless to the parties and it would irreversibly damage their interests. The fact that conclusions in *Factortame I* needed further clarification is not so surprising. It is a common feature of the dynamic nature of Court's case-law which may be witnessed in many areas.

Despite the ambiguity of its assessment and diversity of comments, in a wider context *Factortame I* case can be considered as one of those cases from the early 90s where – under the auspices of application of the principle of effectiveness – the Court made **more severe interventions into national procedural rules**. Among its “companions” in this period there are cases as *Dekker*,³⁰ (decided in 1991, the same year as *Factortame I*), *Emmott*³¹ and *Francovich*³² (decided also in 1991), or *Marshall II*³³ (decided in 1993). Eventually, after *Marshall II* case, the Court eased its case-law,³⁴ explicitly revised some of its conclusions,³⁵ and developed some others.³⁶ In later cases, the Court increasingly respected national selection of procedures and relied on the application of the principle of equivalence and effectiveness by the national court adjudicating the dispute.

29 See also Craig, P., de Búrca, G.: EU law – text, cases and materials, 5th ed., Oxford University Press, Oxford 2011, p. 226.

30 C-177/88 *Dekker v Stichting voor Jong Volwassenen (VJV) Plus* [1990] I-ECR 3941 where the Court – contrary to the explicit national legislation – inferred objective liability of employers for discrimination against employees on grounds of sex without the need to prove the responsibility of the employer.

31 C-208/90 *Emmott v Minister for Social Welfare* [1991] ECR I-4269 where according to the Court did not apply the time limits for claims resulting from unexecuted directive; for detail see below the part dedicated to time limits.

32 C-6 and 9/90 *Franovich and Bonifaci v Italy* [1991] ECR I-5357 and the State's liability for damages caused by breach of the EU law.

33 C-271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367 where the Court stated non-application of national limits for damages and the power of national courts to adjudge interest.

34 See Craig, P., de Búrca, G.: EU law – text, cases and materials, 5th ed., Oxford University Press, Oxford 2011, pp. 227–231.

35 E.g. conclusions in *Emmott* case were found specific for the circumstances of the case – comp. C-410/92 *Johnson v Chief Adjudication Office* [1994] ECR I-5483, point 26.

36 E.g. conditions for liability for damages in C-46/93 a C-48/93 *Brasserie du Pecheur SA v Germany a R. v Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029 and the formulation of serious breach of the EU law as a condition for liability in case of a broad discretion of Member States.

As indicated above, even the conclusions from *Factortame I* did not avoid certain **clarifications**. It is connected with the fact that in *Factortame I* itself the conditions for issuing an interim measure were not explicitly addressed and the Court left it over to the national law. It seems rather strange especially in a situation if these provisions are completely missing in national law. Therefore, it was up to the national court – in this case the *House of Lords* – to formulate these conditions. As stated above, the conditions formulated by the *House of Lords* were not very favourable to recognizing the powers of British courts to issue interim measures; therefore, in practise they were limited only to exceptional cases.

The matter of issuing interim measures was opened soon after *Factortame I* in *Zuckerfabrick* and *Atlanta* cases. In these decisions, the conditions for issuing interim measures were formulated; both in relation to national legislation implementing the EU law, as well as in relation to the EU law itself. There was also a related question of the applicability of these conditions on a *Factortame I* case-like situation. This was later, after almost two decades, clarified in *Unibet* case. All these cases will be discussed successively below.

3. Interim measures against national implementing legislation and EU law

From the aforementioned it follows that *Factortame I* was viewed primarily through the prism of EU law primacy. It confirmed conclusions about the structural applicational primacy as it was formulated in *Simmenthal* case. As a result, national procedural rules must give way to ensure full application of the EU law. The subsequent case-law on issuing interim measures concerns a slightly different situation. As we noted earlier it is the question of whether and under which conditions the interim measure against the EU law is permitted, either directly or indirectly through national law. In this respect, again we may distinguish two variants:

- **suspension of the application of the national implementing legislation** which was issued in order to implement the EU law;
- **suspension of the application of the EU law itself** (directly effective) without any national implementing legislation.

In the early 90s – in a relatively short time interval – these variations were subject to the Court's decision in preliminary ruling procedures primarily in cases *Zuckerfabrik* and *Atlanta*, which were initiated by German courts. In the following part, we will focus closer on these cases and the subsequent case-law.

3.1 Interim measure against implementing acts: the basic premise

In relation to national law which was issued in order to implement the EU law, the basic problem lies in the fact that any temporary suspension of implementing legislation which is supposed to “bring the EU law to life” actually suspends also

the application of the EU law itself. A temporary suspension of national implementing legislation – i.e. basically the legislation issued at national level under the authorization of the EU legislator – can be at the expense of proper application of the EU law. In some respects this situation is **similar to *Factortame I***: in both situations, national court deciding the matter is to suspend the application of *national law*, but with consequences for the EU law.

On the other hand, we can see a **difference** from the decision in *Factortame I* where the interconnection of national law and EU law was not as straightforward as in case of implementing legislation; primarily, it concerned the question of whether the EU law is applied in a particular area, or how it affects the powers of the Member States. From this point of view *Factortame I* is more concerned with the question of division of powers. That dimension diminishes if the national law is issued for the purpose of implementing the EU law and it is clear that the national law is in the domain of delegated powers. This gives more room to accept a more significant intervention of the EU law into the powers of the national courts to issue interim measures, namely the conditions under which they may do so.

When deciding on interim suspension of implementing legislation, it is possible to distinguish **two possibilities** that appear in the decision-making of national courts and which also arise from the subject of the preliminary ruling procedure. Thus, the national court can have:

- doubts about the validity of the EU law or
- doubts about the correct interpretation of the EU law, and, therefore, its proper implementation in national law.

As far as the **validity** of EU law is concerned, it should be reminded that national judges themselves cannot declare an act of the EU law invalid or inapplicable in a particular case. Based on the decision in *Foto-Frost*³⁷, the Court reserved for itself an exclusive competence to assess the validity and, therefore, also possibly to limit the application of the contested EU law provision. The national court can only rely on the presumption of validity of the EU law; in case of doubt it must refer it to the Court. The conclusions of the Court regarding the validity or invalidity are binding in all Member States. Therefore, declaring the EU law invalid is completely beyond the powers of national courts.³⁸

The review of validity itself is performed by the Court in **several procedures**.³⁹ There is both a direct action for annulment (Article 263 TFEU) before the Court

37 Comp. 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, point 20.

38 For more see Stehlík, V.: Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce, *Právní obzor* no. 4, 2005, pp. 312–334.

39 For the individual proceedings and their effects including selected literature see Hamulák, O., Stehlík, V.: *Praktikum práva Evropské unie. Ústavní základy a soudnictví*, Leges, Praha 2011, pp. 142–173.

and also indirect actions such as the preliminary ruling procedure (Article 267 TFEU) in proceedings before a national court, or plea of illegality (Article 277 TFEU) in proceedings before the Court. According to the Court, the founding treaty “*established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted this review Community Courts*”⁴⁰ and these remedies and procedures as a whole create a complete system to ensure the validity review of the EU law. All these procedures are mutually complementary. When reviewing the validity based on the founding Treaties, the Court is explicitly entitled to suspend the application of the contested regulation.⁴¹

From the summary given above it is clear that the review of validity is strictly **centralized**. In this respect, it would be expected that the review of validity in proceedings before national court should be parallel to the suspension of the application of the EU law by the Court. However – similarly to the situation in *Factortame I* case – in the written EU law this power is not explicitly stated in relation to decision-making of national courts.

In addition to doubts about the validity of the implemented EU law, a national judge might consider issuing an interim measure in the event of doubt as to the **correctness of the implementation of the EU law** into national law. First and foremost, in case of an apparent conflict of national and EU law, the principle of primacy must be followed and if the conditions for direct effect are met, the national judge is obliged to apply the EU law directly, omitting the contradictory national legislation.

However, problems may occur, particularly if the EU act is not directly effective or its interpretation is not clear, as well as the assessment whether the problematic implementation is in line with the EU law. The logic of the situation suggests that the absence of direct effect in case of EU acts that require national implementation represent a more likely scenario in practice. At this stage, the national court (of the last instance) should ask the Court for interpretation of the act. It is the exclusive power of the Court to provide a binding and uniform interpretation of the EU law across the whole EU using the preliminary ruling procedure, including the obligatory procedure in case of national courts of the last instance.⁴² In addition to the aforementioned procedure, again a national judge

40 See C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, point 40.

41 See Art. 278 TFEU (suspending the application of acts) and 279 TFEU (issuing interim measures) and Articles 83–90 of the Rules of Procedure of the Court (version from 1. 7. 2011).

42 At national level this was accepted also by the Czech Constitutional Court in *Pfizer* case, decision of 8 January 2009, II. ÚS 1009/08, where not referring a question for preliminary ruling by a court last instance is considered a violation of the right to the lawful judge guaranteed by the Czech Charter of Fundamental Rights. For more see Stehlík, V.: The obligatory preliminary ruling procedure and its enforcement in the Czech and Slovak legal

might consider issuing an interim measure against the controversial implementation act. From the perspective of the EU law, the negative effect is that any suspension of national implementing legislation leads to the suspension of the EU law itself as it is acting through the implementing act.

Regarding the impact on the EU law, both variants – that is issuing an interim measure in relation to both the review of validity and the contested interpretation of the EU law – are the same. Conditions for issuing an interim measure against an implementing act in case of doubt about EU law validity was an issue in *Zuckerfabrik*; in case of interpretation will be dealt in *Kofisa*.

3.2 *Zuckerfabrik* case: challenging the validity of EU law and interim measures against implementing legislation

The Court had an opportunity to comment on the question of power and conditions for issuing interim measures when contesting the *validity* of the EU law in *C-143/88 and C-92/89 Zuckerfabrik*⁴³ which was decided a year after the *Factortame I*. The case concerned a dispute over the legality of an EC regulation and a decision adopted on its basis by German administrative authorities. According to it a levy was collected from sugar producers in order to eliminate the losses of the European Community caused by high export refunds financed by the Community. The aim was to ensure the sales of the Community's sugar surpluses to third countries in that given year. One of the questions of the national court was:

- whether the general force of a regulation in the Member States does not exclude the power of national courts to suspend provisionally effects of an administrative act adopted on the basis of that regulation until the dispute in the main proceedings is settled; and
- about the conditions under which national courts may provide interim protection, or whether this protection is provided purely on the basis of national law or the EU law itself states the conditions which are applicable in this case.⁴⁴

In relation to the first question the Court concluded that the general character of the regulation **does not preclude the power** of national courts to suspend the enforcement of a national administrative measure adopted on the basis of the regulation. The Court explicitly established a relation between the power to preliminary suspend the application of national law which appears to be in contrary to the EU law, as stated in *Factortame I* case, and the suspension of application of the EU law under the circumstances of *Zuckerfabrik* case. In this regard, it stated that:

order, UWM Law Review, University of Warmia, Olsztyn, no. 3, 2011, pp. 6–25.

43 *C-143/88 a C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* [1991] ECR I-415.

44 Comp. *ibid*, point 5.

“[t]he 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.”⁴⁵

The aforementioned findings concerned the power of national courts to issue interim measures in *Zuckerfabrik* case. Only then the Court addressed the **conditions** thereof. Thus, it was unclear whether the requirement for the same level of protection exclusively concerns the existence of *powers* or whether it means that also the *conditions* for issuing interim measures should be the same in both situations. This is of particular importance especially for the situation in *Factortame I* case where the Court did not formulate any detailed conditions. Although at first glance it may seem it is so (“interim protection ... must remain the same ...”), this conclusion does not follow from *Zuckerfabrik* case quite clearly. The Court dealt with the conditions themselves in other parts of the decision where it did not refer explicitly to the *Factortame I* case.⁴⁶

As indicated above, in the following part of the *Zuckerfabrik* decision the Court pursued the formulation of the **conditions** for issuing interim measures. In case of temporary suspension of the EU law, the national court must reflect the factual and legal context of the case. The national court must take into consideration the **following aspects**:⁴⁷

- it must be convinced that there are serious doubts about the validity of the EU law;
- suspension of enforcement must keep the nature of a preliminary decision;
- national court deciding on the interim measure may order suspension only until the Court rules on the question of validity;
- if the question is not subject of proceedings before the Court, the national court is obliged to seek a preliminary ruling;
- adoption of interim measures should prevent serious and irreversible damage to the party seeking its adoption. It means that the damage should occur before the prospective decision of the Court on the validity of the contested regulation; in principle purely pecuniary damage cannot be regarded as irreversible;
- when deciding on interim measures, national courts must respect the existing case-law of the Court on validity of the disputed acts;

45 See *Zuckerfabrik*, point 20, (emphasis added).

46 We will come back to the question of application of *Zuckerfabrik* case conditions to cases like *Factortame I* below in connection with the discussion over the Court's conclusions in *Unibet* case.

47 For detailed definitions of the conditions see De La Torre, F., C.: Interim Measures in Community Courts: Recent Trends, *Common Market Law Review*, vol. 44, 2007, pp. 273–353.

- national court must take into account the interests of the Union, especially the damage to the EU resulting from non-application of the contested act; it must also take into account the possible impacts on individual interests and national interests;
- if the interim measure poses a threat to the financial interests of the EU, national court must require adequate financial guarantees (e.g. the deposit of money or other security).⁴⁸

The Court then summarized these conditions into **three basic points** when an interim measure would be admissible:

1. national court has serious doubts regarding the validity of EU measures and if the validity of the act is not yet subject to decision of the Court, it will seek a preliminary ruling;⁴⁹
2. there is demand and threat of serious and irreparable damage to the applicant;
3. the national court takes into account the EU interests.⁵⁰

These general conditions have been regularly repeated by the Court in the subsequent case-law.⁵¹ The Court set these conditions fairly strictly; with regard to the *erga omnes* effect of the decisions in preliminary rulings, these conditions are applicable uniformly before courts in all Member States.

In the light of the aforementioned considerations regarding the correlation between the review of validity of the EU law and the implications of the interim measures issued by the national court, it is not surprising that the Court explicitly related the conditions to those applicable in the review of validity in an action under Article 263 TFEU.⁵² Due to the dependence of national courts on the decision of the Court regarding the (il)legality of EU secondary legislation, adopting an interim measure by a national court might be regarded as **ancillary to the review validity** of the EU law by the Court, whether this review is carried out in a procedure under Article 263 or under Article 267 TFEU. Hence, from this perspective, the application of the same conditions for issuing an interim measure as by the Court itself seems to be logical.

To summarize the findings in *Zuckerfabrik* case, it may be noted that:

1. the Court confirmed the existence of power of national courts to issue interim measures and to preliminary suspend the application of the EU law;

48 Comp. *Zuckerfabrik* and argumentation in paras. 24–32. See also *C-465/93 Fruchthandels-gesellschaft and others (I) v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

49 Recently confirmed e.g. by *C-305/09 European Commission v Italian Republic*, decided on 5 May 2011, so far not published, point 43.

50 Comp. *Zuckerfabrik*, point 33.

51 Comp. below e.g. cases *Atlanta*, point 51, or *Krüger*, point 47.

52 Comp. *Zuckerfabrik*, point 27.

2. unlike in *Factortame I* case, the Court set quite detailed conditions that must be met for the issuance of an interim measure.

In this regard, *Ward* highlights the different approach of the *House of Lords* in the instructions for the British courts on issuing interim measures following the decision in *Factortame I* case and the requirements of the Court formulated in *Zuckerfabrik* case, particularly with regard to the emphasis on safeguarding the interests of the EU.⁵³ It is difficult to determine whether in its decision the Court responded also to the restrictive interpretation of the conditions formulated by the *House of Lords*. However, even in the Court's case-law the *Zuckerfabrik* case does not represent a significant shift. Although the conclusions regarding the powers and conditions seem to be logical and reasoned by the cohesiveness of the system of preliminary validity review,⁵⁴ at the same time it is a significant interference into the national rules governing the procedures before national courts. The requirements of the Court may cause national courts considerable complications. While previously it was sufficient for national courts to fulfil criteria set by national law, after *Zuckerfabrik* case it also has to examine the case-law of the Court and the General Court regarding interim measures. Thus, national courts are bound to monitor EU interests, analyse the damage that may arise to the EU or decide on the appropriate financial guarantees for the EU. From this perspective, *Zuckerfabrik* case reflects Court's activist period of the early 90s in relation to national procedural rules.

3.3 *Atlanta* case: interim measures directly against the EU law

A slightly different variation in relation to *Zuckerfabrik* case and an interim measure against national *implementing* act is the situation where the national court questions the legality and application of *the EU law directly*, without any mediation via implementing acts.

The question of power and the conditions for issuing an interim measure in this legal context was dealt with by the Court a few years after the *Zuckerfabrik* decision in case *C-465/93 Atlanta*.⁵⁵ The core of the dispute was the EU regulation establishing banana import quotas.⁵⁶ The importers of bananas from third countries into the EU were deprived of the duty-free quota. For that reason, in proceedings before a German court they contested the legality of the EU regulation and at the same time they requested this duty-free quota as an interim

53 See Ward, quoted at footnote 21, p. 171.

54 Recently confirmed e.g. in joined cases *C-453/03, C-11/04, C-12/04 and C-194/04 The Queen, on the application of ABNA Ltd and others v Secretary of State for Health a Food Standards Agency*, judgement of the Court of 6 December 2005, European Court reports p I-10423, point 103.

55 *C-465/93 Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

56 Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25.2.1993, pp. 1–11.

measure. In one day the German court both asked for clarification of the conditions for preliminary suspension of application of an EU act and asked about the validity of the given EU regulation.⁵⁷

The Court confirmed that if a national court has doubts about the legality of an act and at the same time it starts the preliminary ruling procedure, it also has the power to preliminarily suspend the application of an EU act. Further it concluded that in the proceedings before the national court the same conditions as in *Zuckerfabrik* case are applicable.

But *Atlanta* case enabled the Court – in its own words – to further clarify these **conditions**.⁵⁸ First, the Court specified how to interpret the factual and legal circumstances leading the national court to serious doubts concerning the validity of the regulation, as formulated in *Zuckerfabrik* case. According to the Court:

*“[t]hat requirement means that the national court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid.”*⁵⁹

Therefore, in addition to initiating proceedings for a preliminary ruling, the national court must demonstrate that there are **valid reasons** for the suspension of the application of the EU law. According to the Court, when assessing the question of invalidity, national court must take into account the **degree of discretion** of the EU institutions in the sector concerned. One can imagine that fulfilling this condition requires a good knowledge of the EU law and decision-making processes and, therefore, again it makes it significantly more difficult for the national court to grant interim measures or, at least, to ground them properly. The question of assessing discretion of the EU institutions is the subject of litigation before the Court and in practice we can hardly imagine how competent the national court is to be able to examine this issue.⁶⁰ On the other hand, it is significant to follow how strictly or to what details the Court would require the application of this condition in practice, and whether at all a decision of a national court in a particular case will ever get before the Court. As far as we know it has not been at the core of the Court's subsequent decisions on interim measures.

57 *C-466/93 Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3799. In this decision the Court confirmed the validity of the regulation. In both cases – i.e. regarding the possibility to issue interim measures and also the validity of the regulation – the Court issued a judgement on the same day.

58 *Comp. ibid*, point 34.

59 *See ibid*, point 36.

60 A general reproach might be added that these conditions affect especially the activities of lower courts without sufficient analytical background, for which, due to their work load, it will be difficult to analyse the Court's case-law in this area in details.

The practical difficulty in fulfilling conditions and requirements for sound reasoning can be seen from further “clarification” according to which the act in question is not to be completely divested of efficiency. According to the Court the national court must examine the **cumulative effect** of its decision. Therefore, it has to examine what are the implications for the application of the EU law if a large number of other national courts provisionally suspended the application of the act concerned.⁶¹ In this regard, the specific situation of the parties must be taken into account; whether these particular circumstances distinguish them from other persons.⁶² It cannot be overlooked that the wording of this condition closely resembles the restrictive concept of individual concern adopted by the Court when determining the *locus standi* of underprivileged applicants in the action for annulment under Article 263 TFEU.⁶³

In addition, the Court commented in more details on the condition that requires national courts to respect the Court’s **earlier decision** in the given matter. Thus, if the Court has already rejected the merits of an action for annulment or found no grounds for invalidity in a preliminary ruling procedure, the national court concerned cannot suspend the application, or it must cancel the measures already taken. An exception is the case when the national court refers to other grounds of invalidity.⁶⁴

In the overall conclusion of *Atlanta* case the Court reiterated the three conditions formulated in *Zuckefabrik* case and explicitly it added a **fourth condition**: when deciding on interim measures, the national court must take into account all decisions of the Court and the General Court on the legality of regulations or on the requests for similar interim measures at the EU level.⁶⁵

In general it can be **concluded** that *Atlanta* case complements the *Zuckefabrik* decision. Similarly to the sister-couple cases such as *Rewe/Comet* or

61 The request to examine the practice of courts also in other Member States is obviously inspired by case 283/81Srl *CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415, point 16, where the Court defined the conditions under which a court of last instance does not need to initiate obligatory preliminary ruling procedure. CILFIT case was by some commentators interpreted as binding for nations court to rely not on their own discretions but on the Court, and did not forget to initiate the preliminary ruling procedure; in this regard see e.g. Mancini, G., F., Keeling, D., T.: *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, Yearbook of European Law, Clarendon Press, Oxford 1991, p. 3; Bobek, M.: *Porušení povinnosti zahájit řízení o předběžné otázce podle čl. 234(3)*, C.H.Beck, Praha 2004, p. 39.

62 Comp. *Atlanta*, point 44.

63 Comp. especially case 25/62 *Plaumann and Co. v Commission* [1963] ECR 95.

64 Comp. *Atlanta*, point 46. Again, this reminds the diction of the Court’s decision regarding the obligatory character of its preliminary rulings. But the Court allows raising again questions for preliminary ruling in the same matter if the national court states different reasons for invalidity. For more see f.e. Stehlík, V.: *Řízení o předběžné otázce v komunitárním právu*, Univerzita Palackého v Olomouci, Olomouc 2006, pp. 123–132.

65 Comp. *Atlanta*, point 51.

Francovich/Factortame III, *Zuckerfabrik/Atlanta* cases create a couple and in the subsequent case-law they are usually quoted together. When a national court is deciding on an interim measure either against national implementing acts based on potential invalidity of EU law as well as directly against the EU law, it bases its decision on the same conditions or reasoning.

In *Zuckerfabrik/Atlanta* a logical connection to procedure before the Court/General Court in review of validity was made. We cannot object to the fact that the Court requires the use of the same conditions as it uses itself. By this the Court established the basis for **uniform EU-wide standards/conditions** that are further elaborated in the subsequent case-law. We believe that these findings are a natural consequence of the requirement for a unified judicial protection of the individual rights in the validity review of EU law.

Finally, one can deliberate a little bit on the fact that the requirement for a uniform interpretation was formulated only in the early 90s in *Zuckerfabrik/Atlanta* cases. This relates to the developments at the EU level. For a long time the question of interim suspension of application was not dealt uniformly even in the proceedings before the Court. The situation changed in connection with a significant increase in applications for interim measures in the 80s⁶⁶ and then in the late 80s when the Court began regularly to refer to the conditions formulated in its previous decisions on the admissibility of interim measures; thanks to this the judicial doctrine in proceedings at the EU level started to unify. The creation of the General Court, i.e. the Court of First Instance at that time, also significantly contributed to the stabilization of conditions since the two-tier judicial system allowed for appeal against the decisions of the Court of First Instance to the Court.⁶⁷ These facts help to explain the creation and more detailed specification of the conditions for interim measures also in proceedings before national courts.

3.4 *T. Port* case: outer limits for interim measures

Finally, the third major case which clarified the scope of powers of national courts to issue interim measures was *C-68/95 T. Port* case.⁶⁸ Similarly to *Atlanta* case, the *T. Port* case concerned a regulation which established quotas on imports of bananas into the EU.⁶⁹ The importing company, however, did not contest the validity of the regulation but claimed that due to temporary problems with the supplier of a third country its quota – determined by the volume of imports in previous years – was not properly set. The importer demanded an interim mea-

66 This trend continued also in the 90s; comp. de la Torre, F.: Interim Measures in Community Courts: Recent Trends? Common Market Law Review, vol. 44, 2007, p. 274.

67 Comp. *ibid.*, p. 275. To the right to appeal against the decision of the General Court about issuing interim measures see Art. 57 of the Statute of the Court.

68 *C-68/95 T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

69 Council Regulation (EEC) No 404/93.

sure which would grant it a higher quota. The case reached the German Federal Constitutional Court which confirmed the claim for the interim measure also with regard to the regulation itself which allowed for taking this kind of difficulties on the part of importers into account. In subsequent proceedings before the German Court of Appeal this issue was addressed again, and questions concerning the powers to issue interim measure regarding the application of the given regulation were referred to the Court through the preliminary ruling procedure.

The Court upheld the conclusions from *Zuckerfabrik/Atlanta* cases;⁷⁰ but at the same time it distinguished *T. Port* from these cases. *T. Port* case did not primarily concern the review of validity of the regulation but the provision of judicial protection for individuals which must be considered in the overall context of the EU judicial system. The regulation itself enabled to **issue an interim measure**; but it had to be **authorised by the Commission** which should determine the existence and extent of the rights of traders. The Commission did not issue the measures but that did not constitute the power of national courts to do so. Likewise, the demand that the Court stated inaction of EU institutions cannot be subject of preliminary ruling procedure. Both the Member States and the traders themselves are provided with a remedy either by a direct proposal of the Commission, or in particular through the proceedings for failure to act. In these proceedings directly the Court or the General Court is entitled to decide about interim measures.⁷¹

T. Port case therefore complemented *Zuckerfabrik/Atlanta* cases; a national court is entitled to issue an interim measure if the validity of the EU law is contested. But the national court cannot substitute the powers of EU institutions to issue interim measures if they are attributed to them by the EU law. From this perspective, *T. Port* case represents a limit for the powers of national courts in this area.

3.5 ABNA case: power of administrative authorities to issue interim measures

Finally, there is a very interesting recent decision in joined cases *C-453/03 ABNA*⁷² concerning the status of administrative bodies. These cases were brought by three courts of different Member States (the United Kingdom, the Netherlands and Italy) concerning the validity of the EU directive on the circulation of compound feedingstuffs.⁷³ One of the questions asked about whether the admin-

⁷⁰ See *T. Port*, especially paras. 47–51.

⁷¹ Comp. *ibid.*, paras. 52–61.

⁷² *C-453/03, C-11/04, C-12/04 a C-194/04 The Queen, on the application of ABNA Ltd and others v Secretary of State for Health a Food Standards Agency*, judgement of the Court of 6 December 2005, European Court reports p I-10423.

⁷³ Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC, OJ L 63, p. 23.

istrative authorities have powers to issue interim measures and to suspend the application of the contested act, or whether this power belongs only to courts in the review of the administrative decision. In the context of this case it is important to mention that the court of the Member State had already issued an interim measure and at the same time the proceedings for a preliminary ruling on the review of the validity of this act had been initiated. Therefore, the conditions for issuing this interim measure, particularly with regard to the examination of the (strict) conditions of *Zuckerfabrik/Atlanta* cases, had to be met. In this situation it seems that issuing interim measures by administrative authorities of (other) Member States is justified.

However, the Court was of another opinion. It summarised its conclusions regarding the conditions for issuing an interim measures in *Zuckerfabrik/Atlanta* cases and the position of national courts as to give full effect to the EU law.⁷⁴ Although the national public authorities assume that these conditions are met, they are not entitled to issue an interim measure under these conditions because:

- the status of those bodies in general cannot provide the same degree of independence and impartiality as the status granted to the national courts;
- it is not certain that these authorities are able to ensure adversarial trial which allows to hear out the arguments put forward by the parties before weighing their interests and making the decision.⁷⁵

These conclusions are not compromised by the need for speedy proceedings when it is in the interest of the participants to provide them with protection as quickly as possible. According to the Court, also courts can issue interim measures promptly; the necessity for speed or economic aspects of proceedings cannot prevail over the guarantees provided by judicial proceedings.⁷⁶

Thus, while the administrative authorities have a duty to preferentially apply the EU law in case of its conflict with national law,⁷⁷ on the other hand, when they should provisionally disapply the EU law, they do not have the same power as the national courts to issue an interim measure. And not even if they consider that the conditions for its issue were met, not even if objectively these conditions were met in another case and assessed by a court of (another) Member State. Therefore, interim measures of this type can be issued only in subsequent judicial proceedings.

74 See *ABNA*, paras. 103–107.

75 Comp. *ibid*, point 109.

76 Comp. *ibid*, point 110.

77 See *C-118/00 Lasy v INASTI* [2001] ECR I-5063 and the obligation of social security authorities to apply then Directive 1408/71; for detail see Craig, P., de Búrca, G.: *EU law – text, cases and materials*, 5th ed., Oxford University Press, Oxford 2011, p. 264 and the sources quoted here.

3.6 Case-law following *Zuckerfabrik/Atlanta* cases

In subsequent cases the Court elaborated conditions formulated in *Zuckerfabrik* and *Atlanta* cases in specific situations. One of them is the case *C-334/95 Krüger*⁷⁸ in which the Court accepted the possibility to appeal against the decision of a national court to issue an interim measure while this measure remained in force. The preliminary ruling regarding the validity of the EU law would lose its meaning only if a superior court changed or cancelled the decision on interim suspension of application of the act concerned.⁷⁹ In *C-17/98 Emesa Sugar*⁸⁰ the Court confirmed that *Zuckerfabrik/Atlanta* conditions apply even if the national court decides on interim measures against authorities of non-member countries which are responsible for the implementation of the EU law (specifically from overseas countries and territories).

Finally, the range of variations is complemented by a decision in the form of an order of the President of the Court in *C-186/01 Dory*.⁸¹ The case concerned the interpretation of the directive implementing the principle of equal treatment for men and women⁸² which – according to Mr. Dory – was violated by Germany by introducing conscription for men only. The German court initiated a preliminary ruling procedure.⁸³ In these proceedings Mr. Dory demanded that the Court issued an interim measure and suspended the application of the decision of the German military administration (“call-up”). In his rejecting order the President of the Court pointed out to the indisputable character of the preliminary ruling procedure under which, unlike in direct actions, the Court is not entitled to grant such interim measure. Due to the division of competencies this is a task for the national court, under the conditions stated in *Zuckerfabrik* case.⁸⁴

4. Conditions for suspension of application of national law: current development

4.1. Basic framework

While the Court made a link between the conditions for granting interim measures in situations like in *Zuckerfabrik* and *Atlanta* cases, it was still not clear

78 *C-334/95 Krüger GmbH & Co. KG v Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517.

79 Comp. *ibid.*, point 52. Direct reference to *Zuckerfabrik* and *Atlanta* cases is in point 50 of the decision.

80 *C-17/98 Emesa Sugar (Free Zone) NV v Aruba* [2000] ECR I-00675, see especially point 73.

81 *C-186/01 R Alexander Dory and Bundesrepublik Deutschland* [2001] ECR I-7823.

82 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, p. 40.

83 *C-186/01 Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479; in this decision the Court subsequently held that limiting compulsory military service only to men is compatible with the EU law.

84 Comp. *ibid.*, point 12.

whether these conditions apply also in relation to situations like *Factortame I*. When we compare, on the one hand, *Factortame I* and, on the other hand, *Zuckerfabrik/Atlanta* cases and the subsequent case-law, we can see an obvious difference in the elaborateness of the Court's reasoning. While in *Factortame I* the Court did not formulate further conditions for interim suspension of national law, in the context of interim measures against national implementing legislation or directly against the EU law there is a whole set of conditions for national courts.

One of the reasons for this discrepancy can be deduced from the fact that in *Factortame I*, the Court focused primarily on the question whether the EU law itself gives the power to national courts to issue an interim measure even if the national law did not permit it. Thus, the Court (intentionally) did not deal with the conditions⁸⁵ and left the matter to the application of national regulation (with regard to *Rewe/Comet* cases while following the principles of equivalence and effectiveness). However, with respect to the subsequent development in *Zuckerfabrik/Atlanta* cases, a dilemma remained whether *Factortame I* case is only the first step in the development of EU rules on interim measures and the subsequent case-law represents clarification also in relation to this case, or whether in *Factortame I* case the Court intentionally left out detailed conditions and, as a result, indicated that different conditions for interim measures should be applied.

In *academia* conclusions regarding the differences in both situations were not perceived unambiguously. This is well illustrated in *Dougan's* work who argues that conditions formulated in *Zuckerfabrik/Atlanta* cases could also be used for granting an interim measure in relation to the situation in *Factortame I* case.⁸⁶ Therefore, it would be possible to apply these conditions in parallel in relation to interim measures, or to temporary suspension of the application of national law in case of an alleged conflict with the EU law, whose validity is challenged. This is based on the requirement that individuals should be protected in both situations in the same way, and also on the requirement for uniform application of the EU law.⁸⁷

But simultaneously *Dougan* pointed out that the Court itself did not explicitly equate the situations in *Factortame I* and in *Zuckerfabrik/Atlanta*. Consequently, it can be argued that those conditions need not be necessarily uniform, with respect to the different perspectives of both situations. In *Zuckerfabrik/Atlanta* the presumption is that the Court has an exclusive power to assess the validity of the EU law; granting an interim measure suspending its application is closely related to it – the Court leaves this decision up to the national court under prearranged conditions. On the other hand, in *Factortame I* the situation concerned an assessment of the compatibility of national law with the EU law where the

85 For the direct question of *House of Lords* see *Factortame I*, point 15.

86 See *Dougan*, quoted at footnote 12, p. 130.

87 Comp. *ibid.*, p. 320.

requirement for the very existence of an interim measure is sufficient, given that other conditions may be governed by national law while respecting the principle of equivalence and effectiveness.⁸⁸ The Court had the opportunity to solve this dilemma in *Unibet* case.

4.2. *Unibet* case: refining the rules

A recent case *C-432/05 Unibet*⁸⁹ may be labelled as exceptional. It covers an interesting mix of diverse topics regarding the effective enforcement of EU law in the context of national procedural rules, especially:

- application of the principles of effectiveness and equivalence;
- clarification of the rule that the EU law does not create new remedies;
- conditions for issuance of interim measures or actions for damages; and
- generally, the right to effective judicial protection.

Since the decision was linked to several important questions of national procedural law, it should be examined in more detail, including several references to the main conclusions in the opinion of Advocate General *Sharpson* who aptly analysed some controversial points.⁹⁰

The case concerned the Unibet company – operating betting (lottery) games – which wanted to advertise its services in Sweden. For this purpose it obtained an advertising space in several Swedish media. However, in Sweden betting and lotteries were strictly regulated and all lotteries for public were subject to authorization by the competent administrative authorities. It was forbidden to promote participation in an unpermitted lottery organized in Sweden or in a lottery run outside Sweden. In accordance with this act the Swedish authorities took a variety of measures against the media which cooperated with Unibet company, including criminal procedures.

The Unibet company, even though it was not the participant of these proceedings, filed an action against Sweden, the aim of which was to declare that under then Article 49 of the Treaty (free movement of services, now Article 56 TFEU) it had the right to promote its services in Sweden. At the same time, the Unibet company sought an interim measure in order to be provisionally admitted to exercise the rights until the decision in action for declaration, and, finally, it sought compensation for the damages resulting from the conflicting regulations and procedures of Swedish authorities.

88 Comp. *ibid.*, pp. 323–325.

89 *C-432/05 Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern*, judgement of the Court of 13 March 2007, European Court reports p I-2271.

90 For details on the case see Stehlík, V.: *Národní procesní autonomie v reflexi na případ Unibet*, *Debaty mladých právníků* 2007, Univerzita Palackého v Olomouci, Olomouc 2007, pp. 127–130.

In the proceedings the Swedish court referred several questions to the Court concerning:

- obligation to include in national legislation a separate action aimed at determining the compatibility of the EU and national law if the national law permits only incidental review;
- obligation to provide interim protection through which national law is provisionally prevented from being applied if the applicant claims a breach of the EU law;
- conditions/criteria on which such an interim measure should be granted.⁹¹

The obligation to allow for a separate declaratory action

In relation to the admissibility of interim measures it was necessary to decide whether the EU law forces national law to introduce a declaratory action. This is connected with the issue of interim measure which has an ancillary nature and can be used only in other pending proceedings. However, in Swedish law, there did not exist a separate action for declaration that would allow to examine the compatibility of national and EU law. This review was permissible incidentally, i.e. in other proceedings (e.g. for damages). National courts at various levels declared this action inadmissible because in their opinion it did not meet the legal requirements for its filing. In particular, there was no specific legal relationship between the Unibet company and the Swedish state. Consequently if the court admitted the action, it would equal to an abstract examination of the compatibility of a regulation with the EU law, and under Swedish law that was not possible.

In this respect, the basic question for the Court was whether the **right to an effective remedy** guaranteed by the EU law in the general principles of law contains the right to direct action for declaration of compatibility of national and EU law, or whether it is sufficient to have this review incidentally within related proceedings.⁹² According to the Court in the absence of uniform rules, Member States have the right to determine the competent courts and procedural requirements to ensure the protection of rights guaranteed by the EU law. Only if there were no procedural means at national level – not even incidental – it would be possible to confer rights on individuals stemming directly from the EU law. When making these considerations, the Court referred to *Rewe/Comet* cases and to the case-law regarding the primacy of the EU law, including the aforementioned *Simmenthal* and *Factortame I* cases.⁹³

91 Comp. *Unibet*, point 30.

92 Comp. *ibid*, point 37. When defining the right to effective judicial protection the Court referred to the constitutional traditions of the Member States, to Art. 6 and 13 of the European Convention on Human Rights and to Art. 47 of the Charter of Fundamental Rights of the European Union, which at that time was only unbinding declaration.

93 Comp. *Unibet*, paras. 38–39.

The Court confirmed its earlier case-law that the EU law did not intend to create new procedural tools other than those governed by national law. However, this rule is only a starting point and it depends on the context whether with regard to the principle of effectiveness, specifically effective judicial protection, it will be necessary to apply certain procedural measures, even if they are not available in national law.⁹⁴

The Court then concluded that a different situation would be if there were no procedural means ensuring not even incidental protection of rights of subjects participating in the proceedings – that is a situation when protection of rights of individuals is not adequately guaranteed by national procedural law.⁹⁵ Therefore, it is up to the national law to determine the *locus standi* of individuals on condition that national treatment must not interfere with the right to effective judicial protection and the principles of equivalence and effectiveness are applied.⁹⁶

In *Unibet* the Court explicitly formulated the **obligation of euro-conform interpretation**⁹⁷ of national procedural rules in the context of ensuring effective judicial protection when it stated that:

“it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual’s rights under Community law”.⁹⁸

Then in the light of these general observations the Court analysed Swedish law with regard to the principle of equivalence and effectiveness, and concluded that the principle of effective judicial protection as such does not require the existence of a separate action seeking primarily to challenge the compatibility of national provisions with the EU law. In principle, it is sufficient that the compliance can be examined indirectly in other proceedings. According to the Court these proceedings include also the action for damages; the assessment, if it is necessary to create a new procedural means, depends on whether a claim for compensation is sufficient to ensure the right to effective judicial protection. As inferred e.g. by *Taborowski*, this situation is the norm and, in practice, the alter-

94 Comp. Taborowski, M.: Case C-432/05 *Unibet* – some practical remarks on effective judicial protection, 14 *Columbia Journal of European Law*, vol. 14, 2007/2008, p. 630.

95 Comp. *Unibet*, paras. 40–41.

96 Comp. *ibid*, paras. 42–43.

97 Comp. case 14/83 *Von Colson and Kamann v Land Nordrhein-Wetsfalen* [1984] ECR 1891.

98 See, *Unibet* point 44, (emphasis added). For the requirement of euro-conform interpretation of national procedural rules see also C-50/00 *P Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, point 42 or C-263/02 *P Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-3425, point 32.

nation of existing procedural legislation by the principle of effectiveness is sufficient, and new procedural means do not need to be created.⁹⁹

It should be added that according to the Court procedures are considered not to be available if the person:

“... was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law”.¹⁰⁰

This argument obviously offers a parallel to the case-law of the Court which concerns insufficient *locus standi* of individuals to bring an action for annulment under the fourth paragraph of Article 263 TFEU. The circumstances of the well-known *Jégo-Quéré* case show that individuals may have the only chance to violate the EU law in order to contest the validity of the legislation in subsequent legal proceedings.¹⁰¹ It seems that contrary to the case-law regarding the *locus standi* of individuals to bring the action for annulment the Court is not so restrictive in relation to the *locus standi* of individuals in proceedings before national courts *in favour* of the EU law. To require the breach of national law as the only tool for the party to launch the review of compatibility is in breach of the right to effective judicial protection (as opposed to the action for annulment and situation in *Jégo-Quéré* case).

For example Arnall describes this ambivalent approach of the Court to the interpretation of the right to effective judicial protection as *extremely damaging cohesion of Community law and a threat undermining the spirit of cooperation*.¹⁰² In the previous case-law, the Court intervened also when there was a need to create new procedures but the obligation of national courts to create new remedies was not clearly defined in this regard.¹⁰³ In *Unibet* case, the Court openly admitted that the **principle of effective judicial protection may require new procedural means**. Thus, any uncertainty on this issue was eliminated.¹⁰⁴ Anyway, *Unibet* case potentially opens the way for greater intervention into national procedural rules.

99 Comp. Taborowski, M.: Case C-432/05 Unibet – some practical remarks on effective judicial protection, 14 Columbia Journal of European Law, vol. 14, 2007–2008, p. 631.

100 See *Unibet*, point 64.

101 For a favourable decision in favour of the *locus standi* of the then Court of First Instance see T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365; for a contrary decision of the Court in the appeal decision see C-263/02 *P Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-3425.

102 Arnall, A.: Case C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern*, judgment of the Grand Chamber of 13 March 2007, Common Market Law Review, vol. 44, 2007, p. 1776.

103 Here Arnall quotes e.g. cases *Simmenthal I*, *Factortame I*, *Courage* or *Antonio Muñoz*; see *ibid*, footnote no. 39.

104 Comp. *ibid*, p. 1773.

Without wanting to underestimate the aforementioned criticisms or analyse in detail the reasons why in cases like *Jégo-Quéré* the Court did not loosen the conditions for filing an action for annulment,¹⁰⁵ in practise there are relatively few cases when the Court abandoned its doctrine formulated in *Nold* case and inferred the obligation of national courts to create a new procedural means. Though it might be done by the principle of effectiveness directly by national courts, in our opinion it is in fact unlikely that in such a sensitive situation national court would create a new procedural means using solely its own discretion, without referring the matter for a preliminary ruling.

Rather theoretical dimension of these considerations is apparent also in *Unibet* itself where the Court concluded that in Swedish law there were sufficient (indirect) means and this direct “intervention” was not necessary.¹⁰⁶

The power to grant an interim measure

As indicated above the availability of action for declaration is closely connected with the right of subjects to achieve the grant of an interim measure to suspend the application of national legislation. The question is whether the principle of effective judicial protection requires the legal order of a Member State to set up the possibility of granting interim measures until the competent court decides on the conformity of national law with the EU law.¹⁰⁷

Quite unsurprisingly the Court referred to *Factortame I* and *Siples*¹⁰⁸ cases, and – to ensure full effectiveness of the final decision on the matter – it confirmed the power of national court to issue such an interim measure.¹⁰⁹ It further stated that:

“Where it is *uncertain* under national law, applied in accordance with the requirements of Community law, *whether an action* to safeguard respect for an individual’s rights under Community law *is admissible*, the principle of effective

105 One of the obvious reasons is the problem of overloading the Court and the fear of increasing the number of cases which might paralyse the Court. There is a large number of analyses and commentaries in the literature, including the question of partial extension of the *locus standi* by the Lisbon Treaty; for this topic see e.g. Blahušiak, I.: Access of citizens to the Court: The role of regulatory acts, Dny Práva, PF MU Brno, Brno 2010, p. 2399 et seq.; Mikulová, K.: Prístup jednotlivcov k súdnému preskúmaniu právnych aktov EÚ podľa čl. 263 a 267 ZFEÚ, Dny Práva, PF MU Brno, 2010, especially p. 2612 et seq.; Sehnálek, D.: Jednotlivec v evropském soudnictví, Dny Práva, PF MU Brno, 2010, p. 2704; available at: <http://www.law.muni.cz/content/cs/proceedings>; Mazák, J.: *Locus standi* v konaní o neplatnost: od Plaumannovho testu k regulačným aktom, Právnik no 3, 2011, p. 219 et seq.

106 See *Unibet*, point 65.

107 Comp. *ibid*, point 66.

108 C-226/99 *Siples Srl v Ministero delle Finanze a Servizio della Riscossione dei Tributi* [2001] ECR I-277.

109 Comp. *Unibet*, point 67.

*judicial protection requires the national court to be able, none the less, at that stage, to grant the interim relief necessary to ensure those rights are respected.*¹¹⁰

In other words, the aim of these measures is to achieve interim protection of rights which the applicant claims in the matter itself. Therefore, it is important that the substantive action is possible; and if it is, interim measures must be available too. On contrary, if no such action is possible in the case concerned, according to the Court it is not admissible to decide on interim measures in the matter.

In that regard we may refer to the opinion of Advocate General *Sharpson* who points out to the employ of *Factortame I*. There the Court concluded that the *national court deciding the case* shall have the power to issue interim measures. According to *Sharpson*, in case of inadmissibility of an action the national court should not be regarded as the court hearing the case, and, thus, concludes the inadmissibility of any interim measure itself.¹¹¹ In this regard she foreshadowed the subsequent decision of the Court.

The Court has not mentioned the third variant yet – that is the case when the admissibility of action is *uncertain* under national law; therefore, it is disputable whether the absence of a procedural means is consistent with the EU law or with the principle of effective judicial protection. In the case of uncertainty the national court should have the power to issue interim measures.¹¹² In *Unibet* decision it is possible to see a shift in the case-law, since in previous cases it was not disputed that the “main” proceeding was admissible and interim measure was just ancillary to it. However, the *Unibet* case shows that this is not necessarily always the case and that the principle of effective judicial protection may require granting a relatively independent interim measure even without clarity over the *locus standi* of subjects to bring the merits of the case.

As we noted above, with regard to the circumstances of the *Unibet* case itself, the national court found the declaratory action unavailable and in the context of procedural means provided by the Swedish law it was not prescribed even under the EU law. Therefore, it was not possible to grant an interim measure. However, outside this framework the Court ruled the admissibility of interim measures in action for damages which was filed by the Unibet company and which was admissible. The Court held that:

“...where the competent national court examines, in the context of the claim for damages, whether the Law on Lotteries is compatible with Community law, it must be able to grant the interim relief sought, provided that such relief is necessary, which it is a matter for the national court to determine, in order to ensure the

¹¹⁰ Ibid, point 72, (emphasis added).

¹¹¹ Comp. opinion of the Advocate-General *Sharpson* in *Unibet* case, point 76.

¹¹² Comp. *Unibet*, point 72.

full effectiveness of the judgment to be given on the existence of the rights claimed under Community law“.¹¹³

In the final phase the Court referred to the national court and its assessment about the necessity of the interim measures in a particular case. In this respect, we can see certain insufficiency in the arguments of the Court which essentially requires and presupposes the review of compatibility of national and EU law in an action for damages. *Arnull* points out that this strict requirement may be in conflict with the principle of procedural economy, and it is not always an available means of reviewing the compatibility of EU and national law.¹¹⁴

Conditions for issuing interim measures

Finally, for purposes of this analysis the key point are the conditions under which a national court grants interim measures.¹¹⁵ The Swedish court directly asked whether the conditions in *Factortame I* and *Zuckerfabrik/Atlanta* cases are the same or different, as was discussed in the previous subsections. In *Unibet* case the Court had a “chance” to clarify this dilemma. In this respect, arguments used by the Court in *Zuckerfabrik* case might be used as a starting point: the protection provided by interim measures must remain the same, regardless of whether the compatibility of national legislation with the EU law or the validity of secondary EU legislation are questioned; in both cases the dispute is based on the EU law itself.¹¹⁶

This issue was again raised by the Advocate General *Sharpson*, according to whom this statement primarily concerned the *existence of power* to issue interim measures and not the conditions for that. In her opinion, in situations like *Factortame I* or *Unibet*, i.e. regarding the compatibility of national and EU law, an analogy with action for annulment in *Zuckerfabrik/Atlanta* does not apply, and, thus, it is not necessary to apply the same criteria as the criteria used by the Court when reviewing validity.¹¹⁷

In this regard the Court held as follows:

“It is clear from established case-law that the suspension of enforcement of a national provision based on a Community regulation in proceedings pending before a national court, whilst it is governed by national procedural law, is in all

113 See *ibid*, point 76.

114 Comp. *Arnull*, A.: Case C-432/05, *Unibet* (London) Ltd, *Unibet* (International) Ltd v Justitiekanslern, judgment of the Grand Chamber of 13 March 2007, *Common Market Law Review*, vol. 44, 2007, p. 1775.

115 For more on these questions see *Sinaniotis*, D.: *The Interim Protection of Individuals before the European and National Courts*, Kluwer Law International, Hague/London/New York 2006, p. 51 and following; *Hamulák*, O.: *Předběžná ochrana subjektivních komunitárních práv v řízení před národními soudy – podmínky a mantinely*, Sborník z konference Olomoucké Monseho dny 2007, Univerzita Palackého v Olomouci, Olomouc 2008, pp. 439–456.

116 Comp. case *Zuckerfabrik*, point 20.

117 Comp. opinion of the Advocate-General in *Unibet* case, paras. 91–96.

*Member States subject to conditions which are uniform and analogous with the conditions for an application for interim relief brought before the Community Court (judgements... Zuckerfabrik... Atlanta... ABNA etc.). However, the case in the main proceedings is different from those giving rise to those judgments in that Unibet's application for interim relief does not seek to suspend the effects of a national provision adopted in accordance with a Community regulation where the legality of that regulation is contested, but rather the effects of national legislation where the compatibility of that legislation with Community law is contested.*¹¹⁸

Therefore, the Court endorsed the view embodied in the opinion of the Advocate General. In doubt about the compatibility of national and EU law, the conditions of domestic law should be used and when applying them the national courts are limited (only) by the principle of equivalence and effectiveness.

These findings may be criticized with regard to the principle of uniform application of the EU law as they could lead to different conditions applicable in various Member States.¹¹⁹ However, we do not believe that granting interim measures in the event of a conflict of national and EU law must necessarily be tied to uniform conditions in all Member State. It is not a final judgment, and the damage that might result from evidently faulty application of the EU law even in the form of interim measure could be compensated. From a more general point of view, it can be assumed that in situations like *Factortame I/Unibet*, there is no reason not to respect the characteristics and customs of national procedural rules.

Anyway, in *Unibet* case the Court upheld the findings of *Factortame I* case and the different circumstances and conditions associated with the grant of interim measures in *Factortame I* and *Zuckerfabrik/Atlanta* cases. It can be regarded as a sign of an increased respect of the Court for national procedural rules, done in a similar way in other cases at the end of the 90s and at the beginning of this century.¹²⁰

5. *Kofisa* case: controversial interpretation of national implementing legislation

Finally, we should open one more dimension of interim measures: these are rules which national courts should use in cases concerning doubts on *interpretation* of EU law (and not validity as analysed in the previous text); in other words – whether we apply the strict conditions from *Zuckerfabrik/Atlanta* cases or the conditions formulated in *Factortame I* and *Unibet*. These cases do not give a clear answer.

¹¹⁸ See *Unibet*, point 79, (emphasis and abbreviations added).

¹¹⁹ Arnall, A.: Case C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v Justitie-kanslern*, judgment of the Grand Chamber of 13 March 2007, Common Market Law Review, vol. 44, 2007, p. 1778.

¹²⁰ Comp. *ibid.*, p. 1780.

For example *Ward*¹²¹ in this regard refers to *C-1/99 Kofisa*¹²² case which concerned a disapplication of a decision issued by national administrative body taken on the basis of the EU regulation establishing the EU Common Customs Tariff.¹²³ The question for preliminary ruling was formulated in terms of whether the power to suspend the application belongs only to the customs authorities, as specified in the EU Common Customs Tariff, or also to national courts. Thus, it was a question of interpretation of specific provisions of the EU legislation.

On the one hand, the Court confirmed that according to the wording of the Common Customs Tariff this power is exclusively reserved for the customs authorities; however, at the same time such a provision must not undermine the principle of effective judicial protection as a general principle of law.¹²⁴ Therefrom the Court deduced the power of national courts to suspend the implementation of the decision of the customs authority in order to ensure the full effectiveness of the judgment which is to be issued.¹²⁵ Here the Court explicitly refers to the passages from *Factortame I* case where it deduced the power of national courts to grant interim measures.¹²⁶

Since in *Kofisa* case the question of a preliminary ruling concerned the powers (as in *Factortame I* case) and not the conditions for its implementation, in our opinion the Court did not need to argue with *Zuckerfabrik/Atlanta* cases where those conditions were dealt with. After all, in these cases regarding the power of national courts it also referred to *Factortame I* case.¹²⁷ In *Kofisa* case the Court could limit itself only to general statements on the existence of powers as was already decided in *Factortame I*. Thus, based on the *Kofisa* case itself, without Court's explicit formulation, we cannot unequivocally conclude that these conditions would not be applicable.¹²⁸

Therefore, the *Kofisa* decision did not answer the question whether a situation regarding contested interpretation of the EU law and suspension of national implementing law might be considered equivalent to suspension of national law in cases such as *Factortame I*. The *Factortame I* case also concerned the interpretation of primary EU law and arguably contradicting national law which could (possibly) result in EU law based individual rights. If the case is examined from the perspective of a national judge, this situation is largely analogous to granting

121 See *Ward*, quoted at footnote 21, p. 172.

122 *C-1/99 Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi* [2001] ECR I-207, especially paras. 44–49.

123 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community customs code (OJ 1992 L 302, p. 1).

124 *Comp. Kofisa*, point 46.

125 *Comp. ibid*, point 48.

126 See *Factortame I*, point 21.

127 See *Zuckerfabrik*, point 19 and *Atlanta*, point 23.

128 Identically see *C-226/99 Siples Srl v Ministero delle Finanze a Servizio della Riscossione dei Tributi* [2001] ECR I-277, paras. 16–19.

interim measures in relation to national law without any direct links to EU obligations. Simply put, it is the application of national law whose compatibility with the EU law is challenged, and intervention or impact of the EU law depending on its potentially incorrect interpretation is uncertain.

In this situation, the national judge will naturally follow procedural rules laid down in national law, including the possibility to preliminarily suspend the application of national law; they may exercise the option to leave the examination of the EU law validity to the preliminary ruling procedure and – based on *Factortame I* decision – they will have the power to suspend the application of the contested national legislation. When formulating this power in *Factortame I* case, the Court also primarily required the application of the principles of equivalence and effectiveness and generally demanded engagement of national procedural rules.

Since, except for *Kofisa* case, the question of issuing interim measures against implementing acts in case of an ambiguous interpretation was subject to decisions of the Court rather rarely,¹²⁹ judicial conclusions are not entirely clear and an analogy has to be used. In the absence of explicit case-law of the Court in this matter, we incline to the application of the same conditions as in case of doubt about the compatibility of national and EU law, and, therefore, to the use of (only) the principle of effectiveness and equivalence formulated in *Factortame I*. We find this situation closer to the circumstances of *Factortame I* than of *Zuckerfabrik/Atlanta* cases. This conclusion can be supported by the general trend in the recent case-law of the Court to mitigate the interference in national procedural law.

6. Summary EU law rules on interim measures

It is clear from the above that the requirement for full application of the EU law has been the *leitmotif* for the Court to actively formulate the conditions for interventions in national procedural rules. Individual conclusions can be summarized in a few generalised instructions for national courts:

- the power to issue an interim measure in situations like in *Factortame I* and *Zuckerfabrik/Atlanta* cases: in both situations national courts have the power to decide on interim measures even if the national procedural rules do not allow it. The legal basis for this power is based directly on the EU law;
- conditions for interim measure in situations like *Factortame I*: in case of an alleged contradiction between national and EU law the conditions for issuing interim measures are not formulated in the EU law. The Court requires only a general test of equivalence and effectiveness;

¹²⁹ See *Siples* case which was decided at the same time as *Kofisa* case and did not bring anything fundamentally new.

- conditions for interim relief in the situations like *Zuckerfabrik/Atlanta*: in case of an alleged invalidity of the EU law national courts are bound by the conditions formulated in these cases. Conditions for assessing the admissibility of preliminary measures are the same as those applied by the Court in the validity review of the EU law;
- a separate claim for interim measures in *Unibet* case: in case of an alleged contradiction between national and EU law the Court does not require a separate *locus standi* for interim measures if the main procedure is not admissible unless the right to effective judicial protection is violated;
- conditions for issuing interim measures in case of doubt about the correct implementation – in situations like *Kofisa*: here the general principles of effectiveness and equivalence are applied just as in *Factortame I* case;
- launching a preliminary ruling in case of doubt about the validity: simultaneously to the decision on interim measures suspending the application of EU law the national court must seek a preliminary ruling;
- launching a preliminary ruling procedure in case of doubt about the correct interpretation: if the national court has any doubts about the compatibility of EU and national law, or about the correctness of national implementation, then with regard to the principle of the primacy the national court applies the directly effective EU law immediately without taking into account conflicting national implementation. If at the same time the interpretation on the EU act is unclear and if it is the last instance court, it has an obligation to seek a preliminary ruling;
- the enforcement of the obligation to issue an interim measure by individuals: even though most analysed cases concerned primarily the *power* of national courts to issue interim measures if a national court does not issue an interim measure when all the conditions are met, it equals to a violation of the EU law. Individuals might make claims in appeal proceedings or claim a compensation for the damages caused by the violation of the EU law by its incorrect application;
- the enforcement of the obligation to issue an interim measure by an action under EU Treaties: a Member State is responsible for breach of the EU law by its courts and may be sued by the Commission (see the action under Article 258 TFEU). This is especially true in case of non-compliance with the conditions for issuing interim measures against implementing acts.¹³⁰

¹³⁰ As a recent example see e.g. *C-305/09 European Commission v Italian Republic*, judgement of 5 May 2011, yet not published, especially paras. 43–45. This case concerned the suspension of Italian legislation regarding recovery of unlawful state aid which was found inconsistent with the EU law by the Commission. At national level, its enforcement was suspended although the validity of the decision of the Commission was not challenged before the Court and the conditions set down in *Zuckerfabrik/Atlanta* cases were not met.

The analysis might be concluded by one more general note. The formulation of strict conditions in *Zuckerfabrik/Atlanta* cases does not mean that the **role of national courts** is simple and problem-free. For example, the condition that national courts must consider the impact in EU-wide context and take into account the consequences that would arise if the national courts (in other Member States) decided not to apply the act in question is – in our opinion – in everyday practice of (especially lower) courts rather difficult to fulfil. This question needs to be seen with regard to preserving procedural economy – i.e. the time gap which occurs until the response from the Court in the given case. Impacts on EU interests are mitigated by the requirement to provide sufficient (financial) safeguards by the party seeking the action, but – despite this – the safeguards will be used only after the final decision of the Court. Therefore, it can be expected that national courts will be rather reserved to decide on interim measures against the EU law.

Granting interim measures in situations like in *Factortame I/Unibet/Kofisa* cases is not much clearer. The failure to comply with these conditions is – due to the content vagueness of this principle in particular cases – difficult to prove and we suppose that in practice national courts will have a considerable space for their own assessment of the matter.

Anyway, in both types of situations it will also be up to the parties of the dispute which will be interested in getting the interim measure to persuade the national court that the all the conditions are met.

7. Czech procedural rules, EU law and interim measures before Czech courts

The previous text gave a complex analysis of EU rules on interim measures. In the following we will focus in short on the practice of Czech Courts in the area of procedural rules. The basis is formed by decisions of the Supreme Court, Supreme Administrative Court and Constitutional Court that may be found in their public databases.¹³¹

The Supreme Court deals as a last instance court mostly with civil and penal cases. Our research on these cases did not unveil any case which would directly concern the issue of interim measures with a clear link to the EU law. The EU law-based cases even do not elaborate on the principle of national procedural autonomy and the principles of effectiveness and equivalence as adjudicated in *Rewe/Comet* cases.¹³² The EU law based cases concern more precedence of EU law and its application in the area of substantive law or the CILFIT criteria con-

¹³¹ For the Supreme Court see http://www.nsoud.cz/JudikaturaNS_new/ns_web.nsf/Web-SpreadSearch; for Supreme Administrative Court see <http://www.nssoud.cz/main0col.aspx?cls=JudikaturaExtendedSearch>, for Constitutional Court see <http://nalus.usoud.cz/Search/Search.aspx>.

¹³² Actually we could not detect any case directly quoting these cases.

cerning the preliminary ruling procedure.¹³³ The Supreme Court uses the referral to the principle of effectiveness and equivalence only exceptionally, for example when endorsing EU law-based rules on state liability for breach of EU law.¹³⁴

The Supreme Administrative Court is the highest Czech court dealing with appeals in administrative-law cases. In relation to the EU law it is more explicit in its referrals to the EU law compared to the Supreme Court. In the area of Czech procedural rules *vis-à-vis* the EU law requirements we could mention f. e. application of EU asylum rules and direct referral to the principle of national procedural autonomy,¹³⁵ acceptance of principle of equivalence in customs proceedings¹³⁶ or in the application of EU completion rules,¹³⁷ national rules on the party's right of participation in licensing proceedings in transport services.¹³⁸ However, so far we have not found any case dealing directly with granting interim measures and the implication of EU law based rules as are set up in the Court's case law.

Similarly, we are not aware of any cases of the Czech Constitutional Court that would open the issue of national procedural autonomy or specifically EU rules on interim measures if application of EU law is concerned.

The quick survey given above made it clear that the Czech highest courts deal with the EU rules on the application of national procedural rules rather scarcely, if at all. An exception is the Supreme Administrative Court and even this court does not deal with it explicitly very often. In the cases footnoted above it generally accepts the basic principles and does not deal in much detail with subsequent "intricate" case-law of the Court. To refer to the subject matter analysed in this paper, it seems that none of these courts has dealt specifically with the grant of interim measures against EU law or national implementing law. We might speculate on the reasons thereof; however, we suppose that an important part in the EU law enforcement should be the parties themselves who might use the EU rules to support their interest – that is valid also in relation to the interim measures – these measures might be required by one party to postpone the use of a national rule to its disfavour; however, the recourse to strict EU law based rules might be used also as a tool for the party in the dispute to whose detriment the issue of interim measures is aimed.

133 From the early case-law see f.e. 25 Cdo 1582/2006, most recently see f.e. decision 28 Nd 153/2012.

134 Comp. f.e. decision 28 Cdo 2927/2010 and especially par. 34 where it refers to case 199/82, San Giorgio[1983] ECR 3604.

135 Comp. f.e. quite early after Czech accession to the EU case No. 3 Azs 259/2005-2 or No. 4 Azs 450/2005-44 decided in 2006.

136 See a series of cases, f.e. 1 Afs 21/2008-98.

137 Comp. f.e. č. j. 7 Afs 7/2008-200, 5 Afs 9/2008-328

138 Comp. f.e. 8 As 21/2008-189–176 and few more case decided on the same day.

We assume that one of the reasons for infrequent use of EU law based corrections (principles of equivalence and effectiveness) is their complexity and the Court of Justice case-law that sets up these rules. So far, the Czech legal literature has not dealt with these procedural rules extensively. We might also share an optimistic view that any recourse to the EU rules has not been necessary yet; and the Czech procedural rules “sufficiently” protect EU law interest. Be it as it may, we suppose that the application of national procedural rules should be the rule and the recourse to, on one hand, casuistic and, on the other, rather abstract EU rules may and probably will remain quite rare.