INTERIM MEASURES IN PROCEEDINGS BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY.

LL.M thesis
Nicolien van den Biggelaar.
July 1990.

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Introduction.

In a community where the concept of law has been accepted as a means for regulating relations within the community, disputes between members of the community will be solved according to the process of law by judicial settlement and not by fighting.
As a consequence of many developments; the growth in population, technical and industrial progress, increasing prosperity and the influence of all of these on the environment, among others, the scope of legal transactions is continally increasing. Legal problems have not only become more complex, but also the number of persons, natural or legal, and authorities taking part in legal transactions has increased. As a result, the number of judicial disputes has reached enormous proportions. These remarks do not only apply on a national level but also on an international level. Everywhere, the authorities responsible for the administration of justice are submerged in a mass of proceedings. This causes enormous delays and parties quite often have to wait for a long period before a final judgment is given. One can imagine that the authority of the decisions of a court will suffer because of this in the long run.
This is an issue of major importance, in particular on an international level, such as within the European Community. In spite of the acknowledged supremacy of Community law, the legal effect of decisions of the Court of Justice depends to a certain extent on the willingness and cooperation of the Member States.
Within the European Community, an attempt has been made to cope with the problem of the increasing workload of the Court of Justice, by the establishment of the Court of First Instance.

Opinions concerning the actual effect which the Court of First Instance will have, however, are divided.[1]

The proper functioning of a legal system depends largely on the judicial remedies available to ensure effective legal protection. Such protection requires that a judgment given in a particular dispute is not merely symbolic. One can imagine that the passage of time or an intervening event pending a final decision may render a final decision a nullity. Most legal systems have special proceedings designed to provide immediate protection for certain rights which may be threatened pending a judicial settlement. Their purpose is to preserve the effectiveness of a final judgment.

The way legal systems have treated the issue of provisional protection, in particular in administrative disputes, depends on their concept of the functioning of the administration.[2] This is because interim orders might adversely affect the exercise of the administrative and normative powers of the administration. This conflict between the necessity to provide effective judicial protection and the maintenance of a proper functioning of the administration is the crucial problem when discussing proceedings for interim relief.[3]

Summary proceedings in the laws of the Member States have many common features, but one can distinguish an essential difference in relation to the link required between the interim proceedings and the action on the merits. In those systems where such a connection is required in the sense that a pending main action is

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1. See e.g. D. Vaughan, Statement on the Procedural Reform at the European Court of Justice, in "Perspective for the development of judical control in the European Community", Baden Baden 1987, p. 223.
2. The term administration is used in the continental sense: the complex of executive bodies.
3. See section 1.1.

a precondition to a request for interim relief, the original purpose of interim measures, namely to preserve the effectiveness of the final decision, is paramount. However, in systems providing for interim relief irrespective of whether a main action is pending or not, summary proceedings seem to be used with the objective of obtaining a speedy judicial decision. In practice these latter interim decisions, although provisional in nature, seem to have a definitive effect in that the parties are satisfied with the outcome of the proceedings and do not institute a main action. In particular in areas concerning aspects of contemporary economic affairs for instance, such as competition or issues of consumer protection, interim proceedings seem to be used in this way. One may argue whether the fact that more decisions are taken in summary proceedings by one judge alone without an in depth examination, is a desirable development. Although the parties may have an opportunity to subsequently bring a main action, one may ask more importantly whether the summary nature of the proceedings is appropriate for reaching a final decision without seriously affecting the rights of the parties.

Proceedings for interim relief before the Court of Justice of the European Community will be examined in this thesis. According to Articles 185 and 186 EEC, the Court may under certain conditions order suspension of the operation of a challenged act or grant other interim measures.[4]

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4. In this thesis the considerations will be concentrated on the EEC Treaty; Article 39 ECSC and Articles 157 and 158 Euratom Treaty are more or less identical to Articles 185 and 186 EEC. The provisions dealing with suspension of the enforcement of a decision of the Court and suspension of the enforcement of a measure adopted by another institution will

(Footnote continues on next page)

A preconcition to proceedings for interim relief before the Court of Justice is the existence of a pending substantive action. The combination of the strong link between the requested interim measure and the main action with the prohibition of prejudice to the final decision, seems to preserve the original purpose of interim measures. This may be supported by statistics which show that, contrary to developments in national systems where a connection is not required, there has not been a considerable increase in the number of orders on interim relief before the Court in the past decade.[5] On the contrary, this number has been more or less the same for the last eight years, averaging approximately 17 orders a year.[6]

1955 : 2	1965 : 5	1975 : 5	1985 : 16
1956 : 2	1966 : 2	1976 : 6	1986 : 24
1957 : 1	1967 : -	1977 : 6	1987 : 20
1958 : -	1968 : 1	1978 : 6	1988 : 21
1959 : 5	1969 : 1	1979 : 6	1989 : 12
1960 : 2	1970 : -	1980 : 12	
1961 : 1	1971 : 1	1981 : 8	
1962 : 2	1972 : 2	1982 : 18	
1963 : 7	1973 : 2	1983 : 14	
1964 : 4	1974 : 6	1984 : 16	

(Footnote continued from previous page)

not be dealt with in this thesis since in view of their nature and function one should not regard them as interim measures stricto senso, although they are governed by the same articles in the Rules of Procedure; Article 89 RoP referring to Articles 44 and 92 ECSC, Articles 187 and 192 EEC and Articles 159 and 164 Euratom.

5. See also M.C. Bergerès, Contentieux Communautaire, Paris 1989, p. 156.
6. Statistics from "Synopsis of the work of the Court of Justice of the European Communities", yearly periodical, Luxembourg.

As has been noted, the crucial issue concerning interim measures is the conflict between the provision of effective judicial protection to the parties and the necessity to assure a proper functioning of the administration. This thesis aims to examine the way the Court of Justice has sought to balance these conflicting interests so as to define the scope and functioning of proceedings for interim measures in the European Community.

Outline.

I propose to divide this thesis in the following manner. Chapter One consists of a description of proceedings for interim relief in administrative law in France, Germany and the Netherlands. A comparative examination can be helpful to develop a deeper knowledge of a particular aspect of judicial protection which exists commonly in many legal systems. It is conceivable that the Court has been guided by principles adapted by national courts in comparable situations. The brief examination is restricted to provisional protection in administrative proceedings for it would seem that the Court of Justice acts in the first place as an administrative court whose duty is to protect its legal subjects against illegal acts or omissions of the Community institutions.[7] Therefore, systems of provisional protection in administrative law would seem the most appropriate source for seeking to gain greater insight into proceedings for interim relief before the Court of Justice.[8]

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7. However, one should remember that the jurisdiction of the Court in some cases is similar to a constitutional Court or an international court, depending on the type of action.
8. See also M. Slusny, Les mesures provisoires dans la jurisprudence de la Cour de Justice des Communautes europeennes, Rev. Belge de Droit Int. 1967, p. 133.

In section 1.1. provisional protection is considered in view of the objective of the underlying substantive action. Thereafter the systems of provisional protection in France, Germany and the Netherlands are discussed.

The first section of chapter Two deals with the question whether the objective of the substantive action before the Court affects the scope of interim relief in the Community. Subsequently, the main characteristics of interim measures are discussed. In this respect, the required procedural link between the interim measure and the substantive action is discussed, including the question of how to ensure provisional protection pending a preliminary ruling. The link concerning content between interim measures and the main action may be divided into a factual and a legal part. The factual link will be dealt with in section 2.3., whereas for practical reasons the legal link will be considered in the section concerning the conditions for the grant of interim relief. The second main characteristic considered in this chapter is the temporary nature of interim measures and the consequence thereof, namely the prohibition of prejudice to the final decision.

In chapter Three the conditions to be considered in evaluating an application for interim relief are be discussed. Firstly, there is the establishment of a prima facie case, which should be regarded as the requirement of a legal link between the interim measure and the main action. Secondly, the factors which are important in the assessment of urgency are discussed. Urgency is assessed in the light of the serious and irreparable damage the applicant is likely to suffer if his application is rejected. The nature of this damage is discussed separately according to whether the main proceedings are actions against Member States, anti-dumping cases, competition cases or staff cases.

Finally the role of the balance of interests is considered in this chapter. It should be noted at this point that a separate treatment of the different conditions is rather artificial since

they are intrinsically interrelated and should always be considered in view of the facts of each particular case.
Chapter Four deals with the forms of interim relief that may be granted. Suspension and other interim measures are discussed separately. Article 186 EEC does not define what kinds of provisional relief may be granted and thus leaves the President an extraordinary leeway.
Procedural aspects of the proceedings for interim relief are considered in chapter Five. The establishment of the Court of First Instance and the influence this might have on proceedings for interim relief are also discussed in this chapter.
In chapter Six an evaluation is made of the functioning and effectiveness of interim measures before the Court of Justice.

Chapter 1 : Provisional protection in administrative law in France, Germany and the Netherlands.

Introduction.

Articles 185 and 186 concerning suspension and other interim measures are very brief and give only a little guidance regarding the conditions demanded for interim protection. The chapter in the Rules of Procedure dealing with interim relief gives more detailed information but mainly with regard to procedural questions.[1] The Court of Justice used in several cases a comparative approach as to interpret the Treaty or secondary legislation.[2] In order to understand the scope and meaning of Articles 185 and 186 it might be useful to have a look at the national systems of provisional protection, in particular in administrative law, in the Member States. The ideas underlying the system of interim relief as provided in the EEC-Treaty are the same as in the national systems. The methods used to establish a system of provisional protection however, are not the same in all Member States. One might assume that the Court of Justice, in order to interpret the Articles concerning provisional protection, has used the different systems of Member States as a source from which common principles can be derived. The elements which appeared to be most in accordance with the spirit of the Treaty, taking into account the special features of the European Community, probably helped to give content to the Articles 185 and 186.
Therefore this chapter deals with a brief study of the systems of provisional protection in administrative law in France, Germany

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1. Articles 83 - 90 Rules of Procedure of the Court of Justice.
2. See for instance [1976] ECR 1541 and 1735, [1977] ECR 2175, [1981] ECR 1391.

and the Netherlands. France was chosen because it is very often said that the French system of judicial protection was the model for the system of judicial protection in the European Community,[3] Germany because it is the only Member State where actions against administrative acts have suspensory effect and the Netherlands because the system of provisional protection in this country has developed in a broad way.

1.1. Interim relief in the context of the objective of the substantive action.

Judicial provisional relief against the administration can be obtained either through special administrative courts or through ordinary courts. A mixture is also possible : although special administrative courts exist, ordinary courts still can be competent in some administrative matters.[4]
In general, two types of administrative jurisdiction can be distinguished. The first one is a system, like that in France, with a Council of State, sometimes acting as the only administrative judge, sometimes as judge of appeal from decisions of administrative courts of first instance. The second type of system has a special jurisdiction competent in almost all administrative matters, like that of Germany. These systems differ fundamentally.

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3. P. Becker, Der Einfluss des Französischen Verwaltungsrecht auf den Rechtschutz in den Europaischen Gemeinschaften, Hamburg 1963; M. Slusny, Les mesures provisoires dans la juirsprudence de la Cour de Justice des CE, Rev. Belge dr. int. 1967, p.151.
4. For instance in the Netherlands where the President of the Arrondissementsrechtbank is competent to give provisional protection if the act of the administration cannot be challenged before an administrative court.

The French system is based on an objective concept in which control of the legality of administrative acts, in view of the public interest, is of major concern.[5] The emphasis of judicial review is on the annulment of an illegal act rather than on the protection of subjective rights of individuals.

The German system however is based on the principle that subjective rights of private persons need to be protected against the administration.

These differences can be explained by the fact that the systems were created in different periods. The 19th century view of administrative law was different from today's concepts as it is now, not least because the scope of the activities of the administration has become broader. The need to protect private persons against the administration, a concept elaborated at the end of the 19th century, has thus become more urgent. The different ways countries dealt with this need to reform resulted in those two different systems.

In the classical system an administrative judge lacks competence to grant an injunction to the administration. As a consequence, the holder of a right infringed by an illegal act can only ask for damages. Thus the legal position of the entitled person can never be restored because of this prohibition of granting an injunction.

The German system, elaborated after the Second World War, is an improvement on the classical system because it provides an action allowing an administrative judge to give an injunction directly to an administration and therefore the possibility to restore private persons to the legal position to which they are entitled.

Whereas the classical French system was limited to financial compensation, the German system gave a more effective protection.

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5. An illustration of this is the importance of the action of 'recours pour excès de pouvoir'.

The purpose of interim measures may be defined as intending to prevent the effectiveness of a final judgment from being jeopardized by a situation which is incompatible with the realisation of the rights of one party. If the effectiveness of the final judgment is to be preserved, the objective of the final judgment will play a significant role when it comes to provisional measures. Therefore, one can submit that the position of provisional measures in a system of judicial protection will be influenced by the purpose or object of the substantive proceedings. A procedure which aims to control the objective legality of administrative acts, a so called 'recours objectif', will be mainly concerned with the legal effect of such acts. The legal effects of an illegal act can be neutralized retroactively by its annulment by an administrative judge. The interest in protecting observance of the law is sufficiently protected by this annulment. In such a 'recours objectif', like the 'recours pour excès de pouvoir' in French administrative law, the practical effects of an annulment are not of major concern. Although the administration will be required to restore the status quo ante, in most cases this will be too difficult so that the only possible remedy is the award of compensation in the form of damages. It is in this respect that one has to consider the limited scope of provisional measures in French administrative law. In a 'recours pour excés de pouvoir', an action with an objective character, one can request suspension of the contested act. However, as will be shown in section 1.4, the conditions to be fulfilled are very strict and, apart from suspension of building permissions, an application for suspension will rarely be granted.
The objective character may be a reason for the limited scope of proceedings for suspension. However, it should be noted that the nature of a 'recours objectif' does not have to be a barrier to a more flexible attitude towards provisional measures. An explanation for the limited scope of interim measures in France,

even in a 'recours subjectif' like the 'recours de pleine jurisdiction', is most likely found in the relationship between the administrative judge and the administration. It seems that the administration still benefits to a large extent from privileges, with the effect that individuals challenging an administrative act are placed in a subordinate position which adversely affects their protection against the administration.

In this classical system provisional protection is governed by two main principles. In the first place the principle of the right of immediate execution. This privilege has been justified by the concept of a presumed legality of administrative acts so as to assure a proper functioning of the administration. The second main principle is the lack of competence of the judge to give injunctions to the administration, even in summary proceedings, so as not to upset the separation of powers. These two principles are the expression of the idea existing in the 19th century about the relation between the state and its citizens and the public authorities among themselves. At that time the function of the administration was solely to maintain the public order and thus favoured immediate execution as the rule.

[As opposed to a 'recours objectif', a 'recours subjectif' aims to protect the legal position of an individual. As has been stated, the German system is based on a subjective concept. For instance, the action for annulment in German administrative law, the Anfechtungsklage, primarily protects subjective rights of individuals and may be classified as a 'recours subjectif'. For this provision to be effective, it is necessary that an applicant has adequate means to protect himself from being presented with a fait accompli or suffering disproportional damage pending the action. Compensation for damages does not alter the fact that an applicant has lost his legal position. When an applicant loses his legal position, one may conclude that the action did not provide for effective protection of the rights claimed. Therefore, actions

against administrative acts imposing a burden on somebody have, in principle, suspensory effect.

One can say that the function of provisional protection in the classical system is limited in that it is only intended to avoid a situation in which judicial control is deprived of any effect. In the German system which is an example of the modern system, protection of subjective rights is of primary consideration and provisional protection is intended to avoid a situation in which the applicant is deprived of his legal position. It is in this context that one has to consider the objective of the substantive proceedings and its effect on the position of interim relief. But once again, a 'recours objectif' is in itself no barrier to a more flexible approach towards interim relief.

1.2. Provisional protection in French administrative law.

In French administrative law one can distinguish three types of proceedings providing provisional protection: suspension of execution, a 'référé administratif', and the procedure of 'constat d'urgence'. This section will mainly consider the provision of suspension because the others have more or less a function to support the principal procedure. The provision of suspension of execution of an administrative act on the other hand, really effects the relation between the administration and individuals.[6]

1.2.1. Suspension of execution of an administrative act.

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6. The possibility of suspension of a judicial act in case of an appeal will be left aside in this section.

Actions before French administrative courts do not have suspensory effect.[7] This rule is laid down in Article 48 of the ordonnance of 31 July 1945 with regard to the Conseil d'Etat and in Article R. 118 of the Code des Tribunaux administratifs with regard to the Tribuneaux Administratifs, the administrative courts.[8]

One can give several arguments for the absence of suspensory effect. In France judicial control of the administration has always been retrospective. From a historical point of view, the intervention of a judge before execution of an administrative act is considered as a rarity and as an infringement of the function and responsibility of the administration. The separation of powers is, on this approach, a barrier for such prior judicial intervention.[9] The second motif is a theoretical one. Administrative acts are given in order to take care of the public interest and therefore they benefit from a privilege of immediate execution. If actions against administrative acts had suspensory effect, this special character of administrative acts would be denied. Practical reasons form the last justification for the absence of suspensory effect. If actions of private persons against administrative acts had suspensory effect, the number of actions against the administration would increase and would endanger the proper functioning of the administration.

In principle, actions against an administrative act do not have suspensory effect in French administrative law. However, Article

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7. There are some exeptions e.g. Article L.223 of the Code électoral.
8. Code des Tribuneaux administratifs, recently modified by décret 89-641 of 7 september 1989, Rec. Dalloz Sirey 1989, 31e cahier, Legislation.
9. One can argue whether this is an argument concerning the absence of suspensory effect. The intervention of the judge is necessary just because of this absence! However, this does seem a very theoretical point of view.

48 of the ordonnance of 31 July 1945 concerning the Conseil d'Etat, formulates an exception: s'il n'en est autrement ordonné.[10] The requirements for such an order are laid down in Article 54 of the décret of 30 July 1963.[11] Paragraph 4 of this Article provides:

> 'Dans tous les autres cas[12], le sursis peut etre ordonné, à la demande du requérant si l'exécution de la décision attaquée risque d'entrainer des conséquences difficilement réparable et si les moyens énoncés dans la requete paraissent en l'état de l'instruction, sérieux et de nature à justifier l'annulation de la décision attaquée.'

Basically there are three conditions to be fulfilled.
A request for suspension of execution of an administrative act can only be made if the applicant has started an action before an administrative court in order to obtain the annulment of the contested act. The grounds on which the request is based should be serious enough to justify annulment of the contested act. Furthermore immediate execution of the contested act should cause damages which are difficult to repair.

1.2.1.1. Procedural link

A request should be lodged at the Court competent in the main action. In most cases this will be the Tribunal Administratif.

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10. Regarding administrative courts this rule is laid down in Article R.118 of the CTA: 'Le recours devant le tribunal administratif n'a pas d'effet suspensif s'il n'en est ordonné autrement par le tribunal à titre exeptionnel.'
11. This Aricle has been modified by décret 75.791 of 26 August 1975.
12. The foregoing paragraphs deal with suspension of judicial decisions in case of an appeal.

When the Conseil d'Etat is competent in first and last instance the application should be lodged at the Conseil d'Etat.[13]
The admissibility of the action for annulment is a condition for admissibility of the request for suspension, but the judge deciding on the suspension rejects this request arguing that there are no serious grounds. He does not speak about the admissibility of the main action.[14]
The administrative act which suspension is being sought cannot be a negative decision. Suspension of such a decision would mean an injunction to the administration and such an injunction is not allowed in French administrative law.
In 1970 the Conseil d'Etat decided:[15]

> 'Le juge administratif n'a pas qualité pour adresser des injonctions à l'Administration; le Tribuneaux administratifs et le Conseil d'Etat ne peuvent donc, en principe, ordonner le sursis à exécution d'une décision qui leur est déférée que si cette décision est executoire; en revanche ils n'ont pas le pouvoir d'ordonner qu'il sera sursis à l'exécution d'une décision de rejet, sauf dans le cas ou le maintien de cette décision entrainerait une modification dans une situation de droit ou de fait telle qu'elle existait antérieurement...'

Thus suspension of a negative décision is only possible if maintenance of the contested act would change the situation in fact or in law. This happened, for example, in the Montcho case.[16] The Conseil d'Etat considered refusal of a residence permit, which had been requested for the first time, as a change of the facts because the applicant was obliged now to leave

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13. CE 1 February 1963, Ministre constr. v. Dame Derivery, Rec. Lebon p. 957; CE 4 February 1972, Deliot, Rec. Lebon p. 115.
14. CE 18 February 1972, Epoux Audoire, Rec. Lebon p. 155; See also Gabolde, La procédure des Tribuneaux Administratifs, Paris 1981, p. 198.
15. CE 23 January 1970, Amoros, Rec. Lebon p. 51.
16. CE 11 July 1980, Montcho, Rec. Lebon p. 315.

France. However, more recently the Conseil d'Etat decided in a similar case that such a refusal did not change nor facts nor law.[17] An act which has already been executed cannot be suspended; such a request will be inadmissible[18]; only if such an act continues to have effect, suspension will be possible.[19] Decisions on suspension are subject to appeal within 15 days.[20] The parties can ask for a provisional ending of the suspension in a separate request. If an administrative court of appeal is seized to decide on an appeal, it may immediately stop the suspension pending the decision on the appeal, where suspension could cause serious harm to the public interest or to the applicant.[21] The President of the 'Section Contentieux' of the Conseil d'Etat will be involved when an applicant starts a 'recours en cassation' against a decision on suspension.

1.2.1.2. 'Moyens serieux'

This condition is in fact a codification of previous case-law.[22] Serious grounds are established if the main case appears prima facie to be well-founded. The formula most frequently used by the Conseil d'Etat concerning the condition of serious grounds is:

> 'Considérant que l'un des moyens soulevés par le requérant à l'appui de son recours tendant à l'annulation de la décision attaquée, est de nature à justifier une demande de sursis.'[23]

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17. CE 12 November 1987, Tang Kam Teung, Rec. Lebon p. 367.
18. CE 16 December 1977, Lehodey, Rec. Lebon p. 508.
19. CE 18 June 1976, Moussa Konate, Rec. Lebon p. 321.
20. Art. R. 123 of Décret 89-641 of 7 September 1989.
21. Art. R. 124 of Décret 89-641 of 7 September 1989.
22. CE 19 january 1955, Préfet de la Seine v. Ass. des propriétaires de la villa de Montmorency, AJDA 1955, p.66.
23. e.g. CE 17 june 1955, Ass. des sports Randenay, AJDA 1955, p.289; CE 24 october 1986, Boyer, Lebon Tables, p.662.

The Conseil d'Etat does not give an indication as to which of the grounds are serious. Probably the reason for this approach derives from the principle that the judge, sitting in summary proceedings, may in no way prejudice the substance of the case. It is worthwhile noting that in more recent cases it is sometimes indicated which of the grounds are serious.[24]

The judge deciding on the request for suspension in fact gives his opinion, albeit provisional, on the legality of the contested act with this interpretation of 'moyens serieux'. It is not surprising therefore that in a few cases only the main application has been rejected after suspension has been ordered. This is a result deriving from the rather thorough examination in the proceedings for suspension.

Some authors do not agree with this condition that the main case be well-founded in order to obtain suspension. Their main argument is that suspension becomes unnecessarily difficult and that the original function of suspension disappears. Suspension should protect the applicant against irreparable damage caused during the lengthy time needed to give a decision in the main case. A thorough examination of the merits of the main claim in an action for interim relief cannot, in their opinion be justified. Requiring that the main case be well-founded splits the principal procedure into two parts, according to Schwaiger.[25] Another consequence might be, according to Gabolde, that proceedings for suspension become attractive in order to test the chances for a

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24. TA de Strasbourg 8 september 1986, Ass. de sauvegarde de la valée de la Moselle e.a., AJDA 1987, p. 122; CE 29 june 1988, Ministre du budget v. Contamin, Rec. Lebon 1988, p. 957.
25. N. Schwaiger, Le référé devant la Cour de Justice des trois Communautés Européennes, Montpellier 1965, p. 51; see also in this sense C. Debbasch, Contentieux Administratif, Paris 1985, p. 485.

principal procedure.[26] This is currently happening in France. Applicants ask for suspension with the objective of obtaining a quick judicial opinion on their legal position. Obviously, proceedings for suspension are not meant to serve this function. Nevertheless it is possible that there will be a decrease in the number of main procedures, which might be regarded as a positive development.
If the request for suspension is rejected because the main case does not appear to be well-founded, the applicant will not launch a main claim and both the applicant and the judge will be saved a lot of time.
The conclusion from the case-law might be that in French administrative law the merits of the main claim determine whether there are serious grounds or not to the effect that only a well-founded main action will establish 'moyens serieux'.

1.2.1.3. 'Conséquences difficilement réparables'

It is difficult to ascertain what facts would fulfil this condition. The main reason for this is that many decisions rejecting suspension are not motivated and those awarding suspension are motivated briefly in a stereotype way. Some general lines however can be derived from the case-law.
The purpose of suspension of execution of an administrative act is to protect the interest of the applicant during the time that a case on the substance is pending. Immediate execution of an administrative act could create a situation causing damage to the applicant, which damage could not be repaired if the applicant was to succeed in his main case. The final judgment would be deprived

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26. C. Gabolde, La procédure des Tribunaux Administratifs, Paris 1981, p. 198.

of its effect if such irreversible damage was suffered by the applicant. One can imagine that especially in disputes concerning the construction or destruction of buildings this danger arises. Once a construction permit is given, an action against this permission is not useful anymore if the building has been constructed before a final decision in the action for annulment. Therefore the damage in this kind of case is normally considered as difficult to remedy.[27] Thus, an action challenging a building permission is the only situation in which there is a reasonably good chance of obtaining an order granting suspension. Financial damages, as well as commercial damages, are in most cases considered to be reparable.[28] Finally it should be mentioned that the damage has to be suffered by the applicant himself, damage to third parties cannot support a request for suspension.[29]

1.2.1.4. Balance of interest ?

In 1976, the Conseil d'Etat refused for the first time a request for suspension although both conditions -serious grounds and irreparable harm- were fulfilled.[30] From this decision the conclusion may be drawn that the administrative judge has a discretionary power as to award or reject suspension. It is

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27. CE 12 December 1973, Robinet et Flandre, Rec. Lebon p. 722 and the note of G. Braibant;See also C. Debbasch, Contentieux Administratif, Paris 1985, p.486.
28. e.g. as regards financial damage TA Paris 15 October 1985, Société Europe Entretien, Lebon Tables, p. 730; e.g. as regards commercial damage CE 21 May 1985, Société alsacienne de supermarchés, Rec. Lebon p. 838.
29. CE 23 November 1977, Jan, Rec. Lebon p. 298; See also R. de Saint Marc, Les notions de 'préjudice difficilement réparable' et de 'moyens serieux', Gaz. du Pal. 1985, p. 124.
30. CE (Ass.) 13 February 1976, Ass. de sauvegarde du quartier de Notre-Dame, Rec. Lebon p. 100.

interesting to know in which cases the judge actually uses this discretion. It seems that the judge examines whether suspension will harm a manifest public interest.[31] For example reasons concerning security could be an argument for rejecting suspension although the conditions have been fulfilled. Again the lacking reasoning makes it difficult to examine whether a balance of interest has been made.[32] Some authors therefore argue that the administrative judge has too much discretionary power and that opportunity of suspension as a third condition destroys the jurisprudential basis of the conditions for suspension.[33]

1.2.2. Référé and constat d'urgence.

The strict separation in French administrative law between the administrative institutions and the judicial institutions has its influence as well on the other proceedings concerning provisional measures. According to Article 27 of the décret of 30 July 1963[34], the president of the section contentieux " ... peut, dans les cas d'urgence, ordonner toute mesure en vue de la solution d'un litige. Sa décision ne peut préjuger le fond." As regards administrative courts of first instance the competence to order interim measures is laid down in Article R. 130 of the CTA[35]. This Article provides:

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31. CE 11 June 1976, Moussa-Konate, AJDA 1976, p. 582; CE 2 July 1982, Huglo et autres, Rec. Lebon p. 258; CE 20 February 1987, Mme Blanche Ricard, Dr. Adm. 1987, no. 186.
32. See for example the decision of the TA Strasbourg of 8 September 1986, Ass. de saufegarde de la vallée de Moselle et autres, AJDA 1987, p. 122.
33. J.R. Etchegaray, Les limites du sursis à l'exécution, Gazette du Palais 1985, p.87.
34. modified by décret of 26 August 1975. .
35. modified by décret 89-641 of 7 September 1989

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'En cas d'urgence, le président du tribunal administratif ou de la cour administrative d'appel ou le magistrat que l'un d'eux délègue peut, sur simple requète qui, devant le tribunal administratif, sera recevable mˆme en l'absence d'une décision administrative préalable, ordonner toutes mesures utiles sans faire préjudice au principal et sans faire obstacle à l'exécution d'aucune décision administrative.'

Article R. 136 CTA defines the procedure of 'constat d'urgence'. This procedure provides in case of urgency for the possible appointment of experts to establish facts concerning an action which is pending before an administrative court. Because this procedure in fact does not provide provisional protection the details as regards 'constat d'urgence' will not be considered.
Référé proceedings are linked with a main procedure in the sense that there must be a real dispute between the applicant and the defendant, but it is not necessary that a principal procedure is already pending before the court. In this the référé proceedings differ from the provision of suspension where a procedural link is required.[36] The competent judge is the President of the court which is competent to decide on the main action, which implies in most cases the President of the Tribunal administratif. Appeal is possible within 15 days to the Cour administrative d'appèl or - when the Conseil d'Etat is competent- to the Conseil d'Etat.[37]
Actually there are four conditions that have to be fulfilled in order to obtain interim measures, two positive and two negative conditions. The measures asked for should be adequate in that they are of a nature as to protect the rights of the applicant.[38] For example a measure ordering an expert to give report before 31 January 1980 whereas the procedure of consultation should be

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36. CE 15 July 1957, Ville de Royan, Rev. dr. publ. 1958, p. 109.
37. Art. R. 132 of Décret 89-641 of 7 September 1989.
38. CE 11 May 1979, Ministre de Santé v. Epinasse, Rec. Lebon p. 214.

finished the 28th of november is not an adequate measure.[39] Urgency must justify the requested measure.[40]
The two negative conditions concern the prohibition of prejudicing the substantive case and the prohibition to create a barrier for execution of administrative decisions. The first condition is interpreted in the way that the judge deciding on the request for interim measures may not give his opinion on the well-foundation of the main case or on the questions of law raised.[41] The Conseil d'Etat is very strict with regard to this requirement.[42] The second condition limits the scope of the référé by excluding suspension as a provisional measure.[43] Only measures of instruction and conservatory measures can be awarded in the référé proceedings. Case-law shows that the administration especially benefits from this procedure mainly in actions concerning a 'contrat administratif'. On request of the administration private persons can be obliged, pending the final decision, already to

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39. CE 16 January 1981, Sté "Les cables de Lyon", Rec. Lebon p. 21; An example where the requested measure explicitly was declared efficient can be found in CE 3 June 1988, Diallo, Lebon Tables p. 288.
40. CE 14 March 1958, Sécret.d'Etat reconstr. et logement, Rec. Lebon p. 174; CE 9 December 1988, Société "le téléférique de Massif de Mont Blanc", Rec. Lebon p.438.
41. See e.g. CE 25 January 1980, Sté des terassements mécaniques, AJDA 1980, p.615.
42. CE 17 December 1956, Sécr. d'Etat à la Reconstruction et au Logement v. Dubreuil, AJDA 1957,II p. 51.
Request rejected because prejudicing the main case e.g. CE 6 January 1989, Lovera, Rec. Lebon p. 3; An example of a measure explicitely stated not to prejudice the main case e.g. CE 16 January 1985, Cordornier, Lebon Tables p. 727.
43. Article R.136 CTA : '...et sans faire obstacle à l'exécution d'aucune décision administrative'.

fulfil certain contractual obligations.[44] One can allege that the référé proceedings are in practice proceedings supporting the administration in proceedings instead of giving provisional protection against the administration.

1.2.3. Conclusion.

The French administrative courts are rather strict in the award of requests for orders of suspension of execution of an administrative act. The requirement of serious grounds, interpreted as the necessity to establish that the main case is well-founded confirms the exceptional character of suspension in the French administrative system. There is no real balance of interests; the privilege of immediate execution which is part of the classical system of French administrative law and the prohibition on giving injunctions against the administration in any situation make it very difficult for an individual to protect his interest. Private parties are not equally protected because they have to struggle against privileges of the administration that were created in the 19th century. Presumably, owing to the the objective concept of the French system, it is considered to be satisfactory to annul an illegal administrative act retroactively. The protection of the public interest is of major concern rather than the protection of the legal position of an individual who is suffering as a result of an illegal act. It is worth noting that the stringent requirements with respect to suspension have not lead to a decrease in the number of applications for suspension. A

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44. CE 9 February 1962, Vivien, Rec. Lebon p. 100; CE 11 May 1979, Ripert, Rec. Lebon p. 214; See also J.C. Piedbois, L'urgence et l'utile dans la procédure du référé, Gazette du palais, 26 February 1985, p. 121 and X. Pietot in note on CE 3 June 1988, Diallo, AJDA 1988, p. 689.

possible explanation would be that in many cases the principal aim is, to obtain an opinion of the judge on the grounds concerning the main action rather than an order for suspension.
Decisions in 'référé' proceedings seem to be limited to measures of instruction, which have the aim to ascertain facts which are of a temporary nature. A provisional permission for certain activities will not be granted in référé, nor will injunctions to the administration.
In conclusion, one may state that interim measures in France are of little importance since their scope is very limited. It would be preferable to refrain from using proceedings for interim relief in French administrative law as an example to be followed by the Court of Justice.

1.3. Provisional protection in German administrative law.

Article 19 Abs. 4 GG, which requires "eines effectiven Rechtsschutzes" has an important influence on the system of provisional protection in German administrative law. The Bundesverfassungsgericht has considered in several cases:[45]

> "(...) es sollen durch Art. 19 Abs. 4 GG auch irreparable Entscheidungen, wie sie durch die sofortige Vollziehung einer hoheitlichen Massnahme eintreten können, soweit wie möglich ausgeschlossen werden. Hierin liegt die verfassungsrechtliche Bedeutung des Suspensiveffekts verwaltunggprozessualer Rechtsbehelfe, ohne den der Verwaltungsrechtsschutz wegen der notwendigen Verfahrensdauer häufig hinfällig würde (...)"

The German system of provisional protection has two main characteristics. In the first place there is no general presumption of the legality of administrative acts. Therefore

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45. BverfGE 51,284.

individuals are placed on a par with the administration when challenging its acts. Secondly, the separation of powers is not considered to be a barrier against a judge enjoining the administration if this is necessary to protect the legal position of an applicant. Article 80 of the Verwaltungsgerichtsordnung (hereafter: VerwGO) provides for automatic suspension when contesting and administrative act by means of an 'Anfechtungsklage'. Furthermore, Article 123 VerwGO provides the possibility of requesting positive interim measures if suspension is not possible or cannot be the effective solution.
The far-reaching protection of the interests of individuals as a result of automatic suspensory effect matches a system of 'Individualrechtsschutz' as established in Germany.
An argument, used for instance in France and the Netherlands, against suspensory effect, is the fear for an undue incentive towards initiating litigation before the court and thus endangering the proper functioning of the administration. In Germany, however, the applicant will be ordered to pay the costs if he loses in administrative proceedings. Therefore an individual will think twice before he starts prospectless proceedings.
In this section Article 80 VerwGO and the implications of this provision will be discussed first. The power to order positive interim measures based on Article 123 VerwGO, will be dealt with later.

1.3.1. Article 80 VerwGO and the principle of suspensory effect.

Article 80, paragraph 1 VerwGO states:

> "Widerspruch und Anfechtungsklage haben aufschiebende Wirkung. Dies gilt auch bei rechtsgestaltenden Verwaltungsakten.

Both actions before administrative courts, and preliminary complaints (Widerspruch) result in suspension of the execution of the contested act.

In principle Article 80, paragraph 1 VerwGO permits only suspensory effect in actions against administrative acts imposing a burden on an individual, because Article 80, par. 1 only mentions the 'Anfechtungklage'. Actions challenging administrative refusals, such as the Verplichtungsklage[46], do not suspend the operation of this act. The idea behind Article 80 VerwGO is, to protect rights of individuals and not to protect their desire to improve their position.[47] A positive measure may be obtained in those situations by the provision of Article 123 VerwGO. However, if an applicant attacks a refusal to prolong an authorisation concerning legal rights, this action has suspensory effect. In this case the suspension assumes that the applicant still has the legal entitlement.[48]

A controversial point in the doctrine concerns the question whether suspension only affects the execution of an act by the administration (Vollziebarkeitstheorie) or extends to prohibiting action upon such an act by the addressee (Wirksamkeitstheorie). As a result of this dispute, opinions are divided regarding actions against administrative acts which are beneficial to the addressee but which impose a burden on third parties.[49] A classic example of such an administrative act is a building permission. If a third party is affected by this permission, he can challenge it by means of a 'Nachbarklage'. The question is whether this action has suspensory effect, in that the addressee of the permission is

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46. A 'Verplichtungsklage' is, in brief, an action against a negative administrative decision or against a failure to act.
47. BVerwGE 47, 175; BVerwGE 55, 99; NJW 1980, 1544.
48. BVerwGE 34, 325; NJW 1970, 396; BayVBl. 1976, 275.
49. So called 'Verwaltungsakten mit Doppel- or Drittwirkung'.

enjoined from using his permission. The leading view is in favour of permitting suspensory effect in this situation instead of using Article 123 VerwGO.[50]

The operation of a measure will be suspended immediately after a procedure has been started to challenge an administrative act. According to the wording of Article 80, par 1 VerGO, there is no test of admissibility or of whether of not the main action is well founded. Although there is no consistent theory on this, the leading view seems to be that manifestly inadmissible or unfounded main actions are a barrier to automatic suspensory effect. The Bundesverwaltungsgericht rejected suspension in a case in which the application was lodged manifestly too late.[51] The only condition seems to be whether or not the applicant is directly affected by the contested act or not.

There are four important restrictions on the principle of suspensory effect. According to Article 80, paragraph 2 VerwGO there is no suspensory effect in actions concerning taxes, concerning certain police measures and in other cases if determined in federal laws.[52]

The fourth exception is mentioned in Article 80, paragraph 2, in fine. The administration can exclude suspension by declaring the immediate execution necessary in view of the public interest or an interest outweighing the interest of the applicant. The administration has to give a written reasoning. Such a written

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50. BVerwGE 49, 250 seems to point in favour of using Article 80 VerwGO.
51. See also M. Fromont, La protection provisoire des pariculiers contre les decisions administratives dans les Etats-Membres des Communautés Européennes, International Review of administrative science 1984, p. 321.
52. See for the scope of these terms e.g. Eyermann -Frohler, Verwaltunsgerichtsordnung, 7th Edition, p. 562. An example of a federal law excluding suspensory effect: Article 21, par.2, al.2 of the Auslandergesetz.

reasoning is not required in the event of an urgent measure concerning an imminent threat to life, health or property.
An order for immediate execution seems to be the counterpart of automatic suspensory effect, in the same way as an order for suspension is the counterpart of the absence of suspensory effect. Actually, the possibility for the administration to order immediate execution has the effect of returning to a system in which an individual has to request suspension. Basically the difference is that the judge in this case grounds his decision to re-establish suspension on the merits of the decision ordering execution instead of on a consideration on the merits of the main action.
If there is no suspensory effect either because the administration ordered execution or because the law excluded automatic suspensory effect , the applicant has the possibility of requesting re-establishment of suspension.[53] According to Article 80, paragraph 5, the judge can order suspension in those cases.[54] The competences is that of the court which is competent in the main action. In most cases this will be, in first the instance the 'Verwaltungsgericht' and in appeal or cassation the 'Oberverwaltungsgericht', and the Bundesverwaltungsgericht respectively. In urgent cases the President of the competent court may decide. An appeal may be brought to the full court against his decision, according to Article 80, par. 7 VerwGO. 'Beschwerde is

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53. In view of a 'Widerspruchsverfahren' the 'Widerspruchsbehörde' can order suspension, according to Article 80, paragraph 4.
54. In the event there is no action for annulment possible because the contested act is a measure of a general character or there is no administrative act at all, the judge may order other interim measures according to Article 123 VerwGO (Einstweiligen Anordnungen). This provision will be dealt with in section 1.3.2.

possible against a negative decision of the administrative court in first instance. If the same court considers the 'Beschwerde' inadmissible or unfounded, the higher court will take the decision.

Article 80, par. 5 VerwGO does not mention any criterion on the basis of which the judge may order suspension. If suspension is excluded due to the administration having ordered immediate execution, the judge will order suspension if he considers that immediate execution is not "in the public interest or in the outweighing interest of an individual". In al the other cases the judge will balance the interests of all parties concerned, including the public interest. He will order suspension if immediate execution causes disproportional damage to the applicant.[55] The merits of the main action will be taken into account in this balance of interests. The leading opinion regarding this issue is that in manifestly inadmissible or unfounded cases, without further consideration, the interest of the administration in immediate execution will prevail.[56] Conversely, one can say that in manifestly well-founded main actions the interest of the applicant in suspension will prevail.[57] It should be noted at this point that an exclusion of suspensory effect by law, presupposes an outweighing public interest. Thus in fact there is a presumption of legality in favour of immediate execution. Therefore suspension will only be awarded if the applicant is able to show a really strong interest in suspension.

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55. BVerfGE 51, 286; Kopp, Verwaltungsgerichtsordnung, München 1981, p. 586; Eyermann-Fröhler, Verwaltungsgerichtsordnung. München 1977, p. 578.
56. See M. Fromont, o.c., p.320.
57. Kopp, o.c., p. 588.

Suspension is not the most appropriate form of relief whenever an administrative act has already been executed. The administrative judge may order in those cases the 'Aufhebung der Vollziehung', according to Article 80, paragraph 5. Such an order defines the measures to be taken by the administration to neutralise the effects of execution.

1.3.2. Other interim measures - Article 123 VerwGO.

As has been stated before, only administrative acts challenged in proceedings for annulment are subject to automatic suspension. Provisional protection in other actions against administrative acts, should be obtained by interim relief based on Article 123 VerwGO. Those other cases are basically actions to oblige the administration to do, to leave or to tolerate something (Leistungsklage) or actions for a declaratory judgment (Feststellungsklage). The competent court is the court which would be competent to decide on the main action; in urgent cases the President of the competent administrative court may decide.[58] 'Beschwerde' is possible against decisions refusing the requested measure.[59] The parties have the possibility to appeal, when the decision on interim measures is given by judgment. Aside from Article 80, paragraph 5 VerwGO, interim measures based on Article 123 VerwGO can be ordered without a pending main action.[60]
The measures ordered by the administrative court should be provisional and may not give a solution which should be obtained in the main action. However, if effective protection can only be assured by giving a remedy which is sought in the substantive

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58. Article 123, par. 2 VerwGO.
59. Article 123, par. 3 VerwGO; for the conditions as regards 'Beschwerde' see Article 146 VerwGO.
60. Kopp, o.c., p. 884.

action, the judge would seem to be allowed, according to an interpretation of Article 19, par. 4 GG, to order such a measure if the applicant would suffer irreparable damage otherwise.ÜAn example from the case law is the admittance of pupils to follow the final year since otherwise a complete year would be lost.[61] In this type of case the probability of success in the substantive claim is an important consideration, along with the question of urgency and the irreparability of the damage to the applicant.[62] Apart from the standard conditions of admissibility[63], the applicant has to show the entitlement to a certain right and a threat of infringement of this right.[64] The decision on interim measures depends mainly on a balance of interests which should favour those of the applicant.[65] The judge has to weigh all private and public interests at stake against each other. In fact the conditions are similar to those required for suspension based on Article 80, paragraph 5.[66] In this balance of interests, the merits of the main action can play a role. If the main action is clearly admissible and well-founded the interests of the applicant will normally prevail.[67] If it seems that the main action is manifestly inadmissible or unfounded, the balance of interests will usually favour the defendant and the request will be dismissed.[68] Aspects which are taken into account in the balance of interests if the outcome of the main action is completely

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61. Mannheim DOV 1980, 614; Kopp, o.c., p. 880.
62. Berlin NJW 1978, 1811; BVerfGE 53, 122.
63. See Article 40 VerwGO.
64. So called 'Anordnungsanspruch' and 'Anordnungsgrund'; see BVerfGE 51, 280; Kopp, o.c., p. 884.
65. Kopp. o.c., p. 885.
66. BVerfG 51, 286; NJW 1980, 35.
67. Munchen BayVBl 1979, 470.
68. BVerwGE 50, 134, NJW 1976, 113; Munchen BayVBl 1976, 275.

unpredictable, are urgency and the irreparability of the damage for the applicant if relief is not granted.
The interim measures will only be effective until the final judgment or until a date determined by the judge on condition that a main action be started within this period.

1.3.3. Conclusion

In German administrative law the system of provisional protection is very well developed. Unlike many other states, the system is based on the principle of suspensory effect in actions for annulment of an administrative decision. The idea behind suspensory effect is to create a balance between the administration whose acts are immediately enforceable and individuals challenging those acts. As opposed to the French and the Dutch systems, the administration and private persons have in principle an equal position when it comes to protection of their interests. The principle of suspensory effect matches the subjective concept of the system, a system of 'Individualrechsschutz', as established in Germany. The proper functioning of the administration is assured by excluding some administrative acts from automatic suspension when challenged. Moreover, the administration can order immediate execution in urgent cases and thus block suspension. In those situations the rights of individuals are protected by the capability of the administrative court to order suspension (Wiederherstellung der Aufschiebende Wirkung) or, if the act already has been executed, to order restoration of the previous situation (Aufhebung der Vollziehung). When considering whether suspension should be re-established or not, all the interests involved should be taken into account. The general approach seems to be that only clearly inadmissible or unfounded cases make the balance without further

consideration lie in favour of the defendant.[69] Altogether, Article 80 VerwGO provides a system of provisional protection which has found a balance between the protection of the public interest an the interests of individuals. Finally, Article 123 VerwGO gives the possibility to request interim measures in actions which fall outside the scope of Article 80 VerwGO. Once again, the administrative court has to consider whether the interim measures are necessary to protect the interests of the applicant. Protection of this interest should prevail over the public interest.[70] In the balance of interests the admissibility and well-foundation of the main action are taken into account; only obvious cases will lead to a rejection of the request for interim measures because in those cases the interest of the defendant will be more important.

The award of interim measures is not conditional on there being a pending main action, a situation which does not exist in, for instance, Dutch administrative law. This has the practical advantage of being able to obtain interim relief without recourse to the main action.

The interim measure may have any content but can in principle not lead to the same decision as asked for in the main action. However, this principle has been mitigated by allowing such a measure if effective protection can only be obtained in this way.[71]

It should be noted that several difficulties which make the system more complex are left aside in this section. Yet one may say that the German system of provisional protection in administrative

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69. Luke, NJW 1978, 83 -suspension in all inadmissible cases; Mannheim NJW 1978, 720.
70. All the interests should be weighed against each other:BVerfG 51, 280.
71. BayVGH 28-2-'66, BayVBl 66, 207.

matters is an effective system. An effectiveness which is ensured by the constitution in Article 19, par. 4 GG. The system is on the one hand based on equality as regards the legal position of the administration and individuals, and on the other provides enough possibilities for the administration not to be paralysed by actions against it. In particular the first factor is very important nowadays because the scope of the executive power has enlarged the recent past. Therefore the need for effective protection, based on equality, for individuals whose rights might have been infringed, has never been so urgent.

1.4. Provisional protection in Dutch administrative law.

1.4.1. Introduction.

The system of provisional protection in administrative matters is rather complicated in the Netherlands. The Dutch system is based on the French conception of administrative law. As in France, the main administrative jurisdiction is exercised by the Council of State.[72] However, judicial protection in Dutch administrative law is complex owing to the large number of specialised administrative courts, and absence of a general law regarding the competences of the different courts. The only general law is the Law on appeals against administrative decisions (Wet Administrative Rechtspraak Overheidsbeschikkingen).[73] According to this law the judicial division of the Council of State is the judicial body of last resort as regards administrative disputes. A court of first instance does not exist, but there is a procedure of preliminary complaints before the administration which has taken the contested

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72. Raad van State.
73. Wet Arob, KB 20 April 1976, Stb. 284.

decision. The Arob-law is both general and restricted in nature. It is general in so far as it is available in respect of every administrative decision (beschikking); but it is restricted in so far as it is not available in respect of decisions which may be challenged by other means.[74]

1.4.2. Suspension and other interim measures.

Article 107 of the Law on the Council of State provides a procedure for interim measures in actions based on the Arob-law. According to this Article, the President of the judicial division may, pending an action of a preliminary complaint or pending a main action before the judicial division, on the applicant's request, order the suspension of the contested decision wherever " immediate execution will cause disproportionate disadvantage in comparison to the interest involved in the immediate execution of the contested decision. The applicant can request other interim measures in order to protect him against the disproportional disadvantage as mentioned in the previous sentence."[75] As opposed to France and Germany, interim measures are ordered by the

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74. Those other means might be special administrative courts, originated by law, like for example the Court for civil servants, or the court for economic administrative matters. In this section I will not discuss those special administrative courts which in fact have their own provisions regarding provisional protection. The possibility of appeal at the administration itself with the Crown as last resort will be left aside as well.
75. Article 107 should be used as well if the division 'contentieux' has to decide in last resort on the basis of the Temporary Law on Crown disputes. Only if those disputes concern disputes between administrations among each other or disputes about a measure of a general character, the Crown is still competent and interim relief should be obtained by Article 60a of the law on the Council of State.

President and not by a full court or a chamber. One can derive the condition of urgency from the wording of Article 107 stating that "immediate execution will cause disproportionate damage". A second condition is the balance of interests which should lie in favour of the applicant.

The practice to examine first of all the admissibility of the main action is a result of a strict interpretation of the connection between interim measures and a main action. The examination in an application for interim relief as regards the admissibility of the main action is exactly the same as the judge in the main action would have made. To emphazise the provisional nature of the opinion on the admissibility, the president of the judicial division always stresses in his decision that his opinion is only provisional and will not bind the judge deciding on the main action. If the president considers the main application to be inadmissible, he will reject the claim for interim relief. Compared to the French and German judges, the president of the judicial division pays more attention to the admissibility of the main action. Generally spoken, in France and Germany, only a manifest admissibility of the main action is a barrier for the grant of interim relief. In the Dutch system on the other hand, every inadmissibility in the main action will result in a rejection of the claim for interim relief; the 'obviousness' is not mentioned. It is worth noting here that the judicial division deciding on the main application hardly ever deviates from the opinion of the President of its division.[76] Since the conditions for suspension and other interim measures are the same, they will be discussed together.

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76. J.A. Borman, Preadvies voor rechtsvergelijkende studie van het recht van Belgie en Nederland, Zwolle 1982, p. 52.

1.4.2.1. Urgency.

In comparison to the French condition regarding suspension, urgency does not necessarily mean 'serious or irreparable damage' to the applicant if his request would be rejected. As has been said before, urgency refers to disadvantage to the applicant resulting from immediate execution of the challenged measure. 'Disadvantage' is not the equivalent of irreparable damage and will be established more easily. The case law supports this statement. The question of urgency is hardly ever mentioned as a separate condition, but is included in the considerations of the balance of interests. One can understand this in view of the text of Article 107 of the Law on the Council of State.

1.4.2.2. Balance of interests.

Literally Article 107 of the Law on the Council of State requires a balance between the interests of the defendant in immediate execution and the disadvantage this will cause to the applicant. If the disadvantage is disproportional, the President of the judicial division will suspend the enforcement of the contested measure or will order other interim measures. In this balance of interests, the probable opinion as to the legality of the challenged measure in the main action, is of major consideration. The argument put forward for this is the inevitably disproportionate disadvantage for the applicant if the contested act were to be enforced and then ultimately would be annulled for reasons of illegality. After annulment the measure is treated as never having existed. In such a situation every enforcement will cause disproportionate damage. Therefore the request has to be awarded, if the President considers the contested measure to be

illegal.[77] On rare occasions however, a request for interim measures has been refused even though the president of the judicial division considered the challenged measure to be illegal.[78] In the case cited the provisional opinion of the President was not the decisive element in the balance of interests, which emphasises the discretionary power of the judge in proceedings for interim relief.

Sometimes the president considers it impossible to give a provisional opinion on the legality of the contested act. In those cases other circumstances of the case will be taken into account in the balance of interests.

Since the conditions for both suspension and other interim measures are the same, the character of the contested measure is not important. Generally an order for suspension will be given in actions against administrative acts imposing a burden on the applicant. Positive interim measures on the other hand will provide the appropriate solution in actions against decisions refusing something. But once again, there are no restrictions as regards this matter because the criteria for both measures are the same.

Positive interim measures may have a far reaching effect. Once, an administrative decision refusing permission for a streetcollection was challenged before the judicial division of the Council of State. In a request for interim measures, the applicant asked for a provisional permission. The president made an order imposing the obligation for the local authority to take all measures necessary to the effect that the collection could be held two days later.[79] One can argue whether such a measure is

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77. e.g. VzAR 10 May 1983, AB 1983, 407.
78. VzAR 3 February 1983, AB 1983, 427.
79. VzAR 16 August 1979, AB 1980, 297.

still a provisional measure. On the other hand, effective protection of the rights at stake might have only been possible by taking this measure. Since the balance of interests is the only condition, one can argue equally that this measure had to be taken provided that the disadvantage for the applicant appears disproportionate to that of the defendant. Provided that the interim measure is based on a careful balancing of all the interests at stake, one can justify such a far reaching measure by referring to the need for effective protection. Allowing provisional measures which have in fact definitive effect, should be exceptional because the defendant might be deprived from the opportunity to defend his case in an ordinary procedure. The prohibition of prejudicing the final decision in Dutch administrative law only implies that the judge in the main action in not bound by the provisional opinion of the President. There is no legal barrier to give an opinion on points of facts or law and as has been stated, his provisional opinion regarding the legality of the contested act plays a dominant role. However, the President is cautious in granting interim measures which actually present the judge in the main action with a 'fait accompli'.

1.4.3. Possibility of an immediate final judgment.

An interesting provision, which as far as I know, does not exist in France or Germany, is given by Article 116 of the Law on the Council of State. According to this Article the judge may give a final judgment immediately, although a request was made only to obtain provisional measures. There are two possibilities which may lead to an immediate definitive judgment. The first possibility regards the situation when the main action appears to be manifestly inadmissible or manifestly unfounded or well-founded. The second possibililty regards the situation if the facts and circumstances of the case are sufficiently clear in that further

examination is not necessary. In the latter situation the parties involved have to give their permission to give a final judgement.[80] Beyond any doubt this provision has some advantages. Parties obtain a quick decision on the substance of the case. Main actions without any foundation will not be persuaded to the effect that the number of main actions before the judicial division will decrease. On the other hand one can argue whether this provision is in accordance with Article 6 of the ECHR, since a final decision is given by just one judge, based on just a summary examination.

1.4.4. Conclusion.

To summarise, the Dutch system of provisional protection in administrative proceedings as examined here, has developed in a broad way. The conditions are actually rather easily fulfilled. As opposed to the French system, disproportionate disadvantage rather then irreparable harm has to be established. The President of the judicial division will in general reject applications for interim relief if the main action seems to be inadmissible.
A balance of interests is the main consideration when deciding on the grant of interim relief. The President will consider whether immediate execution will cause disproportional damage to the applicant compared with the interest of the administration in immediate execution. The provisional opinion on the legality of the contested act is of major consideration in this process. The applicant therefore must at least establish serious grounds as regards the illegality of the challenged act. If according to the provisional opinion of the judge the contested act is illegal, the balance will usually lie in favour of the applicant. If he

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80. e.g. VzAR 14 August 1989, AB 1990, 177.

considers the act to be legal, the balance will usually favour the defendant and the request will be rejected. Yet one should remember that the decision is still subject to the discretionary power of the President.

In the event the judge cannot form an opinion as to the legality, other aspects of the particular case will play a more important role in the balance of interests.

Compared to the French system interim relief is more easily granted by the President of the judicial division.

Chapter 2 : Characteristics of interim measures in Community law.

2.1. Introduction.

To ensure that individuals are adequately protected, a system of interim relief pending a main action is indispensable. Interim measures in Community law have in that respect the same function as interim measures in national systems, namely to preserve the effectiveness of a final judgment. Before discussing the main characteristics of interim measures, it might be interesting to discuss the extent to which the objective of the main action determines the position of interim relief in European procedural law.[1]

The main characteristics of interim measures, including suspension, are the close link between each interim measure and the main action, the provisional nature of the measures in question and the requirement that they should not prejudice the main decision.[2] The connection between each interim measure and the main action has various implications which should be discussed.

Both Article 185 and 186 state that an application for suspension or other, interim measures can only be lodged if a main action is pending before the Court. This procedural link will be discussed in section 2.3. Special attention will be paid to the possibilities as regards the type of the pending main action.

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1. See section 1.1. as regards national administrative law.
2. See Advocate-General Capotorti in his opinion on the order of 28 March 1980, joined cases 24 and 97/80 R, Commission v. France, [1980] ECR 1319; K.P.C. Lasok, The European Court of Justice, Practice and Procedure, London 1984, p. 145; E. van Ginderachter, La procédure en référé, Revue trimestrielle au droit européen 1989, p. 565.

Apart from this procedural connection, one can derive from Article 83, paragraph 2 Rules of Procedure, a link with respect to content between the requested interim measures and the main action. This connection consists of a factual part and a legal part. The factual link will be dealt with in section 2.4. The legal connection between the proceedings for interim measures and the main action, namely the condition of a prima facie justification, will be dealt with in section 3.2. when the conditions for the grant of interim relief are at issue.
The provisional nature of interim measures and the prohibition on prejudicing the main decision[3] will be discussed together since the latter should be seen as a consequence of the former.
These two characteristics find expression in Article 36 of the Statute of the Court and Article 86, paragraph 4 of the Rules of Procedure, stating explicitly that interim measures only have provisional effect and do not prejudice the final decision.

2.2. Interim relief in the context of the objective of the substantive action.

As has been noted before, actions before the Court do not have suspensory effect but an application for suspension can be lodged in all actions before the Court in which the legality of an act of an institution is at stake. Other interim measures may be applied for irrespective the type of main action.[4]
The effect of the objective of an action on the position of interim relief has been discussed in section 1.1. with reference

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3. See Article 36 of the Statute of the Court and Article 86, paragraph 4 Rules of Procedure.
4. Articles 185 and 186 EEC. References for a preliminary ruling are not included because the dispute is not pending before the Court. See section 2.3.1.

to the respectively objective and subjective concepts of the French and the German systems. What about the concept of judicial protection in the European Community?

Article 173 EEC fulfils two different functions which in some national systems are performed by separate procedures available under quite different conditions. On the one hand, its function is to control the legality of binding Community acts, so as to ensure observance of the objective law. In this respect Article 173, par. 1 EEC may be regarded as a 'recours objectif'. The objective concept of Article 173, par. 1 EEC is apparent from its wording because it specifies that Member States, the Council and the Commission are entitled to bring an action without having to show any particular interest in the act in question. On the other hand, the function of Article 173, par. 2 EEC is to afford legal protection to individuals whose rights and legitimate interests are adversely affected by an illegal act of one of the institutions. If the act is not addressed to the applicant, a private party may challenge it provided that the challenged act concerns the applicant directly and individually. Therefore, the action based on Article 173, par. 2 EEC would seem to be a 'recours subjectif'.

The function of Article 169 EEC should obviously be regarded as a 'recours objectif'. In infringement proceedings the Commission is the only party which may apply. Representing the Community interest, the Commission may start proceedings against a Member State if a Member State has not fulfilled an obligation under Community law. The Court, in its judgment is confined to declaring that the Member State is in default. It does not have the power to stipulate that a Member State do or abstain from doing any particular thing in order to eliminate the infringement. However, the Member State is required by Article 171 EEC to take the necessary measures to comply with the judgment.

An analysis of the case law shows that the President seems to be favourable disposed towards suspension in the field of economic affairs, such as competition law. It seems feasible to percieve this attitude as a direct consequence of the subjective concept of Article 173, par. 2 EEC , which implies that the effective protection of the legal position of the applicant plays a preponderant role.
However, the fact that infringement proceedings have an objective concept does not restrain the President from granting interim relief.[5] On the contrary, in appropriate cases, i.e. when interests of private parties or other Member States are involved, the necessity to ensure an effective protection is of primary concern for the President when deciding on the grant of interim relief in infringement proceedings. This approach has broadend the scope of infringement proceedings as will be shown in section 3.3.3.1.

2.3. Procedural link.

A request for interim relief is only admissible, according to Article 83, paragraph 1 Rules of Procedure, if at the same time a main action is pending before the Court. This condition follows immediately from Articles 185 and 186. Article 185 provides for suspension of 'the contested act', which implies a pending action before the Court. With regard to interim measures Article 186 states that the Court may, in any case before it, prescribe any interim measure.

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5. See e.g. order of 25 October 1985, case 293/85 R, Commission v. Belgium, [1985] ECR 3521 in which the interests of students were of major concern. See also order of 10 October 1989, case 246/89 R, Commission v. United Kingdom, in which the interests of actually ten(!) fishing ships were involved.

The interim measure should always be within the scope of a particular action.[6]

At this point, it is necessary to examine in which type of main action a request for interim relief is possible. Firstly the actions in which a request for suspension under Article 185 could be lodged will be dealt with. Secondly the actions in which a request for other interim measures can be made will be discussed.

The wording of Article 83, paragraph 1 Rules of Procedure, assumes that suspension of the operation of an act adopted by an institution, is only possible in the scope of an action for annulment; "if the applicant is challenging that measure in proceedings before the Court." However, one should be aware of other actions in which the legality of an act might be at stake and in which suspension of this act is necessary in order to protect the right of the applicant. This might be the case in an action for a failure to act (Article 175 EEC), for instance if an existing measure should have been altered or cancelled.[7] The conditions for and action based on Article 175 EEC are, briefly,

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6. See also J.P. Mertens de Wilmars, Het kort geding voor het Hof van Justitie van de Europese Gemeenschappen, S.E.W. 1986, p. 36. He considers this link as a result of the character of attributed competences of the Court. Since the Court is only competent if jurisdiction is attributed, it excludes the possibility for the Court from giving provisional protection in the Community whenever necessary.
7. The facts of the Pfizer case may illustrate this, although actually the action was brought under Article 173 EEC. However, to indicate the possibility, the facts of the case are useful. The alleged damage of the company Pfizer, was the result of a failure of the Commission to alter a list as regards allowed hormonal additives. Although the Commission aready approved the entering of the additives in question on the list, the list still had not been changed and therefore could Pfizer not distribute its products legally; Order of 8 April 1987, case 65/87 R, Pfizer v. Commission, [1987] ECR 1619.

restricted to those cases in which there is an obligation for the institution to act without leaving any discretionary power to the institution. In view of the small number of cases in which these conditions are fulfilled, one can argue that the possibility of interim relief in proceedings under Article 175 is only of academic importance.

In an action based on Article 215 EEC Treaty, concerning the non-contractual liability of the Community, the applicant might have an interest in suspension of the act which causes the damage.[8]

Apart from what will be discussed in the next section as regards interim relief in preliminary rulings, one may assume that a request for suspension based on Article 185 is not restricted to actions for annulment, but may be sought in all actions where the legality of an act adopted by an institution is at stake.

With regard to other interim measures, Article 83, paragraph 1, second sentence of the Rules of Procedure states that 'a request for other interim measures shall be admissible only if it is made by a party to a case before the Court and relates to that case.' The link is apparently less tight than that for suspension where the measure which suspension is being sought should be contested. Other interim measures only have to 'relate' to the case before the Court. It would seem arguable whether the Court may order suspension of an act of an institution as an interim measure under Article 186 if the act is not contested itself. This issue has

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8. The problem in actions concerning the non-contractual liability of the Community will be the establishment of irreparable damage. One can argue whether such an action indicates that the damage suffered will be restituted as a result of the main action to the effect that such harm will always be reparable. A request for interim relief in an action based on Article 215 EEC Treaty has been made in the order of 12 July 1983, case 114/83 R, Kerisnel v. Commission, [1983] ECR 2315.

arisen in an early staff case where in the main action the applicant sought the annulment of a decision relating to his suspension and transfer.[9] The applicant requested under Article 158 Euratom (equivalent of Article 186 EEC) the suspension of the operation of the vacancy notice for the post he had previously occupied, even though he had not yet contested this notice in a main action. The President granted the request because:

> "it would be excessively formalistic in an application for the adoption of an interim measure to compel the parties to enter multiple pleadings when the facts of the case show that the subject matter of the main application and of the application for the adoption of the interim measure are so linked to cause and effect that the second appears as the inevitable consequence of the first."

One can wonder whether this order for suspension should be regarded as an interim measure under Article 186, as has been alleged by Lasok[10], or whether the measure in fact still lies within the scope of Article 185. The last proposition would seem the most appropriate. The term 'contested measure' is interpreted in a broader sense to the effect that suspension of an act of an institution is possible, although the act is not contested itself, if the act whose suspension is being sought can be considered as a direct consequence of the challenged measure.[11] If it were otherwise, the difference in the link required between Article 185 and 186 EEC would be meaningless.

A request for the adoption of other interim measures then suspension may be made in any case before the Court by a party to

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9. order of 8 April 1965, case 18/65 R, Gutmann v. Commission, [1966] ECR 135.
10. K.P.C. Lasok, The European Court of Justice, Practice and Procedure, London 1984, p.154.
11. See also order of 16 December 1980, case 258/80 R, SpA Metallurgica Rumi v. Commission, [1980] ECR 3667.

that action. The type of action is not important in applications for interim measures. Again an exception should be made for references for preliminary rulings, which will be discussed in the next section. It should be noted at this point that unlike a request for suspension, which can only be requested by the applicant to the main action, a request for other interim measures can be made by the applicant, the defendant or the party which has started third-party proceedings. At a first glance interveners in the main action do not seem to be allowed to ask for interim measures. Because they can only support or oppose the case made by the applicant, one can argue whether they should be considered as real parties in the case. However, it is considered by the Court that intervention is allowed, on the condition that intervention in the main action in principle would be possible.[12]

2.3.1. Interim relief in preliminary rulings.

The power to suspend the application of an act follows from the fact that 'actions brought before' the Court do not have suspensory effect. Other interim measures will be possible in 'any case before the Court.' References for a preliminary ruling are not actions brought before the Court. These proceedings are non-contentious since the actual dispute is a case before a national court and the jurisdiction of the Court of Justice is limited to the questions contained in the national court's order for reference. The proceedings before the Court of Justice in references for preliminary rulings are regarded as incidental to

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12. Private persons cannot intervene in an infringement procedure for example, see Article 37 Statute of the Court; interveners have been accepted in e.g. order of 11 May 1989, joined cases 76, 77 and 91/89 R, Radio Telefis Eireann v. Commssion, [1989] 4 C.M.L.R. 749.

the main action before the national court. In view of these remarks it should follow that interim relief cannot be granted by the Court in references for a preliminary ruling. However, if a question on the validity of an act of one of the institutions of the Community is raised, it could be possible that suspension of this act is necessary in order to provide for effective protection of the rights of an individual. Since the Court of Justice seems to lack jurisdiction to order suspension, effective protection has to be assured by other means.

According to the ex-president of the Court, Mertens de Wilmars the possibility of suspension by the Court should not be excluded completely, in those preliminary rulings where the (in)valididty of a Community act is at stake. He considers that national Courts lack the competence to suspend provisionally the application of an act of the Community.[13] But it does seem however, that the case Foto Frost leaves open the possibility for a national court to order provisionally the suspension of a Community act by way of summary procedure.[14] The Court stated:

> "It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question."

One can argue therefore that in certain circumstances national courts have the power temporarily to suspend a provision of Community law. If one denies the competence of the Court to grant interim relief, direct and immediate protection should be afforded

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13. J.P. Mertens de Wilmars, o.c., p. 40.
14. Judgment of 22 October 1987, case 314/85 R, Foto Frost v. Hauptzollambt Lübeck-Ost, [1987] ECR 4225.

by the national courts.[15]

At the moment a reference for a preliminary ruling concerning this issue is pending before the Court.[16] The question has arisen before the Finanzgericht Hamburg whether Article 189 EEC Treaty should be understood in the sense that Member States may order suspension of the application of an administrative act which is based on a Community measure of general application. And if this is the case, what conditions should be applied by the national courts? One should remember that the question is not identical to the one examined in Foto Frost, where the remark of the Court concerned suspension of a Community act itself. The opinions of the parties in this case are divided. The United Kingdom denies the power of national courts to suspend the application of a national act based on a Community Regulation by referring to the Foto Frost case. It maintains that only the European Court can hold Community legislation to be invalid for reasons of uniformity and legal certainty. The United Kingdom considers the same argument to be valid in summary proceedings, in particular since the national competences as regards interim measures vary from one state to another. The other parties involved are unanimously in favour of granting the power of interim relief to national courts in situations like this since suspension does not imply a decision on the validity of Community legislation.[17] Although it is not explicitly mentioned, it would seem to make no difference if the question examined would regard the competence to suspend Community legislation itself since the same argument may be used; suspension

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15. Judgment of 19 December 1968, case 13/68, Salgoil v. Italy, [1968] ECR 453 at 462-3.
16. case 143/88, Zuckerfabrik Süderdithmarchen AG v. Hauptzollambt Itzehoe.
17. See Report of the hearing case 143/88, p. 20 -23.

of Community legislation does not imply a decision on the validity.

With regard to the conditions required for suspension by a national court of an act based on a Community Regulation, it would seem appropriate to apply national law, as has been put forward by all parties concerned. Referring to the judgment in the Rewe case, the Commission considers that it is not for the Community to change national law of procedure to the effect that national courts should apply, by analogy, the conditions as laid down in Article 83 Rules of Procedure.[18] On the other hand, one can argue whether the different systems of provisional protection in the Member States and the different requirements for provisional protection do not have a discriminatory effect. In this respect one should not exclude too easily the possibility to apply Article 83 of the Rules of Procedure by analogy.

It should be noted that the Commission suggested certain conditions which have to be taken into account by national courts, in order to minimise the influence on the exclusive competence of the Court to decide on the validity of Community acts. In the first place the interests of the Community have to be taken into account. In the second place the national court which suspends an act based on Community legislation should be obliged to make a reference for a preliminary ruling at the same time on the validity of the Community act in question. Finally, a judgment on the substance of the case before the national court should not be given before the Court has given judgment on the preliminary ruling within the scope of the summary proceedings.

A closely related issue has recently arisen before the House of

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18. Judgment of 7 July 1981, case 158/80 R, Rewe v. Hauptzollambt Kiel, [1981] ECR 1805.

Lords.[19] A brief description of the case is necessary to understand the situation. The applicants applied for judicial review of certain provisions in the Merchant Shipping Act 1988 which, they submitted, were inconsistent with the EEC Treaty. They asked for a declaration that those provisions may not be applied.[20] The Court made a reference for a preliminary ruling to the Court of Justice and awarded interim relief pending the ruling under Article 177 EEC Treaty.[21] The Court of Appeal however, held unanimously that under English law the courts have no power to grant interim relief in a case such as this. The question arose whether Community law either obliged the national court to grant such interim protection of the rights claimed, or gave the Court of Justice power to grant interim protection. The House of Lords made a reference for a preliminary ruling regarding this question.[22] The principles developed in the case law of the Court provide strong arguments for obliging Member States to empower national Courts with jurisdiction to grant interim relief protecting rights claimed under Community law. The Court has held that national courts have to ensure an effective and immediate protection of enforceable Community rights.[23] The Court has held on several occasions that any provision of a national legal system and any legislative, administrative or judicial practice that might impair, even temporarily, the effectiveness of Community law by withholding from the national courts the power to give

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19. R. v. Secretary of State for Transport, ex parte Factortame, [1989] 2 C.M.L.R. 353, Queens Bench devisional Court and Court of Appeal; [1989] 3 C.M.L.R. 1, House of Lords.
20. See case 246/89 R, Commission v. United Kingdom.
21. case 221/89, O.J. 1989, C211/10.
22. case C 213/89, O.J. 1989, C211/7.
23. case 13/68, SpA Salgoil v. Italy, [1968] ECR 453; case 106/77, Administrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629.

appropriate protection, is incompatible with Community law.[24] It would be nonsense, according to the Commission, to state that certain provisions of Community law may be relied upon before the national courts if any attempt to rely on them could in fact be thwarted by national rules on remedies or procedure.

The crucial issues at this point are the presumption of validity of legislation and the immunity of the Crown from interim relief. The United Kingdom has submitted that the presumption of validity excludes the power to order an interim stay of legislation. But the fact that in national law the contested measure is presumed to be compatible with Community law unless and until it is declared to be incompatible, does not seem to constitute a logical obstacle to the grant of interim relief suspending its application.[25] To support this proposition one can refer to the existence of the same presumption of legality in Community law[26], which does not prevent the Court from suspending pursuant to Article 185 the application of Community measures by way of interim relief. One can even argue that the fact that Article 185 is exercised by the Court with respect to all types of Community legislation, is an argument which grants national courts with the same power in relation to national law alleged to contravene Community law.[27]

In principle, primary legislation, in this case an Act of Parliament, should be in no better position than any other national act or provision by withholding jurisdiction. However,

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24. case 106/77 R, Administrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629; case 222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, [1986] ECR 1651.
25. Report of the hearing case 213/89, Commission, p. 22; A. Barav, The enforcement of community rights in the national courts; the case for jurisdiction to grant interim relief, C.M.L.Rev., p. 375.
26. case 101/78, Granaria v. Hoofdproduktschap voor Akkerbouwprodukten, [1979] ECR 623.
27. A. Barav, o.c., p. 380.

the nature of the act whose compatibility with Community law is contested, may be a relevant consideration whether to exercise the power to grant interim relief.[28]

Furthermore, the United Kingdom relied on the Rewe case, in which the Court ruled that the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law.[29] However, the question seems to concern the scope of an existing remedy rather than the creation of a new remedy.

Very recently, the Court has given judgment on whether the United Kingdom is obliged to provide for interim relief in the absence of such possibility under national law vis-à-vis Acts of Parliament.

In brief, the Court ruled that the national Court is required to grant interim relief to protect the rights claimed under Community law. The main considerations were the following.

Any national law that prevents, even temporarily, Community rules from having its full effect, is incompatible with Community law. The full effectiveness of Community law would be impaired if a rule of national law could prevent a Court, deciding 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 rights claimed under Community law. Moreover, the effectiveness of the system established by Article 177 EEC would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice on the preliminary question, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice. The common law rule that an interim injunction might not be granted

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28. A. Barav, o.c., p. 377.
29. judgment of 7 July 1981, case 158/80, Rewe v. Hauptzollambt Kiel, [1981] ECR 1805.

against the Crown must be side aside if it is the sole obstacle to the grant of interim relief.
The case is, according to Advocate General Tesauro of "unquestionable importance to the relationship between Community law and national courts." The impact of the decision of the 19th of June 1990 will be enormous. The ruling touches the sensitive issue of the sovereignty of Parliament because Parliament is no longer supreme in every circumstance. In particular in Britain, this decision will cause many debates about the progress towards a more supra-national Community.

2.4. Connection with respect to content between main action and interim measures - Factual link.

As has been noted in the introduction to this section, the connection with respect to the content of interim measures and the main action consists of two parts: a factual link and a legal link. The legal connection is expressed in Article 83, paragraph 2 Rules of Procedure by the requirement to establish a prima facie case.[30] The factual connection must be interpreted in that the applicant has to establish an objective connection between the alleged illegality of the contested act and the damage flowing from that act.
In a case concerning the ECSC, the contested decision in the main action, fixing the production quota for wire rods, appeared not to be the origin of the damage caused. The applicant, the company Moselstahlwerk, alleged that compliance with the quota imposed by the Commission's decision threatened the factory with closure. The President ruled, however, that the difficulties which Moselstahlwerk claimed it would face derived from its own

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30. See for discussion of this requirement section 3.2.

financial structure rather then from the application of the production quota to its products. Therefore it had failed to establish the factual link i.e. that the difficulties were caused by the fixing of the disputed quota.[31]
More recently the same problem regarding the factual link with the main action has arisen in a case before the Court. Co-Frutta, an organisation of fruit importers, challenged a Commission decision which excluded from Community privileges bananas originating in third world countries but brought on the market in one of the Member States. At the same time Co-Frutta asked for firstly a suspension of this measure and secondly interim permission for the import of 2,000 tons bananas originating in Columbia and which were in free circulation in Belgium. Owing to problems arising from transporting the bananas by sea, Co-Frutta had not received a direct delivery of Columbian bananas. In order to be able to supply the members of the import organisation, Co-Frutta tried to obtain the bananas through Belgium. The President considered that the alleged damage was caused by problems with transport over sea and not by the application of the contested decision. The request was dismissed because there was no link between the alleged damage and the contested decision of the main action.[32]

2.5. Conclusion as regards connexity.

In conclusion one can say that the connection between the requested interim measures and the main action has many aspects. In order to elaborate this connection, a distinction has been made between a procedural link and a link as regards the content. The

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31. order of 20 September 1982, case 220/82 R, Moselstahlwerk v. Commission, [1982] ECR 2971.
32. order of 19 August 1988, case 191/88 R, Co-Frutta v. Commission, not yet published.

procedural link basically requires a pending main action before the Court. The link with respect to the content has two limbs, a factual and a legal limb. In this section only the factual link has been discussed. To satisfy this condition the applicant has, briefly stated, to establish that the alleged damage is a result of the act contested in the main action. It would seem that the connection between the proceedings for interim measures and the main action has been interpreted by the President rather strictly. Due to this strong link, the Presidents power to give interim orders does not extent to providing interim relief whenever necessary.

2.6. Provisional character of interim measures and prohibition on prejudicing the final decision.

The provisional character of interim measures is both expressed in Article 36 of the Statute of the Court and Article 86, paragraph 4 Rules of Procedure. The first Article states: 'The ruling of the President or the judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case. Article 86, paragraph 4 Rules of Procedure is different in its wording: 'The order shall have only an interim effect and shall be without prejudice to the decision of the Court on the substance of the case.' [33] This principle affects three

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33. Examination of the case law reveals that the President is not consistent in his wording. He mixes the words 'prejudice' and 'prejudge' and uses both when he states the principle. Both Article 36 and Article 86, paragraph 4, use in the English version the term 'prejudice'. One can argue that the meaning of the words is not identical and therefore the President should use the term used in the Treaty. On the other hand, the French version of the principle mentions 'prejuger', which does seem to be the equivalent of prejudge.

different areas. In the first place as regards the duration of the interim measures, secondly as regards the content of interim measures and finally as regards the special character of the order itself in the sense that the judge deciding on the substantive action is not bound by the ruling of the President.

Regarding the duration of the interim measures, Article 86, paragraph 3 Rules of Procedure states: 'Unless the order fixes the date on which the interim measure is to lapse, the measure shall lapse when final judgment is delivered.' Therefore at the moment interim measures are ordered it is already clear that they will only be effective for a limited period, either until a date fixed by the judge or until a judgment is given in the substantive action.

As has been noted, the provisional character of interim measures affects the content of the order for interim relief too. The Court has consistently held that interim measures cannot be considered "unless they are provisional in the sense that they do not prejudge the decision on the substance of the case."[34] This consideration implies that the prohibition on prejudicing the final decision should be seen as a consequence of the provisional character of interim measures. Since interim measures are of a temporary, provisional nature, one should ensure that the interim measure ordered will not paralyse the effects of the final decision or even render the final judgment nugatory. In this respect a first question to be answered is whether or not the President can order an interim measure which seeks the same relief

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34. See in particular order of 7 July 1981, joined cases 60 and 190/81 R, IBM v. Commission, [1981] ECR 1857; more recently e.g. order of 26 September 1988, case 229/88 R, Cargill a.o. v. Commission, [1989] 1 C.M.L.R. 304; order of 11 May 1989, joined cases 76, 77 and 91/89 R, Radio Telefis Eireann v. Commission, [1989] 4 C.M.L.R. 749.

as that in the substantive action. The only time the President dealt with this question explicitly, he dismissed the application because the relief sought was, in fact, identical to that which was sought in the main action.[35] The President considered:

> "In no respect therefore has the subject-matter of the application for the adoption of an interim measure the provisional character required by Article 83 of the Rules of procedure..."

This approach is to be rejected. The essential difference between proceedings for interim measures and a substantive action is precisely the provisional character of the former as opposed to the definitive character of the latter. Although the relief sought might be identical, the legal foundation differs fundamentally. Therefore it would seem appropriate in such a case, to examine whether the relief sought is necessary to maintain the status quo. If so, the interim measure awarded, will still be of a temporary nature, although it provisionally provides the same relief as sought in the main action.

A second issue deriving from the provisional character of interim measures as regards the influence on the content, concerns the interpretation by the Court of the prohibition on prejudicing the final decision. On several occasions the Court explicitly noted that this prohibition implies that an interim order should not decide at this stage disputed points of law or of fact, or neutralize in advance the consequences of the decision subsequently to be given on the substantive action.[36] This would seem an appropriate interpretation in that it emphasises the

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35. order of 5 December 1979, case 794/79 R, B. v.European Parliament, [1979] ECR 3668.
36. order of 26 February 1981, case 20/81 R, Arbed v. Commission, [1981] ECR 721; order of 13 December 1984, case 269/84 R, Fabbro v. Commission, [1984] ECR 4333.

purpose of interim measures, namely to preserve the effectiveness of the final judgment. Referring to a possible prejudice to the main action, the President refuses, in general, to give provisional opinions on certain points. For instance in the Hoechst case, the President declined to examine Hoechst submissions regarding the manifest illegality of the Commission's decision ordering a verification, so as not to prejudice the main decision.[37] In a case concerning scheduled air-services between the Commission and Italy, the President, refusing the interim measures, considered that proceedings for interim measures were not an appropriate means of providing the Community legislature with an interpretation of an provision [38] which could form a solid basis for future legislative development. Such an order would, according to the President, prejudice the decision on the substance of the case.[39]

One can wonder what would be the prejudice if the President gave his provisional opinion on a certain point of law or of fact since no finding of fact or law may be given any binding effect in the main action. As long as no irreversible situations are created, there would seem to be no prejudice to the final decision. An explanation for the cautious attitude of the President, as regards giving a provisional opinion, would possibly be the fact that, in contrast to ordinary proceedings, the President will decide by himself. A psychological barrier to rule, even provisionally, on the merits of the case might be created by the fact that the President has to decide on his own. Moreover one should consider the composition of the full Court and the influence of the

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37. order of 26 March 1987, case 46/87 R, Hoechst v. Commission, [1987] ECR 1540.
38. Article 8 (1) of Council decision 87/602.
39. order of 3 February 1989, case 352/88 R, Commission v. Italian Republic, not yet published.

different nationalities of the judges. The absence of the support of the other judges might cause a certain fear with the President to give a provisional opinion. Furthermore, the President possibly will try to avoid the situation, in which the Court in the final judgment comes to another conclusion then the provisional opinion expressed in the order on interim measures. It might well be that, on the basis of a full scale investigation, the provisional opinion appears to be wrong. Although theoretically it is precisely the brief examination in summary proceedings which might justify a deviation from a provisional opinion in the final judgment, in practice this seems to create a psychological barrier for the President to give such a provisional opinion.

A third area of influence of the provisional character of interim measures concerns the legal force of the order for interim measures. The judge deciding in the substantial case in is no way bound by the considerations of the judge deciding in proceedings for interim relief. This principle would seem to be justified by the consideration that the brief examination in summary proceedings is not enough to come to a decision which solves the substantive dispute, without damaging the rights of both parties. An order for interim measures does not create a binding legal situation which must be respected by the Court deciding on the main action. However, the legal effects of an order for interim measures have to be respected causa pendente by the judge in the substantive action. As a consequence it would seem impossible to regard the execution of an interim order as illegal. For example, an order allowing provisionally a particular selling method, implies that transactions made according to that method, should be regarded as valid.

Finally attention should be paid to two decisions which would seem contradictory to the above noted interpretation of the prohibition

on prejudicing the decision on the main action. These decisions actually do decide on disputed points of law[40] or of facts.[41]
The first case is the Camera Care case, in which the Court in proceedings on interim measures ruled that the Commission has the power to take interim measures which are indispensable for the effective exercise of its functions, pending an investigation based on Regulation 17/62. The delicate point in this case was the manifest absence of an explicit provision to take such interim measures. The Court examined in detail the legal question whether the Commission has an implied power to take interim measures and concluded in the affirmative. It is clear that the Court decided on a disputed point of law but this was no obstacle to giving an interim decision.
The Pfizer case, concerning hormonal additives, is an example of an interim order actually solving the main dispute. Council Directive 70/524, concerning hormonal additives, has two annexes. Annex I contains a list of authorised additives and Annex II contains additives which may exceptionally be authorised on a temporary basis by Member States, until it has been determined by investigation on the part of the Commission whether they may be included in Annex I. The Commission proposed to include an additive produced by Pfizer, Carbadox, in Annex I but without at the same time proposing to renew the authorisation under Annex II to the effect that Carbadox could no longer be legally marketed in the EC. The President ruled that in the interest of the proper administration of justice it was necessary to restore the status quo ante, which implied that Carbadox should be included again in Annex II pending the completion of the procedure for including it

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40. order of 17 January 1981, case 792/79 R, Camera Care v. Commission, [1980] ECR 119.
41. order of 8 April 1987, case 65/87 R, Pfizer v. Commission, [1987] ECR 1691.

in Annex I. The President decided on a disputed point of fact namely whether or not the Commission had to ensure inclusion in Annex II. This decision afforded the same relief as was sought in the substantive action but this did not restrain the President from awarding the interim measure. Pfizer has in fact withdrawn the main action from the Register after this decision which might be an indication that the actual dispute has been solved in proceedings on interim measures.

These two decisions encroach on the interpretation given by the Court to the prohibition on prejudicing the final decision, but should be accepted positively. They stress the flexible way in which the President consideres the particular facts of each case in order to find an adequate solution even if this implies that he has to go beyond the established criteria.

Chapter 3 : Conditions for the award of interim measures.

3.1. Introduction

Although it seems that Article 83 of the Rule of Procedure makes a difference in conditions for the admissibility of the application and conditions regarding the ground of the application, one can not distinguish this division in the orders of the President given in proceedings on interim measures. Therefore it would not seem necessary to make such a distinction when discussing the conditions for the award of interim measures. Actually the conditions are all linked together and should be regarded in the light of the circumstances of each specific case. The relative significance of the different conditions may vary from case to case. However, one can derive three main conditions.

In the first place there should be a case pending before the Court. This condition has been examined before in the section on the characteristics of interim measures. In the second place, there should be a 'prima facie case'. This condition will be dealt with in section 3.2. In the third place, there should be urgency in the sense that the applicant will suffer serious and irreparable harm if no interim relief will be granted. This condition will be discussed in section 3.3. Finally it should be noted that on several occasions the President balanced the harm of the applicant if the interim measures were refused against the damage the defendant will suffer if the interim relief will be granted. This issue will be discussed in section 3.4.

It is not clear whether these conditions follow a certain sequence. When interim relief is refused, the President usually seems to found his decision on the absence of serious and irreparable harm, without an examination of the prima facie condition.

3.2. Prima facie case

Article 83, paragraph 2 EEC-Treaty requires:

> 'The request referred to in the preceeding paragraph shall specify the subject of the dispute, the circumstances giving rise to urgency and the grounds of fact and law showing prima facie justification for the granting of the interim measure requested.'

The requirement of a prima facie justification raises different questions. Should the application for interim measures itself prima facie be justified? Or, does this condition refer to a main case which should be prima facie justified?
Although the wording of the text is not clear, the Court has always explained the condition of a prima facie case as referring to the substance of the case in the main application. In section 2.2. the link between interim measures and the main action is mentioned as one of the characteristics of proceedings for interim relief. As has been noted, this link consists of two limbs. One part concerns the procedural link and the other concerns a link as regards the content. The latter can be divided in a factual part and a legal part. The condition of a prima facie case is an expression of this legal link between interim measures and the substantive action. The prima facie condition can be justified by the fact that suspension of administrative acts encroach on the principle of immediate execution. Both suspension and other interim measures affect the legal position of the applicant in that he will be provisionally entitled to a legal position which he can actually only claim if he is ultimately successful in the substantive action. Therefore, a prima facie case has to be established.
In this section the actual content will be discussed, which is required by the President in the case law to satisfy the condition of a prima facie case.

The earliest three cases concerning the application for adoption of interim measures did not refer at all to the issue of a prima facie justification. This implies that no answer was given to the question whether the condition of a prima facie justification refers just to the interim measures asked for themselves, or whether the main case should be prima facie justified.
However in Acciaeria e Tubificio di Bresia v. High Authority[1] the parties discussed the question whether there is a presumption that the request in the main action is justified. The President of the Court held that this question would arise only if it were first established that the circumstances demanded suspension, that is, if the probability of irreparable harm were proved. This indicates that the President regards the question indeed as referring to the main case, but only as a secondary issue after the probability of irreparable harm has been proved.
In the three following cases the Court seemed to have a different approach. In Von Lachmüller v. Commission[2] the Court said:

> 'In order not to grant a suspensory measure which would only be a mere prolongation of the period of notice, it should be apparent that there is a strong presumption that the application in the main action is well-founded (fumus boni juris).'

In Lühleich v. Commission[3] the President required even more. He stated:

> 'Whereas an allowance for necessities cannot be granted by means of an interim measure unless at first sight the original case appears manifestly well-founded.'

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1. order of 26 June 1959, case 31/59 R, [1960] ECR 98.
2. order of 20 October 1959, joined cases 43, 44, and 45/59 R, [1960] ECR 489.
3. order of 17 July 1963, case 68/63 R, [1965] ECR 618.

Because at this stage of the action it was impossible for the President to form an opinion on whether the original case was well-founded, he rejected the application for suspension of the execution of the contested decision. Also in Prakash v. Commission[4] the President required the original application to be clearly well-founded.

These cases show that the President felt obliged by the requirement of a prima facie justification to look at the merits of the main action. All these staff-cases were dismissed because at that stage of the proceedings the President could not form an opinion on the merits of the substantive action.[5]

However in 1975, the President of the Court considered in Johnson & Firth Brown v. Commission[6]:

> 'Although certain of the grounds on which the substantive application is made appear, on first examination, not to be manifestly without foundation and thus make it impossible to dismiss the present application for the adoption of interim measures, nevertheless it is necessary that the measures applied for should be urgently required.'

Instead of a clearly well-founded case, a substantive action which was not manifestly without foundation appeared to be enough to establish a prima facie case. As follows from this case the merits of the main action still have influence on the award of interim measures but it is not necessary anymore to have a manifestly well-founded main case. From this case onwards, the President has

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4. order of 25 June 1963, joined cases 19 and 65/63 R, Prakash v. Commission, [1965] ECR 576.
5. It should be mentioned that in the latter two cases a reason for this stringent criterium can be found in the character of the requested interim measure. These cases are staff-cases in which the application concerned a provisional moneypayment.
6. order of 16 January 1975, case 3/75 R, Johnson & Firth Brown v. Commission, [1975] ECR 1.

used various words to express whether the prima facie condition was fulfilled or not. Some examples may illustrate this. In Agricola Commerciale Olio v. Commission[7] the President considered that "... the challenge by the applicants to the legality of the Commissions measures...is based on serious considerations such as to make the legality of those measures seem doubtful to say the least."

In Ford v. Commission[8] the President ruled that "certain questions ... may give rise to serious disputes."

In Raznoiimport v. Commission[9], an anti-dumping case, serious doubts concerning the contested act, constituted a prima facie case. In the case Group of the European Right v. Parliament[10] the President considered:

> 'In the light of the forgoing considerations it may be accepted that the applicants have succeeded in putting forward relevant arguments which should be analysed more thoroughly when the substance of the application is considered. It follows that the submissions put forward by the applicants establish a prima facie case for the grant of the interim measure applied for.'

A final example with regard to the various words used considering the prima facie condition may be given by a recent case in which, according to the President, the Commission's decision raised "delicate questions" as to the exact scope of Article 86 EEC and of the Commission's powers under Regulation 17/62.

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7. order of 21 August 1981, case 232/81 R, Agricola Commerciale Olio v. Commission, [1981] ECR 2193.
8. order of 29 September 1982, joined cases 228 and 229/82 R, Ford v. Commission, [1982] ECR 3091.
9. order of 19 July 1983, case 120/83 R, Raznoiimport v. Commission, [1983] ECR 2573.
10. order of 16 October 1986, case 221/86 R, Group of the European Right v. European Parliament, [1986] ECR 2969.

The conclusion that may be drawn from the above mentioned cases is that the President requires at least an arguable case in that there has to be a substantive question to be tried. To establish this the President often examines the facts and the legal situation in a very detailed way.[11]

Yet it must be mentioned that there are cases which do not fit in this approach. For instance the case Pardini v. Commission.[12] The facts of this case are rather complicated so a brief description of the facts might be helpful. Pardini, an undertaking in the cereal sector had obtained an export licence from the Italian authorities but lost it because of a theft. The Italian Government did not issue a new one because that is prohibited by Article 17 (7) of Regulation No.193/75. Pardini wanted the Commission to authorize the Italian Government to issue it with the licence. In the application for the adoption of interim measures Pardini claimed that the Court should order the Commission to authorize the Italian Government to issue a fresh export licence. The President considered that the applicant had not satisfied the condition of establishing a prima facie case. He said:

> '... It is right to observe in this respect and without prejudice to the decision in the main action that it does not seem to have been established prima facie that the Commission is entitled to authorize national authorities to issue an export licence under the Community rules in the matter.'

It does seem that the President demands too much in this case because the applicant in fact is required to prove his rights in the main application. The evidence available will be incomplete,

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11. See for example the order of the President of 25 October 1985, case 293/85 R, Commission v. Kingdom of Belgium, [1985] ECR 3521.
12. order of 17 January 1980, case 809/79 R, Pardini v. Commission, [1980] ECR 169.

so it seems unfair to restrain a party from obtaining interim relief because at this stage of the proceedings there is no likelihood of success. Moreover one could argue that this interpretation is violating the principle not to prejudice the final decision. The rule of a prima facie case must be reconciled with this principle. This might be difficult sometimes, in particular when the applicant refers in his application for interim relief to the application in the main action. In practice applicants refer quite often to their main application just because otherwise they have to state the same arguments twice. The establishment of a prima facie case often implies that the President has at least to look at the arguments concerning the main action. The sensitive relation between the prima facie condition and the principle not to prejudice the final decision, has been discussed in a case in 1986, in which the President considered:

> "In proceedings on an application for interim measures a finding that there is a prima facie case does not, however, prejudge the decision to be given on the substance of the case. It remains open to the Parliament to put forward in the proceedings in the main action all such arguments as it may consider appropriate for the purpose of establishing that its vote on 12 December 1985 lay within its powers and was lawful."

By interpreting the prima facie condition in that there has to be an arguable case, the President avoids a confrontation with the principle not to prejudice the final decision. Although it will sometimes be inevitable to have a look on the merits of the case, the President does not have to go into depth and therefore he will usually not be obliged to decide on disputed points of law or facts.

It should be noted at this point that the Commission generally will not have any problem in establishing a prima facie case in actions against Member States. It does seem that before the

Commission actually starts an infringement procedure, it will be established that there is at least an arguable case. If it were otherwise, the Commission would never have exercised its power under Article 169 EEC.
To conclude this section concerning the prima facie condition, the issue of the admissibility of the main case and its influence on the proceedings for interim measures should be discussed.

3.2.1. Admissibility of the main case.

The general principle seems to be that an alleged inadmissibility of the main case will not be examined in proceedings for interim measures. It should be reserved for the examination of the main application so as not to prejudice that proceeding.[13]
In some cases the President was very brief in dealing with the argument of the defendant that the main case was inadmissible.[14]
For example in Plaumann v. Commission[15] the President stated:

> "The application for the adoption of an interim measure is not intended to prejudge the decision in the main action and the arguments on inadmissibility or absence of grounds in the main action are irrelevant and must be dismissed."

However there is a mitigation of this principle. There are cases in which the President actually gives his judgment, although of

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13. e.g. order of 30 November 1972, case 75/72 R, Perinciolo v. Council, [1972] ECR 1201; order of 16 December 1980, case 186/80 R, Suss v. Commission, [1980] ECR 3867; order of 16 October 1986, case 221/86 R, Group of European Right v. EP, [1986] ECR 2969.
14. order of 13 December 1984, case 269/84 R, Fabbro v. Commission, [1984] ECR 4333; order of 22 April 1986, case 351/85 R, Fabrique de Fer de Charleroi, [1986] ECR 1307.

15. order of 21 December 1962, case 25/62 RII, [1963] ECR 126.

course provisional in nature, on the admissibility of the main case. These cases mainly concern manifest inadmissibilities. This would seem in accordance with the required legal link between interim measures and the substantive action. A clearly inadmissible main action cannot give rise to serious questions and therefore the prima facie condition would not be satisfied.[16]
Procedural defects were the reason for the President, in the case Bensider v. Commission[17], to declare the application for interim relief inadmissible because the main application had been lodged manifestly too late with regard to Article 33 of the ECSC-Treaty.
In Farrall v. Commission[18] the applicant did not make a correct application because he did not comply with the requirement that it should be lodged by a lawyer.
More recent case law shows that the President is less afraid to give an opinion as to the admissibility of the main action. The Muratori case has been the turning point.[19] In this case the President examined the question of admissibility of the main action as a preliminary issue. Probably the circumstances of the case, reference was made to the jurisdiction of the Court of Justice, were the reason for this different approach. Whatever the reason might have been, the fact remains that from this decision onwards, the President became less reluctant to deal with an argument raised by the defendant concerning an inadmissible main action.

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16. See also M. Slusny, Les mesures provisoires dans la jurisprudence de la Cour de Justice des Communautés Européennes, Revue Belge de droit international, 1967, p. 140.
17. order of 23 May 1984, case 50/84 R, [1984] ECR 2247.
18. order of 26 February 1981, case 10/81 R, [1981] ECR 717.
19. order of 5 August 1983, case 118/83 R, Muratori a.o. v. Commission, [1983] ECR 2583.

Apart from manifestly inadmissible actions due to procedural defects, there is a second group of decisions in which an opinion regarding the admissibility of the main case has been given, namely when a measure of a general character is at stake. The President's approach in these cases is well illustrated in the case Distrivet v. Council.[20] First the President refers to a consistent line of case law emphasizing that in principle the issue of the admissibility of the main application should not be examined in proceedings relating to an application for interim measures. Then he states that nevertheless it might be necessary, when an objection is raised that the main application is manifestly inadmissible, to establish whether there are any grounds for concluding prima facie that the main application is admissible. The argument used by the President is to prevent a situation where a person is able by means of an application for interim measures, to obtain the suspension of the operation of a measure of general application, which the Court ultimately refuses to declare void because the application in the main case is declared inadmissible.

The same approach has been taken by the President in Autexpo v. Commission[21], where a request was made for suspension of a decision of the Commission authorising Italy to apply intra-community surveillance to imports of motor vehicles originating in Japan. The Commission contended that since this decision was addressed to a Member State, Autexpo's application for annulment of the decision was admissible only if the decision was of direct and individual concern. This condition was not satisfied because the decision concerned the applicant merely by reason of its

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20. order of 27 January 1988, case 376/87 R, Distrivet v. Council, [1988] ECR 209.
21. order of 8 May 1987, case 82/87 R, Autexpo v. Commission, [1987] ECR 2131.

status as an importer of the goods in question. The President held that it was necessary to establish certain factors which would support the conclusion that the main application in the case was prima facie admissible. After an examination in which he referred to the jurisprudence concerning Article 173, paragraph 2 EEC-Treaty, the President concluded that no such factors existed.
Given this, it can be said that the impact of the interim measure asked for influences the examination of the admissibility of the main application in summary proceedings. If it concerns a measure of a general character, the President will probably pay more attention to a question raised by the defendant concerning the admissibility of the main action.

3.2.2. Conclusion.

The requirement of establishing a prima facie case, expressing the legal link between interim measures and the main action, should be regarded as a consequence of the auxiliary character of interim measures. This legal link, however, is not interpreted to the effect that the applicants chances for success on the merits are examined. Such an interpretation would be in contradiction with the prohibition on prejudicing the final decision. Moreover, it would seem unfair to make the award of interim relief dependant on an evaluation of the chances of applicant's ultimate success whereas, due to the summary nature of the proceedings, the available evidence will be incomplete. The President has interpreted the condition to establish a prima facie case to the effect that there have to be serious questions to be tried, or in other words, there has to be at least an arguable case. This interpretation preserves the legal link because a clearly inadmissible or unfounded main action does not raise serious questions and interim measures will not be justified. Moreover,

this interpretation of a prima facie case may be reconciled with the prohibition on prejudicing the decision in the main action.

3.3. Urgency and serious or irreparable damage.

3.3.1. Introduction

Article 185 formulates that suspension may be ordered if circumstances so require. Interim measures may be ordered if they are necessary according to Article 186. As has been stated before, a detailed elaboration of these Articles can be found in the Rules of Procedure. Regarding the above mentioned sentences, Article 83, paragraph 2, of the Rules of Procedure should be consulted. This Article contains the requirement that the application for interim relief should state the circumstances giving rise to urgency. In fact urgency is the key word if one speaks about interim measures. Only urgency justifies deviation from the principle of non suspensory effect because without an urgent situation there will be no reason not to wait until the final judgment.[22] Support for this statement can be found in some decisions of the President. In a staff case of 1980[23], the President stated:

> "It is appropriate for the judge hearing the application for the adoption of interim measures to restrict the scope of his consideration only to those matters enabling it to be established whether its immediate application, that is to say before the decision in the main proceedings, is likely to involve the applicant an irreversible damage which could not be made good even if the contested decision were annulled or which in spite of its provisional nature would be disproportionate to the Community interest, pursuant to Article 185, in

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22. See also M.C. Bergeres, 'Les mesures provisoires devant la Cour de Justice', Sebb info 1983, p. 41.
23. order of 21 August 1980, case 174/80 R, Reichardt v. Commission, [1980] ECR 2665.

having its decisions applied even when they are subject of an application to the Court."

This consideration shows that the President examines first whether there is urgency or not, before he goes on to consider the question of a prima facie case. This approach has not been followed consistently but in the more recent cases it seems to have been the general approach.

The condition of urgency appears in the case law in combination with the necessity for interim relief in order to prevent serious and irreparable harm to the party requesting suspension before a decision in the main action is given.[24] Therefore urgency on the one hand, and serious and irreparable harm on the other, are linked together, although one can theoretically make a distinction. When the President does not consider a certain damage as irreparable, he does not always refer to a lack of urgency. This is the reason why 'serious and irreparable' harm appears in the case law as a separate condition.[25] For these reasons a separate examination of both urgency and serious and irreparable damage will not be made in this section.

As has been said before urgency must be assessed in the light of the extent to which an interlocutory order is necessary to avoid serious and irreparable damage to the party seeking the interim measure.[26]

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24. See e.g. order of 12 February 1965, case 2/65 R, Ferriera Ernesto Preo e Figli v. High Authority, ECR 231; order of 26 February 1981, case 20/81 R, Arbed a.o. v. Commission, [1981] ECR 721.
25. e.g. order of 7 July 1981, joined cases 60 and 190/81 R, IBM v. Commission, [1981] ECR 1857.
26. See e.g. order of 9 July 1986, case 119/86 R, Spain v. Council and Commission; order of 10 October 1989, case 246/89 R, Commission v. United Kingdom, [1989] C.M.L.R. 601.

In this section some general themes in the case law of the Court concerning the requirement of serious and irreparable damage will be discussed. Secondly some features of the nature of the damage as developed in the case law will be described. In this part a distinction will be made according to the subject matter of these cases. Subsequently damage in actions against Member States, competition cases, anti-dumping cases, and staff cases will be examined.

3.3.2. General features concerning serious and irreparable harm.

Establishing urgency does not necessarily imply that the applicant has to prove that the alleged damage will inevitably take place. There must be, at least, an imminent threat that irreparable harm will be suffered before the Court can decide in the main action.[27] If the application concerns a measure which does not have binding effect or which is in fact a measure requesting inquiry or investigation which precedes a decision of the Commission, urgency cannot be shown. According to the President, these measures are not generally of such a nature as to cause serious or irreparable damage.[28]
A delay in making the application may nullify the argument of urgency. It would seem difficult to argue that suspension is urgent when the challenged measure has in fact been executed in the sense of having its full effect. The Court will reject an

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27. order of 28 August 1978, case 166/78 R, Italian Republic v. Council, [1978] ECR 1745. Article 66 ECSC-Treaty, the equivelent of Articles 185 and 186 EEC, states this principal literally.
28. order of 7 July 1981, joined cases 60 and 90/81 R, IBM v. Commission, [1981] ECR 1857; order of 30 June 1983, case 122/83 R, De Compte v. EP, [1983] ECR 2151.

application for suspension in this circumstance.[29] The President ruled in the Simmenthal case:[30]

> "... the said licences have already been issued, so that from this point of view the effectiveness of the decision in dispute has been exhausted and it can therefore no longer be the subject matter of a suspensory measure."

However, in cases where the contested measure continues to have effect and thus may give rise to serious and irreparable damage in the future, suspension or other interim measures may be ordered.[31] In an application for interim measures, as opposed to suspension, the fact that the measure in question already has been enforced, does not seem to be a barrier for the award of interim measures.[32]

It should be noted that the Commission has to avoid allowing too much time to elapse before applying for interim relief in infringement procedures. This happened recently in a case against Germany.[33] One should consider that it takes usually a long time for the Commission to bring a case before the Court. The case against Germany concerned the construction of banks to protect the coast of the German Wadden in the Leybucht zone. The Commission alleged that this plan, adopted on the 25th of September 1985,

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29. e.g. order of 21 December 1976, case 61/76 R II, Geist v, Commission, [1976] ECR 2075; order of 9 November 1977, case 121/77 R, [1977] ECR 2107.
30. order of 22 May 1978, case 92/78 R, Simmenthal v. Commission, [1978] ECR 1129.
31. order of 1 February 1984, case 1/84 R, Ilford v. Commission, [1984] ECR 423; order of 8 May 1987, case 82/87 R, Autexpo v. Commission, [1987] ECR 2131. In this sense see E. Van Ginderachter, o.c., p. 599; G.M. Borchardt, o.c., p. 219; K.P.C. Lasok, o.c., p. 162.
32. order of 21 May 1977, case 61/77 R, Commission v. Ireland, [1977] ECR 937.
33. order of 16 August 1989, case 57/89 R, Commission v. Germany, not yet published.

violated Article 4 of Directive 79/409, concerning the conservation of wild birds.[34] Leybucht is an area under special protection in the sense of the Directive. By enforcing the disputed plan, the protection of wild birds in this zone may be endangered, the Commission argued. The President, however, considered the reaction of the Commission to be too late. In 1984, an organisation for environmental protection had already informed the Commission about the German plan, the actual works had been started in 1986, and it was only in August 1987 that the Commission made use of its power under Article 169 EEC which resulted in a reasoned opinion in July 1988. The main application was lodged in February 1989 and the application for interim relief was lodged in July 1989. The actual works were nearing completion and the Commission asked for suspension of the works 'à mi-chemin' , according to the President. He considered that the Commission could only rely on the damage to the protection of the wild birds resulting from the works planned for 1990. Since the Commission could not establish a danger for the protection of the birds resulting from the works planned for 1990, the application of the Commission was rejected.

An interesting issue arises, if the defendant institution gives an undertaking not to apply the measure whose suspension is requested. In that case the urgency seems to have disappeared. The Court has expressed its view on this matter in several cases, by declaring that it had taken into account the undertaking of the Commission not to implement or enforce the challenged measure. Thus the threat justifying interim relief has been eliminated and the application has been dismissed.[35] That the President

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34. Council decision of 2-4-1979, OJ 1979, C103/01.
35. e.g. order of 28 March 1984, case 45/84 R, EISA v. Commission, [1984] ECR 1759.

sometimes has been too optimistic, is shown in a staff case concerning a request for suspension of a decision transferring the applicant to Rome. Although the Commission gave an undertaking not to transfer the applicant before a formal decision was taken, the applicant had been transferred the day afterwards.[36] If third parties cause the threat to the applicant and they undertake not to act, the President takes formal note of their declaration, and in this situation too, he dismisses the claim because no urgency justifying the interim relief has been proved.[37]

Another factor which removes the urgency can be the text of the challenged measure itself. This happened in a case in which the Commission did not oblige the applicant to stop the infringement of Article 86 EEC Treaty forthwith. The Commission just required the company in question to make proposals to end the infringement before a certain date. Urgency could not be proved and the claim was dismissed.[38]

The right to request suspension of operation of a contested act, is granted to the applicant to protect his own interest. Therefore the applicant can in principle only rely on personally suffered damage. However, there are two exceptions to this principle. The first exception concerns the situation in cases where a Member State asks for interim measures. The second exception concerns cases where the Commission requests interim measures against a

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36. order of 31 July 1980, case 161/62 R, Carbognani et Zabetta, [1980] ECR 2655.
37. order of 11 October 1973, case 160 and 161/73 R I, Miles Duce v. Commission, [1973] ECR 1049. Interesting is the follow up of this case, in which the President considered it necessary to oblige the Commission to take all measures necessary to ensure the status quo. A single declaration was not enough anymore: order of 16 March 1974, case 160 and 161/73 R II, Miles Duces v. Commission, [1974] ECR 281.
38. order of 21 March 1972, case 6/72 R, Continental Can v. Commission, [1972] ECR 157.

Member State. For systematic reasons the latter will be dealt with in section 3.3.3.1., dealing with the nature of the damage. At this point only the first exception will be discussed.

When a Member State asks for interim measures, the damage relied on may be any damage caused to a special sector of industry or a part thereof. In the case Italian Republic v. Council[39], the damage relied on by Italy was the damage that the cereal starch manufacturing industry would suffer by execution of the contested Regulation introducing the payment of a production premium for potato starch. The application was rejected because the Italian Government had not established the imminence of serious and irreparable damage to the cereal starch manufacturing industry. Although in this particular case serious and irreparable damage was not proved, the type of damage relied on could, in principle, justify interim relief.[40]

However, a Member State cannot rely on the damage that will be suffered by one national company in order to prove urgency. In 1987 Belgium tried to obtain suspension of a Commission decision ordering Belgium to recover unlawful state-aid from the steel company Tubemeuse.[41] The President decided in this case:

> "... The party seeking the suspension of the operation of a measure, must furnish the proof that he cannot await the conclusion of the main action without personally suffering damage which would have serious and irreparable effects for him."

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39. order of 28 august 1978, case 166/78 R, Italian Republic v. Council, [1978] ECR 1745.
40. See also order of 17 March 1989, case 303/88 R, Italian Republic v. Commission, not yet published.
41. order of 16 June 1987, case 142/87 R, Belgium v. Commission, [1987] ECR 2589.

possibility of recouping the financial damage before a national court, the President uses the same argument to deny the irreparability of the damage.[48]

However, if the damage consists not only of a financial loss, but also of an injury to property rights, this damage may be considered as serious and irreparable, even if an award of damages is possible. This has been established in Agricola Commerciale Olio v. Commission.[49] The property rights in question concerned a quantity of olive oil, sold to the applicants by lot at a fixed price pursuant to a Commission Regulation. In two subsequent Regulations, the Commission annulled the first Regulation with the argument that the situation in the market of olive oil had changed, and they again offered that lot of olive oil for sail by tender. The applicants claimed in their action for annulment of the two Regulations, that they had already acquired the property rights in the olive oil. The President considered:

> "It is clear from those considerations that the applicants are faced with a serious and immediate loss, the effects of which cannot be offset by the prospect of an unspecified amount of compensation in the future when all the evidence suggests that they are being deprived of their property."

The possibility of an infringement of a subjective right was of major consideration in this case.

The serious and irreparable nature of the loss alleged in support of an application to suspend the operation of certain measures, must be assessed in concreto.[50] In other words, the President has to take into account the size of the company involved for

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48. order of 6 February, case 310/85 R, Deufil v. Commission, [1986] ECR 537.
49. order of 21 August 1981, case 231/81 R, [1981] ECR 2193.
50. order of 21 August 1981, case 231/81 R, Agricola Commerciale Olio v. Commission, [1981] ECR 2193.

example.[51] The President considered in a recent case against Italy[52]:

> "... it need merely be pointed out that they are national airline companies whose business is of such a magnitude that a loss of the amount in question cannot be regarded as sufficient damage to establish urgency."

In order to indicate the special circumstances which play a role in the different types of cases, a distinction will be made in the next section between the damage involved in actions against Member States, in anti-dumping cases, competition cases and staff cases.

3.3.3.1. Damage in actions against Member States.

In infringement proceedings based on Article 169 EEC, the Commission can apply for interim measures against Member States. The damage relied on by the Commission does seem to have a special character. One should remember the position of the Commission as the guardian of the Treaty. Infringements of the Treaty by Member States undermine the authority of the Community and therefore directly affect the Commission. But a breach of Community law as such is not enough to establish urgency. In its oral submissions in the air-services case[53], the Commission itself conceded that the risk that an infringement of Community law may persist

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51. See e.g. order of 10 June 1988, case 152/88 R, Sofraimport v. Commission, not yet published. In this case it was said that in order to determine whether there is a risk of serious and irrepparable damage to the applicant, it is necessary to take into consideration the fact that Sofraimport is a small undertaking.
52. order of 3 February 1989, case 352/88 R, Commission v. Italy, not yet published.
53. order of 3 February 1989, case 352/88 R, Commission v. Italy, not yet published.

throughout the course of the proceedings is inherent in any action for failure by a Member State to fulfil its obligations. Therefore it is necessary to show the existence of a particular imperative justifying the grant of interim measures in such a case. Thus urgency should be elaborated in a more specific way, in that other interests should be effected as well. For example in the French-Italian wine case, the interests of Italian wine producers were a relevant factor.[54] In the Irish watersupply case, the interests of contractors whose tenders were not considered for the award of a public works contract were taken into account.[55] However, in the first case in which the Commission requested interim measures against Member States, the Court only considered the possible harm to the Community although the parties also included in their arguments the harm to Member States. In this case, dealing with state-aid of the United Kingdom to pig farmers, the Court seemed to accept a breach of Community law as such, as serious and irreparable harm.[56] The Court ruled that:

> "disregard of the final sentence of Article 93 EEC interfered with the proper operation of that machinery to such an extent as to be capable by itself of giving rise to the application of Article 186 EEC."[57]

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54. order of 4 March 1982, case 42/82 R, Commission v. France, [1982] ECR 841.
55. order of 13 March 1987, case 45/87 R, Commission v. Ireland, [1987] ECR 1369.
56. order of 21 May 1977, joined cases 31/77 R and 53/77 R, Commission v. United Kingdom, [1977] ECR 921.
57. Because of this Gray came to the conclusion that political harm was sufficient for the Commission, bringing a claim for interim measures against a Member-State. She concluded on behalf of this that is was more easy for the Commission to show irreparable harm then for a private person who has to prove a more concrete damage; C. Gray, o.c., p. 102.

Later on, the Court took into account the harm to other Member States and the harm to third parties. Political damage to the Community is therefore no longer sufficient to establish urgency.[58]

An interesting case, as regards the issue of damage in a procedure against a Member State, is the order of the President concerning the Belgium 'Minerval', a financial requirement with which foreign students had to comply in order to enter university.[59] The damage relied on by the Commission was the damage caused to students who could not enter university. No reference was made by the Commission to damage to the Community as such. It is clear that in this case the President took into consideration, inter alia, the interests of the students, that is the harm suffered by them because they could not enter university. One can argue whether the public interest of the Community was at stake. Of course, as has been noted, there is always an interest for the Commission that Member States comply with Community law immediately, but if this were enough to obtain interim measures, the Commission could and would always request for interim relief in Article 169-procedures. The particular interest of this case lies in the fact that it is obvious that the private interests of the students were the primary consideration for the President in awarding the interim measure. Thus protection of private interests results in suspension of a national law as a result of the power of the Commission in infringement proceedings. One should consider that the use of Article 169 is completely to the discretion of the Commission and private persons do not have a direct influence on the Commission. Infringement proceedings have the function to

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58. See ov. 21 of the order of 3 February 1989, case 352/88 R, Commission v. Italian Republic, not yet published.
59. order of 25 October 1985, case 293/85 R, Commission v. Belgium, [1985] ECR 3521.

ensure compliance with the Treaty by Member States ('recours objectif') rather that to protect private interests. This interim order broadens the impact of the infringement procedure, since the Court in its final judgment can only give a declaratory judgment. The President realised this and tried to find the most appropriate solution in which both the interests of the Belgium government and the interests of the foreign students were protected by ordering suspension under the condition for the students to provide security to the amount of the Minerval.

3.3.3.2. Damage in anti-dumping cases.

In cases concerning definitive anti-dumping duties, the financial damage relied on by the applicants is normally considered to be a direct consequence of the imposition of anti-dumping duties. In 1987 a request for suspension of a Council Regulation imposing a definitive anti-dumping duty was rejected because the President did not consider the alleged damage to be irreparable.[60] The applicant claimed that he would suffer serious damage because the payment of the anti-dumping duty would result in a rise in prices and this would effect the competitiveness of the products concerned. Furthermore the applicant alleged that a price rise would bring about a reduction or even a complete elimination of its market share. The President reacted on these arguments in the following way:

> "It must be observed that, in seeking to demonstrate the urgency of its application, the applicant confines itself to describing effects which are inherent in the imposition of anti-dumping duties, namely a rise in the price of its

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60. order of 9 april 1987, case 77/87 R, Technointorg v. Council, [1987] ECR 1793; see also order of 8 June 1989, case 69/89 R, Nakajima all precision v. Council, not yet published.

products and a consequent diminuation of its market share. It is in the very nature of anti-dumping duties that they should result in an increase in the price of the product in question because their purpose is to counterbalance the dumping margin which has been established and to protect the Community industry against the injury caused by dumping."

The argument put forward by the President that the damage relied on by the applicant is inherent in the imposition of anti-dumping duties, does seem at first glance rather strange. Damages caused to a company by immediate execution of a Commission decision based on Articles 85 or 86 EEC, are inherent in the same sense. However, in competition cases, as will be shown later on, the condition of irreparable harm is satisfied rather easily. The explanation for this difference is most likely to be found in the character of the contested decision. A decision of the Commission as regards an infringement of Articles 85 or 86 EEC, normally effects the applicant directly and individually. A decision of the Council imposing anti-dumping duties on the other hand, involves the use of a Regulation which is a measure of a general character. Although the Court did not interpret this in a strict way by deciding that an action for annulment of such a Regulation is possible, it remains a measure with a general character. Therefore the applicant has to show, if he requests suspension of a Regulation of the Council, that the damage suffered by it as a result of the duty, is special to it.[61] It would seem likely that the argument that the damage is inherent in the imposition of the anti-dumping duty, should be understood in this sense; that the company should have to prove why the alleged damage especially affects it.

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61. order of 17 December 1984, case 254/84 R, Nippon Seiko v. Council, [1984] ECR 4357; order of 9 April 1987, case 77/87 R, Technointorg v. Council, [1987] ECR 1793.

3.3.3.3. Damage in competition cases.

In general one can say that in competition cases the condition requiring serious and irreparable harm is rather easily fulfilled. Out of the 23 cases decided prior to 1988 regarding the competition rules of the EEC and ECSC Treaties, and not including those relating to the suspension of a fine, only 8 of those cases have been rejected because the damage suffered was considered not to be sufficiently serious and irreparable.[62]
Several examples will show the arguments and approaches towards the nature of the damage in these competition cases. In the Gema case, the suspension of a decision of the Commission prohibiting concerted practices was requested. The President conceded that immediate execution would seriously disturb the relationship between the participants.[63] In a case concerning an agreement in the book sector, the President also took into account the distortion of the relationship between the participants and concluded that this relationship would be difficult to restore if the action for annulment was ultimately successful.[64] In the NSO case the possible alteration of the market as a result of immediate execution of the decision of the Commission constituted serious and irreparable harm.[65] In most of the competition cases the damage relied on by the applicant is of an economic character. The loss of a market share is considered to cause serious and irreparable damage, in particular if the lost market shares are

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62. See E. Van Ginderachter, o.c., p. 606.
63. order of 18 August 1972, case 45/71 R, Gema v. Commission, [1971] ECR 791.
64. order of 31 March 1982, joined cases 43 and 63/82 R, VBVB and VBBB v. Commission, [1982] ECR 1241.
65. order of 14 December 1982, case 260/82 R, N.S.O. v. Commission, [1982] ECR 4371.

being taken over by competing products.[66] A complete halt in supplying to an undertaking may place that undertaking in an extremely difficult situation and this situation is sufficient to constitute urgency, according to the President in the Ilford case.[67] In the Ford decision, the obligation for Ford to reduce its prices immediately, as was ordered by the Commission in an interim order, was considered to cause irreparable harm.

Finally it might be appropriate to examine two more recent competition cases. The first case deals with a request for suspension of a Commission decision which found the applicant organisations in breach of Article 86 EEC in relation to the market for television programme guides. The applicants published weekly television guides. By refusing to grant licences for the reproduction of their individual advance weekly programme listings, they prevented the publication and sale of comprehensive guides in Ireland and Northern Ireland. The decision of the Commission contained an order to supply the programme listings to each other and third parties under terms approved by the Commission. The President, dealing with the issue of serious and irreparable harm, held that the obligation for the applicants to make the listings available to third parties forthwith might lead to new developments in the market that would subsequently be very difficult, if not impossible, to reverse. The publishers of the newspapers and consumers would have become accustomed to having comprehensive programme schedules available, according to the applicants. For these reasons the President considered that the applicants could suffer serious and irreparable damage if the

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66. order of 8 April 1987, case 65/87 R, Pfizer v. Commission, [1987] ECR 1691.
67. order of 1 February 1984, case 1/84 R, Ilford v. Commission, [1984] ECR 427.

decision was ultimately annulled by the Court.[68]

The second recent case deals with a request for suspension of a Commission decision, refusing an exemption under Article 85, paragraph 3, for the so called 'Net Book Agreement 1957', which laid down a price maintaining system for the Members of the Publishers Association. The Commission required in its decision that all steps necessary to bring the infringement to an end be taken forthwith. The applicant organisation claimed that this would cause it serious and irreparable harm, because it would either have to abrogate the agreement and the marketing system established by it or to amend the agreements and the system thereunder so that they ceased to cover the book trade between Member-States. Abrogation of the agreements would, as the national court with jurisdiction in competition matters held, entail the consequence that there would be fewer stock-holding book shops, fewer and less varied titles would be published and the prices of books would be higher overall. The President accepted that those consequences would cause considerable damage and could lead to developments on the United Kingdom and Irish book markets which it would be impossible to reverse subsequently.

Besides typical economic damage in competition cases, another type of damage can play a role. In two, rather similar, recent cases concerning the competences of the Commission to make an investigation based on Article 14, paragraph 3, of Regulation 17/62, the applicants relied on damage caused by an infringement of their right of inviolability of commercial premises. It should be sufficient to discuss only one case at this point. In Hoechst v. Commission, the applicant requested suspension of a Commission decision ordering an investigation. Hoechst claimed that the

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68. order of 11 May 1989, joined cases 76, 77, and 91/89 R, Radio Telefis Eireann a.o. v. Commission, [1989] 4 C.M.L.R. 749.

contested decision was manifestly illegal, because of a breach of the fundamental right of legal persons to the inviolability of their commercial premises because a warrant had not been obtained from a judge.[69] Referring to the IBM case[70], Hoechst submitted that where a measure of Community law, the suspension of which is requested, appears on a prima facie appraisal to be manifestly illegal, it is not even necessary to examine the material or non-material damage. A manifestly unlawful measure always gives rise to a danger of serious and irreparable damage, according to Hoechst.[71] Therefore no other arguments showing urgency were made. The President held that a decision about the problems raised by the applicant would prejudge the main action. Therefore those submissions could not be regarded as disclosing the existence of a manifest illegality. Because Hoechst had not made further submissions to establish urgency, the President dismissed the application, but he added a general consideration as to the issue of damage caused in the event of an investigation. He stated:

> "Indeed if the investigation were carried out on the basis of the decision (and if this decision were annulled by the Court) ... the Commission would in that event be prevented from using, for the purposes of proceeding in the matter of an infringement of Article 85 of the EEC Treaty, any documentary evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might be annulled in so far as it was based on such evidence."

This consideration, which has been repeated in a later case[72],

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69. order of 26 March 1987, case 46/87 R, Hoechst v. Commission, [1987] ECR 1540.
70. order of 7 July 1981, joined cases 60 and 190/81 R, IBM v. Commission, [1981] ECR 1857.
71. Hoechst relied on the principle known in French and Belgium administrative law as 'voie de fait administrative.'
72. order of 28 October 1987, case 85/87 R, Dow Chemical Nederland v. Commission, [1987] ECR 4367.

might suggest that when economic damage is not really in issue, it is, even in competition cases, difficult to establish urgency. One can understand that suspension of a decision ordering an investigation is not so simple, because otherwise the Commission would encounter serious problems in attempting to fulfil its task. However, an alleged breach of the right of inviolability of commercial premises is not to be treated lightly. One should avoid the situation where the prohibition on the use of unlawfully obtained evidence, enables the Commission to infringe rights of persons or companies without an effective sanction. There is always the possibility of judicial review afterwards and the prohibition on the use of unlawfully obtained evidence, ensures that the final judgment can have full effect, but this does not alter the fact that one may argue whether in this case the applicant is effectively protected against an infringement of his legal position.

3.3.3.4. Damage in staff cases.

In staff cases, it seems generally to be assumed that damage is not serious and irreparable in the sense that an eventual annulment of the contested act in the main decision will restore the status quo ante and carries with it the possibility of compensation in damages.[73] Only exceptional circumstances are capable of establishing serious and irreparable harm. An example is the De Compte case of 1984.[74] The very substantial reduction in De Compte's remuneration which would have resulted from an immediate application of the contested decision, would have

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73. order of 16 March 1988, case 44/88 R, De Compte v. European Parliament, [1988] ECR 1669.
74. order of 3 July 1984, case 141/84 R, De Compte v. European Parliament, [1984] ECR 2575.

compelled him to sell his property on unfavourable terms and thus he would have been permanently deprived of a part of his assets. Even if the Court subsequently gave judgment in his favour, he would not be able to recover the property he had lost on the same terms. The damage was therefore considered to be irreparable. This decision may be explained by the fact that the damage in question consisted of both financial damage, and an injury to property rights.

A surprising recent staff case, concerned a request for suspension of a refusal to prolong a part-time job. The President held that there was urgency by referring simply to family circumstances, noting the fact that there were young children at home. The President supported his decision with the argument that the applicant already worked part-time for quite a long period which was fully accepted. Since circumstances had not changed in the meantime there was no justification not to prolong the part-time job this time.[75] It is likely that this decision, in which urgency would seem easily established, should be seen an an exception. It does not seem to indicate a change of mind on the part of the President which would enable urgency to be established more easily in staff cases in the future.

In order to give an idea of circumstances which would not constitute serious and irreparable damage, it should suffice to illustrate some examples from staff cases. Assignment to another department does not give rise to urgency.[76] Neither does an exclusion from a recruiting competition if there is a sufficient likelihood of another competition being held before the applicant

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75. order of 23 August 1988, case 76/88 R, La Terza v. Court of Justice, [1988] ECR 1741.
76. order of 20 May 1983, case 69/83 R Lux v. Court of auditors, [1983] ECR 1785.

reaches the age limit for candidates.[77] The expenses and the inconvenience of moving from one country to another, are also not capable of constituting urgency.[78]
The practical reason for the reluctance of the President, in the staff cases, to regard a certain damage as serious and irreparable, might be the fact that otherwise he would be overburdened with requests for suspension. Perhaps the establishment of the Court of First Instance, which will deal with all the staff cases, will allow for a more encouraging attitude, but so far this is only speculation.

3.3.4. Conclusion as regards urgency.

Urgency, in the sense of serious and irreparable harm which might be caused to the applicant if no interim measures are awarded before a final judgment is given, is the most important condition in the procedures relating to interim measures. Such an exceptional procedure may only be justified if urgency of this nature exists. Although serious and irreparable harm is so important, its exact scope and content is difficult to define. It depends very much on the circumstances of each specific case. In order to draw some guidelines a distinction has been made between the nature of the damage involved in actions against Member States, anti-dumping cases, competition cases and staff cases.
Damage of a purely financial nature, does not seem capable of causing serious or irreparable harm since normally it would be possible to redress the money if the ultimate judgment would be in favour of the applicant.

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77. order of 13 January 1978, case 4/78 R, Salerno v. Commission, [1978] ECR 1.
78. order of 28 August 1980, case 174/80 R, Reichardt v. Commission, [1980] ECR 2665.

In principle the damage should be suffered by the applicant personally to the effect that he cannot rely on damage suffered by third parties. There are two exceptions on this principle. Member States may rely on damage caused to an industrial sector as a whole. The Commission cannot rely only on the damage caused to the Community as such by an infringement of a Member State of Community law, but has to show a particular imperative justifying interim relief, which may be damage to other Member States or individuals of Member States.
Apart from the fact that the Commission may rely on damage caused to third parties, it is difficult to identify a different approach with regard to the actual nature of the damage. One should however remember that in actions against Member States political damage may always play a role.
In anti dumping cases the damage will be quite often of a financial character and therefore urgency will be difficult to establish.
In competition cases the condition of urgency seems to be satisfied rather easily. In most of these cases it is not hard to show that immediate execution of a Commission decision will cause a distortion of the market which will be irreparable.
In staff cases on the other hand, it seems to be rather difficult to establish serious and irreparable harm, because in most cases adequate compensation in damages will be possible.

3.4. Balance of interests.

The previous section made clear that the applicant has to show that he is threatened with serious and irreparable damage unless interim measures are granted. On several occasions however, the President has also considered the damage that may be caused to other parties in the case, third parties or the general interest of the Community, if the relief sought is granted. In this

approach, the President considers whether the detrimental consequences for third persons or the Community as such as a result of the grant of interim measures, do not outweigh the interest of the applicant. The Court seems to invoke the balance of interests in particular in cases where the award of interim measures does not only affect the defendant but also directly affects third persons in a concrete way.[79] Third parties may be either interveners who are directly affected, or other parties whose damage is relied on by Member States or Community institutions when they are the defending party.
A balance of interests taking account of these factors, may lead to different results, as can be illustrated by some examples of the case law.

3.4.1. Balance of interests in the case law

In some cases the President passed some observations on the alleged threat to the defendant, but concluded that such a threat did not exist and thus granted the requested interim measure.[80]
In several cases the principle of proportionality demands a balance of interests to the effect that the President can find an adequate solution which protects the interests of the applicant without imposing an excessive burden on the defendant or affected third parties. In this respect the President can, for instance, make his decision dependent on the fulfillment of certain conditions, thus protecting the interests of the defendant or a

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79. See G. Borchardt, o.c., p. 222.
80. See e.g. order of 13 June 1989, case 56/89 R, Publishers Association v. Commission, [1989] 4 C.M.L.R. 816; order of 27 September 1988, case 194/88 R, Commission v. Italy, not yet published.

third party.[81]

In the case Johnson and Firth Brown v. Commission[82], the applicants asked for suspension of a Commission decision authorizing the take-over by British Steel, by buying the shares from JSL, a company with financial problems. The president considered:

> "To grant the application would result in making the creditors of JSL, who are entiteld to a considerable quantity of shares in JFB, suffer damage at least as serious and as irreparable as that which the latter founds upon."

The application for suspension was rejected but other interim measures were granted in order to protect the interests of both parties. The judge tried to find the most appropriate form of relief, by balancing the interests of all parties concerned.

As regards the damage of the applicant the President considered in an earlier case[83]:

> "However substantial this damage may be, it can only be appraised by the judge dealing with urgent matters, in relation to the damage the Zoja company (intervener-NvdB) would suffer if it were deprived of supplies or subjected to rationing such as to threaten its autonomy."

The request for suspension was rejected but the President made an order extending the time limit in which proposals should have been made, as was ordered in the contested decision.

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81. See e.g. order of 25 October 1985, case 293/85 R, Commission v. Belgium, [1985] ECR 3521.
82. order of 16 January 1975, case 3/75 R, Johnson and Firth Brown v. Commission, [1975] ECR 1.
83. order of 14 March 1973, joined cases 6 and 71/73 R, Instituto Chemiotherapatico Italiano and Commercial Solvents v. Commission, [1973] ECR 357.

Owing to a balance of the respective interests, the President rejected in the Irish Fishery case a request for suspension of certain measures taken by the Irish government in the area of fishery conservation. The President considered that:

> "Although such suspension may appear justified in principle, it is, however appropriate also to take into account the consequences, for the conservation of maritime resources, of the simple abolition of a measure whose efficacy and appropriateness can only be definitively assessed in the context of the proceedings on the substance of the case."

This consideration resulted in an interim order giving the parties the opportunity to agree within a short space of time upon an alternative solution.[84] Here the balance of interests was considered to be necessary in order to find a solution in accordance with the principle of proportionality.

Finally, the balance of interests was in several cases the decisive element in that the application for interim relief was totally rejected after a balance of the respective interests.

According to Lasok, the risk to the defendant would have be at least as great as the threat to the applicant, i.e. a threat of serious and irreparable damage, if relief were ordered, in order to cause the claim to be rejected.[85] However, it does seem that recent case law reveals authority for the view that a hardship to the defendant which is less then 'serious and irreparable, can be sufficient to bar the claim for relief. This has occurred in relation to different subjects: in staff cases, in actions of individuals against measures of a general character, in anti-dumping cases and in actions against Member States. In addition to the requirement of showing serious and irreparable harm, the

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84. order of 21 May 1977, case 61/77 R, Commission v. Ireland, [1977] ECR 937.
85. K.P.C. Lasok, o.c., p. 167.

applicant has to show that the grant of relief will not cause considerable damage to the other interests at stake.
In staff cases for instance, the applicant always has to prove that the award of the requested interim measure will not result in disproportional inconvenience for the defendant institution. Although he might suffer irreparable harm his request will not be granted if it cannot established that any such inconvenience will come into existence.[86]
In applications for interim relief in actions against measures of a general character, a balance should be struck between the public interest protected by the general measure and the private interest of the applicant. In these cases it is not enough for the applicant to prove that he will suffer serious and irreparable harm if his request is rejected. He must also establish that the balance between his private and the public interest lies in his favour. Support for this view can be found in several cases. An example is the Simmenthal case, in which applicants requested suspension of a Regulation concerning the beaf and veal market. The President considered that the scope and consequences of such an interim order would render it out of proportion to the individual interests which the applicant wished to safeguard.[87]
In anti-dumping cases the applicant has to show that the balance of interests at stake points in his favour in the sense that the grant of the interim measures requested will not cause appreciable

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86. e.g. order of 21 August 1980, case 174/80 R, Reichardt v. Commission, [1980] ECR 2665; order of 3 July 1984, case 141/84 R, De Compte v. European Parliament, [1984] ECR 2575.
87. order of 22 May 1978, case 92/78 R, Simmenthal v. Commission, [1978] ECR 1129.

injury to the Community industry.[88]

As regards applications for interim measures against Member States, the general approach of the President seems to be to weigh all the interests at stake against each other. Recently a case of major importance has been decided by the President with respect to the balance of interests. The dispute concerned the award of a public works contract for the construction of a drinking-water supply. The Commission conceded that the conditions for the award of the contract infringed of Article 30 EEC Treaty. The Commission brought proceedings against Ireland under 169 EEC Treaty and requested an order against Ireland to ascertain that the contract would not be awarded before a final judgment were made. Although the Commission had put forward arguments and circumstances which would in principle justify an interim order, the claim was rejected. The President stated:

> "Although at first sight the problem seems to be a matter of some urgency, particularly since the damage to the Commission, as guardian of the interests of the Community, will arise as soon as the contract at issue is awarded, it may be necessary in proceedings for interim measures under Articles 185 and 186 of the EEC Treaty to weigh against each other all the interests at stake."

Then he considered:

> "In this case the objective of the public works contract in question, namely to secure water supplies for the inhabitants of the Dundalk area by 1990 at the latest, and the aggraviation of the existing health and safety hazards for them if the award of the contract at issue is delayed, tilt the balance of interests in favour of the defendant."

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88. order of 18 October 1985, case 250/85 R, Brother industries v. Council, [1985] ECR 3459; order of 9 April 1987, case 77/87 R, Technointorg v. Council, [1987] ECR 1793.

After this decision it would seem difficult to take the view, that the balance of interests is just an additional element in order to support a decision already taken on the other criteria.[89] In this case was clear that all the interests at stake had to be balanced. Interim relief will only be granted if the balance lies in favour of the applicant.

In addition to the considerations of the President in the Irish watersupply case quoted at this point, the President stressed that a quite different assessment might have been arrived if in a case of other public works contracts, serving different purposes, the delay in the award of the contract would not expose a population to such health and safety hazards. A few months after this decision, the President came, indeed, to a different result in a comparable case, this time against Italy. The Commission alleged that Italy acted against directive 71/365, regarding the procedure for public procurement, by not publishing the announcement of a works contract for an incinerator. The request for an interim measure, ordering Italy not to award the contract before a final decision was given, succeeded this time. The President actually mentioned the serious risks for public health and the environment as a result of a delay of the construction of the incinerator. Nonetheless, since it was due to the conduct of the Italian Government itself that the incinerator did not comply with the new conditions required by the Italian law, the Government could not rely on this damage. Although the President admitted that there was a threat of serious harm to the defendant, the balance of interests was considered to lie in favour of the Commission and therefore the interim measures were granted.[90]

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89. see G.M. Borchardt, o.c., p. 221.
90. order of 27 September 1988, case 194/88 R, Commission v. Italian Republic, not yet published.

3.4.2. Conclusion.

Several cases mention the effects of the grant of interim relief on other parties than the applicant just to support the decision already taken on the other criteria, such as a 'prima facie' case and urgency. It seems, however, that on several occasions a balance of interests is made. This balance of interests seems to be important, in particular, in those cases in which the interests of third parties are affected.

Sometimes, a balance of the respective interests may lead to another form of relief then was requested. This can be regarded as a consequence of the principle of proportionality. In accordance with this principle the President should not grant an interim measure if such a measure imposes an excessive burden on the defendant or third parties affected.

A balance of interests may lead to the rejection of an application, when the applicant is not able to show that the grant of interim relief will not considerably harm the other interests at stake. The President will take a balance of interests into account, in particular, in staff cases, actions against measures with a general character, anti-dumping cases and actions against Member States.

In conclusion one may say that a balance of all the interests at stake plays a dominant role when deciding on interim measures. In view of the impact interim measures may have it is of major concern to find the most appropriate solution for each particular case. The balance of interest provides a flexible means for the President to decide on the grant of relief, thus making full use of his discretionary power.

Chapter 4 : Content of orders on interim measures.

4.1. Introduction.

"Interim measures are intended to prevent the effectiveness of the decision (decision in the substantive action-NvdB) from being jeopardised by a situation which is incompatible with the realisation of the rights of one party."[1] The purpose of interim relief therefore constitutes at the same time the limits of the content of the interim order. The measure requested has to be adequate to serve the purpose of preserving the effectiveness of the final decision.

The order granting interim relief may contain an order for suspension or any other interim measures. This distinction, made by Articles 185 and 186 EEC, is not followed in the Rules of Procedure, where suspension and other interim measures are both governed by the same Articles in title III. Although there is a difference as regards the required link with the substantive action and as regards the qualification of the party competent to apply for interim relief, the conditions for awarding the request are the same. This is a striking difference from the systems in France and Germany in which a clear distinction is drawn between the conditions for suspension and other interim measures. In fact, suspension should be regarded as a particular interim measure, it is a specialis of the generalis 'interim measures'. The essential difference between suspension and other interim measures is to be found in the negative character of the former as opposed to the positive character of the latter. Suspension has only a negative

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1. Advocate General Capotorti in his opinion on order of 28 March 1980, joined cases 24 and 97/80 R, Commission v. French Republic, [1980] ECR 1319.

effect in that the contested measure ceases to have legal effect. Sometimes it can be necessary to take positive measures to assure the effectiveness of the final judgment and therefore Article 186 EEC-Treaty provides for this possibility. It would seem that the origin of the distinction lies in the fact that the authors of the Treaty explicitly wanted to express that an action before the Court does not have suspensory effect. Consequently it was necessary to state that suspension could be obtained by an order of the Court. Some authors regard the various types of jurisdiction of the Court as the origin of the distinction between suspension and other interim measures.[2] In their view suspension refers to the Court having jurisdiction in administrative disputes whereas the competence to order other interim measures is necessary to provide interim relief in cases which ask for positive measures. This explanation does not seem convincing since it suggests that a request for interim measures other than suspension cannot be made in administrative disputes. The wording of Article 186 EEC reveals no authority for this proposition. Moreover, while it might be correct, from a historical point of view, to regard suspension as the appropriate form of relief in administrative disputes, nowadays it is possible in many Member States, to request other interim measures in such conflicts.
One should not however exaggerate the importance of the difference between suspension and other interim measures because in practice it can be difficult to distinguish between them. Suspension which is made dependent on compliance with certain conditions, can resemble an interim order restricting the power of a Community institution.[3]

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2. Slusny, o.c., p. 131-132; Van Ginderachter, o.c., p. 153.
3. See e.g. order of 14 March 1973, case 607/73 R, I.C.I. and Solvents v. Commission, [1973] ECR 357.

In this section decisions containing an order for suspension will firstly be discussed. Secondly, orders dealing with other interim measures will be considered, including interim measures in actions against Member States.

4.2. Orders for suspension.

Suspension of the operation of an act adopted by an institution seems to be a rather clear notion. If the application of an act is suspended, it ceases to have legal effect and no steps may be taken to execute or enforce the act in question. Consequently, suspension cannot be the appropriate measure in actions against decisions constituting a refusal. This has been stated by the President on several occasions. It should suffice to give at this point two examples.

In Germany v. Commission[4], the German government attacked a Commission decision authorising Germany to suspend imports into Germany of various agricultural products because this decision would result in prohibiting all measures other than suspension of imports. Germany wanted to charge compensatory amounts on imports and to grant subsidies on exports. It was therefore not satisfied by the protective measures allowed by the Commission. The application for suspension of the Commission decision was rejected on the ground that suspension of the operation of a decision of refusal cannot be equivalent to granting of the authorisation.

A second example concerns an application for suspension of a Commission decision finding the applicant in breach of Article 85 (1) EEC Treaty.[5] The President considered that the aim of the

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4. order of 5 October 1969, case 50/69 R, Germany v. Commission, [1969] ECR 449.
5. order of 15 October 1974, case 71/74 R and RR, Fruit en Groenteimporthandel v. Commission, [1974] ECR 1031.

interim application was to persuade the Court to decide in favour of the suspension of the operation of the Commission decision, with the result that the prohibited agreement would be regarded as temporarily valid until judgment was given in the main action. Then he stated as follows:

> "However it is outside the jurisdiction of the Court within the context of an interim procedure to substitute its own appraisal for that of the Commission and render provisionally valid an agreement which has been annulled on the basis of Article 85 (1) EEC Treaty with the consequences of Article 85 (2)."

However, suspension was finally granted, under the condition that the clauses of the agreement under which penalties may have been imposed should not be applied. This order shows how conditions can be imposed in order to come to an appropriate, proportional solution. Nevertheless, although the Court said that it was outside its jurisdiction to render provisionally valid an agreement which has been annulled, it has been submitted that suspension of a decision concerning Article 85 (1), like in this case, would in fact have that effect.[6] Even the Commission seems to support this view, according to its submissions in a recent case.[7] The dispute concerned a Commission decision which consisted of four Articles. Article 1 stated that certain agreements constituted an infringement of Article 85 (1), Article 2 refused an exemption under Article 85 (3), Article 3 required the applicant to bring the infringement to an end forthwith and finally Article 4 required that the parties concerned be informed. All these Articles have to be mentioned because the Commission claimed that suspension should not cover Article 1 of the decision

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6. See C. Gray, o.c., p. 95.
7. order of 13 June 1989, case 59/89 R, Publishers Association v. Commission, [1989]] 4 C.M.L.R. 816.

since the effect of such a suspension would be to restore the provisional validity of the agreements which would go beyond the scope of jurisdiction of the Court in an interim procedure. This opinion seems to be doubtful to say the least. In the first place the Court has expressly stated on several occasions that 'such a suspension in no way makes provisionally valid any agreement or concerted practice declared null and void under Article 85 (1).[8] Furthermore the legal effect of a suspension precludes, inherently, the grant of a right which did not previously exist.
In general the President seems to be rather generous in granting suspension if it concerns a decision imposing a fine. The Commission introduced in 1981 a new policy, namely to suspend enforcement of such a decision in the event of action, but only under the condition of providing security. The Court has accepted this policy and applies it often in cases before it.
Suspension is often ordered, in particular in competition cases, in a qualified way within certain limits.[9] In competition cases often only parts of the challenged decision need to be suspended.[10] The Ilford case is a good example of suspension in a qualified way. The Commission had authorised Italy not to apply Community treatment to rolls of films for colour photographs, originating in Japan and put into free circulation in the other Member States. This decision had retroactive effect; applications for import licences already pending were also covered by the Commission decision. Ilford had already applied for an import licence and requested suspension of the Commission decision. The

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8. order of 30 October 1978, joined cases 209 to 215 and 218/78 R, Van Landewyck v. Commission, [1978] ECR 2111.
9. See order of 15 October 1974, case 71/74 R and RR, Fruit en Groenteimporthandel v. Commission, [1974] ECR 1031.
10. See order of 13 June 1989, case 59/89 R, Publishers Association v. Commission, [1989] 4 C.M.L.R. 816.

President ordered suspension of the Commission decision in respect of the applications affected by the retroactivity of the decision and to the extent necessary in order to ensure normal supplies. Furthermore it is worthwhile noting that the President acted as a mediator by ordering Ilford and the Commission to negotiate about the possible number of units to import for release into free circulation. This kind of qualified suspension shows the 'grey area' between suspension and other interim measures.
At this point it would seem appropriate to discuss orders for 'other interim measures'.

4.3. Orders for other interim measures.

In those cases where the mere suspension, which has only a negative effect, is not sufficient to protect the applicants position, positive interim measures may be ordered. The wording of Article 186 leaves the President a wide range of discretion. However, this discretionary power is limited by the provisional character of the interim measures in that they only preserve the efficacy of the final judgment.[11] Keeping this in mind, it would seem that interim measures in principle are of a conservatory nature. However, several decisions granting interim relief, seem to go beyond this conservatory character, as will hopefully become clear in this section.[12]
A first important guideline set out by the case law on interim measures is the persistent refusal of the President to take administrative measures in place of the competent Community

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11. e.g. order of 28 May 1975, case 45/75 R, Konecke v. Commission, [1975] ECR 637.
12. See J.P. Mertens de Wilmars, o.c., p. 48.

institution.[13] The Court discussed in Geitling v. High Authority the limits on its powers. After having stated that suspension of a decision constituting a refusal is not equivalent to the grant of the authorisation, the President considered:

> "That authorisation may be granted only by the administration over which the Court has no power of direction. The 'other interim measures' referred to in the last paragraph of Article 39 ECSC (equivalent of Article 186 EEC Treaty), can only be of a conservatory nature and do not give the Court the power to substitute itself for the administration, or to take, even provisionally, administrative decisions in place of the executive."

The issue arose again in Plaumann v. Commission.[14] It would seem, however, that the approach there was slightly less stringent. The dispute concerned a Commission decision refusing to grant Germany an import quota for clementines of 10% instead of 13%. A German importer, Plaumann, challenged this decision and requested the President to declare, as an interim measure, that the Commission was obliged to authorise Germany, pending judgment on the main issue, to levy a customs duty of only 10%. For the remaining 3% Plaumann would lodge security. The President considered:

> "The applicant is thus asking for more than a mere suspension of the operation of the Decision which it is contesting. It seeks rather to prejudge the results by assuming beyond doubt that these will lead to a decision in its favour in the main action, that is to say, that the Commission then be required in each case to grant the contested authorisation and moreover that the Federal Government will avail itself of this authorisation and, indeed, with retroactive effect."

He then stated:

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13. order of 12 May 1959, case 19/59 R, Geitling v. High Authority, [1960] ECR 34.
14. order of 31 August 1962, case 25/62 R, [1963] ECR 123.

> "It is true that Article 186 of the EEC Treaty does not clearly exclude such measures; nevertheless so far reaching an interim measure could be justified by wholly exceptional circumstances only and if there were very good reasons for thinking that the party concerned would otherwise suffer serious and irreparable damage."

In the absence of any exceptional circumstances, the President dismissed the application. Although it was not explicitly mentioned in this case, the refusal to grant the interim measure sought would seem to result from the reluctance of the President to substitute his own discretion for that of the Commission. In this case the Commission had a discretionary power; an order to the Commission to adopt a specific course of action would largely interfere with this discretionary power.

However, the fact remains that the President did not completely exclude the possibility of obtaining a positive interim measure under Article 186, in disputes about decisions constituting a refusal. One can imagine that the absence of a discretionary power in the Commission would create a situation in which the President could award positive interim measures. Another situation might be the cases in which the Court has full jurisdiction. In these cases the Court has the competence to place itself above the administration. A positive interim order would not be an interference with the power of another institution.

The same issue has arisen in disputes concerning a refusal by the Commission to take interim measures. The competence of the Commission to take interim measures is explicitly provided for in Article 66 ECSC. In 1975 the National Carbonising Company requested the President under Article 39 ECSC to order the Commission to take emergency measures or to give a direct order to a concurrent company, NCB, to refrain from a certain pricing

policy.[15] Even the Commission considered in this case that 'it is more appropriate that the Court should order interim measures rather than the Commission, notwithstanding, moreover, that the Commission considers that it has an inherent power to adopt a temporary measure to protect the status quo.' Despite this position of the Commission, the President considered in line with the case law:

> "It would be contrary to the balance between the institutions which derives from the Treaty for the judge hearing the proceedings for the adoption of interim measures to substitute himself for the Commission in the exercise of a power which belongs primarily, subject to review by the Court, to the Commission which has all the information required for this purpose or the means of obtaining it."

This consideration resulted in an interim measure containing an order to the Commission to take the measures of conservation it considered strictly necessary. The same issue arose in a competition case regarding an infringement of Article 85.[16] The situation was different since neither the EEC Treaty, nor Regulation 17/62 explicitly confer upon the Commission the power to adopt interim measures pending the examination of an alleged infringement of Articles 85 or 86. The applicant asked the Court, under Article 186, to order the Commission to take interim measures pending its investigations or in the alternative for the Court to take such measures itself. The first question raised concerned the power of the Commission to take interim measures. Although one might have expected that the Court would not give a decision on this point in a procedure for interim relief, this

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15. order of 22 October 1975, case 109/75 R, National Carbonising Company v. Commission, [1975] ECR 1193.
16. order of the Court of 17 January 1980, 792/79 R. Camera Care v. Commission, [1980] ECR 119.

did not seem to be an obstacle.[17] The Court concluded, after an examination of Article 3 (1) of Regulation 17/62, that the powers given by this Article 'include the power to take interim measures which are indispensable for the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist.'[18] This case has been considered in section 2.6. concerning the prohibition on prejudicing the final decision. The Court ruled again that:

> "It is in accordance with the key principles of the Community that any interim measures which prove to be necessary should be taken by the Community institution which is given the task of receiving complaints by governments or individuals, of making inquiries and taking decisions in regard to infringements which are found to exist."

Therefore the matter was referred back to the Commission so that the Commission could take an interim decision. The Court explicitly referred to the possibility for any party concerned, to challenge Commission decisions on interim measures before the Court and to ask, if necessary, for interim measures under Article 185 or 186. If such a request is made, it will be important to know whether the Commission has refused to take any interim measure at all or whether the applicant is not satisfied with the specific measure that has been taken. In the first situation, the

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17. One can wonder how this decision can be reconciled with the interpretation given by the President as regards the term 'prejudice'. The prohibition not to prejudice the main action must be understood as meaning that no decision may be given on disputed points of law or fact. It would seem clear that the power of the Commission to take interim measures basically is a disputed point of law.
18. In essence this power is similar to the power of the Court under Articles 185 and 186 to order interim measures. The Commission will therefore act on the principles adopted by the Court.

President will probably order the Commission to take all the necessary steps. But if the President considers the measure taken by the Commission inadequate, he might order a specific form of relief because the Commission has not adopted the measure it should have adopted. This does not seem to interfere with the discretionary power of the Commission since this discretion is limited by the opinion of the President when he rejects the measure taken as being inadequate to protect the applicant.[19]

More recently the discretionary power of the judge in an application for interim measures was at issue in an anti-dumping case. In order to understand the case, it might be helpful to give a brief description of the factual and legal situation.

According to Article 11 (1) of the basic anti-dumping Regulation 2176/84, the Commission may impose provisional anti-dumping duties under certain conditions. Irrespective of whether a definitive anti-dumping duty is to be imposed subsequently by the Council, the Council has to decide what proportion of the provisional duty definitive has to be collected, according to Article 12 (2). This decision has to be taken when the period of validity is extended which will be normally 4 months. In this case, Technointorg v. Commission,[20] the applicant asked for suspension of the Commission's decision imposing a provisional anti-dumping duty, on the condition that security would be provided for the payment. One should realize the implications of such a suspension. Suspension implies that if the Council decides to collect of the provisional duty, the decision would be without any practical effect, since the collection would have been suspended in advance. For this reason the President considered:

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19. See also K.P.C. Lasok, o.c., p. 152.
20. order of 17 December 1986, case 294/86 R, [1986] ECR 3979.

"Although the judge hearing an application for interim measures has a wide discretion and considerable autonomy, he is nontheless bound to take into account the special features of the procedure at issue and may not encroach upon the powers to be exercised by the Council under that procedure or deprive them of all practical effect prior to their existence."

The request for suspension was thus rejected once again.

Finally a recent case should be mentioned, in which the President seemed to provide a rather far-reaching measure. Sofraimport, an importer of fresh fruit, lodged an application for an import licence for dessert apples originating from Chile. The French intervention agency refused to issue a licence, following the adoption by the Commission of a Regulation which, in brief, contained protective measures for apples originating from Chile to the effect that the issue of import licences should be suspended until the end of 1988. The applicant asked for suspension of this Regulation and for an order requiring an import licence to be issued for the dessert apples stored in transit in the port of Marseilles. The main problem concerned the refusal of the import licence following the Regulation, which was in fact adopted after the departure of the vessel transporting the goods. The President considered that the damage to Sofraimport was serious and irreparable since the transaction in question represented approximately 35% of its annual turnover and more then 10 times its annual profit. Therefore he ordered suspension of the Regulation with respect to the 89.514 cartons of dessert apples pending the issue of an import licence by the French authorities. The emphasis in this respect should be on the fact that the President clearly refused to interfere in the matter of the

issue of the import licence which was a power of the Commission in cooperation with the French intervention agency.[21]

In the previous section, the discretionary powers of the institutions in taking executive measures and the effect on the discretion of the President have been discussed. At this point it should be noted, once again[22], that the President is also careful not to interfere with legislative acts of the Community. An application for the adoption of interim measures against a measure with a general character, presupposes, according to the case law, that the applicant must prove in a particularly clear fashion that he is concerned directly and individually. If the applicant can satisfy this condition, an interim order regarding a measure of general application is possible.

To return to the beginning of this section, the range of interim measures is broad. It is useful to cite some examples in order to give an impression of the content of several interim orders.

In an early staff case the question arose whether a provisional money payment would be within the scope of Article 186.[23] The

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21. order of 10 June 1988, case 152/88 R, Sofraimort v. Commission, not yet published.
The Pfizer case (case 65/87 R, [1987] ECR 1619) might be interpreted in two ways. The President ordered the Commission to place the hormonal additive Carbadox on a list of allowed additives. The first interpretation, probably the most convincing one, was that the President did not want to interfere with the competences of the Commission by stating for example that Carbadox should be considered as being placed on the list. A different interpretation might lead to the conclusion that the President obliged the Commission to take a legislative measure, which would seem to contradict with the balance between the institutions, according to which the Commission has the exclusive power to initiate legislation.
22. See also paragraph 3.4. dealing with the balance of interests.
23. order of 17 July 1963, Luhleich v. Commission, [1965] ECR 618.

President did not exclude this possibility but made it clear that this might only occur if the main action was manifestly well-founded. Arguably, however, if the main action is successful, the money will be paid back in any event. The damage would not seem to be irreparable in that case. On the other hand, the need for money pending the judgment, may be urgent given the financial position of the applicant, so in those cases one could justify a provisional payment.

Interim measures may be related to procedural problems. One could, for instance, imagine a situation where evidence concerning the main action is under a threat of destruction. An interim order may be obtained in order to prevent such destruction.[24]

There have been applications for interim orders to produce documents at the oral proceedings in the final judgment.[25] These requests have been rejected because the President considered:

> "It does not seem to be possible for the judge sitting on the application for the adoption of an interim measure to take a decision on this point, which is one for the Court dealing with the original case."

In the light of more recent jurisprudence, one could explain this consideration by the fact that the President does not want to use the interim measures procedure if the objective of such measures is to obtain a measure which could be obtained by a preparatory

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24. Lasok does not agree with this proposition. He argues that the destruction of evidence does not prevent a judgment in the applicants favour from being enforced effectively. This seems an excessively legalistic approach since the importance of the evidence would be to ensure a favourable judgment or at least to increase the chances of the applicant of a succesful outcome to the case.; K.P.C. Lasok, o.c., p. 154.
25. order of 17 July 1963, case 68/63 R, Luhleich v. Commission, [1964] ECR 618; order of 25 June 1963, joined case 19 and 65/63 R, [1964] ECR 576.

inquiry as provided for in Article 45 of the Rules of Procedure. Recently, an applicant in an anti-dumping case[26] requested the appointment of an expert who should examine whether there is similarity between calcium metal of the Community and calcium metal imported from China and the USSR. If no such similarity exists, an anti-dumping duty cannot be imposed. The Council claimed that the appointment of an expert cannot be ordered as an interim measure because the findings of the expert are constituent elements for the main action and would prejudice the final decision. The President did not discuss this argument but considered:

> "Enfin, en ce qui concerne la demande de la nomination d'un expert qui aurait pour mission ..., il convient de constater qu'une tell disignation constitue une mesure d'instruction. Or la condition relative à l'urgence n'etant pas remplie, il n'y a pas lieu de procéder à une instruction dans le cadre de la procédure en référé. Il y a lieu d'ajouter que, dans la mesure ou l'expertise concerne l'affaire principale, la désignation d'un expert relève de la compétence de la Cour en vertu de l'article 45 du Reglement de procédure et non pas de celle du président statuant en référé."

Notwithstanding this clear statement, the President has appointed, on one occasion, in an earlier case, an expert.[27] The President noted clearly that the checks requested at this stage of the proceedings, both by the Commission and by the defendant are of a precautionary and urgent nature. Therefore the appointment of an expert does seem a possible interim measure but only under special circumstances.

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26. order of 14 February 1990, case 358/89 R, Extramet Industrie v. Council, not yet published.
27. order of 28 April 1982, case 318/81 R, Commission v. Codemi, [1982] ECR 1325.

As has been pointed out when discussing the orders for suspension in section 4.2., the President sometimes imposes certain conditions on an order for suspension. One could argue that these extra conditions are in fact 'other interim measures' in the sense of Article 186. One example will suffice at this point. In Razoimport, an anti-dumping case, the request for suspension was rejected but the Commission was ordered to check every day whether the imposed provisional anti-dumping duties were still justified.[28]

The Court has accepted in 1977 that its power under Article 186 EEC to "prescribe any necessary interim measures" extends to proceedings against a Member State which is violating Community law. The Commission brought an action against the United Kingdom under Article 93 (2) because the United Kingdom provided illegal state aid to pig producers. The Advocate General argued that the Court has no jurisdiction to enjoin specific conduct on a Member State in interim proceedings when it is confined in its final judgment to declaring that there has been a failure to fulfil a Treaty obligation. The Court however did not discuss the objections of the Advocate General and ordered the United Kingdom to cease to apply the aid-measure forthwith. An interim measure under Article 186 against a Member State thus appears to be possible. One should remember that the Court of Justice has full jurisdiction only in special cases.[29] Therefore an interim order which goes beyond the boundaries of the possible judgment in the main action may indeed seem anomalous, as the Advocate General considered. On the other hand, the possibility to enjoin specific conduct on a Member State in an infringement procedure, provides

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28. order of 19 July 1983, case 120/83 R, Raznoimport v. Commission, [1983] ECR 2573.
29. Article 172 EEC Treaty.

for a remedy plugging the gap in the Article 169-procedure. A declaratory judgment is easy to deny but it may not be so easy with a direct order imposing a particular conduct.

On the same day the Court ordered another interim measure against a Member State.[30] Ireland had introduced fishery conservation measures which were considered to be incompatible with Community law and therefore the Commission started proceedings under Article 169 EEC. Although suspension of the national measures appeared to be justified in principle, the Court concluded, balancing the interests, that it would be appropriate if the parties concerned started negotiations first. This is a perfect example of the Court acting as a mediator in proceedings on interim measures. This use of interim measures as a method of trying to reach an agreement is an interesting feature. As has been pointed out, proceedings for interim relief do not seem to be the appropriate means of arriving at a final decision. However, they may serve as a final attempt to get the opposing parties around the table, as is shown by the Irish Fishery case.[31]

The Commission can ask for interim relief under Article 186 EEC in proceedings against Member States for having failed to fulfil its obligations under Article 171 EEC to take the measures necessary for compliance with a judgment of the Court. However, an order will be refused if it would simply reiterate the substance of the

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30. order of 21 May 1977, case 61/77 R, Commission v. Ireland, [1977] ECR 937.
31. See also order of 1 February 1984, case 1/84 R, Ilford v. Commission, [1984] ECR 423. The main case had been withdrawn by order of OJ 1985 C31/05. The President had ordered that the Commission and Ilford should try to come to an agreement on the number of units of photographic films which may be imported for release into free circulation. Since Ilford has withdrawn the main action one may assume that the parties actually did come to an agreement.

previous judgment. For this reason, the Court rejected an application of the Commission in the Mutton and Lamb case.[32]

It would seem that interim measures against Member States have become more common. Between 1977 and January 1990, 17 orders have been made against a Member State in 12 different cases. The Commission was successful in 8 of the 12 cases. Until 1985 the President referred proceedings on interim measures against Member States to the full Court[33], but at the moment it seems that he is taking care of these applications himself. A summary of the different measures ordered will suffice at this point.

In case 42/82 R the Court enjoined France to take specific measures with regard to the release of Italian wine onto the French market.[34] In case 154/85 R, the interim order obliged Italy to restore the status quo ante as regards the parallel importation of cars from other Member States.[35] In case 293/85 R, the President ordered the Belgium Government to adopt all measures necessary to ensure that foreign students could enter university on the same conditions as Belgian students. This order implied that universities could not ask for the contested entrance fee, the so called 'Minerval'. The interest of the universities was, however, taken into account by the President because foreign students were required to give a personal undertaking to pay the fee in question if the main application was dismissed by the Court. Furthermore, Belgium was required to inform the Commission and the Court of the measures which it adopted in order to comply with the interim order. As a consequence of the principle of

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32. order of 28 March 1980, case 24 and 97/80 R, Commission v. France, [1980] ECR 1319.
33. Article 85 Rules of Procedure.
34. order of 4 March 1982, case 42/82 R, Commission v. France, [1982] ECR 841.
35. order of 7 June 1985, case 154/85 R, Commission v. Italy, [1985] ECR 1753.

supremacy of Community law, the scope of interim measures appears to be broad: universities, which were not a party to the case, have to disregard national legislation as far as this legislation blocks equal entrance of foreign students thereto. In order for such an interim order to have practical effect, it will be essential that the national government informs the universities of the order.

The Commission has recently brought actions under Article 169 EEC against Ireland and Italy concerning an infringement of Community legislation as regards public procurement. In both procedures the Commission requested interim relief. In the action against Ireland, the request was rejected because a further delay in the awarding of the contract for a water supply augmentation scheme would cause serious risks to the health of people.[36] The Commission action against Italy was successful because the President ordered Italy to suspend the award of a contract for the construction of an incinerator.[37] It will not be surprising if there is an increase in the number of interim proceedings dealing with public procurement, because an interim order prohibiting the award of a public works contract alleged to be infringing Community law seems to be an effective and appropriate provision for the Commission to seek in Article 169-proceedings.

4.4. Conclusion.

In ordinary proceedings the Court only has jurisdiction to annul a decision, to award damages or to declare that a Member State has failed to fulfil an obligation imposed by Community law. The

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36. order of 13 March 1987, case 45/87 R, Commission v. Ireland, [1987] ECR 1369.
37. order of 27 September 1987, case 194/88 R, Commission v. Italy, not yet published.

President of the Court deciding on a request for interim measures has a wider jurisdiction. In proceedings for interim relief the President has the competence to create provisionally a binding legal situation pending the final judgment. The wide range of discretion left to the President has made it possible to give effective interim protection to the applicant whether it be an individual or the Commission. In particular in actions against Member States concerning public procurement, interim measures seem to fulfil an important role. It would not seem useful to repeat at this point the possible content of interim measures since they have been discussed widely in the previous section. However, two main issues may be repeated. In the first place the President does not want to interfere with powers attributed to the administration and therefore he will not substitute his own discretion for that of the executive institution. Secondly, it should be noted that the President has used his discretion not only to protect the rights of the applicant, but also to try to reach an agreement between the parties and thus to act as a mediator.

Chapter 5: Procedural aspects.

Several procedural aspects have already been discussed in the previous sections, for example the question who may apply for interim measures and the procedural link between an application for interim measures and a substantive action. In this section a brief description of the procedure itself will be made.

5.1. Competence in proceedings for interim relief.

The competence to decide on applications for interim relief is not attributed to the Court as such, but to the President of the Court.[1] In cases where the President is be prevented from attending, his place is be taken by the President of the Chambers, according to seniority, and if he is unable to attend, one of the other judges will take his place.[2]
One should remember the special features of proceedings for interim measures namely that they are based on urgency and the need for immediate action. It is because of these special characteristics that the President is competent as a judge alone to decide on applications for interim relief. The importance of this competence is emphasised by the fact that he is not obliged to hear the Advocate General. In practice however, the President will be accompanied at the hearing by the Judge Rapporteur and the Advocate-General who is acting in the main case. Nevertheless, he is in no way bound to adopt their opinion and the President therefore has a totally discretionary power in this matter.

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1. Article 36 of the Statute of the Court and Article 85, paragraph 1 Rules of Procedure.
2. Article 85, paragraph 1 Rules of Procedure juncto Articles 11 and 6 Rules of Procedure.

The President of the Court may refer the application to the full Court.[3] In this case, the Court has to postpone all other cases and has to give preference to the proceedings for interim relief. If the the case is referred to the full Court, the Advocate-General has to be heard. One cannot derive what the criteria are to refer a case to the full Court from the wording of Article 85 Rules of Procedure. Moreover, the President does not have to explain his decision on this issue. It would seem however, that reference to the full Court is made by the President in cases of real difficulty or importance.[4] It used to be the practice to refer applications for interim measures against Member-States to the full Court.[5] But since 1985 the President has decided himself on applications for interim measures against Member-States.[6] In fourteen cases, out of a total number of 231 from 1957 onwards, the applications have been referred to the full Court. The procedure, when the Court decides on the application, is the same as the one followed by the President. The Court has the same powers as those entrusted to the President. The possibility of referring the application to the full Court so as to provide for a collective decision on interim relief, should be regarded as a procedural tactic which could possibly assure a more profound or mature decision. One might assume that an order granting interim relief by the full Court would strengthen the force of the decision, since it is a collegial decision which the parties should accept more readily.

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3. Article 85, paragraph 1 Rules of Procedure.
4. e.g. order of 17 January 1981, case 792/79 R, Camera Care v. Commission, [1981] ECR 119; order of 12 July 1990, case 195/90 R, Commission v. Germany, not yet published.
5. See e.g. order of 21 May 1977, case 61/77 R, Commission v. Ireland, [1977] ECR 957.
6. order of 7 June 1985, case 154/85 R, Commission v. Italy, [1985] ECR 1753.

5.2. Procedure.

An application for interim measures must be made by a separate document and should be in accordance with the provisions of Article 37 and 38 of the Rules of Procedure, both dealing with the written procedure.
According to Article 83, paragraph 2 of the Rules of Procedure, the application shall state the subject matter of the dispute, the circumstances giving rise to urgency and the factual and legal grounds establishing a prima facie case for the interim measures sought. However, according to Article 38 of the Rules of Procedure, it is sufficient to state the subject matter of the dispute and the grounds on which the application is based. This difference may be explained by the different course of both proceedings. As opposed to a substantive action before the Court, proceedings for interim relief have to be decided upon the facts known at that stage of the proceedings. In view of the urgency, it is important to furnish to the President all information available since a full scale investigation will not be possible and is not to be expected in view of the summary nature of the proceedings.
The application will be served on the other party, as usual, and the President will prescribe a short period within which written or oral submissions may be submitted.[7] The usual practice is to give the defendant two or three weeks to submit written observations and subsequently a date for the hearing will be fixed. The President may decide to give the opportunity to submit only oral observations at the hearing. Conversely, the President may consider the written submissions sufficient to rule on the

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7. Article 84, paragraph 1 Rules of Procedure.

application and therefore decide without a hearing.[8] Thus the President has a discretionary power in this matter.

In cases of extreme urgency, the President may grant the application even before the observations of the opposite party have been submitted.[9] However, such a decision may be varied or cancelled, either on application or by the President of his own motion. This extraordinary step will only be taken if it is clear that a further delay until the hearing on the interim measures will inevitably alter the status quo. The considerations of the President do not go beyond stating that at first sight the claim is not without foundation and that is cannot be denied that the facts of the case establish urgency.

The President may order a preparatory inquiry, but it would not seem to be the practice to do so.[10] This might be explained by the fact that in most cases it will be sufficient to request all supplementary documents from the parties or, even if they are not a party to the case, from an institution or a Member State[11], without ordering a preparatory inquiry.

The decision takes the form of a reasoned order, from which there is no appeal possible. The reasoning of the decision is important because, although an appeal as such is not possible, the parties may ask for the order to be varied or cancelled on account of a

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8. See e.g. order of 13 July 1988, case 160/88 R, FEDESA v. Council, not yet published.
9. Article 84, paragraph 2 Rules of Procedure. See e.g. order of 20 July 1988, case 194/88 R, Commission v. Italy, not yet published; order of 28 June 1990, case 195/90 R, Commission v. Germany, not yet published.
10. Since no special rules are mentioned, one should presumably apply the general rules regarding preparatory inquiries: Articles 21-27 Statute and Articles 45-53 Rules of Procedure.
11. See e.g. order of 17 March 1986, case 23/86 R, United Kingdom v. European Parliament, [1986] ECR 1085, in which case the President sought information from the Commission which was not a party to the case.

change in circumstances.[12] Furthermore, the unsuccessful applicant can make a further application on the basis of new facts.[13] It would seem that proceedings in this situation will be the same as for an application for interim relief under Article 83 Rules of Procedure.[14]

The order will be served on the parties forthwith which in practice will be per telex or telefax.

The enforcement of the order may be made conditional on the lodging of security by the applicant.[15] The President has made use of this provision in many cases, in particular where the contested measures were of a financial nature, such as in anti-dumping cases.[16] Lodging of security has never been ordered against a Community institution since it is assumed that there is no risk that the Community will be insolvent if it ultimately has to pay damages.

Finally it should be noted that the decision on the costs of the interim proceedings will usually be reserved until the judgment in the main action. Orders for costs are generally made without discussion. It does seem that in most cases the Court orders the unsuccessful party in the main case to pay the costs of both actions, irrespective of whether the application for interim relief was successful or not. Although the final judgment may deal specifically with the costs incurred in relation to the proceedings for interim measures, it may be assumed that if no such reference has been made, the decision on costs relates to the

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12. Article 87 Rule of Procedure.
13. Article 88 Rules of Procedure.
14. See also K.P.C. Lasok, o.c., p. 175.
15. Article 86, paragraph 2 Rules of Procedure.
16. See about the use of this provision section 4.1. too.

total costs.[17]

An interesting issue arises if the applicant withdraws the main action after a decision on interim relief has been given. If the application for interim measures is dismissed, the applicant generally will be ordered to pay the costs of the interim proceedings in the order for removal from the Register, in accordance with the principle expressed in Article 69, paragraph 4 of the Rules of Procedure. Even if the applicant is successful in the interim proceedings, but withdraws the main action, he will usually be ordered to pay the costs. However, in the Pfizer case, Pfizer requested the removal of the main case from the Register, because the order for interim relief had brought the relief sought, but the Commission was ordered to pay the costs of the interim proceedings. Therefore the order for removal might be interesting since it may give an indication of the legal positions of the parties concerned.

5.3. Influence of the establishment of the Court of First Instance

Article 168a EEC, introduced, pursuant to Articles 4, paragraph 2 and Article 26 of the Single European Act, the possibility to add to the European Court of Justice a Court of First Instance. Council decision 88/591 of 24 October 1988 established this Court of First Instance.[18] It does not seem necessary at this point to discuss in detail the reasons for its establishment.[19] It may however be noted that due to the increase of in the number of

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17. Further details as regards the decision on costs may be found in J. Usher, European Court Practice, London 1983, p. 330-346.
18. OJ 21-8-1989, C215/01.
19. See e.g. E. Van Ginderachter, Le Tribunal de Première Instance des Communautes Europeennes, un nouveau-ne prodige?, Cah. dr. europ. 1989, p. 614.

cases brought, the duration of proceedings has become unacceptable. In 1970 it took the Court approximately 9 months to decide on direct actions and 6 months in references on preliminary rulings. In 1989 the average length was 23 months in direct actions and 17 months in preliminary rulings.[20] Another alarming situation has been created by the increase in the number of cases pending before the Court at the end of the year. Whereas in 1970 there were about a hundred cases still pending at the end of the year, this number had increased to six hundred cases at the end of the year 1988. In order to preserve an effective system of judicial protection the Court of First Instance has been established and took up its duties in October 1989. What is the importance of the establishment of the Court of First Instance, in relation to proceedings for interim measures? This is the issue to be discussed in this section.

The Court of First Instance shall exercise at first instance the jurisdiction conferred on the Court of Justice as regards disputes between the Community and their servants, in actions based on Articles 33 and 35 ECSC[21], and in actions brought against a Community institution by natural or legal persons pursuant to Article 173, paragraph 2 and Article 175, paragraph 3 EEC, relating to the implementation of the competition rules applicable to undertakings. Where an action for damages is brought related to a case in which the Court of First Instance has jurisdiction, the Court of First Instance will have jurisdiction to hear and determine the action for compensation of damages too.[22] Since most

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20. Statistics from Proceedings of the Court of Justice of the European Communities 1989.
21. Only the provisions related to the EEC Treaty will be dealt with in this section.
22. Article 3 of Council decision 88/591.

applications for interim measures are made, in particular, in staff cases and competition cases, one should consider the effect which the jurisdiction of the Court of First Instance may have.
Articles 185 and 186 EEC have been declared applicable to the Court of First Instance.[23] This implies that actions brought before the Court of First Instance do not have suspensory effect, but suspension and other interim measures may be requested. The procedure before the Court of First Instance is governed too by Title III of the Statute of the Court.[24] The competence of the President to decide on applications for interim relief, laid down in Article 36 of the Statute of the Court, is included in Title III of this Statute. The President of the Court of First Instance therefore has the same power as the President of the 'ordinary' Court. The Court adopted the Rules of Procedure of the Court of First Instance on the 5th of June 1990.[25] The Articles 104 - 110, dealing with 'suspension of operation or enforcement and other interim measures' are identical to Articles 83 - 90 of the Rules of Procedure of the Court. In fact the President of the Court of First Instance has already given an order on interim relief. In December 1989 he dismissed an application for an interim order, requesting the President to oblige the Commission to use its power to take the necessary interim measures. Referring to the Camera Care case, the President stated that such an order would upset the balance between the different institutions.[26]
Since all applications for interim measures regarding staff disputes and competition cases from October 1989 onwards should be

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23. Article 4 of Council decision 88/591.
24. Article 46 Statute of the Court, introduced by Article 7 of Council decision 88/591.
25. OJ 1990 C136/01.
26. order of 6 December 1989, case T-131/89 R, Cosimex v. Commission, OJ 1990 C63/06.

made to the President of the Court of First Instance, one can forsee a decrease in the number of applications for interim relief made to the President of the Court.

Another impact on the proceedings for interim relief might be expected from the jurisdiction of the Court of Justice to decide on appeals against decisions of the Court of First Instance.[27] Appeals are limited to points of law and should be brought on the grounds of lack of competence of the Court of First Instance, a breach of procedure adversely affecting the interests of the applicant or an infringement of Community law by the Court of First Instance. The possibility of appeal might have two consequences regarding interim relief.

In the first place, an appeal against a decision of the Court of First Instance does not have suspensory effect. However, interim relief pending the procedure for appeal, may be granted according to Article 53 of the Statute of the Court: "Without prejudice to Articles 185 and 186 of this Treaty, an appeal shall not have suspensory effect." One might assume that even without this explicit provision, Articles 185 and 186 EEC would have been applicable because an appeal could be regarded as 'a case before the court' as used in these Articles. As a consequence of the possibility of appeal to the Court, it might be assumed that there will be an increase in applications for interim measures relating to appeals pending before the Court.

It should be noted that a decision of the Court of First Instance declaring a measure of a general character to be void, shall only take effect either after expiration of the period for appeal or after the decision dismissing the appeal. In this exceptional case, suspensory effect was considered necessary in order to avoid

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27. Article 49 Statute of the Court, introduced by Article 7 of Council decision 88/591.

legal uncertainty. If a decision of the Court of First Instance is subsequently over ruled by the Court, the ensuing situation would be very complex in that the annulled Regulation would be retroactively effective again. According to Article 53 of the Statute of the Court, the right of a party to apply to the Court, pursuant to Articles 185 and 186, for suspension of the effects of a regulation which has been declared void or for the award of any other interim measure, is not affected. In principle, the chances of a grant of interim relief in actions against measures of a general character are not high but the judgment in first instance might have a certain influence on the decision on interim measures. One may assume that the applicant has shown a sufficient directly and individual concern because otherwise the Court of First Instance would have declared the application inadmissible.[28] Moreover, the Court of First Instance has declared a regulation void. This leaves no doubt that there are 'serious questions' to be tried. Therefore a prima facie case seems to have been automatically established.]One can argue therefore that in this particular situation the only condition for the President to consider will be the urgency of the request. However, one should remember that the President is not bound by the opinion of the Court of First Instance.

The second effect of the provision of an appeal to the Court, concerns Article 50 Statute of the Court which states: "The parties to the proceedings may appeal to the Court of Justice against any decision of the Court of First Instance made pursuant to Article 185 or 186 or the fourth paragraph of Article 192 of this Treaty within two months from their notification." The appeal against a decision on interim relief taken by the President of the

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28. See e.g. order of 25 May 1975, case 44/75 R, Konecke v. Commission, [1975] ECR 637.

Court of First Instance shall be heard and determined under the procedure referred to in Article 36 of the Statute of the Court. The President of the Court therefore has jurisdiction to decide on an appeal on interim measures ordered by the President of the Court of First Instance. As regards the conditions to be fulfilled in proceedings on an appeal, one may assume that they are identical to those applicable in first instance. It is not unlikely however, that the earlier opinion of the President of the Court of First Instance might have a certain influence on the decision of the President of the Court. For the moment this is just a speculation. Thusfar, there has not been an appeal against a decision on interim measures. It will be interesting to see in which cases, and under what conditions, the President will grant an appeal.

5.4. Conclusion.

The procedure governing interim measures is designed in a way that action can be taken swiftly so as to obtain a quick decision on interim relief, which is inherent in the nature of provisional protection. The President may even give an interim order before the defendant party has had the opportunity to answer its case, so as to maintain the status quo until the hearing on the application for interim measures. On the other hand, the Rules of Procedure also provide for the possibility of referring a case to the full Court so that a collective decision on interim measures can be obtained. Therefore, one may conclude that the Rules of Procedure contain safeguards for both parties and provide the President with various methods for deciding upon each case in an appropriate way. As regards the establishment of the Court of First Instance, one can say that on the one hand, one might expect a decrease in the number of interim orders by the President of the Court because the Court of First Instance shall have jurisdiction in competition and

staff cases. Most orders for interim relief have been made in competition and staff cases. Now the President of the Court of First Instance has to decide on these cases instead of the President of the Court. The total number of interim orders will not be affected, but there will be a shift in the origin of the orders from the President of the Court to the President of the Court of First Instance.

On the other hand, as a consequence of the possibility to appeal to the Court against decisions of the Court of First Instance, the total number of interim orders might increase. The existence of an appeal might have two consequences. Firstly, pending an appeal, interim relief might be necessary, which might lead to an increase in the number of applications for interim measures before the Court. Secondly, an appeal may be made against an interim order of the President of the Court of First Instance. These two issues will perhaps make the task of the President with respect to interim relief more arduous.

Chapter 6 : Evaluation and conclusion.

In this concluding chapter it would seem appropriate, firstly, to give a brief summary of the conditions which have to be fulfilled according to the case law as to obtain interim protection from the President of the Court.
Secondly, some evaluatory remarks will be made and a general conclusion will subsequently be drawn.

6.1. Conditions for interim relief.

It has been shown that the case law of the Court consistently states that interim measures cannot be considered unless the factual and legal grounds relied upon establish a prima facie case for granting them. In addition there must be urgency, in the sense that it is necessary for the measures to take effect before the decision of the Court on the substance of the case, in order to avoid serious and irreparable damage to the party seeking them. Finally they must be provisional in the sense that they do not prejudge the decision on the substance of the case.[1]
The condition requiring the establishment of a 'prima facie' case refers to the legal link between the interim measure and the substance of the case. This condition must be reconciled with the prohibition on prejudicing the final decision. The latter is interpreted by the Court in the sense that an order for interim measures must not decide on a disputed point of law or fact or neutralize in advance the consequences of the final decision. As a consequence of this strict interpretation, it would seem that an

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1. See e.g. order of 11 May 1989, joined cases 76, 77 and 91/R, Radio telfis Eireann v. Commission, [1989] 4 C.M.L.R. 749. As has been noted, the Court mixes the terms 'prejudice' and 'prejudge'.

assessment of the merits of the substantive case is impossible at the interim stage. The view taken by the President seems to be that the probability of success in the main action is not to be given any weight, unless the ultimate failure of the main action is beyond reasonable doubt. The analysis of the case law has shown that a 'prima facie' case will be established when there are 'serious questions to be tried' in the main action. This seems to be a justifiable approach in that the applicant may be protected without having to show a well-founded case, which would be difficult at such an early stage of the proceedings. On the other hand, one must suspect that the President cannot help but take into account his preliminary assessment of the merits of the main claim. For fear of prejudging the main action the President may prefer not to state his opinion, but the parties themselves do not refrain from considering aspects of the main action and sometimes even refer to the documents of the main application which makes it all the more difficult for the judge.

It emerged from the case law that an important consideration in determining whether interim relief should be granted, is whether the applicant is in danger of suffering serious and irreparable harm which could not be adequately compensated if the applicant ultimately succeeded in the main action. In principle, the applicant cannot rely on the damage that may be caused to third parties if the relief is not granted. However, an exception should be made for the Commission and Member States who may rely on damage suffered by third parties to support their claim.

A significant factor is the balance of interests which the President has invoked, in particular in cases where the interests of third parties were involved in the sense that the grant of interim relief would adversely affect their interests. On several occasions the President balanced the applicants interest in the grant of relief against the interests of other parties in a refusal of relief. In some cases this balance of all the interests

at stake has lead to a rejection of the claim for interim relief because the interests of the defendant or third parties were considered to outweigh the interests of the applicant. In accordance with the principle of proportionality, the President has, in other cases, balanced the interests at stake, and awarded a different type of relief then was requested by the applicant, so as to ensure the protection of the interests of the applicant without imposing an excessive burden on the defendant. It seems that the balance of interests is used as a technique which makes it possible to take into account the special features of each case and thus to find an appropriate solution.

It should be stressed that an important consideration flowing from an analysis of the case law is that the extent to which the above mentioned criteria have to be satisfied may vary from case to case.

The great variety of the interim measures that may be granted has been discussed generally in chapter Four. Since Article 186 EEC does not limit the available forms of relief, the President is entrusted with a wide discretion. However, a limit can be found in the provisional character of interim measures themselves. In principle, they should not be used to create irreversible situations.

It would seem that in proceedings for interim relief the President may even grant as a provisional remedy what the Court itself could not grant as a final relief. He may order a party to do or not to do specified acts and may even give directly orders to Member States, although the Court itself is restricted to a declaratory judgment in infringement proceedings. It is worth noting that Article 186 EEC has broadened the impact and scope of infringement proceedings. By means of an order for interim measures the Commission is in a position to alter the objective concept of Article 169 EEC, an Article which was never meant to provide for the protection of private interests of individuals. An interim

order against a Member State may be more effective than a mere declaratory judgment and could therefore mitigate the accepted weakness of infringement proceedings.
However, the President is determined not to exceed his judicial function so as not to upset the balance between the institutions. In this respect he will not give injunctions to the administration when this implies a substitution of his own appraisal for the discretion of the administration.
An interesting issue concerns the use of interim measures by the President aimed at securing a provisional agreement between the parties by ordering them to negotiate, which in some cases, mainly disputes between the Commission and companies, seems to have been the start of a final settlement.

6.2. Evaluation and conclusion.

In the light of everything that has been stated previously, one should firstly note that decisions on interim relief are usually made by a single judge, the President of the Court. One might assume that this exceptional situation -almost all decisions in the Community are taken on a collective basis- makes the President more cautious in his approach. It should not be forgotten that the President can always refer the matter to the full Court if he feels the issue is too complex to be decided by one judge.[2]
Secondly, a decision on interim relief has to be given within a very short time and on the basis of only a summary examination of the facts as they appear at that time. One should not place too much reliance on the precise manner in which the judge has

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2. Recently this occured in an order against Germany concerning the introduction of a road tax on lorries, orders of 28 June 1990 and 12 July 1990, case 195/90 R, Commission v. Germany, not yet published.

formulated the conditions to be met. In cases where relief has been refused the President has often restricted himself to examining the weakest element. Moreover, the use of different wordings may be due to the character of proceedings for interim measures since they aim at a solution for a specific case.

Initially proceedings for interim measures resembled the French system. However, the Court has gone beyond the boundaries of interim relief in France by accepting the possibility of giving injunctions to the administration. The President will however refrain from taking executive measures in place of the administration.
All things considered, provisional protection in European law is not as well developed and frequent as in Germany and the Netherlands, and one may expect that there are persons who will not regret this since the workload of the Court is ever-increasing.
Although there are certain common features, one may regard proceedings for interim relief before the Court as proceedings sui generis. This raises the interesting question of to what extent the demands in the Community required an autonomous approach towards interim relief.
In section 2.1. it was suggested that the subjective concept of Article 173, par. 2 EEC required that private parties who want to uphold their rights should be protected effectively by providing for interim measures. A restriction, like the French prohibition of enjoining the administration, would have made effective protection of the legal position of private parties more difficult. Therefore, the Court had to go beyond the limited scope of the French system of provisional protection.
The cautious attitude of the President towards granting interim relief, in comparison with the systems in the Netherlands and Germany, could possibly be explained by the quasi federal

structure of the Community. An order from the President suspending a national measure has a far-reaching impact at the national level, in particular when the order concerns rights or obligations of subjects who were not a party to the case.[3] In spite of the supremacy of Community law, a Member State might feel restricted in its discretionary power, in particular in view of the summary nature of the proceedings and the fact that the decision is given by one judge. Therefore it might be appropriate in such a situation for the President to refer those cases to the full Court so as to give more weight to its decision.[4]
In addition, the President will probably show more respect for the discretionary powers of the Community institutions, in contrast with a judge in a Member State as regards its administration, because of the different national interests involved.
Community law is predominantly economic law which implies that, in view of the changing circumstances of economic life, sufficient discretion should be left to the institutions. Too much interference from the President would encroach on the discretion of the Community institutions. This might be another explanation for the relatively cautious attitude of the President.

The examination of the case law has shown that it is hard to abstract generally applicable principles from it concerning the conditions for the grant of interim relief. This seems, however, inherent in the nature of summary proceedings. It might even be undesirable for the Court to be guided by one theory. One could argue, that in order for proceedings for interim relief to function satisfactorily, it is necessary to avoid the creation of

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3. See order 25 October 1985, case 293/85 R, Commission v. Belgium, [1985] ECR 3521.
4. See order of 12 July 1990, case 195/90 R, Commission v. Germany, not yet published.

an artificial structure in which every case has to be contorted. It would seem that the Court is aware of the special features involved in proceedings for interim relief and has established a case law in which the main criteria are set out. However, the circumstances of each case which fulfil the criteria, have not been subject to any artificial limitation. The considerations of the President are a product of the precise circumstances in each case.

This flexible approach does not imply that many actions for interim relief have actually been successful. Taking into account the orders made from 1985 until 1990, the chances of success are very poor, around 15 %. The Commission seems to have been more successful. Interim relief claimed by the Commission against Member States has been granted in eight cases out of a total number of twelve such actions taken against Member States until 1990.

The relatively low number of applications may be due to the rather stringent requirements, but it would seem also that Articles 185 and 186 EEC are just not well-known among advocates and lawyers in the Member States. One should not regard this remark as a plea in favour of more cases being brought before the Court. It is just an expression of surprise, in view of the fact that it seems that applications for interim measures in the Member States are enjoying an increasing popularity, even if, like in France, judges are not favourably disposed towards granting interim relief.

In conclusion one can say that orders granting interim relief have proved the value of interim measures in the system of judicial review in the European Community. In this respect the role of the President in summary proceedings as a mediator between the parties should be mentioned as well.

It would seem that the President of the Court has found a balance which ensures the protection of the rights of the parties pending

the final decision so as to assure the effectiveness of the judgment, even if an interim order may have far-reaching effects, without paralysing the proper exercise of administrative and normative powers by the Community institutions. Yet, the strict interpretation of the conditions for relief is an indication that interim measures should be seen as an extraordinary step in the course of the ordinary proceedings. A development similar to that in some of the Member States, in which summary proceedings enjoy an increasing importance, is most unlikely to occur in the European Community.

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A.J.D.A.	L'actualité juridique, Droit administratif.
A.B.	Administratiefrechtelijke Beslissingen.
E.L.R.	European Law Review.
C.M.L.R.	Common Market Law Report.
C.M.L.Rev.	Common Market Law Review.
Rec. Lebon	Recueil Lebon.
S.E.W.	Sociaal Economische Wetgeving.