

INTERIM MEASURES AND EU LEGISLATION¹

MEDIDAS PROVISIONALES Y LEGISLACIÓN DE LA UNIÓN EUROPEA

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ABSTRACT

In the EU Charter of Fundamental Rights there are rights related to Justice and to the effective remedy. The latter is the most relevant as it serves as a reference to the remaining rights established in Article 47 concerning parties' procedural guarantees and particularly, the right to defence during trial

The aim of the proceeding for interim measures is to guarantee the full effectiveness of the ECJ's future final decision in order to avoid the lack of judicial protection that shall be ensured by this Court.

KEY WORDS: Interim measures, fumus boni iuris, court of justice.

RESUMEN

Entre los derechos recogidos en la Carta de Derechos Fundamentales vigentes en la Unión Europea se hallan aquellos relacionados con el valor Justicia y, como no podía ser de otro modo, el derecho a la tutela judicial efectiva ocupa un lugar prioritario ya que sirve de pórtico al resto de derechos que se contienen en el artículo 47 relacionados con las garantías procesales de las partes y, en particular, con el derecho de defensa

La finalidad de las medidas provisionales es garantizar la plena eficacia de la futura decisión definitiva al objeto de evitar una laguna en la protección jurisdiccional que depara el Tribunal de Justicia.

PALABRAS CLAVES: medidas provisionales, fumus boni iuris, tribunal de justicia.

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I. INTRODUCTION

According to Articles 278 and 279 of the Treaty on the Functioning of the European Union (TFEU) actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may order, however, if it considers that circumstances so require, the suspension in executing the act appealed or adopt other necessary measures. Consequently, we firstly highlight that the granting of provisional measures is an exemption to the general rule according to which acts adopted by the EU institutions benefit from a presumption of legality and shall be in principle enforceable.

As we will see, Articles 278 and 279 are developed in the Rules of Procedure of the Court of Justice (25 September 2012), and also in the Practice Directions to Parties Concerning Cases brought before the Court (25 November 2013). Here the most striking aspects of the procedure for ordering provisional measures are detailed (application's requirements, conditions, decision of the Court...). Also the Rules of Procedure of the General Court (2 May 1991) consider these Articles.

II. PROVISIONAL MEASURES AND THE RIGHT TO AN EFFECTIVE REMEDY

The aim of the proceeding for interim measures is to guarantee the full effectiveness of the ECJ's future final decision in order to avoid the lack of judicial protection that shall be ensured by this Court. This statement is reiterated in ECJ's case law when assessing applications for interim measures (Order of the Vice-President of the ECJ of 21 January 2014,¹ Case C-574/13, ECJ 2014/36). It also provides us with an opportunity to reflect on the so-called interim measures at the European level.

In the EU Charter of Fundamental Rights there are rights related to Justice and to the effective remedy. The latter is the most relevant as it serves as a reference to the remaining rights established in Article 47 concerning parties' procedural guarantees and particularly, the right to defence during trial².

It must be recalled that the provisional protection which always happens at a national level, is therefore strongly linked with the need of achieving effectiveness in the effective remedy. In other words, protective measures are intended to ensuring the effectiveness of declaration procedures and rights enforcement as the period that takes between both of them may distort the court's future ruling.

Therefore, the legal basis of these measures is the need of guaranteeing the effectiveness of the court's future ruling as there is a risk of obstructing the effective remedy which could be granted to the party requesting the interim measure. The ECJ has emphasized

²Article 47 of the EU Charter of Fundamental Rights states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". OJEU, no. 83, 30 March 2010.

this concern in its notorious *Factor-tame* ruling (19 June 1990, Case C-213/89)³. This ruling offers a wide interpretation for adopting interim measures by national judges in order to guarantee the effectiveness of the Community Law protection. These judges may not respect the eventual prohibitions for adopting these measures imposed by National Law.

More recently and after the Lisbon Treaty entered into force (2009), the EU Charter of Fundamental Rights has the same legal value as the Treaties. The Order of the Vice-President of the ECJ of 20 November 2013 (Case C- 390/13, TJ 3013/795) determines, on the basis of this Charter, the need of requesting the measure against the imminent risk of any serious and irreparable harm to the effective remedy stated in Article 47 of this Charter. It would then be a “provisional protection linked to the effective judicial protection”⁴.

Nevertheless, it cannot be said that rejecting a request for a protective measure is an infringement of the fundamental right to effective remedy recognised in Article 47. These measures are regulated at the EU level and subordinated to certain requirements for their adoption and to an specific procedural regime⁵.

It should be noted that EU rules refer to “provisional measures”, but the ruling of Court of Justice of the European Communities of 26 March 1992 (Case C-261/90) defined “provisional, including protective, measures” as measures which “are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter”.

In any case, the legal regulation of provisional measures is linked to the protective measures' requirements (*fumus boni iuris* and *periculum in mora*) and to the specific characters of these measures; even if a protective effect that expands the provisional protection is derived from them. Furthermore, the most recognised scientific doctrine treat them as protective measures despite that EU rules refer to them as provisional measures⁶.

³An exhaustive analysis of this ruling in García de Enterría, E.: *La batalla por las medidas cautelares*, Civitas. Madrid. 2006, p. 97. See also the rulings of the cases *Zuckerfabrik* (21 February 1991) and *Atlanta* (9 November 1995).

⁴García Valdecasas and Fernández R.; and Carpi Badía, J.M^a.; “El Tribunal de Justicia de la Unión Europea. Algunas consideraciones respecto a su papel en el marco la construcción europea”, *Revista Jurídica de Castilla León*, n. 3, 2004, p. 38.

⁵We are referring to Articles 279 and 379 of the TFEU and to Articles 104ff. of the Rules of Procedure of the General Court.

⁶Pastor Borgoñón, B.; and Van Ginderachter, E.; *El procedimiento de medidas cautelares ante el Tribunal de Justicia y el Tribunal de Primera Instancia de las Comunidades Europeas*. Civitas. Madrid. 1993.

III. CHARACTERISTICS OF MEASURES.

As we think about the characteristics of interim measures we can see that EU regulations establish that those that are derived from protective measures shall be applied to provisional measures. This occurs with the features of provisionality and instrumentality. As an example, the Order of the Vice-President of the Court of Justice of 19 December 2013 (Case C-426/13, ECJ 2013/848) establishes that: the judge hearing an application for interim relief had powers whose impact vis-à-vis the institutions of the European Union went beyond the effects attaching to a judgment annulling a measure, provided that those interim measures apply only for the duration of the proceedings on the substance (...). So they are temporally subordinated to a judgement.

But also, if there is a required feature of protective measures this is the so-called instrumentality. This means that the measure cannot autonomously exist as it is subordinated to a proceeding on the substance. Similarly, the ruling of the Spanish Constitutional Court 39/1995 of 13 February (Appeal 1995/39) states that protective measures anticipate in some way the effects of the final decision. This is why protective measures that produce consequences that never could derive from a final decision shall not be adopted. It is therefore interesting to highlight that the ECJ has pointed out in the so called Case C-426/13 two features that shall be required to provisional measures: a) not prejudicing the decision of the Court on the substance of the case and b) not obstructing the effect of the proceeding on the substance⁷.

Concerning the first feature, the ECJ states that the jurisdiction of the competent judge for adopting the requested measures is limited to whether the legally established requirements for their adoption are fulfilled or not. But if we consider those as real protective measures we will finally accept that it is possible to adopt measures with similar or identical content to the proceeding on the substance one. However, the interim measure strict sensu provides a protection to certain interests that are not granted by the protective measure adopted to guarantee the effectiveness of a ruling that upholds the plaintiff claim⁸.

With regards to the second feature, it is clear that the adopted measure cannot neutralise or obstruct the effects of the decision that precisely they are intended to guarantee.

IV. TYPES OF MEASURES THAT MAY BE ADOPTED.

⁷See Article 162.4 of Rules of Procedure of the Court of Justice.

⁸Continuing with the Case C-426/13, the Member State applied for the provisional measure “for the purposes of protecting human health and, specifically, children’s health” which were the recipients of the toys with controversial materials; being this concern part of the proceeding on the substance. Either way, the Rules of Procedure of the Court of Justice is not precisely rigorous when treating interim measures as it considers as such measures the applications to suspend the enforcement of a decision of the Court or of any measure adopted by the Council, the European Commission or the European Central Bank, submitted pursuant to Articles 280 TFEU and 299 TFEU, Article 164 TEAEC, or Article 81 TEAEC; as they are not adopted to guarantee the effectiveness of the future final decision.

The measures that may be adopted according to Articles 278 and 279 of TFEU are categorised in two main components:

- The first one establishes an specific interim measure, this is, the suspension of the enforcement of the contested act.
- The second one refers to other measures that without being specified are necessary according to the competent opinion of the court.

With regards to ex Articles 242 and 243 (nowadays Articles 278 and 279) it has been criticised that there is not an exhaustive list of the possible measures by which the judge may order any action as it deems appropriate⁹. In contrast, our national legislation establishes a catalogue of specific measures that may be adopted. This list of measures is closed with a generic protective clause (Article 727.11 of the Civil Procedural Act - Law 1/2000): it is possible to adopt “those other measures that in order to protect certain rights are legally established or are necessary for ensuring the protection of the effective remedy that may be granted in the judgment upholding the plaintiff’s claim”.

So if we analyse it and we obviate the evident differences, the scheme is essentially maintained: specific measure -which is the one used in practice-, and measures considered necessary in order to achieve the specific aim of the interim measure.

Before briefly explaining these two components, we must highlight that from a legal point of view, the request for provisional measures is recognised in the frame of the so-called direct actions. Therefore is usual their approach by a separate document in cases of actions of annulment (and of failure) brought against the EU Institutions by the Member States, by the EU Institutions themselves and by any natural or legal person if the decision is addressed to them.

A. THE INTERIM MEASURE SUSPENDING THE CONTESTED ACT

An application to suspend the operation of any measure adopted by an institution shall be admissible only if the applicant has challenged that measure in an action before the Court (Article 160.1 of the Rules of Procedure of the Court of Justice) and only if it is made by a party to a case before the Court and relates to that case¹⁰.

Nevertheless, this requirement is not always strongly required and therefore the Order of the Vice-President of the Court of Justice of 7 March 2013 in the Case C-551/12 (ECJ 2013/157) establishes that “whilst, in the present case, the application for interim measures does not formally seek suspension of the operation of a measure, the interim measures sought resemble such a suspension since the appellant seeks to obtain an

⁹Giménez Sánchez, I: La eficacia de las sentencias dictadas por el TJCE. Aranzadi. Pamplona. 2003, p. 180.

¹⁰Villagómez Cebrián, M.; Derecho Procesal Comunitario. Tirant Lo Blanch. Valencia. 2001, p. 292.

additional period of more than two years in order to choose between the two options laid down in the commitments given by it with regard to the Nest-Energie project”.

In contrast, we can see in the Order of the Vice-President of the Court of Justice of 21 January 2014 concerning the Case C-574/12 (ECJ 2014/36) that the act whose suspension is requested corresponds to the contested act in the main appeal. In this case, the Member State brings an action of annulment of the Decision of the Commission on the recovery of a benefit at a national level (a benefit granted by the State) and, simultaneously is recommended to suspend the Decision concerned as an interim measure, until the General Court decides on the substance of the appeal, as understands that “giving immediate effect to the contested decision, which ordered the recovery from the Société Nationale Corse Méditerranée (SNCM) of more than EUR 220 million and the cancellation of all payments after the date of notification of the decision, would inevitably bring about the insolvency and liquidation of that company and thus cause serious, irreparable and immediate harm to that Member State.

B. OTHER MEASURES FOR GUARANTEEING THE EFFECTIVENESS OF THE FUTURE DECISION ON THE SUBSTANCE OF THE MATTER

As we said, under Article 279 TFEU other interim measures can be adopted but only in two specified cases (Article 160.2 Rules of Procedure of the Court of Justice):

1. If they are applied by a party to a case before the Court
2. If they are related to that case.

These requirements means that they have to be similar measures as the ones adopted for the enforcement of the judgement upholding the petitioner's claim¹¹. Indeed, adopting a measure which provisionally allows to maintain stricter national provisions than those rules established at the EU level on toys' materials is addressed by the Order of the Vice-President of the Court of Justice of 19 December 2013 (Case C-426/13, ECJ 2013/848). Here suspending the enforcement of an act in the sense established in Article 278 TFEU is not pursued, but instead other interim measure that grants an enhanced protection to the recipients of the toys is sought, in the sense stated in Article 279 TFEU.

V. REQUIREMENTS

Articles 160.3 of the Rules of Procedure of the Court of Justice and 107 of the Rules of Procedure of the General Court state that adopting interim measures is subjected to the “circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for”. Also we must highlight that “the execution of the order may be made conditional on the lodging by the applicant of security, of an amount and nature to be fixed in the light of the circumstances”. This way the so-called requirements of the protective measures that are established in our national legislation (Article 728 of the Civil Procedural Act) correspond with the

¹¹Villa Gómez Cebrián, M.; Op. cit. p. 293.

appearance of a prima facie case or “fumus boni iuris” and urgency or “periculum in mora”.

In the EU case-law, the competent judge may order the suspension of the operation of an act or other interim measures when concurring the following requirements:

1. The urgency, this means that in order to avoid serious and irreparable harm to the applicant's interests, the measure shall be adopted and produce its effects before a decision is reached in the main action¹². The urgency must therefore be assessed with regards to the need of provisionally protecting the applicant's interests and is related to the chances of a serious and irreparable harm¹³.
2. Fumus boni iuris, which is fulfilled when the applicant proves that the granting of the interim measure is justified prima facie, in fact and in law¹⁴.

In that order, the applicant shall prove to the competent authority the fulfilment of both requirements but is not necessary to prove that in all cases the harm is going to inevitably be produced, but that there is a reasonable chance that this harm may occur¹⁵.

In other words, it is not necessary that the imminence of the danger is proved with absolute certainty; but only that this damaging effect is foreseen with a sufficient degree of probability. This does not prevent to requiring the applicant of the measure to prove the facts that are the basis of the belief that the mentioned harm is going to happen. This is also required when fundamental rights are at stake and even considering the reinforced protection granted by the Treaty of Lisbon. In this sense, the ECJ stated that “it is not sufficient to allege infringement of fundamental rights for the purposes of establishing that the harm which could result would necessarily be irreparable”¹⁶.

As far as the fumus boni iuris principle is concerned, it is only required to justify prima facie that the requested measure is appropriated for its aimed purpose of guaranteeing the effectiveness of the final decision. Exceeding that limit involves a consideration of the evidence unrelated to the one that shall perform the competent judge.

¹² For more information on the concept of serious and irreparable damage see Pastor Borgoñón, B. and Van Ginderachter, E.; Op. cit. p. 97.

¹³Cfr. the periculum in mora established in Article 728 of the Civil Procedural Act: “Protective measures shall only be adopted when the applicant justifies that situations that can show up when pending the proceeding could impede or obstruct the effectiveness of the remedy granted by an eventual judgement upholding the petitioner's claim”.

¹⁴Cfr. the fumus boni iuris established in Article 728 of the Civil Procedural Act: “The applicant of the protective measures shall attach to his application the data, grounds and documentary justification so the Court can inform without prejudicing on the substance of the matter a provisional judgement favourable to his application”.

¹⁵See also the Case of the EU Commission against ANKO AE Antiprosopieion, Emporioukai Viomichanias. Order of 8 April 2014. ECJ 2014\161 and the mentioned case-law.op. cit. pg. 97. See also the Case of the EU Commission against ANKO AE Antiprosopieion, Emporioukai Viomichanias. Order of 8 April 2014. ECJ 2014\161 and the mentioned case-law.

¹⁶See Order of the President of the ECJ of 15 April 1998, Camar/Commission, C-43/98).

One of the most complex issues in proceedings for interim measures is precisely the provisional assessment that the judge has to carry out for upholding the application for provisional measures. Here we must highlight:

- The need of taking into consideration in a comprehensive manner the application for interim measures. The conditions of *fumus boni iuris*, the urgency and the harm that may be produced are cumulative requirements, so that an application for interim measures must be dismissed if any one of them is absent (Order of the President of Court of Justice of 14 October 1996, Case C-268/96).
- The need of balancing the conflicting interests and favour certain of them instead of the others¹⁷. This assessment will lead the judge of interim measures to compare or collate between the conflicting interests.

VI. PROCEEDING

The application for suspending the operation of an act or for the adoption of other interim measures shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for (Article 160.3 of the Rules of Procedure of the Court of Justice and 104.2 of the Rules of Procedure of the General Court). The application shall be made by a separate document¹⁸. These rules out the possibility of applying for the measure jointly with the main application; which is allowed by our Civil Procedural Act¹⁹.

¹⁷The balancing of interests in our national legal system is linked to the adoption of protective measures when administrative acts are under appeal. In this sense, the “provisional suspension of the act under appeal or the contested administrative decisions” is foreseen as a specific measure; and in general terms, “all those measures that guarantee the effectiveness of the final decision” are granted. (Article 129 and 130 of the Law 29/1998 of 13 July governing Administrative Jurisdiction.

¹⁸ The Rules of Procedure of the Court of Justice establishes the content of the application of direct actions:

- a) the name and address of the applicant;
- b) the name of the party against whom the application is made;
- c) the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law;
- d) the form of order sought by the applicant;
- e) when appropriate, any evidence produced or offered.

¹⁹ Article 730.2 of the Civil Procedural Act states: “protective measures may also be requested before submitting the application if the applicant at the same time alleges and proves urgency or necessity reasons”.

In any case, the proceeding is based on the principles of urgency/expeditiousness – given the urgency on which is based – and on the principle of party disposition.

Procedural stage for applying: the application for interim measures usually is jointly submitted with the direct actions. But when Regulations do not bar the party who applied for interim measures from making a further application on the basis of new facts after being rejected a previous application (Articles 164 of the Rules of Procedure of the Court of Justice and 109 of the Rules of Procedure of the General Court), we understand that while the main proceeding is pending, the applicant can choose the procedural stage for applying for the interim measure or for provisionally suspending an act that may provoke a serious and irreparable harm on him.

The President shall either decide himself on the application or refer it immediately to the Court. The Rules of Procedure of the General Court establishes that being the President of the General Court absent or prevented from attending, he will be substituted by other Judge as the “judge hearing the application for interim measures”.

The applicant undoubtedly has the locus standi, this is, he is entitled to submit the application for suspending the execution of the act. When granting other provisional measures requested “by a party to a case before the Court” the locus standi is more problematic. In this case, a third party may be considered as an intervener as he may have an interest in the applicant's application²⁰. The opposite party shall be the defendant in the main proceeding.

Processing of the defendant's arguments: The application shall be served on the opposite party, and the President shall prescribe a short time-limit within which that party may submit written or oral observations (not being subject to any other requirement as to form)²¹.

Interim and urgent provisional measures. We believe that the extreme urgency of the measure, in the absence of regulation in this respect, shall be assessed by the President in each particular case. So in this situation, the President may grant the application even before the observations of the opposite party have been submitted (without hearing the other party), but the decision which terminates the proceeding for interim measures could only be adopted after hearing that party. This decision may be varied or cancelled even without any application being made by any party.

The decision on the application for interim measures or for the suspension of the execution of an act, shall take the form of a reasoned order. The order shall be forthwith served on the parties. The President may, where he considers it appropriate, adopt temporary solutions, in particular by granting an application

²⁰Pastor Borgoñón, B.; and Van Ginderachter, E.; Op. Cit. p.46.

²¹On an indicative basis, see Article 124 of the Rules of Procedure of the Court of Justice when the defendant lodges a defence within the written procedure of the direct actions.

seeking the suspension in part of the operation of an act (Order of the Vice-President of the Court of Justice of 28 November 2013, Case C-390/13).

Appeals: the Order delivered by the President of the Court of Justice can in any way be contested. Consequently, it has to be complied by the parties and has relative authority as *res judicata*²². Orders made by the General Court can be subject of an appeal brought before the Court of Justice.

Modification of the measure: on application by a party, the order may at any time be varied or cancelled on account of a change in circumstances.

VII. CONCLUSIONS

Nevertheless, the regulation of the proceeding for ordering provisional measures is characterised, in my opinion, by these two features: 1) it is short and brief, and Regulations only establish the most basic aspects; and 2) it grants to the competent judge a wide discretion for deciding on procedural matters which are in some way secondary (way of contesting the application, preparatory inquiry).

In any case, the proceeding is based on the principles of urgency/expeditiousness – given the urgency on which is based – and on the principle of party disposition.

²²Villagómez Cebrián. Op. Cit.; p. 304. We have to consider that the order shall only have an interim effect, and shall be without prejudice to the decision of the General Court on the substance of the case.