Davide Maresca

Regulation of Infrastructure Markets

Legal Cases and Materials on Seaports, Railways and Airports

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To Simona

Preface

The writing and publication of a book is often a composition of different factors that give its author the motivation to start a work that, in its early stages, has an uncertain final form. In my case, I had three strong motivations.

The first motivation for this book derived from my research method. During my still short experience as a lecturer and researcher, I have always concentrated my efforts on the interpretation of the living law in order to understand the real implications of the law in the life of the people it affects. In fact, I think that before entering into the study of academic doctrines, it is necessary to understand the "reality of law". By this I mean that although scholars can discuss theories and academic contrasts as long as they like, in the end, the most import goal of a researcher should always be a "product" directly applicable to concrete situations.

For this reason, during my studies, I have always appreciated every source that could provide me with concrete examples of the application of the law, as close to reality as possible, and preferably through the direct reading of cases. One such source is the fantastic casebook of Berman, Goebel, Davey, and Fox, *Cases and Materials on European Union Law* (2011), where it is possible to read and gain a deeper understanding of every single relevant case concerning European Union law. Only through the direct reading of the judgments it is possible to understand the true grounds for judicial decisions. Judicial opinions offer the most reliable way to grasp a law's effects as applied to real life, and consequently, provide the most reliable indicia for determining best behaviors according to the law. In fact, the underlying goal of legal certainty is tightly bound to the comprehension of judicial decisions, which create the real behavioral parameters for people and companies.

The second motivation is set in my desire to carry out a new academic challenge. I have focused my years of research activity on the regulation of infrastructures from two distinct, yet related, perspectives: access to relevant markets and the law of competition. Yet despite the ample scholarship on infrastructure regulation, I never found a complete reference of cases related to transport infrastructures. During my studies, I reflected on how much I would have appreciated a casebook through which I could have directly compared scholars' theories to judicial decisions. I soon realized how much simpler my research would be had I direct access to the most important cases on this issue. Moreover, such a book has the potential to both support researchers' and professors' activities and, in my opinion, stimulate academic discussion on the laws as they are actually applied by

the most important courts, rather confining such discussion to topics emerging from academic conferences or workshops.

The third reason for writing this book is set in my lectureship purpose. I often prepare lectures for graduate and post-graduate programs on European Transport Law. I have always preferred an empirical approach to teaching effected through the explanation of cases and the direct study of the opinions of courts. The point is that I could never suggest to my students a text to use as a reference of cases. This is one of the most important reasons leading me to put together this compendium of all the most important cases I discussed with students and the most important materials on which I based my research. The result should be a casebook where scholars and students can appreciate the different approaches to the regulation of different infrastructure markets: seaports, railways, and airports.

The research method of this book is based on the direct reading of cases. However, before entering into the discussion on the single facilities, I thought it was necessary to introduce the most important applicable rules of European Union law. Indeed, it is now clear that the European model of regulation has gone beyond its initial purposes and is already competent to regulate the situations internally located within a member State, as the concrete effects of the public or private restraint of competition can potentially interest people and companies from other member States.

Consequently, the boundaries of the application of European Union law have expanded beyond traditional geographical borders. In order to understand whether a concrete situation falls within the scope of European Union law, it is necessary to find a specific norm emanating from the treaties that set the field of application for European rules. It is, therefore, possible to state that some matters are entirely covered by European Union law even if the actual effects of measures and behaviors are internally located within a particular member State. If only one other European subject can have a potential interest in that situation, it will be regulated by European Union law.

In the infrastructures market, the potential interest of operators from different member States is always present thanks to the globalized dimension of transport services companies. Indeed, maritime services and air services have become liberalized and every single company from Europe has the right to access every facility under the same conditions as domestic operators. This framework has enjoyed many years of application and is leading to the liberalization of transport infrastructures, even if national practices continue to create some breaches of European Union law. The case of railways is a little different. There, the liberalization of services is not yet a concrete reality, although there are some tendencies to let European carriers enter into national markets. For this reason, the discussion of cases on regulation in the railway sector in this book takes into consideration the experience of the United States of America, where we can see cases of rail de-regulation over the past two hundred years. Importantly, the same principles applied by the Supreme Court were introduced in the rail liberalization directives and are now being applied by the European Court of Justice and by the European Commission.

The result is that European Union law created a common legal framework that defines a real uniform law applicable to the regulation of transport infrastructures. The aim of this book is to provide the main principles and reasoning that are behind this uniform law.

As with any project that takes a lot of time, this book benefited from the important help of many people that I thank but I cannot list all of them. First of all, I should thank my father, for the education and inspiration of my research activity, and Professor Sergio Carbone who trained me in the study of this difficult field. I also thank Justin Kesselman who gave me detailed, page by page, comments and an important concrete help. Last but not least, I thank Simona, who helped me in the research and always supported me, and my mother, who continuously encouraged me.

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Chapter 1 European Union Law: Main Principles and the Regulation of Public Infrastructures

1.1 European Union Law's Fundamental Principles and Scientific Method

There are three main sources of European Union law: primary law, secondary law, and soft law[1]. Primary law is comprised of the Treaty on European Union, the Treaty on the Functioning of the European Union, and general principles of the European Union[2]. Secondary law is comprised of directives[3] (legislative acts providing States with obligations to be met through instruments supplied by national laws), regulations (legislative acts directly and generally applicable to all Member States and to all European citizens), and decisions (legislative acts directly applicable only to those States or citizens to whom they expressly refer). Soft laws are non-legislative acts (such as Communications, Green Papers, and White Papers) that provide a correct interpretation of the Primary and Secondary laws[4].

Market regulation[5] of public utility services, as well as the standard and emergency public procurement awarding of works and services, fall within the field of European Union law as matters of "competition law" and "internal market law." These three issues (market regulation, standard procurements, and emergency procurements) will be discussed from two points of view. First, they will be discussed

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1 See De Búrca G. - Weiler J.H.H., *The worlds of European constitutionalism*. Cambridge, 2012 and Twomey P. - O'Keeffe D., *Legal Issues of the Amsterdam Treaty*, Oxford, 1999 p. 185 ff.

2 The most important principle regulating the relationship between the European Union and the member States is the subsidiarity principle: Strozzi G., *Le principe de subsidiarité dans la perspective de l'intégration européenne: une énigme et baucoup d'attentes*, in *Révue trimestrielle de droit européen*, 1994, pp. 373 ff. and Maresca M., *Il riparto delle competenze legislative nell'ordinamento italiano con riguardo alla materia dei trasporti e dei. L'incidenza dei principi fondamentali e degli obblighi internazionali, in Dir. comm. internaz., 2002, p. 273 ff.*

3 See Fuchs M., *From legislators to the end-user: practical difficulties of implementing European directives*. Wiesbaden, 2011.

4 See the complete work of Tesauro G., *Diritto dell'Unione europea*, Padova, 2010.

5 According to Breyer S., *Regulation and its reform*, Cambridge, 1982, the European regulation of markets needs a structural reform towards a more effective balance of powers.

D. Maresca, *Regulation of Infrastructure Markets: Legal Cases and Materials on Seaports, Railways and Airports*, DOI 10.1007/978-3-642-33820-5_1,

substantively: this means listing and explaining the rules applicable to each sector in order to define the scope of the legislature (in this case of the European Union) in the adoption of applicable bills of law (Secondary law). Second, they will be approached from a procedural perspective: this means describing and analyzing the different procedures that have emerged from the substantive legislation. In other words, the goal is to discern the correct behaviors for a public body in order to ensure both cogency with European legislation and respect for stakeholders' rights.

1.2 European Legal Principles Applicable to Infrastructures Regulation

1.2.1 The Internal Market

Before commencing the procedural examination, it is necessary to take a panoramic view of the different market regulations that, according to European law, will be applied in a standard administrative procedure for market regulation.

The internal market[6] is one of the pillars of the European Union. Completed in 1992, the single market is an area without internal frontiers, wherein persons, goods, services, and capital can move freely in accordance with the Treaty on the Functioning of European Union. The internal market is essential for prosperity, growth, and employment in the EU, contributing to the achievement of its objectives under the Lisbon strategy[7]. As an integrated, open, and competitive area, it promotes mobility, competitiveness, and innovation, interacting in particular with EU policies[8]. To ensure that everyone, whether citizen or business, can make the most of the advantages of the single market, the EU concentrates on dismantling barriers still impeding its operation. It seeks to harmonize legislation in order to improve its response to the challenges of globalization and to adapt to advances such as new technologies.

At its core, this means that every person or company aiming to carry out an economic activity has the right to begin an enterprise under the same conditions as any other person or company residing in any other member state. Consequently, in the roads and highways sector, every interested company has the right to participate in the construction and maintenance of roads without unreasonable national

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6 A paraphrase of intermal market principles is clearly explained in Micossi S., *Regulation and Deregulation of industrial products in the Internal Market of the European Union: finding the right balance*, in *The Forum for Us-Ec legal-economic affairs*, The Mentor Group, 20-23 September 1995.

7 See Kaczorowska A., *European Union law*. Abingdon, 2011.

8 See the interesting explanation of European legal system of Foster N., *Foster on EU law*, Oxford, 2011

restrictions[9]. A recent decision of the European Court of Justice (case 1) ECJ, 12 July 2012, Case C-176/11, in Rep. 2012, HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd v Bundesminister für Finanzen) clearly explained the concepts of restriction and proportionality:

(…)

16 Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, inter alia, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 85 and the case-law cited).

17 More specifically, in the area of advertising for games of chance, the Court has held that national legislation whose effect is to prohibit the promotion in a Member State of gambling organised legally in other Member States constitutes a restriction on the freedom to provide services (see, to this effect, Joined Cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921, paragraphs 33 and 34).

18 Likewise, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services since it impedes the access of consumers resident in Austria to the services offered in casinos located in another Member State, by making the promotion in Austria of those activities subject to an authorisation scheme which requires, in particular, that the operator of the casino concerned prove that the legal provisions for the protection of gamblers adopted in the Member State where that casino is operated at least correspond to the relevant Austrian legal provisions ('the contested condition').

19 Consequently, it must be held that national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services that is guaranteed by Article 56 TFEU.

Justification of the restriction on the freedom to provide services

20 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 51 TFEU and 52 TFEU, applicable in this area by virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

21 It is clear from the Court's case-law that restrictions on gaming activities may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (see, to this effect, Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, paragraph 55 and the case-law cited).

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[9] See also the reasonings of Farrell, S., *Financing European Transport Infrastructure*, London, 1999, concerning the admissible financing techniques under European law framework.

22 However, the restrictions imposed by the Member States must satisfy the conditions laid down in the case-law of the Court as regards their proportionality, that is to say, be suitable for ensuring attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. It should also be recalled in this connection that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, the restrictions must be applied without discrimination (see, to this effect, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraphs 59 to 61 and the case-law cited).

23 In the case in point, it is not in dispute that the national legislation at issue and, in particular, the contested condition pursue the objective of protecting consumers against the risks connected with games of chance, which, as is clear from paragraph 21 of the present judgment, is capable of constituting an overriding reason in the public interest such as to justify restrictions on the freedom to provide services.

24 In this connection, the Court has repeatedly held that legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57 and the case-law cited).

25 Thus, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58 and the case-law cited).

26 Here, the Austrian Government takes the view that the restriction on the freedom to provide services at issue in the main proceedings is not disproportionate in relation to the objectives pursued. It states that the number of casinos is limited in Austria to a maximum of 15 and casino operators are required to observe strict rules concerning the protection of gamblers, such as the duty to retain details of their identity for at least five years or the duty of the casino's management to observe a gambler's conduct in order to determine whether the frequency and intensity of his participation in gaming jeopardize the minimum income required for his subsistence.

27 According to the Austrian Government, in practice the application of those preventive rules has resulted in a significant reduction in the number of gamblers, as more than 80 000 persons were subject in 2011 to restrictions or bars on entering Austrian casinos. Therefore, in the absence of the contested condition, gamblers would be further encouraged to cross the border and to incur greater risks in casinos located in other Member States where similar regulatory guarantees of protection in some cases do not exist.

28 In that regard, it is apparent from the contested condition that, in order for a permit to carry out advertising in Austria for casinos established abroad to be granted, the levels of protection for gamblers that exist in the various legal systems concerned must first be compared.

29 Such an authorization scheme is in principle capable of fulfilling the condition of proportionality if it is limited to making authorization to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the

latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting its residents against the risks connected with games of chance.

30 Such a condition does not appear to constitute an excessive burden for operators given the objective, recognized by the Court as an overriding reason in the public interest, of protecting the population against the risks inherent in games of chance.

31 Since the Member States are free to set the objectives of their policy on games of chance and to define in detail the level of protection sought (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59 and the case-law cited), it must be held that legislation such as that at issue in the main proceedings does not go beyond what is necessary provided that it merely requires, in order for authorization to carry out advertising to be granted, that it be established that, in the other Member State, the applicable legislation ensures protection against the risks of gaming that is in essence of a level equivalent to that which it guarantees itself.

32 The position would, however, be different, and the legislation would have to be regarded as disproportionate, if it required the rules in the other Member State to be identical or if it imposed rules not directly related to protection against the risks of gaming.

33 In the procedure referred to in Article 267 TFEU, a provision which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court (see Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 46 and the case-law cited).

34 Thus, it is for the referring court to satisfy itself that the contested condition is limited to making authorization to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting individuals against the risks connected with games of chance.

35 The referring court will, in particular, be able to consider whether Paragraph 56(2)(1) of the GSpG, by the reference which it makes to Paragraph 21 in its entirety, imposes conditions that go beyond consumer protection.

36 In light of the foregoing, the answer to the question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

1.2.2 The Direct Effects of European Union Law and Member States Liability

This principle is made concrete by the particular effects of EU law, according to which every European citizen has the right to assert European laws upon national jurisdictions[10]. According to the European Court of Justice (Van Gend en Loos of February 5th 1963, case 26/62) "*EU law . . . as it imposes duties on single citizens, gives them subjective rights which national judges have a duty to protect.*" In fact, the Court has pointed out that the EC Treaty (now TFEU) did not only create reciprocal obligations among Member States, but also intended to enact "*a juridical system of new kind in the field of international law, applying to States which have given up, even if in limited sectors, to their sovereign power, law system which recognizes as subjects not only member States but also their citizens*." Furthermore, there are some features that risk causing a violation of the Treaty on the Functioning of the European Union, mainly of the principle of separation between public administration and business activities[11]. As a result, member States could face liability for damages caused by breach of EU dispositions concerning such rights (case 2) ECJ, 19 November 1991, Joined cases C-6/90 and C-9/90, Francovich, in Rep., Page I-05357):

(…)

3. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law.

4. Although the liability of the Member State to make good loss and damage caused to individuals by breaches of Community law for which it can be held responsible is required by Community law, the conditions under which there is a right to reparation depend on the na-

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10 Nehl H. P., *Legal protection in the field of EU funds*, in *European state aid law quarterly*, 2011, p. 629 ff.

11 Rittberger B., Phelan W. (eds), *Why do the EU Member States accept the supremacy of European law? Explaining supremacy as an alternative to bilateral reciprocity*, in *Journal of European Public Policy*, 2011, p. 766 ff.

ture of the breach of Community law giving rise to the loss and damage which have been caused.

In the case of a Member State which fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive the full effectiveness of that rule of Community law requires that there should be a right to reparation where three conditions are met, that is to say, first, that the result prescribed by the directive should entail the grant of rights to individuals; secondly, that it should be possible to identify the content of those rights on the basis of the provisions of the directive; and thirdly, that there should be a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties.

In the absence of any Community legislation, it is in accordance with the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. Nevertheless, the relevant substantive and procedural conditions laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

The same principle was applied by the European Court of Justice in recognizing the right to obtain temporary measures from national courts on grounds of European Union law[12] (case 3) ECJ, 5 March 1996, Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd, in Rep., p. I-01029):

(…)

1. The application of the principle that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible cannot be discarded where the breach relates to a provision of directly applicable Community law. The right of individuals to rely on directly effective provisions before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of Community law. That right, whose purpose is to ensure that provisions of Community law prevail over national provisions, cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.

2. Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

3. The principle that Member States are obliged to make good loss or damage caused to individuals by breaches of Community law for which they can be held responsible is applicable where the national legislature was responsible for the breaches. That principle, which is inherent in the system of the Treaty, holds good for any case in which a Member State

[12] See Bermann G.A.– Goebel R.J.– Davey W.J.– Fox E.M., *Cases and Materials on European Union Law*, New York, 2010.

breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach, and, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied, the obligation to make good damage enshrined in that principle cannot depend on domestic rules as to the division of powers between constitutional authorities.

4. In order to define the conditions under which a Member State may incur liability for damage caused to individuals by a breach of Community law, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, the full effectiveness of Community rules and the effective protection of the rights which they confer and the obligation to cooperate imposed on Member States by Article 5 of the Treaty. Reference should also be made to the rules which have been defined on non-contractual liability on the part of the Community, in so far as, under the second paragraph of Article 215 of the Treaty, they were constructed on the basis of the general principles common to the laws of the Member States and it is not appropriate, in the absence of particular justification, to have different rules governing the liability of the Community and the liability of Member States in like circumstances, since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Accordingly, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation. In particular, pursuant to the national legislation which it applies, the national court cannot make reparation of loss or damage conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law. The decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits on its discretion.The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.On any view, a breach of Community law will be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

5. Reparation from Member States for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to ob-

tain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

6. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question. Since the right to reparation under Community law exists where the requisite conditions are satisfied, to allow the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question would amount to calling in question the right to reparation conferred by the Community legal order. In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the Member State concerned would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement.

The principle of effective judicial protection of European Union legal rights brought the European Court of Justice to hold that member States have the obligation to provide interim measures for the suspension of the effects of national laws that risk breaching European Union law[13] (case 4) 13 March 2007, Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern, in Rep., I-02271):

(…)

36 By its first question, the Högsta domstolen asks, in essence, whether the principle of effective judicial protection of an individual's rights under Community law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other legal remedies permit the question of compatibility to be determined as a preliminary issue.

37 It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/84 Johnston [1986] ECR 1651, paragraphs 18 and 19; Case 222/86

[13] See Shelton D. (ed.), *International law and domestic legal systems: incorporation, transformation and persuasion*. Oxford, 2011.

Heylens and Others [1987] ECR 4097, paragraph 14; Case C-424/99 Commission v Austria [2001] ECR I-9285, paragraph 45; Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 39; and Case C-467/01 Eribrand [2003] ECR I-6471, paragraph 61) and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

38 Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law (see, to that effect, Case 33/76 Rewe, [1976] ECR 1989, paragraph 5; Case 45/76 Comet [1976] ECR 2043, paragraph 12; Case 106/77 Simmenthal [1978] ECR 629, paragraphs 21 and 22; Case C-213/89 Factortame and Others [1990] ECR I-2433, paragraph 19; and Case C-312/93 Peterbroeck [1995] ECR I-4599, paragraph 12).

39 It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law (see, inter alia, Rewe, paragraph 5; Comet, paragraph 13; Peterbroeck, paragraph 12; Case C‑453/99 Courage and Crehan [2001] ECR I-6297, paragraph 29; and Case C-13/01 Safalero [2003] ECR I-8679, paragraph 49).

40 Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law (Case 158/80 Rewe [1981] ECR 1805, paragraph 44).

41 It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law (see, to that effect, Case 33/76 Rewe, paragraph 5; Comet, paragraph 16; and Factortame, paragraphs 19 to 23).

42 Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, inter alia, Joined Cases C-87/90 to C-89/90 Verholen and Others [1991] ECR I‑3757, paragraph 24, and Safalero, paragraph 50). It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (Unión de Pequeños Agricultores v Council, paragraph 41).

43 In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 Rewe, paragraph 5; Comet, paragraphs 13 to 16; Peterbroeck, paragraph 12; Courage and Crehan, paragraph 29; Eribrand, paragraph 62; and Safalero, paragraph 49).

44 Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever