

GRAZIA VITALE*

REVERSE DISCRIMINATION AND THE PROTECTION OF VICTIMS OF VIOLENT INTENTIONAL CRIME

SUMMARY: 1. Introduction. – 2. The position of the Court of Justice of the European Union on the phenomenon of reverse discrimination. – 3. The position of the Court of Justice on Directive 2004/80. The rulings rendered in the case *Paola C. and Commission v. Italy*. – 4. The preliminary question of the Italian Supreme Court of Cassation. – 5. What are the potential alternative solutions to the phenomenon of reverse discrimination? – 6. Brief conclusions.

1. Introduction

This essay will deal with the so-called “reverse discrimination”¹, often identifiable as a consequence deriving from a tendentious irrelevance which purely internal matters assume for European Union law, and this is according to the most consolidated jurisprudence of the Court of Justice.

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¹ The literature on this matter is practically limitless. Important references are: G. DRUESNE, *Remarques sur le champ d’application personnelle du droit communautaire: des ‘discriminations à rebours’ peuvent-elles tenir en échec la liberté de circulation des personnes?*, in *Rev. trim. dr. eur.*, 1979, p. 429 ss.; S. KON, *Aspects of Reverse Discrimination in Community Law*, in *European Law Review*, 1981, p.75 ss.; K. MORTELMANS, *La discrimination à rebours et le droit communautaire*, in *Dir. com. sc. int.*, 1980, p. 1 ss.; D. PICKUP, *Reverse Discrimination and Freedom of Movement of Workers*, in *Comm. M. Law Rev.*, 1986, p. 135 ss.; B. GRELON, *La “loi Lang” sur le prix du livre et la discrimination à rebours*, in *Rev. trim. dr. eur.*, 1987, p. 405 ss.; A. TRYFONIDOU, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens Europe*, in *Leg. Iss. Ec. Int.*, 2008, p. 43 ss.; A. TRYFONIDOU, *Reverse discrimination in EC Law*, The Netherlands, 2009; P. RAMBAUD, *La discrimination à rebours et le droit communautaire: un mythe juridique?*, in *Gaz. Pal.*, 1992, p. 339 ss.; G. GAJA, *Les discriminations à rebours: un revirement souhaitable*, in *Mélanges en hommage à Michel Waelbroeck*, Bruxelles, 1999, p. 993 ss.; F. SPITALERI, *Accesso alla professione forense e discriminazioni “alla rovescia” nella sentenza Lussemburgo c. Parlamento europeo e Consiglio*, in *Dir. Un. eur.*, 2001, p. 179 ss.; J. DE BEYS, *Le droit européen est-il applicable aux situations purement internes?: à propos des discriminations à rebours dans le marché unique*, in *JT. Droit européen*, 2001, p. 137 ss.; H. TAGARAS, *Règles communautaires de libre circulation, discriminations à rebours et situations dites “purement internes”*, in *Mélanges en hommage à Michel Waelbroeck, cit.*, p. 1499 ss.; A. RICCARDI, *Parità di trattamento e discriminazioni alla rovescia*, in *Mass. giur. lav.*, 1996, p. 202 ss.; S. PELLERITI, *Situazioni puramente interne e certezza del diritto*, in *Dir. comm. int.*, 2014, p. 154 ss.

In the context of the European Union, the expression “reverse discrimination” refers to such situations of unjustified unequal treatment to the detriment of citizens of one of the Member States which emerge as an indirect effect of the application of a norm emanated by the highest legislation of the European Union. The term “reverse” is used since the most burdensome regulation, indeed, rests on legal situations and subjects that, strictly speaking, should, on the contrary, be favoured by the legislation of the relative State.

Today, renewed interest in a matter which actually has always fascinated and still fascinates the most careful legal theorists has been rediscovered thanks to a recent ruling of the Supreme Court of Cassation, whereby our judges of second instance courts submitted two preliminary questions to the Court of Justice of the European Union². They concerned matters which are essentially relative to compensation by the State of damage suffered by victims of violent intentional crimes who have not had the chance to obtain efficient protection from perpetrators of criminally relevant and, obviously, judicially verified acts. In particular, and without going into a detailed description of the facts of the case that led to the lawsuit, it regards a woman of Romanian origin, though already an Italian citizen residing in Italy, who became a victim of sexual abuse, which was judicially verified under criminal law as committed by identified but fugitive individuals, in the Italian territory. The woman, therefore, took legal action against the Italian government, with a query aimed at obtaining compensation of the damage suffered because of the lack of right implementation by the Italian legal system of the well-known directive 2004/80/CE relative to the compensation of victims of violent intentional crimes.

According to the interpretation, in particular, of the plaintiff under this directive, Member States, including ours, would be obliged to establish a compensation system for “all” victims of “all” violent intentional crimes committed in their own territory which would basically be able to guarantee equal and adequate compensation to them. The Italian government, in turn, resisted by advancing two specific issues in the proceedings. The first one regarded the fact that the Italian State, indeed, had agreed to implement the directive in question through legislative decree n. 204/2007; the second one used as a lever the discretion which the directive seemed to confer upon the State itself in identifying specific crimes, within the *genus* of violent intentional crimes, wherefrom the right of the victim to act in order to obtain compensation of the damage which they have suffered would arise lawfully.

The Court of Turin³ with a rather surprising and not really embraceable ruling accepted the query of the plaintiff, maintaining in this regard that directive 2004/80 CE, and in particular paragraphs 1 and 2 of article 12, are aimed to regulate both cross-border and entirely national situations⁴. The Court basically considered the regulatory tool

² It refers to order n. 2964/2019; see on this matter R. G. CONTI, *Il contenzioso sul risarcimento dello Stato alle vittime di reato: Cass. n. 2964/2019 alla ricerca dell'eguaglianza europea*, in *Rivista di diritti comparati*, 1/2019.

³ Refer to the Court of Turin 3 May 2010; see on this matter R. G. CONTI, *Vittima di reato e obbligo di indennizzo a carico dello Stato: really?*, in *Corr. giur.*, 2011, 2, p. 245 ss.; M. M. WINKLER, *Francoich colpisce ancora: una nuova condanna dello Stato per ritardato (ed errato) recepimento di una direttiva europea (Nota a Trib. Torino, 3 maggio 2010)*, in *Resp. civ. prev.*, 2011, p. 918 ss.; M. CONDINANZI, *La responsabilità dello Stato per violazione del diritto dell'Unione europea: prime applicazioni dei recenti orientamenti della Corte di Cassazione*, in *Giurisprudenza di merito*, 2010, p. 3063 ss.; M. BONA, *La tutela risarcitoria statale delle vittime dei reati violenti ed intenzionali: la responsabilità dell'Italia per la mancata attuazione della Direttiva 2004/80/CE*, in *Resp. civ. prev.*, 2009, p. 662 ss.

⁴ According to article 12, paragraph 1, of the directive “The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States' schemes on compensation

introduced by the directive to be finalistically oriented to offer an alternative relief mechanism, in case the perpetrator of the crime has failed to grant it, to “any” individual who has been a victim of violent intentional crime. Therefore, it could only amount to the non-execution by the State of article 12, paragraph 2, of the directive, which, according to the judge that took the decision, operated obviously in all potentially relative situations, even in those that were not cross-border cases.

The ruling of the judge in Turin, as it was predictable, caused particular uproar and became an object of numerous interventions and comments by legal theorists who sometimes were in favour of it⁵, seeing in it an important tool of protection for all victims of violent intentional crime, once the State has not complied with its obligation to implement the regulatory tool; some other times they regarded it sceptically, which was in fact more understandable⁶. Indeed, it seems absolutely clear that the directive has not in any way intended to regulate “also” purely internal situations, but rather “only and exclusively” cross-border ones characterized by a difference between the place of residence of the victim and the place in which the violent intentional crime is committed⁷. Therefore, the attempt to make up for a possible flaw in the regulatory system designed by the directive by generalizing the subjective range of its application and of the subsequent obligation to compensate which falls on the State appears to be technically inappropriate.

The case then ended up with the exam of the Court of Appeal of Turin which essentially confirmed the ruling of first instance, changing only the point relative to the amount due to be paid to the woman⁸.

Given the scale of the legal and human matters in question, the lawsuit was brought before the Supreme Court of Cassation as well which, after postponing it for several times, submitted two preliminary questions to the Court of Justice.

The first, which is the one that interests us in more detail, regards the possibility of European Union law to allow the constitution of an obligation to compensate by the member State with relation to non-cross-border subjects who, therefore, would not have been the direct recipients of the benefits deriving from the implementation of the directive, but who “in order to avoid the violation of the principle of equality/non-discrimination in the field of European Union law would have to and be able to, wherever the directive would be promptly and fully adopted, benefit by extending the practical effect

to victims of violent intentional crime committed in their respective territories.” Paragraph 2 of the same regulation follows stating that «All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims».

⁵ See, for example, F. MARTINI, *Se il colpevole è contumace o non può pagare lo Stato deve garantire un ristoro alla vittima*, in *Guida dir.*, 2010, p. 22 ss.; M. CASTELLANETA, *Indennizzo per reati intenzionali violenti: da Torino una completa attuazione delle regole comunitarie*, *ivi*, p. 14 ss.; M. BONA, *Vittime di reati e Direttiva 2004/80/CE: l'Italia ancora inadempiente tra condanne, procedure di infrazione e rinvio pregiudiziale alla Corte Ue*, in *Resp. civ. prev.*, 2014, p. 220 ss.; M. S. LEMBO, *L'inadempimento dell'Italia all'attuazione della direttiva 2004/80/CE. La giurisprudenza successiva in tema di tutela risarcitoria-indennitaria delle vittime di reati intenzionali violenti*, in AA.VV., *Vittime di crimini violenti*, Santarcangelo di Romagna, 2014, p. 269 ss.; G. NICASTRO, *Mancato indennizzo delle vittime di reato e responsabilità dello Stato per inattuazione della direttiva 2004/80/CE*, in *Dir. uomo*, 2013, p. 33 ss.

⁶ See, for example, R. G. CONTI, *Il "dialogo" tra giudice nazionale e Corte UE*, in *Corr. giur.*, 2009, p. 1053 ss.

⁷ As the Court of Justice will also state. On this matter see *infra*.

⁸ Refer to the Court of Appeal of Turin, 23 January 2012, n. 106. For comments see R. G. CONTI, *Vittime di reato intenzionale violento e responsabilità dello Stato. Non è ancora tutto chiaro*, in *Corr. giur.*, 2012, p. 668 ss.; F. BRAVO, *La tutela sussidiaria statale "risarcitoria" o "indennitaria" per le vittime di reati intenzionali violenti in Europa e in Italia*, in *Rivista di crim., vitt. e sic.*, 2012, p. 144 ss.

of the directive itself (that is, of the aforementioned compensation system)⁹.

Now, after this introduction, the paper will discuss a series of steps, and for greater clarity it seems appropriate to give a short account of them.

First, it will be demonstrated that the query submitted by the Supreme Court of Cassation to the Court of Justice is not particularly embraceable, even though it is undoubtedly stunning, because it seems to intend to confer upon purely internal situations, such as the one in question, a scope that in the jurisprudence of the Court of Justice they objectively do not have, as well as grant to the principle of non-discrimination such pervasiveness that leads to excessive compelling of the aforementioned prerequisite.

For this purpose it will be indispensable to focus on the meaning which has to be given to the expression “reverse discrimination”, an expression which is used and abused both by national and EU jurisprudence, but until today keeps making the determination of the structural and functional prerequisites of the concept that it entails anodyne. The goal will clearly be one of specifying whether and to what extent, if need be, it is possible to overcome the obstacle of irrelevance for European Union law with regard to purely internal situations. This need is rather heart-felt wherever reverse discrimination becomes significant and derives from the application with relation to “residents” of a regulatory treatment which is less favourable compared to that to which citizens who go through situations that fall within the field of application of European Union law are entitled. Such an examination will take place also inevitably through a quick presentation of the jurisprudence of the Court of Justice relative to the scale of Directive 2004/80, in particular when it comes to defining its subjective reach of application.

Finally, by following the guidelines of the most authoritative legal theorists, efforts will be made to propose some potentially alternative methodological criteria compared to the one used by the relative body, which has tried to confer through its own interpretation a certain relevance within the legal framework of the European Union upon purely internal matters, and this so as to compensate for the shortages of the relative regulatory system and for the consequences originating from them in the context of the so-called reverse discrimination. Nevertheless, and I will reveal it in advance, two outlines will be highlighted in conclusion: on the one hand, the courage of the Supreme Court of Cassation which, instead of going along a way, which is perhaps more certain in the outcome, of constitutional legitimacy, preferred to talk to the Court of Justice. On the other hand, the substantial inadequacy of a preliminary ruling which, as it can be predicted, will not be able to produce the desired effect, and this because of reasons of methodology and substance which comply with the significant and insurmountable irrelevance of situations which are purely internal and of discrimination which they can lead to for European Union law.

Before reaching the heart of the matter, it seems appropriate to give two further clarifications of methodology and substance together.

Firstly, scholars of European Union law are often especially attracted by the temptation to solve problems which in some way are related to European Union law through legal categories of the latter, by giving maybe the final word to the Court of Justice, as the guarantor of the efficiency of European Union law as well as of the homogeneity of its interpretation and application in all member States. However, the matter I will deal with and the phenomenon of discrimination which derives from it seem

⁹ The second issue related to the adequacy of the criteria foreseen by national law for the settlement of the compensation will purposely not be examined.

to be important in order to understand how essential and appropriate it is to “resist” this temptation. There are some fields of regulations of national importance where the State is supposed to intervene in a desirably decisive way with the tools at its disposal to solve the problems which could potentially arise. And that of reverse discrimination is one of them.

Secondly, in order to avoid lengthy descriptions this paper will deliberately disregard the analysis of all the tools which the internal legal system, especially what regards the Italian one, has at its disposal to regulate the mechanisms of reverse discrimination. One should just remember that the choice of the most appropriate one is probably affected by the features themselves of the present case. Referring to the judicial authorities, which confer upon the Constitutional Court the main competence to judge the internal regulations in terms of violations of the internal principle of equality, could be the most efficient way in principle¹⁰. Nevertheless, this regulation might prove to be the most appropriate one whereby the extension of EU legislation, which hypothetically is more favourable, to all citizens would have such economic implications on the State's budget that it would be more reasonable to avoid them in judicial assessment.

2. *The position of the Court of Justice on the phenomenon of reverse discrimination*

A critical reconstruction of the reasoning contained in the preliminary questions brought by the Supreme Court of Cassation to the attention of the Court of Justice inevitably passes through the analysis of the forms through which EU judges over time have dealt with the phenomenon of reverse discrimination.

In this regard, however, one clarification, also related to methodology, needs to be given.

In order to be brief, this paper will not focus on a repeated introduction of the historical development which the system of Luxembourg has undergone on the subject of reverse discrimination, but only on one reconstruction which generally is critical. The relevant rulings, in other words, will be presented as direct and immediate expression of an “attitude” adopted by the Court of Justice which by now has generally been consolidated, and the relative dicta will be introduced only within the limits which prove it to be

¹⁰ The most illustrative rulings of the Italian Constitutional Court are n. 249 of 1995 on teachers of foreign languages, n. 61 of 1996 on lawyers and n. 443 of 1997 on pasta. On this jurisprudence see S. NINATTI, *L a sola alternativa praticabile: eguaglianza, discrezionalità legislativa e norme comunitarie nella sentenza 443/97 della Corte costituzionale*, in *Riv. it. dir. pub. com.*, 1998, p. 215 ss.; C. PINELLI, *Adeguamento al diritto comunitario e interpretazione costituzionale*, in *Giur. cost.*, 1997, p. 3915 ss.; A. VEDASCHI, *L'incostituzionalità delle discriminazioni a rovescio: una resa al diritto comunitario?*, *ivi*, 1998, p. 283 ss.; A. SPADARO, *Di un paradosso comunitario: il principio di libera circolazione delle merci fra nazionalismo francese (cd. restrizioni quantitative) ed autolesionismo italiano (cd. discriminazioni alla rovescia)*, in *Dir. pub. comp. eur.*, 1999, p. 334 ss.; S. SPINACI, *Divieto comunitario di discriminazioni in base alla nazionalità e principi costituzionali di uguaglianza*, in *Dir. Pubbl.*, 2007, p. 241 ss.; C. PINELLI, *Adeguamento al diritto comunitario e interpretazione costituzionale*, in *Giur. cost.*, 1997, p. 3915 ss.; S. VEZZANI, *Diritto UE, discriminazioni a rovescio e loro rimozione nell'ordinamento italiano*, in *Dir. pub. com. eur.*, 2015, p. 527 ss.; A. D'ALOIA, *Eguaglianza sostanziale e diritto diseguale. Contributo allo studio delle azioni positive nella prospettiva costituzionale*, Padova, 2002. On the relationship between the Constitutional Court and the Court of Justice see B. NASCIBENE, *Le discriminazioni all'inverso: Corte di giustizia e Corte costituzionale a confronto*, in *Dir. Un. eur.*, 2007, p. 717 ss.; F. DINELLI, *Recenti tendenze in materia di cittadinanza europea: oltre il limite delle “situazioni puramente interne” all'ordinamento degli Stati membri*, in *Foro Amm. TAR*, 2011, p. 1777 ss.; R. CALVANO, *Cittadini “statici” e diritti diseguali*, in *Giur. cost.*, 2011, p. 2536 ss.

functional with regards to the principal subject of the analysis, which conforms, as previously said, to future scenarios to which the latest order of the Supreme Court of Cassation could lead.

The term “reverse discrimination” traditionally is meant to be understood as the condition of disadvantage in which national subjects find themselves compared to other national subjects, or also citizens of other member States, due to the lack of satisfying the prerequisites required by an EU regulation which confers certain rights. The most favourable regulation, in other words, is the highest one, that is the one ascribable to the EU legal system, and it would be applied not with regard to the citizens of the given State, which it already does, but to foreigners. This is where the description “reverse” comes from.

According to a traditional reconstruction, there are two elements whose presence can lead to the emergence of the phenomenon of reverse discrimination. The first one is related to the limits which EU legislation sets to the subjective and material reach of application of the given regulation. The second one is more appropriately related to the contents of EU law norm which, on the grounds of the aforementioned limits, is applied with regard to some and not all subjects.

From the first point of view, it is worth remembering that many EU regulations, both within its primary and secondary legislation, are essentially directed to the legal regulation of relationships characterized only by the element of transnationality. In other words, this means that they cannot be applied with regard to legal situations which, despite of having similar substantive contents compared to those which fall within the field of application of EU law, in fact take place and are wholly limited to national legal contexts. From the second point of view, it is necessary to provide the regulations under discussion with autonomous regulatory contents which could apply on their own within the field of their own suitable application and in view of pursuing the goals of the EU legal system¹¹.

Therefore, ultimately the phenomenon of reverse discrimination appears in all circumstances in which EU law is technically inapplicable with regard to national situations, due to the lack of prerequisites on which the efficiency of common regulations depends¹².

Now, the Court of Justice, which has already been referred to many times in order to remedy in some way the cases of reverse discrimination, has traditionally denied its ability to intervene by maintaining that all those situations, which do not have any connection with EU law and, therefore, completely fall within only one member State, are irrelevant to EU law¹³. The Court of Justice, in other words, has repeatedly ruled out the fact that EU law contains an appropriate legal foundation to censure in a centralized and uniformed way

¹¹ For a broader description of such prerequisites presented in light of the previous jurisprudence of the Court see S. AMADEO, R. P. DOLSO, *La Corte Costituzionale e le discriminazioni alla rovescia*, in *Giur. cost.*, 1998, pp. 1224-1230; S. AMADEO, *Novità in tema di divieto di misure di effetto equivalente*, in *Dir. com. sc. int.*, 1994, p. 671 ss., especially on the subject of autonomy of the contents of EU regulations. See also K. MORTELMANS, *La discrimination à rebours et le droit communautaire*, in *Dir. com. sc. int.*, 1980, p. 1 ss.; K. LENAERTS, *L'égalité du traitement en droit communautaire – Un principe unique aux apparences multiples*, in *Cab. dr. eur.*, 1991, spec. p. 19 ss.; P. GARRONE, *La discrimination indirecte en droit communautaire: vers une théorie générale*, in *Rev. trim. dr. eur.*, 1994, p. 425 ss.; L. DANIELE, *Non-Discriminatory Restrictions on the Free Movements of Persons*, in *Eur. Law Rev.*, 1997, p. 191 ss.

¹² S. AMADEO, R. P. DOLSO, *La Corte Costituzionale e le discriminazioni alla rovescia*, cit., p.1230.

¹³ See, as an example of this first case of the Court of Justice, the following two historical rulings: Court of Justice 28 January 1992, C-332/90, *Steen I*, ECLI:EU:C:1992:40; Court of Justice 16 June 1994, C-132/93, *Steen II*, ECLI:EU:C:1994:254. For such jurisprudence, in its immediate development see I. ZOPPI, *Le discriminazioni a rovescio*, in *Dir. com. sc. int.*, 2006, pp. 795 ss.

unequal treatment in similar circumstances. And it has likewise rejected the idea that the general principle of non-discrimination based on nationality (used, as it will be shown further on, by certain legal theorists to reconstruct that of reverse discrimination as a phenomenon of EU importance) could implicate that reverse discrimination falls in some way within the field of application of EU law. Ultimately, the Court of Justice in this first stage of the development of its jurisprudence, on the one hand, has ruled out that reverse discrimination is relevant to the EU; on the other hand, it has correlatively recognised in member States an almost exclusive competence concerning the regulation of purely internal situations¹⁴.

The jurisprudence on this subject is broad and above all even too well-known to further analyse in detail its vision.

Instead, it is interesting and useful to remember that the strictness in the position of the Court of Justice has weakened with time giving space to some exceptions regarding the mechanism which has just been sketched.

In this sense it is worth remembering the rulings with which the Court of Justice has introduced the path of “trial collaboration” with national judges consisting in providing national judges with authentic interpretation of the EU regulation, according to which relative national regulations should be applied in purely internal cases. In other words, the Court of Justice, in spite of being aware of the peculiar nature of purely internal situations, has aimed to help national judges in such a way that they can decide then if an internal legal relationship is actually regulated in an unjustifiably inferior way compared to similar situation of EU importance, and gain as a consequence all the developments envisaged by the national legal system¹⁵.

A particularly explicit is the position of the Court of Justice in the ruling made in *Guimont* case¹⁶. Therein the Court of Justice, after having reiterated the traditional formula according to which national judges are actually the only ones in charge of taking decisions

¹⁴ M.V. BENEDETTELLI, *Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità europee*, Padova, 1989, p. 243.

¹⁵ Court of Justice 7 May 1997, from C-321/94 to C-324/94, *Pistre e a.*, EU:C:1997:229; Court of Justice 6 June 2000, C-281/98, *Angonese*, EU:C:2000:296. See G. GAJA, *Può un cittadino italiano utilmente imparare il tedesco in Austria?*, in *Riv. dir. int.*, 2000, pp. 1051-1053; C. SCHEPISI, *Cosa si nasconde dietro al caso Angonese? Novità e conferme in materia di libera circolazione dei lavoratori*, in *Dir. Un. eur.*, 2002, p. 327 ss.

¹⁶ Court of Justice 5 December 2000, C-448/98, *Guimont*, ECLI:EU:C:2000:663; on this subject see P. PALLARO, *La sentenza Guimont: un definitivo superamento processuale dell'irrelevanza comunitaria "sostanziale" delle c.d. "discriminazioni a rovescio"?*, in *Riv. it. dir. pub. com.*, 2001, p. 95 ss. It is necessary to specify that the citation appears to be especially relevant as it demonstrates the position of certain legal theorists who believe that the phenomenon of reverse discrimination has to be dealt with at the level of EU law for reasons related to the logic of integration that serves as its foundation and to the difficulty of considering entirely irrelevant for EU law situations and norms belonging to a legal complex which is inseparably connected to that of the EU. See also S. IZZO, *Superlavoro (talvolta) per il giudice comunitario*, in *Dir. pub. comp. eur.*, 2001, p. 437 ss.; D. POUCHARD, *Une réglementation nationale qui prohibe la commercialisation d'un fromage dépourvu de croûte sous la dénomination "emmental" est une mesure d'effet équivalent à une restriction quantitative*, in *Semaine Jur. – Ed. Gén.*, 2001, p. 1551 ss.; C. RITTER, *Purely Internal Situations. Reverse Discrimination, Guimont, Dzodzi and Article 234*, in *Eur. Law Rev.*, 2006, p. 690 ss. On the same subject as *Guimont* see: Court of Justice 5 March 2002, joint cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch e a.*, ECLI:EU:C:2002:135; Court of Justice 15 May 2003, C-300/01, *Doris Salzmann*, ECLI:EU:C:2003:283; Court of Justice 11 September 2003, C-6/01, *Anomar e a.*, ECLI:EU:C:2003:446; Court of Justice 17 February 2005, C-250/03, *Mauri*, ECLI:EU:C:2005:96; Court of Justice 30 March 2006, C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl C. Calafiori*, ECLI:EU:C:2006:208; Court of Justice 5 December 2006, joint cases C-94/04 and C-202/04, *Cipolla*, ECLI:EU:C:2006:758; Court of Justice 31 January 2008, C-380/05, *Centro Europa 7 Srl*, ECLI:EU:C:2008:59.

with relation to the necessity of a preliminary ruling in order to solve a pending case in front of them, except for situations of evident irrelevance with relation to EU law, proceeds further on by proclaiming that “in the present case it does not seem evident that the demanded interpretation of EU law is not necessary for the national judge. In fact, such an answer could be useful to them in cases where the national law imposes, in lawsuits similar to the given case, to act in a way in which a producer may enjoy the same rights which a producer of another member state would enjoy according to EU law in the same situation” (point 26). Therefore, without abandoning the fundamental assumption regarding the irrelevance of reverse discrimination to EU law, the Court of Justice certainly declares itself available, if asked, to provide internal judges with interpretation tools which are useful to define EU parameters of an internal judgement. This judgement, in its turn, is aimed to measure the exact reach of the national regulation and, as a consequence, the potential existence of reverse discrimination in case it contemplates an unjustifiably unfavourable regulation compared to that envisaged in similar situations in material terms, though falling within the field of application of the most favourable EU regulation.

For the sake of completeness another further stage of the jurisprudence of the Court of Justice should be noted within which the judges of Luxembourg, with a restrictive approach again¹⁷, which resembles very much the original one, have declared to agree to express their opinion on the interpretation of EU law criticized by national regulations in the context of purely internal situations on the condition that their own opinion is actually relevant to the interpretation of such regulations by the national judge. The Court of Justice, in other words, now asks the national court to provide an explanation which is as detailed as possible of the reasons which induce it to recognise the competence of the Court of Justice itself, also in order to subsequently remove potential reverse discrimination¹⁸.

3. *The position of the Court of Justice on Directive 2004/80. The rulings rendered in the case Paola C. and Commission v. Italy*

In a case, which took place at a later time compared to the one that involved the judges in Turin, the Court of Florence decided to bring to the Court of Justice a preliminary request related to the hermeneutic reach of article 12 of the Directive under discussion¹⁹.

¹⁷ It is about the one which has been defined as “reflexive” orientation, so different from the first of those mentioned, the “traditional”, and from the second one, that is the so-called “expansive”. For such considerations and for copious jurisprudential references see A. ARENA, *I limiti della competenza pregiudiziale della Corte di giustizia in presenza di situazioni puramente interne: la sentenza Sbarigia*, in *Dir. Un. eur.*, 2011, p. 201 ss., e ancora più ampiamente A. ARENA, *Le “situazioni puramente interne” nel diritto dell’Unione europea*, Napoli, 2019.

¹⁸ See among many references Court of Justice 5 May 2011, *McCarthy*, C-434/09, ECLI:EU:C:2011:277; Court of Justice 13 April 2010, *Wall*, C-91/08, EU:C:2010:182; Court of Justice 28 March 1995, *Kleinwort Benson*, C-346/93, EU:C:1995:85; Court of Justice 22 December 2010, *Omalet*, C-245/09, ECLI:EU:C:2010:808; Court of Justice 1 July 2010, *Sbarigia*, C-393/08, ECLI:EU:C:2010:388.

¹⁹ The Court of Florence, 20 February 2013, in *Corr. giur.*, 2013, p. 1389 ss., with notes of R.G. CONTI, *Sulle vittime di reato la parola passa alla Corte di giustizia che, forse, ha già deciso*, in *Corr. giur.*, 2013, p. 1389 ss. In the litigation the plaintiff was a female Italian citizen who had been a victim of sexual assault committed in Italy and verified under criminal law by the Supreme Court of Cassation n. 10383/2012. The Court of Florence

On the one hand, indeed, article 1 of the Directive seems to refer unequivocally to cross-border situations, while article 12 leads to such misinterpretation. In fact, it imposes on the States to provide a system of compensation to the victims of crimes to which the given directive refers, thus giving a broader interpretation of the reach of subjective application, that is, to establish protection of compensation in favour of any liable subject of intentional and violent crimes committed in the territory where they reside. And it is this exegetic scenario based on the spirit of article 12, paragraph 2, that persuades the Court of Florence to raise the preliminary request in question, whose outcome would have produced perceptible consequences also in terms of protection of compensation to which individuals are entitled due to lacking correct and timely implementation of the Directive by the State.

Indeed, the doubts cast by the judge in Florence already back then did not seem to be particularly convincing given that the Court of Justice had taken a rather explicit position on the subjective reach of application of Directive 2004/80. It refers to the ruling in *Giovanardi* case²⁰, in which the judges in Luxembourg had specified that the directive in question was clearly inspired by the need to make it easier for the victims of violent intentional crimes to access compensation in cross-border situations, whereas it was obvious that in the main lawsuit the accusations concerned crimes committed involuntarily and, what is more, in a purely national context. Therefore, no application of the directive seemed to be able to take place in situations defined quite rightly as “purely internal”²¹.

It is right in this context that the ruling of the Court of Justice in view of the preliminary request, which has just been mentioned, presented by the Court of Florence comes in²². Given, in particular, the ruling in question it seemed that the Court had ended the question related to the field of application of directive 2004/80, by defining a situation which so far had been rather fluctuating within the relevant case law between the position of internal courts inclined to do the *dictum* of Kirckberg in *Giovanardi* case, and thus to rule out the relevance of the directive in purely internal situations²³, and that of national judges who have been right in choosing to follow the groove laid by the judges in Turin²⁴.

Now the judges of the European Union had a chance to affirm that Directive 2004/80 establishes a system of cooperation aimed to make it easier to the victims of crimes to access compensation in cross-border situations. This means that, according to the Court of Justice, in a purely internal situation it could not consider itself competent to decree on the matter raised by the national court. Moreover, the judges in Luxembourg specified that the decision of preliminary request does not result in the Italian law

was asked to verify the reasonableness of the application for compensation of damage in a civil case submitted by the injured party against the Italian government. This request was filed on the assumption that Directive 2004/80/CE was legally binding in Italy, in so far that it would have imposed compensation on the State for the victims of some categories of violent or intentional crimes in those cases in which the convict would not reimburse moral and material damage to the victim as a result of the damage suffered by the victim.

²⁰ Court of Justice, 12 July 2012, C-79/11, *Giovanardi e altri*, EU:C:2012:448.

²¹ See Court of Justice 13 June 1996, C-144/95 *Jean-Louis Maurin*, EU:C:1996:235; Court of Justice 29 May 1997, C-299/95, *Kremzow*, EU:C:1997:254; Court of Justice 6 ottobre 2005, C-328/04, *Attila Vajnai*, ECLI:EU:C:2005:596; Court of Justice 18 December 1997, C-309/96, *Annibaldi*, ECLI:EU:C:1997:631; Court of Justice 26 March 2009, C-535/08, *Pignataro*, ECLI:EU:C:2009:2004; Court of Justice Corte 19 September 2013, C-5/12, *Betriu Montull*, ECLI:EU:C:2013:571.

²² Court of Justice 30 January 2014, C-122/13, *Paola C.*, ECLI:EU:C:2014:59.

²³ See, for example, Court of Trieste, 5 December 2013; Court of Florence 8 September 2014.

²⁴ Court of Rome 8 November 2013.

imposing on the national court to recognise with relation to Ms C. the same rights from which the citizen of another member State would benefit in an equal situation under EU law.

We will now turn to the ruling rendered in *Commission v. Italy*²⁵.

In the given case the Court of Justice, expressing its opinion on the appealed proposed by the Commission, maintained that Italy, by not having adopted all the necessary measures to guarantee the existence of a system of compensation for victims of all violent intentional crimes committed on its own territory in cross-border situations, was falling short of the obligation which it was bound by under article 12, paragraph 2, of directive n. 80 of 2004. The cited norm, indeed, according to EU judges, does not confer any margin of discretion on the States in the choice of criminal cases which shall fall within the field of application of the regulation. Instead, it aims to guarantee to citizens of the European Union the right to obtain compensation which is equal to the injury they have suffered in the territory of a specific member State in which, when exercising the right of free movement, they find themselves at the moment in which the crime is committed. Ultimately, according to the Court of Justice, Italy had not adhered to the obligation to introduce a general system of compensation for all violent intentional crimes which would take place in its territory. It is not worth focusing on the ruling in question in more detail, as it does not seem that the present decision has affected, perhaps only marginally, the question related to compensating victims of violent intentional crime which does not fall within the field of cross-border situations, as in the case under discussion.

4. *The preliminary question of the Supreme Court of Cassation*

The first question submitted by the Supreme Court of Cassation to the Court of Justice (which is the only one worth being analysed in detail) certainly has great theoretical importance and it also appears to be quite “bold”, as it was said in the introduction, at the practical level. Despite this, the judges of our supreme court do not seem to have chosen the “best” way to solve the problem of reverse discrimination which is certainly serious, and thus to deal with a situation of objective non-compliance of the Italian legal system, on the one hand, and of a similarly objective regulation of the field of application of the directive on the subject of victims of intentional and violent crime, on the other hand.

The Supreme Court of Cassation, being well-aware of the foundations of the jurisprudence of Luxembourg, does not even attempt to call into question the idea that critical reading and interpretation of article 12 of Directive 2004/80 lead to the conclusion that such a regulation is applied only to cross-border situations. Nevertheless, having ruled out that article 12 and also the non-compliance committed by Italy with regard to the regulatory reach of such a regulation could assume importance also in purely internal situations, as the one actually scrutinized by the judge *a quo*, has not determined without further elaboration the rejection of the compensation request.

It is right here that we find peculiar theoretical importance to be ascribed to the preliminary request in question, which was mentioned before: the Court of Justice, indeed

²⁵ Court of Justice 11 October 2016, C-601/14 *Commissione c. Italia*, ECLI:EU:C:2016:759; for a comments on it see M. C. LOCCHI, *Il diritto all'indennizzo delle vittime di reato: l'Italia condannata dalla Corte di Giustizia per inadempimento della dir. 2004/80/CE*, in *Dir. pub. com. eur.*, 2017, p. 119 ss.

with subtle and juridically refined reasoning, departs from the assumption that EU law is permeated with fundamental rights whose protection represents a primary interest for the legal system itself. Among these, particular importance is given to the principles of equality and non-discrimination. Now, the Supreme Court of Cassation questions the Court of Justice basically on the possibility whether the regulation contained in Directive 2004/80, read in the light and according to the above-mentioned standards, can be interpreted in such a sense that Italy is indeed obliged to introduce a regulation similar to that envisaged by the European Act for cross-border situations also for purely internal situations, given the determination of situations of reverse discrimination. That legal complex containing principles of equality and non-discrimination, on the one hand, as well as the directive, on the other hand, should have been imposed, therefore, in such terms to make the system of compensation applicable also in purely internal situations, thus avoiding treating a citizen regularly residing in the territory of the State in an unjustifiably discriminatory way. And this on the grounds of immanent effect which the principle of non-discrimination would seem to have within the European Union, almost a kind of a super principle able to impose on the State to establish coherent internal legislation which would comply with that of the EU to such an extent that it could regulate internal situations in ways which are similar to those regulating cross-border ones. Therefore, ultimately, according to the judges of the Supreme Court of Cassation, the lacking provision of an appropriate regulation for purely internal situations in which victims are involved causes discrimination at the expense of Italian citizens who could not enjoy the same protection which instead the Italian State has introduced for foreign victims. It is discrimination which could be eliminated by extending the most favourable EU legislation through interpretation also to its citizens. Proof in favour of this reconstruction can be implicitly tracked down to a paper by professor Cannizzaro which was published a couple of years ago, in which he maintained that discriminatory phenomena under discussion originate from the subtraction of such cases from the regulatory capacity of national legal systems and from the consequent transfer of such competences in favour of the EU. This leads to the fact that “it would be inadequate to believe that the transfer of competences has resulted in ruling out that a need of equality can be enforced in the regulation of similar cases only as a result of the diversity of the source of regulation”²⁶. According to this reconstruction, in other words, it is as if States, by transferring to the EU a part of their own competences, had implicitly expressed a general principle of equality, capable of avoiding the emergence of unequal treatment from such a transfer.

Now, the request which has been discussed, and above all the subtle reasoning which underlies it, certainly represent a praiseworthy and creditable attempt to attribute decent importance in the EU legal system to purely internal situations, in particular on such a sensitive subject and given the multiple human and social implications as the protection of crime victims²⁷. Nevertheless, it seems that both the request and the topic underlying it appear to be intrinsically deficient from some point of view since they are tarnished by a sort of “original sin”, a basic vice which seems to be rather difficult to heal. The Supreme Court of Cassation, in fact, insists on conferring upon principles of equality and non-discrimination, and, consequently, upon the directive under discussion a role, a reach and

²⁶ E. CANNIZZARO, *Esercizio di competenze comunitarie e discriminazioni “a rovescio”*, in *Dir. Un. eur.*, 1996, p. 364.

²⁷ On the regulatory interventions of the European Union on the actually particularly sensitive subject under discussion see C. AMALFITANO, *L’azione dell’Unione europea per la tutela delle vittime di reato*, in *Dir. Un. eur.*, 2011, p. 643 ss.

power to affect the system which are frankly excessive, although it has the objective to pursue worthy goals of protection and consideration. The fundamental rights, in particular, would obtain importance compared to a situation which in the light of the doubts cast by the Supreme Court of Cassation itself does not fall within cross-border situations.

We shall proceed in order, though, in an attempt to better understand the reach of the request in question and the scenarios which might emerge from it.

Now, a great merit which apparently can be attributed to the Supreme Court of Cassation is without a doubt the fact of having undertaken the road of dialogue with the Court of Justice, by probably being convinced that the problem of reverse discrimination can be solved in its original system, that is at the EU level, and according to its legal parameters of reference²⁸. On the other hand, the internal regulations, from its point of view, are non-discriminatory, in the sense that through them the national legislation deals with all the citizens of the State in the same way both at the formal and material level. When do these regulations become “unfavourable”? When they are applied only to some citizens, while towards those who fall within the field of cross-border situations the most favourable regime envisaged by the EU legislation is applied. Therefore, probably the problem should be brought back and, if possible, solved at the level of EU law. At the same time, would it be possible to consider totally devoid of any connection with EU law those cases which are evidently discriminatory and to whose creation EU law itself actually contributes? Certainly, as it has been rightly highlighted, there would not exist such a “material connection” between such situations and EU law to justify the direct application of the most favourable EU regulation to a national subject, actually inversely discriminated since not being in a cross-border situation. There would probably exist, instead, such a “causal” link to allow the individual involved to invoke the EU principle of equality in order to obtain the removal of unequal treatment from which they unjustifiably suffer²⁹.

With time, in fact, influential theorists have moved in this direction, and in spite of not forgetting the stretches that such a prospect inevitably carries along, they have nevertheless tried to set key criteria of the system. It concerns theorists who, in other words, have attempted to track down a solution to the phenomenon of reverse discrimination in EU law, for example, through a structural principle of such a system as the one of non-discrimination³⁰.

²⁸ References along these lines are: M. POIARES MADURO, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in C. KILPATRICK, T. NOVITZ, P. SKIDMORE (eds.), *The Future of European Remedies*, Oxford, 2000, p. 128, and also in its Conclusions of 6 May 2004, in case C-72/03, *Carbonati*, whereby it is written that it would be difficult to admit that EU law disregards a situation to whose creation it has contributed itself. In similar cases, EU law has created a problem which national law without it would not have got to know, and it would have tolerated it even less, and regarding which it might be devoid of tools (point 55). For a similar and more recent reference see F. SPITALERI, *Le discriminazioni alla rovescia nel diritto dell'Unione europea*, Roma, 2010.

²⁹ See, for instance F. SPITALERI, *Le discriminazioni alla rovescia nella recente giurisprudenza comunitaria: rimedi insufficienti o esorbitanti?*, in *Dir. Un. eur.*, 2017, p. 925. L'A. proposes also the idea for which reverse discrimination presents also a “teleological” link for EU legislation, in the sense that its own existence can determine a breach with respect to objectives which the higher legislation aims to pursue.

³⁰ The reconstruction options which the theorists have proposed in order to tackle the discriminatory phenomenon under discussion at the level of EU law are actually various. They will not be analysed in this paper since it is believed that, despite the appealing attempts of the theorists, the problem of reverse discrimination anyway remains an internal one which has to be solved at the internal level by means of tools that are at the disposal of the national legislation. For a structured presentation of the position of the theorists see E. CANNIZZARO, *Producing Reverse Discrimination through Exercise of EC Competences*, in *YB. Eur.*

5. *What are the potential alternative solutions to the phenomenon of reverse discrimination?*

Nevertheless, it cannot be left unnoticed that all the attempts to attribute some sort of relevance in the EU legislation to the matters of reverse discrimination in general and also in the given case do not appear to be satisfying for a series of technical reasons which will be analysed below.

Firstly, it is by now almost undisputed in the jurisprudence of the Court of Justice that the norms of the Treaty on the Functioning of the European Union are not applied to cases which fall within only one member State³¹. Similarly, the Court of Justice has maintained that not even the Treaty can find application beyond the case in which EU law comes into play³². It is true that the Court of Justice has in the meantime admitted the existence of some exceptions to this general rule and to that which, as a consequence, concerns the limits of its judgement. Given such exceptions, indeed, it has considered itself competent to respond preliminary questions raised in purely internal litigation which is actually devoid of any cross-border element³³. The point is that the case under discussion, at a closer look, does not seem to fall within any particular case group which, in the reconstruction presented by the jurisprudence of the Court of Justice, could justify the exercise of the competence of EU judges although the requests submitted to their attention concern purely internal situations³⁴.

The intention of this paper is not to introduce the development of the jurisprudence of Luxembourg related to the importance purely internal situations have obtained in EU Law with time. It is worth remembering here that the particular national case which is under discussion does not seem to contain specific elements of connection which could in some way lead it to the higher legal system. For example, it does not appear to regard a situation in the field of which the application of the norm of internal law can in some way affect the exercise of freedom of movement, as presented by the Court of Justice in the field of a certain judicial current which has allowed it to express its opinion on preliminary requests proposed by national judges who regulated situations devoid of cross-border

Lam, 1997, p. 29 ss.

³¹ This is true, for example, for regulations in the field of freedom of establishment, freedom to provide services and free movement of capital. See on this subject: Court of Justice 15 November 2016, C-268/15, *Ullens de Schooten*, ECLI:EU:C:2016:874, points 23 and 47; Court of Justice 30 June 2016, C-464/15, *Admiral Casinos & Entertainment*, ECLI:EU:C:2016:500, point 21, and Court of Justice 20 March 2014, C-139/12, *Caixa d'Estalvis i Pensions de Barcelona*, EU:C:2014:174, point 42. As far as the inapplicability of the general principles of the EU legislation towards purely internal situations is concerned see Court of Justice 18 December 1997, C-309/96, *Annibaldi*, cit.; Court of Justice 25 May 1998, C-361/97, *Nour*, ECLI:EU:C:1998:250; Court of Justice 10 April 2003, C-276/01, *Steffensen*, ECLI:EU:C:2003:228.

³² Court of Justice 17 March 2009, C-217/08, *Mariano. Conf.*, ECLI:EU:C:2009:160; Court of Justice 26 March 2009, C-535/08, *Pignataro*, ECLI:EU:C:2009:204; Court of Justice 3 October 2008, C-287/08, *Crocefissa Savia*, ECLI:EU:C:2008:539; Court of Justice 23 September 2008, C-427/06, *Birgit Bartsch*, ECLI:EU:2008:517; Court of Justice 5 October 2010, C-400/10 PPU, *J. McB*, ECLI:EU:C:2010:582; Court of Justice 12 November 2010, C-339/10, *Asparuhov Estov e a.*, ECLI:EU:C:2010:680; Court of Justice 1 March 2011, C-457/09, *Chartry*, ECLI:EU:C:2011:101; Court of Justice 15 November 2011, C-256/11, *Dereci e a.*, ECLI:EU:C:2011:734.

³³ It does not seem to be worth focusing in more detail on such exceptions. Therefore, refer to the brief description given above.

³⁴ On the subject see A. ARENA, *Le "situazioni puramente interne" nel diritto dell'Unione europea*, Napoli, 2019, which distinguishes in the jurisprudence of the Court between a traditional, an expansive and a reflexive orientation.

elements. In any case, even if the internal situation had appeared in such conditions to convince the Court of Justice to express its opinion, the request brought to its attention in the present case would presume an answer which would have to go well beyond the one on which the Court of Justice would be ready to express its opinion. Indeed, it has already been said that the Court of Justice has shown to be willing to answer preliminary request of interpretation of EU regulations only in order to provide national judges with tools which they need to solve the matter by themselves in the field of their own legislation, with the tools that this puts at their disposal. It rather seems that the request presented by the Supreme Court of Appeal cannot be brought back to that sort of trial collaboration between internal judges and EU judges, which represents one of the cases in which they have been asked to express their opinion. On the other hand, it is worth remembering that our judges of highest courts do not need the Court of Justice to offer interpretation prompts of EU law, and then on the basis of their outcome reach a possible solution to the discriminatory phenomenon at the internal level. This is not only because, as it has been said before, the judges of Luxembourg have already taken a stance on the matter, but also because the relative body does not attempt to actually call into question the reach of such a position.

On this base, therefore, it seems that the Supreme Court of Cassation has tried to force the issue a bit too much!

Certainly, the reach which the general principles of the EU legislation take on in order to hold the system is well-known. Besides the regulatory function in the strict sense they carry out as well the function of interpretation and integration of other regulations of the complexly established legislation. However, I wonder whether these last two functions can lead to such a point to broaden in itself the reach of application at the subjective level of an act of secondary legislation or a directive allowing its application even in particular cases which in principle do not fall neither within the field of application of the principle nor of the directive. Because, after all, this is what the Supreme Court of Cassation is demanding without beating around!

Now, with the question being set in this way, I believe the answer could only be no.

The regulations of the EU legislation, including the general principles, are basically applied to particular cases which, because of their structural features, fall within the field of application of EU law³⁵. In the given case in the main proceedings, we deal with a crime committed in Italy against an Italian citizen residing in the Italian territory; in other words, a totally irrelevant case to the field of application of the directive under discussion. It should be added that, traditionally, that is according to a classical concept which is affected by the system of subdivision of competences between national and EU legislations, it is believed that the EU principle of non-discrimination has a “sector-based” nature, in the sense that it could be applied only and exclusively with relation to discriminatory situations which are produced in the field of application of EU law. It follows very clearly that the responsibility of compensation by the State for lacking or inexact adoption of the measures necessary for the implementation of the directive in question could not even become relevant. On the other hand, there could not be any obligation of compensation because the Italian State did not have any obligation to implement the directive if not in

³⁵ Legal theorists actually have not left out attempts to extend the field of application of the general principles of EU legislation. On this subject see J. WEILER, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, in *Washington Law Review*, 1986, p. 1103 ss.

strict respect of the terms provided for by itself, that is only in reference to cross-border situations.

We will now come to the second technical reason. In the given case we are tackling a purely internal situation, as it has been said, in the traditional sense of the term. According to the classical definition, relevance is obtained by one of those situations which is not regulated nor otherwise able to be regulated by EU law, and in which therefore member States keep a decent margin of autonomy for the purposes of judicial regulation of relevant situations.

With the question being set this way, one could be led to believe that, in order to solve the problem of the ascertained reverse discrimination at the level of EU law, perhaps the Supreme Court of Cassation should have proposed rather than a request of interpretation, as it has actually done, facing all the obstacles which have been presented above, one related to the validity of the directive, and this because of the breach of the general principle of non-discrimination. And, indeed, a certain share of theorists have actually presented this option which has just been mentioned as a potential technical and judicial tool through which relevance might be given at the level of EU law to the phenomena of reverse discrimination and, as a consequence, these issues could be solved. In this direction, some in fact have believed that the EU principle of equality could become relevant for the purposes of assessing the legitimacy of acts of secondary law which would contemplate in essence unequal treatment, and that by excluding unreasonably some situations from their own field of application. In other words, according to these theorists a national judge could formulate a request concerning the rationality of defining the subjective reach of application of the EU regulation, by using the “most unfavourable” regulation considered by a member state as *tertium comparationis* of this hypothetical judgement of equality. To be even more clearly, it is as if the judgement on the validity of the act at the beginning of reverse discrimination implied a comparison, technically possible under article 267 of the Treaty on the Functioning of the European Union, between the most favourable treatment envisaged by the EU regulations and the one of low quality reserved to subjects who do not fall within its field of application.

Indeed, also this reconstructive option, no matter how subjective and in principle able to overcome the obstacle of the use of the EU regulation beyond its own field of application it is, does not seem to be satisfying in general terms, in the sense that on its own it does not seem to be able to solve unequivocally, definitely and reasonably for any circumstance the problems related to discriminatory phenomena in question. This is basically because, with the EU being an entity with listed competences, it would not be possible to judge an act considering its limited field of subjective application, whereby the incompetence to regulate particular excluded cases would derive right from the primary law³⁶. This means, in other words, that the emanation of acts characterized by a limited subjective field of application is often the result of the application of norms of the Treaty which explicitly exclude the situations which are not directly connected to the fulfilment of the integrative process or to the harmonization of certain sectors.

Of course, wherever possible, this problem could or, maybe, should be overcome, through an interpretation of the regulations of the Treaty which would be based on the theory of implicit powers or also through the appeal to the clause of flexibility under

³⁶ Such a view is expressed, for example, by M. V. BENEDETTELLI, *Il giudizio di uguaglianza nell'ordinamento giuridico delle Comunità europee*, Padova, 1989, p. 182 ss.

article 352 of the Treaty on the Functioning of the European Union. Wherever the Treaties, that is, do not limit explicitly the powers of the European Union, a regulatory intervention aimed to avoid the creation of reverse discrimination could be necessary for the fulfilment of the objectives of the European Union.

It could be said, therefore, that the Supreme Court of Cassation could have urged the Court of Justice not a judgement of equality, which, as it has been just said, does not appear to function to our ends when the incompetence to regulate excluded particular cases derives from primary law, but a judgement of proportionality of a typically binary structure. This kind of judgement could actually disregard a comparison with the normative treatment provided for by single member States, by expecting that the judicial control should act like control on sensibleness of the choice of the EU legislator for the purposes of pursuing its own objectives of the EU legislation.

Nevertheless, it is not always necessarily like that.

If we limited ourselves to judging the rationality of the choice of the EU lawmaker with relation to the purposes to whose pursuing the regulations of the sector tend, one would have been convinced to believe that, except for cases of evident disproportion between the means and the end, its “will” has to be respected. If the directive, in our case, has preferred to define its reach of application at the subjective level only to cross-border situations, it perfectly and completely falls within the boundaries of discretion which is difficult to be overcome, especially if such boundaries are marked by general criteria of the EU competences envisaged by the Treaty. On the other hand, if the European Union has issued a directive, which is legitimate at the formal and material level, as well as at the functional one with relation to pursuing general objectives of the highest legislation, it is not clear why validity could be called into question only because from the limitation of its subjective reach of application, discriminatory consequences related to internal situations regulated by the national legislation and explicitly and legitimately taken away from the field of application of the EU law can derive in great amount.

One could believe, therefore, that when verifying the adequacy of the most favourable EU regulations, in the light of the parameters themselves of the EU legislation, the judgement of proportionality or rationality contains necessarily, even if in an incidental way, a verification on the adequacy of the least favourable State regulation, referred to as a benchmark. And this is because one should question whether the definition of the subjective reach of application of the EU regulation, applicable to only some subjects, can be justified in order to pursue objectives which are typical of the common market despite the consequences which it produces at the level of the phenomena of reverse discrimination under discussion. In other words, it is about verifying the existence of a reasonable relationship between the most favourable treatment which is reserved to some subjects to pursue relevant goals in the EU legal system and the lower one envisaged by national regulations for subjects who actually are not in a relevant situation in order for EU regulations to be applied. Therefore, this means that in all the cases, also the one in question, in which the EU regulation competes with the national one in the legal regulation of a particular case of almost the same material contents, the question of the diversity of treatment, which directly derives from the diversity of the two regulations, would convert the judgement of proportionality into a judgement of equality³⁷.

³⁷ On the relationship between the judgement of equality and the judgement of proportionality see M. HERDEGEN, *The Relation between the Principle of Equality and Proportionality*, in *Comm. M. Law Rev.*, 1985, p. 683 ss.

The result, however, which also sets up some principal limit compared to the opportunity to proceed along the sketched methodological path, is always the same. Both if one proceeds with a judgement of equality, which typically has a ternary structure, using the internal regulation as *tertium comparationis*, and if one gives space for a judgement of proportionality, which typically has a binary structure, the phenomenon of reverse discrimination in fact would not be solved if not by attributing importance to legal situations which in principle are indifferent for the EU law, by being irrelevant to it because they are qualified as “purely internal situations”. This would lead to reintroducing the problem presented at the beginning, that is the one of overcoming a traditional, and in my opinion, essentially embraceable arrangement, according to which there are not tools that can solve such discriminatory phenomena in the field of EU law.

6. *Brief conclusions*

Departing from the last statement, it is clear why the preliminary request of the Supreme Court of Cassation has been qualified as “daring” and “courageous”.

If the Supreme Court of Cassation had turned to the Constitutional Court, in fact, its preliminary request would have been more in line both with the jurisprudence of the Court of Justice on the subject of reverse discrimination which have been mentioned; and with the latest foundations of the Constitutional Court itself which, starting from the famous ruling 269, and with the further adjustments of the following rulings, has conveyed the idea of the opportunity which establishes its own competence in all cases in which a right articulated by the Charter of Nice intersects a similar right protected by the Constitution. Actually, in reference to this second profile the Constitutional Court does not exclude at all the possibility for a common judge to turn immediately, as he actually did, to the Court of Justice by means of a preliminary request. Therefore, this means that if the approach of the Supreme Court of Cassation seems to certainly wedge in the decisions which we could call “subversive” and which have been made by a judge of the last instance, it is anyway completely in compliance with a range of possibilities presented to the national judge.

Nevertheless, the solution which the Supreme Court of Cassation would like to reach seems to be, as it has been attempted to put it in light, a bit forced, also because it is anything but supported by literal, systemic and teleological analysis of the text of the Directive. Indeed, for explicit admission of the Supreme Court of Cassation it has meant the obligation to create a guarantee fund as functionally connected to pursuing the main goal of the directive itself, which is the one of bringing about the functioning of a system assisted by an access to compensation but only in particular cross-border cases. From this comes the conclusion that the obligation of the State to compensate the damage potentially caused to a subject by lacking implementation of a directive, which actually excluded from its field of application purely internal situations, should be ruled out.

Thus, also in our particular case, it does not seem that there are strong reasons to believe that the Court of Justice will decide in line with what has been proposed by the Supreme Court of Cassation. The matter concerns, and it is worth underlining it, a crime committed in Italy against a victim who is an Italian citizen and residing in Italy in a case which does not fall within the subjective reach of the secondary law. Therefore, it is

believed that it cannot detect the responsibility of the Italian State for lacking adoption of measures aimed at its implementation³⁸.

Without a doubt, there is a problem, but it has to be solved by the national law by means of necessary tools provided by itself.

As it has already been said before, this paper will not pay special attention to such tools except for one of them, that is article 53 of law 234/12³⁹. This regulation, indeed, does not seem to be particularly useful, contrary to what could apparently be thought, to lead the discussion in a different direction compared to how it has been conducted so far. This is not only because of limitation of substantial nature which the most accurate legal theorists have identified with regard to the given regulation.⁴⁰, but also because, as it was shown quite a long time ago, the preliminary ruling produced by a national regulation cannot extend the reach of EU law. It regards an autonomous unilateral operation, which in order to refer to one or another substantial regulation of EU origin, does not affect the field of application of EU law⁴¹. Therefore, it does not seem to be plausible that article 53 is used as a tool through which one or more EU norms can be extended to legal situations which go beyond their own field of application. At most, by confirming thus the conclusion which is intended to be supported in the given paper, that is the one of conferring upon national law the responsibility and the task to tackle discriminatory phenomena in question, article 53 could mean something else. It could mean to impose on national judges the obligation to ensure treatment similar to that which relative EU regulations provide for EU citizens to Italian citizens by means of tools at their disposal by the Italian legal system. In addition, the presence of this regulation in the Italian legal system could also be helpful to internal judges who tend to turn to the Court of Justice with the aim of obtaining authentic interpretation of relative EU law from it. This means, in other words, that article 53 could be useful in order to show the existence of an obligation of the relative judge to extend regulations envisaged by EU law for similar cross-border cases to purely internal situations which are the object of the main proceedings, thus guaranteeing the relevance of the ruling on interpretation by the Court of Justice in order to solve the litigation pending before the national judge⁴².

³⁸ Such a view along these lines even before the recent order of the Supreme Court of Cassation in question was expressed in R. MASTROIANNI, *La responsabilità patrimoniale dello Stato italiano per violazione del diritto dell'Unione: il caso della direttiva sull'indennizzo delle vittime dei reati*, in *Giust. civ.*, 2014, p. 283 ss.; R. MASTROIANNI, *Un inadempimento odioso: la direttiva sulla tutela delle vittime dei reati*, in *Quad. cost.*, 2008, p. 406 ss.; R. MASTROIANNI, *La tutela delle vittime dei reati tra obblighi comunitari e indifferenza nazionale*, in *www.astrid.eu*.

³⁹ In its current formulation, article 53 envisages that «with regard to Italian citizens, internal regulations or practices of Italian legal system, which produce discriminatory effects compared to the conditions and the treatment guaranteed to EU citizens under Italian law, are not applied».

⁴⁰ See, for example, R. MASTROIANNI, *La responsabilità patrimoniale dello Stato italiano...*, cit., p. 313-314, which underlines why article 53 cannot offer a solution to the given case.

⁴¹ The Conclusions of Advocate General Darmon presented 3 July 1990 in joint Case C-297/88 e C-197/89.

⁴² For comments see A. ARENA, *Le questioni puramente interne...*, cit., pp. 214-217.