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"Play it again, Sam": Remedying procedural discrimination in *TGSS*

Case C-113/22, *DX* v. *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*, Judgment of the Court of Justice (Second Chamber) of 14 September 2023, EU:C:2023:665

1. Introduction

It is common wisdom that wrongs should not occur and that adequate remedies must be available when they, nevertheless, take place.

Consider the possibility of obtaining a review of an administrative act, an injunction compelling the infringer to act or refrain from acting, an order recognizing the violation of one's right, an award for compensatory, nominal, restitutionary or punitive damages. From the viewpoint of the legal subjects, the right of action underlying these tools constitutes a secondary entitlement, which serves the protection of the primary entitlements infringed.[1] From the perspective of the legal order, these broadly intended remedies ensure the effectiveness of both the primary norms concerned, and of the legal system as a whole.[2] When activated, remedies restore a status of legality and fairness, while their very presence deters the reiteration of the wrong, if not its commission in the first place. At the same time, they fulfil a specific protective function inherent in the rule of law, offering protection to legally recognized interests.[3]

In the unique European setting, remedies maintain their essential importance but assume an additional feature, peculiar to the Union's vertically integrated configuration. As it is well known, EU law heavily relies on the Member States' remedial and procedural rules. The qualification of domestic judges as "decentralized EU courts", the attribution of competencies based primarily on substantive policies, the respect of national constitutional identities, and the foundational principles of attribution, subsidiarity, and

1. For a theoretical overview of these and other different types of rights, see Herstein, "Legal rights" in Zalta and Nodelman (Eds.), *The Stanford Encyclopedia of Philosophy Archive* (2023), available at <plato.stanford.edu/archives/win2023/entries/legal-rights/> (all websites visited 21 May 2024).

2. Kelsen, *Pure Theory of Law*, trans. Knight (University of California Press, 1967).

3. For an explicit connection between effective judicial protection and the rule of law in the ECJ's jurisprudence, see Case C-294/83, *Parti écologiste "Les Verts"* v. *European Parliament*, EU:C:1986:166, para 23.

proportionality are all elements that contribute to a setting where the EU mostly establishes substantive rights, while "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Art. 19 TEU), either by setting new rules and adapting existing ones, or by relying on established venues, norms, and practices, as long as they prove adequate.[4]

In this context, national remedial and procedural systems play a dual role in enforcing Union law: facilitating the realization of its provisions on one hand, and potentially obstructing it on the other, depending on whether they align with or contradict the latter.

The EU's impact in the field of remedies has massively evolved over the years, greatly affecting Member States' role in setting up the judicial system, defining the available remedies, as well as determining the rules of procedure for bringing and adjudicating claims based on EU law.[5] The complex interaction between EU law and national remedies and procedures is what makes the so-called principle of "national procedural autonomy" highly debated. Indeed, it is unclear to what extent this *prima facie* autonomy of national law represents a normative limit to the EU's interventions, both legislative and judicial. Some have famously claimed that the very concept is an oxymoron, which describes the status of whichever decision on the adequacy of national rules is taken by the EU legislature and judicature alike, alternating permissive and strict trends based on factual, policy-driven, or diplomatic considerations.[6] Others, instead, see it as having at least some

4. Episcopo, "The vicissitudes of life at the coalface: Remedies and procedures for enforcing Union law before national courts" in Craig and de Búrca (Eds.), *The Evolution of EU Law*, 3rd ed. (OUP, 2021), pp. 275–306, at p. 276 ff. On the field of remedies and procedures, and their configuration within EU law: Craufurd-Smith, "Remedies for breaches of EU law in national courts: Legal variation and selection" in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 1st ed. (OUP, 1999), pp. 287–320; Lonbay and Biondi, *Remedies for Breach of EC Law* (Wiley, 1997); Van Gerven, "Of Rights, Remedies and Procedures", 37 CML Rev. (2000), 501–553; Kilpatrick, Novitz and Skidmore (Eds.), *The Future of Remedies in Europe* (Hart Publishing, 2000); Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004); Arnull, "Remedies before national vourts" in Schütze and Tridimas (Eds.), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (OUP, 2018), pp. 1011–1139.

5. See e.g. Biondi and Gentile, "National procedural autonomy" in Fabri (Ed.), *Max Planck Encyclopedia of International Law* (OUP, 2019); Widdershoven, "National procedural autonomy and general EU law limits", 12 REALaw (2019), 5–34.

6. Kakouris, "Do Member States possess judicial procedural 'autonomy'?", 34 CML Rev. (1997), 1389–1412; Biondi, "The European Court of Justice and certain national procedural limitations: not such a tough relationship", 36 CML Rev. (1999), 1271–1287; Bobek, "Why there is no principle of "procedural autonomy" of the Member States" in Micklitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p. 305.

degree of constitutional ground, imposing constraints on – and prudence from – from all EU institutions.[7]

Against this background, ECJ's decisions on remedial and procedural aspects of EU and national law have particularly important effects. They contribute to the development of the specific area of law concerned – adding a brick in the wall of consumer, data protection, discrimination law, or whatever field the infringed norms belong to. They also play a crucial role in constructing a *sui generis* area of remedies and procedures in EU law, as well as in shaping the intricate division of powers within the multilevel EU legal order. This dual aspect of "remedial cases" – self-standing and ancillary to the area of law concerned – is precisely what characterizes the decision under consideration.

With its judgment of 14 September 2023 in Case C-113/22,[8] the ECJ answered important preliminary questions raised by the High Court of Justice of Galicia, concerning both the definition of discrimination prohibited under Directive 79/7/EEC on equal treatment in social security[9] and the remedies available when such discrimination takes place. The Court ruled that, where a male pension scheme member is denied extra benefits due to an administrative practice upholding a provision already declared discriminatory by the ECJ,[10] forcing him to assert his right in court, the domestic courts should instruct the authority not only to grant said supplement but also to compensate for the losses and damages suffered, including legal costs and fees sustained.[11]

This note will first offer a short account of the facts underlying the referred questions, put in the context of the ECJ's earlier decision, which *DX* v. *INSS* and *TGSS* ("*TGSS*") follows up. Then, it will reconstruct the content of the judgment, highlighting the argumentative passages used and the conclusions reached. Finally, it will critically analyse the double relevance that the ruling bears *qua* remedial case, discussing its impact on anti-discrimination law as well as on the judicial construction of EU remedies and procedures.

7. Prechal, "Community law in national courts: The lessons from Van Schijndel", 35 CML Rev. (1998), 681–706; Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? Study on the "Functionalized Procedural Competence" of EU Member States* (Springer, 2010); Halberstam, "Understanding national remedies and the principle of national procedural autonomy: A constitutional approach", 23 CYELS (2021), 128–158.

8. Judgment.

9. Council Directive 79/7/EEC of 19 Dec. 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, O.J. 1979, L 6/24.

10. Case C-450/18, *WA* v. *Instituto Nacional de la Seguridad Social (INSS)*, EU:C:2019:1075, noted by Mair, "Why less is not always more: Mother's pensions and parenthood in *WA*", 58 CML Rev. (2021), 201–222, and De la Corte-Rodríguez, "Recent cases and the future of Directive 79/7 on equal treatment for men and women in social security: How to realise its full potential", 23 EJSS (2021), 4–6.

11. Judgment, para 63.

2. Facts of the case

The claimant in the referred case was awarded by the *Instituto Nacional de la Seguridad Social* (INSS) the full basic pension established in the *Ley General de la Seguridad Sociale* (General Law on Social Security, LGSS),[12] due to a permanent and absolute incapacity, with effect from 10 November 2018. However, the INSS did not award him the 5 percent top-up envisaged by Article 60(1) LGSS as an additional benefit in favour of *female* recipients of said contributory pension, who were mothers of at least two biological or adopted children.[13]

As a father of two daughters, the claimant appealed against the decision, claiming entitlement to said supplement. The INSS, however, dismissed the appeal, stating that the additional 5 percent was granted to women exclusively, to reduce the structural gap between pension payments of men and women, whose career paths have been interrupted or shortened because of parenthood.

The claimant contested the dismissal before the *Juzgado de lo Social No. 3 de Gerona*, which, in turn, referred the case to the ECJ.

On 12 December 2019, the ECJ answered in Case C-450/18[14] that provisions like Article 60 LGSS – which recognize the right to the pension supplement exclusively to a certain category of women, and not to men in the same situation – constitute a form of direct discrimination covered by Directive 79/7, which could not be allowed either through the exceptions listed under Article 7 of said Directive or under the justification of positive actions established in Article 157(4) TFEU.

Following the publication of this first ECJ ruling the claimant applied again to the INSS. However, the request was once more rejected, in adherence with the authority's official position of refusing to grant men the supplement until further amendment to the LGSS, unless their entitlement had been judicially recognized.[15]

12. *Ley General de la Seguridad Sociale* in the consolidated version as approved by Royal Legislative Decree 8/2015, of 30 Oct. 2015 (BOE No. 261 of 31 Oct. 2015, p. 103291).

13. Ibid., Art. 60(1): "Women who have had biological or adopted children and are recipients of a contributory retirement, widow's or permanent invalidity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security. That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to of a specified percentage which shall be based on the number of children in accordance with the following scale: (a) in the case of two children: five per cent …": Judgment, para 10.

14. Case C-450/18, *WA* v. *Instituto Nacional de la Seguridad Social*.

15. Criterio de Gestión 1/2021 of 31 Jan. 2020: "As long as the legislative amendment necessary to adapt Article 60 of the LGSS to the judgment [in C-450/18] has not been made …, the

The claimant brought an action against this decision to the *Juzgado de lo Social No. 2 de Vigo*, which ruled on two points. First, it recognized the man's entitlement to the pension but ordered its payment only as of 10 August 2020 (hence, using the *second* application to INSS as a reference point). Second, it refused compensation for the damages suffered, arguing that INSS's rejection was consistent with national law, which constituted the only ground of discrimination.

The claimant upheld the request for compensatory and exemplary damages before the *Tribunal Superior de Justicia de Galicia*, also demanding that the supplement be recognized starting from the moment when he was first awarded the pension. Faced with these issues, the Tribunal referred the following questions to the ECJ: (i) whether the administrative practice of systematically refusing to grant the supplement to men and forcing them to bring an action before a court should be considered discrimination prohibited by Directive 79/7, particularly its Articles 4[16] and 5;[17] (ii) whether, according to the Directive and in particular its Article 6,[18] the recognition of the supplement must be backdated and, if so, to which moment; (iii) whether the Directive, and especially its Article 6, as well as the principles of equivalence and effectiveness, require that the victim of said discrimination be awarded compensatory and exemplary damages – inasmuch as not addressed by the backdating of the judicial recognition of the supplement – and be reimbursed for the court fees and costs of legal representation sustained for the proceedings.

following guidelines for the actions of this managing body shall be laid down: 1. The supplement provided for in respect of permanent invalidity, retirement and widows' pensions, governed by Article 60 of the LGSS, continues to be granted only to women who satisfy the conditions laid down by that article, as has been the case so far, so long as the appropriate legal amendment to that article has not taken place. 2. The provisions of the preceding paragraph must logically be interpreted without prejudice to the obligation to enforce final judgments given by the courts which recognise the abovementioned pension supplement for men": Judgment, para 11.

16. Art. 4(1), Directive 79/7: "The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits".

17. Art. 5, Directive 79/7: "Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished."

18. Art. 6, Directive 79/7: "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possible after recourse to other competent authorizes".

3. Judgment

The case was decided considerings the written submissions of the claimant and INSS, the Spanish Government, and the European Commission, without an opinion from an Advocate General.[19]

During the proceedings, the referring court withdrew the second question, the Spanish Supreme Court having decided, in the meantime, that male applicants were entitled to the benefits starting from the date of access to the pension.[20] The ECJ was hence left to answer only the first and third questions – both considered admissible and relevant to the dispute[21]. The Court reformulated the questions as asking whether (Article 6 of) Directive 79/7 means that, if a pension supplement application is rejected based on a national law found to be discriminatory by a prior ECJ ruling, the referring court must instruct the authority not just to grant the supplement but also to compensate with exemplary damages and on that basis reimburse the victim for court costs and lawyers' fees, where the rejection is based on the authority's practice of continuing to apply the discriminatory law, forcing the individual to assert their right in court.[22]

To answer this question, the ECJ recalled that Article 60 LGSS had already been found to be in breach of Directive 79/7 in Case C-450/18, and stated that the applicant must at least be granted the supplement starting from the date when he was first awarded the invalidity pension. As long as equal treatment had not been realized, the principle of equality required both national courts and administrative authorities to set aside incompatible domestic provisions, attributing the disadvantaged category the same treatment as the advantaged one.[23] This obligation constituted the benchmark against which INSS's practice was then assessed. Indeed, the authority failed to recognize the benefit, with a decision that was discriminatory "where [it reproduced], with regard to the person concerned, the discriminatory elements of that legislation".[24]

19. The Court often decides without an opinion from an Advocate General when the preliminary questions are considered straightforward, lack significant legal complexities, or where required by procedural reasons. Indeed, *TGSS* can be seen as a relatively easy case. However – as noted further below – the judgment given by the Court is significant from multiple perspectives, and the lack of an opinion should not be read as signalling otherwise.

20. Judgment, para 26.

21. Ibid., paras. 28–36.

22. Ibid., paras. 37–40 and 44.

23. Ibid., paras. 41–42, citing Joined Cases C-231/06 to C-233/06, *Jonkman*, EU:C:2007:373; Case C-406/15, *Milkova*, EU:C:2017:198: Case C-177/20, *"Grossmania"*, EU:C:2022:175.

24. Judgment, para 43.

Moreover, the rejection was not merely based on an incorrect interpretation of national law, but rather on a specific practice, reproduced in administrative position 1/2020, according to which the INSS continued, pending amendment of Article 60 LGSS, to grant the supplement only to women, except when asked to implement final judicial decisions recognizing said entitlement to men.[25] This circumstance was "liable to lead . . . to *discrimination with regard to the procedural conditions* governing the grant of the supplementary pension at issue, irrespective of the direct discrimination on the grounds of sex, resulting from the substantive conditions laid down in the legislation".[26] Although equal treatment might ultimately be restored through a judicial decision providing for the award, the practice implied that men were required to follow the judicial route to have their rights recognized and enforced, delaying the award of the supplement and leading to additional costs.[27]

Indeed, it was precisely the exposure to further expenses and losses connected to the judicial proceeding that ultimately triggered the core pronouncement. The Court underscored the requirement, outlined in Article 6 of the Directive, that Member States introduce in their legal systems measures necessary to enable those who suffered discrimination to pursue their claim through a judicial process, possibly after recourse to other competent authorities. Those measures must effectively contribute to the Directive's goal of establishing equal opportunities, by "restoring such equality, provide effective and efficient judicial protection and have a genuine deterrent effect on the body which has committed discrimination".[28] Where financial compensation was adopted to restore genuine equal opportunity, the latter must hence be "adequate, in that it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full in accordance with the applicable national rules".[29] This full compensation had to be "capable of ensuring that such loss or damage is effectively compensated or compensated in a way which is dissuasive and proportionate".[30]

In a situation such as the one at hand, first, the national court could not limit itself to retroactively granting the benefit, as doing so would restore equal treatment for the substantive conditions of the award but would not remedy the harm resulting from the discriminatory nature of those procedural

25. Ibid., para 45.
26. Ibid., para 46 (emphasis added).
27. Ibid., para 47.
28. Ibid., paras. 48–49, citing Cases C-271/91, *Marshall* v. *Southampton and South West Hampshire Area Health Authority*, EU:C:1993:335; and C-407/14, *Arjona Camacho* v. *Securitas Seguridad España*, EU:C:2015:831.
29. Ibid., para 50, with the same references as above.
30. Ibid., para 51, citing Case C-407/14, *Arjona Camacho*.

conditions.[31] On the contrary, the claimant must receive adequate financial compensation that covered, in full, the loss and damages suffered as a result of the discrimination, in accordance with domestic rules[32] – rules that, in this case, seemed capable of ensuring full restoration, since Spanish law requires judges to award compensation covering both the moral damage and the additional harms and losses suffered because of the discrimination, instructing them to put the victims, as much as possible, in the position they would have been in had the infringement not occurred, as well as to contribute to preventing damage.[33]

Secondly, it must be possible to include in the award the courts' and lawyers' fees caused by the application of discriminatory procedural conditions.[34] Indeed, precisely because compensation must fully make good the loss and damage suffered, "it is not possible to disregard the costs which the person concerned had to incur as a result of [the procedural discrimination], including, where appropriate, the costs and lawyer's fees relating to the court proceeding" initiated to assert their rights.[35] Again, such a solution seems *prima facie* allowed by Article 183 of Spanish Law 36/2011[36] and, importantly, it should apply irrespective of the fact that domestic procedural rules precluded courts from ordering the body responsible for the discrimination to pay for said expenses, as "the compensation covering the costs and lawyers' fees does not fall within such procedural rules but forms an integral part of the full compensation of the person concerned".[37]

However, the Court concludes, while it is up to the Member States to establish specific provisions for determining the redress, including how to account for the discrimination resulting from an intentional act of the

31. Ibid., paras. 52–53.
32. Ibid., para 54.
33. Ibid., para 55. On the relevant national provisions, see Art. 183 of *Ley 36/2011, reguladora de la jurisdicción social* (Law 36/2011 governing procedure of the social courts) of 10 Oct. 2011 (BOE No. 245 of 11 Oct. 2011, p. 106584): "1. Where the judgment declares that an infringement has taken place, the court shall rule on the amount of any damages that may be payable to the applicant for discrimination suffered or any other infringement of his or her fundamental rights and civil liberties, on the basis of both the non-material damage linked to the infringement of the fundamental right and the additional damage and losses arising therefrom. 2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as possible, fully restore him or her to the position he or she was in prior to the damage, and to contribute to the objective of preventing damage. …': Judgment, para 12.
34. Ibid., para 56.
35. Ibid., paras. 57–58.
36. Ibid., para 59.
37. Ibid., para 60.

competent body, those rules must not undermine the fundamental essence of the reparative measures.[38]

4. Analysis

The ECJ's approach to the so-called Spanish motherhood pension has raised significant concerns, and understandably so. Mair, for instance, has compellingly denounced the Court's refusal to frame the Spanish provisions as protective measures and positive actions under, respectively, Article 7(b) of Directive 79/7 and Article 157(4) TFEU. The correct alternative, she argued, would have been to engage in a constructive discussion on whether the challenged provision was adequate and proportionate in its pursuit of women's protection.[39]

Consequently, *TGSS* may be read as a mere follow-up to the previous litigation, to be acclaimed or criticized based on the underlying substantive policies involved. However, the case unfolded as distinctively *remedial*: triggered by INSS's resistance to the C-450/18 ruling, it addressed the consequences of persistent discrimination on individual rights, with a focus on the victim's claim to compensation. Hence, its relevance bypasses many of the issues involved in the original litigation.

To fully capture the ruling's relevance, the present comment is organized as follows. First, it will situate the case within the broader developments of equality law in Europe. Then, it will analyse the judgment, discussing: the ECJ's identification of INSS's behaviour as procedural discrimination; the alternative pathways available to the Court in developing remedies and procedures against such wrongs; the exclusion of exemplary damages to address the infringement, as well as the concurrent demand for "full compensation" that covers judicial costs; and, lastly, the case's significance for a judicial approximation of EU anti-discrimination law.

4.1. *The two-speed harmonization of remedies in anti-discrimination law*

Anti-discrimination law is a long-standing and much-developed area of EU law. Over the years, it has transitioned from a primarily "market unifying", to a more comprehensive "regulatory" and ultimately "constitutional" role,

38. Ibid., para 61, citing by analogy Cases C-154/15, C-307/15 and C-308/15, *Gutiérrez Naranjo and Others*, EU:C:2016:980.

39. Mair, op. cit. *supra* note 10.

progressively expanding the list of protected grounds, on which discrimination is prohibited.[40]

At its inception, anti-discrimination law was rooted in Article 119 EEC and mostly addressed equality between men and women in issues of pay, access to and conditions of employment, as well as social security. Each area was regulated by corresponding secondary legislation, with different directives targeting specific aspects of gender-based inequality.[41]

The EU's commitment to combating discrimination expanded significantly with the adoption of Article 19 TFEU, which led to directives targeting discrimination based on racial and ethnic origin,[42] as well as religion, belief, disability, age, and sexual orientation in employment.[43] The resulting legislative landscape was partly consolidated with the Recast Directive,[44] which prohibits direct or indirect discrimination based on sex in public and private sectors, equal pay, occupational social security, and employment conditions.

To complement such a highly developed legislative harmonization, the ECJ has over the years produced significant rulings, many of which added substance to the sparse provisions on remedies and sanctions.[45] Through the

40. On the evolution of EU anti-discrimination law: Bell, "EU anti-discrimination law: Navigating sameness and difference" in Craig and de Búrca (Eds.), *The Evolution of EU Law*, 3rd ed. (OUP, 2021), pp. 651–677; Belavusau and Henrard, "A bird's eye view on EU anti-discrimination law: The impact of the 2000 Equality Directives", 20 GLJ (2019), 614–636; Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (OUP, 2018); Givens and Case, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (OUP, 2014); Ellis and Watson, *EU Anti-discrimination Law*, 2nd ed. (OUP, 2012); Meenan, *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007); Schiek, Waddington and Bell, *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart Publishing, 2007); Bell, *Anti-discrimination Law and the European Union* (OUP, 2002).

41. Council Directive 75/117/EEC of 10 Feb. 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast).

42. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22.

43. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

44. *Supra* note 41.

45. Craig and De Búrca, *EU Law: Text, Cases and Materials*, 7th ed. (OUP, 2020), at p. 986. On the progressive proceduralization of EU-antidiscrimination law: Muir, "Procedural rules in the service of the 'transformative function' of EU equality law: Bringing the prohibition of nationality discrimination along", 8 REALaw (2015), 153–176. See, for instance: Case C-43/75, *Defrenne* v. *SABENA*, EU:C:1976:56; Case C-14/83, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206; Case C-14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*, EU:C:1984:153; Case C-222/84, *Johnston* v. *Chief Constable of*

case law of the Court, anti-discrimination law is one of the fields that most contributed to developing proper EU remedies and procedures.

These innovations were progressively incorporated into the newer waves of legislation. It is often recognized how, together with the constitutional relevance of the field and the expansion of the ground of protection, progressive proceduralization constitutes one of the overarching trends of equality law in Europe.[46] The Racial Equality Directive and Employment Directive provided more advanced provisions on remedies,[47] and gender equality legislation partly caught up with the Recast Directive, which encompasses provisions on adequate compensation, recourse to judicial and conciliation procedures, burden of proof, equality bodies, compliance, information, and dialogue.

Against those developments, Directive 79/7 seemed to be left behind. It is the only one of the first-generation equality directives still standing and essentially maintains the same configuration it had in the late 1970s. In terms of remedies, the Directive has minimal requirements, as it only provides that Member States "shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished" (Art. 5), and "introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities" (Art. 6).

the Royal Ulster Constabulary, EU:C:1986:44; Case C-377/89, *Cotter and Others* v. *Minister for Social Welfare*, EU:C:1991:116; Case C-208/90, *Emmott* v. *Minister for Social Welfare and Attorney General*, EU:C:1991:333; Case C-271/91, *Marshall*; Case C-338/91, *Steenhorst-Neerings* v. *Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen*, EU:C:1993:857; Case C-180/95, *Draehmpaehl* v. *Urania Immobilienservice*, EU:C:1997:208; Case C-66/95, *R* v. *Secretary of State for Social Security, ex parte Sutton*, EU:C:1997:207; Case C-246/96, *Magorrian and Cunningham* v. *Eastern Health and Social Services Board and Department of Health and Social Services*, EU:C:1997:605; Case C-326/96, *Levez* v. *Jennings Ltd*, EU:C:1998:577; Case C-185/97, *Coote* v. *Granada Hospitality*, EU:C:1998:424; Case C-54/07, *Feryn*, EU:C:2008:155; Case C-63/08, *Pontin*, EU:C:2009:666; Case C-94/10, *Danfoss A/S and Sauer-Danfoss ApS* v. *Skatteministeriet*, EU:C:2011:674; Case C-81/12; *Asociaţia Accept*; Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12, *Specht and Others*, EU:C:2014:2005.

46. Muir, op. cit. *supra* note 40, in particular, notes how the Racial Equality and the Employment Directives, alongside recast and modernization efforts, established something akin to a common procedural law for EU anti-discrimination, with emphasis on access to judicial and administrative procedures, burden of proof, the fight against victimization, specialized bodies, and – especially interesting – more detailed provisions in the area of sanctions, penalties, compensation, and reparation.

47. See Arts. 7–12 Directive 2000/43/EC and Arts. 9–14 Directive 2000/78/EC.

Most importantly, the case law developed at the ECJ concerning social security focused almost exclusively on substantive issues (material and personal scope, justification for the discrimination, etc.).[48] The only relevant case dealing with remedies in Directive 79/7 so far is *Sutton*,[49] famous as an instance of "restrictive" judicial review over national rules, after the roaring period of judicial activism expressed by *Emmott*, *Factortame*, *Francovich*, etc.[50] There, the Court was asked whether a previously discriminated subject who, under the Directive, is entitled to arrears of a social security benefit, also has a right to obtain interest on the belated payments. Refusing to apply the solution adopted *Marshall,*[51] the Court answered negatively and stated that, if the conditions apply, said losses may fall within the reparatory duties of the State under *Francovich* liability.

Against this background, *TGSS* opens a new chapter on remedies in EU social security equality law.

4.2. *Forced judicial recourse as a form of procedural discrimination*

TGSS owes parts of its remedial dimension to the ECJ's framing, which shaped a matter concerning both the prohibition of direct discrimination as well as the remedies available against it, into one solely related to compensation and reimbursement of judicial costs.[52]

It is not uncommon for the Court to rephrase preliminary questions in a way that better suits its tasks and goals. Yet, the operation realized here stands out, not only for the degree of its creative liberty but also for its implication, as it ultimately relegates the definition of the wrong to an *obiter dictum*, downplaying the relevance of its findings.

Indeed, the first part of the decision discusses the INSS's refusal – pending amendment of Article 60 LGSS – to grant male applicants the supplement, unless compelled by a final judgment recognizing their entitlement. The

48. See e.g. Case 30/85, *J.W. Teuling* v. *Bestuur van de Bedrijfsvereniging voor de Chemische Industrie*, EU:C:1987:271; Case C-9/91, *R* v. *Secretary of State for Social Security, ex parte Equal Opportunities Commission*, EU:C:1992:297; Case C-172/02, *Robert Bourgard* v. *Institut national d'assurances sociales pour travailleurs indépendants*, EU:C:2004:283.

49. Case C-66/95, *R* v. *Secretary of State for Social Security, ex parte Sutton*.

50. Case C-208/90, *Emmott*; Case C-213/89, *R* v. *Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257; Joined Cases C-6/90 & C-9/90, *Andrea Francovich and Danila Bonifaci and others* v. *Italian Republic*, EU:C:1991:428. On the "three periods framework" of judicial review in the field of remedies and procedure see Dougan, op. cit. *supra* note 4.

51. Case C-271/91, *Marshall*.

52. The ECJ followed the defensive strategy adopted by the applicant, who argued that deciding on the discriminatory nature of the practice was necessary to answer the question of liability.

Court, unsurprisingly, deems said practice to be in breach of the Directive, claiming that the authority failed to set aside the discriminatory national provisions and grant the disadvantaged category the same treatment wrongly reserved for the advantaged one.[53] However, the Court takes this established framework further and concludes that imposing a more difficult pathway to obtain the contested benefit constitutes *discrimination in the procedural conditions* governing the grant of said entitlement.

Recognizing that inequality in procedural conditions constitutes in itself discrimination, hence considering the infringements realized by the legislative and the administrative bodies as separate and autonomous wrongs, is a solution of salient importance. First, it brings to the spotlight the role of judicial remedies in anti-discrimination law.

Article 6 of Directive 79/7 – like the Equality Directive before it, and as many other instruments after[54] – requires "Member States [to] introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorizes". The possibility for victims of discrimination to embark on the judicial route is hence specifically envisaged in the Directive, as well as, at a higher level, implied in the very principle of effective judicial protection first recognized in *Johnston*[55] and now enshrined in Article 47 CFR.[56] However, judicial redress cannot be something that is

53. Judgment, paras. 41–42, where the Court explicitly refers (solely) to Joined Cases C-231/06 to C-233/06, *Jonkman*, C-406/15, *Milkova*, and C-177/20, "*Grassmania*".

54. See the no-longer-in-force Council Directive 76/207/EEC of 9 Feb. 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 1976, L 39/40, Art. 6: "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities". This succinct formulation has been adjusted in the new waves of harmonization and modernization, and the new blueprint for a provision on access to justice can be found in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/26, Art. 7: "Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

55. Case C-222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*.

56. For an overview see Ward, "Right to an effective remedy and to a fair trial" in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights*, 2nd ed. (Hart Publishing, 2021), as well as the recent contributions in Bonelli, Eliantonio, Gentile (Eds.), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1* (Hart Publishing, 2022).

imposed as an additional burden on specific categories of subjects to avoid recognizing the entitlements they seek to obtain through the standard, administrative procedure.

By qualifying INSS's behaviour as procedural discrimination, the ECJ hence not only reaffirms the hierarchy of remedies and avenues of protection provided by Directive 79/7 but also strengthens the role of judicial protection, clarifying that the latter cannot be instrumentalized to filter out legitimate requests and "level up" the treatment solely in favour of the most combative applicants.

Second, qualifying the INSS's recalcitrant behaviour as an autonomous wrong allows national courts to take into consideration the full extent of the infringements and especially of the damages caused by the latter. This is essential, especially considering that discrimination concerning the procedural conditions for obtaining an entitlement comes with specific negative consequences, as it exposes the victims to – at least – extra delays and losses. This second point constitutes, in fact, the linchpin to the central theme of the judgment, namely, civil liability and reimbursement of judicial costs.

4.3. *Remedies between national procedural autonomy and the primacy of EU law*

Before embarking into the discussion of damages, a few words must be spent on the standards used by the Court to frame the matter.

Indeed, the national judge asked whether the Directive, and especially its Article 6, as well as the principles of equivalence and effectiveness, require that the victim of discrimination be awarded damages for the loss sustained and exemplary damages, and receive compensation for the court fees and costs of legal representation sustained. However, the ECJ considers the question as aiming to know whether the Directive imposes the referring court to order, in addition to the payment of the supplement, compensation of damages and reimbursement of the judicial costs.[57]

In this sense, the Court intervenes in the very framing of the issue, reducing the two decisional standards suggested by the national judge into one. While seemingly minor, this choice signals important assumptions about the relationship between national and EU law,[58] ultimately shaping the potential impact of the judgment beyond the specific underlying case.

57. Judgment, para 37.

58. The importance of considering alternative framings as a step to critically deconstruct ECJ case law is highlighted in Episcopo, "Deconstructing the CJEU's jurisprudence to enable judicial dialogue" in Mak and Kas (Eds.), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, 2023), pp. 79–98, at p. 80 ff.

Relying on the principles of effectiveness and equivalence enshrined in the so-called *Rewe-Comet* test[59] implies that the issue at stake falls outside the scope of broadly intended "harmonized" EU law; hence, national provisions can be reviewed only where they make the exercise of EU rights excessively difficult, or more difficult than what occurs for similar claims based on national law. One drawback of this standard is that it catalyses particular attention, as it involves a sensitive balancing between competing principles (effectiveness of EU law and effective judicial protection against, for instance, the requirement of good administration of justice), as well as between European and national competences.

Another drawback concerns the extent, stringency, and scope of application of the review enabled by the principles of equivalence and effectiveness. First, said review is often perceived as exceptional and based on a case-by-case review (absent EU remedies and procedure, national law applies unless it makes the exercise of EU rights excessively difficult, or more difficult than it would be for similar domestic claims). Second understanding of national procedural autonomy as a "constitutional" principle implies that deference to national law should increase as we move along the spectrum of substantive, remedial, and procedural law: since the EU has the least power to intervene there, the threshold for requiring a disapplication of a procedural rule should be higher.[60] Conversely, referring to the Directive entails that the matter is directly covered by EU law, whose supremacy/primacy requires any incompatible national provision to be interpreted in conformity with it, or else disapplied.

However, the prerequisite for such assessment is that EU law can be interpreted as covering a specific issue even if it does not explicitly say so – which is exactly what happens in *TGSS*. Despite not providing for compensation as a mandatory remedy, the Directive is interpreted as implying: first, that the victim of discrimination "must also be able to benefit . . . from . . . adequate financial compensation in that it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full";[61] and, second, that in the context of the claim "it must be possible to take into account in terms of financial compensation the expenses, including the costs and lawyers' fees, incurred by the member concerned for the purpose of asserting his right to the pension supplement at issue".[62]

59. From the two leading cases on the matter: Case C-33/76, *Rewe* v. *Landwirtschaftskammer für das Saarland*, EU:C:1976:188, and Case C-45/76, *Comet BV* v. *Produktschap voor Siergewassen*, EU:C:1976:191.

60. Halberstam, op cit. *supra* note 7, at 136 ff.

61. Judgment, para 54.

62. Ibid., para 56.

Moreover, the Court rebuts the idea that the judicial costs sustained by the claimant could remain where they fell because national procedural rules preclude the referring court from ordering their payment. That costs and fees may need to be covered is considered part of compensatory remedies, and not a matter of procedural law, left to the autonomy of Member States.[63] In other words, with the overall framing of the issue (supremacy/primacy of the Directive, broadly interpreted, rather than effectiveness and equivalence) and by distancing the issue from the domain of procedural law (most commonly associated with the *Rewe-Comet* test), the Court stresses that reimbursement of judicial costs here constitutes part of the remedy which the victim may be entitled to under EU law. Importantly, this means that the matter falls within the scope of "harmonized" EU law and is capable of being applied way beyond the specific case which triggered the pronouncements.

However, linking the matter to a European idea of damages and reimbursement of judicial costs poses more questions than it solves, as it leads us to wonder how, and to what extent, liability for breach of anti-discrimination law is hence "harmonized". This matter is, in turn, touched upon in two separate passages: the first discusses whether compensation needs to be punitive; the second considers whether it must be possible to cover court costs and lawyers' fees to ensure full compensation. These points are discussed respectively in sections 4.4 and 4.5 below.

4.4. *No need for (broadly intended) punitive damages in case of discrimination*

To discuss where the Court stands on the function and nature of liability we need to consider, again, how the original question has been rephrased, and what consequences derive from this rephrasing.

The referring judge asked whether the victim of discrimination must be awarded damages for the loss sustained and exemplary damages, and in any case, receive compensation for the court fees and costs of legal representation sustained for the proceedings. However, the ECJ interprets this question as asking whether the referring court must instruct the authority not just to grant the supplement "*but also to pay him exemplary damages and to reimburse him, on that basis, the costs and lawyers' fees which he has incurred in court*".[64] The reference to compensatory damages is erased, leaving only the

63. Ibid., para 60.
64. Ibid., para 37 (emphasis added).

availability of exemplary ones at centre stage, where the aside "on that basis" gives the impression that reimbursement of those costs would be, indeed, part of a punitive award.

Yet, the Court *prima facie* does not address the matter of exemplary damages and only echoes the well-known mantra that compensation should occur according to the rules laid down by the Member States. Indeed, the reference to this specific award is implicit, as the Court substantiates its position by citing, almost in passing, *Arjona Camacho*,[65] which stands as the "precedent" in anti-discrimination law for the principle according to which Member States are not required to provide for punitive damages unless the latter would be available for similar domestic actions.[66]

Given the Court's intentional rephrasing, the elliptical answer seems striking, signalling that the main stakes of the matter may lay elsewhere.

While it is up to the Member States to lay down detailed rules on the determination of the award:

> "*the payment to the person injured of compensation which covers in full the loss and damage sustained* as a result of direct discrimination …, in accordance with [national laws] *is capable of ensuring that such loss or damage is effectively compensated or compensated in a way that is dissuasive and proportionate*".[67]

This passage is particularly important, as it goes one step beyond *Arjona Camacho* in clarifying what is not required by EU law and what, instead, makes compensation adequate.

To develop this argument, however, a short conceptual clarification is needed. The term "exemplary" or "punitive" damages usually denotes a very specific tool developed in common law jurisdictions, where courts may order defendants to pay a sum of money, in order to punish wrongdoers for the gravity of their actions and discourage similar conduct in the future. Within the broad category of damages, exemplary/punitive ones are distinctively non-compensatory and take the form of a civil sanction, often unrelated to the

65. C-407/14, *Arjona Camacho*: Judgment, para 50.

66. On the normative value of Court's decision in terms of precedents and authorities: Tridimas, "Precedent and the Court of Justice: A jurisprudence of doubt?" in Dickson and Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP, 2012), pp. 307–330; Jacob, *Precendents and Case-based Reasoning in the European Court of Justice. Unfinished Business* (Cambridge University Press, 2014). For an affirmation of the principle see also Joined Cases C-295/04 to C-298/04, *Manfredi*, EU:C:2006:461, paras. 92–99; Joined Cases C-46/93 & C-48/93, *Brasserie du pêcheur* v. *Bundesrepublik Deutschland* and *The Queen/ Secretary of State for Transport, ex parte Factortame and other*, EU:C:1996:79, para 89.

67. Judgment, para 51 (emphasis added).

presence and quantification of the harm.[68] In contrast, compensatory damages are designed to make good for the harm suffered. This holds also for the specific category called "aggravated damages", which compensates for the more severe harm suffered by the victim due to aggravating circumstances, such as the heinousness, methods and motives of the wrong, or the wrongdoer's subsequent conduct.[69] Yet, distinguishing compensatory from extra-compensatory damages may, in practice, not be easy, and systems historically unfamiliar with exemplary/punitive damages often conflate different remedies, labelling "punitive" any award that channels punitive or dissuasive goals.[70]

The reasoning in *TGSS* seems to acknowledge that courts mean different things when inquiring about exemplary/punitive damages, and hence expand the focus from those framed as proper civil sanctions, towards any type of award that is retributive/deterrent because it exceeds the compensation of the harm suffered. In stating that "*the payment to the person injured of compensation which covers in full the loss and damage sustained . . . is capable of ensuring that such loss or damage is effectively compensated or compensated in a way that is dissuasive and proportionate*",[71] the Court seems to answer the broader question in the negative: strict reparation of the losses, as long as it is full, is enough. Hence, at least in the case of Directive 79/7, extra-compensatory considerations *may* be taken into consideration by judges based on their national law but are *not required* at the EU level.[72]

However, this framing raises new questions: what does excluding the requirement of extra-compensatory damages while demanding "full

68. For an analysis of punitive damages and their status in EU and national law, see the insightful contributions in Koziol and Wilcox, *Punitive Damages: Common Law and Civil Law Prospectives* (Springer, 2009); Meurkens and Nordin (Eds.), *The Power of Punitive Damages. Is Europe Missing Out?* (Intersentia, 2012); Goudkamp and Katsampouka, "Punitive damages and the place of punishment in private law", 84 *Modern Law Review* (2021), 1257–1293.

69. Episcopo, "Il problema dei danni puntivi" in Navarretta (Ed.), *Codice della Responsabilitá civile* (Giuffrè, 2021), pp. 2100–2136, at p. 2103.

70. Ibid.; Beever, "The structure of aggravated and exemplary damages', 23 *Oxford Journal of Legal Studies* (2003), 87–110: Sebok and Wilcox, "Aggravated damages" in Koziol and Wilcox (Eds.) op. cit. *supra* note 68, pp. 237–255.

71. Judgment, para 51 (emphasis added).

72. For example, in Italy the tort has a compensatory function but can be accompanied by an ultra-compensatory component on which there are specific regulatory indices: the possibility of publishing the sentence in a national newspaper, the consideration in the liquidation of the retaliatory nature of the tort: Donadio, "Responsabilità da violazione del divieto di discriminazione" in Navarretta (Ed.), *Codice della Responsabilità civile commentato* (Giuffré, 2022), pp. 2109–2120, at p. 2218 ff. For an interesting overview of other countries, especially Germany and the UK, see Mulder, "Employment law" in Giliker (Ed.), *Research Handbook on EU Tort Law* (Edward Elgar, 2017), pp. 212–238.

compensation" mean for the common narrative, according to which remedies for the breach of EU law must be not only effective and proportional to the damage caused, but also dissuasive? Indeed, significant efforts have been put over time to ensure that civil liability could uphold the efficacy and effectiveness of EU law, particularly in the field of anti-discrimination law: for instance, by absolving liability from the requirement of fault, dismissing any imposition of upper limits on damages awarded asserted, and – most interestingly for the purposes of this note – excluding that compensation, where provided, could be merely nominal or symbolic.[73]

While positive in terms of effective judicial protection, the overall focus on deterrence within EU law has been at times perceived as a functional requirement which stands at odds with the traditional conception of private law tools, and especially with the compensatory function primarily attributed to torts within the majority of Member States' legal systems.[74] Against this background, requiring "full" compensation may ultimately be seen as a compromise between competing visions on the role of deterrence in EU private law.

Indeed, demanding an extra compensatory twist to the calculation of the damage, on the one hand, and ensuring that all costs and damages are covered, on the other, could be framed as two alternative strategies, leading to comparable results. In the first case, the award is elevated by factoring in circumstances external to the actual harm suffered, which count as criteria for the quantification. In the second, the award is increasing by expanding the list of "recoverable losses".

While the Court does not engage in this discussion, it appears that the preferred option is to push for strict compensation while emphasizing the exhaustiveness of the recoverable losses. This impression is reinforced by comparisons with recent decisions adopted in other fields, such as data protection law. In those cases, the ECJ ruled that liability should cover all losses and damages and that this full compensation inherently has a sufficient deterrent effect, without the need to inflate the award based on external circumstances, such as the severity of the infringement and the fault of the wrongdoer.[75]

73. Case C-14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*; Case C-152/84, *Marshall*; Case C-180/95, *Draehmpaehl* v. *Urania Immobilienservice*.

74. On the peculiar rationality of EU private law, see Michaels, "Of islands and the ocean: The two rationalities of European private law" in Brownsword et al. (Eds.), *The Foundations of European Private Law* (Hart Publishing, 2011), pp. 138–158 and with reference to compensatory remedies Leczykiewicz, "Compensatory remedies in EU law: The relationship between EU law and national law" in Giliker (Ed.), op. cit. *supra* note 72, pp. 63–93.

75. See, for instance, Case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, paras. 84–87, 102 ("Since the right to compensation provided for in Article 82(1) of the GDPR

However, if *tout le dommage, mais rien que le dommage* is the way to go, it will become increasingly important to identify what *tout le dommage* is and how circumstances related, for instance, to the severity of the wrong, may be factored in as directly impacting the harm suffered by the victim. This awareness is probably what pushes the Court to clarify that the principle according to which Member States are to lay down the detailed rules on the quantification of the award, also means that, despite being free to decide which consequences judges should derive from the discrimination resulting from a deliberate act of the competent body, those rules "cannot adversely affect the very substance of that reparation".[76] Member States are hence not bound to set rules that take elements such as the severity of the infringement into consideration, but if they do, they may not lower the award in a way that frustrates the substance of the reparation. Hence, *TGSS* links back to cases like *Van Colson*, *Feryn* and *Asociaţia Accept*,[77] which, in other fields of equality law, said that compensation could not be merely symbolic or nominal. From a practical point of view, it also prevents questions raised for instance in data protection law, where infringers appealed to the limited degree of fault to argue for a lower quantification of the damage.[78]

4.5. *Full compensation – what does it mean?*

As anticipated in the previous sections, the approach adopted by the Court puts increasing pressure on achieving full compensation. Indeed, *TGSS* affirms that, in circumstances such as the one at stake there, the victim of discrimination "must also be able to benefit, in addition to the retroactive recognition of the pension supplement at issue, from . . . adequate financial

does not have a dissuasive, or even punitive, function, as envisaged by the referring court, the gravity of the violation of that regulation which caused the damage in question cannot affect the amount of compensation awarded under this provision, even if the damage involved is not material but rather immaterial. It follows that this amount cannot be set at a level that goes beyond full compensation for that damage" – para 60, translated by the author from Italian), and Case 687/21, *MediaMarktSatur*, EU:C:2024:72, para 54 ("having regard to the compensatory function of the right to compensation laid down in Article 82 of the GDPR, that provision does not require taking into consideration the severity of the infringement of that regulation, that the controller is presumed to have made, while setting the amount of the compensation allocated for non-material damage under that provision, but requires that that amount is set in a way that the damage actually suffered as a result of the infringement of that regulation is compensated in full").

76. Judgment, para 61.

77. Case C-14/83, *Von Colson*; Case C-54/07, *Feryn*; Case C-81/12, *Asociaţia Accept*, EU:C:2013:275.

78. Case C-687/21, *MediaMarktSatur*, paras. 51–55.

compensation in that it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full".[79]

This clarification is essential, as it further ensures effective judicial protection and contributes to the proper construction of the judicial route as instrumental to the realization of one's right, and not as a filter to enforcement.

However, the concrete significance of the Court's ruling is open to competing interpretations. As per the reimbursement of judicial costs, the wording of the judgment seems to push for a narrow interpretation, imposing the payment of courts' costs and lawyers' costs only in the context of the claim, namely, when the latter expenses are caused by a form of procedural discrimination like the one realized by INSS. Indeed, the ruling explicitly links the reimbursement of these costs to the circumstance in which access to court is presented not as an ordinary venue of legal protection, but as essential to sidestep the authority which failed to remedy the original infringement in the first place, imposing a judicial pathway to have the entitlement recognized.

However, the very logic of full restoration may require covering judicial costs regardless of the type of discrimination concerned, any time in which judicial proceedings are indeed commenced because of prohibited unequal treatment. Hence, a broad reading of the judgment would include these costs in the award for damages independent of the situation concerned, as long as the judicial route is activated as a venue of protection against discriminatory behaviours.

Judicial costs aside, one cannot help but wonder what other heads of damages and losses – if concretely suffered – would need to be covered to make compensation full. Without seeking to give any comprehensive answer to this question, it is worth highlighting how, in a case like *TGSS*, we might doubt that redress would be fully realized without awarding the victim the interests accrued on the belated benefit, either as part of the original entitlement or loss to be compensated.

Indeed, in *Sutton*[80] – the only prior ruling on the interpretation of Article 6 of Directive 79/7 – the ECJ stated that retroactive award of the invalid care allowance constitutes a mere "reintegration" equal to a *restitutio in integrum*. On this basis, it dismissed the analogical application of *Marshall*, where interests on the salaries not paid due to a discriminatory dismissal were, instead, granted.[81]

Interestingly, in *TGSS*, the Court does not refer to *Sutton*, not even in passing. This could depend on the loose connection between the factual background of the two cases, as – to the best of our knowledge – in *TGSS* no

79. Judgment, para 54.
80. Case C-66/95, *R* v. *Secretary of State for Social Security, ex parte Sutton*.
81. Case C-152/84, *Marshall*.

request was made concerning the payment of interests accrued until the belated recognition of the benefit.

However, the doubts raised against the fairness of the solution in *Sutton* appear stronger than ever.[82] Moreover, the Court's reasoning stresses how the inclusion of judicial costs would be relevant to the extent that the latter are not covered by the retroactive recognition of the benefit from which the male applicant has been irregularly precluded, since "such retroactive recognition makes it possible, in principle, to restore equal treatment as regards the substantive conditions for the grant of the pension supplement [but] it is not appropriate for the purpose of remedying the harm resulting . . . from the discriminatory nature of those procedural conditions.[83]

As previously discussed, this statement says that full restoration could not occur solely via the award of the benefit if other losses and damages – here, the costs and fees associated with bringing judicial proceedings to overcome INSS's procedural discrimination – are not adequately covered. Doubts have already been expressed above about whether the different nature of the measures – one restitutionary, the other compensatory – can really justify a different treatment as per the accrual of interests. However, assuming that the principle in *Sutton* is not overruled anytime soon, recognizing that procedural discrimination exposes the victims to further delays and costs which need to be accounted for in the award for damages, may lead to a "distinguishing" of *Sutton*, as national judges may be asked to treat any further delay in the payment of benefits caused by the procedural discrimination as a *discrimen* between restitution and compensation. In this sense, they could allow interests to accrue from the moment when the competent body should have "levelled up" the treatment, and frame their missed payment as a specific loss to be compensated.

4.6. *Approximating remedies across anti-discrimination law*

A final brief point before moving to the conclusion.

Section 4.1 above has highlighted how Directive 79/7 has been mostly left behind in the proceduralization of EU anti-discrimination law. In this sense, *TGSS*' contribution is particularly important, as it brings the idea of effective judicial protection into a directive whose remedial provision remained underdeveloped compared to other recently enacted or updated provisions. However, the case's positioning vis-à-vis the vast case law of the Court also casts a different light on the analysis of the ruling, leaving the reader

82. See, for instance, the comment to the case made by van Casteren, 35 CML Rev. (1998), 481–492.

83. Judgment, para 53.

wondering whether the principles affirmed therein are indissolubly linked to the specificity of the case, whether they stand as generally applicable within the scope of application of Directive 79/7, or whether they may have broader relevance, setting a precedent which would constrain, *mutatis mutandis*, other fields of EU equality law. For instance, it has been highlighted above how the recognition of the specific form of *procedural* discrimination is given in the context of a very specific breach of Directive 79/7, but could equally apply to any other cases, linked neither to recalcitrant behaviour of competent authorities nor to the field of state social security.

Likewise, the text above discussed how requiring the reimbursement of courts' costs and lawyers' fees could have different scopes of application. In one version, both the wrong and the remedy would be specific to when judicial redress is necessary to sidestep the competent authority's refusal to implement EU law by imposing the judicial route for obtaining recognition of the entitlement. In another version, covering these expenses could be considered to be required irrespective of the type of discrimination (substantive or procedural), at any time in which judicial proceedings are indeed commenced because of the discriminatory behaviour. Moreover, it is open to discussion whether the judgment fits into some common understanding of compensatory damages in EU anti-discrimination law, or if, rather, it means facing a compartmentalized framework, where each directive has its own remedies, with limited repercussions on the neighbouring silos.

While a definitive answer is impossible at this stage, some features of *TGSS* seem to support the first option. Not only is the substantive solution adopted by the Court in line with what is required both in other seminal cases and newer directives, but the principles and precedents developed in the interpretation of other directives are presented as applicable *directly*, not merely by analogy.[84] However, the specific idea of full compensation possibly being the minimal required threshold of compensation might be at odds with some variations in the remedy's framework, especially when prior limitation on the ceiling of such damages is expressly excluded.

84. See e.g. the reference to Case C-271/91, *Marshall* and Case C-407/14, *Arjona Camacho* in paras. 50–51 of the Judgment, which are then identified again in para 60 as the case law imposing the "full compensation" which national courts, in the case at hand, are called on to realize.

5. Concluding remarks

To summarize, this note has highlighted five fundamental elements of *TGSS*. First, the ruling introduces a much-welcomed notion of procedural discrimination, which allows national courts to consider the full consequences of persistent infringements. It reinforces both the competent institutions' obligation to immediately level up the treatment when faced with discriminatory measures, as well as the role of effective judicial protection as a self-standing fundamental right in the EU.

Second, the judgment expands the role of liability within the range of effective, dissuasive, and proportionate measures which Member States must adopt to combat discrimination. On the one hand, it requires that compensation, without indulging in punitive awards, be effective and deterrent by ensuring that all relevant losses and costs are covered. On the other hand, it includes judicial costs and lawyers' fees as integral components of the award, hence adding an important element to the definition of a European notion of anti-discrimination damages, at least in cases of procedural discrimination.

Third, the case channels effective judicial protection requirements into a measure left behind against the general proceduralization of anti-discrimination law, contributing to the updating of a scattered system where modernization seemed to have followed a two-speed approach.

Fourth, the contributions made by *TGSS* have a potentially broad scope of application, thanks to the specific decisional tool used by the Court. For instance, the recoverability of judicial costs and damages is traced back to the Directive and not to the principles of equivalence and effectiveness, making it required as a matter of a "harmonized" EU remedy. Likewise, the extensive use of cases and principles developed in other sub-fields of equality law possibly signals a willingness to further approximate remedies and procedures across the various equality directives.

Last but not least, many argumentative choices underpinning the ruling shed further light on the ECJ's approach to reviewing national remedies and procedures, contributing to our understanding of this field. Indeed, the Court's choices to frame judicial costs and lawyers' fees as a substantive, rather than a procedural, matter, and to consider it directly "harmonized" under Article 6 of the Directive, seem to be strategically driven by the availability of decisional tools – primacy, instead of equivalence and effectiveness – which not only allow a more stringent review, but also imply a less contested allocation of competences in the multilevel EU system

In conclusion, *TGSS* stands not only as a pivotal remedial case but also as a potential precedent influencing the understanding of damages, procedural

discrimination, and the evolving dynamics of EU anti-discrimination law, on which further pronouncement will likely be prompted soon.

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