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Substantive relief and compensatory relief in EU law: a step backwards in terms of effectiveness of national remedies?

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SUMMARY: 1. Preliminary considerations. – 2. The relationship between substantive relief and compensatory relief. – 3. *Res judicata*, substantive relief and compensatory relief. – 4. The *ex ante* exclusion of substantive relief in the *Cairo Network* judgment. – 4.1. The limits and broader implications of the *ex ante* preclusion of substantive relief. – 5. The non-linearity of compensatory relief. – 6. Concluding remarks on the evolution of the Court of Justice's case-law.

1. *Preliminary considerations*

The relationship between substantive relief and compensatory relief constitutes a delicate and significant issue within the system of judicial protection in the European Union legal order. This matter engages the principle of effectiveness, which pertains to both the rights conferred on individuals by EU law and the corresponding judicial protection,[1] which today

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[1] Cf., *ex multis*, A. ARNULL, *The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?*, in *ELR*, 2011, p. 51; M. E. BARTOLONI, *La natura poliedrica del principio della tutela giurisdizionale effettiva ai sensi dell'art. 19, par. 1, TUE*, in *DUE*, No. 2, 2019, p. 245; M. BOBEK, *Why There Is No Principle of "Procedural Autonomy" of the Member States*, in B. DE WITTE, H. MICKLITZ (eds.), *The European Court of Justice and the Autonomy of Member States,* Bruxelles, 2012, p. 305; M. BONELLI, M. ELIANTONIO, G. GENTILE (eds.), *Article 47 of the EU Charter and Effective Judicial Protection*, Vol. 1 (The Court of Justice's Perspective), Oxford, 2022; E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, in *DUE*, No. 3, 2013, p. 659; M. CONDINANZI, *Art. 47*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, II ed., Padova, 2014, p. 1770; F. FERRARO, D.P. DOMENICUCCI, A. CIRCOLO, *I principi di base del diritto processuale dell'Unione*, in R. MASTROIANNI (a cura di), *Il diritto processuale dell'Unione*, Torino, 2025, p. 93; K. GUTMAN, *Article 47: The Right to an Effective Remedy and to a Fair Trial*, in M. BOBEK, J. ADAMS-PRASSL (eds.), *The EU Charter*

finds express recognition in Articles 19(1), second subparagraph, TEU and 47 of the Charter of Fundamental Rights of the European Union and which the Court of Justice has recognized as a fundamental criterion for assessing the adequacy of national remedies, with an aim to «fully safeguarding the position of individuals».[2]

For the purposes of this contribution, "substantive relief" (also known as "direct protection") refers to remedies aimed at securing for the individual the very benefit or legal position guaranteed by EU law, including annulment, disapplication, restitution or restorative relief. By contrast, "compensatory relief" (or "damages") refers to remedies aimed not at securing the substantive benefit itself, but at providing monetary compensation for the damage resulting from the breach or denial of rights conferred by EU law.[3]

Although arguably interdependent and closely connected, the relationship between the principle of effectiveness of EU law and the principle of effective judicial protection remains controversial.[4] It is unclear whether the two coincide, in whole or in part, or diverge. Even among those who believe they are distinct, opinions vary considerably, as some consider the former to be superordinate to the latter, while others argue that effective judicial protection has attained autonomous status.[5] What may be affirmed is that the general principle that rights deriving from EU law must be effective is realised through

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of Fundamental Rights in the Member States, London, 2020, p. 371; S. PRECHAL, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?*, in C. PAULUSSEN, T. TAKACS, V. LAZIĆ, B. VAN ROMPUY (eds.), *Fundamental Rights in International and European Law. Public and Private Law Perspectives*, The Hague, 2015, p. 143; A.M. ROMITO, *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali*, Bari, 2015; M. ROSS, *Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?*, in *ELR*, 2006, p. 476; G. TESAURO, *Art. 19 TUE*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, II ed., Milano, 2014, p. 195.

[2] Opinion of Advocate General Tesauro of 28 November 1995, Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, point 17.

[3] For a general overview, see D. LECZYKIEWICZ, *Compensatory Remedies in EU Law: The Relationship between EU Law and National Law*, in P. GILIKER (ed.), *Research Handbook on EU Tort Law,* Cheltenham, 2017, p. 63.

[4] See S. PRECHAL, R. WIDDERSHOVEN, *Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship*, in *Today's Multilayered Legal Order: Liber Amicorum in Honour of Arjen W.H. Meij*, Zutphen, 2011, p. 283; M. ROSS, *op. cit.*, p. 476. On the general relationship between rights and remedies in the enforcement of EU law before national courts, see W. VAN GERVEN, *Of Rights and Remedies in the Enforcement of European Community Law Before National Courts*, in *Collected Courses of the Academy of European Law*, The Hague, 2001, p. 274; M. RUFFERT, *Rights and Remedies in European Community Law: A Comparative View*, in *CMLR*, 1997, p. 327.

[5] In these terms, see A.M. ROMITO, *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali,* cit., p. 75.

effective judicial protection and, simultaneously, that effective judicial protection secures the full implementation of that same principle (the effectiveness of EU law). Such interdependence is salient for the present analysis, insofar as the progressive compression of substantive relief in favour of compensatory relief in certain contexts affects not only the effectiveness of judicial protection in the strict sense, but also reverberates on the broader principle of effectiveness of EU norms and risks compromising their full implementation.

That being said, the issue that arises, and that constitutes the common thread of the following analysis, concerns the evolution of the Court of Justice's case-law regarding the interaction between these two levels of national protection. As a general rule, the Court of Justice has precluded individuals from obtaining the substantive relief to which they would have been entitled under EU law where an administrative decision has become final or a judgment has acquired the force of *res judicata*, in order to safeguard legal certainty and the stability of legal relationships.

Such exclusion of substantive relief has undergone further extension, as the Court has progressively recognised the legitimacy of additional preclusive mechanisms inherent in national procedural systems. In such cases, compensatory relief is called upon to perform a residual compensatory function of closure of the system, providing a residual avenue of redress, subject to the conditions governing liability. Yet, it is crucial to analyse whether such compensatory function is effectively capable of guaranteeing an adequate level of protection, or whether, on the contrary, relegating the individual to compensatory relief alone does not represent a step backwards in terms of effectiveness. This is all the more pertinent given that the case-law on the liability of Member States in damages vis-à-vis individuals has not developed in a coherent manner, proving, in practice, rather restrictive.

The following analysis aims, without any claim to exhaustiveness, to examine the coordinates within which the complex relationship between substantive relief and compensatory relief is articulated, with particular reference to breaches of EU law attributable to public authorities, highlighting the tensions that emerge, in light of the Court of Justice's case-law, between respect for the procedural autonomy of Member States and the need to guarantee the effectiveness of rights derived from EU law and of the judicial protection of such rights.[6] An in-depth examination of this relationship makes

[6] See A. BIONDI, *The Principle of National Procedural Autonomy: Shadows and Lights*, in *RCE*, No. 1, 2026, p. 1.

it possible to grasp a particularly problematic and dynamic aspect of EU law, in which the ongoing search for an equilibrium point between this supranational legal order and national legal systems is reflected.

2. *The relationship between substantive relief and compensatory relief*

At the outset of this inquiry, it is appropriate to clarify certain fundamental concepts relating to substantive protection and compensatory relief, in order to delineate with greater precision the framework within which their relationship develops.[7]

Substantive protection comprises a set of remedies aimed at securing the individual the substantive benefit recognised by EU law: for instance, annulment of a national administrative act conflicting with a European norm, disapplication of an incompatible domestic provision, or restitution of sums unduly levied in breach of EU law. In practice, such relief is achieved through consistent interpretation and disapplication, availing itself, where appropriate, of the dialogue with the Court of Justice via Article 267 TFEU or of the involvement of Constitutional Courts. These instruments aim at restoring European legality as a primary matter, ensuring that the right-holder obtains exactly what EU law confers upon him.

By contrast, compensatory relief operates on a qualitatively different level and, in certain respects, a subsidiary one vis-à-vis substantive relief: it does not aim to restore to the individual the substantive benefit to which he is entitled under EU law, but rather to compensate in monetary terms the prejudice arising from its non-attribution. On that basis, substantive protection has sometimes been characterised as "primary" and compensatory relief as "secondary", since monetary compensation intervenes only where primary measures fail to restore the person's legal position, although, as the paper will later highlight, this taxonomy is not entirely accurate.[8]

The tendentially subsidiary nature of compensatory relief may be seen from a twofold perspective. Chronologically, compensatory relief typically intervenes at a subsequent stage, once the infringement of the right deriving from EU law has already been irreversibly consummated and the restoration of the situation in conformity with EU law is no longer materially achievable.

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[7] On the different forms of protection and redress available for the harm suffered, see, generally, W. VAN GERVEN, *Of Rights, Remedies and Procedures*, in *CMLR*, Vol. 37, 2000, p. 501.

[8] See, to that effect, the Opinion of Advocate General Kokott of 4 September 2025, C-408/24, *Austrian Airlines,* point 27.

Functionally, compensatory relief comes into play notably when recourse to substantive relief, although abstractly conceivable, can no longer be pursued to useful effect, whether due to the expiry of procedural time-limits, the formation of *res judicata* on a decision contrary to EU law, or the operation of preclusive mechanisms provided for by national procedural legislation. Damages attributable to the State, in this perspective, represent the residual instrument through which the legal order nonetheless guarantees redress for the individual harmed by a breach of EU law.

The principles set out by the Court of Justice in the landmark judgment in *Francovich,*[9] and subsequently refined in *Brasserie du Pêcheur and Factortame,*[10] have delineated a regime of Member State liability which, although subject to certain conditions (the rule of EU law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious, understood as a grave and manifest infringement, and there must be a direct causal link between that breach and the loss or damage) is established as a principle inherent in the system of the Treaties.[11]

Nonetheless, to avoid possible interpretative misunderstandings, certain clarifications are required regarding the relationship between primary and secondary protection.

First, there is no requirement that an action for substantive relief must precede the action for damages, or at least the case-law of the Court of Justice has never expressly ruled to that effect. The Court has merely recognised that the national court may verify whether the injured party has shown reasonable diligence to avoid the damage or to limit its extent. In this perspective, EU law does not, in principle, preclude national legislation that excludes compensation for damage the injured party failed, intentionally or negligently, to avoid by exercising the remedies at his disposal. However, such legislation is compatible with EU law only on condition that recourse to those remedies does not give rise to excessive difficulties and can reasonably be required of the injured party.[12] It would indeed be contrary to the principle of effectiveness to

[9] Court of Justice, 19 November 1991, Joined Cases C-6/90 and C-9/90, *Francovich and Others*. See D. RUIZ-JARABO COLOMER, *Once upon a time* - Francovich: *from fairy tale to cruel reality?*, in M. P. MADURO et al. (eds.), *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, 2010, p. 405.

[10] Court of Justice, 5 March 1996, Joined Cases C-46/93 and C-48/93, *Brasserie du pêcheur and Factortame*, with a case note by E. DEARDS, Brasserie du Pêcheur: *Snatching Defeat from the Jaws of Victory?*, in *ELR*, 1997, p. 620.

[11] In general terms, on State liability for infringement of EU law, see F. FERRARO, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione*, Milano, 2012.

[12] Court of Justice, 28 June 2022, C-278/20, *Commission/Spain*, paras 123 and 124.

require injured parties systematically to exhaust all available remedies, even where this would cause excessive difficulties or could not reasonably be expected of them. It follows that the reasonable diligence of the injured party cannot be interpreted as necessarily subordinating compensatory relief to the prior exercise of substantive relief.

More generally, it may be considered that the regime of Member State liability in damages is aligned with that of the non-contractual liability of the Union, which has rejected any prerequisite nature of the action for annulment vis-à-vis the action for damages. This gives effect to the principle that the conditions governing the two forms of liability (of the Member States and of the Union) must not diverge in the absence of a specific justification, «since the protection of the rights which individuals derive from Community law cannot vary depending on whether a national or a Community authority is responsible for the damage».[13]

Second, Member State liability in damages for breach of EU law is not necessarily an alternative to substantive relief, as the former may also accompany and prove complementary to the latter.[14] In this sense, an action for damages brought by injured parties constitutes a remedy of a general character which is independent of the direct effect of the norm infringed and may be used for damage not covered by the direct action. It follows that, where substantive relief cannot fully redress the prejudice suffered by the individual, compensatory relief is called upon to perform an integrative function, ensuring coverage of those components of the damage that fall outside the restitutory scope of substantive relief and thereby guaranteeing the full effectiveness of the protection of rights conferred by the EU legal order.

Third, certain judgments of the Court of Justice appear to narrow the scope of compensatory relief,[15] characterising damages as an "alternative" or "consolatory" remedy compared with the "full" direct effect of an unimplemented directive. Similarly, certain Opinions of Advocates General consider «the restoration of the patrimonial content a *minus* compared with the hypothesis of substantive relief which remains the optimal means of

[13] *Brasserie du pêcheur and Factortame*, cited above, para. 42.

[14] A thorough and detailed analysis of the issue can be found in the Opinion of Advocate General Tesauro in the *Brasserie du Pêcheur* case, where it is clearly highlighted that «the principle of the State's financial liability must be applied as a remedy which is both alternative and additional to substantive protection; consequently, it must be applied in the event of infringements both of provisions without direct effect, in the sense of provisions which may not be directly relied on before the national courts, and of provisions which may be so relied on» (point 34).

[15] See Court of Justice, 25 February 1999, C-131/97, *Carbonari and Others*, para. 53.

protection».[16] In reality, the effectiveness of compensatory relief cannot be resolved in general terms; rather, a case-by-case assessment is required. The aforementioned approaches do not give adequate consideration to the heterogeneity of concrete situations, nor to the empirical fact that compensatory relief does not necessarily represent a *minus*, since for the interests of the injured party it may also assume a value superior or equivalent to other forms of protection. In some cases, patrimonial protection may better satisfy the needs of the injured party, for example, where the substantive benefit originally due has lost its utility by reason of the passage of time, or where reinstatement in kind would be excessively onerous or difficult to implement in practice, such that monetary compensation ultimately represents the most effective and satisfactory form of protection in concrete terms.

3. Res judicata*, substantive relief and compensatory relief*

Recognition of the principle of State liability for decisions of courts of last instance does not in itself entail calling into question the authority of a judgment having the force of *res judicata.*[17] Indeed, the action for damages against the defaulting Member State and the various instruments of substantive relief operating within national legal orders cannot be placed on the same footing.

However, the action for damages has assumed increasing significance among the remedies available to individuals precisely in view of the difficulty of calling into question at national level the authority of *res judicata* that is not in conformity with EU law.[18]

EU law does not require the reopening of final judgments or definitive administrative decisions unless national law permits it or specific obligations arising under EU law require it in the exceptional circumstances identified by

[16] See Opinion of Advocate General Léger of 8 April 2003, C-224/01, *Köbler.*

[17] Court of Justice, 30 September 2003, C-224/01, *Köbler,* paras 38 and 39. See also, 16 October 2019, C-189/18, *Glencore Agriculture Hungary*, para. 45; 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, para. 185 et seq. On this topic, see the analysis by A. TURMO, *National Res Judicata in the European Union: Revisiting the Tension between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law*, in *CMLR*, Vol. 58, 2021, p. 361.

[18] Cf., *inter alia*, H. C. H. HOFMANN, *A Commentary on the Right to an Effective Remedy in the Case Law of the Court of Justice*, in *Law Working Paper Series Paper University of Luxembourg*, No. 2019-016, p. 23.

the Court.[19]

This gap also derives from the fact that, in the EU legal order, there exists no direct remedy aimed at ensuring compliance with EU law by national courts, since the proposal contained in the 1984 Draft Treaty (the so-called Spinelli draft) that, in Article 43, entitled «Judicial review», entrusted the Court of Justice with the task of acting as a Court of Cassation «against national decisions rendered at last instance which refuse to make a preliminary reference to it or fail to comply with a preliminary ruling delivered by the Court», was ultimately not adopted.

Faced with this difficulty, the Court of Justice merely requires that the procedural conditions laid down by national legislation for breaches of EU law must not be less favourable than those governing analogous remedies available in respect of situations arising under domestic law (principle of equivalence), and must not render the attainment of compensation impossible or excessively difficult (principle of effectiveness).

EU law does not, therefore, oblige Member States to establish remedies other than those already provided for under domestic law, unless it follows from the systematic structure of their national legal order that two pathological situations arise: the first occurs where no judicial remedy exists that permits, even incidentally, the safeguarding of the rights which individuals derive from EU law; the second arises where the only way for an individual to gain access to a court is to commit an infringement of the law.[20]

It follows that national courts of last instance are competent to have the final word, both on the facts and on the law, in the dispute at issue,[21] so that EU law does not generally require a further appeal against their decisions, provided that the national system affords effective judicial protection, without prejudice to the specific limits on finality examined below.[22]

In this regard, it has been held that EU law does not preclude a provision of domestic law which, according to national case-law, does not allow an

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[19] See Section 5 below. For administrative decisions, see Court of Justice, 13 January 2004, C-453/00, *Kühne & Heitz*: the duty to review arises under cumulative conditions, including a national-law power to reopen the decision, and does not itself entail reopening the final judicial judgment.

[20] See, in particular, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* cited above, para. 143; Court of Justice, 21 December 2021, C-497/20, *Randstad Italia*, para. 62.

[21] *Randstad Italia*, cited above, para. 64.

[22] Cf. C. SCHEPISI, *Il tormentato rapporto tra il Consiglio di Stato e la Corte di giustizia e la revocazione per contrasto con il diritto dell'Unione (brevi riflessioni a margine della sentenza Hoffmann-La Roche),* in *Lavoro Diritti Europa*, No. 3, 2022.

individual to challenge before the Court of Cassation, on grounds relating to jurisdiction, the conformity with EU law of a judgment of the supreme administrative court.[23] The limitation of the grounds which may be raised in proceedings before the Court of Cassation has not been found to be contrary to the principles of equivalence and effectiveness.

Consistent with the case-law of the Court of Justice, the need to preserve the authority of *res judicata* and, more generally, the procedural autonomy of the Member States has prevailed. As a general rule, EU law does not require a national court to disapply domestic procedural rules conferring the force of *res judicata* on a decision, even where doing so would make it possible to remedy a breach of EU law.

Similarly, the Court of Justice has ruled on the possible use of the remedy of revocation where the Council of State has failed to take into account the interpretation of EU law provided by the Court of Justice in response to its request for a preliminary ruling, holding that in such a case the preclusion of the extraordinary remedy is not contrary to EU law, in particular Articles 4(3) and 19(1) (second indent) TEU and Article 267 TFEU, read in the light of Article 47 of the Charter of Fundamental Rights.[24] Member States are entitled to limit the possibility of seeking the revocation of a judgment of a court of last instance to exceptional and exhaustively regulated situations. It follows that the preclusions arising from Italian legislation, held to be legitimate by the Court of Justice, inevitably shift attention to the action for damages, which may provide redress for damage caused by a decision of a court of last instance contrary to EU law, without constituting an appeal against that decision or removing its *res judicata* effects, without prejudice to the possibility of

[23] *Randstad Italia*, cited above, para. 58. See, in this regard, F. AULETTA, *Ammissibilità del ricorso per "motivi attinenti alla giurisdizione" ed effetti della decisione della Corte di cassazione sulla questione pregiudiziale del giudice speciale "tenuto" al rinvio alla Corte di giustizia*, in *FI*, No. 3, 2021, I, p. 1025; R. BARATTA, *Le pregiudiziali "Randstad" sull'incensurabilità per cassazione della violazione di norme europee imputabile al giudice amministrativo*, in *EJ*, No. 1, 2021, p. 167. See also interviews conducted by R. CONTI with F. FRANCARIO, G. MONTEDORO, P. BIAVATI, R. RORDORF, E. CANNIZZARO, *La Corte di Giustizia risponde alle S.U. sull'eccesso di potere giurisdizionale. Quali saranno i "seguiti" a Corte Giust., G. S., 21 dicembre 2021 - causa C-497/20, Randstad Italia? - 5)*, in *giustiziainsieme.it*, 10 January 2022.

[24] Court of Justice, 7 July 2022, C-261/21, *F. Hoffmann-La Roche*, esp. para. 44, on which see L. COUTRON, *L'impossible évolution du renvoi préjudiciel en interprétation en un mécanisme de contrôle de la correcte application d'un précédent arrêt préjudiciel*, in *RTDE*, No. 4, 2023, p. 714; B. NASCIMBENE, P. PIVA, *Rinvio pregiudiziale e garanzie giurisdizionali effettive. Un confronto fra diritto dell'Unione e diritto nazionale. Commento all'ordinanza n. 2327/2021 del Consiglio di Stato*, in *giustiziainsieme.it*, 30 July 2021.

requesting the Commission to initiate infringement proceedings or bringing an application before the ECtHR.[25]

The concern that emerges from the case-law of the Court of Luxembourg is not so much to remedy immediately and systematically an unlawful decision which has become final, as to circumscribe its effects, so as to prevent the breach of EU law from being perpetuated in further national proceedings or administrative procedures. It follows that the protection of the rights of individuals may prove recessive vis-à-vis the need to safeguard the authority of *res judicata* and, more generally, the predictability and certainty of the law. The principal objection to overcoming *res judicata* lies in the principle that no legal system can tolerate that the validity of legal relationships be called into question *sine die*. In this perspective, the interested party also bears the burden of acting promptly to secure the judicial protection of his rights, it being necessary to balance the safeguarding of individual legal positions with the principle of legal certainty. Nonetheless, where national procedural rules allow compliance with EU law, in accordance with the principles of equivalence and effectiveness,[26] the protection of the rights of individuals must be guaranteed, whether by preventing the formation of *res judicata* or by intervening on a decision that has already become final.[27]

A similar approach can be seen in the recent judgment of the Court of Justice in *Casotta,*[28] concerning the rescission of a final judgment pursuant to Article 629-bis of the Code of Criminal Procedure, an extraordinary remedy aimed at obtaining the annulment of a final judgment of conviction rendered *in absentia*. In that judgment, the Court held that Articles 8 and 9 of Directive (EU) 2016/343, read in the light of Articles 47 and 54 of the Charter, do not preclude national legislation which, according to the interpretation of domestic case-law, requires the court to grant the extraordinary remedy in the absence of direct proof of the accused's voluntary evasion of knowledge of the proceedings, thereby recognising the faculty of Member States to guarantee a level of protection of the right of the accused to be present at his own trial higher than that required by EU law. In particular, since Directive (EU)

[25] See European Court of Human Rights, 16 December 2025, Application. No. 34701/21, *Gondert/Germany*.
[26] It is well established that the procedural rules governing actions intended to safeguard the rights of individuals must not be less favourable than those relating to similar domestic actions (principle of equivalence) nor render the exercise of rights conferred by EU law impossible or excessively difficult (principle of effectiveness). See already above.
[27] Court of Justice, 10 July 2014, C-213/13, *Pizzarotti*.
[28] Court of Justice, 23 April 2026, C-24/26 PPU, *Casotta*.

2016/343 lays down common minimum rules, Member States retain the faculty to extend the rights provided for therein in order to ensure a higher standard of protection, provided that this does not compromise the level of protection afforded by the Charter, as interpreted by the Court, nor the primacy, unity and effectiveness of EU law.[29] The judgment in *Casotta* expressly recognised that Italian legislation, insofar as it requires direct proof of the accused's voluntary evasion of knowledge of the proceedings, sets a level of protection above the minimum threshold established by secondary EU law, without that higher level of national guarantee being regarded as incompatible with the EU legal order. The decision thus confirms the tendency of the Court of Luxembourg to safeguard, also in criminal matters, the procedural autonomy of the Member States in shaping extraordinary remedies against *res judicata*, while reaffirming that the minimum standard of protection laid down by the directive may not in any event be disregarded.[30]

4. *The* ex ante *exclusion of substantive relief in the* Cairo Network *judgment*

The Court of Justice's case-law has begun to recognise the lawfulness of national rules that exclude substantive relief *ex ante*, allowing only an award of damages. This development is of considerable systematic significance, as it marks a departure from the idea that reinstatement in kind constitutes the natural and necessary remedy for the protection of rights conferred by the EU legal order. If in the cases examined in the preceding section, the preclusion of substantive relief found its justification in the need to safeguard the authority of *res judicata* and the stability of final decisions, the preclusion at issue here operates on a qualitatively different level: it is laid down by the national legislature in advance and on a general basis, irrespective of the formation of any *res judicata*, excluding *ab origine* the possibility for the individual to obtain the substantive benefit to which EU law would entitle him.

The judgment in *Cairo Network* deserves particular attention in this regard.[31] It concerns national legislation which, in the context of procedures

[29] Court of Justice, 26 February 2013, C-399/11, *Melloni*.

[30] For comparison, see *Dorigo v. Italy* (Application No 33286/96), Committee of Ministers, Interim Resolution DH (99) 258, 15 April 1999.

[31] Court of Justice, 11 September 2025, Joined Cases C-764/23, C-765/23 and C-766/23, *Cairo Network, Europa Way and Persidera*. See F. MARTUCCI, K. LAURENT, *Electronic communications: The Court of Justice of the European Union clarifies the effectiveness of judicial remedies brought against acts adopted in the context of the reconfiguration of frequencies for the use of digital terrestrial television frequencies and the powers held by the national regulatory authority* (Cairo Network e.a.), in *Concurrences*, No. 12, 2025, p. 1; C.

for the assignment of radio frequency use rights for digital terrestrial television broadcasting, excludes reinstatement or specific performance in the event of annulment of the acts and measures adopted, limiting interim relief to payment of a provisional sum and final relief to pecuniary compensation alone. In that judgment, the Court of Justice recognised that the award of pecuniary compensation, together with any payment of a provisional sum, is not in itself capable of ensuring that the unlawful situation resulting from an irregular assignment of radio frequency use rights is effectively called into question, nor that the applicant operator may obtain the use rights to which he would be entitled.

Nonetheless, the Court distinguished the case at hand from that which was the subject of the judgment in *Prezes Urzędu Komunikacji Elektronicznej and Petrotel,*[32] on three grounds. First, in *Prezes* the question raised was not whether Article 4(1) of the Framework Directive required the national court to have the power to annul the decision of the NRA, but solely whether that provision precluded such a power from being recognised by national legislation; in *Cairo Network*, by contrast, the referring court invited the Court to assess whether such annulment proved necessary in the circumstances of the main proceedings. Second, in *Prezes* the referring court had already established the necessity of annulment for the purpose of safeguarding the rights of the undertaking concerned, whereas in *Cairo Network* the Court was called upon to rule precisely on whether such annulment was indispensable in a situation such as that of the main proceedings. Third, *Prezes* concerned the modalities of judicial review of a decision relating to the adjustment of tariffs connected to a mobile telephone network, the effects of which are of a different nature from those produced by a decision relating to the assignment of radio frequency use rights; hence, the competent court's powers cannot be presumed to be analogous in the two settings.

On those premises, the Court proceeded to an articulated balancing of the interests at stake. In particular, it noted that the annulment of an act relating to the assignment of radio frequency use rights or the lasting suspension of its effects may produce significant consequences on the use of radio frequencies, risking hindrance to the "refarming" of the 700 MHz frequency band, required by Decision (EU) 2017/899, and to prejudice the proper functioning

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MASSA, *L'effettività della tutela giurisdizionale europea del pluralismo dei media*, in *EJ*, No. 2, 2026.

[32] Court of Justice, 13 October 2016, C-231/15, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel*.

of 5G in the Union. Similarly, a measure of specific performance, consisting in the direct reassignment of use rights, could disrupt the continuity of digital terrestrial television broadcasting, given the scale of the investments necessary for the operation of a broadcasting network, and could also infringe the rights of operators in good faith to whom such rights have in the meantime been assigned. In the face of such risks, the Court observed that the actions in question have the sole purpose of defending the interests of economic operators active in the audiovisual sector, interests which should normally be capable of material assessment and thus of pecuniary compensation.

On that basis, the Court reached the conclusion that «Article 4(1) of the Framework Directive, read in the light of Article 19 TEU and Article 47 of the Charter, must be interpreted as not precluding national legislation which, on the one hand, limits the effects of actions brought by economic operators against acts relating to the assignment of radio frequency use rights, in the context of the refarming of the 700 MHz frequency band, to the award of pecuniary compensation and, on the other hand, limits the scope of the interim relief pending examination of such an action to the payment of a provisional sum, provided that the modalities of such pecuniary compensation make it possible to compensate in full the damage suffered by those economic operators by reason of the application of those acts», specifying that «the award of such compensation is such as to confer effective judicial protection on the economic operators concerned only in so far as the modalities of the compensation itself make it possible to compensate in full the damage suffered by those economic operators by reason of the application of the act which the competent court has found to be unlawful».[33] The judgment thus recognises the scope afforded to Member States, in the exercise of their procedural autonomy, to shape national remedies and, in the specific context of the 700 MHz refarming, to exclude reinstatement in kind, subject, however, to an essential substantive condition: full compensation for the damage suffered by the injured party. That solution also reflects the Court's assessment of the regulatory objectives pursued, the continuity of digital terrestrial television broadcasting and the rights of operators in good faith.

The requirement of full compensation for the damage suffered, to which that solution remains subject, entails that pecuniary compensation must not be reduced to merely symbolic or partial redress, but must be capable of covering the entirety of the loss suffered, including, reasonably, loss of profits and consequential damages arising from the deprivation of the substantive benefit

[33] C*airo Network*, cited above, paras 84 and 86.

to which the applicant would have been entitled. It nonetheless remains to be verified in practice whether national courts are effectively able to ensure an assessment of damages which meets such a standard, given that the quantification of prejudice in sectors characterised by a high degree of technical and economic complexity, such as the assignment of radio frequency use rights for digital terrestrial television broadcasting, presents substantial evidentiary difficulties, with the risk that the principle of full compensation remains stated but not fully implemented.[34]

4.1. *The limits and broader implications of the* ex ante *preclusion of substantive relief*

The question of the potential extension of the *Cairo Network* reasoning to other sectors has been directly addressed by the subsequent judgment of the Court of Justice in *FIGC and CONI,*[35] concerning disciplinary sanctions consisting in a temporary inhibition from exercising professional activities imposed by a national sports association on two directors of a professional football club for having made or approved false financial and accounting declarations. The judgment is of particular significance for the present analysis, as it directly engages the question whether the *ex ante* preclusion of substantive relief, validated in *Cairo Network* for economic operators in a sector characterised by overriding objectives of general interest pursued by the Union legislature, may be transposed to situations in which a natural person directly and personally asserts a fundamental freedom of movement against a restrictive measure.

In that judgment, the Court expressly distinguished the situation at issue from that in *Cairo Network*. While acknowledging that, in the latter case, the limitation of remedies to pecuniary compensation was justified by the risk that the annulment of acts relating to the assignment of radio frequency use rights could prejudice the objectives of general interest pursued by the Union legislature and the rights of third parties in good faith, the Court held that the situation of natural persons upon whom a sports association has imposed a sanction infringing their freedom of movement under Articles 45 and 56

[34] See A. WARD, *Judicial Review and the Rights of Private Parties in EU Law*, 2nd ed., Oxford, 2007, p. 283.

[35] Court of Justice, 16 July 2026, Joined Cases C-424/24 and C-425/24, *FIGC and CONI*. See S. BASTIANON, *Autonomia dell'ordinamento sportivo, tutela giurisdizionale effettiva e principi dello Stato di diritto europeo: la sentenza della Corte di giustizia nelle cause riunite FIGC-CONI (C-424/24 e C-425/24)*, in this *Review*, No. 3, 2026, p. 1.

TFEU does not fall within such a scenario. The Court further recalled the principle, established in its earlier judgment in *Royal Football Club Seraing*,[36] that the national court must be able not only to find a breach of a fundamental freedom and to award damages, but also, where necessary, to bring to an end the infringing conduct or to annul the act constituting the infringement, in order to enable the individual to recover the exercise of his freedoms and professional activities. When the measure at issue is a sanction such as a temporary inhibition from exercising professional activities imposed on an individual, the annulment of the act introducing such a sanction is necessary to guarantee effective judicial protection.

In particular, the Court rejected the argument advanced by the Italian Government that the annulment of the sanctions could entail the annulment of penalty points imposed on the football club and thereby create lasting uncertainty as to the final standings of the national championship, observing that the questions raised concerned exclusively the situation of the individual applicants and not the club or the legitimacy of sanctions imposed upon it. In so doing, the Court confirmed that the assessment of the need for substantive relief must be conducted with reference to the position of the person who directly invokes a right of freedom of movement, and cannot be deflected by hypothetical consequences on third parties or on the broader organisational framework within which the sanction operates.

Notwithstanding that distinction, however, the Court did not arrive at a finding of incompatibility of the Italian system with EU law; instead, it delivered a conditional non-preclusion ruling. It held that Article 19(1), second subparagraph, TEU, read in conjunction with Article 47 of the Charter, does not preclude national legislation which confines the powers of the administrative court – once all instances of the sports justice system have been exhausted – to awarding pecuniary compensation, excluding both the power of annulment and interim relief, *provided that* at least the body ruling at last instance within the national sports justice system constitutes a "court or tribunal" within the meaning of EU law. The Court specified five cumulative requirements which that body must satisfy: it must be endowed with the requisite guarantees of independence and impartiality; it must be established by law as regards its existence, composition and organisation; it must exercise a genuinely judicial function; the procedure before it must respect the rights of the defence and the adversarial principle; and it must be in a position to

[36] Court of Justice, 1 August 2025, C-600/23, *Royal Football Club Seraing*, paras 95 et seq., including the discussion of effective judicial review and interim protection.

exercise effective judicial review over the sanction itself, with annulment where necessary and effective interim protection available within the system. The Court further observed, in its reasoning, that such a body must also be capable, where appropriate, of submitting a request for a preliminary ruling to the Court of Justice under Article 267 TFEU. The Court did not determine whether the Italian sports bodies satisfy those requirements, leaving that assessment to the national court. Should they not be met, the administrative court would be required to exercise full judicial review, including powers of annulment and interim protection.

The ruling is thus of considerable systematic importance for the relationship between substantive relief and compensatory relief. On the one hand, it sets a clear limit to the extension of the *Cairo Network* logic: the preclusion of substantive relief cannot be automatically transposed to situations in which a natural person directly and personally asserts a right to freedom of movement against a restrictive measure whose annulment does not entail comparable systemic consequences, such as the disruption of a Union-wide regulatory framework or prejudice to the rights of third parties in good faith. The distinction concerns the nature of the restriction and the consequences of the available remedies. The annulment remedy, far from being dispensable, is regarded as necessary to ensure effective judicial protection when an individual is deprived of the exercise of his fundamental freedoms by a restrictive sanction. On the other hand, the conditional non-preclusion structure adopted by the Court attests to its pragmatic approach: rather than declaring the national system incompatible, the Court preserves a margin for the Member State to demonstrate that effective judicial protection is already afforded within the sports justice system itself, provided that it satisfies the substantive requirements of a "court or tribunal" within the meaning of EU law. This solution confirms that the trajectory of the Court's case-law in this domain is neither linear nor unidirectional, but rather proceeds through context-sensitive assessments which calibrate the required intensity of judicial review according to the nature of the rights at stake, the gravity of the restriction, and the availability of adequate alternative remedies within the national system.

The limitations just examined must be distinguished at the level of the national system as a whole: in *FIGC and CONI*, restricting the administrative court to damages is permissible only if effective substantive and interim protection is available within the sports justice system. A further, but different, illustration is provided by Article 125 of the Code of Administrative Procedure (Legislative Decree No 104 of 2 July 2010), concerning strategic infrastructure

and productive installations under the regime referred to in Part II, Title III, Chapter IV of Legislative Decree No 163 of 12 April 2006. Subject to Articles 121 and 123, paragraph 3 provides that suspension or annulment of the award does not render ineffective a contract already concluded, leaving damages by way of monetary equivalent. It therefore concerns the contractual consequences of annulment rather than a general exclusion of the power to annul; its application must also be coordinated with the current procurement legislation and the relevant temporal rules.

This model has an EU legislative antecedent in paragraphs 6 and 7 of Article 2 of Directive 89/665/EEC, which permit, under the conditions laid down therein and subject to the ineffectiveness regime, the limitation of post-contractual remedies to damages. *INGSTEEL* further confirms that compensation must remain available for the loss of the opportunity to participate in a procurement procedure with a view to obtaining the contract, although national law governs its assessment subject to equivalence and effectiveness.[37]

The tension between substantive relief and compensatory relief finds further illustration in the case-law of the Court of Justice concerning the abusive use of successive fixed-term contracts, governed by Clause 5 of the Framework Agreement annexed to Directive 1999/70/EC. In this field, the exclusion of substantive relief – namely, the conversion of a fixed-term contract into a contract of indefinite duration – results not from the formation of *res judicata*, but from a legislative choice which, in certain sectors, excludes conversion as a particularly strong remedy for abuse. Clause 5 does not, however, confer a general EU-law right to conversion, provided that another effective, proportionate and dissuasive measure is available. In the judgment *Ministero della Giustizia and Others,*[38] the Court held that Clause 5(1) of the Framework Agreement precludes national legislation permitting the renewal of a fixed-term employment relationship for a total duration of up to sixteen years, where no provision is made for any effective and dissuasive sanction against abusive renewals. The complete absence of any sanction was found to be manifestly incapable of preventing such abusive practices.

The subsequent judgment in *Fondazione Teatro alla Scala*[39] has further refined the analysis, confirming that Clause 5 of the Framework Agreement does not impose a general obligation on Member States to provide for the

[37] Court of Justice, 6 June 2024, C-547/22, *INGSTEEL*.
[38] Court of Justice, 7 April 2022, C-236/20, *Ministero della Giustizia and Others*.
[39] Court of Justice, 29 January 2026, C-668/24, *Fondazione Teatro alla Scala*.

conversion of fixed-term contracts into contracts of indefinite duration, and that the application of different rules to a specific economic sector is not, in principle, precluded. However, where conversion is excluded, the national legal order must provide for alternative measures that are effective, proportionate and dissuasive. The Court has thus held that a system of presumed damages, coupled with the possibility of proving greater loss, may in principle constitute an effective sanction, provided that no ceiling prevents proportionate and full compensation and that the national court verifies the practical effectiveness of the measures as a whole.[40] These judgments are of considerable significance for the present analysis: they confirm that compensatory relief, where it replaces conversion, must satisfy stringent requirements of effectiveness, echoing the condition laid down in *Cairo Network* that pecuniary compensation must not be reduced to a merely symbolic or partial redress.[41]

A tendency thus emerges to prioritise the stability of acts and legal relationships to the detriment of restitutory protection, entrusting compensatory relief with a function of closure of the system.

Such an option responds to legitimate requirements of legal certainty and continuity of administrative action, which are particularly felt in strategic sectors such as the audiovisual, infrastructure and productive installations, and

[40] See Italian Constitutional Court, judgment no 71 of 12 May 2026, which declared the constitutional illegitimacy of Article 29(5) of Legislative Decree No 116/2017, insofar as it conditioned the stabilisation of honorary magistrates upon a generalised waiver of all claims arising from the prior service relationship, including rights to paid annual leave, social security and insurance cover conferred by EU law. Integrating the constitutional parameter of the right of access to justice (Article 24 of the Italian Constitution) with Article 47 of the Charter of Fundamental Rights, and drawing on the case-law of the Court of Justice, the Constitutional Court held that, while stabilisation may legitimately constitute a remedy in specific form for the abusive reiteration of fixed-term contracts, it cannot be made conditional upon a generalised renunciation of the substantive rights conferred on workers by EU law in relation to the prior employment relationship. The decision is of particular significance for the present analysis, as it illustrates that the ex ante preclusion of substantive relief cannot extend so far as to deprive the individual of the very rights that EU law confers independently of the remedy chosen to sanction the abuse. Compensatory relief and substantive relief each retain an autonomous sphere of application, and the effectiveness of the former cannot be invoked to justify the suppression of the latter. See also Court of Justice, 4 September 2025, C-253/24, *Pelavi*, on confirmation being conditional on waiver of accrued paid annual leave; and 13 May 2026, C-155/25, *Commission/Italy*, on the inadequacy of measures to prevent successive fixed-term employment abuse affecting substitute administrative, technical and auxiliary school staff. Neither judgment establishes a general right to conversion.

[41] At the same time, the case-law on fixed-term contracts reveals that, in a legislative context which imposes neither limits on duration nor conditions on renewals, the very demonstration of the abusive character of the recourse to such contracts becomes difficult, thereby undermining the practical effectiveness of the compensatory remedy.

fixed-term employment, but raises questions of considerable importance from a twofold perspective. First, neither the normative framework nor its interpretation clearly defines the conditions, requirements and limits under which a Member State may be considered entitled to exclude in advance recourse to substantive relief. In particular, uncertainty persists as to the objective criteria and the thresholds of relevance of the public interests involved that may justify such a compression, as well as the procedural guarantees and mechanisms of judicial review capable of ensuring that such exclusion does not amount to a disproportionate and generalised limitation of the individual's rights.

Second, the State's choice gives rise to frictions with the principle of effective judicial protection, insofar as the individual is systematically deprived of the possibility of obtaining the substantive relief sought and is instead limited to pecuniary compensation, the adequacy of which ultimately depends on the court's capacity to carry out a correct and full quantification of the damage.

5. *The non-linearity of compensatory relief*

The case-law of the Court of Justice appears to have a degree of inconsistency, in that it has identified derogatory situations in which the predominance of compensatory relief gives way to the need to ensure substantive relief. Firstly, the case-law of the Court of Justice has elaborated exceptions to the principle of the inviolability of *res judicata.*[42]

In this regard, the judgment in *Lucchini,*[43] in which the Court held that the recovery of State aid declared incompatible with EU law under Article 87 EC (now Article 107 TFEU) by a definitive Commission decision cannot be precluded by the existence of a national judgment having the force of *res judicata*, becomes particularly significant. According to the Court, the national court is required to give full effect to EU rules on State aid, «disapplying, if need be, of its own motion, any conflicting provision of national legislation», including those which enshrine the principle of *res judicata* (Article 2909 of the Italian Civil Code). In that judgment, the Court affirmed the primacy of EU law in clear and peremptory terms, omitting any reference to its previous case-law on the matter, in particular to the conditions elaborated for allowing

[42] Opinion of Advocate General Mazák of 28 June 2011, C-218/10, *ADL*, point 74.
[43] Court of Justice, 18 July 2007, C-119/05, *Lucchini*, esp. para. 63. See, on the judgment, A. BIONDI, *Case C–119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA, formerly Lucchini Siderurgica SpA, Judgment of the Court of Justice (Grand Chamber) of 18 July 2007*, in *CMLR*, Vol. 45, 2008, p. 1459.

the overcoming of *res judicata* in the presence of a manifest breach of EU law. The scope of the judgment must, however, be examined in the light of two elements which circumscribe its systematic significance. It pertains, first, to a peculiar sector, namely that of State aid, characterised by the exclusive competence of the Commission to declare its compatibility. Secondly, it relates to a situation involving a direct conflict between a national judgment having the force of *res judicata* and a prior decision of the Commission which has become definitive.

The Court of Justice has also limited the effects of finality in *specific settings*, notably the extension of *res judicata* from earlier VAT periods to subsequent disputes,[44] the first effective review of unfair terms where an unchallenged payment order contains no express and reasoned assessment,[45] and the recognition of judgments in the field of judicial cooperation.[46] These situations are not equivalent to reopening the original judgment: *Olimpiclub* concerns its external preclusive effects; *SPV Project* permits review at the enforcement stage; and *London Steam-Ship* concerns recognition under the Brussels I regime. It is true that these exceptions are not clearly defined and it is increasingly difficult to draw a dividing line between the general regime and the derogatory one. The Court has hitherto opted for a case-by-case basis rather than identifying with precision the instances of serious breaches of EU law which allow the overcoming of the force of *res judicata* subject to rigorous conditions.

In the second place, as has been observed,[47] compensatory relief may yield to substantive relief where the particular norms protecting general or diffuse interests do not confer rights for State-liability purposes. This is not a categorical exclusion covering environmental law as a whole. In the ambient-air context examined below, the Court distinguishes between the possibility

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[44] Court of Justice, 3 September 2009, C-2/08, *Olimpiclub*.

[45] Court of Justice, 17 May 2022, Cases C-693/19 and C-831/19, *SPV Project* (on the same date, see also C-600/19, *Ibercaja Banco*; C-725/19, *Impuls Leasing România*; C-869/19, *Unicaja Banco*), with a note by M. ARANCI, *Tutela del consumatore e giudicato implicito: una coesistenza (davvero) impossibile? Note a prima lettura di Corte di giustizia 17 maggio 2022,* SPV Project, in *EJ*, No. 2, 2022, p. 29; S. GUZZI, *L'intangibilità del giudicato monitorio e i suoi limiti: tra esigenze di stabilità e tutela del consumatore*, in *DUE*, No. 2, 2022, p. 1.

[46] Court of Justice, 20 June 2022, C-700/20, *London Steam-Ship Owners' Mutual Insurance Association*, with a commentary by A. CIRCOLO, *La certezza del diritto cede il passo all'effettività della tutela giurisdizionale. Note a margine della sentenza* London Steam-Ship, in *I Post di AISDUE*, V, section "Atti convegni AISDUE", No. 3, 2023, p. 51.

[47] In these terms, see M. FISICARO, *Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza JP c Ministre de la Transition écologique*, in *EP*, No. 1, 2023, p. 131.

of invoking such norms before national courts in order to obtain compliance with EU law obligations, which remains open and is indeed encouraged, and access to compensatory relief, which is instead precluded.

Emblematic, in this regard, is the judgment in *JP v Ministre de la Transition écologique,*[48] in which the Grand Chamber held that the provisions of Directive 2008/50/EC on air quality examined in that case do not give rise to an individual claim for compensation under the EU State-liability regime. While recognising the clarity and precision of the obligations laid down therein, the Court emphasised that they are oriented towards the protection of the community as a whole, and not towards the protection of individual subjective legal positions. The first of the three conditions required to establish State liability for breach of EU law is therefore lacking.

Incidentally, it should be observed that the judgment under consideration risks creating confusion as to the distinction between norms intended to confer rights on individuals and norms having direct effect. The concern stems from the passage in which the Court states that direct effect is «neither necessary (see, to that effect, judgment of 5 March 1996, *Brasserie* du pêcheur and Factortame, C-46/93 and C-48/93, EU:C:1996:79, paras 18 to 22), nor sufficient in itself (see, to that effect, judgment of 11 June 2015, Berlington Hungary and Others, C-98/14, EU:C:2015:386, paras 108 and 109)» to satisfy the first condition.[49] While the principle that direct effect is not a necessary requirement for establishing that the infringed norm must confer rights on individuals is well established, the assertion that a provision having direct effect is not, in itself, sufficient proves more problematic. In this regard, the Opinion of Advocate General Tesauro, subsequently endorsed by the judgment in *Brasserie*, had clarified that the first condition (the EU norm infringed must be intended to confer rights on individuals), by definition, «is always satisfied in the case of norms having direct effect».[50] Thus, while a norm having direct

[48] Court of Justice, 22 December 2022, C-61/21. Cf. M. ELIA, *Air ambient quality Directives and individual rights for state liability: JP v Ministre de la Transition Ecologique*, in *ELR*, Vol. 49, No. 5, 2024, p. 537; C. D. CLASSEN, *Rechte erster Klasse und Rechte zweiter Klasse? Anmerkung zum Urteil des EuGH v. 22.12.2022, Rs. C-61/21 (Ministre de la Transition écologique)*, in *Europarecht*, 2023, p. 296; P. DE PASQUALE, *"Francovich ambientale"? Sarà per un'altra volta. Considerazioni a margine della sentenza* Ministre de la Transition écologique, in *Quaderni AISDUE*, No. 1, 2023, p. 195; M. FISICARO, *op. cit.*; B. W. WEGENER, *No Francovich in environmental law: The ECJ's decision in J.P. v. Ministre de la Transition écologique*, in *CMLR*, Vol. 60, No. 6, 2023, p. 1773.

[49] *JP v Ministre de la Transition écologique and Premier ministre,* cited above, para. 47.

[50] Opinion in *Brasserie du Pêcheur*, cited above, point 56. To that effect, see also Court of Justice, 24 March 2009, C-445/06, *Danske Slagterier*, paras 22 to 26; 25 November 2010, C-

effect is, as a rule, intended to confer rights on individuals, the converse is not necessarily true, since a norm intended to confer rights on individuals may or may not have direct effect, depending on whether it possesses the further qualifying requirements (precision, clarity and suitability for immediate application).

Irrespective of this critical observation, the individual is not left without means of reaction, as he retains the faculty of bringing proceedings before national courts in order to obtain a review of the legality of the conduct of the competent authorities and, where appropriate, the adoption of coercive measures against them.

This approach illustrates the importance of substantive remedies for securing compliance with the ambient-air obligations examined in *JP*. It does not mean that an individual invoking environmental law necessarily lacks a legal position of his own, or that the collective dimension of the protected interest always excludes compensation. Standing to seek compliance and entitlement to damages remain distinct questions, depending on the provisions concerned.

An important legislative qualification is now provided by Article 28 of Directive (EU) 2024/2881: it requires compensation for damage to human health caused by intentional or negligent violations, by the competent authorities, of national provisions implementing specified air-quality obligations. At the date of this contribution, the transposition deadline of 11 December 2026 has not yet expired, and Directive 2008/50/EC is to be repealed from 12 December 2026. The new regime must therefore be distinguished from that considered in *JP*, since it expressly provides, subject to the conditions and limits laid down in the directive, for individual compensatory relief for damage to health resulting from breaches of specific air-quality obligations.[51]

On a systematic level, the judgment in *JP* illustrates a divergence between the two forms of protection: under the directives examined, the assessment of whether the norm infringed confers individual rights is situated upstream of the remaining liability analysis, precluding access to compensatory relief even before the assessment of the seriousness of the breach and the existence of the causal link is reached.

429/09, *Fuß*, paras 49 and 50; 25 March 2021, C-501/18, *Balgarska Narodna Banka*, paras 63 and 86.

[51] Directive (EU) 2024/2881, Article 28(1)–(3), Article 30(1) and Article 31. The compensation right relates to national provisions implementing Article 19(1)–(5) and Article 20(1) and (2).

To close the circle, it should be noted that the apparent increase in actions for damages must not be overestimated, since we find in the case-law of the Union the unequivocal assertion that State liability to compensate damage caused to individuals may arise only «in the exceptional case» in which the court of last instance has manifestly infringed EU law.[52] The attainment of compensation for damages thus remains limited, to an extent that Advocate General Hogan suggested making the conditions for holding the State liable less onerous, considering «the Francovich-type remedy [...] an illusion rather than a reality».[53] It is clear that an excessively episodic and limited application of the principle under discussion, both on account of the various factors of resistance still interposed by the Member States and the complexity of the legal framework, risks betraying the primacy and effectiveness of EU law, especially in cases where it is not possible to obtain substantive relief, so that it is necessary to reflect on the need to recalibrate and, therefore, simplify in EU law certain aspects of this peculiar form of Member State liability on the compensatory level.

6. *Concluding remarks on the evolution of the Court of Justice's case-law*

The analysis conducted in the preceding sections enables certain summarising considerations on the relationship between substantive relief and compensatory relief in the EU legal order, which proves far more complex and problematic than a linear reconstruction might suggest.

The case-law of the Court of Justice has progressively consolidated a framework in which compensatory relief is called upon to perform a function of closure of the system of judicial protection of the rights conferred on individuals by EU law. Such a function becomes particularly prominent in cases where substantive relief is precluded both downstream, by virtue of the inviolability of *res judicata* and the stability of final administrative decisions, and upstream, by virtue of national legislative choices which exclude *ab origine* reinstatement in kind, relegating the individual to damages by way of monetary equivalent alone. The judgment in *Cairo Network* represents, in this sense, a

[52] Court of Justice, 30 September 2003, C-224/01, *Köbler*, para. 53; 8 September 2026, C-293/24, *Ferreira da Silva e Brito and Others,* para. 51; C-163/24, *Statul Român Ministerul Finanțelor Publice and Curtea de Apel București,* para. 82. See also 9 December 2003, C-129/00, *Commission/Italy.*

[53] Opinion of Advocate General Hogan of 9 September 2021, C-497/20, *Randstad Italia*, point 82. See O. SCARCELLO, *Opinion of Advocate General Hogan in* Randstad Italia: *Disarming the Constitutional Bomb*, in *The Italian Review of International and Comparative Law*, 2021, p. 420.

significant development in a specific regulatory context: full compensation is indispensable, but the restriction also depends on the refarming objectives and its consequences for broadcasting continuity and good-faith operators. Such an approach, while taking account of the patrimonial nature of the interests involved alongside those specific regulatory considerations, nevertheless raises the question whether the same reasoning may be extended to other sectors in which economic interests susceptible of monetary quantification come into play, with the risk of a further generalisation of the preclusion of reinstatement in kind.

The subsequent judgment in *FIGC and CONI*[54] confirmed the limits of the *Cairo Network* reasoning. As noted above, the restriction of remedies to pecuniary compensation could not be justified on the same grounds where individuals directly invoked their freedoms under Articles 45 and 56 TFEU against disciplinary sanctions whose annulment entailed no comparable systemic consequences. Yet the outcome was not a declaration of incompatibility: the Court permitted the restriction of administrative judicial review to pecuniary compensation provided that the final adjudicating body within the sports justice system meets the requirements of a "court or tribunal" under EU law and affords effective substantive and interim protection. Otherwise, the administrative court must exercise full judicial review, including powers of annulment and interim protection. The ruling thus reinforces the central argument of this contribution: compensatory relief cannot replace substantive protection merely because it offers a residual avenue of redress. At the same time, the conditional nature of the ruling illustrates the Court's pragmatic and non-linear approach, which takes account of the rights at stake, the gravity of the restriction and the capacity of the national system as a whole to afford effective judicial protection.

Such a non-linear trajectory is further borne out by the broader findings of the inquiry. On the one hand, the EU judicature has elaborated exceptions to the principle of the inviolability of *res judicata* – for example, in the field of external *res judicata*, State aid to undertakings, consumer protection and judicial cooperation – which, although circumscribed to particular instances, attest to the enduring vitality of substantive relief and the reluctance to entrust entirely to compensatory relief the function of safeguarding the effectiveness of EU law. On the other hand, the judgment in *JP v Ministre de la Transition écologique* has highlighted the structural limits of compensatory relief with respect to the safeguarding of collective and diffuse interests, denying a

[54] *FIGC and CONI*, cited above.

compensation right under the particular ambient-air provisions examined while preserving substantive compliance remedies. That conclusion cannot, however, be generalised: Article 28 of Directive (EU) 2024/2881 expressly provides for compensation for damage to human health in cases falling within its scope. What emerges overall is a system in which compensatory relief, while having assumed the status of a general remedy subject to cumulative conditions, presents intrinsic limits which compromise its suitability to guarantee protection truly equivalent to substantive relief where compensatory relief is imposed as the sole remedy. The conditions elaborated by the case-law of the Court of Justice have proved difficult to demonstrate, to the point of prompting denunciations of the largely illusory character of the remedy. To this must be added the evidentiary difficulties connected with the quantification of damage in sectors characterised by a high degree of technical and economic complexity, which risk rendering nugatory in practice the principle of full compensation.

In conclusion, the evolution of the case-law of the Court of Justice reveals an unresolved tension between the need to preserve the procedural autonomy of the Member States and legal certainty, on the one hand, and the principle of effective judicial protection, on the other. The uneven restriction of substantive relief and the variable effectiveness of compensatory relief raise fundamental questions as to the capacity of the current arrangement to guarantee individuals effective judicial protection of the rights conferred on them by EU law, as required by Articles 19(1), second subparagraph, TEU and 47 of the Charter of Fundamental Rights. The difficulty is not a uniform retreat: the judgments in *FIGC and CONI* and *Seraing* preserve substantive and interim protection, albeit in ways specific to their respective contexts, while *INGSTEEL* and Directive (EU) 2024/2881 strengthen compensation in specific settings. What remains problematic is the uneven allocation of remedies and the absence of a sufficiently predictable framework governing their substitutability. The risk, which is far from theoretical, is that compensatory relief, from an instrument of closure of the system, may become an alibi for its incompleteness: a remedy which, rather than compensating for the absence of substantive relief, legitimises its systematic compression. Reconsideration is thus needed of the relationship between the two levels of protection, which could take the form of an expansion of the spaces reserved for substantive relief, through a more rigorous delimitation of the instances in which Member States may legitimately preclude it, or of a recalibration of the conditions for Member State liability in damages, in order to restore to that

remedy the function of ultimate guarantee which the system assigns to it and which, as matters stand, it does not appear fully capable of discharging.

The foregoing analysis may be situated within the broader debate concerning the principle of national procedural autonomy and the variable degree of scrutiny exercised by the Court of Justice over the procedural rules of the Member States. It has been authoritatively argued that the apparent inconsistency in the Court of Justice's application of the principles of equivalence and effectiveness does not necessarily denote incoherence, but rather reflects a deliberate calibration of the intensity of judicial scrutiny according to the constitutional significance of the interests at stake: high-intensity review where fundamental rights under the Charter or core areas of EU competence are engaged, and low-intensity review where national procedural rules *stricto sensu* are at issue and intervention would threaten common procedural values such as legal certainty and the finality of judgments.[55] On this reading, the *contrôle à géométrie variable* exercised by the Court would be the expression of a "shared procedural responsibility" between the EU and national legal orders, in which the twin principles operate not as rigid and uniform standards but as flexible instruments, adapted to the specific constitutional context of each case. Such an approach would find its methodological foundation in the balancing test elaborated in *van Schijndel,*[56] which requires the role of the national procedural provision, its place within the procedure as a whole, and the basic principles of the domestic judicial system to be taken into account.

While such a reconstruction offers a valuable analytical framework for understanding the Court's approach to procedural rules in the strict sense – such as time-limits, cost rules and res judicata – it is submitted that it cannot be transposed without qualification to the distinct problem examined in the present contribution, namely the progressive compression of substantive relief in favour of compensatory relief in certain contexts. The variable intensity of judicial scrutiny may well be justified where the question is whether a given procedural rule renders the exercise of an EU right excessively difficult: in such cases, the contextual calibration of the effectiveness test responds to the legitimate need to accommodate the diversity of national procedural traditions. Where, however, a national rule does not merely regulate the procedural modalities of the exercise of a right, but excludes *ab origine* the very possibility

[55] A. BIONDI, *op. cit.*

[56] Court of Justice, 14 December 1995, Cases C-430/93 and C-431/93, *van Schijndel and van Veen*, para. 19.

of obtaining the substantive benefit conferred by EU law, the stakes are qualitatively different. In such circumstances, a deferential approach which may be appropriate for procedural rules *stricto sensu* risks legitimising a structural deficit in the protection of individual rights, particularly where the compensatory relief to which the individual is relegated proves, in practice, inadequate to ensure full redress. The conclusion that there is "more light than darkness" in the Court's case-law on procedural autonomy must therefore be qualified: in the specific domain of the relationship between substantive and compensatory relief, the shadows persist, and there remains a need for a more rigorous and predictable framework for assessing the compatibility of national preclusive mechanisms with the principle of effective judicial protection.

It should moreover be observed that, from the standpoint of effective judicial protection, a clear distinction must be made between situations in which recourse to compensatory relief constitutes the result of an autonomous choice by the injured party, who, while entitled to substantive relief, consciously opts for damages by way of monetary equivalent, and cases in which such recourse is legislatively or judicially imposed due to the exclusion of substantive protection. In the former case, the injured party's choice to pursue the compensatory route presupposes an autonomous assessment of his own interests and does not, in itself, raise concerns from the standpoint of effectiveness, given that the individual retains full access to the remedies provided by the legal order. In the latter case, by contrast, the confinement of the individual to compensatory relief alone, in the absence of any substantive alternative, requires a particularly rigorous scrutiny of the suitability of the remedy to guarantee effective judicial protection, since damages by way of monetary equivalent no longer represent one option among the various forms of protection available, but rather the sole instrument of redress concretely accessible to the injured party.

ABSTRACT (ita)

Il contributo esamina il rapporto tra tutela sostanziale e tutela risarcitoria nel sistema giurisdizionale dell'Unione europea, alla luce dell'evoluzione della giurisprudenza della Corte di giustizia. L'indagine muove dalla constatazione che la tutela risarcitoria ha progressivamente assunto una funzione di chiusura del sistema, intervenendo nei casi in cui quella sostanziale risulta preclusa sia a valle, in ragione dell'intangibilità del giudicato e della stabilità dei provvedimenti amministrativi definitivi, sia a monte, per effetto di scelte legislative nazionali che escludono *ab origine* la reintegrazione in forma specifica. Particolare attenzione è dedicata alla sentenza *Cairo Network*, nella quale la Corte ha ammesso un modello di tutela limitato nel peculiare contesto della riorganizzazione delle frequenze, subordinandone l'ammissibilità al pieno risarcimento del danno e tenendo conto degli interessi connessi alla regolazione del settore e di quelli dei terzi coinvolti. È inoltre esaminata la successiva sentenza *FIGC e CONI*, nella quale la Corte ha posto limiti precisi all'estensione di tale impostazione. In quest'ultima pronuncia, la Corte ha affermato che la preclusione della tutela sostanziale non può essere automaticamente estesa alle situazioni in cui una persona fisica invochi direttamente una libertà fondamentale di circolazione avverso una sanzione restrittiva, adottando una pronuncia di non incompatibilità condizionata al rispetto, da parte dell'organo di giustizia sportiva, dei requisiti sostanziali propri di una "giurisdizione" ai sensi del diritto dell'Unione. Il contributo mette altresì in luce la non linearità della giurisprudenza della Corte, che ha elaborato eccezioni al principio dell'intangibilità del giudicato e ha fatto emergere i limiti della tutela risarcitoria nell'ambito delle disposizioni sulla qualità dell'aria ambiente esaminate nella sentenza *JP*, la cui portata deve oggi essere riconsiderata alla luce del diritto al risarcimento introdotto dalla direttiva (UE) 2024/2881. Il contributo si conclude rilevando una tensione irrisolta tra l'autonomia processuale degli Stati membri e il principio di tutela giurisdizionale effettiva e segnalando il rischio che la disomogenea compressione della tutela sostanziale e la variabile effettività della tutela risarcitoria possano compromettere la piena attuazione dei diritti conferiti ai singoli dal diritto dell'Unione, in violazione degli articoli 19, paragrafo 1, secondo comma, TUE e 47 della Carta dei diritti fondamentali.

ABSTRACT (eng)

This contribution examines the relationship between substantive relief and compensatory relief within the EU system of judicial protection in light of the evolution of the case-law of the Court of Justice. The inquiry proceeds from the observation that compensatory relief has progressively assumed the role of a mechanism of systemic closure, intervening in cases where substantive relief is precluded both downstream, by virtue of the inviolability of *res judicata* and the stability of final administrative decisions, and upstream, by virtue of national legislative choices which exclude *ab origine* reinstatement in kind. Particular attention is devoted to the judgment in *Cairo Network*, in which the Court accepted a restricted remedial model in the specific refarming context, subject to full compensation and the regulatory and third-party interests involved. The contribution also examines the subsequent judgment in *FIGC and CONI*, in which the Court set clear limits to the extension of that reasoning, holding that the preclusion of substantive relief cannot be automatically transposed to situations in which a natural person directly asserts a fundamental freedom of movement against a restrictive sanction, and delivering a conditional non-preclusion ruling which requires the sports justice body to satisfy the substantive requirements of a "court or tribunal" within the meaning of EU law. The contribution highlights, moreover, the non-linearity of the Court's case-law, which has elaborated exceptions to the principle of the inviolability of *res judicata* and has brought to light the limits of compensatory relief under the ambient-air provisions examined in *JP*, the scope of which must now be reassessed in light of the right to compensation introduced by Directive (EU) 2024/2881. The contribution concludes by identifying an unresolved tension between the procedural autonomy of the Member States and the principle of effective judicial protection, signalling the risk that the uneven restriction of substantive relief and the variable effectiveness of compensatory relief may compromise the full implementation of the rights conferred on individuals by EU law, in breach of Articles 19(1), second subparagraph, TEU and 47 of the Charter of Fundamental Rights.