Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 April 2016 [1]

Case C-601/14

European Commission
v

Italian Republic

(Failure of a Member State to fulfil obligations — Directive 2004/80/EC — Compensation for victims of crime — Article 12 — No general scheme governing compensation for victims of all types of violent intentional crime committed on Italian territory — Area of freedom, security and justice)

1. By its action, the European Commission is asking the Court to declare that the Italian Republic, by not providing for a compensation scheme for the victims of all violent intentional crimes committed on its territory, has failed to fulfil its obligations under Article 12(2) of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. [2]

2. The Italian Republic provides, in its national law, that such compensation is possible only for certain violent intentional crimes, such as acts of terrorism or crimes linked to the Mafia.

3. In this Opinion, I shall set out the reasons why I consider that this action for failure to fulfil obligations is well founded.

I – Legal framework

A – *EU law*

4. Recital 3 of Directive 2004/80 states that 'at its meeting in Tampere on 15 and 16 October 1999, the European Council called for the drawing-up of minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and their rights to compensation for damages, including legal costs'.

5. Under recital 6 of that directive, 'crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed'.

1 — Original language: French.
2 — OJ 2004 L 261, p. 15.

6. Recital 7 of that directive is worded as follows:

‘This Directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States’ schemes on compensation to victims of violent intentional crime, committed in their respective territories. Therefore, a compensation mechanism should be in place in all Member States.’

7. Under Chapter I, entitled ‘Access to compensation in cross-border situations’, Article 1 of Directive 2004/80 provides as follows:

‘Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.’

8. Chapter II, entitled ‘National schemes on compensation’, comprises a single article. Article 12 of that directive thus provides:

‘1. The rules on access to compensation in cross-border situations drawn up by this Directive shall operate on the basis of Member States’ schemes on compensation to victims of violent intentional crime committed in their respective territories.

2. All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.’

9. Lastly, Article 18 of that directive provides:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 2006 at the latest, with the exception of Article 12(2), in which case the date of compliance shall be 1 July 2005. They shall forthwith inform the Commission thereof.

2. Member States may provide that the measures necessary to comply with this Directive shall apply only to applicants whose injuries result from crimes committed after 30 June 2005.

...’

B – *Italian law*

10. Directive 2004/80 was transposed into Italian law by decreto legislativo n. 204 — attuazione della direttiva 2004/80/CE relativa all’indennizzo delle vittime di reato (Legislative Decree No 204 on the application of Directive 2004/80/EC relating to compensation to crime victims), of 9 November 2007,[3] and by decreto ministeriale n. 222 — regolamento ai sensi dell’articolo 7 del decreto legislativo n. 204/2007 (Ministerial Decree No 222 laying down rules in accordance with Article 7 of Legislative Decree No 204/2007), of 23 December 2008.[4]

11. In its defence, the Italian Republic provided an exhaustive list of the special laws governing the grant of compensation payable by the State to the victims of certain types of violent intentional crime.

3 — Ordinary Supplement to GURI No 261 of 9 November 2007, ‘Legislative Decree No 204/2007’.

4 — GURI No 108 of 12 May 2009.

12. Those special laws are the following:

— legge n. 466 — recante norme in ordine a speciali elargizioni a favore di categorie di dipendenti pubblici e di cittadini vittime del dovere o di azioni terroristiche (Law No 466 establishing rules on special compensation to certain categories of public officials and citizens who are killed or injured in the line of duty or are victims of terrorism), of 13 August 1980 [5] (Articles 3 and 4);

— legge n. 302 — recante norme a favore delle vittime del terrorismo e della criminalità organizzata (Law No 302 establishing measures for victims of terrorism and organised crime), of 20 October 1990 [6] (Articles 1, 3, 4 and 5);

— decreto legge n. 419 — recante istituzione del Fondo di sostegno per le vittime di richieste estorsive, convertito dalla legge 18 febbraio 1992, n. 172 (Decree-Law No 419 on the creation of a support Fund for victims of extortion — converted into statute by Law No 172 of 18 February 1992), of 31 December 1991 [7] (Article 1);

— legge n. 340 — recante norme per l'estensione dei benefici di cui agli articoli 4 e 5 della legge n. 302/1990, ai familiari delle vittime del disastro aereo di Ustica (Law No 340 establishing rules on the extension of the benefits referred to in Articles 4 and 5 of Law No 302/1990 to family members of the victims of the Ustica air disaster), of 8 August 1995 [8] (Article 1 — which refers to Articles 4 and 5 of Law No 302/1990);

— legge n. 108 — recante disposizioni in materia di usura (Law No 108 establishing rules regarding usury), of 7 March 1996 [9] (Articles 14 and 15);

— legge n. 70 — recante benefici per le vittime della cosiddetta 'Banda della Uno Bianca' (Law No 70 establishing benefits for the victims of the 'White Fiat Uno Gang'), of 31 March 1998 [10] (Article 1 — which refers to Articles 1 and 4 of Law No 302/1990);

— legge n. 407 — recante nuove norme in favore delle vittime del terrorismo e della criminalità organizzata (Law No 407 establishing new rules for victims of terrorism and organised crime), of 23 November 1998 [11] (Article 2);

— legge n. 44 — recante disposizioni concernenti il Fondo di solidarietà per le vittime delle richieste estorsive e dell'usura (Law No 44 establishing rules concerning the solidarity Fund for victims of extortion or usury), of 23 February 1999 [12] (Articles 3, 6, 7 and 8);

— decreto del presidente della Repubblica n. 510 — regolamento recante nuove norme in favore delle vittime del terrorismo e della criminalità organizzata (Decree of the President of the Republic No 510 establishing new measures for victims of terrorism and organised crime), of 28 July 1999 [13] (Article 1);

5 — GURI No 230 of 22 August 1980.
6 — GURI No 250 of 25 October 1990.
7 — GURI No 49 of 28 February 1992.
8 — GURI No 192 of 18 August 1995.
9 — Ordinary Supplement to GURI No 58 of 9 March 1996.
10 — GURI No 80 of 6 April 1998.
11 — GURI No 277 of 26 November 1998.
12 — GURI No 51 of 3 March 1999.
13 — GURI No 4 of 7 January 2000.

— legge n. 512 — recante istituzione del Fondo di rotazione per la solidarietà alle vittime dei reati di tipo mafioso (Law No 512 establishing the revolving Fund for solidarity with the victims of Mafia-style crimes), of 22 December 1999[14] (Article 4);

— decreto legge n. 13 — recante disposizioni urgenti in favore delle vittime del terrorismo e della criminalità organizzata, convertito con modificazioni dalla legge n. 56/2003 (Decree-Law No 13 establishing emergency measures for victims of terrorism and organised crime — converted into statute, after amendment, by Law No 56/2003), of 4 February 2003;[15]

— legge n. 228 — recante misure contro la tratta di persone, che istituisce il Fondo per le misure anti-tratta e uno speciale programma di assistenza per le vittime dei reati previsti dagli articoli 600 e 601 del codice penale (Law No 228 on measures against trafficking in human beings, which establishes the Fund for anti-trafficking measures and a special programme of aid for the victims of the criminal acts referred to in Articles 600 and 601 of the Criminal Code), of 11 August 2003,[16] as amended by decreto legislativo n. 24, articolo 6 (Legislative Decree No 24, Article 6), of 4 March 2014;[17]

— decreto legge n. 337 — recante disposizioni urgenti in favore delle vittime militari e civili di attentati terroristici all'estero, convertito con modificazioni dalla legge n. 369/2003 (Decree-Law No 337 establishing emergency measures for military and civilian victims of terrorist attacks abroad — converted into statute, following amendment, by Law No 369/2003), of 28 November 2003[18] (Article 1);

— legge n. 206 — recante nuove norme in favore delle vittime del terrorismo e delle stragi di tale matrice (Law No 206 establishing new rules for victims of terrorism and massacres of a terrorist nature), of 3 August 2004[19] (Article 1);

— legge n. 266 — legge finanziaria 2006 (Law No 266 relating to the 2006 Budget), of 23 December 2005,[20] Article 1 (paragraphs 563 to 565) contains provisions on the payment of benefits to persons killed or injured in the line of duty, persons entitled to the same treatment and to their families;

— legge n. 91 — recante norme in favore dei familiari superstiti degli aviatori italiani vittime dell'eccidio avvenuto a Kindu l'11 novembre 1961 (Law No 91 establishing rules for the surviving family members of the Italian airmen who died in the Kindu massacre of 11 November 1961), of 20 February 2006;[21]

— decreto del presidente della Repubblica n. 243 — regolamento concernente termini e modalità di corresponsione delle provvidenze alle vittime del dovere ed ai soggetti equiparati (Decree of the President of the Republic No 243 concerning the time limits and procedures for the payment of benefits to persons killed or injured in the line of duty and to persons entitled to the same treatment), of 7 July 2006;[22]

14 — GURI No 6 of 10 January 2000.
15 — GURI No 80 of 5 April 2003.
16 — GURI No 195 of 23 August 2003.
17 — GURI No 60 of 13 March 2014.
18 — GURI No 8 of 12 January 2004.
19 — GURI No 187 of 11 August 2004.
20 — Ordinary Supplement to GURI No 302 of 29 December 2005.
21 — GURI No 62 of 15 March 2006.
22 — GURI No 183 of 8 August 2006.

— decreto legge n. 187 — recante misure urgenti in materia di sicurezza, convertito con modificazioni dalla legge n. 217/2010 (Decree-Law No 187 establishing emergency measures on security matters — converted into statute, following amendment, by Law No 217/2010), of 12 November 2010,[23] including, under Article 2a, the establishment of the 'Civil Solidarity Fund' for victims of criminal acts committed on the occasion or as a result of sporting or other events.

13. As regards the substantive conditions for the grant of compensation payable by the Italian State, Legislative Decree No 204/2007 refers to the special laws laying down the forms of compensation for victims of crimes committed on the national territory. However, not all types of intentional violent crimes are covered by those special laws. Thus, there is no special law guaranteeing just and appropriate compensation, within the meaning of Article 12 of Directive 2004/80, for victims of crimes of sexual violence.

II – Pre-litigation procedure

14. By letter of 20 June 2011, the Commission informed the Italian Republic that it considered that its legislation did not provide for a general compensation scheme for victims of violent intentional crime, contrary, according to the Commission, to the requirements of Article 12(2) of Directive 2004/80. In reply to that letter, the Italian Republic informed the Commission, by letter of 11 October 2011, that it considered that that directive conferred on the Member States a broad discretionary power for the purposes of transposing that provision.

15. On 25 November 2011, the Commission, which still considered that the Italian Republic had incorrectly transposed that directive, sent it a letter of formal notice and invited it to submit its observations on that point.

16. On 14 May 2012, in its reply, the Italian Republic submitted draft legislative measures designed to establish a general compensation scheme. Those draft measures provided for the establishment of a solidarity fund for compensation for victims of intentional crimes committed on the national territory resulting in death or serious or very serious bodily injury. As no legislative timetable was submitted for those draft measures, the Commission was unable to terminate the pre-litigation procedure. The Italian authorities were informed of that fact at a meeting on 25 November 2012.

17. The Italian Republic informed the Commission, by letter of 24 January 2013, that, because of the government crisis and resultant early dissolution of the Italian Parliament, it had not been possible to adopt the draft law, but that this would be done after the new government took office. There was no official legislative timetable enclosed with that letter.

18. By letter of 12 July 2013, the Italian Republic informed the Commission that the Tribunale ordinario di Firenze (District Court, Florence, Italy) had referred a question for a preliminary ruling to the Court concerning the interpretation of Article 12 of Directive 2004/80 (case which gave rise to the order of 30 January 2014, *C.* (C-122/13, EU:C:2014:59)), and it therefore proposed awaiting the Court's decision in that case before continuing the procedure initiated by the Commission.

19. The Commission issued a reasoned opinion on 17 October 2013, which was sent to the Italian Republic on 18 October 2013, in which it called on the Italian authorities to adopt the measures necessary to comply with Article 12 of Directive 2004/80 within two months of the latter date.

20. In its reply, received by the Commission on 18 December 2013, the Italian Republic reiterated its view that it was expedient to await the Court's decision in Case C-122/13, in order that any guidance given by the Court regarding Article 12 of Directive 2004/80 be taken into account.

23 — GURI No 265 of 12 November 2010.

21. By an order,[24] the Court declared, in that case, that it clearly had no jurisdiction to reply to the question referred by the Tribunale ordinario di Firenze (District Court, Florence). The Commission therefore decided to bring the present action for failure to fulfil obligations before the Court pursuant to the second paragraph of Article 258 TFEU.

III – The action

22. By its action, the Commission claims that the Court should:

— declare that, by failing to adopt all the measures necessary to guarantee the existence of a compensation scheme for victims of all violent intentional crimes committed on its territory, the Italian Republic has failed to fulfil its obligations under Article 12(2) of Directive 2004/80, and

— order the Italian Republic to pay the costs.

23. The Italian Republic contends that the Court should:

— dismiss the action, and

— order the Commission to pay the costs.

24. By application lodged at the Court Registry on 27 April 2015, the Council of the European Union applied for leave to intervene in support of the Commission. By decision of 22 May 2015, the President of the Court allowed that application.

IV – Arguments of the parties

25. The Commission criticises the Italian Republic on the ground that it provides, in its legal order, for a compensation scheme only for victims of certain violent intentional crimes, even though, according to the Commission, Article 12(2) of Directive 2004/80 requires the establishment of such a compensation scheme for victims of all those crimes.

26. Accordingly, the Commission states that, according to recitals 2 and 6 thereof, the aim of Directive 2004/80 is to guarantee victims of crime in the European Union fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Union the crime was committed. That is a corollary of the free movement of persons.

27. It then explains that that directive establishes a cooperation procedure intended to enable those victims to have easier access to compensation in cross-border situations. That is why Chapter I of that directive establishes the rules on access to compensation in such situations, whilst Chapter II of that directive, which consists solely of Article 12, sets out the provisions applicable to national compensation schemes. Those schemes are therefore the basis for the proper functioning of the cooperation procedure. Article 12(2) of Directive 2004/80 accordingly requires the Member States to have such a scheme.

24 — See order of 30 January 2014, *C.* (C-122/13, EU:C:2014:59).

28. The Commission submits, in that regard, that it is not sufficient for the Member States in which no compensation scheme existed to introduce such a scheme. According to the Commission, the Member States must satisfy themselves that the compensation scheme for victims established in their territory has the characteristics required by Directive 2004/80, namely that it guarantees fair and appropriate compensation and that it covers the category of crimes covered by that directive. The Commission states that that directive concerns a very specific type of crime, namely violent intentional crime.

29. As regards that concept more specifically, the Commission submits, in essence, that, although Directive 2004/80 does not define that type of crime, leaving that to the national legislature, the fact remains that Article 12(2) of that directive leaves no discretion to the Member States as to the scope of the national compensation scheme. Accordingly, that scope must cover all violent intentional crimes defined as such in the substantive criminal law of each Member State.

30. The only discretion which the Member States have in establishing a compensation scheme for the victims of violent intentional crime, such as intended by the EU legislature, lies in the classification of crimes as being intentional and violent. In other words, the Commission submits that each time a crime is defined in national criminal law as a violent intentional crime, it automatically falls within the category of crimes in respect of which Directive 2004/80 requires that a compensation scheme for victims be provided for. By way of example, the Commission states that, in the light of their constituent elements, crimes such as homicide or sexual violence cannot, by definition, be excluded from the scope of that directive.

31. That analysis, it submits, is confirmed by a reading of the European Convention on the Compensation of Victims of Violent Crimes, signed at Strasbourg on 24 November 1983, since Directive 2004/80 clearly draws inspiration from that convention as recital 8 shows. Under that convention, cases of sexual violence are included in the category of violent intentional crimes, which, it is submitted, proves that all crimes which are definitely intentional and violent must necessarily fall within that category.

32. The Commission explains also that no provision of Directive 2004/80 states that Member States may restrict the benefit of compensation to the victims of certain violent intentional crimes. It submits that such a restriction would be tantamount to accepting that, even though they may all be regarded as violent intentional crimes, only some of them create a feeling of vulnerability, induce trauma, lead to financial problems, disrupt daily life or compromise the future of victims, thereby justifying compensation by the Member State.

33. Moreover, according to the Commission, if it were to be held that Member States have a discretion as to the choice of violent intentional crimes which may qualify for compensation by the State under Article 12(2) of Directive 2004/80, that would effectively lead to discrimination between the victims of violent intentional crime in the European Union, in so far as compensation following a crime in that category might vary from one Member State to another, depending on whether the Member State offers extensive protection or, as in Italy, limited protection of the right to compensation. Furthermore, it would deprive the system of cross-border cooperation, established by that directive, of all practical benefit.

34. Lastly, the Commission explains that the interpretation it suggests does not have the effect of encroaching upon the powers of the national legislature, since it does not govern questions linked to the level of protection afforded with regard to the damage for which compensation may be granted (non-material damage, material damage, long-term invalidity, illness and psychological damage), the degree of intent (taking into account bodily injury caused by negligence), the conditions for access to compensation (victim and members of the victim's family), the form of compensation (by the perpetrator of the crime or alternative forms of compensation by the Member State, the employer

or insurance), the amount of compensation (table setting a predetermined financial value on each type of injury, reduction of compensation in the event of contribution to the injury), or the procedural conditions for access to compensation (time limit for preparing and/or submitting the claim for compensation).

35. The Italian Republic states, first of all, that it is at an advanced stage in the drawing up of draft legislation in the sphere which is the subject matter of these proceedings.

36. It then sets out the reasons why it considers that the interpretation suggested by the Commission is incorrect. Thus, the Italian Republic relies on the legal basis for Directive 2004/80 in order to delimit the obligation on the Member States under Article 12(2) thereof. It states that that directive was adopted, in the absence of specific provisions, on the basis of Article 308 EC (now Article 352 TFEU). It follows, according to the Italian Republic, that, at the time that directive was adopted in 2004, the European Union was not competent, and is still not competent today, to regulate the procedural and substantive treatment of violent crimes under general law, even in so far as concerns their particular financial consequences. I understand that the Italian Republic considers that, since Directive 2004/80 is based on Article 308 EC and seeks to enable the free movement of citizens, the European Union may not require the Member States to establish a general compensation scheme for victims of violent intentional crime, but may only require those States to take into account cross-border situations in that sphere by giving Union citizens access to the compensation scheme that may be provided for under national law. In other words, Article 12(2) of that directive does not create any obligation to establish a compensation scheme for the victims of violent intentional crime.

37. The Italian Republic therefore contends that it cannot be found to have failed to fulfil its obligations, since national law, which already provides for many forms of compensation for several violent intentional crimes, gives the nationals of other Member States access to those forms of compensation.

38. For the Italian Republic, if the Court were to share the Commission's view that Article 12(2) of Directive 2004/80 requires the Member States to provide for a general compensation scheme for the victims of all violent intentional crimes, it would therefore be necessary to examine the validity of that obligation, because it is not laid down in any specific provision of the Treaties, nor may it be inferred from the clause on 'subsidiary powers', as provided for in Article 308 EC, since that article cannot, in accordance with the principle of proportionality, extend the European Union's competence to purely internal matters. The Italian Republic, whilst recalling the Court's case-law stating that 'in the absence of a provision of the FEU Treaty expressly permitting it to do so, a Member State cannot … properly plead the unlawfulness of a directive addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that directive',[25] submits, however, that Article 12(2) of Directive 2004/80 contains a particularly serious and manifest defect within the meaning of that case-law, which therefore enables it to plead that the provision is unlawful.[26]

39. If the Court were to hold that that provision requires the Member States to establish a general compensation scheme for victims of violent intentional crime, the Italian Republic contends that those States nevertheless retain a discretion for the purposes of determining which crimes fall within the scope of violent intentional crime, for the purposes of Article 12(2) of Directive 2004/80, and may thereby qualify for compensation by the State.

25 — Judgment of 5 March 2015, *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraph 56).

26 — Judgment of 5 March 2015, *Commission* v *Luxembourg* (C-502/13, EU:C:2015:143, paragraph 56).

40. In that regard, the Italian Republic explains that, unlike the other provisions of Directive 2004/80 which lay down the obligations on the Member States in detail, Article 12(2) thereof merely states that the crime to which that provision applies must have the dual characteristics of being intentional and violent. Therefore, it is for each Member State to determine, in their national law, the situations which may qualify for compensation under that provision and the basic criteria for calculating that compensation. The Member States thus have a very broad discretion for the purposes of establishing a compensation scheme for the victims of violent intentional crime, and may therefore limit that compensation to certain crimes or even make it subject to particular conditions, such as examination of the conduct of the victim who cannot, even through imprudence, have facilitated or caused the perpetration of the criminal act, or proof of the insolvency of the perpetrator of the act.

41. It is submitted that that interpretation is supported by an examination of the preparatory work leading to the adoption of Directive 2004/80. The Italian Republic states, accordingly, that, in its Proposal for a Directive,[27] the Commission envisaged the establishment of minimum standards for compensation for victims of crime and specified the personal and territorial scope of the directive by defining the terms 'victims', 'intentional crimes' and 'personal injury'. According to the Italian Republic, the draft directive laid down other extremely detailed rules, intended to prepare for the setting up of a uniform compensation scheme for victims of crime. The comparison of that draft with the current text of Directive 2004/80 shows that the objective of establishing minimum standards was abandoned in order to respect the powers of the Member States in criminal matters and matters of public expenditure.

42. In its reply, the Commission explains that recourse to Article 308 EC is proof only of the fact that, in the absence of express and specific powers to act conferred on the institutions of the European Union, the adoption of the measures contained in Directive 2004/80 was held to be necessary by a decision of the Council taken unanimously by the Member States, including therefore the Italian Republic, in order to attain one of the objectives of the European Union. In this instance, the objective sought by that directive, inter alia by means of the obligation imposed in Article 12(2) thereof, is to abolish obstacles to the free movement of persons and services.

43. For the Commission, the only grounds capable of invalidating the use of Article 308 EC as a legal basis are those linked to compliance with the conditions laid down by the Treaties, namely the necessity that the act to be adopted attain one of the objectives pursued by the Treaties, the fact that the action may be performed within the framework of the policies defined by the Treaties and the fact that the powers to act required for that purpose are not provided for in the Treaties. The Commission submits, however, that the Italian Republic has not established, in its defence, that those conditions were not complied with and merely states that Article 308 EC does not serve to make up for the European Union's lack of competence in criminal and procedural matters.

44. The Commission states that, with the coming into force of the FEU Treaty, the European Union has a specific competence in the field of judicial cooperation in criminal matters, including, inter alia, the approximation of the laws and regulations of the Member States in certain specific aspects of criminal procedure (Article 82(2) TFEU), the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension (Article 83(1) TFEU) and the effective implementation of European Union policies that are already subject to harmonisation measures (Article 83(2) TFEU). It adds, however, that the competence to adopt measures in such areas is conditional on the fact that they must be necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.

27 — Proposal for a Council Directive on compensation to crime victims (COM(2002) 562 final, 'the Proposal for a Directive').

45. The Commission infers, as the Italian Republic contends, that the European Union does not have competence to intervene in the criminal procedure law or in the substantive criminal law of the Member States beyond that which is laid down in the aforementioned provisions. Therefore, the Member States alone are competent to define the criminal offences and the sanctions corresponding to those offences on two conditions. First, that power may be exercised only in the areas of crime which are not among those listed in the second subparagraph of Article 83(1) TFEU, namely terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug and arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. Second, that power may not be exercised in respect of the criminal offences and the sanctions corresponding thereto that the EU legislature considers necessary for the purposes of reinforcing the implementation of legislative harmonisation measures adopted in other areas of EU competence.

46. Consequently, the Commission shares the view of the Italian Republic, namely that the Member States alone are competent to determine the actions which constitute criminal acts under general law and the sanctions corresponding thereto.

47. However, the Commission submits that the aspects relating to the support and protection of victims of crime do not fall within that exclusive competence. According to the Commission, compensation for victims by the Member States, provided for in Directive 2004/80, is based on the existence of a civil action founded on the civil liability of the perpetrator of the crime. Therefore, compensation for a victim of crime is civil in nature, not criminal in nature. The Commission cites, in that regard, the Explanatory Memorandum which accompanied its Proposal for a Directive and which states that 'the civil nature of state compensation is clear from that it serves to confer a pecuniary benefit on individuals, without seeking to achieve any objective related to sanctioning the behaviour of the offender or providing any direct benefit for the public good'. [28]

48. Moreover, the Commission claims that it is apparent from the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47), that the nationals of the Member States have the right to be protected against the risk of assault and to obtain the financial compensation provided for by the law of the Member State on the territory of which the assault was committed, even if that State is not their Member State of origin. That judgment shows that there is a close link between freedom of movement and the right to protection of physical integrity, it being immaterial, in that regard, that the compensation is granted by the State and charged to its budget. Accordingly, it is precisely because the protection of physical integrity is intended to further the freedom of movement of persons that it is necessary to provide for measures to facilitate compensation for victims of violent intentional crime by allowing access to national compensation schemes.

49. The Commission adds that, at the time of the preparatory work leading to the adoption of Directive 2004/80, it had been found that there was great disparity between the Member States regarding compensation for victims of crime, and that some Member States quite simply had no compensation scheme. That disparity therefore resulted in people being treated differently depending on their place of residence or the place where the crime was committed, and that inequality was even more evident in cross-border situations, to the extent that Union citizens were deterred from exercising their freedom of movement.

50. The Commission concludes that compensation for victims of crime cannot be regarded as a matter falling within the exclusive competence of the Member States. It submits that that conclusion cannot be called into question by the obligation on Member States to provide for a compensation scheme for victims of crime which covers all types of violent intentional criminal acts laid down by national law. For the Commission, the need to abolish obstacles to the free movement of persons by protecting

28 — Section 5.1.

their physical integrity and guaranteeing them the possibility of obtaining compensation in the event of an attack upon that integrity cannot be limited to the obligation for Member States which do not have a compensation scheme to establish one. The Commission submits that the concept of violent intentional crime was regarded by the EU legislature as sufficiently broad as to cover all the most frequent kinds of possible attacks upon a person's physical integrity.

51. Therefore, for the Commission, Article 12(2) of Directive 2004/80, as it proposes to interpret it, is not vitiated by any defect of validity, let alone vitiated by so serious and manifest a defect as to render the whole of that directive non-existent.

52. In its rejoinder, the Italian Republic states that, in the absence of relevant provisions on the matter in the Treaties, compensation for victims of ordinary violent intentional crime falls within the competence reserved to the Member States, in accordance with the principle of conferral laid down in Article 5(2) TFEU.

53. According to the Italian Republic, the absence, in Italian law, of a general compensation scheme for victims of all violent intentional crimes committed on Italian territory does not represent an obstacle either to the reality or to the exercise of the freedom of movement of Union citizens. Therefore, pursuit of the objective of freedom of movement of persons cannot justify an intervention by the EU legislature in the matter.

54. Moreover, the Italian Republic contends that the Commission has misread the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47). It contends that, in that judgment, the Court merely stated the obligation to extend the compensation for victims of assault to Union citizens who, in the exercise of their right of freedom of movement, go to France. It submits that it cannot be inferred from that judgment that the Member States are required to establish, where one does not yet exist, a general compensation scheme for victims of ordinary acts of violent intentional crime.

55. The Italian Republic states, furthermore, that, under Article 352(3) TFEU, measures adopted on the basis of that article, such as Directive 2004/80, 'shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation'. Article 12(2) of that directive should therefore be interpreted in accordance with Article 352 TFEU, without extending the sphere of competence of the European Union and without imposing a harmonisation of the Member States' legislative and regulatory provisions concerning compensation for victims of violent intentional crime. The Italian Republic states that such harmonisation cannot be required solely in respect of the 'Eurocrimes' listed in the second subparagraph of Article 83(1) and not in respect of ordinary crimes.

56. The Italian Republic also contends that Article 12(2) of Directive 2004/80 cannot apply to it. It contends that that provision lays down only the obligation for the Member States which did not have a compensation scheme for victims of violent intentional crime to establish one. However, at the time that that directive came into force, the Italian Republic already had such a compensation scheme.

57. The Council, intervening in support of the Commission, submits that it is apparent from the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47), that facilitating cross-border access to the national compensation schemes for victims of violent intentional crime, and ensuring that all the Member States have such a scheme, contribute to ensuring that the objective of freedom of movement of persons and services is attained. As regards the necessity of such action by the European Union, the Council submits that this must be assessed in the light of political, economic and technical criteria and therefore falls within the discretionary power of the institutions of the European Union which had legitimately considered that it was necessary.

58. Therefore, were Article 12(2) of Directive 2004/80 to be interpreted as not requiring the Member States to provide for a general compensation scheme covering all types of violent intentional crime in cross-border situations, the objective of abolishing obstacles to the free movement of persons and services would not be attained, since, in some Member States, certain types of violent intentional crime might not qualify for compensation.

V – My assessment

A – *Admissibility of the action*

59. The Italian Republic disputes the admissibility of the present action. It contends that the subject matter of this action does not correspond to the reasoned opinion in which the Commission mentioned certain types of crimes for which the Italian Republic has not provided a compensation scheme, whereas, in the present action, the Commission complains that it has not provided for such a scheme for all violent intentional crimes. The subject matter of the action has therefore been extended.

60. That plea of inadmissibility cannot succeed. It is clear, from reading the reasoned opinion, that the Commission criticises the Italian Republic on the ground that it has not provided for a compensation scheme for the victims of all violent intentional crimes. Thus, it is stated as early as in paragraph 1 of that opinion, that, on the basis of statements received between the year 2009 and the year 2013, the Commission reached the conclusion that the Italian Republic does not have a general compensation scheme for the victims of violent intentional crime. The Italian legislation provides for such compensation for certain violent intentional crimes, which include those linked to terrorism or organised crime, 'but not for all those crimes'. It is clear from that paragraph that the Commission is referring expressly to the absence of a general compensation scheme for the victims of all violent intentional crimes.

61. It is true, as the Italian Republic contends, that, on pages 5 and 8 of the reasoned opinion, the Commission refers, in particular, to the absence of such a scheme for the victims of homicide and serious assault and battery which are not among the cases provided for by the special rules, or for the victims of rape and other serious sexual assaults. However, there is no doubt, in my view, that the Commission, by referring to those crimes in particular, was merely providing an example of the crimes which it considers are included in the concept of violent intentional crime and which, therefore, ought to have led the Italian Republic to provide for a compensation scheme for the victims thereof. Moreover, also on page 5 of that opinion, the Commission states — in response to the point of view expressed by the Italian Republic — that, since the wording of Article 12(2) of Directive 2004/80 does not limit its application to certain violent intentional crimes, that means that it refers to all crimes of that type; a point which is also to be found on page 6 of that opinion.[29]

62. Above all, the operative part of the reasoned opinion leaves no room for doubt. The Commission clearly states in the operative part that, by failing to adopt the measures necessary to comply with Article 12(1) and (2) of Directive 2004/80 so as to guarantee the existence of a compensation scheme for the victims of 'all' violent intentional crimes committed on its territory, the Italian Republic has failed to fulfil its obligations under the first paragraph of Article 258 TFEU.

63. It must therefore be stated that, by the present action for failure to fulfil obligations, the Commission has not extended the subject matter of the action and it must therefore be declared admissible.

29 — Indeed, it is stated on that page that the reference to the European Convention on the Compensation of Victims of Violent Crimes shows that the objective of that directive is to guarantee, as already envisaged in that convention, state compensation schemes for all violent intentional crimes and not only for some of them.

B – *Substance of the action*

64. By its action for failure to fulfil obligations, the Commission claims that, by providing for a compensation scheme applicable to the victims of not all violent intentional crimes, but only some violent intentional crimes the perpetrator of which is insolvent or unknown, thereby disregarding the provisions of Article 12(2) of Directive 2004/80, the Italian Republic has failed to fulfil its obligations.

65. For its part, the Italian Republic contends that that provision leaves it to the Member States to decide which of those crimes may, on their territory, qualify for compensation by the State.

66. I consider, as does the Commission, that the aforementioned provision requires that the victims of all violent intentional crimes, as defined in national law, must be able to benefit from the national compensation scheme and that a Member State may not choose, from among such crimes in its criminal law, those which may give rise to compensation on the part of the State.

67. Justification for this point of view lies, in my view, in the very wording of the texts which, I consider, form the basis of the lawfulness and legitimacy of Directive 2004/80 and in the body of that directive itself.

68. Indeed, such an interpretation is dictated by Article 3(2) TEU. That provision states that 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured'. Accordingly, the reference to the free movement of persons in recital 1 of Directive 2004/80, already referred to in the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47), is all the more justified in so far as it is essential to the construction of that area, an objective which the European Union has set itself. Therefore, if compensation for injuries caused by the perpetrators, identified or otherwise, of violent intentional crimes were not guaranteed, it is undoubtedly the 'security' aspect of that area which would be impaired.

69. It also appears justifiable to consider that, in order to ensure the reality and cohesion of that single area, a Union citizen who travels within it must, first and foremost, be treated in the same way no matter which Member State he goes to. In the field with which we are concerned, that result may easily be achieved without its being necessary to approximate, let alone harmonise, national legislation. It is clear that the concept of an intentional crime is a basic concept of criminal law known to all the legislative systems of the Member States. As for violence, violence is a factual concept and the only difficulty in understanding it lies not in its characterisation, but in the measure of its effects through the physical, material or non-material damage suffered, and in the measure of its consequences, questions for which expert knowledge is needed, in particular forensic knowledge, and which, thus, fall within the jurisdiction of courts seised of the facts of a case.

70. On this view, the situation of a Union citizen who travels is clear. He has the guarantee, if he exercises his freedom of movement, that, if he is the victim of a violent intentional crime in the Member State to which he goes, he will be able to apply to the competent authorities of that State for compensation if the perpetrator cannot pay, just as he could have done if the crime had taken place in the territory of the Member State in which he resides.

71. Similar criminalisation of violent behaviour by the Member States in itself constitutes a protection. If a person becomes the victim of such a crime, the existing criminal laws in the Member States will enable him to obtain compensation for the damage stemming from the acts constituting the material elements of the crime committed.

72. Usually, a personal action for compensation for damage, generally called a 'civil action,' may, without losing its character as an action intended solely to obtain compensation for personal injury, be brought in conjunction with the criminal proceedings or 'prosecution', [30] a favour generally offered to the victim to facilitate, on a procedural level, his bringing an action for compensation. [31]

73. Where the perpetrator of the crime is unknown or insolvent, the Member States have made provision for compensation by a public body or a special fund which provide compensation for injuries of a certain severity; the threshold from which compensation may be available being left to the discretion of the Member States.

74. The general nature, recognised by the Member States, of the principle of compensation for crimes where the perpetrator is solvent ensures equality of treatment. The fact that, where the perpetrator is unknown or insolvent, certain Member States provide compensation from public funds only for some of those crimes upsets that equality of treatment.

75. That situation creates inequality on two levels, namely in the internal order and, of prime concern in the present action, in relation to the area of freedom, security and justice, since, for example, in one State, compensation might be available for a victim's tetraplegia if it results from a bullet fired by a terrorist, but might not be if the person firing the shot was committing armed robbery, whereas, in the neighbouring State, that is, maybe a few dozen metres away, compensation might be provided in both cases. Such a result is neither fair nor appropriate.

76. The EU legislature therefore wished to remedy that situation for the reasons outlined above.

77. The objective pursued is, therefore, achieved by Article 12 of Directive 2004/80. That article, the structure of which seems to me to be perfectly coherent, is devoted to national compensation schemes. Article 12(1) lays down the principle that the cooperation mechanism established by that directive concerning compensation for the victims of violent intentional crime in cross-border situations is to operate on the basis of the schemes in force in the Member States. To that end, Article 12(2) establishes the obligation for Member States to have such a scheme in order to guarantee fair and appropriate compensation for the victims of those crimes. The EU legislature thus considered that it was necessary for all the Member States to have such a compensation scheme in order to facilitate access to such schemes in cross-border situations. [32]

78. Article 12(2) of Directive 2004/80 refers only to compensation for the victim. It therefore merely requires the Member States to recognise the principle of the right to compensation for all victims of violent intentional crimes classified as such in national law.

79. Therefore, it is by a simple 'game of mirrors', reflecting that which exists at national level, that protection of the victim is ensured in cross-border situations.

80. Contrary to what the Italian Republic maintains, [33] the Member States must therefore have established a scheme conferring the right to compensation for all victims of violent intentional crimes committed on their territory and punishable under their national laws in order that, when such a crime is committed in a cross-border situation, that scheme may be applied correctly and effectively in the circumstances envisaged by Directive 2004/80.

30 — See the Commission's website at the following address: http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_ec_en.htm.

31 — It is possible, moreover, that the victim has a choice between proceeding in that way and bringing his claim directly before a civil court.

32 — See Council documents 7752/04, 7209/04 (p. 9) and 8694/04 (p. II). That necessary counterpart had already been mentioned by the Commission in its Proposal for a Directive, since it stated therein that 'it should be stressed that [access to compensation in cross-border situations and the possibility, in general, of obtaining compensation] are closely intertwined. Without a possibility for state compensation in all Member States, [such] access … cannot be facilitated' (section 3.2).

33 — See point 36 of this Opinion.

81. The justification for such a compensation scheme for the victims of all violent intentional crimes is based to a greater extent on the idea that the commission of the crime and the occurrence of the damage it causes are the consequence of the State's failure to fulfil its protective role, than on a notion of solidarity. As the European Parliament explains in its report on the Proposal for a Directive on compensation to crime victims,[34] 'compensation for the victim must be guaranteed, not only to alleviate the harm and suffering caused as far as this can be done, but also to deal with the social conflict produced by the crime and facilitate the application of a properly rational criminal policy'.[35]

82. Under no circumstances is that interpretation of Article 12(2) of Directive 2004/80 liable to call its validity into question. It cannot be argued that, by so providing, that directive encroaches upon the area reserved to the Member States. Not only is the legal basis of that directive an appropriate choice as regards attaining one of the objectives of the European Union, but also the interpretation I propose does not create or modify any crime.

83. The crimes already laid down in Italian law remain intact in number and in substance. Under Directive 2004/80, the Italian Republic is by no means required to create or modify crimes which, within the organisation of its criminal legal order, already exist as violent intentional crimes, nor is it required to create new ones. It is indisputable that the definition of a crime and the sentence which punishes it lies within the sovereign powers of the Member States, subject to the reservations set out in the case-law of the Court and referred to in the judgment of 2 February 1989, *Cowan* (186/87, EU:C:1989:47).

84. Similarly, the restoration of equality of treatment between the victims of violent intentional crime, by the interpretation which I propose, does not have the effect of leading to a harmonisation of compensation schemes.

85. Although initially the Commission's draft included the establishment of minimum standards concerning, inter alia, the determination of the amount of compensation to be granted,[36] it eventually became apparent from the discussions that such standards could not be established on the basis of Article 308 EC.

86. The setting of the amount of compensation in the light of the injury suffered — permanent disability, total incapacity for work for one month or more, temporary incapacity for work for less than one month — or indeed the setting of any ceilings therefore remain within the exclusive competence of the Member States.

87. Compensation, however, must be fair and appropriate, as required by Article 12(2) of Directive 2004/80, and the national courts may refer questions to the Court in this connection in the event of doubt.

88. The only obligation which Directive 2004/80 imposes on the Member States is to provide for compensation for the victims of violent intentional crimes in cases where their perpetrator is unknown or insolvent, in order to attain one of the objectives of the European Union.

89. Having regard to the above, I consider that the complaint to the effect that the Italian Republic has not provided for a compensation scheme for the victims of all violent intentional crimes committed on its territory is well founded.

34 — Document A5-0330/2003.

35 — See p. 39 of that report. The Parliament, here, is, in effect, reproducing the terms of the Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes (see paragraph 7 of that Explanatory Report).

36 — See Article 4 et seq. of the Proposal for a Directive.

VI – Conclusion

90. In the light of the foregoing considerations, I propose that the Court should:

— declare that, by not providing for a compensation scheme for the victims of all violent intentional crimes committed on its territory, the Italian Republic has failed to fulfil its obligations under Article 12(2) of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, and

— order the Italian Republic to pay the costs.