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WHY NATIONAL COURTS MUST EXPLAIN NON-REFERRAL: THE PRELIMINARY RULING PROCEDURE AND THE DUTY TO GIVE REASONS

ISAK NILSSON*

The Court of Justice of the European Union (CJEU) portrays the preliminary ruling procedure (PRP) as a dialogue between itself and national courts in which parties play a secondary role. Under this conception, what duty does national judges have to justify when they decide not to request a preliminary ruling? While both the CJEU and the European Court of Human Rights (ECtHR) have case-law on this matter, the expectations placed on national courts remain unclear. This article clarifies what is expected by outlining the purpose, applicability and extent of the duty to give reasons for non-referral. It shows that the duty arises primarily in party-led initiatives before courts of last instance and that the required reasoning depends on the diligence of the party's request. This has constitutional implications: by highlighting the parties, the duty partially transforms the PRP, marking a departure from their traditional exclusion from the procedure. Yet, reliance on party requests leaves gaps in absence of such initiatives. This article argues that the duty should also be understood in the logic of Article 267(3) TFEU, requiring apex courts to justify non-referral on their own motion, in line with their obligation to refer.

1 INTRODUCTION

The Court of Justice of the European Union (CJEU) is still figuring out the role of the duty to give reasons within the preliminary ruling procedure (PRP). Nearly four decades after its seminal *CILFIT* judgment,[1] the Grand Chamber in *Consorzio Italian Management* introduced an obligation for national courts to provide reasons when deciding not to refer questions to the CJEU.[2] While this obligation may appear subtle, it has transformative potential, particularly in redefining the role of the parties in a procedure traditionally framed as a dialogue between courts.

However, this development did not occur in a legal vacuum. The recognition of a duty to give reasons echoes the long-standing case-law of the European Court of Human Rights (ECtHR),[3] as well as national practices in several Member States.[4] Yet, the CJEU's adaptation

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[1] Case 283/81 *CILFIT v Ministry of Health* EU:C:1982:335.

[2] Case C-561/19 *Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* EU:C:2021:799. The expectations beforehand were sky high after the far-reaching proposals made by Advocate General (AG) Bobek suggesting amendments to the strict *CILFIT* doctrine. The judgment was thus highly anticipated, but the modifications eventually made to the 'keystone' of the EU legal order, were less of an earthquake than initially expected. Yet, one of the major aspects that came out of the judgment was the reasons-giving for non-referral.

[3] See *Ullens de Schooten and Rezabek v Belgium* Apps no 3989/07 and 38353/07 (ECtHR, 20 September 2011).

[4] Sweden became the first country in 2006 to enact such legislation. Jacques Pertek, *Le renvoi préjudiciel – Droit, liberté ou obligation de coopération des juridicions nationales avec la CJUE* (2nd edn, Bruylant 2021) 285. The background of that law was the initiation by the Commission of an infringement proceeding.

of this obligation raises questions about how it fits within the distinct logics of judicial dialogue and human rights, and what this means for national courts navigating these overlapping legal frameworks.

The Strasbourg court has consistently examined whether domestic courts have failed to provide sufficient reasons when deciding against referral, viewing such instances as potential violations of the right to a fair trial under Article 6(1) ECHR. At the national level, constitutional courts connect the PRP to fundamental rights, such as access to a lawful judge and effective judicial protection.[5] These individual-centred perspectives contrast with the CJEU's traditional view of the PRP,[6] as a mechanism to ensure the uniform interpretation of EU law – one that operates '[…] by way of a non-contentious procedure excluding any initiative of the parties',[7] and not as a means of redress.[8]

Nevertheless, the introduction of a duty to give reasons, especially when approached from a human rights lens, challenges this conception. In *Consorzio Italian Management*, the CJEU linked Article 267 TFEU with Article 47(2) of the Charter when establishing a duty of reasons-giving for non-referral, and with this it is '[…] without a doubt, the [judgment] that, to date, has pushed the process of subjectivation of the preliminary ruling procedure the furthest' [my translation].[9] Still, the CJEU is yet to elaborate on the details of the duty to give reasons in this context.

This raises several questions: Who is the intended audience for this duty to give reasons? What are the legal requirements for the national courts to follow? Can the duty to give reasons serve both the rights of the parties and at the same time uphold the structure of Article 267(3) TFEU?[10]

The European Commission, Reasoned opinion 2003/2161 C(2004) 3899, October 13, 2004. For an overview of Member States encompassing a duty to give reasons for non-referral, see Seminar Organised by the Supreme Administrative Court of Sweden in Cooperation with ACA-Europe, 9-10 October 2023, 15 <https://aca-europe.eu/seminars/2023_Stockholm/2023_Stockholm_General_Report_en.pdf> accessed 1 December 2025, highlighting, although not limited to specific reasons-giving for the PRP, Bulgaria, Cyprus, Finland, Hungary and Sweden. See also Clelia Lacchi, 'Review by constitutional courts of the obligation of national courts of last instance to refer a preliminary question to the Court of Justice of the EU' (2015) 16(6) German Law Journal 1663, 1683 mentioning the case-law of the Czech and the Slovenian Constitutional Courts.

[5] Clelia Lacchi, *Preliminary References to the Court of Justice of the EU and Effective Judicial Protection* (Larcier 2020) 130.

[6] See François-Xavier Millet, 'From the Duty to Refer to the Duty to State Reasons: The Past Present and Future of the Preliminary Ruling Procedure' (2023) 15 European Journal of Legal Studies 26: 'The duty to state reasons however alters the nature of the preliminary ruling procedure. The duty to state reasons is itself classically associated with private parties as a corollary of an individual's right to defense'. See also Jasper Krommendijk, '"Open Sesame!": Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer' (2017) 42 European Law Review 46: 'These judgments [from the ECtHR] seem to change the nature of the preliminary reference procedure from a mechanism of inter-judicial co-operation to a mechanism safeguarding the individual right to a fair trial'.

[7] Case 44/65 *Hessiche Knappschaft v Maison Singer et Fils* EU:C:1965:122 page 971.

[8] *CILFIT v Ministry of Health* (n 1) para 9.

[9] Dominique Ritleng, 'Un droit au renvoi préjudiciel devant la Cour de justice de l'Union européenne? Éléments de réponse' in Dominique D'Ambra et al (eds), *Mélange en l'honneur de Florence Benoît-Rohmer Les droits de l'homme, du Conseil de l'Europe à l'Union européenne* (Larcier 2023) 433: 'La solution [*Consorzio Italian Management*] est sans aucun doute celle qui, à ce jour, a poussé le plus loin le processus de subjectivisation du renvoi préjudiciel'.

[10] See François-Xavier Millet, 'Cilfit Still Fits CJEU 6 October 2021, Case C-561/19, Consorzio Italian Management' (2022) 18(3) European Constitutional Law Review 533, 553; Compare Pertek (n 4) 285: 'Le control de l'obligation de coopération avec la Cour de justice pesant sur les juridictions statuant en dernier

When these layers of EU law, the ECHR, and national law meet in national courts to be applied, they do not blend seamlessly. It is arguably difficult for national judges to adhere to the rules because the legal framework is not entirely clear.[11] Hence, understanding the scope and extent of the duty in this context is necessary – not only to clarify the state of the law, but also to highlight what is at stake when national courts fail to provide reasons.

Generally, the obligation to provide a statement of reasons exists to serve several purposes,[12] among them the rights of the parties to the case. Accessing the justification for a decision is important for understanding how the legal sources were interpreted and then applied to the facts, to stay clear of arbitrariness.[13] In these ways, the duty to give reasons safeguards that the arguments employed by the parties have been properly considered by the judges, by forcing them to give reasons. Yet, the rationale for the giving of reasons goes beyond the parties[14] and includes the purposes of judicial accountability and control,[15] making it possible for the broader public, the higher courts, and the other branches, to scrutinize the exercise of power by the judiciary. Still, its precise function within the PRP remains unsettled and depends on whether one approaches it from the perspective of human rights law or from the logic of judicial accountability.

This article explores what the duty of reasons-giving for non-referral encompasses and its implications, as it emerges from both the ECHR and EU law. It makes two main contributions. First, it critiques the emphasis on party initiative as a trigger for the duty to apply, which narrows the duty's scope and create gaps, specifically where no reasoning is required in the absence of a party request. Instead, it argues that the duty should reflect the purpose of Article 267(3) TFEU, also applying *ex officio* when a question of EU law is raised in courts of last instance, to safeguard against misuse of *CILFIT*. In doing so, the duty would serve both individual rights and the uniformity of Union law. Second, the article shows that while the duty to give reasons does not transform the PRP into a party-driven remedy, it nonetheless signals a shift in that direction away from a court-driven dialogue.

The structure of the article is as follows: Section 2 examines the duty under the ECHR, including its aim, scope and extent needed for the reasoning. Given the link established by Article 52(3) of the Charter of Fundamental Rights of the European Union, with the ECHR setting the bar, it is both logical and necessary to begin with the Strasbourg framework. Furthermore, the case-law of the ECtHR is significantly more developed on this matter, also being authoritative for the national courts to follow.[16] Section 3 turns to EU law, how

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instance pourrait trouver appui sur l'émergence d'une exigence de motivation d'un refus de saisir la Cour d'une demande de décision préjudicielle'.

[11] Bernitz argues that the Swedish law has played out its role considering the legal development at the ECtHR. Ulf Bernitz, *Förhandsavgöranden av EU-domstolen: Utveckling av svenska domstolars hållning och praxis 2010–2015* (SIEPS 2016) 40.

[12] Gunnar Bergholtz, *Ratio et Auctoritas* (Juridiska föreningen i Lund 1987); Tom Bingham, 'Differences Between a Judgment and a Reasoned Award' (1997) 16 Arbitration International; Mathilde Cohen, 'When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach' (2015) 72 Washington & Lee Law Review 483, 504.

[13] Compare Harold Potter, *The Quest of Justice* (Sweet & Maxwell 1951) 13: 'If there is any truth in the aphorism that justice must not only be done but seen done, then a decision without reasons given must be regarded as undesirable, because it must be suspect since it may be arbitrary'. Cited also in Bingham (n 12).

[14] See Bergholtz (n 12) 363-364.

[15] Compare Bergholtz (n 12) 372; Cohen (n 12) 506-507.

[16] Although lacking *erga omnes* effect, the judgments of the Strasbourg Court become binding on the State party in the specific case under Article 46 ECHR. Nevertheless, national courts should follow the Court's

the duty is currently understood, and analyses the implications of adopting an approach that follows the ECtHR too closely. The article then concludes by reflecting on how the reasons-giving obligation redefines the PRP and the role of the parties within it.

2 ECHR – SETTING THE MINIMUM STANDARD OF REASONS-GIVING FOR THE PRP

2.1 INTRODUCTION

The ECHR has not left the '[…] backbone of the entire judicial system of the Union'[17] untouched. In 1993, the European Commission of Human Rights found that, although there is no absolute right to have questions referred, a refusal may violate Article 6(1) ECHR, especially '[…] when such a refusal appears to be arbitrary'.[18] The European Court of Human Rights (ECtHR) has since developed its case-law on this matter.[19]

In *Ullens de Schooten and Rezabek*, the Court clarified the connection between Article 6(1) ECHR and the PRP. The case concerned whether the French Court of Cassation and the Conseil d'État had breached Article 6(1) ECHR by declining to refer questions to the CJEU. The ECtHR emphasized that a non-referral may be arbitrary if '[…] the applicable rules allow no exception […]; where the refusal is based on reasons other than those provided for by the rules; and where the refusal has not been duly reasoned in accordance with those rules'.[20] It is the duty to give reasons that has been at heart of the activities of the Strasbourg Court in this context.

Although the ECtHR may not be the first court that comes to mind when considering the PRP, it plays an important role in ensuring that national courts provide reasons when deciding not to refer. This obligation serves to protect the parties' right to a fair trial. As will become clear in the following section, this important, but rather limited approach to reasons-giving and the PRP, has consequences for the applicability of, and extent to, the duty to provide reasons.

The rationale for a specific duty to give reasons connected to the PRP is phrased similarly to the general duty to provide reasons by a court.[21] It is emphasized that such an obligation '[…] serves to enable the parties to understand the judicial decision that has

interpretation of the Convention generally to prevent violations of the ECHR. See Fiona Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 186.

[17] Michal Bobek, 'Preliminary Rulings Before the General Court: What Judicial Architecture for the European Union?' (2023) 60(6) Common Market Law Review 1515, 1517.

[18] *Divagsa v Spain* App no 20631/92 (The European Commission of Human Rights, Decision of 12 May 1993) page 279.

[19] ECtHR, *ECHR-KS Key Theme Article 6 (Civil) The obligation to give reasons for a refusal to make a preliminary reference to the Court of Justice of the European Union* (2025); *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59. For judgments where the ECtHR found a breach of Article 6(1) ECHR for a failure to give reasons for non-referral, see ECtHR, *Bio Farmland Betriebs S.R.L. v Romania* App no 43639/17 (ECtHR, 13 July 2021); *Schipani and others v Italy* App no 38369 (ECtHR, 21 July 2015); *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014); *Rutar and Rutar Marketing D.O.O. v Slovenia* App no 21164/20 (ECtHR, 15 December 2022); *Sanofi Pasteur v France* App no 25137/16 (ECtHR, 13 February 2020); *Georgiou v Greece* App no 57378/18 (ECtHR, 13 March 2023); *Baltic Master Ltd. v Lithuania* App no 55092/16 (ECtHR, 16 April 2019).

[20] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59.

[21] Compare *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 62 that also reference *Taxquet v Belgium* App no 926/05 (ECtHR, 13 January 2009) para 92. Compare David Harris et al, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2023) 434-436.

been given […] [and] the purpose of demonstrating to the parties that they have been heard […]'.[22] It is also highlighted that it fulfils a broader purpose by 'foster[ing] public confidence in an objective and transparent justice system'.[23]

The ECtHR sets the minimum standards for how national judges must give reasons for not asking questions to the CJEU.[24] However, the right of the individual is subjected to certain conditions.

2.2 APPLICABILITY

The parties play an important role in how the duty is constructed within the ECHR, which is unsurprising given the nature of the Convention protecting individuals' human rights. For the duty to give reasons to activate, there must be some engagement from a party seeking a preliminary ruling.[25] Hence, according to the Convention, national judges are not obliged to state reasons for deeming a preliminary ruling unnecessary when no party has raised the issue. Also, the more precise and extensive the parties' requests and argumentation are, the higher the demands on the courts for the adequacy of their reasoning.

The scope of Article 6(1) is further limited to 'any criminal charge' and 'civil rights and obligations'.[26] Thus, the Convention right to have a reasoned decision covers only parts of the issues that fall within the scope of EU law. In addition, despite the wording of 'everyone' in Article 6(1), not all-party classes may initiate an individual application to the ECtHR.[27] While seemingly a trivial point, the duty to give reasons does not apply as a protection for public authorities.[28] Nevertheless, within the Swedish judiciary, public authorities represent the third most common category of parties seeking a preliminary ruling,[29] and under the Convention framework, these non-referral decisions did not have to be substantiated from this lens.

Although it is clear that courts against whose decision there is no judicial remedy under national law must give reasons for non-referral, it is uncertain whether this duty extends to

[22] *Harisch v Germany* App no 50053/16 (ECtHR, 11 April 2019) para 33.

[23] *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 62.

[24] For the minimum level of protection provided by the ECHR, see Janneke Gerards, 'Article 53 ECHR and Minimum Protection by the European Court of Human Rights' (2022) 3(4) European Convention on Human Rights Law Review 451.

[25] *John v Germany* App no 15073/03 (ECtHR, 13 February 2007) p. 5. The Court concluded that, although the applicant had specified a question for referral before the national court of appeal, his submissions to the Federal Court of Justice and the Federal Constitutional Court contained neither an explicit request nor any arguments supporting such a referral. Instead, the applicant merely asked those courts to uphold his motion as formulated before the court of appeal. The ECtHR found the complaint to be manifestly ill-founded. See also Anna Wallerman Ghavanini and Clara Rauchegger, 'Effective Judicial Protection before National Courts: Article 47 of the Charter, National Constitutional Remedies and the Preliminary Reference Procedure' in Matteo Bonelli et al (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart 2022) 49: '[…] ECtHR has taken the view that the obligation of the courts to provide reasons is activated by the substantiated request of a party to the proceedings'. See also Morten Broberg and Niels Fenger, 'If You Love Somebody Set Them Free: On the Court of Justice's Revision of the Acte Clair Doctrine' (2022) 59(3) Common Market Law Review 711.

[26] See Harris et al (n 21) 379-401.

[27] Article 34 ECHR excludes 'governmental organisations'. *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) para 148.

[28] ibid.

[29] Isak Nilsson, 'A Procedure for the Powerful? – Party Imbalances and the Decision Whether or Not to Refer' (draft).

lower courts. In *Ullens de Schooten and Rezabek v Belgium*, the Court stated that '[…] refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings – even if that court is not ruling in last instance […] [t]he same is true where the refusal proves arbitrary'.[30] This section of the judgment arguably extend the duty to give reasons to lower courts.[31] Yet, the statements should not be interpreted too extensively, as the Court attached 'in this context', implicitly referring to the obligation to refer for courts of last instance and the exceptions in *CILFIT*.[32] It is important to remember that almost all ECtHR judgments concerning the duty to give reasons and the PRP deal with courts of last instance. This is a natural consequence of the system's construction, as an applicant must exhaust all domestic remedies to bring a case before the ECtHR.[33] Therefore, if the issue has not been resolved at the national level, the complaint will typically be directed against the courts of last resort, having an obligation to refer.

Yet, some scholars argue that the ECtHR has imposed a duty to give reasons regardless of court level, based on its decision in *Chylinski v the Netherlands*.[34] However, that decision alone does not provide conclusive evidence for extending the obligation to state reasons to lower courts, but it may leave room for an interpretation in that direction. This is because the ECtHR does not make it fully clear whether the national courts involved were treated as courts falling under Article 267(3) TFEU or not. In that case, the applicants complained that the refusal to request a preliminary ruling from the CJEU violated Article 5(4) ECHR. Relying on *Ullens de Schooten and Rezabek v Belgium,* which encapsulates the duty to give reasons under Article 6 (1) ECHR, the applicants argued that this obligation also extends to detention proceedings. The Dutch courts involved were lower and intermediate courts, and it was specified that no appeal lay against their decisions, save for one exception. The decision of the ECtHR appears to omit the only lower court (the Rechtbank) whose decision could be appealed.[35] This suggests that the Strasbourg Court addresses the matter solely in respect of courts adjudicating at final instance, and not under Article 267(2) TFEU.

The ECtHR held that 'Article 6 § 1 requires that domestic courts give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary

[30] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59.
[31] See Bernitz (n 11) at note 8, 35.
[32] *Ullens de Schooten and Rezabek v Belgium* (n 3) para 59. See *OTP BANKA d.d. and others v Croatia* App no 38541/21 (ECtHR, 8 November 2022) para 12 where the Court specifies that the 'gist of those principles [formulated in *Ullens de Schooten and Rezabek*] is that the domestic courts against whose decision there is no remedy are obliged […] to state the reasons why they have considered it unnecessary to seek a preliminary ruling […]'.
[33] For example, *Lawyers' association for protection of Human Rights v Italy* App no 7494/12 (ECtHR, 22 February).
[34] See Wallerman Ghavanini and Rauchegger (n 25) 49. Compare Krommendijk (n 6) 51: 'The ECtHR is stricter with respect to courts or tribunals of a Member State against whose decisions there is no judicial remedy. […] However, the case law of the ECtHR is not entirely clear yet, since the ECtHR has not ruled out the possibility that lower courts could infringe Article 6 ECHR when refusing to refer in *Ullens de Schooten* and indeed seemed to apply the *Dhahbi* reasoning to such lower courts in *Chylinski*'.
[35] See *Chylinski and Others v The Netherlands* App no 38044/12 (ECtHR, 21 April 2015) para 36: 'All three complained of the refusal of the Netherlands courts to put a preliminary question to the CJEU under Article 267 of the TFEU'. This sentence seems to include all of the national courts involved. See however para 41 that is more specific and seems to leave out the only court that allowed for appeal: 'All three applicants complained about the refusal of the Regional Court (applicant 1, applicant 3,) and the Court of Appeal (applicant 2)', implying that applicant 2 did not complain against the regional court, that in his case, allowed for leave to appeal. To add confusion, para 47 refers to 'The Court of Appeal in all three cases', while it was only applicant 2 that seemingly had his case at the court of appeal (Gerechtshof).

ruling' and then explicitly pointing out '[…] the specific context of the third paragraph of [Article 267 TFEU]', and the obligation to provide reasons deriving from the *CILFIT* exceptions. This case was ultimately declared manifestly ill-founded as the delivery of a preliminary ruling could not have been made in time and hence not affect the lawfulness of the applicant's detention. I can neither subscribe to, nor reject the view that *Chylinski v the Netherlands* strengthens the argument that the duty to give reasons for non-referral applies to all courts, and not only courts of last instance. It remains ambiguous whether *Chylinski* discusses only courts falling under Article 267(3) TFEU or whether it also extends to courts covered by Article 267(2) TFEU.[36]

Having said that, the rationale advanced by the ECtHR for why an individual has the right to a statement of reasons, namely, to know that the decision was not made on arbitrary grounds, should not be limited to courts of last instance. In addition, the general obligation to provide reasons for judgments is not specific to courts of last instance,[37] and it is difficult to envisage why the case would be different here.

Hence, I conclude that while courts of last instance are definitely subject to the duty to give reasons, this arguably applies to lower courts as well. What is expected in adequacy of the reasoning will however differ between courts under Article 267(2) and 267(3) TFEU, with the latter having higher demands.[38]

2.3 ADEQUACY OF THE REASONS

It should be noted that the ECtHR takes a formalistic approach to reasons-giving and does not focus on whether the domestic judges have correctly understood the EU law at hand.[39] Thus, the ECtHR's role is limited to checking if the underlying statement for the decision not to refer is arbitrary. This implies that a national court may fail to understand the relevant EU law, such as a provision being *acte clair* or not, but still follow the formal standards set by the ECHR.[40]

The requirement for a statement of reasons means that the complete absence of a national court's reasoning on the matter constitutes a violation of Article 6(1) ECHR.[41]

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[36] See also *Chylinski and Others v The Netherlands* (n 35) para 42: 'The question is, therefore, whether an obligation to put a preliminary question to the CJEU can arise under Article 5 § 4 of the Convention. For its part, the Court sees no reason to give a ruling on this point, since the applications are in any event inadmissible for the reasons given below'.

[37] Harris et al (n 21) 432: 'The right to a reasoned judgment applies to appellate, as well as lower court, decisions, although an appellate judgment may not have to be so fully reasoned'.

[38] Compare the difference to the general obligation to give reasons putting less emphasis on higher courts, ibid 432.

[39] *Georgiou v Greece* (n 19) para 23: 'although it is for the Court to carry out this check rigorously, it is not for it to examine any errors that the domestic courts may have made in the interpretation or the application of the relevant law'.

[40] This formalistic approach may risk translating into national courts approaching the duty to give reasons as a tick in the box exercise. Yet, this does not mean that they can escape responsibility within EU law, and national law.

[41] *Dhahbi v Italy* (n 19) para 33; *Georgiou v Greece* (n 19) para 25; *Rutar and Rutar Marketing D.O.O. v Slovenia* (n 19) para 63; *Schipani and others v Italy* (n 19) para 42. For criticism of this position by the ECtHR, see the Concurring Opinion of Judge Wojtyczek to the case of *Schipani and others v Italy* para 5 highlighting that the reasons-giving in the context of EU law is treated more favourably within the ECHR compared to other areas including criminal law and that this is not sufficiently justified. In addition, he is not convinced that the absence of a statement of reasons for refusing to refer automatically results in a violation of Article 6(1) ECHR, even concerning courts of last instance.

However, this requires that a party is advocating for a preliminary ruling. The fact that dismissing a party's request without any stated reasons would be arbitrary can be explained by the aims of the duty. Accordingly, '[…] it is […] not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored […]'.[42]

The ECtHR's approach is not binary; not just any justification for rejecting a request to refer is sufficient. The Strasbourg court has clarified the adequacy needed for a statement of reasons to avoid arbitrariness. However, the bar is not set very high.

The ECtHR takes its point of departure for assessing the alleged violation of Article 6(1) ECHR by stating that '[t]he extent to which the duty to provide reasons applies may vary according to the nature of the decision. […] That is why the question of whether or not a court has failed to fulfil the obligation to provide reasons […] can only be determined in the light of the circumstances of the case […]'.[43] This means that there is no absolute duty for the national courts to respond in detail, point by point, to all the arguments that a party may put forward, but that it depends on the context of the case at hand.[44]

The main rule is that courts of last instance must engage with the *CILFIT*-criteria when rejecting a request for referral. This means national courts must at least mention which *CILFIT* exception is at hand, such as whether the questions are irrelevant to the outcome of the case,[45] *acte éclairé*, or *acte clair*.[46] National courts should also assume that they need to explain how these exceptions come into play, especially if the party's request is well substantiated. In *Dhahbi*, the ECtHR specified that the courts must '[…] indicate the reasons why […]' the *CILFIT* exceptions can be activated.[47] This implies describing for *acte éclairé* the case-law from the CJEU that is relied upon and how these relate to the present case. Additionally for *acte clair,* it needs to be explained why no reasonable doubt exists by going through the demanding test set out in *CILFIT* and amended in *Consorzio Italian management*.[48] In other situations, however, the ECtHR has found it acceptable for the national court of last instance to only mention an exception to the duty to refer, especially when party engagement is lacking. Indeed, a request with formulated questions, rather than just broadly stating that a preliminary ruling is needed, demands more from the national court, while the latter requires less engagement.

Yet, the dynamic between how substantiated the party claim is and whether the apex court must engage and explain how the *CILFIT* criteria comes into play, rather than just mentioning an exception, is not always easy to deduce. Hence, national courts should arguably stay on the safe side and not only pay lip service to *CILFIT*, but also clearly explain how they are exempted from referring. This is already expected under Article 267(3) TFEU, where they must correctly apply the exceptions from *CILFIT* and *Consorzio Italian management*, although the ECtHR does not control this.

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42 *Dhahbi v Italy* (n 19) para 33.
43 *Baydar v the Netherlands* App no 55385/14 (ECtHR, 24 April 2018) para 40.
44 *Harisch v Germany* (n 22) para 34.
45 See for example *Jesus Pinhal v Portugal* App no 48047/15 (ECtHR, 8 October 2024) [2025, referral to the GC] para. 212.
46 *Ullens de Schooten and Rezabek v Belgium* (n 3) para 62.
47 *Dhahbi v Italy* (n 19) para 31.
48 See Bernitz (n 11) 38.

In *Somorjai v Hungary*, the majority found that the applicant had not requested a preliminary ruling in the petition for review before the national court of last instance, and deemed the case before the ECtHR as manifestly ill-founded.[49] The minority however emphasized that the majority conclusion was 'formalistic',[50] and determined that although there had not been an explicit claim, the applicant had raised the issue of the proper interpretation of EU law, which was the main issue in the review proceeding, and '[…] the arguable need to give at least some consideration to the *CILFIT* criteria was also raised through the applicant's argument concerning a violation of [Article 267 TFEU])', in respect to the judgment appealed against.[51] The case illustrates how the lack of party engagement requires less from national courts in terms of reasons-giving. However, the Court disagreed on where to draw the line for the threshold when a party has requested a preliminary ruling that subsequently demands more or less attention from national courts.

In *Baltic Master Ltd*, the ECtHR highlighted that 'the applicant's […] request […] was very specific […]' while the court of last instance had rejected the claim by stating *acte clair* without further showing how that was the case. The court found a violation because '[…] it is not clear from the reasoning […] on what specific legal grounds that court considered the application of the EU law to be so obvious that no doubts could arise […]'.[52] It should be noted that *acte clair* in itself is haunted by arbitrariness and is hence in great need to be substantiated when relied upon.

In *Sanofi Pasteur v France*, the court held that '[…] the request for a preliminary ruling […] had been very precisely worded […]',[53] while the national court of last instance rejected the claim with the reasoning that the motion was 'without any need arising to request a preliminary ruling from the [CJEU]'.[54] The ECtHR concluded that the national court had not provided statements in line with the *CILFIT* criteria, not even implicitly through its legal reasoning. Although the national court provided a statement for why it did not ask for a preliminary ruling, that reasoning '[…] does not demonstrate whether those issues were examined in the light of the *CILFIT* criteria, and if so, which of those criteria […] as the basis for deciding not to transmit them to the CJEU'.[55] Consequently, the court found a violation.

Departing from the main rule, Broberg identifies five different scenarios where the ECtHR accept little, or no direct reasoning.[56] For example, the Court has deemed there is no violation when a lower court in the same case provided detailed reasons for non-referral, which can be inferred even if the apex court's reasoning was brief and did not mention or engaging with the *CILFIT* exemptions.[57] This is however not entirely unproblematic since the rules are different for courts adjudicating at last instance compared to lower courts, with

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[49] *Somorjai v Hungary* App no 60934/13 (ECtHR, 28 August 2018) para 60. See also *SOL.IN.MUS S.R.L and others v Italy* App no 6656/15 (ECtHR, 13 February 2024).

[50] Joint Separate Opinion of Judges Sajó and Pinto de Albuquerque to the case of ECtHR *Somorjai v Hungary* para 3.

[51] ibid.

[52] *Baltic Master Ltd. v Lithuania* (n 19) paras 41, 43.

[53] *Sanofi Pasteur v France* (n 19) para 71.

[54] ibid para 73.

[55] ibid para 77.

[56] Morten Broberg, 'National EU courts must seek advice in Luxembourg or face reproach in Strasbourg' (2021) 2 European Human Rights Law Review 162. See also ECtHR, *ECHR-KS Key Theme Article 6 (Civil)* (n 19).

[57] *Harisch v Germany* (n 22) para 41.

the former being bound by the *CILFIT* criteria.

Summary reasoning may also be acceptable when it is clear from other parts of the merits why a preliminary ruling was not requested.[58] Although, the ECtHR acknowledges that the national court 'could have explained more explicitly why it refused to make a preliminary reference […] an implicit reasoning can be considered sufficient […]'.[59] Moreover, the ECtHR has found no violation when the party's request is vague or unsubstantiated, and the reasoning then is limited to citing 'the relevant provisions governing such complaints [national law dismissing an appeal in cassation in the context of accelerated procedures]', as long as '[…] the matter raises no fundamentally important legal issue'.[60] Furthermore, stating that the constitutional court had no jurisdiction under national law to review whether a preliminary ruling should be requested was deemed sufficient to avoid violating Article 6(1) ECHR.[61]

In sum, although exceptions exist, it is important to emphasize that courts of last instance must generally make it clear that their decision not to refer follows the *CILFIT* criteria. Also, depending on the strength of the party's argumentation and the clarity of the claims, apex courts may be expected to explain in detail why an exception is applicable to the case at hand.

Courts falling under Article 267(2) TFEU are not expected to reference the *CILFIT* criteria.[62] Instead, it is unclear what is demanded of them, and whether a complaint to the ECtHR would be admissible or declared manifestly ill-founded.[63] However, it is reasonable, falling back on the purposes of the ECtHR's approach to the duty to give reasons for non-referral, that they make it clear that the national court have taken the views of the parties into account, responded to the request, by stating the reasons for not referring. In the words of Wallerman Ghavanini and Rauchegger, '[…] indeed a discretion must not be confused with a freedom to act arbitrarily'.[64] By giving reasons for why a preliminary ruling is unnecessary, the lower courts should stay clear of arbitrariness in the lens of Article 6(1) ECHR.

2.4 TAKEAWAYS

Under the Convention framework, the individual is placed at the centre of the matter. The duty to provide reasons for non-referral arises when a party requests a preliminary ruling, and the level of diligence required from the national court depends on how well the request is substantiated. This reflects a narrow approach, which distinguishes itself from the broader aims underpinning the PRP for several reasons. First, while courts of last instance are under

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[58] *Baydar v the Netherlands* (n 43) para 43.

[59] *Repcevirág Szövetkezet v Hungary* App no 70750/14 (ECtHR, 30 April 2019) para 58.

[60] *Baydar v the Netherlands* (n 43) para 42.

[61] *Repcevirág Szövetkezet v Hungary* (n 59) para 61. See also the fifth exception identified by Broberg (n 56) 58 that '[…] in a case of appeal in cassation in which "is declared inadmissible with a summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable" there will be no infringement of Article 6(1) of the ECHR'.

[62] See an *e contrario* interpretation of the statement 'for the specific context of the third paragraph of [Article 267]'. *Dhahbi v Italy* (n 19) para 31.

[63] This was the case in *John v Germany* (n 25). In addition, applicants need to exhaust all domestic remedies under Article 35 ECHR. See the discussion following footnote 34.

[64] Wallerman Ghavanini and Rauchegger (n 25) 49-50.

an obligation to refer *ex officio,* they are not required to provide reasons for non-referral on their own initiative. Second, the duty to provide reasons does not extend to requests made by public authorities, which is logical from a human rights perspective, but does not serve the purpose of transparency for how the judges handle the PRP. Third, when courts of last instance decide not to refer, they are expected to justify their decision by invoking one of the recognized exceptions – *irrelevancy*, *acte éclairé*, or *acte clair* – and explain how it applies. However, under certain situations, a brief justification may suffice, for example when the reasoning can be inferred from the decision of a lower instance. Yet, lower courts are not expected to apply or reference the *CILFIT* criteria, which are specifically designed for Article 267(3) TFEU. Fourth, the ECtHR has not excluded the possibility that the duty to give reasons could also apply to lower courts. While this aligns with the rationale of Article 6(1) ECHR offering protection against arbitrariness, it appears inconsistent with the structure of Article 267 TFEU. Overall, the human rights-based approach leaves potential gaps: national courts of last instance may avoid providing reasons for not referring in several situations, thereby limiting the possibility of external scrutiny for how they handle their obligation to refer under Article 267(3) TFEU. EU law has the potential to fill these gaps.

3 EU LAW – A CLASH OF INTERESTS

3.1 INTRODUCTION

The ECtHR sets the minimum requirements on the national courts while the CJEU can raise the bar even higher. There is a bridge connecting the Convention and the EU Charter through Article 52(3) of the Charter.[65] This provision entails that, since Article 47(2) of the Charter corresponds to Article (1) ECHR, while having a broader scope,[66] 'the meaning […] shall be the same […]', although Article 47(2) can set a higher standard.[67] In this way, the ECHR lays out the foundation for which the EU Charter can build upon, while using the case-law of the ECtHR as '[…] a source of interpretation of Charter rights based on the ECHR'.[68] The legal standards set out in the former section thus travel through to the EU legal system,[69] but come out on the other side with a wider scope, covering the entirety of EU law, rather than being limited to civil rights and criminal proceedings.[70] This Section

[65] Compare Bobek (n 17) 1524.
[66] Explanations relating to Article 52(3) of the Charter of Fundamental Rights [2007] OJ C303/17.
[67] Article 52(3) of the Charter.
[68] Steve Peers and Sacha Prechal, 'Article 52 – Scope and Interpretation of Rights and Principles' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1651. See also Clelia Lacchi, 'Multilevel judicial protection in the EU and preliminary references' (2016) 53 Common Market Law Review 702.
[69] Bernitz (n 11) 37: 'That entails that EU law as a whole ought to be subjected to the duty to give reasons, as formulated by the ECtHR' [my translation]. Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd edn, Oxford University Press 2021) 245 '[…] we submit that the latter provision [Article 47(2)] must be construed so as to prohibit Member State courts of last instance from arbitrarily refusing to make a preliminary reference […] to reflect the same meaning as constructed by the European Court of Human Rights […]', referencing Lacchi, 'Multilevel judicial protection in the EU' (n 68).
[70] Clara Rauchegger, 'Sources and Content of Article 47' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1254. See also Explanations relating to Article 52(3) of the Charter of Fundamental Rights.

argues that the CJEU does not have to copy the position of the ECtHR, but should articulate the duty to give reasons in a manner also consistent with the objectives of Article 267 TFEU. This would bring a higher standard for reasons-giving in the context of the PRP, bridging both the human rights and uniformity approaches.

In *Consorzio Italian management*, the CJEU held that

> […] it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that, if a national court or tribunal against whose decision there is no judicial remedy under national law takes the view because the case before it involves one of the three situations [referencing *CILFIT*] […], that it is relieved of its obligation to make a reference […], the statement of reasons for its decision must show [that one of the three exceptions is present] […].[71]

Yet, this paragraph of the judgment should not be understood in isolation. It is followed by a statement that the courts must 'independently and with all the requisite attention', decide whether any exceptions to the duty to refer are present concerning 'the interpretation of EU law that has been raised before them'.[72] The Court also highlighted that the PRP 'does not constitute a means of redress available to the parties'.[73]

Even though the CJEU does not explicitly reference the ECtHR in *Consorzio Italian management*, it is evident that the Court has drawn inspiration from the Convention system.[74] At the same time, the CJEU is careful not to do away with the PRP as a 'dialogue between judges' stressing the independence of the national judges deciding whether any of the *CILFIT* exceptions are applicable to the case, and that the procedure constitutes no remedy for the parties.

The Court specifies that the obligation to give reasons 'follows' from the PRP '[…] read in the light of the second paragraph of Article 47 of the Charter […]'. Arguably, 'read in the light' does not equal a direct application of Article 47(2),[75] but rather as attributing the addition of a duty to give reasons in the context of the PRP to that Charter provision, flowing in turn from Article 6(1) ECHR.[76] This framework, reading Article 267 TFEU in light of Article 47(2) of the Charter in conjunction with the substantive EU law in question, forces national judges at last instance to provide reasons for the decision of non-referral.[77]

[71] *Consorzio Italian Management* (n 2) para 51.
[72] ibid para 54. See also para 53: '[…] the system […] is completely independent of any initiative by the parties […]'.
[73] ibid para 54.
[74] Millet, 'Cilfit Still Fits CJEU' (n 10) 548. See citations in the Opinion of Advocate General Bobek in Case C-561/19 *Consorzio Italian Management* EU:C:2021:291 para 108.
[75] Compare Opinion of AG Bobek in *Consorzio Italian Management* (n 74) para 171: '[…] in my view, the duty to state adequate reasons, although it is likely to already flow from relevant national rules, is also an obligation imposed by EU law under Article 47 of the Charter'.
[76] This opens up the world of ECtHR jurisprudence. Compare Clelia Lacchi, 'The ECrtHR's Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure' (2015) 8 Review of European Administrative Law 177: 'A different interpretation of Article 47(2) of the charter, which does not cover the national judges' refusals to refer under Article 267 TFEU, would risk contradicting Articles 52(3) and 53 of the Charter'.
[77] Millet, 'Cilfit Still Fits CJEU' (n 10) 555: '[…] there is arguably now an enforceable right under EU law to receive a statement of reasons in reply to their specific arguments'; Bobek (n 17) 1518 at 9. See also the potential implications for the doctrine of state liability, Millet, 'Cilfit Still Fits CJEU' (n 10) 552. There might

The focus on the individual brings a set of underlying aims surrounding the reasons-giving, which can also be located within other corners of EU law. The Union is not foreign to a duty to give reasons,[78] for understanding the reasoning behind a decision,[79] which also becomes important when considering the option for appeal.[80] Still, something happens when it is located within the context of the PRP. The 'keystone' of the EU legal system has notoriously been described as a dialogue between judges and as establishing no remedy for the parties. It is in this setting that the CJEU in *Consorzio Italian management* brings the parties into the picture, having the duty to provide reasons for the protection of the parties' rights to a fair trial, although they simultaneously have no right to a preliminary ruling.[81] In this regard, Gentile and Bonelli express that '[…] fundamental rights have colonized [bold font omitted] yet another aspect of the EU constitutional order'.[82] A difference to the ECtHR however, is that the CJEU does not necessarily condition the activation of the duty to give reasons on a request from the parties. I argue that within the context of the PRP, the human rights dimension to reasons-giving must be complemented by the main objective of the PRP: securing the uniform interpretation of EU law.

3.2 APPLICABILITY

So far, questions arriving at the CJEU regarding the duty to give reasons for non-referral have involved a party requesting a preliminary ruling,[83] but the duty to state reasons for non-referral is not expressly limited to a party claim.[84] While it is clear that the duty activates with a party request, it arguably also applies when questions about the interpretation of EU law is raised before national courts of last instance, in tandem with the obligation to refer. The prerequisite in Article 267 TFEU of questions 'raised' encompasses both issues identified by the parties and those raised *ex officio* by the judges.[85] This brings up the question:

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also be potential personal liability consequences under national law for individual judges flouting their obligation to refer, or the obligation to give reasons. Compare Fabio Ferraro, 'Les Conséquences de la Violation de l'Obligation d'Introduire une Demande de Décision Préjudicielle' in Fabio Ferraro and Celestina Iannone (eds), *Le Renvoi Préjudiciel* (Bruylant 2023) 236-237; Opinion of AG Szpunar in Case C-83/21 *Airbnb Ireland and Airbnb Payments UK* EU:C:2022:545 para 85.

[78] Article 296 TFEU; Article 47(2) of the Charter. See also Jane Reichel, *God Förvaltning i EU och i Sverige* (Jure 2006) 531–537; Case C-619/10 *Trade Agency Ltd v. Seramico Investments Ltd* EU:C:2012:531 para 60.

[79] Debbie Sayers, 'Article 47(2) A Fair and Public Hearing within a Reasonable Time' in Steve Peers et al (eds), *EU Charter of Fundamental Rights A Commentary* (Bloomsbury 2021) 1367.

[80] Compare Case 222/86 *Unectef v Heylens* EU:C:1987:442 para 15. For the context of the PRP and the possibility of appealing the decision not to refer, see Case C-210/06 *Cartesio* EU:C:2008:723 para 93: '[…] the outcome of such an appeal cannot limit the jurisdiction conferred by [Article 267 TFEU] on that court to make a reference to the [CJEU]'.

[81] This is also the position by the ECtHR. *Ullens de Schooten and Rezabek v. Belgium* (n 3) para 57.

[82] Giulia Gentile and Matteo Bonelli, 'La Jurisprudence des Petits Pas: C-561/19, Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA' (*REAlaw.blog*, 30 November 2021) <https://realaw.blog/2021/11/30/la-jurisprudence-des-petits-pas-c-561-19-consorzio-italian-management-e-catania-multiservizi-and-catania-multiservizi-by-giulia-gentile-and-matteo-bonelli/> accessed 1 December 2025.

[83] *Consorzio Italian Management* (n 2); Case C-144/23 *Kubera* EU:C:2024:881; Case C-767/23 *Remling* [forthcoming].

[84] *Consorzio Italian Management* (n 2) para 51; Broberg and Fenger, 'If You Love Somebody Set Them Free' (n 25) 725; Wallerman Ghavanini and Rauchegger (n 25) 49.

[85] See Article 267 TFEU; Case C-126/80 *Salonia v. Poidomani* EU:C:1981:77 para. 7: '[…] the second and third paragraphs of Article [267] of the Treaty are not intended to restrict this procedure exclusively to cases where

does the duty to give reasons apply even in the absence of an explicit party request?

Apart from *Consorzio Italian management,* two additional cases are of importance: *Kubera,*[86] and the pending case *Remling*.[87] *Kubera* addresses the duty to refer, as well as the obligation to provide reasons for non-referral in the context of filtering procedures for granting leave to appeal. *Remling*, in turn, concerns whether summary reasoning can suffice when declining to refer.

The judgment in *Kubera* did not add much to the duty to give reasons. The CJEU confirmed that the obligation applies also in filtering procedures, but apart from this, it essentially reiterated what was said in *Consorzio Italian management*. The Advocates General in the post-*Consorzio* cases provide more developed analysis on this matter, even if their views are not binding on the CJEU.

AG Ćapeta in *Remling* takes the position that the duty to give reasons is not dependent on a party request,[88] while AG Emiliou's view in *Kubera* is less consistent.[89] On the one hand, he argues that the *duty to refer* in filtering procedures only arises when the parties have properly raised a genuine issue of EU law, substantiated its arguments, and expressly invited the court to make a reference, highlighting the principle of *vigilantibus non dormientibus iura succurrunt*.[90] On the other hand, when discussing the *duty to give reasons*, Emiliou argues that it applies when 'an appellant has properly raised an issue of interpretation of EU law'.[91] The Court did not follow his suggestion in *Kubera*, concluding that also the stage of leave to appeal encapsulates the same duty to refer, existing generally for apex courts.[92] For the duty to provide reasons, the CJEU stated that 'Article 267 TFEU, read in light of the second paragraph of Article 47 of the Charter […] [a national court of last instance] must set out, in its decision refusing an application for leave to appeal on a point of law *containing a request* […] the reasons why that reference was not made […] [italics added]'.[93] This should not, however, be read as foreclosing the possibility that courts of last instance must give reasons on their own motion. There are compelling arguments in favour of such an obligation.

Under Article 267 TFEU, national judges have a monopoly to decide whether or not to refer, under the banner of securing the uniform interpretation of EU law.[94] In this sense,

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one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of [EU] law, but also extend to cases where a question of this kind is raised by the national court or tribunal itself […]'; David Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002) 87. See also *Consorzio Italian Management* (n 2) para 54.

[86] *Kubera* (n 83). This case is a reminder of the issues highlighted by the Commission when initiating an infringement proceeding against Sweden in 2004. The Commission alleged that Sweden violated Article 267(3) TFEU with the courts of last instance hiding behind the national filtering procedure to avoid their obligation to refer questions to Luxembourg. The situation was resolved with the Swedish parliament imposing a duty on these courts to give reasons when deciding against referral through para 1 lagen (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol.

[87] *Remling* [forthcoming] (n 83).

[88] Opinion of AG Ćapeta in Case C-767/23 *Remling* EU:C:2025:486 para 58.

[89] Opinion of AG Emiliou in Case C-144/23 *Kubera* EU:C:2024:522.

[90] 'The law assists those who are vigilant with their rights and not those that sleep thereupon'. See ibid paras 107-108. In this connection he highlights that 'Nor can they expect those courts to engage with requests to seise the Court of Justice which are vague, confusing or unsubstantiated'.

[91] ibid para 134.

[92] *Kubera* (n 83) para 66.

[93] ibid para 65.

[94] A uniform interpretation of Union law may also serve the rights of individuals at large. See Fabio Spitaleri, 'La Faculté et l'obligation de renvoi préjudiciel' in Fabio Ferraro and Celestina Iannone (eds), *Le Renvoi Préjudiciel* (Bruylant 2023) 168.

the duty to give reasons *ex officio* safeguards against the obligation to refer disappearing into the abyss in national courts. The exception of *acte clair* has particularly caused problems with courts of last instance flouting their obligation to refer.[95] Relying solely on the parties for reasons-giving to apply, would arguably not serve the purpose of Article 267 TFEU. Here, the statement of reasons can safeguard against the abuse of *CILFIT*.[96] Parties may very well be uninterested in a preliminary ruling, and lacking such requests, it still makes it possible for others,[97] and especially the Commission, to scrutinize the decision not to refer.[98]

Yet, this approach comes with far-reaching implications. The CJEU highlights that national courts adjudicating at last instance, deciding not to refer, must show which of the three exceptions is at hand.[99] This includes the requirement for national judges to give reasons for not referring also when irrelevant.[100] Hence, the obligation to give reasons covers situations in which a referral would potentially have resulted in inadmissibility at the CJEU.[101] Since the duty to give reasons also arguably applies *ex officio* and in situations where the EU law in question would not affect the outcome of the case, national judges must explicitly address the decision *not* to refer, even when irrelevant in the first place. It is fully possible that national courts make a correct assessment regarding whether any of the exceptions in *CILFIT* are applicable and thus not risking the uniform interpretation of EU law, without mentioning their decision against referring and which of the *CILFIT* criteria were relied upon.[102] Such implicit practice seems now forbidden under the approach adopted in *Consorzio Italian Management*.

When judges are required to give reasons for the decision of non-referral, even without any party initiative, they might realize that the reasons for invoking *irrelevancy, acte éclairé* or *acte clair* do not hold, prompting them to ask questions when initially hesitant.[103] It should

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[95] See Julio Baquero Cruz, 'Francovich and Imperfect Law' in Maguel Poiares Maduro and Loïc Azoulai (eds), *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty* (Hart 2010) 420.
[96] See Millet, 'From the Duty to Refer to the Duty to State Reasons' (n 6) 14.
[97] This could be national constitutional courts, but also the general public. Compare Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5) 133: 'The Slovenian Constitutional Court further points out that the reasoning of national courts of last instance must be adequate to enable the Constitutional Court to determine whether the conditions setting out the duty under Article 267(3) TFEU have been respected'.
[98] See the infringement proceeding against Sweden, where the lack of reasoning for the non-referral, when declaring the case inadmissible, made it 'impossible for the individual to verify whether the obligation under [Article 267(3)] has been complied with', and '[…] not possible for the Commission as guardian of the Treaty to control that Article [267(3)] is complied with'. The European Commission, Reasoned opinion 2003/2161 C(2004) 3899, October 13, at [37, 51]. Yet, it will be notoriously difficult for the Commission to identify omissions to the duty to refer and the duty to give reasons for non-referral in situations with no party activity on the matter.
[99] *Consorzio Italian Management* (n 2) para 51.
[100] See Lorenzo Cecchetti, 'CILFIT "Motionless Titan" Has Moved, albeit Softly and with Circumspection: Consorzio Italian Management II' (*REAlaw.blog*, 21 January 2022) <https://realaw.blog/2022/01/21/cilfit-motionless-titan-has-moved-albeit-softly-and-with-circumspection-consorzio-italian-management-ii-by-lorenzo-cecchetti/> accessed 1 December 2025. Cecchetti highlights differences between the proposed solutions by A.G Bobek and the final judgment by the Court. For example, that the duty also encompasses 'irrelevant questions […] and stems not from Article 47 of the Charter only'.
[101] See Broberg and Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (n 69) 141-194 concerning the relevancy criteria.
[102] Compare Lacchi, 'Multilevel judicial protection in the EU' (n 68) 702. See also Opinion of AG Ćapeta in *Remling* (n 88) para 67, making a similar point in reference to summary reasonings.
[103] Compare Cohen (n 12) 511-512: 'In attempting to reason her decision, a judge discovers that she cannot find an appropriate legal justification, leading her to reconsider her initial ruling and make a more accurate determination'. See also Opinion of AG Ćapeta in *Remling* (n 88) para 49.

not be too demanding to state why a preliminary ruling would be irrelevant, or which judgments the national court relies upon for *acte éclairé*. The challenge instead lies with the *acte clair* criteria, where the duty to give reasons can increase transparency in how that exception is applied, both for individuals to the case and for the Commission as the guardian of the treaties.

A limited approach of conditioning the activation of reasons-giving on party requests fails to consider that parties are entitled to due process, even when they are themselves uninterested or unaware of the obligation for courts of last instance to refer questions. In this vein, Lacchi argues that the ECHR requirement for parties to request a referral, '[…] does not ensure a higher level of protection in favour of individuals' and hence the reading of Article 47(2) of the Charter does not have to mirror such a position,[104] but rather not be below the level of protection afforded by the Strasbourg Court. Moreover, '[u]nder EU law […] since the parties are not required to submit a request for a preliminary reference, the fairness of the procedure could not depend on the parties' application".[105] AG Ćapeta also acknowledges that the case-law of the ECtHR is relevant even without party requests.[106]

In sum, the threshold within EU law for the application of a duty to provide reasons for non-referral clearly includes party requests, and, with less certainty, situations where questions about the interpretation or validity of EU law is raised before the national court. A difference from the ECHR is that the PRP brings its own logic, and hence the human rights dimension cannot be the only rationale guiding the duty to give reasons in this context.[107]

There are divergences between the two Courts' approaches to the reasons-giving within the context of the PRP, which affect the scope and extent of the duty to give reasons. Apart from the obligation likely existing regardless of party requests within EU law, the CJEU only takes stock on courts subjected to Article 267(3) TFEU, namely those against whose decision there is no judicial remedy under national law.[108] Yet, with the floor provided by the ECHR, it could potentially be argued that this obligation applies to all national courts, at least when a party requested a referral.[109] This reflects one of the benefits of the CJEU incorporating a duty to provide reasons for non-referral by reading Article 267 TFEU *in the light of* Article 47(2) of the Charter, thereby anchoring the rationale in both the logic of the PRP and the human rights dimension.

3.3 ADEQUACY OF THE REASONS

Regarding the expected adequacy of the reasoning,[110] *Consorzio Italian management* clearly states that a reference to the *CILFIT* criteria is necessary. In this vein, the national courts must 'show' how these apply,[111] explaining 'why' one of the three exceptions are applicable in

[104] Lacchi, 'Multilevel judicial protection in the EU' (n 68) 703 at 150.
[105] ibid 110.
[106] Opinion of AG Ćapeta in *Remling* (n 88) para 57.
[107] ibid paras 46–47.
[108] See Case C-99/00 *Lyckeskog* EU:C:2002:329.
[109] See Wallerman Ghavanini and Rauchegger (n 25) 55-56.
[110] Note that the CJEU did not incorporate the suggestion by AG Bobek for 'adequate reasons'. Cecchetti (n 100).
[111] See the language versions of *Consorzio Italian Management* (n 2) para 51: 'for its decision must show either that', 'doivent faire apparaître soit que', and 'måste det framgå av skälen till detta beslut'.

the given case.[112] The *e contrario* reading suggests that national courts may not depart from the obligation to refer based on other reasons than those listed in *CILFIT*. Similar to the ECtHR's point of departure, the adequacy of the statement is related to '[…] the nature of the case, its complexity, and above all the arguments brought before the deciding court and those contained in the case file'.[113]

Although the CJEU had the chance to elaborate on the details regarding the obligation to give reasons in *Kubera,* it has not gone beyond what was originally stated in *Consorzio Italian management*. Further clarification may come in future rulings, such as the upcoming case *Remling*.[114] In the meantime, national courts are expected to meet certain standards. As a general rule, a national court of last instance must clearly indicate which *CILFIT* exception it relies on and explain why. However, similar to the ECHR, there may be circumstances that justify a less detailed approach. AG Emiliou appears to draw inspiration from ECtHR case-law, which links what is expected of the court reasoning to the diligence of the parties. He notes that there are situations where implicit reasoning may be acceptable,[115] for example when the request is vague, but also scenarios that raises the bar for what is needed. This is the case when the request includes 'diverging lines of case-law across the [EU] […] or […] meaningful differences in the various language versions […]'.[116]

Focusing on the activities and quality of the parties as a benchmark for judicial diligence is problematic in this context. Parties deserve an explanation for why no questions were sent to the CJEU, regardless of their ability to argue their case. It is not a given that parties who submit extensive and persuasive requests are more deserving of attention than those who lack expertise in EU law and are typically 'weaker' parties. While the principle of *vigilantibus non dormientibus iura succurrunt* aligns well with procedural law, it translates poorly into human rights law, which aims to protect all individuals, including the vulnerable, from arbitrariness. Although AG Emiliou explicitly refers to this principle in the context of filtering procedures and the duty to refer,[117] the same strand of reasoning can unfortunately be located, between the lines, in the part concerning the duty to provide reasons for non-referral.

Also, it should be reminded that to safeguard the uniform interpretation of Union law, transparency is necessary even when no party has the knowledge or motivation to provide arguments for referral.

One form of a potential exception is the use of summary reasons. This issue is at the heart of the questions posed to the CJEU in *Remling*, but also whether they are permissible 'whether or not in conjunction with an explicit request for a preliminary ruling?'. Hopefully, the Court will provide guidance regarding both summary reasons, and settling whether the duty to give reasons also applies *ex officio*.

Both AG Emiliou and AG Ćapeta deem that summary reasons may be in line with the obligation to give reasons, referencing ECtHR case-law, but not without some qualifications. The former argues that, apart from lacklustre requests described above,

[112] See Opinion of AG Ćapeta in *Remling* (n 88) para 40; Opinion of AG Emiliou in *Kubera* (n 89) para 128.
[113] Opinion of AG Bobek in *Consorzio Italian Management* (n 74) para 168; See also the Opinion of AG Emiliou in *Kubera* (n 89) para 127.
[114] *Remling*, [forthcoming] (n 83).
[115] Opinion of AG Emiliou in *Kubera* (n 89) para 129.
[116] ibid para 130.
[117] ibid para 107.

implicit reasoning may be sufficient also 'where the party's appeal is inadmissible or manifestly unfounded' or 'the grounds for refusal can be clearly inferred from the reasons given in the remainder of the decision or from the decisions by the lower courts'.[118] AG Ćapeta, meanwhile, emphasizes that what matters most is whether the applicant can understand which *CILFIT* exception was relied upon and why it was applicable to the case at hand. In her view, this level of understanding may sometimes be achieved through summary reasons, such as when last instance courts adopt the reasoning of a lower court that had adequately give reasons in line with the *CILFIT* criteria.[119]

Still, courts operating under Article 267(2) TFEU are not subject to a duty to refer and the exceptions set out in *CILFIT*. Hence, last instance courts must be cautious when using summary reasons and relying on the reasoning provided by lower courts.[120]

The main difference between the two AGs is that AG Emiliou focuses on whether appellants can grasp the reasons for why their questions were not sent,[121] while AG Ćapeta stresses the importance of the parties understanding the decision of non-referral, also without any party requests. However, both approaches share a common shortcoming: they assume that parties are generally interested in preliminary rulings. This overlooks the broader public interest in ensuring that courts of last instance offer transparent and reasoned decisions when they deviate from their obligation to refer.[122]

Apart from these developments, Wallerman Ghavanini and Rauchegger point out that 'it remains to be seen whether the CJEU will construe the duty […] to provide reasons for their refusal to refer as a formal or substantive duty […]'.[123] The ECtHR only formally checks whether the reasoning reflects the acceptable exceptions to Article 267(3), and does not inquire whether the reasoning actually translates to the correct application of Article 267 TFEU, or if the understanding of EU law is erroneous at large. In contrast, the CJEU is in a position to examine substantially whether the national courts of last instance have followed the duty to refer and interpreted the EU law correctly.

3.4 TAKEAWAYS

So far, the positioning of the CJEU is closely related to the ECtHR, but with the setup of the PRP, the Luxembourg court could impose higher demands on national courts to mirror the expectations already existing under Article 267(3) TFEU. This entails that national courts of last instance should reason their non-referral decisions when EU law is raised, by themselves or by a party, and not be conditional on a party request. The core objective of

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[118] Opinion of AG Emiliou in *Kubera* (n 89) para 129.
[119] Opinion of AG Ćapeta in *Remling* (n 88) paras 79–80.
[120] See also ibid para 81.
[121] Opinion of AG Emiliou in *Kubera* (n 89) para 131 also stating that: '[…] whether the courts which may be seised by those appellants can effectively rule on their complaints'.
[122] It should be noted that AG Ćapeta in her opinion in *Remling* discusses the rationale for a duty to give reasons both in light of Article 267 TFEU and Article 47 of the Charter. Yet, her view is rather narrow regarding what the obligation in light of Article 267 TFEU entails. It is stated that '[…] the public interest in ensuring the uniformity of EU law […] might be satisfied if the national court of last instance takes into consideration the *CILFIT* situations, but has not given its reasons for the decision not to refer', concluding that summary reasons do not *per se* contravene such a purpose, see Opinion of AG Ćapeta in *Remling* (n 88) para 67. Hence, her examination of the compatibility of summary reasons is limited to the rationale of the parties.
[123] See Wallerman Ghavanini and Rauchegger (n 25) 60.

the PRP, securing a uniform interpretation of EU law, requires transparency even in the absence of well-argued party requests. Although the rights based-approach to reasons-giving is welcomed to avoid arbitrariness, it should arguably be accompanied by the logics inherent to the PRP making the duty extend even further.

4 CONCLUSION

The duty to give reasons for non-referral did not originate in Luxembourg. It was developed by the ECtHR and within certain Member States before being transplanted over to the EU legal system in *Consorzio Italian Management*. The *raison d'être* for the obligation to give reasons for non-referral resembles the general duty to give reasons, but takes slightly different expressions in the two regional courts. Within the ECHR, the duty to give reasons for non-referral exist for the sake of the parties if they have raised the matter, while the PRP classically has had little regard for the parties within Union law.[124] The main argument of this article has been that the focus on the human rights dimension to reasons-giving, although important, should not be the sole guiding factor, because it is too party-dependent. The suggested path is a duty to provide reasons for the PRP that is underpinned both by the right of the individual, and safeguarding the uniform interpretation of EU law.

With the introduction of a duty to give reasons, the horizontal dialogue between judges has been expanded to include the vertical power dimension between the rights of individuals against the State. The intended audiences for the duty to exist in the first place seems to be mainly the parties, but it should also encompass the Commission and the public at large, allowing for scrutiny and fostering legitimacy in the decision-making. Viewed in this light, the dual function of the duty to give reasons echoes the two overarching purposes of the PRP, namely securing uniformity and safeguarding individual's EU rights.

With the invitation of the parties to the PRP, in the sense of a duty to give reasons for non-referral, it might better reflect the role of the parties that has previously been largely neglected in the law in the books. The parties and their counsel have practical importance at the national level in convincing the domestic courts asking questions to the CJEU.[125] Nevertheless, what the parties arguably wish for is not primarily being provided with reasons for non-referral, but a preliminary ruling in itself. Still, what the parties seek should not matter within the PRP since it provides no remedy.[126] Nevertheless, by bringing Article 47 (2) of the Charter into the picture as the CJEU did in *Consorzio Italian Management*, it opened a door that might be difficult for the Court to shut,[127] partly welcoming the parties into the warmth,[128] and thus parting ways from their traditional exclusion from the PRP. It should at the same

[124] See however the opportunity for the parties to submit observations in Article 96(1) Rules of Procedure of the Court of Justice. See also point 13 in the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure, 2024, highlighting: 'In the interests of the proper administration of justice, it may also be appropriate for the reference to be made only after both sides have been heard'.
[125] Tommaso Pavone, *The Ghostwriters – Lawyers and the Politics Behind the Judicial Construction of Europe* (Cambridge University Press 2022); Broberg and Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (n 69) 255.
[126] *Consorzio Italian Management* (n 2) paras 53, 54.
[127] See Gentile and Bonelli (n 82): '[…] one may wonder whether this judgment could be the first move towards establishing an individual right to trigger a preliminary ruling', but concludes that '[…] we should be cautious and not put the chariot before the horses […]'.
[128] See Millet, 'Cilfit Still Fits CJEU' (n 10) 554; Krommendijk (n 6) 62.

time be noted that the CJEU has refrained from adopting the positions of different constitutional courts, which takes it a step further with a right to a lawful judge and establish even stronger ties to effective judicial protection.[129]

The duty to give reasons is derived in parts from the common tradition of the Member States.[130] By analogy, it follows that the CJEU should consider national constitutional courts' view of the PRP and possibly adopt it.[131]

It also remains to be seen how the giving of reasons plays out in practice. The answers from the 27 administrative courts of last instance in the Member States, witness that only five out of these deem that 'the reasons for rejecting a party's claim to request a preliminary ruling are more extensive since the rulings of the [CJEU in *Consorzio Italian Management*] and the ECtHR [in *Sanofi Pasteur v. France* and *Rutar and Rutar Marketing d.o.o. v. Slovenia*]'.[132] Whether the actual practice of giving reasons by the national courts adheres to the legal requirement is for future studies to tell. It is clear however that the PRP as a dialogue between judges is expanding to also encompass a dialogue between national judges and the parties, broadening the category of actors involved in the forging of the 'jewel in the crown'[133] of the EU legal order. This makes *Consorzio Italian Management* deserving of the name *CILFIT 2*.[134]

[129] For how this plays out in certain national constitutional courts, see Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5). See also the Opinion of AG Bobek in Case C-683/19 *Viesgo Infraestructuras Energéticas* EU:C:2021:300 para 34. See also Julio Baquero Cruz, *What's Left of the Law of Integration?* (Oxford University Press 2018) 53-86: 'Following the case law of some national constitutional courts and of the Strasbourg Court, the Court of Justice should flesh out the position of the individual in the preliminary reference procedure on the basis of Article 47 of the Charter. As already suggested, the obligation to refer could give rise to direct effect and deserves as much protection as any substantive provision of Union law, especially if it is part of the effective judicial protection granted by Article 47 of the Charter'.

[130] Compare the Opinion of AG Emiliou in *Kubera* (n 89) para 125.

[131] See Lacchi, *Preliminary References to the Court of Justice of the EU* (n 5) 275: 'All these courts [Constitutional Courts of Germany, Austria, Croatia, the Czech Republic, Spain, Slovenia, and Slovakia] interpret the right to effective judicial protection (in the broad sense) under their constitution as including the preliminary reference procedure. Therefore, this practice could contribute to the adoption of a similar interpretation of Article 47(2) of the Charter. The latter, in fact, is inspired by the constitutional practices of the Member States and by its counterpart under the ECHR, i.e. Article 6'.

[132] Seminar Organised by the Supreme Administrative Court of Sweden in Cooperation with ACA-Europe (n 4) 15, 17. These are the supreme administrative courts of Spain, Romania, the Netherlands, Malta and Austria. The French Conseil d'État is coded as unclear while the rest answered 'no'.

[133] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (8th edn, Oxford University Press 2024) 493.

[134] 'CILFIT due', see Davor Petrić, 'How to Make a Unicorn or "There Never Was an Acte Clair" in EU Law: Some Remarks About Case C-561/19 Consorzio Italian Management' (2021) 17 Croatian Yearbook of European Law and Policy 307.

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EVOLUTION OF PERSONAL DATA IN THE COURT OF JUSTICE'S CASE LAW AND IMPLICATIONS FOR SCIENTIFIC RESEARCH

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This article provides an in-depth analysis of the concept of personal data under the General Data Protection Regulation (GDPR) in light of the Court of Justice's jurisprudence and explores its implications for such a data-intensive field as scientific research. It traces the evolution of the core definitional elements set out in the definition – 'any information', 'relating to', and 'an identified or identifiable natural person' – highlighting how their interpretation has developed through case law, with particular attention to such newest cases as IAB Europe and SRB. Through the analytical approach it takes, this article enhances clarity in data processing activities in scientific research, and illuminates questions that necessitate further inquiries. Moreover, by linking case-law developments to ongoing discussions on the notion of personal data, it enhances awareness of pseudonymisation and its legal nature, and nuances the boundaries between data processing that triggers the GDPR and that which does not.

1 INTRODUCTION

The General Data Protection Regulation (GDPR) establishes a comprehensive, far-reaching framework for the protection of personal data across the European Union and has been in effect for almost a decade.[1] Central to its scope is the definition of personal data, provided in Article 4(1) as 'any information relating to an identified or identifiable natural person'. This definition is not new in the EU legal culture; it can already be found in the previous EU personal data framework, the Data Protection Directive, adopted in 1995,[2] and in addition to the GDPR it features in other legal instruments, notably, the Law Enforcement

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[1] See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ 2016 L119/1, which will be cited as the 'GDPR'.
[2] See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, which will be cited as the 'Directive' or the 'Data Protection Directive'.

Directive (LED)[3] and the Data Protection Regulation for EU institutions, bodies, offices, and agencies (EUDPR).[4] While deliberately broad to accommodate a wide range of data types and contexts,[5] the definition's interpretation – particularly in technologically complex and data-driven environments – has given rise to legal uncertainty and judicial scrutiny.[6]

Because the GDPR applies to the processing of personal data pursuant to Article 2(1) GDPR, the assessment of whether the data in question constitutes personal data is central to all activities involving the processing of information about individuals, including such data-intensive fields as biomedical research. It has implications not only for ascertaining whether the GDPR applies and, if so, what obligations must be complied with, but also for how the intended data-processing aims can be effectively met. In scientific research, if a dataset is treated as falling outside the scope of personal data, this may have implications for decisions regarding how data processing activities and data flows are organised, and even for the extent to which the intended study is legally feasible.[7] This is also particularly relevant for consortia in which datasets are located both within different EU Member States, and within and outside the EU, and in which data are shared with third countries. When data are located across different EU Member States, administrative and practical hurdles may make data sharing difficult, if not impossible. When data are located both within the EU and in third countries, and a data transfer is crucial to achieving the scientific aims, at times, a study may not appear feasible given the requirements set out in Chapter V of the GDPR for international data transfers, legal realities in respective third countries, and the risks that research partners in the EU are willing to assume.[8]

A correct assessment of whether a dataset in question constitutes personal data or not is also crucial for other considerations. For example, in Sweden, if data-driven scientific research involves processing sensitive data within the meaning of the GDPR, it requires ethical approval, whereas the processing of a health data dataset that is not personal under the GDPR does not.[9] Whilst ethical approval is an important safeguard, it is also resource-intensive. It must be used when required. However, if ethical approval is sought when it is not required, whilst it can be perceived as an additional safeguard, it is not serving

[3] See Article 2 of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89, which will be cited as 'LED'.

[4] See Article 2 of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L295/39, which will be cited as 'EUDPR'.

[5] See, by analogy, Case C-434/16 *Nowak* EU:C:2017:994 paras 33–34 and Case C-604/22 *IAB Europe* EU:C:2024:214 para 36.

[6] Compare for example the referring courts' questions in Case C-582/14 *Breyer* EU:C:2016:779 and *IAB Europe* (n 5).

[7] For example, in organisational decisions regarding AI development, whether to train AI in a centralised data pool or to adopt a federated model. Whereas the data-minimisation principle may incline towards the latter, in cases where the intended processing objectives could be compromised by federated learning, a centralized data pool might be the only viable option.

[8] See Santa Slokenberga et al, 'EU Data Transfer Rules and African Legal Realities: Is Data Exchange for Biobank Research Realistic?' (2019) 9(1) International Data Privacy Law 30.

[9] Lag (2003:460) om etikprövning av forskning som avser människor (The Ethical Review of Research Involving Humans Act) Section 3.1.

the intended purpose, and it is adding not only to the costs but also is placing a burden on the respective ethics body, and hampering the effectiveness of the achievement of the intended research objectives.

Over the years, the Court of Justice of the European Union (CJEU), and in particular the Court of Justice, has played an important role in developing the concept of personal data and in understanding its constituent elements. As one of the central pillars of the right to data protection, the notion of personal data has appeared in a broad range of cases, from the era of the aforementioned Data Protection Directive to the present, under the GDPR, the LED, and the EUDPR. As the concept of personal data is essentially the same across all areas of EU data protection law,[10] the CJEU has assigned it a uniform interpretation across the different instruments,[11] allowing case law clarifying the notion under one instrument to be applied under another. Despite the notion of personal data having a prominent role in EU law, the concept has been substantiated in only a relatively small number of decisions,[12] including the well-known cases of *Nowak*[13] and *Breyer*,[14] adjudicated in the previous decade. In those cases, the CJEU has gradually provided guidance on how key notions included in the definition – any information, its relation to a natural person, and identifiability – should be interpreted and applied, allowing one to pursue a devil's advocate's position, highlighting that even information about weather can constitute personal data, and caution that the GDPR is becoming the law of everything.[15]

In scientific research, working with pseudonymised data is commonplace. It has been a prevailing argument that '[t]the GDPR explicitly defines data that have undergone pseudonymization as personal data, thus falling within the scope of the regulation'.[16] Interpretations like this have not only provoked considerable debate about the GDPR in scientific research but also given rise to practical consequences, in particular, the necessary arrangements to ensure compliance with the GDPR for pseudonymous data.

In 2024-2025, the Court of Justice delivered preliminary rulings in two tone-setting cases: *IAB Europe* (request for a preliminary ruling)[17] and *SRB* (appeal of the General Court judgment).[18] These cases add further nuance to the concept of personal data, its constitutive elements, and its interplay with anonymous data, and challenge the view that treats pseudonymised data as personal data in all cases. They also arguably open up the possibility of drawing a bit clearer boundaries between when data are personal and when they are not, within the meaning of the GDPR. In a scientific research context, this means a new opportunity, with potentially greater legal certainty, to make more nuanced assessments of

[10] Compare Article 2(a) of the Data Protection Directive (n 2), Article 3(1) LED (n 3), Article 3(1) EUDPR (n 4) and Article 4(1) GDPR (n 1).
[11] See Case C-413/23 P *SRB* EU:C:2025:645 para 52, *IAB Europe* (n 5) para 33 and compare Case C-180/21 *Inspektor v Inspektorata kam Visshia sadeben savet* EU:C:2022:967 para 12.
[12] Central cases are reviewed in Section 3.
[13] *Nowak* (n 5).
[14] *Breyer* (n 6).
[15] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10(1) Law, Innovation and Technology 40.
[16] Mahsa Shabani and Luca Marelli, 'Re-identifiability of Genomic Data and the GDPR' (2019) 20 EMBO Rep EMBR201948316. For a broader insight into the scholarly debates, see Section 2.
[17] *IAB Europe* (n 5).
[18] *SRB* (n 11).

whether a dataset is personal, and, when it is not, to avoid the associated legal requirements.[19]

Taken together, the body of case law on the notion of personal data provides guidance on how the constituting elements of that notion should be interpreted and combined. Moreover, it also demonstrates how the concept of personal data functions within the broader structure of the GDPR and in light of its underlying purposes. These cases gradually clarify the boundaries of the GDPR by adding interpretive detail and methodological nuance on a case-by-case basis, and contributing to an increasingly substantive understanding of what constitutes personal data. At the same time, their contextual foundations allow for nuanced – and at times diverging – interpretations and methodologies to be applied, leaving the legal landscape with some ongoing uncertainty about the true meaning of the concept and how it ought to be assessed.

This article examines the meaning of personal data in light of recent CJEU rulings, situates it within the broader trajectory of the concept's evolution as shaped by prior case law, and explores its implications for such a data-intensive field as scientific research. It further considers the implications of this evolving conceptualisation for delineating the substantive scope of data protection under the GDPR, and illuminates a way forward for enhancing legal certainty for those acting in good faith in their attempts to comply with the GDPR, whilst fulfilling aims of public importance. Whilst the primary objective of the article is to offer a doctrinal analysis of the evolution of the understanding of personal data, it has two secondary implications. On a practical level, it enhances clarity in data processing activities in scientific research, including the design of data flows. Conceptually, by linking case-law developments to ongoing discussions on the notion of personal data, it aims to enhance awareness of pseudonymisation and its legal nature, and to nuance the boundaries between data processing that triggers the GDPR and that which does not.[20]

2 SOME REMARKS ON THE NOTION OF PERSONAL DATA

2.1 THE PROVISIONS OF THE GDPR

Following Article 4(1) GDPR, '"personal data" means any information relating to an identified or identifiable natural person ("data subject")'. It clarifies that 'an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'. Neighbouring to that definition is the definition of pseudonymised data set out in Article 4(5) GDPR. It states that '"pseudonymisation" means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'.

These two definitions are primarily grounded in Recital 26, although subsequent

[19] Even though the data might not be personal data within the meaning of the GDPR, these data might, nonetheless, be subject to other legal or ethical requirements.
[20] For reasons elaborated in Section 4, anonymous data are not contrasted with personal data.

recitals have also appeared to be helpful interpretative tools. It states that '[t]he principles of data protection should apply to any information concerning an identified or identifiable natural person'. In regard to pseudonymised data, it affirms that '[p]ersonal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person'. Thereafter, it guides that

> [t]o determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments.

The limits on the application of the GDPR are highlighted by a further affirmation in that recital, namely, that

> [t]he principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

2.2 THE SCHOLARLY DEBATE AND POLICY APPROACHES

What data fall within the scope of the personal data definition, and what fall outside it, have generated considerable scholarly debate and attracted policymakers' attention. To illustrate briefly, computer science has its roots in technology, including the development of privacy-preserving tools, and, against that background, understanding the requirements and challenges posed by the legal standards of anonymisation and personal data. Law, especially the EU law, has its roots in preserving the right to privacy and the right to data protection against evolving technology, whilst not placing undue obstacles to market objectives. Both converge somewhat on the understanding that anonymised information cannot be linked back to an individual and therefore cannot be used to cause harm to the individual, while also opening up discussion of the construct of anonymisation and its content. The data protection rules in the EU are anchored in the understanding that an individual shall be protected insofar as the scope of personal data stretches. Where data are rendered anonymous, even if they come from an individual, they no longer benefit from the legal protection, as the data subject has ceased to exist in that particular context.[21]

Anonymisation is not defined in the GDPR. In scholarship, it has been referred to as

[21] See Santa Slokenberga, 'You can't put the genie back in the bottle: on the legal and conceptual understanding of genetic privacy in the era of personal data protection in Europe' [2021] BioLaw Journal - Rivista di BioDiritto 223.

an approach to find a balance between sharing data and protecting an individual's privacy.[22] From a technical perspective, the standard of anonymity has been achieved as a requirement against privacy attacks. Consequently, anonymous data should be robust against attempts to (re)identify and learn about individuals.[23] A key question has been re-identification and the extent to which risks are acceptable for the dataset to remain regarded as anonymous. This bears on how privacy is generally approached and on how the notion of personal data is understood, whether as a static or context-dependent concept. Against this, various approaches to privacy are also located. That of pragmatists, who focus on the risk of re-identification, and that of formalists, who focus on mathematical rigour when defining privacy.[24] Put in different terms, whether privacy is relative or objective, understood also as absolute, a debate that has existed for a considerable time, and was already picked up by Advocate General in the case of *Breyer*, as a background to the questions raised in that case.[25]

A body that can be said to have pursued a zero-risk approach is the WP 29, established under the Data Protection Directive and now replaced by the EDPB. It stated that 'anonymisation is a technique applied to personal data in order to achieve irreversible deidentification'.[26] This approach can be contrasted with that of the GDPR, where the above-quoted Recital 26 takes a relativist approach by focusing on 'reasonably likely'.[27] While some actors, such as the Irish Data Protection Authority, have adopted a relativist approach,[28] a zero-risk approach is also evident. In 2020, Finck and Pallas reported that this has been the case with regard to the French Data Protection Authority (Commission nationale de l'informatique et des libertés). The finding holds even in February 2026, when the CJEU has taken the opportunity to clarify its case law on the fundamental concepts surrounding the notion of personal data, and notably the case of *SRB* in 2025. In particular, it still explicitly guides that 'L'anonymisation consiste à utiliser un ensemble de techniques de manière à rendre impossible, en pratique, toute identification de toute personne par quelque moyen que ce soit'.[29] That is, at a time when awareness of perfect anonymisation as a myth, against the growing number of reported cases that identify the anonymised in

[22] Andrea Gadotti et al, 'Anonymization: The Imperfect Science of Using Data While Preserving Privacy' (2024) 10(29) Science Advances eadn7053.
[23] Gadotti et al (n 22).
[24] See in that regard Ira Rubinstein and Woodrow Hartzog, 'Anonymization and Risk' (2016) 91 Washington Law Review 703, 715–716.
[25] Opinion of Advocate General Campos Sánchez-Bordona in Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* EU:C:2016:339 para 52.
[26] Article 29 Data Protection Working Party, 'Opinion 05/2014 on Anonymisation Techniqus', 0829/14/EN WP216, 7.
[27] See in that regard, e.g., Michèle Finck and Frank Pallas, 'They Who Must Not Be Identified—Distinguishing Personal from Non-Personal Data under the GDPR' (2020) 10(1) International Data Privacy Law 11.
[28] Data Protection Commission, Guidance on Anonymisation and Pseudonymisation, 'Anonymisation and Pseudonymisation - Latest April 2022.Pdf', 2-3 <https://www.dataprotection.ie/sites/default/files/uploads/2022-04/Anonymisation%20and%20Pseudonymisation%20-%20latest%20April%202022.pdf> accessed 12 February 2026.
[29] "Anonymization involves using a set of techniques to make it practically impossible to identify any person by any means whatsoever," authors' translation. 'Comment prévenir les risques et organiser la sécurité de vos données ?' <https://www.cnil.fr/fr/comment-prevenir-les-risques-et-organiser-la-securite-de-vos-donnees> accessed 12 February 2026.

different datasets, has already existed for a while in the scholarship.[30]

The absolutist or relativist approach to understanding anonymisation has also had implications for the discussion on pseudonymisation. Article 4(5) GDPR approaches 'pseudonymisation' as a manner of processing of data.[31] However, it does not necessarily preclude treating pseudonymisation as an action in which personal data undergoes pseudonymisation. Indeed, the EDPB also highlights that pseudonymisation requires a pseudonymisation transformation of data.[32]

The scholarship is rich in approaches that treat pseudonymous data as personal data, either explicitly[33] or rather more subtly.[34] These conclusions are not difficult to achieve against such considerations as recital 28, stating that

> [t]he application of pseudonymisation to personal data can reduce the risks to the data subjects concerned and help controllers and processors to meet their data-protection obligations. The explicit introduction of 'pseudonymisation' in this Regulation is not intended to preclude any other measures of data protection.

A rather radically different take, considering the time, has been made by Mourby et al, who, against the background of the *Breyer* case, have argued in 2018 that 'it should be possible for these data [data which have undergone pseudonymisation under the GDPR, author's note] to be rendered anonymous in some circumstances'.[35] Ideas along those lines can also be found elsewhere,[36] and potentially read between the lines in policy documents, such as those of the Irish Data Protection Authority.[37] Thus, the idea that pseudonymised data are not necessarily personal data has lingered for some time, though it has not dominated the scholarship. Alongside these discussions, pseudonymisation as means has been widely discussed, with much of the focus on datasets that undergo pseudonymisation.

3 PERSONAL DATA CLOSE UP IN THE CASE LAW

3.1 'ANY INFORMATION'

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[30] See Rubinstein and Hartzog (n 24).

[31] See EDPB, 'Guidelines 01/2025 on Pseudonymisation' (16 January 2025) para 3 onwards.

[32] ibid para 18 onwards.

[33] 'As the definition makes clear, "pseudonymised data" remains "personal data" which are within the scope of the GDPR, and the data subject rights set out in Articles 15–20 still apply'. Claudia Irti, 'Personal Data, Non-Personal Data, Anonymised Data, Pseudonymised Data, De-Identified Data' in Roberto Senigaglia, Claudia Irti, and Alessandro Bernes (eds), *Privacy and Data Protection in Software Services* (Springer Singapore 2022) 54.

[34] See, 'The result of pseudonymisation is pseudonymised data which remain personal data but being protected through coding or encryption'. Gauthier Chassang, 'The Impact of the EU General Data Protection Regulation on Scientific Research' (2017) 11 Ecancermedicalscience 709.

[35] Miranda Mourby et al, 'Are "Pseudonymised" Data Always Personal Data? Implications of the GDPR for Administrative Data Research in the UK' (2018) 34(2) Computer Law & Security Review 222, section 1.3.

[36] See note 6, where the authors reflect on pseudonumisation and state that '[t]his raises the potential problem of pseudonymised data being used for identification purposes, which makes it in effect personal data' in Mark Elliot et al, 'Functional Anonymisation: Personal Data and the Data Environment' (2018) 34(2) Computer Law & Security Review 204.

[37] 'Where a pseudonym is used, it is often possible to identify the data subject by analysing the underlying or related data. The Authority uses often, as popsed to always, which opens up for our interpretation'. Data Protection Commission (n 28) 3.

Article 4(1) GDPR sets out 'any information' as a starting point in the personal data definition. A case that illustrates the application and interpretation of the first criterion in the definition of personal data, the criterion of 'any information', is *Nowak*. In *Nowak*, the CJEU examined whether written answers submitted by a candidate at a professional examination, and an examiner's comments with respect to those answers, constitute personal data within the meaning of Article 2(a) of the Data Protection Directive.[38] The CJEU famously held that

> [t]he use of the expression 'any information' in the definition of the concept of 'personal data', within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information […] provided that it 'relates' to the data subject.[39]

This notion was driven by the recognition that the scope of the Directive was broad, encompassing diverse categories of personal data.[40] However, as reflected in the quote, the expression 'any information' is qualified by the requirement that the data must 'relate to' an individual. This first criterion ensures that the scope is not artificially limited by excluding certain types of information, thereby preserving the GDPR's protective function. Rather than narrowing the concept of personal data itself, potential concerns arising from an overly broad scope are addressed through additional criteria – such as identifiability and the 'relates to' test – which ensure that the application of the rules remains proportionate and coherent.[41]

As elaborated in case law, 'any information' potentially encompasses all kinds of information provided that it 'relates to' the data subject. It includes not only objective, but also subjective information.[42] Moreover, whilst the CJEU has long accepted that erroneous data can be protected as personal data, in *Nacionalinis visuomenės sveikatos centras,* it noted that fictitious data do not constitute personal data.[43] However, the reasoning appears not to be that such data fail to qualify as information, but rather that they are not linked to a real, existing natural person and therefore are not personal data.[44]

In the recent *SRB* judgment, the Court of Justice nuanced that the nature or type of information may have implications for the application of the subsequent criteria.[45] It derives from the case that comments reflecting the opinions and views of data subjects constitute information relating to those individuals by reason of their content alone.[46] This illustrates that the nature of the information can be significant in determining whether it constitutes personal data under the GDPR.[47] Accordingly, where the information in question consists of the personal views or opinions of its author, the 'relates to' criterion is, in effect, fulfilled. Such information inherently establishes a connection to the individual, not through external

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38 See *Nowak* (n 5).
39 ibid para 34.
40 Compare ibid at paras 33–34.
41 Compare the use of the principle of proportionality to limit unwarranted obligations following a wide interpretation of the scope of the Directive in Case C-101/01 *Lindqvist* EU:C:2003:596 para 88.
42 See e.g., Case C-487/21 *Österreichische Datenschutzbehörde and CRIF* EU:C:2023:369 para 23; Case C-479/22 *OC v Commission* EU:C:2024:215 para 45; *IAB Europe* (n 5) para 36; and *SRB* (n 11) para 54.
43 Compare Case C-683/21 *Nacionalinis visuomenės sveikatos centras* EU:C:2023:949 para 55.
44 ibid.
45 *SRB* (n 11).
46 See ibid paras 52–61.
47 See ibid para 56.

effect or purpose, but by its content alone.[48]

While it is clear that the nature of the information can influence the application of the 'relates to' criterion, its connection to the identifiability criterion warrants further examination, particularly in light of the Court of Justice's judgment in *IAB Europe*.[49] This case concerned the so-called Transparency and Consent String (TC String), in which user preferences were encoded and stored as a string of letters and characters.[50] This string formed part of a broader transparency and consent framework designed to facilitate the communication of user choices within real-time bidding – an automated system for auctioning advertising space on the internet based on user profiles.[51] Through this system, advertising technology companies could bid, in real time, for the opportunity to display personalised advertisements tailored to individual user profiles. In addition to the TC String, a cookie was placed on the user's device once he or she had consented to or objected to the processing of their data. When combined, the TC String and the cookie could be linked to the user's IP address.[52] In assessing whether the TC String constitutes personal data, the Court of Justice found that, although it did not contain direct identifiers, it encoded user preferences that originated from a specific natural person and related to that individual.[53] On this basis, the Court concluded that the TC String fell within the scope of personal data under Article 4(1) GDPR.[54]

The reasoning of the *IAB Europe* can be argued to present a shift in emphasis: rather than requiring that identifiability be established from the outset, the Court treated the human origin of the data – and its potential linkability to other information – as sufficient for the 'relates to' criterion to be met. In reaching this conclusion, the Court drew on Recital 26, which frames identifiability in risk-based terms, as well as the concept of pseudonymisation, despite the TC String not involving the typical removal of identifiers.[55] The judgment thus appears to decouple 'any information' from immediate identifiability, raising broader questions about the threshold for classifying data as personal under the GDPR when the data stems from a human. It thus appears that the nature of the information, as assessed under the first criterion, may influence the application of the subsequent criteria – both in determining whether the information relates to a natural person and whether that person is identifiable.

3.2 'RELATING TO'

The second essential criterion for information to qualify as personal data is the 'relates to' criterion, which requires that the information must relate to a natural person – that is, it must be personal. In contrast to the broader 'any information' element, which received a defining interpretation in *Nowak*,[56] this criterion has prompted more diverse interpretations in case

[48] Compare *SRB* (n 11) para 60 and *Nowak* (n 5) as referenced.
[49] *IAB Europe* (n 5).
[50] See ibid para 25.
[51] See ibid para 26.
[52] ibid para 25.
[53] See ibid para 43.
[54] See ibid para 51.
[55] Compare ibid paras 39–40.
[56] See *Nowak* (n 5) para 34.

law – some adopting a more teleological approach, while others take a more systematic or strict stance.[57]

In a joined case dating back to 2014, the Court of Justice elaborated on the criterion 'relating to' enshrined in the definition of personal data in Article 2(a) of the Data Protection Directive. The case *YS and Others* illustrates that the criterion serves to limit the otherwise broad scope of the term 'any information' in Article 4(1) GDPR.[58] In line with the purpose of the Regulation, it is not sufficient for information to be merely linked to an identified or identifiable individual; rather, the information must concern the person in a manner that could justify the exercise of data subject rights. The core questions in the preliminary ruling concerned draft documents and attached 'minutes' drawn up by the case officer of the Immigration and Naturalisation Service regarding applications for residence permits. A minute may include information about the case officer and the applicant, as well as applicable legal provisions, and an assessment of the foregoing information in the light of the legal provisions.[59] The national courts sought the Court of Justice's advice on whether the contents of such a minute constitute personal data. The Court of Justice initially noted that there is no doubt that information relating to the applicants who are identified in the minutes, in particular, by their name must be considered personal data.[60] However, the same cannot be said for the legal analysis contained within a minute.[61] The Court of Justice arrived at that conclusion against an interpretation of the wording of Article 2(a) of the Data Protection and the purpose of the Directive. The rights of the data subject, such as the right of access, uphold the rights to privacy and respect for one's private life by allowing the data subject to be certain that the data concerning him or her are correct and lawfully processed.[62] However, as a legal analysis is not itself subject to scrutiny for accuracy or lawfulness by data subjects, treating a legal analysis as personal data would not serve the Directive's purpose.[63] While this preliminary ruling is important for various reasons, including demarcating the scope of the regulation of national administrative procedures, it is also important for understanding how far the criterion 'relating to' in the personal data definition extends. Nonetheless, this balance can be very fine and context-dependent. In case *YS and Others*, access to documents, a matter commonly falling under the national constitutional and administrative law traditions, was at stake. However, with respect to medical information, one can readily argue that medical assessments of an individual constitute personal data,[64] unless the health records hold very general information that has lack of relevance to an individual's particular situation.

A few years after the *YS and Others* ruling, in *Nowak* in 2017, the Court of Justice elaborated on the meaning of the term 'relating to' a data subject in light of the purpose of

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[57] Compare Joined Cases C-141/12 and C-372/12 *YS and Others* EU:C:2014:2081 with *Nowak* (n 5).
[58] See *YS and Others* (n 57).
[59] See ibid paras 13–14.
[60] ibid para 38.
[61] ibid para 39. The Court explained that 'such a legal analysis is not information relating to the applicant for a residence permit, but at most, in so far as it is not limited to a purely abstract interpretation of the law, is information about the assessment and application by the competent authority of that law to the applicant's situation, that situation being established inter alia by means of the personal data relating to him which that authority has available to it'. *YS and Others* (n 57) para 40.
[62] See *YS and Others* (n 57) para 44.
[63] ibid para 46.
[64] See Case C-21/23 *Lindenapotheke, ND v DR* EU:C:2024:846.

the law.[65] Instead of adopting a broad interpretation of the 'relates to' element in the definition of personal data, the Court adopted a more structured approach, setting out criteria to assess whether information has a sufficiently close connection to an individual to justify the application of data protection rights. It explained that information relates to a data subject where the Court, by reason of its *content, purpose or effect*, is linked to a particular person.[66] The CJEU pointed out that in this case, the information in question, the candidate's written answers, and the comments made by the examiner relate to the candidate on account of all three mentioned bases.[67] Recently, in *SRB*, the Court reaffirmed that the three elements are alternative criteria, as signalled by the conjunction 'or'.[68] However, *SRB* introduces some uncertainty regarding how detailed the assessment must be. As noted in relation to the first criterion, the presence of personal opinions or views necessarily implies a close link to the natural person concerned.[69] It appears that for certain types of data, the 'content' element may be deemed satisfied without a detailed assessment of the data's connection to the individual concerned. That could be the case when data originates from a sample of human biological material. This is further supported by the Court's reasoning in *IAB Europe*, where the user preferences contained in a TC String were considered to relate to a natural person without requiring a more elaborate analysis, rendering the content of the information essentially decisive.[70] Thus, while *Nowak* involved a detailed assessment of each of the three elements relevant to the case, despite them being alternative, such an in-depth analysis does not appear to be a requirement in itself. It is sufficient that one element only is met.

In light of these cases, it appears that the essential function of the second criterion in the definition of personal data is to limit the scope of the GDPR in a manner consistent with its underlying purpose. However, one might question whether the CJEU's approach is in line with that ambition. In a recent case delivered after *IAB Europe*, the definition of personal data was once again called into question. In *Ministerstvo zdravotnictví*, the Court was asked to consider whether the personal contact information of natural persons acting on behalf of a legal person could be regarded as personal data of those individuals.[71] Of particular interest is the Court's finding that the name, surname, and signature of a natural person qualify as personal data where the individual is identifiable.[72] However, it left the assessment of other types of contact details – such as email addresses, telephone numbers, and websites – to the national courts, which were to make that determination by reference to factors such as those discussed in *IAB Europe*.[73] The Court indicated that the criterion of whether data 'relates to' a data subject may require a more detailed assessment in such cases. Information directly linked to the identity of a data subject appears to constitute personal data without much controversy. In contrast, information that pertains to an individual in a more indirect or functional manner may require more careful consideration to determine whether it genuinely

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[65] See *Nowak* (n 5).
[66] ibid para 35.
[67] ibid paras 37-39.
[68] *SRB* (n 11) para 56.
[69] See ibid para 58.
[70] See *IAB Europe* (n 5) para 43. This is also paving pathway for pseudonymisation being affirmed as a state of data. See below 4.
[71] See Case C-710/23 *Ministerstvo zdravotnictví* EU:C:2025:231.
[72] ibid para 24.
[73] ibid para 25.

'relates to' a natural person under the GDPR. In such instances, the relates to criterion seems to overlap with the identifiability criterion, as the question of whether data relates to someone may depend, at least to some extent, on whether that person can be identified, directly or indirectly, through the information in question.

3.3 'AN IDENTIFIED OR IDENTIFIABLE NATURAL PERSON'

The third and final criterion – the identifiability criterion – focuses less on the inherent qualities of the information and more on the risk associated with its potential to identify an individual. For the GDPR to apply, the data must relate to someone who is either identified or identifiable, aligning the scope of the Regulation with its risk-based approach to protecting individuals from potential misuse of their personal data. This criterion has given rise to legal uncertainty regarding its precise meaning despite, and perhaps partly because of, the clarifications provided in Recital 26. The text of the GDPR provides that the identifiability of an unidentified data subject depends on the means reasonably likely to be used, by the controller or any other person, taking into account all objective factors.[74] However, this formulation leaves certain ambiguities unresolved. Is it sufficient that any person has the means to identify the data subject for the information to be considered personal data? Can the same data be personal in relation to one actor, while remaining non-personal in relation to another? And where, precisely, is the threshold drawn between 'unreasonable' means and those 'reasonably likely' to be used? These questions have gradually been addressed through the development of case law.

The most prominent case exploring the meaning of personal data prior to the GDPR's entry into force was *Breyer*.[75] In *Breyer*, the CJEU established a framework for assessing whether a natural person is identifiable, shaping our understanding of the risk-based identification criterion – namely, whether there are means reasonably likely to be used to identify an individual. The Court's approach permitted a broad interpretation of the concept of personal data, allowing information held by another person to be considered when assessing an individual's identifiability in relation to the controller, as reflected now in Recital 26 of the GDPR. At the same time, the judgment introduced uncertainty regarding whether the assessment of identifiability should be objective or subjective. While Recital 26 states that identifiability depends on the means reasonably likely to be used by the controller or by any other person, the Court appeared to base its analysis primarily on the means accessible to the controller – either directly or indirectly through another party. In its judgment, the Court appears to have adopted a relative understanding of the concept of personal data – assessing identifiability on a subjective basis with reference to a specific data holder. However, it remains unclear whether this was the Court's intended approach, or whether the means most relevant to assess in this case were simply those available to the controller with particular emphasis on the potential for indirect identification.

The Court held that it follows from the wording of the personal data definitions set out in the Data Protection Directive that it is not necessary that information alone allows the data subject to be identified for it to be considered personal data of an indirectly identifiable

[74] Recital 26 GDPR (n 1).
[75] *Breyer* (n 6).

person.[76] As guided by Recital 26 of that directive, account should be taken of all the means reasonably likely to be used either by the controller or by any other person to identify a person to determine whether that person is identifiable.[77] Regarding 'any other person', the Court of Justice held that it is not required that all the information enabling the identification of the data subject must be in the hands of one person.[78] The question that subsequently emerges, however, is whether the Court thereby accepted an objective assessment of identifiability – based on the hypothetical availability of identifying means to any third party – or whether the assessment remains relative, grounded in what is reasonably accessible to the specific data controller in question.

In this case, the Court of Justice then proceeded with a subjective assessment, examining whether the possibility to combine a dynamic IP address with the additional data held by the internet service provider constitutes a means reasonably likely to be used to identify the data subject and stated that it would not be the case if 'the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant'.[79] It held that it appears that the service provider had the means reasonably likely to be used to identify the data subject with the assistance of other persons.[80] Thus, *Breyer* demonstrated that there is reason to conduct a subjective assessment of whether the means are reasonably likely to be used by a specific person. However, it cannot be conclusively said that the judgment rules out an objective approach. In accordance with the GDPR, information must be reasonably likely to be used to identify an individual for the information to qualify as personal data. Therefore, an assessment based on the capabilities of a specific party – often the controller – may be unavoidable.

The CJEU has continued down the path of a relative concept of personal data also in cases following *Breyer*. In a case concerning the market surveillance of motor vehicles,[81] *Gesamtverband Autoteile-Handel*, the Court of Justice was asked to clarify whether Vehicle Identification Numbers (VINs) qualify as personal data under EU law.[82] The case endorsed a contextual, or relative, approach to identifiability, highlighting that a natural person may be identifiable in relation to a particular actor, rather than in absolute terms. The Court noted that data which is not personal in itself may become personal data for a person who has the means reasonably likely to associate it with a specific individual.[83] It stated that

> where independent operators may reasonably have at their disposal the means enabling them to link a VIN to an identified or identifiable natural person, which it

[76] *Breyer* (n 6) paras 40–41.
[77] Which is now comparable to Recital 26 of the GDPR. See *Breyer* (n 6) para 42.
[78] ibid para 43.
[79] ibid para 46.
[80] ibid para 48. The Court referred to the fact that, in case of a cyber-attack, legal channels that allow an online media services provider to contact the competent authority which in turn can take the steps necessary to obtain that information from the internet service provider existed. *Breyer* (n 6) para 47.
[81] See Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC [2018] OJ L151/1.
[82] See Case C-319/22 *Gesamtverband Autoteile-Handel* EU:C:2023:837.
[83] ibid para 46.

> is for the referring court to determine, that VIN constitutes personal data *for them* [emphasis added], within the meaning of Article 4(1) of the GDPR, and, indirectly, for the vehicle manufacturers making it available, even if the VIN is not, in itself, personal data for them, and is not personal data for them in particular where the vehicle to which the VIN has been assigned does not belong to a natural person.[84]

The case appears to build on the Court's reasoning in *Breyer*, which has been interpreted as supporting a relative approach to identifiability. However, as in *Breyer*, the Court in this case did not reject an absolute approach outright but rather limited its assessment to whether the individual was identifiable based on the means available to a specific person. It also illustrates that data may become personal data once the identification of an individual becomes both reasonably possible and contextually relevant.

Building on earlier case law, the Court of Justice recently clarified the assessment of the identifiability criterion in the *SRB* judgment. The case helped resolve lingering uncertainty about the relative nature of the concept of personal data, with reference to the distinction between anonymous data and pseudonymised data. It arose in the context of a resolution process conducted by the European Single Resolution Board (SRB), the central authority within the Banking Union. As part of this process, shareholders and creditors were invited to express their interest in exercising the right to be heard regarding potential compensation. The SRB collected their comments and pseudonymised them before transferring the data to Deloitte for an independent valuation. The question was whether these comments should be considered personal data. While acknowledging that pseudonymisation is not part of the definition of personal data but rather a process aimed at reducing the risk of associating a dataset with the identity of a data subject, the Court of Justice held that pseudonymisation can, in certain circumstances, alter the nature of personal data to the extent that it no longer qualifies as personal data.[85] This conclusion rests on the distinction that pseudonymised data remain personal data from the perspective of the controller who performed the pseudonymisation, but may no longer qualify as personal data in relation to a third party who lacks the means to re-identify the data subjects.[86] The Court of Justice stated that the assessment of 'reasonably likely means' set out in Recital 26 would be deprived of any practical effect if pseudonymised data were considered personal data in all cases and for every person.[87] Instead, whether data qualifies as personal is not determined once and for all, but may vary depending on the context and the party processing the data. As shown in *Gesamtverband Autoteile-Handel,* data which are in themselves impersonal may become personal in the hands of others with the means reasonably likely to be used to identify the individuals behind the data.[88] Conversely, personal data that has undergone pseudonymisation may cease to be personal in relation to another party who lacks access to the additional information necessary for re-identification.[89] While affirming that pseudonymisation is not part of the definition of personal data, the Court nonetheless relies on its relevance to the identifiability criterion,

[84] *Gesamtverband Autoteile-Handel* (n 82) para 49
[85] See *SRB* (n 11) paras 72 and 75.
[86] Compare ibid paras 76–77.
[87] ibid para80.
[88] See ibid para 84.
[89] *SRB* (n 11) para 86.

using the concept to assess the nature of identifiability.

The question remains: where does the threshold for the identifiability criterion lie? In dealing with the appeal following a decision of the General Court, in *OC v Commission*, the Court of Justice further clarified identifiability, focusing on its relative – or subjective – dimension.[90] The case concerned a press release issued by the European Anti-Fraud Office about the fraudulent use of research funding. The key question was whether the researcher mentioned in the press release could be identified by reasonable means from the information in the press release, and thus whether the information in that press release constituted personal data. In the case at hand, a journalist had successfully identified the researcher based on the press release, using additional information. However, the CJEU held that this individual instance of identification was not, in itself, sufficient to conclude that the press release contained personal data.[91] Rather, it emphasised the need to assess the broader risk of identification. The Court of Justice found that the risk of identification could not be regarded as insignificant, as individuals working in the same scientific field would be able to identify the researcher, considering easily accessible other information on the internet, and thus doing that without disproportionate effort in terms of time, cost, or labour, thus meeting the threshold for identifiability under data protection law.[92] However, while initially the Court placed emphasis on a defined group, individuals working in the same scientific field, it also went further in its analysis and acknowledged that the issue as such can likely arouse interest among the public and induce readers to investigate who is the subject of the press release. In particular, it noted that the internet searches that could be conducted to identify the person in question did not render the effort disproportionate, and consequently, the identification risk could not be insignificant.[93] When pointing at the errors of the General Court, the Court of Justice went even further and not only emphasised the means reasonably likely to be used by the readers of the press release, but also that the simple, objective reading of the press release might be sufficient to identify the data subject in question.[94] Thus, while the analytical side focuses on the reasonable efforts – internet search and publicly available information – which do not require advanced knowledge of the field or computing skills, the Court also includes a consideration that, for some readers, even that might not be necessary. This raises the question of the spectrum of reasonably likely means. This case appears to fall at one end, requiring limited analytical inquiry or professional expertise. Towards the other end, however, are questions of identifiability from genetic data alone or coupled with other information, the efforts, skills, and resources required, and whether, in a research context, those could make an individual reasonably likely to be identified.

The case of *OC v Commission* underscores two key principles for interpreting identifiability under EU data protection law. First, it confirms that identifiability is not a black and white concept but lies on a spectrum that requires a case-by-case assessment of what constitutes 'reasonable means' of identification. Second, it highlights that the risk of identification is inherently context-dependent, particularly in relation to the characteristics of

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[90] See *OC v Commission* (n 42).
[91] ibid para 58.
[92] ibid para 61.
[93] See ibid paras 62–63.
[94] ibid para 64.

the data recipient and their ability to access and combine additional information. While the judgment does not provide a definitive standard for how context and risk should be factored into the analysis, it offers important indications. In line with the risk-based approach adopted in EU data protection law, the Court appears to favour a more objective criterion – focused not on whether any individual could identify the data subject, but whether identification would be reasonably likely for an average recipient. In this context, the average reader of a press release may serve as a reference point for assessing whether, when combined with reasonably accessible information, the data constitutes personal data.

The identifiability, but from a different angle, was further elaborated in *IAB Europe*, a decision delivered on the same day as the decision in *OC v Commission*. In the *IAB Europe* case, the data in question[95] were still considered personal data in relation to IAB Europe, since the organisation's members were required to provide IAB Europe with the relevant identifiers upon request, and IAB Europe thus had means reasonably likely to be used to identify the data subjects.[96] Even without a pseudonymisation process, data that were pseudonymous with respect to IAB Europe, as they contained individuals' choices and were considered personal due to the means available to the organisation, were considered personal despite the fact that these choices, in themselves, did not contain direct identification details such as name. Following that argument, if a party has the means to obtain identifiers that enable inherently impersonal data to be linked to an individual – for example, in the form of legal access – such data must be regarded as personal data from that party's perspective.[97] In such a case, it seems that the party cannot avoid the application of the GDPR by relying on anonymisation, as the means to identify the data subjects remain reasonably likely. Treating data that is pseudonymous by nature as personal, depending on, for example, the legal restrictions or options available to a processor, may appear very broad. However, the Court of Justice introduced an additional nuance in the *SRB* judgment. Since the concept of identifiability is relative, the identifiable nature of the data subject must be assessed at the time of relevance for the specific provision in question and from the perspective of the relevant party.[98] Hence, it can be argued that data may be regarded as personal in some cases and as non-personal in others, thereby potentially affecting the scope and the application of a legal instrument and the rights and obligations set therein.

4 NOTIONS NEIGHBOURING PERSONAL DATA IN CASE LAW

4.1 PSEUDONYMISED DATA

The case of *IAB Europe* is transformative for understanding pseudonymisation. In this case, the Court of Justice treated a TC-string containing the individual preferences of a specific user regarding his or her consent to the processing of personal data concerning him or her as personal data.[99] It arrived at the conclusion by contrasting indirect identification, which does not require that the information alone allows the data subject to be identified, with

[95] That were later described as 'inherently impersonal' when referred to in *SRB,* see *SRB* (n 11) para 83.
[96] See *IAB Europe* (n 5) paras 46–48.
[97] Compare *Breyer* (n 6) para 46.
[98] See *SRB* (n 11) para 111.
[99] *IAB Europe* (n 5) paras 39–43.

the definition of pseudonymisation and Recital 26. It can be said that the CJEU has implied, by this, that some data may have been pseudonymised by virtue of their very existence, such as the TC string in this case.

The *SRB* case adds further nuance to the understanding of pseudonymisation, particularly regarding the link between pseudonymous and anonymous data. Having acknowledged that pseudonymous data 'are not mentioned in the legislative definition of the concept of "personal data"',[100] the Court of Justice followed Advocate General's opinion, and emphasised that pseudonymised data 'refers to the establishment of technical and organisational measures to reduce the risk of a data set being correlated with the identity of data subjects'.[101] In its view, 'the concept of "pseudonymisation" presupposes the existence of information enabling the data subject to be identified'.[102] In the Court's view, the 'the objective of pseudonymisation is, among other things, to prevent the data subject from being identified solely by means of pseudonymised data'.[103] Against that background, the Court then established that

> provided that such technical and organisational measures are actually put in place and are such as to prevent the data in question from being attributed to the data subject, in such a way that the data subject is not or is no longer identifiable, pseudonymisation may have an impact on whether or not those data are personal.[104]

This reasoning allowed the Court of Justice to clarify that while for the controller, who has pseudonymised data, the data may be personal, it might not necessarily be the case for the recipient of the personal data. That is the case if the recipient 'is not in a position to lift those measures during any processing of the comments which is carried out under its control', as well as the pseudonymisation measures are in fact such as to prevent the recipient from attributing the pseudonymised data 'including by recourse to other means of identification such as cross-checking with other factors, in such a way that, for the company, the person concerned is not or is no longer identifiable'.[105] This approach was ultimately located against the wording of Recital 26 that 'personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information, should be considered to be information on an identifiable natural person'.[106] This is where the reasonable likelihood of identification comes into play,[107] and must be assessed in a particular case at hand.

Against the backdrop of *OC v Commission*, the Court of Justice took a chance to elaborate in detail on the limits and nature of pseudonymous data. It affirmed that, in *OC v Commission*, it did not confine itself to finding that the EU body that published the press

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[100] *SRB* (n 11) para 71.
[101] ibid para 72.
[102] ibid para 73.
[103] ibid para 74. Finally, 'the requirement that the identifying information be kept separately and that it be subject to technical and organisational measures "to ensure that the personal data are not attributed to an identified or identifiable natural person", […], indicates that the objective of pseudonymisation is, among other things, to prevent the data subject from being identified solely by means of pseudonymised data'.
[104] ibid para 75.
[105] ibid para 77.
[106] *SRB* (n 11) para 78.
[107] ibid para 79.

release possessed all the information necessary to identify that person. Instead, it 'examined whether the statements contained in that press release reasonably enabled the public concerned to identify that person, in particular by combining those statements with information available on the internet'.[108] It endorsed the *OC v Commission*, stating that the Court held in that case

> that a means of identifying the data subject is not reasonably likely to be used where the risk of identification appears in reality to be insignificant, in that the identification of that data subject is prohibited by law or impossible in practice, for example because it would involve a disproportionate effort in terms of time, cost and labour.[109]

It went on to further emphasise that '[t]hat case-law bears out the interpretation that the existence of additional information enabling the data subject to be identified does not, in itself, mean that pseudonymised data must be regarded as constituting, in all cases and for every person, personal data'.[110] Consequently, the Court of Justice moved on to clarifying the logic in *IAB Europe* and *Breyer*, referring to data originating from humans as 'inherently personal' and being treated as personal data because the controller had the means to identify the data subject,[111] and pointing out the lesson of *Gesamtverband Autoteile-Handel* that 'data which are in themselves impersonal may become "personal" in nature where the controller puts them at the disposal of other persons who have means reasonably likely to enable the data subject to be identified'.[112]

These cases provide several important lessons. They affirm that some data may be pseudonymous by their nature, as it derives predominantly from *IAB Europe*. Data that are 'inherently personal' may become personal data, but they may also not be such, depending on whether the party in question has the means to identify the data subject with a reasonable likelihood. A risk that appears insignificant should not be such, following *OC v Commission*, that it renders the data personal. The same reasoning also holds for impersonal data. Whilst the language may suggest that they do not concern personal data, in the hands of those with a reasonable likelihood of identification, provided that this identification risk is not insignificant, they could become personal data.

4.2 ANONYMOUS DATA

In contrast to personal data, anonymous data does not relate to an identified or identifiable natural person.[113] The protection of personal data is also limited to personal data which has not been rendered anonymous in such a manner that the data subject is no longer identifiable. The concept of anonymous data has two dimensions: it encompasses both data that has never been related to an identified or identifiable natural person and data that has been effectively anonymised so that it no longer constitutes personal data.[114] Case law predating

[108] ibid para 81.
[109] ibid para 82.
[110] ibid para 82.
[111] ibid para 83.
[112] ibid para 84.
[113] Recital 26 GDPR (n 1).
[114] Compare Recital 26 GDPR (n 1).

SRB appears to hint at a distinction between anonymised and pseudonymised data while defining personal data under the GDPR,[115] albeit in a subtle way, keeping the actual relationship unelaborated.[116] This unelaborated relationship allowed the European Data Protection Supervisor to submit in the *SRB* case that pseudonymised data constitute personal data – in all cases and for every person.[117] However, following the Court of Justice's reasoning in *SRB*, this take was rejected at its roots, and pseudonymisation may appear to be sufficient, in certain contexts, for data to be regarded as no longer identifiable.[118]

As evidenced by more recent CJEU case law, the concept of pseudonymised data has become somewhat clearer, with implications for the understanding of anonymous data. Interestingly, though, the Court of Justice refrains in *SRB* from attaching the anonymous data label to such data that are pseudonymised by a controller, transferred to another party, and not identifiable by that party. One way to look at the question of pseudonymised data versus anonymous data is to consider pseudonymised data as data that can be regarded as rendered not personal and thereby anonymous in relation to a specific person, while data is truly anonymous if it has never been related to a natural person.[119] However, it does not seem appropriate to limit the concept of anonymous data to non-human data, and to require an active anonymisation process for human data relating to an unidentifiable natural person to fall outside the scope of the GDPR. Yet, recent developments in case law call for a reassessment of what anonymous data truly is. As demonstrated in *SRB*, the concept of personal data is inherently relative. If, as suggested in *Nacionalinis visuomenės sveikatos centras*,[120] the distinction between pseudonymous and anonymous data mirrors the boundary between personal and non-personal data, then it raises the question: Is the concept of anonymous data itself also relative?

A reading of Recital 26 may suggest that anonymous information is assessed based on the same principles as the identifiability criterion within the concept of personal data, as indicated by the use of the word 'therefore' to describe anonymous information in relation to that assessment. It would also be consistent with prior case law, such as *Nacionalinis visuomenės sveikatos centras*, if the relative nature of personal data similarly influenced the understanding of anonymous data. However, if anonymous information were to be judged on an objective basis, in relation to any potential individual, there would be a divide between pseudonymised data that can no longer be attributed to a data subject by reasonable means by a specific person, and anonymous data which could not be attributed to a data subject by reasonable means by any person. In that case, the CJEU's choice to refer to the de-identification of data in relation to a third party as 'pseudonymisation' rather than 'anonymisation' makes sense, even though the data is considered non-personal in relation to that third party.[121] However, because the wording of the *SRB* judgment is not entirely clear, it remains unclear whether anonymous information is defined as data not relating to an identifiable person in a relative or absolute sense.[122]

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115 Compare *Nacionalinis visuomenės sveikatos centras* (n 43) paras 57–58.
116 ibid.
117 *SRB* (n 11) para 86.
118 See ibid para 87.
119 Compare the reasoning in *Nacionalinis visuomenės sveikatos centras* (n 43) paras 55 and 57–58.
120 Compare *Nacionalinis visuomenės sveikatos centras* (n 43) paras 57–58.
121 Compare *SRB* (n 11) para 75.
122 Compare the sentence in *SRB* (n 11) para 73: 'The very existence of such information precludes data that

5 SYNTHESIS OF THE FINDINGS: WHERE DO WE STAND NOW?

The concept of personal data has demonstrated both its significance and complexity in CJEU case law, serving as a crucial threshold for the scope and application of data protection laws. The seemingly straightforward wording of Article 4(1) GDPR – defining personal data as 'any information relating to an identified or identifiable natural person' – reveals a far greater significance than it may at first suggest, shaping the very boundaries of data protection and determining the scope of obligations for those who process personal information, and brings along implications for data-intensive fields, such as biomedical research. The Court's clarifications on its application are relevant to understanding when data is inherently protected, when it is not, and when its protection is contingent on individual actions. Recent cases not only clarify the meaning of the concept, but also shed light on pseudonymisation and anonymisation as activities or states in which data can exist. Building on these developments, the analysis now turns to the concept of personal data, examining how its defining criteria, clarifications elaborated in case law, and the Court's key legal reasoning have shaped its current interpretation under the GDPR. To recall, not all of the cases shaping the understanding have been addressed under the GDPR.

First, it has become increasingly clear that the definition of personal data is functional in nature; its interpretation has evolved through the gradual development of CJEU case law, guided by the underlying principles of data protection set out in the relevant secondary legislation at issue in those cases. The first element of the definition, 'any information', serves as a neutral entry point, setting the tone for a technologically neutral framework intended to protect natural persons.[123] As the well-known formulation in *Nowak* illustrates – '[t]he use of the expression "any information" in the definition of the concept of 'personal data' […] reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information […] provided that it "relates" to the data subject'[124] – what qualifies information for protection is not its sensitivity or private character, but the fact that it relates to a specific individual. It thus appears that the first criterion functions less as a limitation and more as a prerequisite for regulating any processable information that concerns a person. Rather than narrowing the scope, it affirms its breadth – emphasising that the concept of personal data is intended to be expansive. That said, in keeping with a framework guided by overarching principles rather than rigid methodology, this criterion acquires meaning through its relationship with the subsequent elements of the definition.

As highlighted in the citation from the *Nowak* judgment above, the 'relates to' criterion serves to qualify what may fall under the broad category of 'any information' within the scope of the GDPR. The 'relates to' criterion may be assessed not only in terms of the content of the data itself, but also with regard to the purpose of the processing or its potential effect on

have undergone pseudonymisation from being regarded, *in all cases* [emphasis added], as anonymous data, which is excluded from the scope of that regulation'.

[123] In line with the principle set out in Recital 15 GDPR (n 1).

[124] *Nowak* (n 5) para 34.

the individual.[125] Although the information need not be inherently personal to fall within the scope of personal data, its content may nevertheless affect the extent to which it is linked to an identifiable individual. The examples of information that relate to an individual by reason of its content, as found in the CJEU case law – such as personal opinions or views[126] – highlight that while 'any information' can constitute personal data, some types of information are more likely to qualify as such because they relate to an individual by their content. This is precisely where information originating from an individual, such as human genetic data, comes in. At the same time, although the Court has refrained from limiting the concept of personal data solely on the basis of the first criterion, its connection to the 'relates to' criterion and its principle-based interpretation mean that some information might not necessarily be considered personal data. As demonstrated in the Court's reasoning in *YS and Others*, information that is clearly linked to personal data but remains too abstract to reveal anything about the individual is unlikely to qualify as personal data.[127] It appears that the 'any information' criterion, when considered alongside the 'relates to' criterion, requires the information to reveal something about the individual that justifies granting them control over the rights protected by the GDPR.[128] Information originating from the individual – whether directly or indirectly, and especially if of a private nature – tends to be inherently revealing. Conversely, information obtained from other sources linked to an individual could qualify as personal data only if it reveals something about that individual that satisfies the effect or purpose criteria. As clarified in *YS and Others*, any information may qualify as personal data, but it should do so only when it concerns an individual in a way that justifies the protection of their rights under the GDPR.[129]

Second, the concept is also relative. This relative dimension of personal data is highlighted in the Court's interpretation of the identifiability criterion. As early as seen in *Breyer*, the identifiability of a natural person must be assessed from the perspective of a specific actor.[130] However, some uncertainty persisted as to whether identifiability – when assessed from the perspective of a relevant party – should be understood in relation to all parties or only specific ones. In the cases following *Breyer*, the Court moved towards a clearly relative understanding of personal data, interpreting it as a concept defined in relation to a particular actor. With the culmination of this approach in the recent *SRB* case, it is now evident that the identifiability criterion is relative, thereby rendering the concept of personal data itself relative. However, some questions remain regarding how identifiability should be assessed in relation to potential data processors or other persons with access to these data. While the assessments in *Breyer* and *SRB* focused on a specific individual in light of a particular provision of the legal instrument at issue, in *OC v Commission,* the Court of Justice departed from this approach. It disregarded the actual identification of the data subject by a specific individual and instead examined the risk of identification by a member of a defined group, and subsequently extended that approach to encompass the public and readers more broadly. A realised risk of identification is thus not sufficient to establish that identification

125 As seen in *Nowak* (n 5) para 35 and further highlighted in *SRB* (n 11) para 56.
126 See *SRB* (n 11) para 58.
127 See *YS and Others* (n 57) paras 39–40.
128 Compare ibid.
129 Compare ibid paras 40–46.
130 See *Breyer* (n 6).

was reasonably likely.[131] This ties into other elements of relative identifiability – namely, that identifiability is also relative in time, as determined by the specific underlying legal provision at issue. The appropriate time for assessing identifiability appears to depend on the context and purpose of the provision in question under data protection law.[132] In *SRB*, the relevant provision concerned the obligation to provide information to the data subject at the time of data collection. Accordingly, the assessment of identifiability had to be made at that specific point in time, rather than retrospectively.[133] However, in *OC v Commission*, the applicant sought compensation for non-material damage under Article 268 TFEU,[134] allegedly caused by a press release issued by an EU institution.[135] In that case, the Court of Justice explicitly held that the question of what constitutes personal data 'cannot be confused with the question relating to the conditions necessary for the European Union to incur non-contractual liability' and that it 'must be assessed exclusively in the light of the conditions laid down by that provision [Article 3(1) of Regulation 2018/1725 – comparable to Article 4(1) GDPR] and therefore, […] cannot depend on considerations relating to the imputability of an act to the European Union'.[136] It thus seemed that the Court of Justice viewed the identifiability criterion as an element which should be interpreted in isolation – disconnected from the provision relevant to the case – contrary to the approach portrayed in *SRB,* where the relevant provision, the obligation to provide information, guided the interpretation. This raises doubts about whether the identifiable nature of a data subject varies with the applicable legal provision, or whether the provision is relevant only in specifying the time at which identifiability should be assessed.[137]

Further, with the relative understanding of the identifiability criterion, it appears to have become more distinct from the 'relates to' criterion. While it is true that information that enables the identification of an individual typically also relates to that individual, and vice versa, the relative approach to identifiability allows information to relate to a natural person to a greater extent while still remaining non-personal data with respect to certain parties. In this line of reasoning, the identifiability criterion is separated from the 'relates to' criterion, and its relevance seems to come in at a later stage than the first two criteria. This line of reasoning aligns with the view that the first criterion – qualified by the second – determines what merits protection, while the third sets out the conditions under which such protection is justified. The definition of personal data, therefore, incorporates both a teleological (purpose-driven) dimension and an element of risk. However, the distinction between the 'relates to' and identifiability criteria becomes less clear when examined in the context of pseudonymisation and pseudonymised data. If data can be considered pseudonymous by nature – such that they are 'inherently impersonal' to the entity processing them – but become personal data when they convey information about an identifiable person to another party, then the differentiation between the two criteria is maintained. Yet, if data of human origin are understood to carry an inherent element of

[131] Compare *OC v Commission* (n 42) paras 57–58.
[132] Compare *SRB* (n 11) para 111.
[133] Compare ibid para 106.
[134] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[135] *OC v Commission* (n 42) para 23.
[136] ibid para 54.
[137] Compare also *SRB* (n 11) para 85.

identifiability, the 'content' aspect of the 'relates to' criterion begins to overlap with the identifiability criterion, thereby weakening the latter's distinct function. Such an interpretation of *IAB Europe* should be cautioned against, as it suggests that a risk of identifiability is presumed for certain categories of data by default.

Third, the concept of personal data can be argued to be subject to a proportionality assessment through the 'means reasonably likely to be used' test within the identifiability criterion, with a de-minimis criterion that the identification risk is not insignificant. This limits the broad scope of the concept of personal data by setting a threshold for identifiability.[138] The risk-based assessment described in *Breyer* as 'the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant'[139] clearly incorporates a proportionality element. Coupled with the fact that actual identification does not necessarily mean the identifiability criterion is fulfilled,[140] it is not proportionate to accept an insignificant risk of identification for the criterion to be met. However, the wording in *Breyer*, describing acceptable risk as 'insignificant', appears to set a relatively low threshold for identifiability, which may seem at odds with the language of Recital 26, which refers to the 'means reasonably likely to be used'. Whether there is a discrepancy between the wording of the provision and the Court of Justice's interpretation remains open to debate, but it is clear that objective factors must be taken into account. While identifiability should be assessed from the perspective of a specific person or group, the means of identification should not be judged based on actual or subjective possibilities, but rather on objective factors such as lawfulness, or time and cost. However, there is a caveat to the proportionality of the concept of personal data: data must be presumed to be personal data in relation to a third party if it cannot be ruled out that the third party has means reasonably likely to be used to identify the data subject.[141]

6 CONCLUSIONS

The more recent cases clearly indicate that, contrary to what was commonly discussed in the scholarship and even maintained by prominent data protection authorities such as the European Data Protection Supervisor, pseudonymised data are not necessarily personal data. An assessment must be made, and where the person lacks reasonably likely means of identifying individuals, those data may be treated as non-personal in the particular case. Whereas one limb of the assessment focuses on a legal prohibition, the other on a case-by-case assessment mandating it being 'practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant'. The guidance provided by the Court sheds light on how to reason about these assessments, but deeper inquiries, especially in the research context, are needed, with the understanding that the relevant data category is not homogeneous.

[138] *SRB* (n 11) para 88.
[139] *Breyer* (n 6) para 46.
[140] As seen in *OC v Commission* (n 42).
[141] *SRB* (n 11) para 85.

Overall, especially the more recent cases, notably *IAB Europe* and *SRB,* are leading in nuancing the understanding of essential concepts for the right to data protection; other cases, including *OC v Commission,* also play a considerable role. However, taken together, they raise questions that merit further inquiry, areas of uncertainty, and thereby mandate further analysis in a scientific research context. In August 2025, at the Nordic Biomedical Law Conference at Lund University, Professor Thérèse Murphy, in her keynote address, highlighted the scholarly trend toward cross-disciplinary writing, setting somewhat aside doctrinal inquiries, and recalled the value of legal scholarship. Arguably, cases like the more recent ones and the questions at their core underscore the need for deeper doctrinal inquiry, including an understanding of *de lege lata* and the actual areas of uncertainty. After all, the Court of Justice continues to signal that all the interpretations set forth in these cases are already contained in the text of the law and in prior case law, predominantly that of *Breyer*. However, this holds true only if one turns a blind eye to interpretative tweaks – analytical elements that may not be readily foreseeable in advance. This is not to argue that work across disciplines is unimportant. It is crucial for several reasons, including understanding the law in context. However, this situation suggests caution against adopting a light-touch approach to the law.

There are various, rather easily accessible repositories in the scientific research context. There is also otherwise easily available information that can facilitate identifiability, including that accessible through internet searches, as in *OC v Commission*. Assessments on whether the data in question are personal continue to be needed, now in some cases, with somewhat greater clarity, but not necessarily with all answers in hand. One way to alleviate the regulatory burden and enhance certainty for researchers is a legal measure prohibiting the re-identification of data disclosed to a particular actor in a research context. Whereas a national legal measure might be sufficient, in light of the growing critique of the GDPR and the need to revisit it,[142] for coherence and in line with the European Health Data Space Regulation, such a clause could also be accommodated within the GDPR. The underlying aim would be to preserve non-identifiability, as well as support certainty. In particular, in light of the unclear dimensions of the reasonable means to identify, a prohibition could support certainty for those researchers who work on data originating from individuals, but do not contain such details that allow them to be directly identified, and do not risk liability under the GDPR, whilst acting in good faith and in line with the established research traditions. Any steps in that direction from third countries could facilitate cross-border collaboration,[143] especially when a recipient country is not covered by an adequacy decision,[144] and help address long-standing research ethics issues, such as parachuting.

[142] See note 111 in Vera Lúcia Raposo, 'Can personal data be recycled? The reuse and repurposing of data under the EHDS' [2025] 33 International Journal of Law and Information Technology <https://academic.oup.com/ijlit/article/doi/10.1093/ijlit/eaae016/8157201> accessed 3 October 2025.
[143] Slokenberga et al (n 8).
[144] See PROMOT, 'Privacy and data protection internal guidance report' (version 1, 2024), available upon request.

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THE EU ANTI-SLAPP DIRECTIVE: (UN) FOUNDED OPTIMISM?

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In April 2024 the EU adopted the Anti-SLAPP Directive which needs to be transposed by 7 May 2026. Strategic Lawsuits against Public Participation (SLAPPs) target public watchdogs such as journalists and NGOs who express themselves on matters of public interest. The primary objective of these lawsuits is not to win the case but to intimidate victims of SLAPPs with the threat of a procedure's high financial and psychological costs. This produces a 'chilling effect' on public discourse. The EU Anti-SLAPP Directive provides for strong safeguards, yet SLAPPs remain difficult to recognize as such by victims, courts and legal practitioners. This article uses the concept of legal opportunity structures to assess the potential de facto effectiveness of the Directive, focusing on the perspective of defamation SLAPP victims. It argues that a clear definition of SLAPP indicators and explicit provisions are crucial for enabling victims to effectively leverage the remedies established under the Directive. Furthermore, strategic litigation and Anti-SLAPP civil society organizations play a vital role in ensuring the Directive's practical impact.

1 INTRODUCTION

Strategic Lawsuits against Public Participation (SLAPPs) are lawsuits against public watchdogs such as journalists and NGOs who express themselves in a matter of public interest.[1] The principal aim of these lawsuits is to intimidate the defendant with high monetary and moral costs of a procedure.[2] The idea is that regardless of the outcome of the case, the procedure itself can be sufficient to make them settle and to delete their content from the public sphere – also referred to as a 'chilling effect' on public speech.[3] Thereby, a matter of public debate is transformed in a matter of private adjudication, a political debate is moved from the political to the judicial arena, also referred to as 'punishment by process'.[4]

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1 As described for example in Judit Bayer et al, 'Strategic Lawsuits Against Public Participation (SLAPP) in the European Union. A Comparative Study' [2021] SSRN Electronic Journal 12 <https://www.ssrn.com/abstract=4092013> accessed 14 January 2025.

2 ibid.

3 Peter Coe, Rebecca Moosavian, and Paul Wragg, 'Addressing Strategic Lawsuits against Public Participation (SLAPPs): A Critical Interrogation of Legislative, and Judicial Responses' (2025) 17(1) Journal of Media Law 103; Directive 2024/1069 of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') [2024] OJ L2024/1069 (Anti-SLAPP Directive) recital 16; Rebecca Bonello Ghio and Dalia Nasreddin, 'Shutting out Criticism: How Slaps Threaten European Democracy' (The Coalition Against SLAPPS in Europe (CASE, 2020), 46 <https://www.the-case.eu/wp content/uploads/2023/04/CASEreportSLAPPsEurope.pdf> accessed 1 December 2025.

4 Penelope Canan, 'The SLAPP from a Sociological Perspective' (1989) 7 Pace Environmental Law Review 23, 23; Justin Borg-Barthet and Francesca Farrington, 'The EU's Anti-SLAPP Directive: A Partial Victory for Rule of Law Advocacy in Europe' (2024) 25(6) German Law Journal 840, 841; Francesca Farrington

This is not only a restriction of the freedom of speech of the SLAPP victim but harm to society as a whole as it has the consequence of removing information from the public sphere.[5] This twofold effect is a threat to EU democracies as thereby the space for protest and criticism on issues of public interest shrinks, pluralism is reduced to the benefit of powerful SLAPP initiators.[6]

Main grounds for SLAPPs are civil and criminal defamation, data protection (GDPR) and the violation of privacy rights.[7] Common litigation tactics include to issue multiple lawsuits, to address the lawsuit to multiple targets or to only target an individual as a puppet and excessive damage claims.[8]

Recently, for example, Greenpeace has been sued by the US company *'Energy Transfer'* as the puppet of protests against the *'Dakota Access pipeline'* on grounds of defamation, nuisance, trespass and conspiracy.[9] If this decision is enforced in the Netherlands, where Greenpeace has its headquarters, it would face bankruptcy.[10]

In April 2024 the EU adopted an Anti-SLAPP Directive which needs to be transposed by 7 May 2026. As the scope of the Directive is limited to civil claims with a cross-border implications,[11] the proposal has been accompanied with a Commission Recommendation on protecting human rights defenders and journalists who engage in public participation from SLAPPs.[12] Moreover, ten days before the EU Anti-SLAPP Directive was adopted, the Council of Ministers of the Council of Europe issued a Recommendation on countering SLAPPs based on ECtHR case law.[13] This soft law instrument also provides a definition of abusive lawsuits and requires Member States to decriminalize defamation and to provide training for lawyers and courts.[14]

The Directive has the purpose to minimize the chilling effect of SLAPPs on public participation.[15] There is a lot of literature on the effectiveness of the Directive in terms of its established safeguards.[16] However, the existence of that legal instrument and

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and Magdalena Zabrocka, 'Punishment by Process: The Development of Anti-SLAPP Legislation in the European Union' (2023) 24 ERA Forum 519, 521; Coe, Moosavian, and Wragg (n 3) 103.

[5] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 842.

[6] Bayer et al (n 1) 19.

[7] Bonello Ghio and Nasreddin (n 3) 43.

[8] Justin Borg-Barthet and Francesca Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation, and Regulatory Responses in the European Union' (European Parliament 2023) PE 756.468 37.

[9] Christina Eckes and Phillip Paiement, 'Silencing Greenpeace' (*Verfassungsblog*, 31 March 2025) <https://verfassungsblog.de/greenpeace-slapp-energy-transfer/> accessed 1 April 2025; Prakken d'Oliveira, 'Summons Greenpeace v. EnergyTransfer' <https://www.greenpeace.org/static/planet4-international-stateless/2025/02/822226e7-summons-gpi-energy-transfer-en-def-redacted.pdf> accessed 1 December 2025.

[10] 'Greenpeace Faces Bankruptcy After Landmark $667 Million Judgement' (*3E*, 27 March 2025) <https://www.3eco.com/article/greenpeace-faces-bankruptcy-after-landmark-judgment/> accessed 25 April 2025.

[11] Anti-SLAPP Directive Art. 1

[12] European Commission, 'Commission Recommendation (EU) 2022/758 on Protecting Journalists and Human Rights Defenders Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation")' (European Commission 2022).

[13] Council of Europe, 'Recommendation CM/Rec (2024)2 of the Committee of Ministers to Member States on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)' (2024) CM/Rec (2024).

[14] ibid.

[15] Anti-SLAPP Directive recital 46.

[16] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4); Marco Pasqua, 'The Proposed EU

the effective use thereof are two distinct aspects that both determine the *de facto* effectiveness of the Directive. For SLAPPs, the effective application of Anti-SLAPP measures is a particular challenge as SLAPPs are an instrumentalization of the law, a phenomenon that is difficult to detect within legal reasoning typically limited to the merits of the case. In addition, the term 'SLAPP' entered the European legal and normative discourse only recently, in the aftermath of the murder of the Maltese journalist Daphne Caruana Galizia in October 2017.[17]

In most Member States, there is no definition or statistical assessment of SLAPPs.[18] The lack of awareness of SLAPPs is particularly evident in Poland, where a variety of remedies materially correspond to those set out in the EU Anti-SLAPP Directive already exists but remain largely unused by courts.[19]

This raises the question how effectively victims can leverage these remedies, which largely depends on the level of awareness thereof among courts, lawyers and victims themselves. Article 19 of the Directive reflects this idea, requiring that persons engaging in public participation *'have access, as appropriate, to information on procedural safeguards and remedies and existing support measures'*.[20] Furthermore, this issue of awareness adds another dimension to the question of which implementation measures are required to ensure that practical application matches the legal situation the Directive aims to create.

While civil society organizations commenting on implementation attempts stress the need for explicit and clear safeguards,[21] all assessments of the potential effectiveness of the Directive so far focus on its black letter remedies, leaving aside their accessibility to victims. This article complements these assessments by examining how the Anti-SLAPP framework established by the Directive presents itself to victims and therefore how effectively it can be utilized in practice. As the situation of victims differs depending on the legal ground used, this analysis is limited to defamation SLAPPs.[22] This

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Directive on SLAPPs: A (First) Tool for Preserving, Strengthening and Advancing Democracy' (2023) 3 Athena: Critical Inquiries in Law, Philosophy and Globalization 209; Petra Bard et al, 'Ad-Hoc Request. SLAPP in the EU Context' (*Social Science Research Network*, 1 May 2020) <https://papers.ssrn.com/abstract=4092853> accessed 29 January 2025; Birgit van Houtert, 'The Anti-SLAPP Directive in the Context of EU and Dutch Private International Law: Improvements and (Remaining) Challenges to Protect SLAPP Targets' (2025) 2024 Nederlands Internationaal Privaatrecht 651; Zuzanna Nowicka, 'SLAPP vs. Mutual Trust: Protecting the Public Debate Through Public Policy Considerations' (2024) 26(4) German Law Journal 568.

[17] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 844; Bayer et al (n 1) 12; European Parliament, 'Media Pluralism and Media Freedom in the European Union' (2018) P8_TA(2018)0204 <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0204_EN.pdf> accessed 29 December 2025.

[18] CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons" à l'occasion de La Transposition de La Directive (UE)2024/1096 Du 11 Avril 2024' (Commission Nationale Consultative des Droits de l'Homme 2025) A-2025-2 6 <https://www.actu-environnement.com/media/pdf/news-45676-avis-CNCDH-procedures-baillons.pdf> accessed 29 December 2025.

[19] Radosław Baszuk et al, 'Co To Są Strategiczne Pozwy Przeciwko Udziałowi W Życiu Publicznym W Polsce I Jak Bronić W Takich Sprawach' (OKO Civic Control Centre Foundation), 39 <https://www.antislapp.eu/curriculum-hub/anti-slapp-curriculum-poland-full> accessed 1 December 2025.

[20] Anti-SLAPP Directive Art. 19.

[21] See for example 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive', 3 <https://www.internetconsultatie.nl/antislapp/b1> accessed 12 June 2025.

[22] Defamation in this article is understood in a broad sense, encompassing not only claims based on direct attacks about the reputation of an individual person but also the claim of false or misleading information about both, natural and legal persons. A more narrow understanding excluding the claim of diffusion of

category was chosen becausea big share of SLAPPs in the EU are based on defamation. According to recent data, 68.7 % of statistically recorded SLAPPs between 2010 and 2023 are based on criminal or civil defamation.[23] By 2023, 64.3% of SLAPPs examined were brought in civil cases.[24].

In Section 2, this article gives an overview of the Anti-SLAPP framework and related instruments to provide an understanding of the functioning of the Directive, pointing out the main challenges to SLAPP victims and the remedies provided. This simultaneously gives a comprehensive overview of the debates in literature on the Anti-SLAPP Directive.

Subsequently, it is assessed how these remedies (potentially) translate into the situation of victims, using the concept of 'legal opportunity structures'. Considering comparative aspects and current implementation tendencies, it is analysed how the definition of SLAPPs, the scope of the Directive and the remedies are perceived by a hypothetical victim of a defamation SLAPP. This includes an analysis of the receptivity of the legal system for SLAPP counterclaims and the legal culture in terms of awareness on the phenomenon among courts and lawyers. Moreover, it examines the extent to which information is available to SLAPP victims to enhance visibility of both the phenomenon and available remedies.

This analysis of victims' legal opportunity structures will point to ambiguities in the Directive, blind spots threatening to hamper its effective use and how they can be corrected, providing guidance for courts, legislators and victims.

2 THE *DE JURE* PROTECTION SYSTEM AGAINST SLAPPS IN THE EU

This Section provides an overview of the phenomenon of SLAPPs, including the main challenges for victims as well as the response provided for by the Directive and other Anti-SLAPP instruments in Europe. This will serve as a basis to analyse the legal opportunity structures of victims in the second part of this work.

2.1 DEFINITION OF SLAPPS

Not every case concerning freedom of speech is a SLAPP. The distinctive criterion is that, in a SLAPP, the main purpose of the procedure is not to seek a legal remedy but to use the procedure itself to promote a private interest that is not necessarily protected by the legal order.[25] This distinction is not sharp, instead, one always needs to balance the fundamental rights of freedom of expression and information (Art. 11 Charter of Fundamental Rights of the European Union (CFR)) and the right to a fair trial

false or misleading information on a company can be found in CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons" à l'occasion de La Transposition de La Directive (UE) 2024/1096 Du 11 Avril 2024' (Commission Nationale Consultative des Droits de l'Homme 2025) A-2025-2 13 <https://www.actu-environnement.com/media/pdf/news-45676-avis-CNCDH-procedures-baillons.pdf> accessed 1 December 2025.

[23] Daphne Caruana Galizia Foundation, 'A 2024 Report on SLAPPs in Europe: Mapping Trends and Cases' (The Coalition Against SLAPPS in Europe (CASE) 2024), 16 <https://www.the-case.eu/wp-content/uploads/2024/12/CASE-2024-report-vf_compressed-1.pdf> accessed 1 December 2025.

[24] ibid.

[25] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 842.

(Art 47 CFR) of the defendant against the right to a fair trial of the applicant (Art. 47 CFR) and to distinguish between a legitimate exercise of a right and an abuse of the right to process.[26] Therefore, there cannot be a general one-fits-all definition of SLAPPs, only indications.[27]

The Directive differentiates between SLAPPs in the form of manifestly unfounded claims and in the form of abusive lawsuits against public participation with counter measures tailored to the respective category.[28]While the Council attempted to include the definition of 'manifestly unfounded' as beyond any reasonable doubt,[29] the Directive does not contain any definition of that category.The category of abusive SLAPPs requires the court proceedings '*have as their main purpose to prevent, restrict or penalize public participation*'.[30] The Article contains a non-exhaustive list of indicators for such an intent including disproportionate, unreasonable claims, the existence of multiple proceedings against the same claimant in relation to the same matter, intimidation or threats and procedural tactics used in bad faith such as abusive forum shipping, delaying proceedings and discontinuing cases at a late stage of proceedings.

Second, claims must be unfounded[31]. This deviates from the formulation 'fully or partially unfounded' in the Directive proposal.[32] Other than one might think, this does not mean that the definition was narrowed. The amendment introducing this change in terminology, filed by the council, was accompanied by a recital, stating that *'abusive court proceedings can be either fully or partially unfounded, the concept of full or partial unfoundedness clarifies the fact that the claim does not necessarily have to be completely unfounded for the proceedings to be considered abusive'*.[33] In other words, it is indicated that only the terminology, not the content of the definition was changed. This is confirmed by Recital 29 of the final Directive.[34] Thereby, the Directive also covers cases where the violation of a law, for example a personal right is not in dispute, but damage claims are excessive, even though they are not considered typical examples of SLAPP cases.[35]

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[26] Farrington and Zabrocka (n 4) 523.
[27] Bayer et al (n 1) 22.
[28] Anti-SLAPP Directive Art. 1, chapter III, chapter IV.
[29] ibid recital 13.
[30] ibid Art. 4(3).
[31] ibid Art. 4(3)
[32] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lassuits against Public Participation")' (2022) COM (2022) 177 final, Art. 3(3).
[33] European Council, 'Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation") – Presidency Draft Compromise Proposal' (2023) Rec. 20a <https://media.euobserver.com/32e2540e1d40a5a019966e17e33ffd0c.pdf> accessed 27 June 2025.
[34] See also the explanations by the German government: Deutsche Bundesregierung, 'Antwort Der Bundesregierung Auf Die Kleine Anfrage Der Abgeordneten Tobias Matthias Peterka, Stephan Brandner, Fabian Jacobi Und Der Fraktion Der AfD EU-Richtlinie Über Den Schutz Vor Sogenannten SLAPP-Klagen' (Deutscher Bundestag) Drucksache 20/12883 2.
[35] Bard et al (n 16) 39; Prakken d'Oliveira (n 9) para 23.

2.2 SCOPE OF THE DIRECTIVE

As the Directive was adopted based on the competence in Article 81(2)f TFEU, the elimination of obstacles to the proper functioning of civil proceedings with cross-border implications, the claim needs to be civil and have 'cross-border implications' for the Directive to apply. These exist *'unless both parties are domiciled in the same Member State as the court seized and all other elements relevant to the situation concerned are located in that Member State'*.[36]

'Elements relevant to the situation concerned' are to be determined by the court hearing the case.[37] They may include, inter alia, factors set out in the Directive proposal, notably, whether the matter of public interest is relevant in more than one Member State ('European element') and whether the claimant has initiated similar proceedings against the same defendants in another Member State.[38] For the first aspect, the Coalition against SLAPPs (CASE) found that 85 % of SLAPPs examined related to a matter of public interest with a 'European element'.[39] As pointed out by the French Senate, this criterion could lead to the scope of the Directive covering almost all civil SLAPPs in a Member State.[40]

The second aspect – simultaneous suits in different Member State – is common for online media content. The author can be sued wherever the content is accessible online if the harm occurred there, for example due to the presence of shareholders.[41] This is due to the fact that under the Brussels Ia regulation either court can have jurisdiction, meaning the court of the place either where the harmful event was initiated or where it occurred is possible.[42]

The mere possibility of choosing different jurisdictions is considered sufficient as a cross-border element by some authors.[43] According to a study examining SLAPPs in 2022 and 2023 this covers 91,4 % of examined SLAPPs.[44] The EP suggested to include in the recitals that an act is to be considered relevant in more than one Member State if it is carried out on the internet.[45] Yet, Recital 30 in the Directive clarifies that the assessment

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[36] Anti-SLAPP Directive Art. 5.
[37] ibid recital 30.
[38] European Commission 2022 (n 12) Art. 4. Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 848.
[39] Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 29.
[40] 'RÉSOLUTION EUROPÉENNE PORTANT AVIS MOTIVÉ Sur La Conformité Au Principe de Subsidiarité de La Proposition de Directive Du Parlement Européen et Du Conseil Sur La Protection Des Personnes Qui Participent Au Débat Public Contre Les Procédures Judiciaires Manifestement Infondées Ou Abusives, COM(2022) 177 Final' (Sénat 2022) recital 14.
[41] European Commission (n 12) 2; van Houtert (n 16) 655; Joined Cases C-509/09 and C-161/10 *eDate and Martinez* EU:C:2011:685.
[42] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2015] OJ L351/1 Arts 4, 7(2); Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 26.
[43] Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8).
[44] ibid 9.
[45] European Parliament Committee on Legal Affairs, 'Report on the Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation")' COM(2022)0177 – C9-0161/2022 – 2022/0117(COD)) 19, Amendment 24<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=EP:P9_A(2023)0223> accessed 19 June 2025.

of the relevant elements shall be *'irrespective of the means of communication used'*.

In any event, the definition of cross-border cases in the Directive goes far beyond definitions of cross-border in international and European private law, typically referring to the defendant being domiciled or habitually resident in another Member State than the court seized or claimant and defendant not domiciled in the same Member State.[46] Only 9.4% of SLAPPs between 2010 and 2023 examined by CASE would fall under this definition.[47]

To summarize, a case is cross-border if claimant and defendant are not domiciled in the same Member State. If this is not the case the aspects mentioned above may qualify it if the court considers them relevant in the specific case. Therefore, the term cross-border leads to a (potentially) broad scope for civil cases.

In turn, SLAPPs based on criminal law and administrative law are excluded from the scope[48] which is a major point of critique.[49] It is argued that so-called 'SLAPPers' can thereby easily circumvent the safeguards of the Directive choosing another legal basis, defamation for example can be based on civil or criminal law. This issue is acknowledged in the Directive[50] which is why the Proposal for the SLAPP Directive was accompanied by a Commission Recommendation stating inter alia that Member States should adopt the same safeguards for SLAPPs beyond the scope of the Directive.[51]

2.3 REMEDIES FOR SLAPP VICTIMS

Remedies are tailored to the two categories of SAPPs: manifestly unfounded claims and abusive lawsuits against public participation.[52]

SLAPP procedures are often lengthy and therefore require a lot of time, psychological resilience and resources from victims. [53] As a response, SLAPP victims subject to manifestly unfounded claims can apply for early dismissal (Art. 11) where the burden of proof to substantiate that the claim is founded remains on the claimant. Moreover, Article 7 prescribes an accelerated treatment of applications for procedural safeguards.

The fact that early dismissal is only available for manifestly unfounded claims is criticized on the ground that abusive lawsuits have a similar effect on SLAPP victims.[54]

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[46] See for example Council Directive_2002/8/EC of 27 January 2003_to improve access to justice in cross-border disputes by establishing minimum common rules_relating to legal aid for such disputes [2003] OJ L26/41 Art. 2; van Houtert (n 16) 659; Daphne Caruana Galizia Foundation (n 23) 8.
[47] Daphne Caruana Galizia Foundation (n 23) 18.
[48] Anti-SLAPP Directive Art. 2.
[49] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 840; Pasqua (n 16) 225; Piotr Kładoczny and Barbara Namysłowska-Gabrysiak, 'Strategic Lawsuits Against Public Participation (SLAPP) in Light of Disclosed Sexua Violance at Universities in Poland - General Reflections Relating to Legal Regulation and Practice' (2023) 100 Studia Iuridica 164 <https://studiaiuridica.pl/resources/html/article/details?id=620329> accessed 6 February 2025; Stefanie Egidy, 'Einschüchterung Ist Das Ziel Stefanie Egidy Strategische Klagen Gegen Öffentliche Beteiligung (SLAPPs) in Deutschland' (*OBS-Arbeitspapier*, 19 March 2025), 77, 79 <https://www.otto-brenner-stiftung.de/einschuechterung-ist-das-ziel/> accessed 1 December 2025.
[50] Anti-SLAPP Directive recital 17.
[51] European Commission 2022 (n 12) 4.
[52] Anti-SLAPP Directive Art. 1, chapter III and chapter IV.
[53] Bonello Ghio and Nasreddin (n 3) 3; Anti-SLAPP Directive recital 16.
[54] Farrington and Zabrocka (n 4) 530.

Yet, it also needs to be considered that abusive lawsuits might be partially founded, the right to fair trial of the claimant (Art. 47 CFR) would be restricted if the claim would nevertheless be subject to early dismissal. It is argued that this could be justified in analogy of the abuse of rights concept (Art. 17 ECHR) stressing that early dismissal is not a denial of access to court.[55] Another point of critique is that 'manifestly unfounded' is a high threshold. Even though the definition of the council as a claim being 'so obviously unfounded that there is no scope for any reasonable doubt' was not adopted, it might be easy for the claimant to substantiate that the claim is not manifestly unfounded.[56]

Addressing the high financial burden of a SLAPP, [57] the Directive obliges Member States to ensure that courts seized in a SLAPP can require the plaintiff to provide security for the estimated costs of the proceedings.[58].

In the case of an abusive lawsuit, the claimant can be awarded all costs of the abusive proceedings, including the costs of legal representation even beyond statutory fee tables.[59] Moreover, Member States have to ensure that proportionate and dissuasive penalties may be ordered against the claimant.[60]. This may not only entail financial compensation but also the publication of the court decision.[61] Member States shall ensure that the award of these remedies cannot be affected by the subsequent modifications of the claim by the plaintiff.[62]

As there is no reason why SLAPPers using manifestly unfounded claims should not be subject to these costs and penalties, it is puzzling that the phrasing of these remedies only refers to abusive court proceedings. In literature it is held that these remedies apply to both categories,[63] possibly because manifestly unfounded claims fall in most cases also under the definition of abusive lawsuits against public participation in Article 4(3). In other words, manifestly unfounded claims might be a sub-category of abusive claims, not a separate category.

If the claim is manifestly unfounded or abusive, Article 9 allows for third-party interventions by organizations having a legitimate interest in safeguarding the rights of persons engaging in public participation.[64]

EU and Private international law amplify the danger of SLAPPs and the asymmetry of power between claimant and defendant.[65]As explained above, the Brussels Ia regulation provides for a broad choice of the forum in defamation cases which enables 'libel tourism', filing a lawsuit in the jurisdiction where the outcome is most likely to be positive.[66] Adding

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[55] Bayer et al (n 1) 41.
[56] Farrington and Zabrocka (n 4) 530; Pamela Shapiro, 'SLAPPs: Intent or Content: Anti-SLAPP Legislation Goes International' (2010) 19(1) Review of European, Comparative & International Environmental Law 14, 25; Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 848.
[57] Bonello Ghio and Nasreddin (n 3) 49.
[58] Anti-SLAPP Directive Art. 10
[59] ibid Art. 14
[60] ibid Art. 15.
[61] ibid.
[62] ibid Art. 8.
[63] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 849; Farrington and Zabrocka (n 4).
[64] For further analysis of this measure see Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 851.
[65] ibid 852; Nowicka, 'SLAPP vs. Mutual Trust' (n 16).
[66] Nowicka, 'SLAPP vs. Mutual Trust' (n 16) 12; Council of Europe, 'Declaration of the Committee of Ministers on the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression' (Council of Europe) Decl.(04/07/2012).

to the disadvantage of the legal system chosen by the plaintiff, being sued in a foreign jurisdiction adds a linguistic barrier, a geographical dimension, and drives up legal costs even further for the victim.[67] This is exacerbated by 'mosaic litigation', the suing of the victim in multiple Member States on the basis of the same 'infringement'.[68] This issue is on the Commission's agenda; currently it is debated to include specific rules of jurisdiction for defamation claims in the Rome II regulation.[69] However, until now there has not been consensus on that among Member States.[70]

What if a SLAPP, a claim designed to intimidate, is successful, even though objectively speaking it might be abusive or manifestly unfounded? If the judgment is issued in a third country, the Directive provides protection against the enforcement of third country SLAPP judgments as EU Anti-SLAPP measures could otherwise be circumvented by private international law.

Member States shall ensure to refuse the enforcement if, under its domestic law, the proceedings are considered manifestly unfounded or abusive (Art. 16). Moreover, the respective national court has jurisdictions to award damages incurred through the SLAPP (Art. 17). Thereby the protection of EU SLAPP victims is not limited to the EU.[71] Greenpeace for example, in its case against Energy Transfer, relies on a conjunct reading of national tort law with Article 17 of the Directive,[72] while it will also need to rely on Article 16 to prevent the enforcement of the US decision.[73]

If, in turn, an EU court gives a judgment based on claims that would be considered manifestly unfounded or abusive under the law of another Member States, there is no such possibility of non-enforcement. While this corresponds to the principle of mutual trust (Art. 82 (1) TFEU), it is problematic, especially in light of issues with judicial independence in the EU.

Yet, in *Le Monde vs RealMardrid*, the CJEU interpreted Article 34 of the Brussels I regulation, the ground of 'public policy' to refuse the execution of a judgment issued by a court in another Member State, as meaning that enforcement must be refused if it would constitute a manifest breach of a fundamental right, notably the freedom of expression.[74]

This exception is not restricted to SLAPPs. Yet, it places particular emphasis on excessive damage claims, one indicator for SLAPPs under Article 4(3) a of the Anti-SLAPP Directive. The CJEU follows upon the ECtHR, which held in *Steel vs Morris* that excessive

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[67] European Commission, 'Commission Staff Working Document Analytical Supporting Document Accompanying a Proposal for a Directive of the European Parliament and of the Council on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation") and a Commission Recommendation on Protecting Journalists and Human Rights Defenders Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation")' (2022) SWD (2022) 117 final 6; Anti-SLAPP Directive recital 30.

[68] van Houtert (n 16).

[69] 'Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Regulation (EC) No 864/2007 on the Law Applicable to Noncontractual Obligations (Rome II Regulation)' (European Commission 2025) 16.

[70] ibid 20.

[71] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 858.

[72] Prakken d'Oliveira (n 9) para 139.

[73] ibid para 124.

[74] Case C-633/22 *Le Monde vs Real Madrid* EU:C:2024:843 para 74.

damage claims may make the interference of a judgment with the freedom of speech disproportionate.[75] The CJEU held that the executing court needs to examine, also in light of the ECtHR case law, whether the damages are capable of 'discouraging the participation of the press in debates over matters of legitimate public concern and, therefore, have a deterrent effect on the exercise of the freedom of the press in respect of such matters'.[76] Whilst, under the principle of mutual trust, it is not on the executing court to review the decision of the issuing court, the CJEU stressed that it is for the executing court to review the proportionality of damages considering all relevant aspects.[77] In other words, SLAPP-victims that are subject to a SLAPP decision abroad may rely on non-enforcement.

In sum, the Directive is in principle welcomed as an important step to counteract SLAPPs and a result of effective legal mobilization by civil society.[78] The feared restrictions by the Council are not reflected in the final Directive.[79] While its scope is limited, it encompasses civil cross-border cases, a kind of SLAPP that is perceived as particularly threatening.[80] Statistical assessments suggest that 85% of SLAPPs in the EU might have a European element and therefore fall within the scope of the Directive.[81]

The Directive provides for remarkable safeguards. Yet, the effectiveness of the Directive is not only about what tools there are but about how effectively they are used by courts.[82] This also applies for legal professionals and – most importantly – victims. It is vital that persons engaging in public participation *'have access, as appropriate, to information on procedural safeguards and remedies and existing support measures'*.[83] Therefore, the subsequent Section assesses how the Directive impacts the legal situation perceived by victims.

3 LEGAL OPPORTUNITY STRUCTURES OF DEFAMATION SLAPP VICTIMS

How the remedies in the Directive (potentially) translate to the situation of victims can be assessed with the 'legal opportunity structures' ('LOS') approach. It is used in political science and social movement studies to better understand the interplay between legal strategies, legislative decisions and public policies.[84] Put differently, it assesses why social movements mobilize the law and engage in strategic litigation and why they succeed or fail.[85]

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[75] Bayer et al (n 1); *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) para 95.
[76] *Steel and Morris v the United Kingdom* (n 75) para 61.
[77] ibid paras 68, 69.
[78] Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 840.
[79] 'Governments' Agreed Stance on EU Anti-SLAPP Directive – a Disappointing Failure to Support the Adoption of Robust Safeguards for Public Watchdogs' (CASE 2023) <https://www.amnesty.eu/wp-content/uploads/2023/06/CASE_EU-anti-SLAPP-directive.pdf> accessed 31 January 2025.
[80] Daphne Caruana Galizia Foundation (n 23) 27; European Commission 2025 (n 69) 5; Bard et al (n 16) 37.
[81] Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 29.
[82] Dominika Bychawska-Siniarska and Zuzanna Nowicka, 'From Zero to Hero' (*Verfassungsblog*, 4 September 2024) <https://verfassungsblog.de/anti-slapp-legislation-poland/> accessed 16 January 2025; Bayer et al (n 1).
[83] Anti-SLAPP Directive Art. 19.
[84] Francesca Colli, 'Legal Opportunity Structures: Social Movements in the European Courts' in Rossana Deplano et al (eds), *Interdisciplinary Research Methods in EU Law* (Edward Elgar Publishing 2024) 105.
[85] Lisa Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental

Legal opportunity structures are composed of the receptivity of the legal system (the 'legal stock') as well as resources accessible to victims, including expertise.[86]

While LOS research typically also examines standing and potential costs,[87] the aspect of standing is not an issue for SLAPP victims, as they are respondents. In this research, the aspect of potential costs is not examined in particular as it is understood as part of the remedies accessible to victims, the legal stock.

LOS research understands social movements as rational actors.[88] If one leaves aside identity and agency aspects, SLAPP victims can be assumed to make a similar rational analysis of their possibilities when they decide between (a) settling and removing the information from the public or (b) defending themselves in court.[89] Yet, the use of this concept for the purpose of this research needed adaptation. First, SLAPPs can be categorized as so called non-aligned strategic litigation as they seek to demobilize, not to mobilize for a public cause.[90] Therefore, they fall under the category of non-aligned strategic litigation. Consequently, other than common LOS research, this assessment does not take the perspective of the initiator of strategic litigation but of the respondent.

A common research design under the LOS framework contains a concrete description of the legal opportunity structures and an assessment of whether the LOS and the decision to litigate correlate positively.[91] That second part of the assessment – the decision to litigate – is difficult to assess as cases where the SLAPP victim settled are of very little visibility: it is inherent to the phenomenon of SLAPPs that many of them end in the pre-litigious phase as the target might at that point already be sufficiently intimidated.[92] Out of fear, these SLAPP victims might prefer to remain silent on the case.[93]

Therefore, the use of the concept cannot give any indications on the explanatory value of legal opportunity structures but only illustrate what is legally possible. Based on the presumption that there is a chilling effect that can be mitigated by favourable legal opportunity structures, this analysis contributes to assessing the effectiveness of the Directive in minimizing the chilling effect of SLAPPs.

As the legal opportunity structures resulting from a Directive are an amalgam of the EU level, and national level, both need to be assessed.

As the Directive is yet to be implemented, the analysis needs to be based on preliminary observations of implementation attempts. Nonetheless, the insights are

Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy' (2018) 51(3) Comparative Political Studies 380, 380; Colli (n 84) 101.

[86] Colli (n 84) 102; Vanhala, 'Is Legal Mobilization for the Birds?' (n 85) 384.

[87] ibid.

[88] Colli (n 84) 101, 103.

[89] Canan (n 4) 7.

[90] As categorized in Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (London School of Economics 2024) 7 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf> accessed 1 December 2025. Other scholars don't consider SLAPPs as strategic litigation, see Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 843.

[91] Colli (n 84); Teresa Weber, 'KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis' (2024) 11 Austrian Law Journal 1 101116. For a more abstract examination of legal opportunity structures see Vanhala, 'Is Legal Mobilization for the Birds?' (n 85).

[92] Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 28; Daphne Caruana Galizia Foundation (n 23) 11.

[93] Bonello Ghio and Nasreddin (n 3) 13.

valuable as they point to pitfalls of the effectiveness of the Directive in the implementation phase. Bearing in mind these limitations, this research will assess legal opportunity structures as they present themselves to a hypothetical defamation SLAPP victim in the implementation phase of the Directive. Insights from draft implementation acts will be used for a preliminary assessment on how shortcomings of the Directive might be corrected on the Member State level. However, as the focus remains on the effectiveness of the Anti-SLAPP Directive, these national (draft) implementing acts are examined only with regard to a potential corrective function with respect to the shortcomings of the Directive.

The assessment of implementation acts is not complete as not every Member State has published implementation attempts yet, and a comprehensive assessment of all 27 MS would be beyond the scope of this research. It will nevertheless identify general tendencies based on insights on Poland (a Member State with a severe SLAPP issue in decline), Malta (a Member State with high numbers of SLAPPs and a legal environment identified as favourable to SLAPPs), France (a Member State with a high number of SLAPPs filed by corporations), Belgium, the Netherlands and Germany (Member States where few SLAPPs are identified).[94]

The analysis will be based on any primary documents available on the implementation in Member States. Where available, it also included secondary sources on these attempts, mainly drafted by NGOs. Given the variety of possible SLAPP targets[95] legal opportunity structures can differ drastically. This will be taken into account in the subsequent analysis, taking note of cases against different actors.

3.1 LEGAL STOCK

The legal stock refers to the receptivity of the legal system[96] for the claim (here the defence against a SLAPP.) This receptivity is determined by the claims alignment with the body of law in the particular field, existing litigation and the cultural stock of norms, i.e. how the topic is handled by courts.[97] If, for example, there exist clear provisions designed for SLAPP victims and clear indicators for SLAPPs as well as a general awareness of courts of the issue, the victim will feel reassured to defend itself.

The body of law on the EU level has been illustrated in Section 2. However, the existence of that legal body and the perception of that legal body are two distinct aspects.

3.1[a] Perception of the definition of SLAPPs

Purpose of the lawsuit

To recall, abusive lawsuits against public participation need to have the prevention,

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[94] Daphne Caruana Galizia Foundation (n 23) 14; Bonello Ghio and Nasreddin (n 3).
[95] Bonello Ghio and Nasreddin (n 3); Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8); Coe, Moosavian, and Wragg (n 3) 8.
[96] Colli (n 84) 102; Jan Beyers, Rainer Eising, and William A Maloney (eds), *Interest Group Politics in Europe* (Routledge 2013) 1131.
[97] Colli (n 84) 102, 107; Vanhala, 'Is Legal Mobilization for the Birds?' (n 85) 348.

restriction or penalization of public participation as their main purpose which is to be determined based on objective indicators.[98] The Directive provides a non-exhaustive list of four indicators:

(a) the disproportionate, excessive or unreasonable nature of the claim or part thereof, including excessive dispute value;
(b) the existence of multiple proceedings initiated by the claimant or associated parties in relation to similar matter;
(c) intimidation, harassment or threats on the part of the claimant or the claimant's representatives, before or during the proceedings, as well as similar conduct by the claimant in similar or concurrent cases;
(d) the use in bad faith of procedural tactics, such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith.

SLAPPs can present themselves in very different ways given the variety of possible targets, initiators and grounds.[99] Therefore it is important for the indicators to represent that variety so that victims in various situations can assess whether they might be a SLAPP victim. Indicators in the final Directive cover typical appearances of SLAPPs.[100] Yet, during the legislative procedure, the EP suggested further indicators: (1) the extent to which the claim is manifestly unfounded; (2) a previous early dismissal of a similar claim as abusive and (3) the exploitation of preponderance in terms of economic power, legal resources or political or social influence in order to restrict the public participation of the defendant resulting in an imbalance of power.[101] The latter criterion, an asymmetry of power between the claimant and the defendant, is archetypical. A study found that it characterizes 89.5% of SLAPPs in its sample.[102] The criteria suggested by the EP correspond to the indicators used by CASE, the network of Anti-SLAPP NGOs that mobilized for an EU Anti-SLAPP Directive.[103]

The Indicators in the Committee of Ministers Recommendations further include that the legal action might be accompanied with a public relations offensive against the defendant (g) and the systematic refusal to engage in non-judicial mechanisms to resolve the claim (j). Moreover, the fact that the legal action deliberately targets individuals rather than the responsible organizations (f) is seen as an indicator.[104] The latter criterion might seem counterintuitive as SLAPP victims that are part of an organization seem less vulnerable. Yet, also the individualization of proceedings in the form of a suit against both, (typically) the journalist and its employer were found to have significant adverse effects on the individual concerned, such as psychological stress, reliance on their employer and legal

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98 Anti-SLAPP Directive Art. 4(3).
99 Coe, Moosavian, and Wragg (n 3) 8; Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 8.
100 Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 852; Nowicka, 'SLAPP vs. Mutual Trust' (n 16); Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 37; Bard et al (n 16) 17; Council of Europe, 'Declaration of the Committee of Ministers on the Desirability of International Standards Dealing with Forum Shopping' (n 66).
101 European Parliament Committee on Legal Affairs (n 45) 104.
102 Bonello Ghio and Nasreddin (n 3) 30.
103 ibid 15.
104 Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 8.

ambiguities when for example a settlement is only agreed upon with the employer.[105]

The more indicators are present in legislation, the easier it is for victims to recognize that they are victims of a SLAPP. In light of the proven relevance of the indicators suggested by the EP and the Council of Europe, their omission from the Directive is difficult to explain. The argument that a too broad definition of SLAPPs runs the risk of preventing plaintiffs from the legitimate exercise of their rights (i.e. under Art. 47 CFR)[106] only applies to a limited extent as these are non-exhaustive indications, it is still on the court to weigh all individual circumstances.[107]

Looking at implementation measures, only the Belgium Model Anti-SLAPP law, drafted by a NGO and submitted by the opposition,[108] includes all indicators of the Directive and of the Council of Europe Recommendations in its Explanatory Memorandum.[109] The French national consultative commission on Human Rights (CNCDH), an independent public institution,[110] published an opinion on the transposition of the Directive in which it recommends to the French legislator to do the same.[111] The Dutch implementing Act does not contain its own definition of SLAPPs, it only refers to Article 4 of the Directive.[112] The Polish, Maltese and Irish draft implementing Acts adopted only the indicators of the Directive.[113] In the Maltese Act, the syntax has been changed from '*abusive court proceedings […] meaning court proceedings which are not brought to assert or exercise a right […] and pursue unfounded claims. Indicators for such a (abusive) purpose include*'[114] to '*abusive lawsuits are lawsuits which are not brought to assert or exercise a right […] and which pursue unfounded claims, including […]*'.[115] It is suggested that this adds another ambiguity as one could then understand the indicators as examples of unfounded claims, not as indicators for abusiveness.[116] However, as the indicators (see above) are clearly unrelated to the

105 Emma Bergmans and Jasmin de Zeeuw, 'Een Onderschat Probleem: Disproportionele Juridische Druk Op de Nederlandse Journalistiek' (Free Press Unlimited 2024) 12, 48.
106 Coe, Moosavian, and Wragg (n 3) 19.
107 Anti-SLAPP Directive Art. 4 (3)
108 Anastasiia Vorozhtsova, 'Belgium: Bill for the Transposition of the EU Anti-SLAPP Directive' (*Global Freedom of Expression*, 26 March 2025) <https://globalfreedomofexpression.columbia.edu/updates/2025/03/belgium-bill-for-the-transposition-of-the-eu-anti-slapp-directive/> accessed 15 May 2025.
109 'Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings' (Anti-SLAPP working group Belgium 2025) 3.
110 'Présentation' (CNCDH) <https://www.cncdh.fr/presentation> accessed 15 May 2025.
111 CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons"' (n 18) 7.
112 'Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version' 224 (A) <https://europadecentraal.nl/praktijkvraag/wat-is-een-bnc-fiche/> accessed 1 December 2025.
113 Ireland: 'Defamation (Amendment) Bill 2024' Art. 34A <https://www.oireachtas.ie/en/bills/bill/2024/67/> accessed 1 December 2025; Malta: 'Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' [2024] Government Gazette of Malta No. 21, 292 4 <https://legislation.mt/eli/ln/2024/177/eng> accessed 1 December 2025.
114 Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') [2024] OJ L2024/1069.
115 'Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' (n 113) 2.
116 Repubblika, Daphne Cuarana Galizia Foundation, 'Re: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' (Repubblika, Daphne Cuarana Galizia Foundation 2024) 2 <https://www.daphne.foundation/documents/letters/letter-on-anti-SLAPP-Directive-transposition.pdf> accessed 1 December 2025.

concept of unfoundedness, this paper argues that the resulting ambiguity is negligible.

Unfounded claims

The second criterion for a lawsuit to be abusive is that it pursues 'unfounded claims'.[117] This includes partially unfounded cases (see above), typical for defamation SLAPPs. Critical acts of public participation often address a certain behaviour of, for example, a company, and thereby include a negative statement on the latter, which might be classified as a slight violation of personality rights of both natural and legal persons.[118] SLAPPs based on defamation often combine (the possibility of) such a slight violation of personality rights with excessive damage claims which makes them partially unfounded.[119] Yet, the term 'unfounded' is misleading as it is commonly understood as a synonym to 'meritless'.[120] This is exacerbated by the fact that the initial formulation was 'partially or fully unfounded'.[121] One could thereby wrongfully think that the new Directive narrowed the definition with the term 'unfounded'.

The Commission Recommendations to counter SLAPPs were published with the Anti-SLAPP proposal and therefore also use the terminology 'partially or fully unfounded'. A similar terminology is used by the Council of Europe Recommendations of the Committee of Ministers.[122] Scholarship does not provide clarification in that regard as many articles are based on the Proposal while articles on the final Directive don't address the new terminology and the issue of ambiguity. SLAPP victims, attorneys and courts are confronted with these distinctive terms concerning unfoundedness:

Term	Meaning and specifities	Use
Partially unfounded court proceedings	Some of the claims have legal merit	Art. 3(3) Anti-SLAPP Proposal; recital 8 Committee of Ministers recommendations ('arguments' instead of 'proceedings'), Council of the EU draft compromise recital 20a, recital 20 of the Directive
Fully unfounded court proceedings	All claims lack legal merit	Art. 3(3) Anti-SLAPP Proposal, recital 8 Committee of Ministers recommendations ('arguments' instead of 'proceedings') Council of

[117] Anti- SLAPP Directive Art. 4(3).
[118] For example Case C-633/22 *Le Monde vs Real Madrid* EU:C:2024:843.
[119] Anti-SLAPP Directive recital 29.
[120] See Cambridge dictionary 'Unfounded' (14 May 2025) <https://dictionary.cambridge.org/dictionary/english/unfounded> accessed 15 May 2025.
[121] European Commission, ' (n 32) 3.
[122] Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 8.

Term	Meaning and specifities	Use
		the EU draft compromise recital 20a, recital 20 of the Directive
Manifestly unfounded (Art. 1 Alternative1)	Own category of SLAPPs, no definition	Art. 1 Alternative 1 Anti-SLAPP Directive, Art. 1 Alternative 1Anti-SLAPP proposal
Partially unfounded claims	Some of the claims have legal merit	Recital 29 of the Anti-SLAPP Directive
Unfounded (Art. 4(3)) claims	At least some of the claims are unfounded[123] Includes both categories: Partially and fully unfounded claims	Art. 4(3) Anti-SLAPP Directive

This misleading formulation can already have consequences for SLAPP victims using the Directive as a basis for their argumentation [124] and the implementation of the Directive by MS. While Greenpeace, a large NGO experienced in Strategic Litigation and frequent SLAPP victim,[125] was able to hire a law firm that conducted an analysis of the Directive, finding that 'unfounded' also includes partially founded claims,[126] individual defamation SLAPP victims might stop their inquiry when reading 'pursues unfounded claims' in Article 4(3) of the Directive. A recent study that interviewed 50 Dutch journalists and editors found that it is a common misconception about SLAPPs that they need to be manifestly unfounded.[127] Furthermore, in German legal scholarship, there are doubts about the term 'unfounded'.[128] This illustrates that the term might also be misinterpreted by courts, leading to a de facto narrowing of the definition.[129]

The confusion can be corrected in the implementation of the Directive. Polish Anti-SLAPP experts stress the need for the national legislator to use the terminology 'partially or fully unfounded' used in the Proposal and by the Council of Ministers.[130] German Anti-SLAPP experts equally recommend align the definition of SLAPPS with the recommendation by the Council of Ministers.[131]

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123 Anti-SLAPP Directive recital 29.
124 Prakken d'Oliveira (n 9) para 91.
125 Tribunal Judiciare de Paris Case N° RG 23/06215 *Total Energies vs Greenpeace France* (2024).
126 Prakken d'Oliveira (n 9) para 123.
127 Bergmans and de Zeeuw (n 105) 12.
128 Johannes Maurer, 'Kein SLAPP-Back' (*Verfassungsblog*, 8 July 2025) <https://verfassungsblog.de/anti-slapp-gesetz/> accessed 14 July 2025.
129 As noted for Poland by Paulina Milewska et al, 'Propozycje Zmian Prawnych w Celu Wdrożenia Dyrektywy w Sprawie Ochrony Osób, Które Angażują Się w Debatę Publiczną, Przed Ewidentnie Bezpodstawnymi Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi („strategiczne Powództwa Zmierzające Do Stłumienia Debaty Publicznej" Tzw. SLAPP)' (Helsińska Fundacja Praw Człowieka 2024) 14 <https://www.Art.19.org/wp-content/uploads/2024/11/SLAPP-rekomendacje-09.2024-FINAL.pdf> accessed 15 May 2025.
130 ibid.
131 Egidy (n 49) 44; 'Stellungnahme von Reporter Ohne Grenzen e.V. (RSF) Zur Umsetzung Der Richtlinie (EU) 2024/1069 Des Europäischen Parlaments Und Des Rates Vom 11. April 2024 Über Den Schutz von

In Ireland, the Draft Defamation Act, containing provisions for defamation SLAPPs,[132] adopted the wording of the Directive 'unfounded claims'. Yet, it inserted the clarification that 'claim' 'includes part of a claim',[133] thereby providing the necessary clarification.

The Polish Draft Implementing Act does not refer to unfoundedness of abusive claims in the legislative text, thereby avoiding the misconception that they need to be fully unfounded. The explanatory memorandum clarifies that abusive lawsuits can be partially legitimate.[134]

The French CNCDH is ambiguous, using the term 'unfounded' in its report while it also cited the Council of Ministers recommendations that use the terminology 'partially or fully unfounded'.[135]

The Maltese Implementing Act, the Belgian Model Anti-SLAPP law and the German draft implementing Act do not provide clarification, using the terminology of the Directive for its definition of abusive lawsuits against public participation, namely that claims need to be 'unfounded'.[136]

The Dutch Draft Implementing Act also only refers to the definition in the Directive.[137] Contrary to the finding of ambiguity in this research, the explanatory memorandum states that the 'Directive does provide the necessary guidance for the assessment of a SLAPP, both in the provisions and the recitals'.[138]

Yet, the lack of a definition of SLAPPs in national law leads to less awareness for both, victims and practitioners. The counterargument provided in the Explanatory Memorandum is that it is assumed that awareness of the phenomenon will increase thanks to a newly established focal point ('central information point'), understanding it as a purely political, not a legislative task.[139]

Personen, Die Sich Öffentlich Beteiligen, Vor Offensichtlich Unbegründeten Klagen oder Missbräuchlichen Gerichtsverfahren („strategische Klagen Gegen Öffentliche Beteiligung")' (Reporter ohne Grenzen) 33.

132 Ireland: 'Defamation (Amendment) Bill 2024' (n 113).

133 ibid 17.

134 'Explanatory Memorandum to the Polish Draft Implementing Bill (Uzasadnienie Do Ustawy o Ochronie Osób Uczestniczących w Debacie Publicznej Przed Oczywiście Bezzasadnymi Roszczeniami Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi) UC 94' 5 <https://www.gov.pl/web/premier/projekt-ustawy-o-ochronie-osob-uczestniczacych-w-debacie-publicznej-przed-oczywiscie-bezzasadnymi-roszczeniami-lub-stanowiacymi-naduzycie-postepowaniami-sadowym> accessed 24 June 2025.

135 CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons"' (n 18) 7.

136 'Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings' (n 109) 9; 'Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' (n 113) 2; Bundesministerium der Jusitz und für Verbraucherschutz, 'Referentenentwurf Eines Gesetzes Zur Umsetzung Der Richtlinie (EU) 2024/1069 Über Den Schutz von Personen, Die Sich Öffentlich Beteiligen, Vor Offen-Sichtlich Unbegründeten Klagen Oder Missbräuchlichen Gerichtsverfahren' 4 <https://www.bmjv.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Anti_SLAPP.pdf?__blob=publicationFile&v=4> accessed 1 December 2025.

137 'Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version' (n 112) 224.

138 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 8.

139 ibid.

3.1[b] Perception of the scope

For Greenpeace, it was clear that they fall under the scope as they were sued in a third country, the situation that Articles 16 and 17 of the Directive are tailored to.[140] For cases where the defendant and the court seized are in the same Member State, this might be more difficult as an element relevant to the situation concerned needs to be located outside that Member State (Art. 5). However, they might still fall within the scope if the matter of public interest on which the SLAPP target expressed itself concerns more than one Member State (see above, Section 2.2). This may include any matter within the competence of the EU.[141] The Directive Proposal named the examples of cross-border pollution or allegations of money laundering with potential cross-border involvement.[142] In literature, the examples of EU-Russia relations, misuse of EU grants, cybersecurity, migration, extradition, access to the Eurozone, organised crime and international drug trafficking are identified.[143] It will be interesting to see where the line will be drawn, especially since the scope is understood broadly in reactions to the Directive (see above).

Climate mitigation, for example, is regulated by the EU to the extent that there is an EU reduction target.[144] Would a SLAPP concerning emissions, such as the case *Total Energies France v Greenpeace*[145] or *Gaz System S.A. vs Ciborska and Zielone Wiadomości*[146] thereby be related to an EU public matter? Zuzanna Nowicka argues that there is room for an even broader interpretation: where the matter of public participation relates to water contamination for example this could constitute a cross-border element as environmental protection is a universal matter, regardless of a concrete EU competence.[147]

In any way, it is unclear to SLAPP victims in which circumstances they can rely on that 'European element'. Therefore, when sued in their country of residence, it might not even occur to them to refer to EU Anti-SLAPP safeguards which is especially crucial if Member States opt for minimum implementation, leaving victims of purely domestic SLAPPs without safeguards.[148] As it is for the court seized to decide which matters are relevant to the case this criterion will need to be concretised in litigation.[149]

3.1[c] Legal culture: SLAPP definition and Remedies after implementation

For the implementation of directives, Member States are free to choose 'form and

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140 Prakken d'Oliveira (n 9) para 154.
141 Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 25.
142 European Commission, 'Proposal for a Directive of the European Parliament and of the Council' (n 32) 13.
143 Borg-Barthet and Farrington, 'The Incidence of Strategic Lawsuit Against Public Participation' (n 8) 39.
144 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L243/1.
145 *Total Energies vs Greenpeace France* (n 125).
146 Safety of Journalists Platform, 'N°252/2023 – Gaz System Sues Zielone Wiadomości for Defamation' <https://fom.coe.int/en/alerte/detail/107640255> accessed 27 June 2025.
147 Nowicka, 'SLAPP vs. Mutual Trust' (n 16).
148 Such as Malta see Zuzanna Nowicka, 'Op-Ed: "The Anti-SLAPP Directive, One Year On"' (*EU Law Live*, 9 May 2025) <https://eulawlive.com/op-ed-the-anti-slapp-directive-one-year-on/> accessed 15 May 2025.
149 Anti-SLAPP Directive Art. 5.

methods'.[150] Nevertheless, the implementation in national law needs to make it sufficiently clear for the individual what their rights are. Moreover, Article 19 of the Directive particularly prescribes transparency and access to information on their procedural safeguards.

Some Member States consider that there is no need for legislative amendments as general provisions of civil procedural law and tort law already provide for the remedies required by the Directive, such as Germany or the Netherlands.[151] It is beyond the scope of this research to examine whether the existing law provides de jure for the required safeguards. Yet, it is important to note that for Germany, scholars warn that especially the German tort law is not sufficient in terms of the Anti-SLAPP Directive.[152] For the Netherlands, the Dutch Anti-SLAPP working group also found that existing laws were not sufficient.[153] Even if the remedies prescribed in the Directive were already established in general tort and procedural law, there is a need for explicit, SLAPP-specific provisions.[154] This is important for victims to see their situation reflected in legislation to understand their rights without the need to engage in judicial creativity.

Moreover, it affects the receptiveness of the legal system for the claim in terms of legal culture, how effectively they are used by courts.[155] It is important for courts and legal practitioners to become aware of the phenomenon and to be able to examine whether remedies are applicable.[156] If they are not, the chilling effect on victims increases as it is costly and nerve wrecking to file appeals, especially if the risk persists that higher courts will also fail to accommodate the phenomenon.[157] This legal culture will now be examined in more detail.

Abusive lawsuits are an anomaly, clashing with legal culture.[158] SLAPPs are different from 'normal' claims, as they are a political instrumentalization of the law.[159] Therefore, legal remedies that do not take account a potential instrumentalization are not an adequate response, neither for detecting them nor for countering them.[160]

First, there are epistemic limitations in the assessment of SLAPP indicators by courts

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[150] Treaty on the Functionning of the European Union Art. 288 (3).
[151] This is based on insights from a stakeholder meeting with the Commission on the implementation of the Anti- SLAPP Directive. 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 1. In Germany there is no official stance on this (yet), however the argument is prominent, see for example 'Der rechtliche Beirat der No SLAPP Anlaufstelle im Gespräch: Christian Löffelmacher' (*NO SLAPP Anlaufstelle*) <https://www.noslapp.de/neuigkeiten/der-rechtliche-beirat-der-no-slapp-anlaufstelle-im-gesprch-christian-lffelmacher> accessed 7 February 2025.
[152] Egidy (n 49) 75.
[153] Dutch Anti-SLAPP workgroup, 'Input by the Dutch Anti-SLAPP Working Group on the Draft Implimenting Act of the Anti-SLAPP Directive' (2024) <https://www.internetconsultatie.nl/antislapp/reactie/e95f79af-f15c-4499-98fa-f5975a2769b3 > accessed 1 December 2025.
[154] ibid.
[155] Bychawska-Siniarska and Nowicka (n 82).
[156] See also 'Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)' (n 131) 35; Egidy (n 49) 75
[157] Which can be seen at the example of Rafał Remont in Bychawska-Siniarska and Nowicka (n 82).
[158] Here I concur with CASE who argues that general provisions make the exercise of these rights arduous per se – Coalition against SLAPPs Europe (CASE), 'Statement on the Transposition of the Anti-SLAPP Directive in the Netherlands' 2 <https://www.internetconsultatie.nl/antislapp/reactie/cfbd0ec5-e6ab-45f4-9f0c-504b23cbed51> accessed 1 December 2025; Dutch Anti-SLAPP workgroup (n 153) 2.
[159] Coe, Moosavian, and Wragg (n 3) 1; Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 841; Farrington and Zabrocka (n 4) 521
[160] Egidy (n 49) 45.

as its examination is limited to the merits of the case.[161] In some Member States, several indicators are not part of the legal test in national procedural or civil law which is why, without specific provisions, these may remain below the radar of courts or, even if they are invoked, courts have no means to include them in their reasoning.[162] In Germany, it has been found that there are no provisions enabling courts to test SLAPP indicators.[163]

Whereas the disproportionate, excessive or unreasonable nature of the claim[164] is typically subject to the control of courts because it is linked to the merits, SLAPP indicators such as the '*existence of multiple proceedings initiated by the claimant or attributable to the claimant*'[165] or '*intimidation, harassment or threats before or during the proceedings […]*'[166] are typically not part of the legal test prescribed by laws. The same applies for the additional indicators (see above) of 'asymmetry of power', the existence of a public relations offense and whether the action deliberately targets an individual instead of the corporation behind it.

However, some national laws contain provisions that require courts to consider factors linked to the abuse of a law. Criterion (c) of the SLAPP Definition, '*the use in bad faith of procedural tactics such as delaying proceedings, fraudulent or abusive forum shopping or the discontinuation of cases at a later stage of the proceedings in bad faith*'[167] is in a grey zone as some national laws include it as a defence. In the Netherlands for example, under instruments such as 'the abuse of power'[168] it is examined whether the right was invoked for something other than its purpose.[169] Yet actions beyond the courtroom such as threats are not examined under this provision.[170] French, Polish and Irish law contain a similar provisions[171] that have already been invoked in SLAPP cases.[172] The notion of abuse of procedure in French law includes indicators similar to the ones in the Directive: lack of legal merits (corresponding to SLAPP indicator (a)), an evident malicious character of the proceedings, the intention to harm or the intent to multiply the engaged procedures (SLAPP indicator (b)).[173] Yet, it is not clear whether an asymmetry of power or pre-litigious behaviour can be taken into account in that legal test.

161 For Germany see Egidy (n 49) 45. For the Netherlands see Dutch Anti-SLAPP workgroup (n 153) 3.
162 Dutch Anti-SLAPP workgroup (n 153) 3.
163 Egidy (n 49) 46. While § 826 (intentional immoral damage) enables courts to consider all circumstances, SLAPPs do not fit the logic of that claim see Jan Kalbhenn et al, 'Der Kommissionsentwurf Zu Einer Richtlinie Zum Schutz Vor Strategischen Klagen Gegen Öffentliche Beteiligung ("SLAPP")' [2022] ZUM 705, 711.
164 Anti-SLAPP Directive Art. 4(3)a).
165 ibid.
166 ibid.
167 Anti-SLAPP Directive Art. 4(3)c).
168 Art. 3:13 in conjunction with Art. 3:15 Burgerlijk Wetboek Boek 3; 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 9.
169 Coalition against SLAPPs Europe (CASE) (n 158); Dutch Anti-SLAPP workgroup (n 153) 3.
170 ibid.
171 France: Art. 31 code de procédure civile and Art. 1240 code civil; Poland: Art. 4 and Art. 226(2) § 2 226(2) § 2 kodeks postępowania cywilnego; Ireland: Law Society of Ireland, 'Submission on the Draft Recommendation of the Committee of Ministers on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)' 11 <https://www.lawsociety.ie/globalassets/documents/submissions/lsi-submission-to-coe-on-slapp-recommendation-08.08.2023.pdf> accessed 25 June 2025.
172 *Total Energies vs Greenpeace France* (n 125); Baszuk et al (n 19) 45.
173 'Les Procédures-Bâillons : Une Menace Démocratique ? L'état Du Droit (2de Partie) – Infractions de Presse' <https://legipresse.com/011-51999-les-procedures-baillons-une-menace-democratique-letat-du-droit-2de-partie.html> accessed 22 June 2025; cited in CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons"' (n 18) 22. Invoked in *Total Energies vs Greenpeace France* (n 125).

In order to incite court to consider all circumstances of the case that may point to the existence of a SLAPP, it is important to make the indicators for abusive procedures part of the legal test.[174] Looking at implementation measures, the indicators of the Directive would be part of the legal test under the Irish, Polish and Maltese draft implementing acts.[175] Under the Belgium model law[176] and the Dutch draft implementing Act they are not.[177]

Second, in addition to this epistemological blindness for SLAPP indicators, the term 'SLAPP' only recently entered the European legal and normative discourse: in the aftermath of the murder of the Maltese journalist Daphne Caruana Galizia in 2017 scholars started to raise concern.[178] The EP first referred to SLAPPs in a resolution in May 2018.[179] The ECtHR first used the term in 2022 in *OOO Memo v Russia* while the CJEU has not used it until this day. In most Member States, there is no definition or statistical assessment of SLAPPs.[180] The German Government stressed that until date there was no reason for German courts to assess whether a case is a SLAPP.[181]

The lack of awareness of SLAPPs is particularly evident in Poland, where a variety of remedies materially correspond to those set out in the EU Anti-SLAPP Directive already exists but remain largely unused by courts.[182] The Council of Europe also stressed the need to give more prominence to the issue.[183] Safeguards explicitly referring to SLAPPs would remind courts of their existence and incite them to apply the remedies provided for by the Directive, also at their own initiative.[184] This would align with the Commission Recommendation to train the judiciary and lawyers to better detect and act upon SLAPPs.[185]

The Belgium Model SLAPP law includes explicit SLAPP remedies.[186] In Poland, the Draft Implementing Act foresees explicit provisions for securities, the participation of third parties, penalties and legal costs in the case of abusive lawsuits.[187] Moreover, there is a provision pointing to the possibility to apply the clause on 'abuse of procedure' to

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174 Coalition against SLAPPs Europe (CASE) (n 158); Dutch Anti-SLAPP workgroup (n 153) 3. German experts for example stress the need to adopt an explicit definition of SLAPPs under German Law also 'Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)' (n 131) 35; Egidy (n 49) 75

175 Ireland: 'Defamation (Amendment) Bill 2024' (n 113); Malta: 'Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' (n 113) 4.

176 'Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings' (n 109) 3.

177 'Draft Law Implementing the Anti-SLAPP Directive - Consultation Version' 224 (A) <https://europadecentraal.nl/praktijkvraag/wat-is-een-bnc-fiche/> accessed 1 December 2025.

178 Borg-Barthet and Farrington, 'The EU's Anti-SLAPP Directive' (n 4) 844; Bayer et al (n 1) 12.

179 European Parliament, 'Media Pluralism and Media Freedom in the European Union' (n 17).

180 CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons"' (n 18) 6.

181 Deutsche Bundesregierung (n 34) 2; CNCDH, 'Avis "Lutter Contre Les Procédures Bâillons"' (n 18) 6; 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 5.

182 Baszuk et al (n 19) 39.

183 Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 57.

184 'Stellungnahme von Reporter Ohne Grenzen e.V. (RSF)' (n 131) 35; Egidy (n 49) 75

185 European Commission 2022 (n 12) 27; Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 57.

186 'Belgium Draft Law on Protecting Persons Who Engage in Public Participation from Manifestly Unfounded Claims and Abusive Court Proceedings' (n 109).

187 'Polish Draft Implementing Bill (Ustawa o Ochronie Osób Uczestniczących w Debacie Publicznej Przed Oczywiście Bezzasadnymi Roszczeniami Lub Stanowiącymi Nadużycie Postępowaniami Sądowymi)'.

SLAPPs.[188] Thereby, if the Act is adopted – which seems unlikely given the veto power of the president – visibility of the phenomenon and accessibility will very likely be enhanced. The Maltese Implementing Act entails specific remedies for SLAPP victims.[189] Ireland's implementation for defamation cases entails specific clauses for SLAPPs concerning early dismissal, costs, security and dissuasive penalties in the form of the publication of the decision.[190] The victim can apply for a declaration that the claim is a SLAPP.[191] (This declaration shall then be taken into account by the court when making an award of costs. In contrast, the Dutch Draft Implementing Act only contains a new provision for the possibility of the court to require securities for the anticipated procedural costs.[192]

In the explanatory memorandum, the necessity for a *lex specialis* on early dismissal for SLAPPs is rejected with the argument that this would *materially* not change the situation of the defendant because also in that case the complex assessment of whether it is a SLAPP is required.[193] This omits the problem preceding any material assessment, namely the lack of awareness on SLAPPs among both victims and courts, which could be mitigated with the introduction of an explicit *lex specialis*. Interestingly, the memorandum mentions that *increasing the knowledge* on SLAPPs in legal practice might lead to SLAPP victims raising the existing general defences more often so that judges will examine whether there is a SLAPP.[194]

Legal culture can also change with enhanced assessment. For example, Article 20 of the Directive requires Member States to submit data on the amount and characteristics of SLAPPs to the commission where available. Precedents could also change the legal culture and visibility of SLAPPs for courts, lawyers and victims.[195] Yet, in some countries like Germany, court decisions are systemically not published.[196] In France and the Netherlands, civil decisions are generally published, yet not collected under the term SLAPPs, which is why they might not immediately generate more visibility for the issue. Therefore, the Recommendations by the Council of Europe require the establishment of a public register of SLAPP cases.[197] The Irish and Maltese Draft Implementation Acts prescribe that decisions of abusive proceedings need to be published.[198]

Concluding on the legal stock, the Directive uses the ambiguous formulation 'pursues unfounded claims' which can be corrected by implementing acts. The criterion of 'cross-border implications' under Article 5 of the Directive is vague and will remain so after implementation as it is for courts to determine which factors are relevant in that regard.[199] Hence, it needs to be developed by case-law. Both, the development of the

[188] 'Polish Draft Implementing Bill (n 187) 7.
[189] Repubblika, Daphne Cuarana Galizia Foundation (n 116) 4.
[190] 'Defamation (Amendment) Bill 2024' (n 113) Art. 34 E.
[191] ibid. Art. 34 F.
[192] 'Dutch Draft Law Implementing the Anti-SLAPP Directive - Consultation Version' (n 112) 1.
[193] 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 10.
[194] ibid.
[195] Anti-SLAPP Directive recital 47 and Art. 19(3).
[196] Egidy (n 49) 78.
[197] Council of Europe, 'Recommendation CM/Rec (2024)2' (n 13) 48.
[198] Defamation (Amendment) Bill 2024' (n 113) 34; Maltese Draft Implementing Act: Legal Notice 177 of 2024 Strategic Lawsuits Against Public Participation Order' (n 113) 12.
[199] Anti-SLAPP Directive Art. 5.

criteria in case-law and the effective use of remedies are contingent upon explicit implementation measures, otherwise the remedies run the risk of remaining under the radar of courts and SLAPP victims that have no or limited access to legal expertise on that matter. Strategic litigation could be vital in that regard. Social movements can shape the law.[200] LOS research on environmental movements in the UK, for example, has shown that for these organizations, due to their strong intrinsic willingness to take policy battles to court, the decision to litigate is quite robust against bad legal opportunity structures, including potentially high financial losses.[201] They create their own legal opportunities, being an important agent for their change.[202] Greenpeace, for example, a NGO experienced in Strategic Litigation and targeted by SLAPPs before,[203] makes use of the Directive in its case against Energy Transfer, thereby showing possible legal avenues for defences and potentially also setting an important precedent.

This brings up the next factor of legal opportunity structures, resources.

3.2 RESOURCES

A victim's financial resources, expertise and access to legal advice also determine how effectively they can leverage the legal stock for their claim.[204] Information is an important resource, especially in light of the previously explained ambiguities, vague criteria and the lack of awareness of the phenomenon of SLAPPs. Moreover, there appear to be serious misperceptions of the concept among victims. In a study where Dutch journalists and editors where interviewed, several respondents stated that a case can only be considered a SLAPP if it has not been won or if the target is part of a large publisher or broadcaster.[205]

Complementary to the obligation to provide access to information under Article 19 of the Directive, the Commission Recommendation urges Member States to establish central national focal points that gather and share information on SLAPPs and provide individual support.[206] Until now, fourteen Member States established such a focal point.[207] Some designated their Ministry of Justice but also civil society organizations or organizations representing media enterprises got appointed as focal points.[208]

Among the countries examined in this research, Ireland, Malta and Poland have not yet established a focal point.[209] In the Netherlands, in light of the decision not to introduce

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200 Colli (n 84) 99.
201 Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK' (2012) 46 Law & Society Review 523, 544.
202 ibid 525.
203 *Total Energies vs Greenpeace France* (n 125).
204 Colli (n 84) 102.
205 Bergmans and de Zeeuw (n 105) 12.
206 European Commission 2022 (n 12) 38.
207 European Commission, 'Commission Staff Working Document on the Follow-up to the Commission Recommendation (EU) 2022/758 of 27 April 2022 on Protecting Journalists and Human Rights Defenders Who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits against Public Participation")' (European Commission 2024) SWD(2024) 292 final <https://data.consilium.europa.eu/doc/document/ST-5801-2025-INIT/en/pdf> accessed 25 June 2025.
208 ibid 3.
209 European Commission, 'List of Member State's Nominated Focal Points According to Point 25 of the

a definition of SLAPPs or explicit safeguards in national law, emphasis is placed on the focal point as the central actor to raise awareness and to ensure that victims are informed in line with Article 19 of the Directive.[210] Nevertheless, the Dutch focal point does not have a website yet.[211] Moreover the French focal point at the Interministerial Delegation for Victim Support does not refer to SLAPPs on its website.[212] The German national focal point, integrated into the Ministry of Justice, is more visible, yet has a limited understanding of its tasks, stating that its main purpose is the exchange with other focal points.[213] For information and awareness it refers to an NGO, the German No SLAPP contact point.[214] A similar structure can be found in Belgium where the federal institute for the protection and promotion of Human Rights refers to the national Anti-SLAPP working group to report SLAPPs to.[215]

In other words, victims do not yet receive information and support directly from Member States but from civil society organizations. In general, it can be observed that national civil society organizations are well connected in national Anti-SLAPP working groups that cooperate on the EU level via CASE.[216] They provide (potential) SLAPP victims with a preliminary assessment on their situation.[217] Moreover, they can help with the search for lawyers specialized in SLAPPs.[218]

Interestingly, in Malta, the court seized shall ensure that the victim has access to all information required under Article 19 of the Directive *after* the victim applied for a specific remedy against SLAPPs.[219] It is not clear how the victim is supposed to obtain this information in the first place. Yet, given the explicit provisions in the Draft Implementing Act, the phenomenon and the remedies available are visible to the victim.

Another aspect of information is the visibility of decisions on SLAPPs. Due to the lack of or only limited publication of SLAPP decisions issued by courts in Member States,civil society organizations contribute to the awareness of SLAPPs with public

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Commission's 2022 Anti- SLAPP Recommendation' <https://commission.europa.eu/document/d357f321-540d-427a-9a5a-aae261486463_en> accessed 27 June 2025.

210 'Dutch Draft Explanatory Memorandum on the Act Implementing the Anti-SLAPP Directive' (n 21) 8.

211 European Commission, 'List of Member State's Nominated Focal Points According to Point 25 of the Commission's 2022 Anti- SLAPP Recommendation' (n 209).

212 'La délégation interministérielle à l'aide aux victimes (DIAV) - Vous avez été victime de terrorisme (FR - en - es)' (*info.gouv.fr*) <https://www.info.gouv.fr/guide-victimes/deleguee-interministerielle-a-l-aide-aux-victimes-diav> accessed 27 June 2025.

213 'BfJ - Aufgaben Des Focal Point SLAPP' <https://www.bundesjustizamt.de/DE/Themen/FocalPointSLAPP/Aufgaben/Aufgaben_node.html> accessed 26 June 2025.

214 ibid.

215 'What Does FIRM-IFDH Do against SLAPP? | FIRM-IFDH' <https://www.federalinstitutehumanrights.be/en/what-does-firm-ifdh-do-against-slapp> accessed 27 June 2025.

216 For example in Ireland, Belgium, Germany, Malta and the Netherlands.

217 The German no SLAPP contact point for example provides a questionnaire 'are you a SLAPP victim' where one receives an answer by an expert. 'NO SLAPP Anlaufstelle' (*NO SLAPP Anlaufstelle*, 11 June 2025) <https://www.noslapp.de> accessed 27 June 2025. The Belgium workgroup has a similar too: 'What Is SLAPP? | ANTI-SLAPP WORKING GROUP BELGIUM' <https://slapp.be/en/what-is-slapp> accessed 27 June 2025.

218 'Expertise' (*NO SLAPP Anlaufstelle*) <https://www.noslapp.de/expertise> accessed 27 June 2025.

219 Repubblika, Daphne Cuarana Galizia Foundation (n 116) 12.

campaigns on SLAPP cases, thereby also destigmatizing the victim.[220] Moreover, NGOs that are SLAPP victims can play a corrective role. Besides showing legal possibilities to defend oneself against SLAPPs, they can further add to the destigmatization of SLAPP victims. The small German environmental NGO *Rettet den Regenwald e.V.,* for example, which was SLAPPed by the oil and timber group Korindo, made a campaign about the lawsuit. In solidarity with a SLAPPed German newspaper, they shared their story on how they successfully defended themselves.[221]

4 CONCLUSION

This research has recalled material shortcomings of the Directive, most pressingly the limitation of the scope to civil cases and the lack of an amendment of jurisdiction rules in light of libel tourism and mosaic proceedings. Nonetheless, the Directive can be perceived as materially strong. However, when considering its effectiveness in terms of minimizing the chilling effect on victims of defamation SLAPPs, not only the *de jure* situation but also the legal opportunity structures perceived by victims need to be considered.

The Directive contains the misleading formulation of 'unfounded claims'. This needs to be corrected by Member States, using the formulation of 'partially or fully unfounded claims' instead. Moreover, Member States need to provide specific Anti-SLAPP remedies to ensure that they are used by courts and victims.

The criterion of 'cross-border implications' under Article 5 of the Directive is vague and will remain so after implementation as it is for courts to determine which factors are relevant in that regard. It needs to be developed by case-law. Integrating the concept of SLAPPs in national legal cultures is challenging because national laws limit courts epistemologically in their assessment of SLAPP indicators. Moreover, the phenomenon is new, multifaceted and atypical. Therefore, the effective use of remedies in SLAPP cases by courts is contingent on specific, explicit implementation measures. Moreover, such measures enhance the visibility of remedies for SLAPP victims that have no or limited access to lawyers specialized on that matter.

The less explicit national legal provisions, the more important are precedents. NGOs may take on a corrective role in that regard as they are common SLAPP targets but, thanks to their enhanced agency and experience in strategic litigation, they may pave the way for smaller, less well-resourced SLAPP victims. Therefore, it is important that decisions on SLAPPs are published as prescribed by the Directive. Civil society organizations specialised in SLAPPs contribute a lot to minimize the chilling effect, providing comprehensive support and information for victims as well as raising awareness in the public.

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220 'The People's Choice Award: European SLAPP Contest 2025 – CASE' (24 March 2025) <https://www.the-case.eu/latest/the-peoples-choice-award-european-slapp-contest-2025/> accessed 27 June 2025; 'Fallbesprechung: Royal Knitting Workers & Clean Clothes Campaign' (*NO SLAPP Anlaufstelle*) <https://www.noslapp.de/neuigkeiten/fallbesprechung-royal-knitting-workers-amp-clean-clothes-campaign> accessed 27 June 2025.

221 '„Einschüchterung misslungen"' (Rettet den Regenwald e.V.) <https://www.regenwald.org/news/13513> accessed 16 May 2025.

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TOWARDS MANDATORY GREEN PUBLIC PROCUREMENT IN EUROPE: COMPARATIVE LESSONS FROM ITALY AND NORWAY ON APPLICATION AND ENFORCEMENT

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While the 2014 Public Procurement Directive neither requires nor prohibits the use of public procurement as a tool to reduce environmental externalities and combat climate change, sectoral legislation introduced under the Green Deal increasingly prescribes public authorities to buy 'green'. Given the limited supranational experience with the shift from voluntary to mandatory Green Public Procurement (GPP), this article undertakes a comparative assessment of two jurisdictions whose experience with mandatory GPP predates the current European trend: Italy and Norway. By examining the legislative frameworks, application, and enforcement concerning Italy's minimum environmental criteria (CAMs) and Norway's 30% weighting requirement for climate and environmental considerations in award criteria, the article identifies key ambiguities that will characterise this emerging phase of mandatory GPP in Europe.

1 INTRODUCTION

In the EU, public procurement accounts for approximately 14% of the GDP.[1] As climate change calls for a comprehensive approach, this purchasing power can be leveraged in prioritising the EU's ambitions for a green transition.[2] The current public procurement framework in Europe, i.e. the Public Procurement Directive, which regulates the award of contracts for works, supplies and services, allows these purchases to be carried out strategically with non-pecuniary objectives. Within this framework, Green Public Procurement (GPP), as defined by the Commission, is procurement 'whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life-cycle when compared to goods, services and works with the same primary function that would otherwise be procured'.[3]

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[1] European Court of Auditors, 'Public procurement in the EU – Less Competition for contracts awarded for works, goods and services in the 10 years up to 2021' 28/2023 (Court of Auditors Special Report).

[2] Enrico Letta, 'Much More Than a Market' (April 2024), 45 <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> accessed 3 November 2025 (Letta Report).

[3] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Public Procurement for a Better Environment' COM(2008) 400 final 4. The Commission's definition of GPP is criticised for being too narrow, see Marta Andhov and Federica Muscaritoli, 'Climate Change and Public Procurement: Are We Shifting the Legal Discourse?' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023). However, due to recent legislative initiatives' insistence on the term, combined with the inherent emphasis on green on the European Green Deal, this article also uses the term GPP.

The Public Procurement Directive, adopted in 2014, is yet to change more than a decade after its adoption.[4] However, the same cannot be said for the rest of European law with public procurement relevance. The Union's roadmap for making its economy sustainable, the European Green Deal, projected public procurement as a role model in the market to respond to climate and environment-related challenges.[5] With this catalyst, GPP in Europe is moving to a new phase where the facilitative framework is being replaced with mandatory requirements. In this context, a mandatory GPP requirement is a requirement that 'directs the decision-making process of a national, regional or local authority, often in their role as a contracting authority'; it may encompass different obligations for public buyers such as mandatory minimum criteria, target and sector-specific legislation.[6] Inevitably, this recent trend triggers scrutiny on the efficiency and effectiveness of such an approach.[7] However, the limited experience in the application and enforcement of mandatory GPP precludes a definitive assessment.[8] Nevertheless, cross-jurisdictional perspectives from procurement systems whose experiences with mandatory GPP criteria predate the supranational trend may serve as a starting point.

Comparative method is a vital element in European law.[9] It also complements the understanding of supranational law as the law itself may be the result of a 'compromise'.[10] As it mimics the method of European integration, a comparative research framework benefits the analyses of Europeanisation.[11] On public procurement, comparative research is 'an important tool for the development of procurement regulation and practice'.[12] Specifically on sustainability, comparative research is 'particularly useful' as different ways

[4] Though note that the works for revision has started, see Court of Auditors Special Report (n 1); Council of the European Union, 'Council Conclusions on the European Court of Auditors' Special Report No. 28/2023 - Improve a fair and effective competition for EU public procurement contracts awarded for works, goods, and services' (C/2024/3521) (Council Conclusions on the European Court of Auditors' Special Report); Ursula von der Leyen, 'Political Guidelines for the Next European Commission 2024-2029' <https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf> accessed November 2025.
[5] European Commission, 'Communication from the Commission, The European Green Deal' COM(2019) 640 final.
[6] Willem Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 17. Note that the author uses this typology for all sustainability requirements not only for GPP.
[7] See Peter Kunzlik, 'From Suspect practice to market-based instruments: policy alignment and the evolution of EU law's approach to "green" public procurement' (2013) 3 Public Procurement Law Review 97, 109-115; Lela Mélon, 'More than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU' (2020) 12(3) Sustainability 988, 1004; Kirsi-Maria Halonen, 'Is Public Procurement Fit for Reaching Sustainability Goals? A Law and Economics Approach to Green Public Procurement' (2021) 28(4) Maastricht Journal of European and Comparative Law 535, 552.
[8] Kleoniki Pouikli, 'Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool' (2021) 21(4) ERA Forum 699, 715.
[9] Antonina Bakardjieva Engelbrekt, 'Comparative Law and European Law: The End of an Era, a New Beginning or Time to Face the Methodological Challenges?' (2015) 61 Scandinavian Studies in Law 88, 91.
[10] Danny Pieters, 'Functions of Comparative Law and Practical Methodology of Comparing' <https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf> accessed 3 November 2025.
[11] Bakardjieva Engelbrekt (n 9) 103.
[12] Foreword by the Editors of the European Procurement Law Series by Roberto Caranta and Steen Treumer in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010).

can be addressed 'only if the question is examined with the technique of the 'as opposed to''.[13] Using this method, this article puts the application and enforcement of mandatory GPP requirements in Italy and Norway under investigation to gain experience on the application and enforcement to explore the challenges that may arise from such approach at the supranational level.

The article is structured as follows: Section 2 briefly introduces the European public procurement and the enforcement system. Building on the historical developments of GPP, Section 3 assesses the move towards a mandatory GPP approach in secondary legislation. Sections 4 and 5 examine the regulation, application and enforcement of mandatory GPP requirements in Italy and Norway. Building on these findings, Section 6 investigates the similarities and differences between selected jurisdictions to unveil the potential uncertainties inherent in the enforcement of forthcoming European GPP requirements. Section 7 concludes by addressing future pathways in the legal framework.

2 PUBLIC PROCUREMENT IN EUROPE AND ENFORCEMENT

Since the 70s, public procurement in Europe has been subject to rules arising from directives. As the award of public procurement contracts is required to comply with principles of the Treaty on the Functioning of the European Union (TFEU), secondary legislation provides rules on 'how to buy' in order to ensure that principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency are respected.[14] Pursuant to this framework, provided that their value is above the specified thresholds, contracts awarded by or on behalf of member states' authorities for the execution of works, the supply of products or the provision of services, should be awarded pursuant to the rules on the procedures established with procurement directives.

Safeguarding the objectives of the rules harmonising the award of public contracts depends on economic operators' ability to protect their rights through available remedies.[15] Since the late 80s, the enforcement of public procurement is subject to rules arising from the Remedies Directive. These rules establish the conditions on review procedures to be initiated in case of decisions of contracting authorities that are alleged to have infringed 'Union law in the field of public procurement or national rules transposing that law'.[16] Such review procedures should be made available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. Under this system, depending on national law, review bodies may be courts or administrative review bodies, which offer interim measures, setting aside an unlawful

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[13] Mario E Comba, 'Green and Social Considerations in Public Procurement Contracts: A Comparative Approach' in Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 300.

[14] Recital 1 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65 (Public Procurement Directive).

[15] Roberto Caranta and Vítězslava Fričová, 'EU Procurement and Concessions Law' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 415.

[16] Art 1 Council Directive 89/665 of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 [2007] OJ L335/31 (Remedies Directive).

decision and damages.[17] Time limit for application for review should not be less than 10 days (or 15 days depending on the means of communication) following the communication of the decision to the candidate/tenderer.[18]

To a large extent, concluded public contracts are protected under this framework.[19] For this reason, there are procedural safeguards precluding the conclusion of the contract to ensure review procedures do not become futile due to the conclusion of the contract. In case of review of contract award decision, there is an automatic suspension which provides that a contract should not be concluded before the review body has made a decision on the application either for interim measures or for review.[20] Also, standstill period is another legal shield, subject to exceptions, which ensures that the public contract cannot be concluded until a certain amount of time (10/15 days) passes from the award of the contract.[21]

One exception to the protection given to concluded public contracts is the remedy of ineffectiveness. Unless exceptions apply, a concluded public contract can be rendered ineffective for serious breaches, including illegal direct awards, but also the breach of the abovementioned procedural safeguards in a way that robs the interested party of obtaining remedies in case of a breach of the Public Procurement Directive.[22] This deprivation of the contract's effect aims to restore competition for the benefit of economic operators who were deprived of potential business opportunities.[23] In case the said procedural safeguards are not accompanied also by the breach of the Public Procurement Directive, member states should provide either for ineffectiveness or alternative penalties.[24] The Remedies Directive does not provide a complete harmonisation of remedies; rather, it sets the minimum conditions required of national review systems.[25]

3 THE REGULATORY EVOLUTION OF GPP IN EUROPE: FROM PERMISSION TO PRESCRIPTION

While the first two generations of procurement directives did not include an explicit reference to GPP, towards the end of the millennium, the Commission acknowledged that the public procurement legislation accommodates the incorporation of environmental considerations by the contracting authorities in the contracts they award.[26] While

[17] Art 2(1) Remedies Directive.
[18] Art 2(c) Remedies Directive.
[19] For concluded public contracts as sacred cows, see See Steen Treumer, 'Towards an Obligation to Terminate Contracts Concluded in Breach of the E.C. Procurement Rules - the End of the Status of Concluded Public Contracts as Sacred Cows' (2007) 6 Public Procurement Law Review 371.
[20] Art 2(3) Remedies Directive.
[21] Art 2(a)(2) of the Remedies Directive.
[22] Art 2(d) Remedies Directive.
[23] Case C-23/20 *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark* EU:C:2021:490 paras 86-87; see Case C-471/21 P(R) *Inivos Ltd and Inivos BV v European Commission* EU:C:2021:984 para 83.
[24] Art 2e Remedies Directive.
[25] Case C-327/00 *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA* EU:C:2003:109 para 47; Joined Cases C-496/18 and C-497/18 *HUNGEOD Közlekedésfejlesztési, Földmérési, Út- és Vasúttervezési Kft. and Others v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* EU:C:2020:240 para 73; Case C-263/19 *T-Systems Magyarország Zrt. and BKK Budapesti Közlekedési Központ v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* EU:C:2020:373 para 53.
[26] Commission of the European Communities, 'Green Paper Public Procurement in the European Union: Exploring the Way Forward' (1996) COM(96)583 final 40.

the Commission explained how green considerations can be legally incorporated in public procurement;[27] the case law of the Court of Justice of the European Union (CJEU) shed light on questions concerning the limits of the use of discretionary GPP criteria.[28] Parallel to this, member states were invited to adopt national action plans for the greening of their purchases within the limits of the applicable framework.[29] With the adoption of the 2004 Directive, the facultative use of environmental considerations was incorporated into the legislation.[30] While the Commission's soft law provided a step-by-step toolkit, the CJEU favoured less strict conditions concerning the limits of GPP. [31] In the meantime, the new Directive was adopted, allowing the incorporation of green requirements under decisions concerning 'what to buy' and 'whom to buy from' as detailed below.

Under the 2014 Public Procurement Directive, while technical specifications, the purpose of which is to set characteristics of a public purchase, can incorporate environmental characteristics, performance conditions can be prescribed to ensure the contractor adheres to certain environmental requirements in the performance of the contract.[32] In the determination of the most economically advantageous tender (MEAT) through comparing submitted bids, award criteria may include the best price-quality ratio, including environmental aspects.[33] In this assessment, contracting authorities can use life-cycle costing (LCC) not only to account for the costs borne by the contracting authorities but also for costs owed to environmental externalities.[34] Labels can be used to specify environmental characteristics of the purchase.[35] Additionally, during the qualitative selection deciding 'whom to buy from', exclusion grounds allow economic operators to be banned from participating for breach of environmental law, and selection criteria include environmental requirements concerning the economic operators' capacity to undertake the contract.[36]

An original provision of the 2014 Directive is Article 18(2), which obliges member states to ensure that economic operators comply with the national, European and

[27] Commission of the European Communities, 'Communication from the Commission Public Procurement in the European Union' COM(1998) 143 final 27; Commission of the European Communities, 'Commission Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Environmental Considerations Into Public Procurement' COM(2001) 274 final.

[28] Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* EU:C:2002:495; Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* EU:C:2003:651.

[29] Commission of the European Communities, 'Communication from the Commission to the Council and the European Parliament Integrated Product Policy Building on Environmental Life-Cycle Thinking' COM(2003) 302 final 12.

[30] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

[31] European Commission, 'Buying Green! A Handbook on Environmental Public Procurement' (2004) First edition; European Commission, 'Buying Green! A Handbook on Green Public Procurement' (2011) Second edition; Case C-368/10 *Commission v Netherlands* (Max Havelaar) EU:C:2012:284.

[32] Arts 42 and 70 Public Procurement Directive.

[33] Art 67 Public Procurement Directive.

[34] Art 68 Public Procurement Directive.

[35] Art 43 Public Procurement Directive.

[36] Arts 57 and 58 Public Procurement Directive. Ezgi Uysal and Willem A Janssen, 'The European Green Deal and Public Procurement Law Its Extraterritorial Reach beyond the EU's Borders' in Mar Campins Eritja and Xavier Fernández-Pons (eds), *Deploying the European Green Deal Protecting the Environment Beyond the EU Borders* (Routledge 2024) 181.

international environmental, social and labour law in the performance of public contracts. Though this provision is often referred to as the 'principle of sustainability' alongside other principles of procurement;[37] it is still questionable whether it establishes an authentic principle of 'sustainability' since it simply refers to compliance with the applicable law.[38] Nevertheless, the CJEU confirmed that the provision was established as a principle and carries 'a cardinal value'.[39] In sum, the current framework does not mandate GPP but maintains the facilitative approach through nudging the public buyers through soft law guidance and the dissemination of good practices, as well as voluntary sectoral GPP criteria regularly updated.[40]

This voluntary approach to GPP was a deliberate choice. It was explicitly noted in the Recital of the 2014 Public Procurement Directive that, due to the crucial differences between sectors, it is not appropriate to set horizontal mandatory GPP requirements with the Directive.[41] Taking into consideration the policies and conditions of the specific sectors, the task of introducing mandatory GPP requirements was left to sectoral legislation. Up until recently, only a limited amount of secondary legislation had, in fact, taken up such a role.[42] Nevertheless, post-Green Deal, there has been an increase in the secondary legislation with public procurement relevance.

Currently, there are more than 50 pieces of secondary legislation with public procurement relevance.[43] While the existing GPP requirements are being amended to introduce more comprehensive requirements or an extended coverage,[44] a considerable

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[37] See Marta Andhov, 'Contracting Authorities and Strategic Goals of Public Procurement-A Relationship Defined by Discretion?' in Sanja Bogojevic, Xavier Groussot, and Jörgen Hettne (eds), *Discretion in EU Procurement Law* (Hart Publishing 2019) 132; Marta Andhov, 'Article 18(2) Public Procurement Principles' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021); Roberto Caranta, 'Sustainability Takes Centre Stage in Public Procurement' (2023) 85(1) Ruch Prawniczy, Ekonomiczny I Socjologiczny 41, 44; Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law' (n 6) 10.

[38] Ezgi Uysal, 'Sustainability Clauses in 'Public' Contracts' (2024) 20(1) European Review of Contract Law 105, 115

[39] Case C-395/18 *Tim SpA Direzione e coordinamento Vivendi SA v Consip SpA, Ministero dell'Economia e delle Finanze* EU:C:2019:595 para 38.

[40] Uysal and Janssen (n 36).

[41] Recital 95 Public Procurement Directive.

[42] See Art 9 Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment [2008] OJ L39/1; Arts 5-6 Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles [2009] OJ L 120/5; Art 9 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings [2010] OJ L153/13; Art 6 Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

[43] Jugatx Ortiz Gonzalez, 'Opening Speech – News from Brussel' in EU Public Procurement anno 2025 - Are the rules fit for purpose? <https://jura.ku.dk/clima/calendar/2025/eu_public_procurement_anno_2025/> accessed 3 November 2025; Willem A Janssen, 'The Coherence of Public Procurement Legislation in the European Union A study into the external coherence of the Public Procurement Directives and other legislative instruments regulating public procurement' Research Report for the EU Commission, July 2025.

[44] See Arts 3-5 of the Directive 2009/33/EC amended with Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116; Art 7 Directive (EU) 2024/1275 of the European Parliament and of the Council of 24 April 2024 on the energy performance of buildings (recast) [2024] OJ L2024/1275; Arts 5-7 Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) 2023/955 (recast) [2023] OJ L231/1.

majority of the recent legislative acts foresee the introduction of mandatory GPP criteria through further acts establishing ‘a common definition of what a “green purchase” is’.[45] GPP in Europe is moving into its next phase, assertively prescribing to the public sector to buy green.

This being said, the European experience with mandatory GPP requirements is in its infancy. With the increasing amount of secondary legislation calling for the adoption of further acts and uncertainties concerning their enforcement once adopted, it is premature to make definitive statements on this new phase. Nevertheless, insights from jurisdictions whose experience with mandatory GPP pre-dates this new European trend, Italy and Norway, could be utilised to gain experience on the application and enforcement of mandatory GPP criteria and to identify approaching ambiguities. Accordingly, in the next sections the mandatory GPP criteria of the respective jurisdictions are investigated, and subsequently compared to find answers to questions relating to mandatory GPP requirements at the European level.

4 MANDATORY GPP CRITERIA IN ITALY

4.1 PUBLIC PROCUREMENT AND ENFORCEMENT

In Italy, public contracts are subject to rules arising from the Public Contracts Code.[46] The enforcement of public procurement rules is regulated partly in this Code and partly in the Administrative Judicial Procedure Code. Pursuant to the latter, in disputes concerning the procedures for the award of public contracts, the regional administrative courts and the Council of State have exclusive jurisdiction. There is no administrative review body within the meaning given under the Remedies Directive.

The Administrative Judicial Procedure Code also provides that if the contract award decision is annulled, considering the facts, such as parties’ interest or the execution state of the contract, a public contract can be declared ineffective.[47] Additionally, under the Public Contracts Code, if a public contract cannot be performed for certain reasons, including the ineffectiveness, the contracting authority checks other economic operators that participated that can take over the contract depending on their rankings.[48] The assignment takes place under the same conditions proposed by the original contractor, or the contracting authority can provide in the contract documents that the assignment is to be realised based on the conditions proposed by the economic operator consulted. Takeover is only possible if requested.[49]

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[45] European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Sustainable Europe Investment Plan – European Green Deal Investment Plan’ COM(2020) 21 final 12.

[46] The new Italian Public Contracts Code was adopted with Legislative Decree 36/2023 in March 2023, following Law 78/2022, giving powers to the Government.

[47] Arts 121-122 of the Italian Administrative Judicial Procedure Code.

[48] Art 124 of the Italian Public Contracts Code.

[49] Cons. Stato Sez. V, Sent., 17/10/2016, n. 4272; Cons. Stato Sez. V, Sent., 24/05/2017, n. 2445; Cons. Stato Sez. V, Sent., 29/10/2018, n. 6131; Cons. Stato Sez. V, Sent., 26/01/2021, n. 788.

4.2 MANDATORY GPP CRITERIA: MINIMUM ENVIRONMENTAL CRITERIA (CAMS)

For a long time, due to the high level of mafia infiltration in public contracts, the predominant horizontal consideration in Italian public procurement was anti-corruption. However, public procurement was not completely oblivious to GPP. Since the late 90s, there has been differing legislation mandating environmentally conscious purchases, such as the use of recycled materials or organic production, but the requirements consisted of annual targets rather than purchase-specific criteria.[50]

The National Action Plan on GPP, adopted following the Commission's call was a turning point as it introduced minimum environmental criteria (*Criteri ambientali minimi* – CAM) for certain categories of purchases. While they were not initially binding on contracting authorities, with several legislative changes to the then-applicable Code, they have become binding under the title of 'energy and environmental sustainability criteria'.[51] CAMs, currently more than 20, are adopted per sector with decrees, are similar to the Commission GPP criteria and may also include social criteria.[52] They are regularly updated based on the 'maturity of the market segment, the public expenditures volume and the potential environmental impacts'.[53]

The public procurement legislation in Italy underwent a major change in 2023. Environmental sustainability was given a predominant role even before the formal adoption of the new Code through the Law delegating to the government.[54] Some of its objectives were achieving the goals of the UN 2030 Agenda for Sustainable Development and increasing sustainable activities in line with the Union's Taxonomy Regulation. Nevertheless, though the new Code kept the mandatory GPP criteria, sustainability or sustainable development did not make it to the text of the Code as a principle. This was discouraging, considering the importance given to principles under the new Code.[55] However, the Council of State acknowledged that a public contract is not simply a means for the administration to procure goods, services and works but a multi-purpose instrument functional to the

[50] 'Regional Guidebook on Circular Procurement – Italy', 26 fn 71 <https://projects2014-2020.interregeurope.eu/fileadmin/user_upload/tx_tevprojects/library/file_1622539554.pdf> accessed 30 March 2025.

[51] For historical development of CAM see Stefano Colombari, 'Le considerazioni ambientali nell'aggiudicazione delle concessioni e degli appalti pubblici' (2019) 1 Urbanistica e appalti 5, 16-17; Roberto Caranta and Sofia Marroncelli, 'Gli appalti pubblici tra mitigazione e resilienza: il contributo del gpp alla lotta contro i cambiamenti climatico' (2021) 1 Rivista giuridica dell'ambiente 83.

[52] See CAM Vigenti <https://www.mase.gov.it/portale/cam-vigenti> accessed 3 November 2025. More on the CAMs, see Rosaria Costanzo, 'Lo sviluppo sostenibile negli appalti pubblici. I criteri ambientali minimi (2023) 1 Rivista Giuridica AmbienteDiritto.it 1; Ilaria Baisi, 'Impresa ed economia circolare: una rilettura della contrattazione ecologicamente orientata alla luce del nuovo Codice dei contratti pubblici' (2024) 3 Rivista scientifica trimestrale di diritto amministrativo 1233; Federico Francesco Guzzi, 'La rilevanza ambientale nel settore dei contratti pubblici' (2024) 2 Rivista Giuridica AmbienteDiritto.it 1.

[53] Giulia Botta, 'Italy: Leading the Way Towards Mandatory Sustainable Public Procurement through Minimum Environmental Criteria' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 195-196.

[54] Law 78/2022.

[55] Andrea Maltoni, 'Contratti pubblici e sostenibilità ambientale: da un approccio "mandatory-rigido" ad uno di tipo "funzionale"?' (2023) 3 CERIDAP 64, 82.

implementation of public policies.[56]

The new Code provides that, in order to contribute to the achievement of the environmental objectives, technical specifications and contract clauses in the CAMs should be incorporated in the tender documentation.[57] Other criteria to be found under CAMs, particularly award criteria, are to be taken into consideration, which does not establish a rigid obligation rather incentivises it.[58] Similar green criteria can be used by analogy in purchases with different subject matter.[59] CAMs not only aim for the reduction of environmental externalities but also the promotion of sustainable and circular production and consumption, as well as the development of green employment.[60]

4.3 APPLICATION AND ENFORCEMENT OF MANDATORY GPP CRITERIA

The proactive role of the Italian judiciary has been crucial in giving effect to the CAMs.[61] The Council of State established that they constitute immediately binding obligations on the contracting authorities.[62] The obligation incumbent on the contracting authorities under the Code is not simply to pursue environmental sustainability but to do so through the CAMs.[63] Their incorporation in tender documents serves a dual purpose: (i) to provide economic operators with the necessary elements to formulate their tender and (ii) to ensure that the procedure contributes to the evolution of public procurement from a mere instrument for the acquisition of goods and services to an instrument of economic policy.[64] Moreover, contracting authorities should factor these obligations in when determining the tender value.[65]

CAMs should be included in the tender notices from the outset, where the contracting authority's failure to do so prejudices the legitimacy of the procedure.[66] Errors in the application of the criteria may lead to annulment of the tender notice, as well as the contract award decision.[67] Moreover, the potential remedy of ineffectiveness of concluded contracts is utilised by the judiciary in the enforcement of CAMs.

A case before the Council of State concerned a tendering procedure where the public buyer failed to include relevant criteria, even though the purchase fell under the scope of

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[56] Cons. Stato Sez. III, Sent., 29/12/2023, n. 11322.
[57] Art 57 Italian Public Contracts Code.
[58] See Cons. Stato Sez. III, Sent., 17/04/2018, n. 2317.
[59] Botta (n 53).
[60] Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934.
[61] Giuseppe Franchina, 'Contratti pubblici e criteri ambientali minimi' (2002) 2 Rivista Giuridica AmbienteDiritto.it 1, 12; Aura Iurascu, 'How Will the Adoption of Mandatory GPP Criteria Change the Game?' (2023) 18 European Procurement & Public Private Partnership Law Review 6, 15.
[62] Cons. Stato Sez. V, Sent., 03/02/2021, n. 972; Cons. Stato Sez. III, Sent. 20/03/2023, n. 2799. See also Cons. Stato, III, 21/01/2022 n. 397; Cons. Stato Sez. V, Sent., 10/11/2022, n. 9879 and TAR Lazio Roma Sez. II ter, Sent., 06/03/2024, n. 4493 in case of a lack of reference in the documents.
[63] Cons. Stato Sez. V, Sent., 03/02/2021, n. 972.
[64] Cons. Stato Sez. III, Sent., 20/03/2023, n. 2799.
[65] Cons. Stato Sez. V, Sent., 27/11/2019, n. 8088.
[66] Cons. Stato Sez. III, Sent., 20/03/2023, n. 2795.Whether the obligations arising from CAMs can be considered automatically incorporated in the contract pursuant to the Civil Code has been discussed, see Massimiliano Pinti, 'L'insostenibile leggerezza dei Criteri ambientali minimi. La difficile integrazione delle istanze ambientali nell'ambito dei contratti pubblici' 2022(3) Rivista Quadrimestrale di Diritto dell'ambiente 192, 203.
[67] Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934.

applicable CAMs.[68] In the tender documents, there was simply a generic reference to the law applicable. Following the contract award, one of the tenderers brought an action before the regional administrative court by alleging the wrongful application the Code regarding CAMs. Not only that the Council of State establish the procedure should be annulled, but as the public contract was concluded in the meantime, also declared the contract ineffective.

In another case, unlike the above-noted case, in the tender documents, there was a mere reference in the tender requirements to the relevant CAM decrees. The regional administrative court established that such a reference is adequate since a tenderer can formulate an informed offer.[69] However, the Council of State established that the reference to the relevant decrees without incorporation of the criteria in the tender documentation is not sufficient to consider the relevant obligation on CAMs complied with and decided to annul the tender documents.[70]

Another matter giving rise to uncertainties in the enforcement of mandatory GPP criteria in Italy is the time of challenge to the non-incorporation or mis-incorporation of CAMs. While the majority of the Council of State case law established that such a breach does not call for an immediate challenge of the tender notice;[71] there were also cases reaching a different conclusion.[72] The Council of State most recently established that whether an immediate challenge of the breach is necessary depends on its effect on the participation and tender preparation.[73]

Additionally, though a contracting authority incorporates CAMs in the procedure, a tenderer may fail to respect them in their bids. In this context, the failure of a tenderer to produce documentation relating to compliance with CAMs could be penalised with exclusion at the award stage.[74] In the scenario that the selected tenderer should have been excluded for failure to comply with CAMs, the award of a contract to a tenderer that should have been excluded will be subject to review procedures. However, unlike the above-mentioned cases, in such a situation, the illegality does not arise from the lack of CAMs.

For instance, in the case of a contract awarded to a tender that does not comply with CAM, even where the contracting authority provided them in the tender documents, the Council of State declared the contract ineffective, and the contract was taken over by

[68] Cons. Stato Sez. III, Sent., 14/10/2022, n. 8773.
[69] TAR Campania Naples I, Sent., 15/01/2024, n. 377. On the same line see TAR Lazio II-ter, Sent., 06/03/2024, n. 4493.
[70] Cons. Stato Sez. III, Sent., 27/05/2024, n. 4701. But see TAR Lazio I, Sent., 26/11/2024 n. 21224.
[71] Cons. Stato Sez. V, Sent., 03/02/2021, n. 972; Cons. Stato Sez. V, Sent., 05/08/2022, n. 6934; Cons. Stato Sez. III, Sent., 14/10/2022, n. 8773; Cons. Stato Sez. III, Sent., 20/03/2023, n. 2795; Cons. Stato Sez. III, Sent. 20/03/2023, n. 2799; Cons. Stato Sez. III, Sent., 27/05/2024, n. 4701; Cons. Stato Sez. III, Sent, 30/12/2024, n 10473.
[72] Cons. Stato Sez. V, Sent., 04/04/2023, n. 3542; Cons. Stato Sez. V, Sent., 18/04/ 2025, n. 3411.
[73] Cons. Stato Sez. V, Sent., 25/07/2025, n.6651; Cons. Stato Sez. V, Sent., 08/10/2025 n.7898. (i) In case of a total absence of CAMs in the tender documents, this constitutes a serious deficiency in data necessary for preparing an offer and therefore calls for an immediate challenge of the tender notice; (ii) In case there is only a generic reference to the relevant CAM decrees, the need for an immediate challenge depends on whether the omission created a serious deficiency affecting offer formulation; and (iii) In case CAMs are incompletely or inconsistently applied, an immediate challenge is necessary only if it can be shown that such defects effectively hindered participation in the procedure.
[74] Cons. Stato Sez. V, Sent., 26/04/2022, n. 3197. However, provided that there is an undertaking at the award stage, assessment of factual compliance with the CAMs can also be placed at post-award, see Cons. Stato Sez. III, Sent., 21/01/2022, n. 397; Cons. Stato Sez. V, Sent., 04/03/2025, n. 1857.

the tenderer that came second.[75] This option gives an additional incentive to interested economic operators in bringing review procedures where the breach does not arise from non-incorporation of CAMs in the tender documents by the contracting authority. In synopsis, the peculiarities of the Italian public procurement remedies system admit intervention in concluded contracts for the sake of enforcement of CAMs, supplemented by the potential of takeover by other tenderers.

5 MANDATORY GPP CRITERIA IN NORWAY

5.1 PUBLIC PROCUREMENT AND ENFORCEMENT

As part of the EEA, Norway is under the obligation to transpose, amongst many others, rules on public procurement and remedies. As it currently stands, the applicable legislation is the Public Procurement Act[76] and Public Procurement Regulation,[77] both of which entered into force in 2017 but have been amended since then.[78] While the Act is more general and contains the main principles, detailed rules are to be found in the Regulation.[79]

Enforcement is regulated by the Public Procurement Act. In the transposition of the Remedies Directive, Norway, in principle, left the enforcement of public procurement to the jurisdiction of courts; civil courts have jurisdiction to hear disputes on public procurement.[80] District courts are first-instance courts, the judgments of which can be appealed before the Appeal Courts and then the Supreme Court. Nevertheless, the Public Procurement Complaints Board (KOFA), an administrative organ with court-like roles, functions as a 'quasi-court' in the enforcement of public procurement rules.[81]

KOFA is, in principle, an advisory body; however, it can impose an administrative fee in cases of illegal direct awards.[82] KOFA may advise that the tender procedure should be cancelled if errors have been made that may have affected the outcome of the competition or the interest of the participants, and which cannot be corrected in any other way than by cancellation.[83] It is accepted that KOFA *de facto* functions as the most important enforcement

[75] Cons. Stato Sez. III, Sent., 2/11/2023, n. 9398.
[76] Norwegian Public Procurement Act 2016/73.
[77] Norwegian Public Procurement Regulation 2016/974.
[78] It should be noted that the structure of the public procurement legislation is planned to change, see NOU 2023: 26 Ny lov om offentlige anskaffelser - Første delutredning; NOU 2024:9 Ny lov om offentlige anskaffelser - Andre delutredning.
[79] NOU 1997:21 111 Offentlige anskaffelser 129.
[80] All procedures that are not criminal or special fall under civil jurisdiction, see Anna Nylund, *Civil Procedure in Norway* (Wolters Kluwer International 2020) 20–22.
[81] ibid 33; Marius Mikkel Kjølstad, Sören Koch, and Jørn Øyrehagen Sunde, 'An Introduction to Norwegian Legal Culture' in Sören Koch and Marius Mikkel Kjølstad (eds), *Handbook on Legal Cultures* (Springer International Publishing 2023) 808.
[82] Established in 2003, KOFA is mainly an advisory body, and its decisions are not normally binding. Yet, in 2007, it was given the authority to issue administrative fines for cases of illegal direct awards. Following the amendment in the Remedies Directive introducing new remedies, KOFA's power over illegal direct awards was repealed. However, after the change, the number of cases of illegal direct awards before the courts has decreased. The abolition of the powers of KOFA on illegal direct award following the 2007 amendment of the Remedies Directive hindered the effectiveness of the system foreseen with the Remedies Directive. In 2017, the power of KOFA to impose administrative fees in case of illegal direct award was established again. See Prop. 51 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om offentlige anskaffelser (anskaffelsesloven) 66.
[83] KOFA referring to HR-2019-1801-A.

body, with 89.8 % of the public buyers reported to follow its advisory opinions.[84]

5.2 MANDATORY GPP CRITERIA: 30 PER CENT WEIGHTING TO CLIMATE AND ENVIRONMENT

The so-called principle of sustainability finds a solid national equivalent in Norway. Though not provided alongside principles, the provision titled 'environment, human rights and other social concerns' introduces obligations to state authorities, county and municipal authorities and bodies governed by public law to procure sustainably.[85] Said authorities should consider reducing their adverse environmental impact and promoting climate-friendly solutions when relevant, as well as have appropriate routines to promote respect for human rights in case of risk.[86]

Similar to its European counterpart, what the provision entails is not clear. While it is ambiguous what 'when relevant' refers to, it is also unclear what stage of procurement is referred to.[87] The provision could be read as an obligation concerning contracting authorities at an organisational level to have aggregate requirements concerning their purchases.[88] Contracting authorities are expected to analyse which procurements entail higher risk, set requirements accordingly and follow up on those contracts; yet how contracting authorities design individual procurements to comply with this obligation is left to their discretion.[89]

In the past, mandatory sustainability requirements in Norway were predominantly focused on the fight against social dumping, especially following the widening of the EU to Eastern Europe.[90] Until recently, GPP requirements were not as ambitious.[91] Before the recent change, the Regulation provided that, where relevant, contracting authorities should include criteria to reduce environmental impact and promote climate-friendly solutions; if the environment is used under the award criteria, it should be weighed at least 30%. Though it signalled the importance of GPP criteria, it was argued that the provision could not have been relied on before a court, as it was possible to deviate from it in case of factual circumstances.[92] However, since the amendment introduced to the Regulation, which

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[84] NOU 2024:9 (n 78) 216. Oslo Economics, Inventura og Advokatfirmaet Arntzen, 'Samfunnsøkonomisk analyse av prekontraktuell håndheving av anskaffelsesregelverket ved klage til KOFA' <https://www.ks.no/fou-sok/2025/254022/> accessed 9 November 2025.
[85] Section 5 of the Norwegian Public Procurement Act.
[86] On human rights considerations in Norwegian public procurement, see AC Jacobsen and N Backer Malm, 'Norway Socially Responsible Public Procurement (SRPP) in Norway – Respect for Human Rights in Supply Chains' (2017) 12(3) European Procurement & Public Private Partnership Law Review 365; Isabel M Borges, 'Safeguarding human rights through public procurement law: recent developments in Norway (2018) 4 Public Procurement Law Review 121.
[87] The Nordic Council of Ministers, 'Climate Accounting in Public Procurements Status in the Nordic Countries' (2022) 21.
[88] Prop. 51 L (2015–2016) Proposisjon til Stortinget (forslag til lovvedtak) Lov om offentlige anskaffelser (anskaffelsesloven) 66; Tonje Platou, 'Den rettslige rekkevidden av miljøkravet i lov om offentlige anskaffelser § 5' (2021) 60(9) Lov og Rett 533, 539-540.
[89] Prop. 51 L (2015–2016) (n 88) 82-83, see also KOFA 2019/413 para 51; KOFA 2019/90 paras 24-29.
[90] NOU 2014:4 Enklere regler – bedre anskaffelser 92. Line Voldstad, Caroline Sandberg, and Morten Gullhagen-Revling, 'Sosial dumping – ulovlig direkteanskaffelse?' (2018) 57(6) Lov og Rett 378. These are provisions on wages and working conditions, workplace crime and limits in supply chain links.
[91] See The Norwegian Agency for Public and Financial Management, 'Action Plan to Increase the Proportion of Green Public Procurements and Green Innovation' (September 2021).
[92] Kristian Jåtog Trygstad, *Tildeling Av Offentlige Kontrakter Rettslige Vurderinger i Tildelingsfasen Ved Offentlige Anskaffelser* (2nd edn, Gyldendal akademisk 2017) 105.

entered into force in 2024, mandatory GPP criteria took a turn in Norway.

The amended Regulation provides that climate and environment (*klima- og miljøhensyn*) requirements should be at least given a 30% weighting in the award criteria.[93] The aim of the provision is to reduce the procurement's overall climate footprint or environmental impact.[94] If the award criteria are to be listed according to the order of importance (either because it is not possible to give a relative weighting or the value of the procurement is below the threshold), climate and environment should be among the top three. If the climate and environmental criteria cannot be given the required priority, climate and environmental requirements should be incorporated under technical specifications.

There are two main exceptions to the 30 % requirement. First, if it is clear that it provides a better climate and environmental impact, the environmental and climate considerations can be set under technical specifications, provided that they are justified in the procurement documents. Second, the obligation to set climate and environmental award criteria does not apply if, due to the nature of the procurement, its effect on climate and environment is insignificant. In terms of the content of the requirement, climate and environment should be understood broadly, and it is within the buyer's discretion to assess which characteristics should be emphasised under the award criteria and how much emphasis should be placed on the various characteristics.[95] The 30% requirement also does not preclude contracting authorities from giving greater weight to climate and environment.[96]

5.3 APPLICATION AND ENFORCEMENT OF MANDATORY GPP CRITERIA

As noted above, the 30% requirement is considerably recent to have a solid jurisprudence on application and enforcement. The fact that there was no preparatory work, provides an additional ambiguity.[97] Nevertheless, much of the question marks concerning the exceptions to 30% requirement has been clarified with guidance from the Norwegian Agency for Public and Financial Management (DFØ) as well as the recent KOFA cases. For instance, based on the Guidance, the weighing of climate and environment under award criteria can take the form of a combination of different sub-criteria, which cumulatively can be given the weighting of 30% such as 15% emission-free and 15% waste minimisation.[98]

The first exception to the use of climate and environment under award criteria, i.e. the use of technical specifications for better impact is interpreted strictly by KOFA. To use this exception, (i) it must be clear that setting minimum requirements will have a better climate and environmental impact than using it as an award criterion, and (ii) this must be

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[93] Section 7.9 Norwegian Public Procurement Regulation. The amendment concerning 30% weighing in award criteria should be seen in light of the simultaneous amendment of the rules on award criteria, which now provides that contracting authorities should award the contract to the tender with the best price/cost and quality ratio. If climate and environmental criteria are not used as award criteria, then the contract can be awarded based on the lowest price or lowest cost see 18 Section Norwegian Public Procurement Regulation.

[94] Requirements and criteria under this provision shall aim to reduce the procurement's overall climate footprint *or* environmental impact (emphasis added), see KOFA 2024/639 para 32.

[95] TOSL-2024-173447.

[96] KOFA 2024/912 para 22.

[97] KOFA 2024/1387 para 22.

[98] DFØ, 'Veileder Til Regler Om Klima- Og Miljøhensyn i Offentlige Anskaffelser' <https://anskaffelser.no/verktoy/veiledere/veileder-til-regler-om-klima-og-miljohensyn-i-offentlige-anskaffelser> accessed 3 November 2025 (DFØ Guidance).

justified in the procurement documents.[99] Contracting authorities are required to compare different measures and assess their respective climate and environmental impact.[100] Even a marginally better climate and environmental impact is acceptable.[101] In the determination of technical specifications, clearly having a better impact, the value of the procurement and the size of the impact should be taken into consideration.[102] The reason why technical specifications are used should be justified in the procurement documents, to the extent that KOFA may establish a breach due to a lack of justifications, even if technical specifications *do* provide a better impact than using the award criteria.[103]

In the determination of better impact, the maturity of the respective market is a highly relevant factor. For instance, in a market where all suppliers can meet the same requirements, setting this requirement under technical specifications rather than award criteria brings a better impact.[104] However, if absolute requirements in technical specifications are set significantly lower than what the market could offer, their better impact becomes questionable.[105] In order to understand the market, contracting authorities should ensure a sufficient knowledge base, which could be obtained through, amongst others, market dialogue.[106]

Nevertheless, in a recent court case, referring to some of the above-cited KOFA cases, the Oslo district court established that in the determination of the better climate and environmental impact of technical specifications, KOFA's standard of review has been too rigid.[107] The court noted that the measurability of the environmental and climate impact is based on difficult assessments; it should be left to the contracting authority's purchasing discretion to a greater extent. It added that a very strict oversight on the contracting authority's assessment will preclude contracting authorities from resorting to use this exception.

To what extent the breach of the 30% requirement due to wrongful application of this exception calls for the annulment depends on the facts of the case. KOFA will establish that the procedure should be cancelled if the breach affects the competition due to the impact of award criteria in determining participation of economic operators and formulation of tenders.[108] Similarly in case of lack of justification, cancellation is called for if the competition was affected.[109] Nevertheless, after establishing breach, KOFA may advise that there is no obligation to cancel if the error did not affect the competition.[110] For instance, breach of duty to justify the use of technical specification may not require cancellation on the basis that even if the justification were included in the procurement documents the conditions of the competition would have been same.[111]

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[99] KOFA 2024/639.
[100] DFØ Guidance (n 98).
[101] KOFA 2024/1387 para 24.
[102] KOFA 2025/666 para 27.
[103] See for instance KOFA 2025/766.
[104] DFØ Guidance (n 98); KOFA 2024/1387 para 23.
[105] KOFA 2025/322.
[106] KOFA 2025/356 para 28.
[107] TOSL-2025-88304.
[108] KOFA 2025/910.
[109] KOFA 2025/819; KOFA 2024/1339; KOFA 2025/999.
[110] KOFA 2025/666.
[111] KOFA 2025/726; KOFA 2025/766.

Another exception to the use of climate and environment in award criteria with 30% weighing is the case of insignificant burden of the procurement. As interpreted, this exception requires both climate footprint and environmental burden to be insignificant and these to be justified in the procurement based on the assessment of the nature of the procurement.[112] DFØ noted that the factual circumstance of the volume of the purchase is not a criterion for the significance.[113] According to the Guidance, some of these procurements are consultancy services and services in connection with training and education.[114]

In a dispute before KOFA, the contracting authority in question made use of this exception as the consultancy services were deemed by their nature to have an insignificant climate footprint and insignificant environmental impact.[115] One of the tenderers submitted that since the consultancy service concerned the purchase of electricity with associated portfolio management, the climate footprint and environmental impact cannot be considered insignificant; it would constitute green-washing. Referring to DFØ guidance, KOFA highlighted that the term 'by its nature' indicates that it will not be the specific procurement's climate footprint and environmental impact that is relevant for the assessment but rather the general features of what is to be procured. KOFA established that because the purchase of electricity was outside of the scope of this procurement, the contract in question had an insignificant climate footprint and environmental impact.

Nevertheless, with a recent case concerning the procurement for a labour market training course, KOFA established that the conditions of the use of the exception were not fulfilled, because even though it was a procurement for training services, the training also encompassed the practical parts, such as driving heavy-duty vehicles, the impact of which on climate and environment cannot be deemed insignificant.[116] Due to the importance of the award criteria in the competition, KOFA called for the cancellation of the tender. In synopsis, due to the peculiarities of the Norwegian public procurement remedies system, there is scarcity of case law from the courts, but KOFA case law on the 30% is abundant which seem to be steering the practice based on its role of as the *de facto* enforcement body.

6 COMPARATIVE ANALYSIS TO EXPLORE AMBIGUITIES IN THE APPLICATION AND ENFORCEMENT OF MANDATORY GPP REQUIREMENTS

In the previous sections, the specific features of the Italian and Norwegian legal systems were examined, with a focus on the application and enforcement of mandatory GPP requirements. Building on those findings, this section first compares the characteristics of the mandatory GPP requirements in Italy and Norway. It then scrutinises the differences in the enforcement in the respective jurisdictions. The comparison aims to classify the various mandatory GPP requirements at the supranational level and forecast the challenges in Europe concerning their enforcement.

[112] DFØ Guidance (n 98).
[113] DFØ Guidance (n 98).
[114] ibid.
[115] KOFA 2024/1422.
[116] KOFA 2025/801.

To begin with, Italy and Norway are not only geographically located on opposite sides of Europe but also represent different legal traditions, which not only impact the law itself but also the sources of law and how legal doctrine develops. In Italy, though case law is not considered a source of law in the strict sense of precedent, it plays a crucial role, especially with the 'law-shaping power of judges'.[117] On the other side, in the Norwegian legal tradition, preparatory works are similar to commentaries on legal sources.[118] They are not only used in doctrinal works but also frequently cited in case law as an authoritative source. As seen above, while the Council of State case law carries a lot of weight in Italy, preparatory works or, in their absence, guidance documents from public institutions function as authoritative sources in Norway.

In terms of their historical development, in both jurisdictions, the current mandatory GPP criteria had voluntary origins. In Italy, the use of CAMs was initially discretionary, while in Norway, the 30% weighing requirement applied only if the environment is used under the award criteria. Out of the different types of mandatory sustainability requirements, both Italian and Norwegian requirements constitute minimum mandatory GPP criteria.[119] For the most part, the similarities of the chosen jurisdictions end here.

The Italian mandatory GPP criteria are to be incorporated in a tendering procedure, provided that there are criteria based on the subject matter of the purchase; as opposed to the Norwegian mandatory GPP criteria, which call for its incorporation of all purchases under the scope of the public procurement rules, regardless of the sector. This means that while the former is sectoral mandatory GPP criteria, the latter is horizontal mandatory GPP criteria.

In terms of the type of requirements, Italian CAMs are substantive requirements, as opposed to the Norwegian 30% requirement, which is more procedural, as the latter does not specify the substantive content of each sub-criterion. Nevertheless, the Norwegian 30% requirement cannot be considered fully procedural, as the criteria to be used by individual contracting authorities should, in any case, fall under the scope of climate and environment in terms of the content of the requirement. In comparison, substantive GPP requirements are 'more muscular' as they regulate 'contracting authority's demand', whereas in procedural GPP requirements, contracting authorities have more discretion, the scope of which depends on the standard of judicial review.[120] As a result of this differentiation, while the litigation concerning mandatory GPP criteria in Italy is focused on procedural aspects such as the consequences of their non-incorporation, the disputes in Norway centre around the substance, i.e. the relevance of sub-criteria set under climate and environmental and the impact of individual contracting authorities' decisions, where the limited court cases seem to indicate a grater discretion to contracting authorities.

In terms of the specific criteria used to incorporate mandatory GPP obligations, Italy uses technical specifications and contract clauses, as opposed to Norway, which employs

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117 See Marinella Baschiera, 'Introduction to the Italian Legal System. The Allocation of Normative Powers: Issues in Law Finding' (2006) 34(2) International Journal of Legal Information 279.
118 Kjølstad, Koch and Øyrehagen Sunde (n 81) 816.
119 For the overview of typology, see Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law' (n 6) 17.
120 Roberto Caranta and Willem Janssen, 'Collective Reflections on the Future of Mandatory Sustainable Public Procurement' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law* (Hart Publishing 2023) 257-258.

award criteria. As a result, while the former establishes absolute requirements to be complied with, the latter establishes a relational requirement, the exact obligation arising from which is only formed once the successful tenderer is chosen. The use of absolute requirements ensures a benchmark that cannot be outbid, whereas the use of relational requirements allows for more competition. However, this means that for Norway, it is possible that a contract could be awarded to a tenderer that does not incorporate any climate and environment requirements, if the its bid is low enough. On the other side, provided that the purchase concerns one of the relevant subject matters, a public contract in Italy will incorporate green requirements.

When it comes to the enforcement of mandatory GPP criteria, in Italy, the case law demonstrates that mandatory GPP requirements are enforced through the (threat of) remedy of ineffectiveness. This is far from surprising, as the concept of ineffectiveness is used loosely in Italian law. Even before the adoption of the remedy of ineffectiveness under the 2007 revision to the Remedies Directive, ineffectiveness was accepted as an autonomous concept determining the fate of a contract where the award decision has been annulled.[121] In the enforcement of CAMs, while the threat of ineffectiveness keeps contracting authorities alert concerning when and how CAMs should be applied, the possibility of a takeover encourages interested economic operators to police the application of the requirement by the contracting authorities.

In Norway, the combined effect of the fact that the 30% requirement is relatively new and the KOFA's role as the *de facto* enforcement body precludes an extensive assessment of court case law on procurement remedies. Taking into consideration the high rate of compliance with KOFA decisions, the assessment of its case law provides some answers, which unveil that there is a potential for annulment in case of non-application or mis-application of the 30% requirement based on the impact of this breach on competition. Nevertheless, unlike Italy, such annulment does not, but more importantly, cannot affect the fate of the concluded contracts.

In the KOFA cases assessed above, even though there is no obligation on the contracting authority to do so, it is often noted that the contract awarding entity has agreed to hold off on the contract conclusion.[122] Nevertheless, had the contracts the legality of which was challenged been concluded, it would not have been possible to intervene in the concluded contracts even by the courts, let alone KOFA. Such intervention in the concluded contracts beyond the Remedies Directive, as is the case in Italy, is incomprehensible in Norway. In fact, even the remedy of ineffectiveness, as is now regulated in the Remedies Directive, was objectionable in the Norwegian public procurement system when it was first introduced.

When the remedy of ineffectiveness was first proposed as an amendment to the Remedies Directive, Norway sent a letter to the Commission stating that this proposed remedy, a possible consequence for illegal direct awards, would breach the traditions of Norwegian contract law, as concluded contracts were protected.[123] Though this neither

[121] Edoardo Chiti, 'Directive 2007/66 and the Difficult Search for Balance in Judicial Protection Concerning Public Procurements' (2010) 2 Italian Journal of Public Law 144.
[122] See for instance KOFA 2025/801; KOFA 2025/999; KOFA 2025/819.
[123] NOU 2010:2 Håndhevelse av offentlige anskaffelserp 51. For the sacredness of concluded contracts, see Treumer (n 19) 371.

prevented the 2007 amendment nor discharged Norway's obligation to transpose this remedy to its national law, Norwegian transposition limited ineffectiveness to the serious breaches listed in the Remedies Directive. As a result, even if disputes similar to those before the Council of State are taken before the Norwegian courts concerning the erroneous application of mandatory GPP criteria, the most the courts can offer is annulment and damages. Nevertheless, both in Italy and Norway, the severity of procurement remedies depends on the effect that the breach of mandatory GPP criteria had on the competitive nature, rather than the underlying objective of their incorporation in the contract.

To a large extent, the GPP requirements to be adopted at the European level with delegated and implementing acts are minimum mandatory criteria similar to Italy and Norway. However, there are also examples of procurement targets, such Clean Vehicles Directive[124] or legislation that incorporates the potential of exclusion from public procurement as a penalty, such as the Deforestation Regulation.[125] Most of the minimum mandatory GPP criteria at the European level resemble the Italian mandatory GPP criteria, as they are predominantly sectoral and substantive minimum criteria, such as the ones signalled in Batteries Regulation[126] and Net-Zero Industry Act.[127] However, differently from Italian mandatory GPP criteria as well, they do not make a choice between absolute requirements and relational requirements but refer to multiple procurement criteria concerning what to buy, ie technical specifications, award criteria and performance conditions.

Departing from the majority, the Eco-Design for Sustainable Products Regulation[128] provides also for a requirement similar to the Norwegian 30% requirement as it stipulates award criteria to have a minimum weighting of between 15% and 30%. Differently from both Italy and Norway, some of the European legislation foresees the introduction of selection criteria such as the Construction Products Regulation[129] and the Regulation on Packaging and Packaging Waste.[130] However, in any case, since the final criteria are yet to be

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[124] Arts 3-5 of the Directive 2009/33/EC amended with Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116.

[125] Art 25 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 [2023] OJ L150/206.

[126] Art 85 of Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Text with EEA relevance) [2023] OJ L191/1.

[127] Art 25 Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 [2024] OJ L 2024/1735 (Net-Zero Industry Act).

[128] Art 65 Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC [2023] OJ L2024/1781.

[129] Art 83 Regulation (EU) 2024/3110 of the European Parliament and of the Council of 27 November 2024 laying down harmonised rules for the marketing of construction products and repealing Regulation (EU) No 305/2011 [2024] OJ L 2024/3110.

[130] Art 63 Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC [2025] OJ L 2025/40.

adopted, there remains significant uncertainty.[131] An exception is the Heavy-Duty Vehicles Regulation,[132] which does not call for delegated law-making but directly provides the relevant criteria to be used by contracting authorities.

As the considerable portion of the mandatory GPP requirements at the European level resembles to the Italian sectoral substantive GPP criteria, the main challenge would arise mainly from procedural matters such as the consequences of failure of the contracting authority to incorporate said GPP criteria in tender documents or a tenderer's failure to comply with them in the competitive procedure. Whereas in GPP requirements where contracting authorities have more discretion like Norway, the challenge would be the extent of which review bodies can intervene. However, identifying the framework in which the relevant review procedures are to be carried out for the enforcement of mandatory GPP requirements is not as easy as categorising them.

As noted in Section 2, the Remedies Directive concerns the decisions of contracting authorities that allegedly 'have infringed the Union law in the field of public procurement or national rules transposing that law'. Both in Italy and Norway, the mandatory GPP criteria arise from the respective public procurement laws; hence there is no question concerning how they would be enforced. However, at the supranational level the same conclusion concerning the enforcement of mandatory GPP requirements is not easily drawn.

As the literal wording indicates, the Remedies Directive regulates the review procedures in case of the 'infringements of Union law in the field of public procurement'. The principal question concerning the enforcement of European GPP requirements is whether the European legislation from which these GPP requirements arose can be considered 'the Union law in the field of public procurement'. As also noted by Janssen, this is uncertain, as most of the above-mentioned legislation, though secondary legislation with public procurement relevance, is not necessarily legislation the main focus of which is public procurement.[133] Below are some arguments why it would be too generous to answer this question in the affirmative unless the Remedies Directive is amended.

To start, though the Remedies Directive is silent regarding this specific word choice of 'Union law in the field of procurement', preparatory documents for its latest revision stipulate that it regulates the review procedures 'in the event of infringement of the Public Procurement Directive[s]'.[134] The same can also be seen in the recent Commission studies, providing that the aim of the Remedies Directive is to provide rapid and effective procedures where it is alleged that contracts had been awarded in 'breach of Procurement Directive[s]' or 'infringement of Public Procurement Directive[s]'.[135]

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131 Janssen, 'The Coherence of Public Procurement Legislation in the European Union (n 43) 109.
132 Art 3e of Regulation (EU) 2019/1242 of the European Parliament and of the Council of 20 June 2019 setting CO2 emission performance standards for new heavy-duty vehicles and amending Regulations (EC) No 595/2009 and (EU) 2018/956 of the European Parliament and of the Council and Council Directive 96/53/EC [2019] OJ L198/202; Regulation (EU) 2019/1242 as amended with Regulation (EU) 2024/1610.
133 Janssen, 'The Coherence of Public Procurement Legislation in the European Union (n 43) 111.
134 Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts' COM(2006) 195 final 2.
135 European Commission, 'Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning the Review Procedures in the Area of Public Procurement' COM(2017) 28 final 2, 5; European Commission, 'Commission Staff Working Document Evaluation of the Modifications

Next, looking at its provision, the Remedies Directive not only mentions the breach of the Public Procurement Directive but also the breach of its own provisions to ensure effective review of the contracting authority's decisions taken under the Public Procurement Directive. To specify, it provides that, even where there is no breach of the Public Procurement Directive, the breach of the Remedies Directive's safeguards concerning the contract conclusion is also subject to penalties even when not combined with the breach of the Public Procurement Directive.[136] As a result, it could be argued that the reason why the scope of the Remedies Directive refers to 'Union law in the field of procurement' rather than the Public Procurement Directive is to reflect this and the potential of sanctions even where there is no breach of the Public Procurement Directive but a breach of the Remedies Directive itself.

Moreover, the International Procurement Instrument (IPI), another secondary legislation with public procurement relevance, explicitly incorporates that the Remedies Directive should apply accordingly.[137] The fact that even the IPI, the main focus of which is to regulate procurement is not automatically considered 'Union law in the field of procurement' but calls for such incorporation, makes it even more challenging to argue that secondary legislation the primary focus of which is not procurement, such as Heavy Duty Vehicles Regulation, automatically falls under the scope of the 'Union law in the field of procurement'. However, it is to be noted that for most of the legislation, the implementing and delegated acts are to be adopted, and the potential that they may refer to the Remedies Directive cannot be overruled. However, in case such referrals are not included in the legislation introducing mandatory GPP criteria, it is not an easy task to argue they fall under the scope of the Remedies Directive.

Even in the scenario that the Union law in the field of procurement is interpreted broadly, it is clear that in the case of contracts concluded in breach of mandatory GPP requirements, the focus of the current procurement remedies, under the Remedies Directive, is the protection of those with economic interests are at stake. What is less clear is to what extent the remedies contribute to the rationale of mandating green purchases. In this context, as noted in Section 2, the Remedies Directive was introduced because the effectiveness of the substantive rules depends on the protection of the rights incorporated with them rules through review mechanisms. Hence, if the interests protected in public procurement are becoming diversified, the enforcement cannot afford to fall behind both in terms of the scope of interested parties as well as the remedies available.

7 CONCLUSION

Making up a considerable percentage of the GDP, public procurement can play a significant

Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC concerning the European Framework for Remedies in the Area of Public Procurement/ Refit Evaluation' SWD (2017) 13 final 12, 14, 45 and 54. See also Remedies Directive <https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en> accessed 3 November 2025.

[136] Art 2e Remedies Directive.

[137] Art 10 Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2022] OJ L173/1.

role in the fight against climate change through reducing emissions, promoting circular economy and facilitating investment in green products, works and services. In this context, the legal framework of European public procurement, since the legislation of the 70s, allows incorporation of the environment-related requirements under the general term of GPP. Additionally, since the 90s, the Commission's soft law has been complementing this voluntary framework by demonstrating the ways in which green requirements can be incorporated in public procurement.

In the post–European Green Deal landscape, the discretionary character of GPP is evolving as more secondary legislation is being introduced mandating procurement to be green. Nevertheless, the fact that the mandatory GPP requirements at the supranational level, to a large extent, await adoption precludes a definitive assessment. Until then, the analysis of jurisdictions with a history of mandatory GPP criteria, i.e. Italy and Norway, provides insights for the application and enforcement of mandatory GPP requirements at the supranational level.

In this article, a comparative analysis between the GPP criteria from Italy, which is absolute, substantive and sectoral, and the GPP criteria from Norway, which is relational, relatively-procedural and horizontal, is used to categorise mandatory GPP requirements at the European level. While most of the recently introduced legislation foresees the adoption of GPP criteria similar to that of the Italian criteria, there are, exceptionally, some similarities also with the Norwegian experience. However, it is also possible to observe that while both Italy and Norway focus on specific what to buy decisions, supranational obligations on the GPP may also relate to targets or the use of the threat of exclusion from public procurement under sanction to enforce environmental law.

When it comes to enforcement, both Italy and Norway transpose the Remedies Directive and the respective mandatory GPP criteria are enforced accordingly as they are parts of national public procurement legislation. Nevertheless, based on their legal traditions, they also present peculiarities arising from how public procurement has been regulated and how those rules are enforced. While the former is not shy to intervene in the concluded public contracts if they were awarded in breach of mandatory GPP criteria, contracts concluded in breach of mandatory GPP criteria are shielded in the latter, potentially giving rise claim for damages.

In the enforcement of mandatory GPP requirements at the supranational level, there are further issues that should be addressed in the future. First is whether the legislation with the public procurement relevance from which mandatory GPP requirements arise can be considered to fall under the scope of the Remedies Directive. Second, whether the harmonised remedies provide adequate protection for the new interests being pursued with public procurement. Answers to both questions should steer the discussions on the revised enforcement system. However, if Europe is embracing a broader vision for public procurement, one that extends beyond the mere acquisition of goods, services, and works, and is prepared to introduce mandatory requirements to reflect this shift, enforcement should also be aligned accordingly, ensuring that remedies available keep pace with the evolving function.

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THE ‘AARHUS ACTION FOR ANNULMENT’ OR ‘CLIMATE CHANGE LITIGATION BEYOND *PLAUMANN*?’

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This article focuses on the so-called ‘Aarhus Action for Annulment’, which was introduced by the Aarhus Regulation in 2006 and revised in 2021. It raises the question of whether this mechanism truly offers a ‘Plaumann-free alternative’ to the traditional annulment route provided for under Art. 263(4) TFEU. In exploring this possibility, the article focuses on the relevance of the ‘Aarhus Action for Annulment’ in the context of climate policy. More precisely, it aims to assess whether it can be a meaningful avenue for climate litigants. A brief overview over the revised request for internal review procedure will set the stage, followed by an examination of key findings of recent requests submitted to the European Commission and cases brought before the CJEU under the amended framework. The article highlights how the different actors that can bring such an action, the types of EU acts encompassing climate policy and the CJEU’s scope of judicial review collectively shape the possibilities and limitations of this legal pathway.

1 INTRODUCTION

It has been more than four years since the amendment of the Aarhus Regulation,[1] and it’s time to take stock. The revised regulation promised to expand avenues for access to justice in environmental matters, which is seen as an ‘important support measure to help deliver the European Green Deal transition’.[2] But has it lived up to that promise?

This contribution sheds light on the revised system’s practical scope, assessing whether the ‘Aarhus Action for Annulment’ can be a meaningful avenue for climate litigants and, essentially, one where claimants do not need to rely on the *Plaumann* test[3] applied by the Court of Justice of the European Union (CJEU) under the traditional annulment route (‘Standard Action for Annulment’).[4] The article aims to find answers to three questions. First, what types of climate acts can be challenged with the Aarhus Action for Annulment? Second, who can be the claimant in these actions? And lastly, what does the judicial review by

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[1] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13 amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (Aarhus Regulation) [2021] OJ L356/1.

[2] Reg 2021/1767 recital 3.

[3] Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* EU:C:1963:17.

[4] This term refers to the procedure in Treaty on the Functioning of the European Union (TFEU), Art 263(4).

the CJEU look like?[5]

The term 'Aarhus Action for Annulment' (AAFA) refers to the procedure that was established by the Aarhus Regulation in 2006. The Regulation was adopted to allow the review of certain administrative acts by EU organs in line with the obligations of the Aarhus Convention.[6] This regulation was amended in 2021. Contrary to the Standard Action for Annulment, the AAFA does not begin with the filing of an action directly with the CJEU. First, the plaintiff needs to go through an administrative procedure. More precisely, they must make a 'request for internal review of administrative acts' (RIR)[7] with the organ that adopted the administrative act in the first place, on the grounds that such an act contravenes environmental law. For the purposes of this paper, the analysis is limited to acts adopted by the European Commission, arguably the most significant body adopting administrative acts in the field of climate policy. Once the European Commission has responded to the RIR, the applicants may, under certain conditions, challenge that reply before the CJEU.[8]

This article is divided into three parts. First, an introduction to the revised request for internal review procedure will set the stage, including an examination of key findings of recent requests submitted to the European Commission and its replies (Section 2). Second, the characteristics of the proceedings before the CJEU will be analysed while also taking into account recent judgements by the General Court (GC) (Section 3). Finally, the conclusion will summarise the answers to the three initial questions of who can bring an AAFA, what types of EU climate acts can be challenged and what the judicial review looks like (Section 4). This last point refers to the scope of judicial control of the CJEU regarding the European Commission's reply whereas the other two look at the procedural requirements of such an action.

Methodologically, this article relies on doctrinal analysis. The RIRs and replies mentioned in this contribution can be found in the European Commission's Repository of requests for internal review.[9] The numbers of RIRs mentioned below refer to the numbers attributed by the European Commission in its repository. There has been a significant rise in RIRs addressed to the European Commission since the amendment of the regulation.[10] According to its repository, of 18 February 2026, a total of 127 RIRs have been filed with the European Commission since the entry into force of the Aarhus Regulation in 2006. 79 of those were filed after the 2021 amendment. 34 RIRs concern the European Commission's acts (or omissions) in regard to pesticides (which is the highest number of

[5] The findings and recommendations of the Aarhus Compliance Committee that motivated the revision of the Aarhus Regulation, see Reg 2021/1767 recital 5, as well as any consideration to the compliance of the amended regulation with the Aarhus Convention are not subject to this paper.

[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 1998.

[7] Aarhus Regulation Art 10.

[8] ibid Art 12.

[9] European Commission, 'Repository of requests for internal review lodged with the European Commission pursuant to Article 10 of Regulation (EC) No 1367/2006 ("Aarhus Regulation")' <https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en#repository-of-requests-for-internal--review-lodged-with-the-european-commission-pursuant-to-article-10-of-regulation--ec-no-13672006-aarhus-regulation> accessed 18 February 2026.

[10] European Commission, 'Aarhus Convention Implementation Report' C(2025) 4316 final, 37; Mario Pagano, 'Climate Legal Mobilization Under the New Aarhus Regulation' (2024) 25(6) German Law Journal 919, 924.

RIRs in one policy area).[11]

2 THE 'ADMINISTRATIVE PART' OF THE AARHUS ACTION FOR ANNULMENT – THE REQUEST FOR INTERNAL REVIEW OF ADMINISTRATIVE ACTS

The following section will look at the requirements of the RIR and their application by the European Commission. Notably who can make a RIR (Section 2.1), which acts can be contested (Section 2.2), and how the European Commission has responded to some of those RIRs concerning climate policy (Section 2.3).

2.1 APPLICANTS

Art. 10 of the Aarhus Regulation lays down the criteria of the RIR. The applicants eligible for a RIR include non-governmental organisations (NGOs)[12] and, since the latest amendment, 'other members of the public'. However, members of the public must meet specific criteria under one of the two alternatives. They must either demonstrate that they are directly affected by an impairment of their rights caused by the alleged contravention of environmental law compared to the public at large,[13] or alternatively they must show that there is a sufficient public interest and that the request is supported by a certain number of members of the public.[14] Additionally, members of the public need to be represented either by an NGO or a lawyer.[15]

Especially when it comes to the demonstration of being 'directly affected', it is not entirely clear which situations are covered. Recital 19 of the amending regulation clarifies that this does not amount to demonstrating direct and individual concern in the sense of Art. 263(4) TFEU. However, in order to avoid an *actio popularis*, applicants still have to be directly affected in comparison with the general public, which would be fulfilled in the event of an 'imminent threat to their own health and safety, or of prejudice caused to a right to which they are entitled pursuant to Union legislation, resulting from the alleged contravention of environmental law, in accordance with the case law of the CJEU'.[16] All of this would suggest that being directly affected requires a higher impairment of the claimant's rights compared to the public at large. In this regard the European Commission could have taken two RIRs, in which the indigenous communities Gabna sameby[17] and Talma sameby[18] figured as co-applicants next to an NGO, as an opportunity to clarify this criterion. In their RIRs the

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[11] See RIRs n 59–61, 67, 73–75, 77–79, 81–85, 87–93, 97–100, 103–106, 121–123 and 127.

[12] Aarhus Regulation Art 11(1) outlines the criteria determining NGOs' entitlement to make a RIR, including the 'primary stated objective of promoting environmental protection in the context of environmental law', their existence for over two years and the subject matter of the RIR being covered by their objectives and activities.

[13] Aarhus Regulation Art 11(1a) point (a).

[14] Aarhus Regulation Art 11(1a) point (b): '[…] 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States'.

[15] Aarhus Regulation Art 11(1a) point (b). Note that Art 11(1a) has been applied from 29 April 2023, see Reg 2021/1767 Art 2.

[16] Reg 2021/1767 recital 19, referring to Cases C-237/07 *Janecek* EU:C:2008:447, C-529/15 *Folk* EU:C:2017:419 and C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* EU:C:2019:824.

[17] See RIRs n 114 and 115.

[18] See RIR n 115.

applicants challenge a European Commission decision which grants the status of a Strategic Project to two Swedish raw materials projects.[19] They claim that Gabna community is directly affected by this decision as the project concessions would 'physically divide [respectively, impact] their ancestral reindeer grazing lands and thus prevent the practice of traditional reindeer herding, a vital part of Sami culture and identity'.[20] Furthermore they see the higher impairment accounted for in the fact that, compared to the general public's concern about environmental impacts, 'the existence and survival of the Gabna community is […] directly threatened by the project'.[21] This case seems like a textbook example of the fulfilment of the criteria laid down in Art. 11(1a) point (a) Aarhus Regulation. Unfortunately, in its recently adopted reply in which the European Commission combined the two RIRs,[22] it only assessed the eligibility of the lead NGO, and standing of both indigenous communities was not considered.

2.2 SUBJECT MATTER

The subject matter of the RIR can be an administrative act or an administrative omission.[23] The definition of an administrative act significantly changed with the amending regulation and now covers '[…] any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Art. 2(1)'.[24] While legislative acts are not covered by this definition, other acts of general scope are not generally excluded.[25] In recent replies, the European Commission has clarified the extent to which acts can be considered to have 'legal

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[19] Based on Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [2024] OJ L2024/1252.

[20] RIR n 114 para 76 and RIR n 115 para 69.

[21] RIR n 114 para 80 and RIR n 115 para 72. Similarly in RIR n 115 in regard to the Talma community, paras 77–79.

[22] Together with RIRs n 107–113 and 116, 117, see European Commission, 'Annex – Detailed assessment of the admissibility and the grounds for the requests of internal review concerning Commission Decision 2025/840 of 25 March 2025 recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council with reference to a number of different projects.' Ares(2025)10337715.

[23] Aarhus Regulation Art 10(1). This paper will focus on administrative acts.

[24] Aarhus Regulation Art 2(1) point (g). Prior to the amendment, only measures 'of individual scope under environmental law' with 'legally binding and external effects' have been covered by the definition, see Reg (EC) No 1367/2006 Art 2(1) point (g).

[25] However, see in this regard the recent judgments by the GC (Ninth Chamber, in Extended Composition), Case T-534/23 *Föreningen Svenskt Landskapsskydd and Others v Council* EU:T:2025:1020 and Case T-535/23 *CEE Bankwatch Network and Ökobüro v Council* EU:T:2025:1021 concerning the replies to RIRs that were addressed to the Council, challenging Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36, that was adopted on the basis of Art 122(1) TFEU. In its judgments, the GC concludes that the Council acted in a legislative capacity when adopting Regulation 2022/2577 (even though its legal basis does not provide for a legislative procedure). See for a first analysis of the judgement Janek Tomasz Nowak, 'EU non-legislative acts can still be legislative acts for the purpose of the Aarhus Regulation' (*LinkedIn*, 20 November 2025) <https://www.linkedin.com/pulse/eu-non-legislative-acts-can-still-legislative-purposes-nowak-sshce> accessed 27 November 2025. See also Clara Sersale, 'The General Court's Judgment in the Case T-535/23 Bankwatch Network: An Additional Obstacle for the Aarhus Regulation?' (*Review of European Litigation*, 10 February 2026) <https://europeanlitigation.eu/2026/02/10/the-general-courts-judgment-in-the-case-t-535-23-bankwatch-network-an-additional-obstacle-for-the-aarhus-regulation/> accessed 18 February 2026.

and external effects'. Accordingly, these criteria are assessed in the same manner as for acts under the judicial review according to Art. 263 TFEU. As a consequence, preparatory acts, recommendations, opinions and other non-binding acts cannot be considered to have external effect if they do not produce legal effects vis-à-vis third parties,[26] whereas the criterion of legal effect is judged on the effects, objective and content of an act, regardless of its form.[27] Thus, the European Commission has determined that a tender,[28] recommendation or Commission Staff working document[29] does not give rise to legal and external effects given their content, context, and wording.[30]

With regard to the aspect of provisions possibly contravening environmental law, any Union legislation may qualify as 'environmental law' provided it contributes to the pursuit of the objectives of Union environmental policy as set out in the TFEU, regardless of its legal basis.[31] This broad interpretation of environmental law is probably also why neither the European Commission, nor the CJEU have so far called into question whether climate related RIR and actions before the Court could fall under the scope of the Aarhus Regulation. In contrast, the European Court of Human Rights (ECtHR) suggested on a side note in its *KlimaSeniorinnen* judgement that 'the standing of associations in the context of climate-change litigation […] is not covered by the Aarhus Convention',[32] though simultaneously acknowledging that in most States party to the Aarhus Convention it would be possible for an environmental association to bring a climate-change case.[33]

Art. 2(2) of the Aarhus Regulation excludes administrative acts from its scope that concern measures taken by EU organs in their capacity as an administrative review body. This exception also covers acts adopted by the European Commission under Art. 107 TFEU. For this reason, a RIR challenging Guidelines on State aid for climate, environmental

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[26] Reg 2021/1767 recital 11.

[27] Reg 2021/1767 recital 12.

[28] RIRs n 94 and 95.

[29] RIR n 68.

[30] See European Commission, 'European Commission reply Internal Review Request No. 94 "ref. IR/2024/873987 by NGO Global legal Action Network concerning Aggregate EU first term mid-tender to ensure stability and predictability of energy supplies"' Ares(2024)5674211, point 2.2; European Commission, 'Internal Review Request No. 95, "Request for internal review under Title IV of the Aarhus Regulation of the short-term tender published on 12 March 2024 by the European Commission (the Contested Act')"' Ares(2024)7035188, point 2.2; European Commission, 'SUBJECT: Internal Review Request – speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements' Ares(2022)8575980, point 2.

[31] Aarhus Regulation Art 2(1) point (f). Furthermore, the CJEU clarified in its judgement in Joined Cases C-212/21 P and C-223/21 P *EIB v ClientEarth* EU:C:2023:546 para 87 that due to the broad scope of the term 'environmental law' it is not relevant either, if the act in question was adopted under the legislative procedure according to Art 289 TFEU. See also Sebastian Bechtel, 'ClientEarth wins first-ever NGO challenge against the European Investment Bank' (31 July 2023) <https://www.clientearth.org/latest/news/clientearth-wins-first-ever-ngo-challenge-against-the-european-investment-bank/> accessed 12 August 2025.

[32] *KlimaSeniorinnen v Switzerland* App no 53600/20 (ECtHR, 9 April 2024) para 494. See also para 501: 'The Court must, however, be mindful of the difference between the basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights. It must also bear in mind the specific features of climate-change litigation […] and the difference between climate change and the more linear and localised (traditional) environmental issues which the Aarhus Convention is designed to address'.

[33] See also in this regard, Christina Eckes and Tessa Trapp, 'The Aarhus Convention's Relevance for Climate Litigation Through the Lens of KlimaSeniorinnen' (*European Law Blog*, 11 September 2024) <https://www.europeanlawblog.eu/pub/xx9vrteu/release/1> accessed 15 October 2025.

protection and energy 2022[34] was deemed inadmissible by the European Commission.[35] In the meantime, the European Commission has amended its Best Practice Code for State aid and included an internal review mechanism equivalent to the one in the Aarhus Regulation for certain final state aid decisions closing the formal investigation procedure initiated under Article 108(2) TFEU.[36] However, since only final state aid decisions are covered by its scope, Guidelines are most definitely not covered. Another notable point lies in the fact that the Best Practice Code does not include 'other members of the public' as possible applicants, therefore only NGOs are eligible to make a RIR under this mechanism.[37]

2.3 REPLY OF THE EUROPEAN COMMISSION

If the European Commission finds the RIR to be well-founded, it is obliged to take necessary steps, which can possibly result in amending or annulling the administrative act in question. However, it does enjoy a wide margin of discretion.[38]

Yet, if the RIR is rejected as inadmissible or unfounded, the requesting party can file for an action for annulment according to Art. 12 of the Aarhus Regulation.[39] It is not possible to make a second RIR regarding the negative reply of the European Commission.[40]

Before the amending regulation, the vast majority of RIR were rejected as only acts of individual scope were covered.[41] There have been in total 22 RIRs related to climate policy[42]

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[34] European Commission, 'Guidelines on State aid for climate, environmental protection and energy 2022' (Communication) [2022] OJ C80/1.
[35] See reply to RIR n 65, European Commission, 'Subject: Request for internal review of the Guidelines on State aid for climate, environmental protection and energy 2022' Ares(2022)3224564.
[36] European Commission, 'Code of Best Practices for the conduct of State aid control procedures' (Best Practice Code) OJ C/2025/2810 point 11. See in detail Clara H L Labus, 'The New Internal Review Mechanism Concerning the Compatibility of State Aid Decisions with EU Environmental Law' (*Unione europea e Diritti*, 20 June 2025) <https://uediritti.it/the-new-internal-review-mechanism-concerning-the-compatibility-of-state-aid-decisions-with-eu-environmental-law/> accessed 15 October 2025.
[37] ibid 2; Best Practice Code, point 11.1. A first RIR under this new mechanism was filed by the Organisation *Laka* on September 25 2025, see European Commission, 'Aarhus – Requests for internal review of certain State aid decisions' <https://competition-policy.ec.europa.eu/state-aid/aarhus-review-requests_en> accessed 18 February 2026. The RIR was rejected as inadmissible since the state aid decision was not adopted on the basis of a formal investigation procedure under Art. 108(2) TFEU, see European Commission 'Subject: SA.103925.AR and SA.103926.AR – Your Aarhus review request concerning decision "State Aid SA.103925 (former SA.103925 (2022/PN) and SA.103926 (2022/PN)) – The Netherlands – PALLAS project: Aid for the construction of a research reactor and of an isotope processing facility in Petten"' C(2026) 9 final.
[38] C(2025) 4316 final, 36–37; Opinion of AG Szpunar in Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2018:837 para 53; Luca Prete, 'EU Environmental Law: A Complete and Effective System of Remedies before the Courts of the European Union?' in Mariolina Eliantonio and Emma Lees (eds), *The Legitimacy of EU Environmental Governance and the Role of the European Courts* (Oxford University 2025) 220–221; Giulia C Leonelli, 'GMO Authorisations and the Aarhus Regulation: Paving the Way for Precautionary GMO Governance?' (2019) 26(4) Maastricht Journal of European and Comparative Law 505, 507; Giulia C Leonelli, 'Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending' (2021) 40 Yearbook of European Law 230, 262.
[39] See below Section 3.
[40] See reply to RIR n 84, European Commisson, 'Votre demande de reexamen interne au titre du reglement Aarhus concernant la reponse de la Commission europeenne du 3 octobre 2023 [ref. Ares (2023) 6685241] a votre demande de reexamen interne du 8 mai 2023 [ref. Ares(2023) 3273454] concernant le reglement d'execution (UE) 2023/574 etablissant des regles detaillees pour l'identification des coformulants inacceptables dans les produits phytophannaceutiques' Ares(2024)1987507.
[41] See n 10.
[42] This figure includes only those RIRs that challenged contraventions of EU climate or energy policy. The author is aware of the fact that no sharp line between climate and environmental policy can be drawn.

under the amended regulation. While all of them have been rejected by the European Commission, the reasons for rejection are not limited to formalities.[43] Eight of the requests have been deemed admissible by the European Commission, meaning it went on to assess the pleas of the applicants.[44]

The scope of review by the European Commission is limited in so far as only the claims brought forward by the applicants must be considered and only in so far as the conformity of the act in question with environmental law is contested.[45] Moreover, the European Commission is not required to engage with pleas that are not sufficiently substantiated. In fact, applicants '[…] are required to put forward, when stating the grounds for their request for review, facts or legal arguments of sufficient substance to give rise to serious doubts'.[46] This requirement can be qualified as a 'burden of raising and presenting the issues'[47] and is not to be confused with the burden of proof. Accordingly, the European Commission assesses the fulfilment of this requirement for each of the claims,[48] while considering inadmissible those claims that are insufficiently substantiated.[49] Hence, the European Commission only engages with pleas that raise serious doubts regarding the legality of the contested act.[50] However, neither the Aarhus Regulation itself, the Commission's replies nor the case law of the CJEU specify what burden of proof applicants must meet in order for the European Commission to consider the RIR well-founded.

RIRs concerning pesticide regulation (which account for most of the RIRs, see above Section 1) as well as RIR related to fishery and agriculture have not been considered in this section. See Pagano (n 10) who has also adopted this approach in his analysis.

43 Some of which have been mentioned above, see Section 2.2.

44 See for an analysis of some of those RIR, Pagano (n 10) 924–934. He concluded that the RIR has become 'a true "scientific" dispute settlement forum'.

45 Aarhus Regulation Arts 10(1) and (2); see also Anaïs Berthier, Anne Friel, and Sebastian Bechtel, 'Access to Justice in European Union Law: A Legal guide on Access to Justice in environmental matters' (2021) 71 <https://www.clientearth.org/latest/documents/access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-edition-2021/> accessed 15 October 2025; Eckard Rehbinder, 'Die neue Aarhus-Verordnung der Europäischen Union – ein Schritt zu mehr Rechtsschutz gegen Entscheidungen der Organe und Einrichtungen der Union' (2022) 44(5) Natur und Recht 293, 296.

46 Reg 2021/1767 recital 14, referring to Case C-82/17 P *TestBioTech v Commission* EU:C:2019:719 para 69.

47 Opinion of AG Szpunar in Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2018:837 para 50. Similarly Giacomo Gattinara, 'Administrative Review as an Instrument to Enforce Article 9 of the Aarhus Convention' in Bojana Todorović and Roberto Caranta (eds), *Europeanisation of Access to Justice in Environmental Matters : The Aarhus Convention in the Balkans* (Hart Publishing 2025) 227; Nicolas Grundhewer, *Torhüter zur Verwaltungsgerichtsbarkeit: Rechtsschutz im Eigenverwaltungsrecht der Europäischen Union unter dem Einfluss der Århus-Konvention* (Schriften zum Europäischen Recht vol 191, Duncker & Humblot 2020) 260.

48 See for example reply to RIR n 80, European Commission, 'Annex: Assessment of the request for internal review of Commission Implementing Decision (EU) 2023/1319 of 28 June 2023 amending Implementing Decision (EU) 2020/2126 to revise Member States' annual emission allocations for the period from 2023 to 2030' Ares(2023)8595289, 2.

49 See for example reply to RIR n 64, European Commission, 'Annex II – Assessment of the grounds for Internal Review of Commission Delegated Regulation (Eu) 2021/2139 included in the Request of ClientEarth' fisma.b.2(2022)5339092.

50 Aarhus Regulation Art 10(2) allows for EU organs to not consider a request that is 'manifestly unfounded or clearly unsubstantiated'. In the author's view this means that whenever the RIR does not include (substantiated) claims at all, the European Commission can reject such a request as a whole without even considering its admissibility. Whereas in the beforementioned case, the assessment of whether a plea is sufficiently substantiated is made for each of the pleas, once the admissibility criteria for the criteria are deemed fulfilled. Furthermore, the GC has clarified in Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 85 that where the applicants have managed to raise serious doubts, the European Commission needs to 'examine all relevant information of its own motion'.

3 THE AARHUS ACTION FOR ANNULMENT BEFORE THE CJEU – LIMITS AND POTENTIAL

Once applicants have, unsuccessfully, run through the administrative proceedings according to Art. 10 Aarhus Regulation, Art. 12(1) Aarhus Regulation allows for an action for annulment before the CJEU under certain criteria.[51] The following section will analyse who can bring such an action for annulment (Section 3.1), what the subject matter of it is and what the judicial review by the CJEU looks like (Section 3.2). At the same time, its potential and limits compared to the Standard Action for Annulment under Art. 263(4) TFEU are discussed.

3.1 PLAINTIFFS – WHO?

According to Art. 12(1) Aarhus Regulation, 'the non-governmental organisation which made the request for internal review pursuant to Art. 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of TFEU'. Interestingly, this provision only refers to NGOs as possible applicants and does not grant a right to access to the CJEU for 'other members of the public'.[52] However, paragraph two grants a right for NGOs and other members of the public to institute proceeding before the CJEU 'where the Union institution or body fails to act in accordance with Art. 10(2) or (3)'.[53] Furthermore, since the reply of an organ to the RIR can be qualified as a decision in the sense of Art. 288(4) TFEU,[54] NGOs, just like other members of the public, should be able to challenge it under the first limb of Art. 263(4) TFEU as addressees of the reply.[55] While to date no AAFA has been brought before the CJEU by members of the public, the Court should interpret this provision in conformity with primary law, thus granting addressed members of the public standing. In cases initiated by NGOs, the CJEU has so far not examined standing but has gone straight to the pleas of the action, which could imply that the applicants were considered as addressees of the contested reply.[56]

As addressees of the reply, plaintiffs do not need to demonstrate individual or direct concern according to the second alternative of Art. 263(4) TFEU. In the past, the individual concern criterion, i.e. the *Plaumann* test, was the biggest hurdle for climate litigants, as seen

[51] This corresponds to the second part of the AAFA that involves the proceedings in front of the CJEU.
[52] While the latter can file for a RIR, see Section 2.1 and Aarhus Regulation Art. 10(1).
[53] Aarhus Regulation Art 12(2).
[54] This was already suggested by the GC before the amending regulation, see Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 53. See also Angelika Krężel, 'Aarhus Regulation Administrative (self-) Review Mechanism: The Inevitable Failure to Contribute to Access to Justice in the EU?' (2023) 32(3) EELR 136, 139; Grundhewer (n 47) 263. Lorenzo Grossio, 'Access to Justice in Environmental Matters Beyond the Aarhus Regulation: Towards an Alternative Adjudicatory Model at the EU Level' (*Review of European Litigation*, 24 June 2025), 12 < https://europeanlitigation.eu/2025/06/24/access-to-justice-in-environmental-matters-beyond-the-aarhus-regulation-towards-an-alternative-adjudicatory-model-at-the-eu-level/ > accessed 15 October 2025.
[55] Similarly Rehbinder (n 45) 297.
[56] See the judgements rendered by the GC under the amended regulation, Case T-331/22 *NLVOW v Commission* EU:T:2024:243; Case T-344/22 *Stichting Nationaal Kritisch Platform Windenergie v Commission* EU:T:2024:244; Case T-345/22 *Stöttingfjällets Miljöskyddsförening v Commission* EU:T:2024:245; Case T-346/22 *Föreningen Svenskt Landskapsskydd v Commission* EU:T:2024:246; Case T-536/22 *PAN Europe v Commission* EU:T:2024:98, T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863; Case T-579/22 *ClientEarth v Commission* EU:T:2025:862; Case T-1049/23 *Bloom v Commission* EU:T:2025:754.

in cases such as the *People's Climate Case*.[57] As for now, the direct concern criterion has never been assessed by the Court in Standard Actions for Annulment challenging climate acts. However, meeting this criterion might be difficult, especially for NGOs.[58] As plaintiffs of an AAFA don't rely on either individual or direct concern, this is also an advantage for underlying regulatory acts that don't require implementing measures and thus could also be challenged through the third limb of Art. 263(4) TFEU, since under this alternative, plaintiffs would still need to demonstrate direct concern.

3.2 SUBJECT MATTER AND JUDICIAL REVIEW – WHAT AND HOW?

The subject matter of an AAFA is not the act subject to the RIR but the reply of the European Commission, therefore if successful only the reply can be annulled.[59] Consequently, the scope of review of the CJEU is limited. Only contraventions against environmental law can be challenged, and new arguments or facts, that have not been presented in the RIR already, cannot be included.[60]

This is a limitation compared to the Standard Action for Annulment, in which the Court has full jurisdiction to review the act, and has been identified as a shortcoming of the AAFA in the past.[61] In order to assess whether the AAFA can still serve as a valuable avenue for climate litigants, the following paragraphs consider the CJEU's earlier jurisprudence as well as recent judgements by the GC deciding on actions against climate related RIRs. At the heart of this analysis lies the question to what extent plaintiffs can challenge the initially contested administrative act ('underlying act'). The possibility of indirectly challenging higher-ranking law ('underlying legislative act') will be considered at the end of this Section.

As stated above, the subject matter of an AAFA is always the reply and not the underlying act itself. However, this does not mean that the Court cannot engage with material arguments at all. The judicial review can consider the underlying act to the extent that the grounds of the administrative review address it, which means that the Court will look in detail at how the European Commission addressed those arguments.[62] Consequently,

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[57] Case C-565/19 P *Carvalho and Others v Parliament and Council* EU:C:2021:252.
[58] Ioanna Hadjiyianni, 'Judicial protection and the environment in the EU legal order: Missing pieces for a complete puzzle of legal remedies' (2021) 58(3) Common Market Law Review 777, 789; Tessa Trapp, 'The Failure of the Aarhus Regulation? The Impossible Possibility of Substantive Judicial Review Under the Internal Review Mechanism of the Aarhus Regulation' [2025] Amsterdam Law School Legal Studies Research Paper, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5194742> accessed 15 October 2025; Catherine Warin, *Individual rights under European Union law: A study on the relation between rights, obligations and interests in the case law of the Court of justice* (Dissertation. Luxemburger juristische Studien volume 17, 1st edition, Nomos Verlagsgesellschaft mbH & Co. KG 2019) 462–463.
[59] Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 56; European Commission, 'Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters' SWD(2019) 378 final, 24. See also Hadjiyianni (n 58) 797.
[60] Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2019:719 para 39. Even if pleas raised in the RIR can be amplified, when demonstrating a sufficiently close connection with those pleas, see Case T-536/22 *PAN Europe v Commission* EU:T:2024:98 para 46. See also Gattinara (n 47) 227–228.
[61] Leonelli, 'Access' (n 38); Hadjiyianni (n 58); Trapp (n 58).
[62] SWD(2019) 378 final, 24 citing Case T-108/17 *ClientEarth v Commission* EU:T:2019:215. See also Bechtel (n 31). The GC (Fourth Chamber, in Extended Composition) suggested this in two recent decisions concerning plant protection, see Case T-412/22 *PAN Europe v Commission* EU:T:2025:1034 paras 30, 36 and Case T-94/23 *Pollinis France v Commission* EU:T:2025:1036 paras 32, 37. See in this regard Matthias Hasler and Marta Morvillo, 'The General Court's Judgment in the Case T-535/23 Bankwatch Network: An Additional

if the arguments concerning the contested administrative act are presented in a substantiated manner in the RIR, plaintiffs can build on these grounds in their action before the CJEU and make them subject to the judicial review.[63]

However, close attention should be paid to the Court's standard of review, as it determines the burden of proof placed on the plaintiffs in such cases. Where the European Commission must make complex assessments when adopting an act, it enjoys broad discretion and the Court's standard of review under Art. 263 TFEU is usually[64] limited: 'judicial review [is] restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion'.[65] In order to fulfil the 'manifest error test' this means that 'the evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible'.[66] The GC has recently applied this standard of review in a Standard Action for Annulment brought by Austria[67] against a European Commission's delegated regulation[68] to the Taxonomy Regulation[69] and dismissed the action.

In the past, the CJEU has applied this standard of review to AAFAs. With regard to the AAFA, this means that plaintiffs have to demonstrate that the European Commission's assessments in its response are implausible.[70] For the first time in climate related rulings, this has been confirmed by two recent judgements of the GC[71] in AAFAs concerning the preceding delegated regulation[72] of the delegated regulation that was challenged in the Standard Action for Annulment by Austria. While the GC did engage with the plaintiffs' arguments contesting the underlying delegated regulation in both actions, it examined, for each of the admissible pleas, whether the 'manifest error' threshold was met.[73] Consequently, none of the pleas were upheld.

When compared to the Standard Action for Annulment by Austria, the GC referred to the material grounds relating to the delegated regulation in a similar manner. As a result, plaintiffs of the AAFA managed to make the underlying act (the delegated regulation) subject

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Obstacle for the Aarhus Regulation?' (*Review of European Litigation*, 10 February 2026) <https://europeanlitigation.eu/2026/02/10/the-general-courts-judgment-in-the-case-t-535-23-bankwatch-network-an-additional-obstacle-for-the-aarhus-regulation/> accessed 18 February 2026.

63 See also Rehbinder (n 45) 297.

64 See however the case law citied by Trapp (n 58) 16–17 where the Court applied a 'quasi-substantive review'.

65 Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 77.

66 ibid para 78.

67 Case T-625/22 *Austria v Commission* EU:T:2025:869 paras 32–37.

68 Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2022] OJ L188/1.

69 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

70 T-536/22 *PAN Europe v Commission* EU:T:2024:98 para 54. See also Grossio (n 54) 21.

71 Case T-579/22 *ClientEarth v Commission* EU:T:2025:862 and Case T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863.

72 Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives [2021] OJ L442/1.

73 Case T-579/22 *ClientEarth v Commission* EU:T:2025:862 paras 31–33; Case T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863 paras 32–34.

to the judicial review. In other words, the scope of review of the AAFA was not a problem in those cases. This observation aligns with the argument developed above according to which the CJEU can engage with material arguments related to the underlying act, as long as the plaintiffs included them in their initial RIR.[74]

Hence, the 'review problem' seems not so much to be a problem of the limited scope of review by the Court (which does not, as explained, necessarily limit the plaintiff in its possibility to *de facto* challenge the underlying act). Rather, it is a consequence of the limited standard of review, or, in other words, of the high burden of proof placed on the plaintiffs. This is however not something that is specific to the AAFA but is equally problematic for the Standard Action for Annulment procedure.

What remains to be considered is whether Art. 277 TFEU – which permits the indirect challenge of an act of general application, including legislative acts – may be invoked in an AAFA. By invoking Art. 277 TFEU, secondary law may be challenged incidentally in an action for annulment under Art. 263 TFEU ('plea of illegality'). This applies in so far as the individual decision being challenged constitutes an implementing measure of the legislative act. For the AAFA, the GC recently held that the reply of the European Commission that is subject to the court proceedings cannot be regarded as a measure implementing the underlying legislative act. According to the Court, the reply can only be considered as a measure implementing the provisions of the Aarhus Regulation. Hence, the plea of illegality cannot be invoked to challenge the validity of an underlying legislative act.[75]

4 CONCLUSION

Coming back to the initial three questions of who, what and how, the following conclusions can be drawn.

Firstly, unanswered questions regarding individuals' access to the AAFA route remain. This concerns both the criteria for members of the public to make a RIR,[76] as well as their right to challenge the European Commission's reply before the CJEU.[77] It can, however, be said, given the state aid exception in the Aarhus Regulation and the exclusion of members of the public from the review mechanism under the Best Practice Code of the European Commission, that the AAFA route in the state aid context remains in any way blocked for individuals.

The aspects of 'what' and 'how' appear to be intertwined. Administrative acts can be challenged through a RIR and can indirectly also be brought to the Court (by challenging the reply), but – due to the high burden of proof in front of the CJEU, the fact that arguments and facts must already be included in the RIR and the fact that only contraventions of environmental law will be reviewed – there are some material limits that

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[74] All of this does not, of course, alter the fact, that the CJEU can only annul the reply and not the underlying act itself, as explained above. It remains up to the European Commission to take the necessary steps. However, if the plaintiff's concerns are upheld by the CJEU, this will most likely have a spill-over effect on the regulatory act itself. See in this regard Hasler/Morvillo (n 62) who came to this conclusion with respect to cases related to pesticide regulation.

[75] Case T-331/22 *NLVOW v Commission* EU:T:2024:243 paras 55–59.

[76] See above Section 2.1.

[77] See above Section 3.1.

come along with the AAFA. However, with respect to the burden of proof, the Court applies the traditional 'manifest error test' in the same manner to both the AAFA and the Standard Action for Annulment. This means, in practice, that in both review regimes the burden of proof remains high due to the usually technical nature of these administrative acts in the field of climate policy.[78]

When it comes to underlying legislative acts of such administrative acts, they remain out of reach for the AAFA. This contrasts with the Standard Action for Annulment, where invoking Art. 277 TFEU would be possible.[79] Lastly, acts that cannot be challenged through the Standard Action for Annulment cannot be challenged through the AAFA either, which applies especially to acts that do not have legal or external effects.[80]

To conclude, the AAFA has created an alternative, *Plaumann*-free route for climate litigants to access the CJEU, which appears especially valuable for NGOs contesting regulatory acts, and may well carry greater importance than the Standard Action for Annulment in such cases. However, it remains to be seen whether this avenue can have a genuine impact on the implementation of EU climate policy: '[t]his is of course one of the limits of procedural environmental rights – that even when they apply they do not guarantee a certain outcome on the substance. When their application is severely restricted, the chances of obtaining a result on the substance are all the more limited'.[81]

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[78] See above Section 3.2.
[79] ibid.
[80] See above Section 2.2.
[81] Warin (n 58) 467.

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LEGAL LIMITS ON THE ECB'S ACTIONS: IS THE PEPP A BRIDGE TOO FAR?

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After the global financial crisis of 2008-2009, the role and monetary policy of the European Central Bank (ECB) underwent a profound evolution, with the turning point being the possibility for the institution itself to intervene on secondary markets to purchase government bonds of eurozone member states. However, this evolution took place within the legal framework established by the EU Treaties, which remained unchanged. The fact that these changes occurred within an unchanged legal context raised a fundamental issue: there was a need to verify whether these changes were compatible with the legal limits on the actions of the ECB under the EU Treaties. It is for this reason that, between 2012 and 2018, the Court of Justice of the European Union (CJEU) developed a case law aimed at (i) verifying whether the new monetary policy tools were compatible with the provisions of the EU Treaties and (ii) defining the legal limits of ECB intervention on secondary markets. Against this backdrop, this article analyses the extent to which the ECB's intervention on secondary markets during the COVID-19 crisis through the Pandemic Emergency Purchasing Programme (PEPP) complies with the criteria established by this case law in relation to Article 123 TFEU. To this end, the article first reviews the role and mandate of the ECB as defined by the EU Treaties. It then analyses both the evolution of the ECB's role over the years and the jurisprudence developed by the CJEU in relation to the legal limits on the ECB's actions, particularly in relation to the prohibition of monetary financing established by Article 123 TFEU. Finally, the article develops an analysis intended to verify whether PEPP can be considered compatible with the legal limits defined by the abovementioned jurisprudence of the CJEU.

1 INTRODUCTION

1.1 THE INCOMPLETE NATURE AND THE RESILIENCE OF THE EMU: THE EVOLUTION OF THE ECB'S ROLE

From its inception, it was clear that the EMU (Economic and Monetary Union) was an incomplete project that would need several adjustments over the years to ensure its full realisation. More specifically, the main source of this lack of completeness was related to the absence of fiscal union, with member states having maintained their fiscal sovereignty.[1] This asymmetry was in turn the source of a moral hazard problem: some EMU member states could have an incentive to implement suboptimal, unsound budgetary policies and then pass the costs on to other – more fiscally virtuous – partners within the mechanism.

Hence, it was necessary to act on the institutional design of the EMU in order to mitigate that risk by guaranteeing a sufficient degree of coordination and convergence of

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[1] On this issue, see Amy Verdun, 'An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners' (1996) 20(1) Journal of European Integration 59.

national budgetary policies. This goal has been pursued on the one hand through the introduction of fiscal rules[2] aimed at ensuring that national budgetary policy keeps to a sound path and on the other through a very precise definition of the mandate of and the limits on the actions of the European Central Bank (ECB).

However, the impact of the economic and financial crises occurring over the years has forced the ECB to introduce a significant evolution[3] in the conduct of monetary policy, which has de facto changed its overall role within the institutional framework of the EMU. From this point of view, it is worth noting that the ECB has repeatedly proved to be extraordinarily resilient by taking – at the most difficult moments – crucial decisions that have guaranteed the stability of the eurozone, if not its own survival.

The resilience shown by the ECB as an institution should be considered even more valuable if we take into account the fact that the abovementioned process of evolution has occurred within a fundamentally unchanged legal and institutional framework. In fact, while the role and the actions of the ECB have evolved significantly, the provisions of the EU Treaties concerning the mandate of the ECB and the legal limits on its actions have remained unchanged.

Consequently, over the course of the years, it has become crucial to verify whether the actions undertaken in concrete terms by the ECB were compatible with the limits on its actions established by the EU Treaties. In this context, compliance by the ECB with the limits on its actions has become a very important topic that has been extensively analysed by the jurisprudence of the Court of Justice of the European Union (CJEU).

1.2 THE RESILIENCE SHOWN BY THE ECB IN THE CONTEXT OF THE COVID-19 CRISIS

An important example of the resilience shown by the ECB was provided during the initial phase of the economic crisis caused by the COVID-19 pandemic. In fact, on 12 March 2020, at the very beginning of the pandemic in Europe – when only Italy had implemented a national lockdown – the President of the ECB, Christine Lagarde, was asked a question by a journalist concerning the role of the ECB in relation to the probable future issuance of a large amount of public debt by several eurozone member states, and in particular by Italy. This is the answer provided by Lagarde:

> My point number two has to do with more debt issuance coming down the road depending on the fiscal expansion that will be determined by policymakers. Well, we will be there, as I said earlier on, using full flexibility, but we are not here to close spreads. This is not the function or the mission of the ECB. There are other tools for that, and there are other actors to actually deal with those issues.

Such a strong statement seemed to suggest that the ECB was intending to adopt a conservative approach, which would largely leave the determination of the spreads between

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[2] The reference is to the Stability and Growth Pact (SGP) first signed by EU member states in 1997 (and subsequently updated) and to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed by EU member states (except Czechia and the United Kingdom) in 2012.

[3] An overview concerning the evolution of the ECB's role is provided in the articles contained in Dimitrios Argyroulis et al (eds), *Ditching the Maastricht Model? The Evolving Role of the European Central Bank in the Economic and Monetary Union* (2025) 13 Politics and Governance <https://doi.org/10.17645/pag.i386> accessed 11 October 2025.

government bonds of eurozone countries to market discipline. However, in the following days, the extreme gravity of the crisis forced the ECB to make an unprecedented U-turn, which led on 18 March – less than one week after the abovementioned statement – to the approval of the Pandemic Emergency Purchase Programme (PEPP).[4]

Between 2020 and 2022, the PEPP was the fundamental tool through which the ECB supported the expansionary fiscal policies implemented by national governments in eurozone countries in order to counter the impact of the economic and financial crisis caused by the COVID-19 pandemic. The PEPP played a crucial role in preserving the eurozone's stability and preventing a severe economic downturn from worsening further. Its conception and implementation in such a critical situation represented proof of incredible resilience by the ECB as an institution. Nevertheless, it is necessary to verify whether this programme falls within the legal limits on the actions of the ECB established by the EU treaties.

1.3 STRUCTURE AND CONTENT OF THE ARTICLE

In this article, I will first review the role and the mandate of the ECB as defined by the EU Treaties. I will then analyse the jurisprudence of the CJEU concerning the legal limits on the ECB's actions, particularly in relation to the prohibition on monetary financing of eurozone member states under Article 123 TFEU. Finally, I will develop an analysis aimed at verifying whether the PEPP can be considered compatible with the legal limits defined by the abovementioned jurisprudence.

2 THE ROLE AND MANDATE OF THE ECB UNDER THE EU TREATIES AND THE LEGAL LIMITS ON ITS ACTIONS

2.1 THE ROLE AND MANDATE OF THE ECB

The role and mandate of the ECB are defined by Articles 127 to 133 TFEU. As far as the overall role of the ECB is concerned, this is defined in terms of the fundamental characteristic that the ECB is independent from both national and EU institutions.
The ECB's independence is established by Article 130 TFEU:

> When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to

[4] European Central Bank, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (*European Central Bank*, 18 March 2020) <www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 11 October 2025.

> influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.[5]

As far as the mandate of the ECB is concerned, this is defined by Articles 127 and 119 TFEU. In particular, Article 127 TFEU establishes a two-fold, hierarchical mandate in which price stability is clearly imposed as the primary objective:

> The primary objective of the European System of Central Banks shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.[6]

In relation to the ECB's mandate, it is important to highlight how it differs structurally from those of other major central banks because of its clear hierarchical remit:

> The ECB's mandate differs somewhat from other central banks' mandates. It establishes a hierarchy of objectives with price stability having priority. At the same time, it is rather open with regard to secondary objectives that are characterized broadly as 'supporting general economic policies of the Union'.

By contrast, the Federal Reserve Act lays down three goals for the monetary policy of the US Federal Reserve System. It instructs the Federal Reserve System (Fed) to maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.

For the Bank of England, s 11 of the Bank of England Act 1998 also sets the monetary policy objective in terms of a hierarchy but with particular emphasis on some secondary objectives: 'In relation to monetary policy, the objectives of the Bank of England shall be—(a) to maintain price stability, and (b) subject to that, to support the economic policy of Her Majesty's Government, including its objectives for growth and employment'.

There are other European central banks with mandates that emphasize price stability but also list other objectives to be supported. These include, for example, Norges Bank and Sveriges Riksbank.[7]

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[5] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) Art 130.

[6] Art 127 TFEU.

[7] Lars P Feld and Volker Wieland, 'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy' (2021) 7(2) Journal of Financial Regulation 217.

2.2 LEGAL LIMITS ON THE ECB'S ACTIONS

As far as the legal limits on the ECB's actions are concerned, these are defined by Articles 123 to 125 TFEU. The most important provision is undoubtedly the requirement concerning the prohibition of monetary financing established by Article 123 TFEU:

> Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.[8]

This is the first of three provisions of the TFEU that define very strictly the discipline concerning financial assistance to eurozone member states. The following article, in fact, has a more general wording and prohibits

> [A]ny measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.[9]

The third relevant provision is Article 125 TFEU, which introduces the 'no bailout clause'. This provision prevents both EU institutions (first sentence) and the Member States (second sentence) from assuming commitments on behalf of the central government or other public sector entities of a Member State:

> 1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.[10]

To conclude here, the combined reading of Articles 123, 124 and 125 TFEU shows how strict the guidelines in the EU Treaties have been – and continue to be – when it comes to the possibility of any form of financial assistance to a Member State.
Over the course of the years, the CJEU has addressed this subject through a series of landmark judgments – particularly *Weiss* and *Gauweiler*[11] – aimed at defining the exact limits

[8] Art 123 TFEU.
[9] Art 124 TFEU.
[10] Art 125 TFEU.
[11] Case C–62/14 *Gauweiler and Others* v *Deutscher Bundestag* EU:C:2015:400; Case C-439/17 *Weiss and others* v *Bundesregierung* EU:C:2018:1000.

of the ECB'S mandate and of its interventions on secondary markets. These judgments will be analysed in detail in Section 4.

3 THE EVOLUTION OF ECB'S ROLE AND MONETARY POLICY BETWEEN 2008 AND 2020

At this point, it is necessary to analyse the evolution of the ECB's role and the monetary policy approach introduced after the 2008 global financial crisis.

3.1 THE 2008 FINANCIAL CRISIS AND THE 2010-2012 EUROPEAN SOVEREIGN DEBT CRISIS

The global financial crisis of 2008 – the origins of which can be found between 2006 and 2007 in the United States, specifically in the 'subprime mortgage market'[12] – had a heavy impact on eurozone member states, causing a significant GDP contraction, which was in turn followed by the resulting worsening in the position of public finances engendered by the need for huge bail-out interventions for the financial institutions affected by the crisis.

As far as the eurozone is concerned, the crisis had been imported from the United States and ultimately caused a huge and generalised increase in the public debt burden carried by the member states, which, it must be said, had not been the cause of the crisis in the first place.[13] It was against this backdrop that – in particular after the announcement in 2011 of the so-called private sector involvement (PSI) introduced to alleviate Greece's debt burden – the eurozone experienced a 'second crisis', which was a sovereign debt crisis directly involving the periphery of the EMU.[14]

From the end of 2009 until well into 2012, the eurozone saw a period of growing financial instability characterised by a dramatic increase in interest rate spreads for government bonds of peripheral countries caused by investors' concerns about the sustainability of public debt. This 'second crisis' revealed once again the existence of several serious flaws in the institutional architecture of the EMU and in its operating mechanisms, potentially capable of putting its sustainability at risk in the medium-long term.

3.2 THE EVOLUTION OF THE ECB'S MONETARY POLICY BETWEEN 2008 AND 2020

Consequently, it is crucial to analyse the profound changes in the monetary policy of the ECB between 2008 and 2020. In this regard, it is important to distinguish between two phases: the

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[12] In terms of the role played by the subprime mortgage market at the beginning of the crisis, see Francesco Giavazzi and Alessia Amighini, 'La Crisi del 2007-2010' in Olivier Blanchard, Alessia Amighini, and Francesco Giavazzi (eds), *Macroeconomia. Una prospettiva europea* (Il Mulino 2009).

[13] On the fact that excessive levels of public debt were not the cause of the crisis, see Francesco Giavazzi and Richard Baldwin, 'Towards a Consensus on the Causes of the EZ Crisis' (*Voxeu*, 7 September 2015) <https://cepr.org/voxeu/columns/towards-consensus-causes-ez-crisis> accessed 11 October 2025;

[14] For a description of the development of the European sovereign debt crisis and of the role played by the PSI in Greece, see Ignazio Visco, 'La Crisi dei Debiti Sovrani e il Processo di Integrazione Europea' (2013) <www.bancaditalia.it/pubblicazioni/interventi-governatore/integov2013/visco_010913.pdf> accessed 11 October 2025.

first phase corresponds to the final part of the presidency of Jean Claude Trichet, whereas the second was managed by his successor Mario Draghi.

In the first phase, the actions of the ECB were cautious and somehow contradictory. On the one hand, in fact, in May 2010, the ECB launched the Securities Market Programme (SMP), a mechanism intended 'to ensure depth and liquidity in those market segments which are dysfunctional'.[15] The objective of this programme was 'to address the malfunctioning of securities markets and to restore an appropriate monetary policy transmission mechanism'.[16] Through this programme, the ECB purchased government bonds for approximately 218 billion euros but at the same time 'the impact of the interventions had been sterilised so that they do not change central bank liquidity'.[17]On the other hand, however, in April and July 2011 – in the middle of the sovereign debt crisis – the ECB took the highly controversial decision to increase its main interest rate on two occasions, with that rate rising from 1% to 1.5%.[18]

In the second phase, the actions of the ECB became more incisive: between December 2011 and February 2012, the ECB decided to approve the mechanism of Long-Term Refinancing Operations (LTRO). These were two operations aimed at providing financing to credit institutions for a period of three years, through which the ECB injected liquidity of approximately 1,000 billion euros into 800 European banks in order to support the overall sustainability of the system and potentially allow banks to replace private investors in holding public debt. In total, 70% of these funds were absorbed by the banking systems of the countries in greatest difficulty (Greece, Ireland, Portugal, Spain and Italy).[19] Notwithstanding those operations – and despite the fact that peripheral eurozone countries had already begun the implementation of structural reforms and restrictive fiscal policies – in the first half of 2012 the sovereign debt crisis was still continuing and the spreads between government bonds of eurozone countries continued to increase, up to a point that could have endangered the stability (and possibly the existence) of the eurozone.

It was in this context that, on 26 July 2012, during the Global Investment Conference inf London, the President of the ECB made the famous statement that has represented a turning point in the history of the eurozone: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough'. Through this crucial announcement, Draghi intended to affirm the clear will of the ECB to act as guarantor of the stability – and of the very existence – of the eurozone.[20] Shortly after this major announcement, on 6 September 2012, the ECB announced the establishment of the Outright Monetary Transactions (OMT) programme.[21]

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[15] European Central Bank, 'Monthly Bulletin May 2010' (*European Central Bank*, May 2010), 8 <www.ecb.europa.eu/pub/pdf/mobu/mb201005en.pdf> accessed 11 October 2025.
[16] ibid 8.
[17] Umberto Triulzi, *Le Politiche Economiche dell'Unione Europea* (Mondadori 2016) 333.
[18] On the ECB raising interest rates twice in 2011, see Reuters 'ECB Raises Interest Rates' (*Reuters*, 7 July 2011) <www.reuters.com/article/business/ecb-raises-interest-rates-idUSTRE7662WZ/> accessed 11 October 2025.
[19] Triulzi (n 17).
[20] Triulzi (n 17) 334.
[21] On the establishment of the OMT by the ECB, see European Central Bank 'Technical Features of Outright Monetary Transactions' (*European Central Bank*, 6 September 2012) <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 11 October 2025.

In a nutshell, through this monetary policy tool, the ECB was able to intervene on secondary markets by purchasing limitless quantities of government bonds of a eurozone country on the specific condition that this country had agreed with the ESM to implement a macroeconomic adjustment programme.[22]

Both Mario Draghi's 'whatever it takes' announcement and the establishment of the OMT were considered by the markets to be sufficiently credible guarantees to stop the growth of the spreads between government bonds of eurozone countries. However, the eurozone continued to be exposed to the risks arising from a prolonged phase of low inflation and the ECB still did not manage to achieve an inflation rate below but close to 2% in the medium term. To tackle this issue effectively, the ECB joined several other central banks in 2015 in implementing a policy of so-called Quantitative Easing, through the Asset Purchase Programme (APP). Through this programme, the ECB was able to intervene on secondary markets by purchasing a wide range of securities to ensure that inflation reached the 2% target in the medium term.

The establishment of the APP marks another turning point in the history of the ECB, which finally started to play an active role on the markets much more similar to the role played by other major central banks, accepting the idea of expanding its own balance sheet.[23] The amount of the ECB's net purchases changed over the course of the years: initially it was 60 billion euros from March 2015 to March 2016, subsequently increasing to 80 billion euros from April 2016 to March 2017 and then falling back to 60 billion euros from April to December 2017. The amount fell again to 30 billion euros from January to September 2018 and to 15 billion euros from October to December 2018. After a period – from January to October 2019 – in which there were no net purchases but rather only reinvestments of redemptions, the ECB decided to make net purchases of 20 billion euros between November 2019 and March 2022 (a temporary envelope of 120 billion euros for net asset purchases was added from March to December 2020).[24] It is therefore in this context – with the APP significantly scaled back – that the eurozone was severely hit by the COVID-19 pandemic and the consequent economic and financial crisis.

To conclude on this point, it is worth noting how the role played by the ECB evolved under the presidency of Mario Draghi. Notwithstanding the abovementioned limits on its actions established by the EU Treaties, the ECB – which had maintained a rather cautious, neutral stance up to the end of Trichet's presidency – had managed to become an 'interventionist' central bank. The historical importance of such an evolution cannot be underestimated. In fact, it can be legitimately argued that without this change the eurozone would not have survived the sovereign debt crisis. However, this evolution is also the reason why Mario Draghi's presidency has been highly controversial, much more than the tenure of previous ECB presidents.[25]

[22] Triulzi (n 17) 334.

[23] On the historical importance of the decision taken by Mario Draghi, see Triulzi (n 17) 334.

[24] For further details on the evolution of the APP, see European Central Bank, 'Asset Purchase Programmes' (European Central Bank) <www.ecb.europa.eu/mopo/implement/app/html/index.en.html> accessed 11 October 2025.

[25] For an assessment of the controversial legacy of Draghi's presidency; see Peter Bofinger 'The ECB's Policy Under the Presidency of Mario Draghi: A Curse or a Blessing for Europe?' (2020) 17(2) European Journal of Economics and Economic Policies: Intervention (EJEEP) 171.

4 THE JURISPRUDENCE OF THE CJEU CONCERNING THE ECB'S ROLE AND THE LEGAL LIMITS ON ITS ACTIONS

Over the course of the years, the evolution of the ECB's role and monetary policy has been the subject of a series of very important judgments by the Court of Justice of the European Union.[26] At this point – before examining the technical features of the PEPP – it is crucial to provide an overview of the main theoretical questions addressed by those judgments, because the interpretative jurisprudence of the CJEU has established the limits in terms of the legitimacy of the ECB's actions.

From a general perspective, it is possible to affirm that the CJEU has defined three fundamental criteria for assessing compatibility between the monetary policy programmes implemented by the ECB and the limits established by the EU Treaties.[27]
These criteria are:

1) Compliance by the monetary policy programme with the ECB's mandate as defined above;
2) Compliance by the monetary policy programme with the principle of proportionality, which stipulates that 'a monetary policy measure by the ECB [is proportionate if it] is (i) suitable to fulfil the price stability objective and (ii) necessary to achieve that objective';[28]
3) Compliance by the monetary policy programme with the prohibition of monetary financing of eurozone member states under Article 123 TFEU.

This article is focused specifically on the third criterion, and consequently in this section I will analyse the arguments developed by the CJEU in relation to the prohibition established by Article 123 TFEU.

4.1 THE ECB'S INTERVENTION ON SECONDARY MARKETS AND THE 'SUFFICIENT SAFEGUARDS' NECESSARY TO ENSURE COMPLIANCE WITH ARTICLE 123 TFEU

The Court of Justice of the European Union has always acknowledged that the prohibition established by Article 123 TFEU does not prevent the ECB – and the European System of Central Banks (ESCB) – from intervening on secondary markets in order to fulfil its mandate.[29]

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[26] See the following CJEU judgments referred to here: 1) Case C–370/12 *Pringle* v *Government of Ireland* EU:C:2012:756; 2) Case C–62/14 *Gauweiler and Others* v *Deutscher Bundestag* EU:C:2015:400; 3) Case C-439/17 *Weiss and others* v *Bundesregierung* EU:C:2018:1000.
[27] On these three criteria, see Sebastian Grund, 'Legal, Compliant and Suitable: The ECB's Pandemic Emergency Purchase Programme (PEPP)' (Hertie School – Jacques Delors Centre, Policy Brief, 25 March 2020), page 2/8 <www.delorscentre.eu/en/publications/detail/publication/legal-compliant-and-suitable-the-ecbs-pandemic-emergency-purchase-programme-pepp> accessed 11 October 2025.
[28] Grund (n 27) 3
[29] *Gauweiler* (n 26) paras 94–95.

However, the Court has also established that an intervention on secondary markets by the ECB should not be – in concrete terms – equivalent to a direct purchase of government bonds of a member state on the primary market:

> Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.[30]

The consequence is that – according to the CJEU – any intervention on secondary markets should be implemented in practice in conjunction with a series of safeguards that can avoid a de facto infringement of Article 123 TFEU:

> when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU.[31]

According to the jurisprudence of the CJEU, those safeguards should be aimed at preventing two fundamental risks:

1) the risk that potential private investors on primary markets could have 'de facto certainty' that the government bonds they purchase will in turn be purchased by the ESCB on secondary markets;
2) the risk that an ECB intervention on secondary markets could in practice disincentivise eurozone member states from following a sound budgetary policy.

4.2 THE RISK OF POTENTIAL 'CERTAINTY' ABOUT ECB PURCHASES ON SECONDARY MARKETS

The first argument developed by the CJEU is that an intervention by the ECB on secondary markets should be accompanied by safeguards aimed at avoiding a situation where private investors on primary markets could have 'de facto certainty that the bonds that they may acquire from the Member States will subsequently be purchased by the ESCB on the secondary markets'.[32]

In fact, if private investors had this kind of 'de facto certainty', they would ultimately be acting as mere intermediaries between the issuers of bonds (the eurozone member states) on primary markets and the ESCB as purchaser on secondary markets.

If that were the case, it is worth noting that member states would de facto become able to determine their own budgetary policy by relying on the support of the ESCB through purchases on secondary markets:

> That said, the point should be made, in the second place, that the ESCB's intervention could, in practice, have an effect equivalent to that of a direct purchase

[30] ibid para 97.
[31] ibid para 102.
[32] *Weiss* (n 26) para106.

> of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.[33]

It is important to note that the CJEU has identified the 'sufficient safeguards' established by the ECB and aimed at avoiding such a risk in relation to both the OMT and the PSPP. On the one hand, for the OMT, the CJEU has stated that:

> [T]he draft decision and draft guideline produced by the ECB in these proceedings indicate that the Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme. The ECB has also made clear before the Court that the ESCB intends, first, to ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and, secondly, to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged. Inasmuch as those safeguards prevent the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, they ensure that implementation of a programme such as that announced in the press release will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States.[34]

On the other hand, in relation to the PSPP, the CJEU has ruled out the possibility that this mechanism could cause such 'de facto certainty' because of several specific technical features of the programme. First, the CJEU noted the fact that – in the implementation of the programme – the ESCB is required to observe a 'blackout period'. The CJEU held that this blackout period 'provided for in Article 4(1) of Decision 2015/774, which is monitored by the ECB pursuant to Article 9 of the Guideline, ensures that bonds issued by a Member State cannot be purchased by the ESCB immediately after they are issued'.[35] Even though Article 4(1) does not specify the actual length of this blackout period,

> which is fixed in Article 15 of the Guideline,[36] the ECB has stated, in its written observations, that the length of the period is measured in days rather than weeks. Such a duration does not, however, give operators who are potential purchasers of government bonds on the primary markets the certainty that the ESCB is going to purchase those bonds very shortly thereafter.
>
> The absence of any publication, either in advance or after the event, of information concerning the duration of the blackout period, and the fact that the period in

[33] *Gauweiler* (n 26) para 104.
[34] *Gauweiler* (n 26) paras 106–107.
[35] *Weiss* (n 26) para 114.
[36] It is worth noting that these guidelines are not public.

> question is only a minimum period, on expiry of which the purchase of a security is permitted, avoid a situation in which a private operator is able to act, de facto, as an intermediary of the ESCB, since those factors limit the foreseeability, in terms of timing, of the ESCB's interventions on the secondary markets. The fact that a purchase may thus take place several months or several years after a bond has been issued increases the uncertainty of private operators all the more, given that the ESCB has the option of reducing the monthly volume of bond purchases under the APP and has, moreover, already made use of that option on a number of occasions.[37]

Second, the Court highlighted the fact that

> although the ESCB discloses the total volume of projected purchases under the APP, it does not disclose the volume of bonds issued by public authorities and bodies of a Member State which will in the normal course of events be purchased in a given month under the PSPP. In addition, the ESCB has laid down rules intended to ensure that that volume cannot be precisely determined in advance.[38]

Third, the Court argued that

> although Article 6(2) of Decision 2015/774 provides that purchases are to be distributed among the central banks of the Member States in accordance with the key for subscription of the ECB's capital, it cannot be deduced with certainty therefrom that the amount thus allocated to a central bank of a Member State will be used, to the extent provided for in Article 6(1) of that decision, for the purchase of bonds originating from public authorities and bodies of that Member State. Decision 2015/774 also includes various mechanisms that inject a degree of flexibility into purchases under the PSPP, in particular by permitting, in Article 3(3) and (4), substitute purchases to be carried out and, in Article 6(3), the Governing Council to allow ad hoc deviations from the specialisation scheme for the allocation of securities purchased under the PSPP.[39]

Finally, the CJEU established that a fundamental safeguard is provided in the form of the quantitative limit represented by the fact that 'the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments'.[40]

4.3 THE RISK OF A DISINCENTIVE FOR MEMBER STATES TO FOLLOW A SOUND BUDGETARY POLICY

The second argument developed by the Court concerns the fact that intervention by the ECB on secondary markets could in practice represent a disincentive for eurozone member states in terms of following a sound budgetary policy:

[37] *Weiss* (n 26) paras 115–116.
[38] ibid para 118.
[39] *Weiss* (n 26) para 120.
[40] ibid para 124.

> In the third place, a programme such as that announced in the press release [the OMT] would circumvent the objective of Article 123(1) TFEU, recalled in paragraph 100 of this judgment, if that programme were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy. In fact, since it follows from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those polices by lessening the impetus of the Member States concerned to follow a sound budgetary policy.[41]

The rationale is that if 'sufficient safeguards' are not established, a member state could rely on the financing possibilities to which an intervention on secondary markets might give rise and thus abandon a sound budgetary policy. It is for this reason that the CJEU has identified the sufficient safeguards for both the OMT and the PSPP aimed at preventing this risk. The first safeguard is represented by the fact that a programme should have a 'temporary nature' and that its objective should in any case be consistent and proportionate with the ECB's mandate of reaching an inflation rate below but close of 2%. In particular,

> according to recital 7 of Decision 2015/774, the PSPP is intended to be implemented only until the Governing Council sees a sustained adjustment in the path of inflation which is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term. Although the actual period of anticipated application of the PSPP has nonetheless been extended on a number of occasions, that principle has never been called into question when it was decided to adopt those extensions, as is confirmed by recital 3 of Decision 2015/2464 and recital 5 of Decision 2017/100.
> It follows that the ESCB has, in its successive decisions, provided for the purchase of government bonds only in so far as necessary for the maintenance of price stability, that it has regularly revised the PSPP volume and that it has consistently preserved the temporary nature of that programme.[42]

To confirm the temporary nature of the programme, the Court also highlights the possibility for the ESCB to sell the bonds purchased through the PSPP at any time:

> [U]nder Article 12(2) of the Guideline, the ESCB has retained the option of selling purchased bonds at any time, which enables it to adapt its programme according to the attitudes of the Member States concerned and means that the operators involved cannot be certain that the ESCB will not make use of that option (see, by analogy, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 117 and 118).[43]

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[41] *Gauweiler* (n 26) para 109.
[42] *Weiss* (n 26) paras 133–134.
[43] ibid para 135.

Second, the Court highlights the fact that the impact of a monetary policy programme on the financing condition of eurozone member states

> is limited by the measures restricting the volume of Member State bonds eligible to be purchased under the PSPP (see, by analogy, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 116).
> In that regard, it can be seen from the considerations in paragraph 88 of this judgment that the total volume of those bonds is limited, *de jure*, both by the setting of a monthly purchase amount under the APP and by the subsidiary nature of the PSPP within the APP, as described in Article 2(2) of the Guideline.[44]

Third, according to the CJEU, another important safeguard is represented by the requirement for compliance with the so-called capital key:

> [T]he distribution, in accordance with Article 6(2) of Decision 2015/774, of those purchases between national central banks in accordance with the key for subscription of the ECB's capital, as referred to in Article 29 of the Protocol on the ESCB and the ECB, rather than in accordance with other criteria such as, for example, the level of the respective debts of each Member State, in conjunction with the rule set out in Article 6(3) of that decision that each national central bank is to purchase securities of public issuers of its own Member State, means that the considerable increase in a Member State's deficit resulting from the possible abandonment of a sound budgetary policy would reduce the proportion of that Member State's bonds purchased by the ESCB. Implementation of the PSPP does not therefore enable a Member State to avoid the consequences, so far as financing is concerned, of any deterioration in its budgetary position.[45]

Moreover, the Court explicitly stated that a fundamental safeguard is represented by the quantitative limit on purchases by the ESCB. In fact, the CJEU established that 'the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments'.[46] Finally, the Court highlighted the fact that

> Article 3(2) of Decision 2015/774 lays down stringent eligibility criteria based on a credit quality assessment, from which it is possible to depart only if the Member State concerned is subject to a financial assistance programme. Article 13(1) of the Guideline provides in addition that, in the event of a downgrade of the rating of a Member State's bonds or of a negative review of a financial assistance programme, the Governing Council will have to decide whether to sell the bonds of the Member State concerned that have already been purchased.[47]

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[44] ibid paras 138–139.
[45] *Weiss* (n 26) para 140.
[46] ibid para 124.
[47] ibid para 142.

5 THE PANDEMIC EMERGENCY PURCHASING PROGRAMME (PEPP)

As mentioned in the introduction, on 18 March 2020, and thus less than a week after the ECB President's highly controversial statement, the ECB announced[48] the launch of the PEPP, taking the official decision[49] establishing its objectives and key features on 24 March 2020. It is therefore necessary to analyse the key technical features of this programme so as to understand whether it can be considered compatible with the criteria established by the jurisprudence of the CJEU.

5.1 PEPP: OBJECTIVES AND TECHNICAL FEATURES

The PEPP was an asset purchase programme – complementary to the ongoing APP – covering private and public sector securities and above all concerning government bonds. Following its initial announcement, the ECB explicitly clarified that there was a clear causal link between the COVID-19 pandemic and the need to launch the PEPP:

> The Governing Council decided the following:
> To launch a new temporary asset purchase programme of private and public sector securities to counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the outbreak and escalating diffusion of the coronavirus, COVID-19.[50]

This point was reiterated in the official decision taken by the ECB on 24 March 2020:

> Taking into account the exceptional economic and financial circumstances associated with the spread of coronavirus disease 2019 (COVID-19), on 18 March 2020, the Governing Council decided to launch a new temporary pandemic emergency purchase programme (hereinafter the 'PEPP').[51]

The range of government bonds eligible for purchase is established in Articles 1, 2 and 3 of the Decision 2020/440.
From this perspective, it is worth noting that, over time, there has been a gradual relaxation of the requirements for the purchase of public sector securities, as established by the original version of the PSPP:

> [T]hroughout all eligibility and portfolio rules, there is a tendency to loosen the initial PSPP constraints. From the Governing Council's perspective, this loosening is a technical necessity, as, with the increasing purchase volumes, the Eurosystem would otherwise run out of eligible securities. However, the relaxation or full suspension of rules comes at the cost of shifting the Eurosystem further into the position of a crucial and strategic creditor for euro area governments. At the same

[48] ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).
[49] European Central Bank, Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) OJ L91.
[50] ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).
[51] ECB, Decision (EU) 2020/440 (n 49).

> time, legal risks are likely to increase as more and more precautions that have been stressed in the ECJ's PSPP verdict are being abandoned.
> The list of relaxations is long. It includes the rules for eligible issuers, minimum credit quality, maturity restrictions, yield restrictions, the issue and issuer limits, and the binding character of the ECB capital key for country allocations alike. While the initial PSPP only invested in securities of national jurisdictions, purchases under PSPP and PEPP now encompass also regional and local jurisdictions. While the PSPP until today excludes Greek bonds due to their limited credit quality, the PEPP rules include an explicit waver for the Hellenic Republic. Initial PSPP rules prohibited the purchases of bonds with maturities below two years while PEPP allows purchases almost until maturity (i.e., 70 days before). Central bank investments into bonds with a negative yield to maturity have been possible from the start of PSPP but, initially, not below the rate of the deposit facility. Today, both PSPP and PEPP allow negative yields to maturity further below. Issuer and issue limits have been lifted over the course of the PSPP programme and are fully suspended for the PEPP. The suspension of issue and issuer limits for the PEPP de facto also renders issue and issuer limits for PSPP irrelevant since the Eurosystem's aggregate holdings from both programmes are now allowed to increase above the PSPP limits. Hence, the Eurosystem has de facto accepted to become a strategic investor with a blocking minority in any possible future debt restructuring negotiation.[52]

As far as the overall amount of the programme is concerned, Decision 2020/440 provided for an amount of 750 billion euros, which was then increased by 600 billion euros on 4 June 2020 and by a further 500 billion euros on the following 10 December, thus representing a final overall amount of 1,850 billion euros. In this regard, it should be emphasised that the ECB itself had declared on the 18 March – and then reiterated in Decision 2020/440[53] – that it was ready to increase the total amount of the programme:

> The Governing Council is fully prepared to increase the size of its asset purchase programmes and adjust their composition, by as much as necessary and for as long as needed. It will explore all options and all contingencies to support the economy through this shock.[54]

More generally, the ECB also made clear that it was ready to remove the 'self-imposed limits' which could represent an obstacle to its action:

> To the extent that some self-imposed limits might hamper action that the ECB is required to take in order to fulfil its mandate, the Governing Council will consider revising them to the extent necessary to make its action proportionate to the risks

[52] Annika Havlik and Friedrich Heinemann 'Sliding Down the Slippery Slope? Trends in the Rules and Country Allocations of the Eurosystem's PSPP and PEPP', EconPol Policy Report, No 21 (ifo Institute – Leibniz Institute for Economic Research at the University of Munich 2020) 8.
[53] ECB, Decision (EU) 2020/440 (n 49).
[54] ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).

> that we face. The ECB will not tolerate any risks to the smooth transmission of its monetary policy in all jurisdictions of the euro area.[55]

As far as the implementation of the PEPP is concerned, Decision 2020/440 established that 'purchases under the PEPP will take place in accordance with the existing frameworks established for the APP, except as specifically set out in this Decision'.[56]
In this regard, there are two main differences in relation to the APP's implementation that it is important to highlight.

First, the fact that – according to Article 4 of Decision 2020/440 – the 33% limit, provided for in Article 5 of Decision 2020/188, both for a single issue of government bonds ('issue share limit') and for the outstanding securities of an issuer ('aggregate limit') does not apply to purchases made under the PEPP.

Second, the fact that under the PEPP, there has been a significant relaxation – compared to what was originally envisaged for the PSPP – of the limit concerning compliance with the capital key, namely the fact that the ECB's purchases must be proportionate to its capital shares held by each euro area member state:

> [T]he Governing Council has loosened the rules on the binding orientation of country allocations to the ECB capital key. The first PSPP ECB decision from March 2015 stipulates that the distribution of purchases across jurisdictions shall be according to the NCB's subscriptions to the ECB's capital. The first version of the rule did not make any explicit distinction between flows and stocks. This initially strong statement signaled a continuous relevance of the capital key in any phase of the programme's operation. Today, the ECB only describes the capital key orientation of PSPP as referring to the stock of security holdings, opening leeway for temporary divergence in the flow of net purchases. The PEPP goes even further. It still upholds the principle importance of the capital key to guide the distribution 'on a stock basis'. However, it explicitly states that purchase flows may fluctuate.
>
> It is difficult to understand to which extent the new PEPP formulation still attributes any relevance of the capital key at all. The wording seems to suggest that, in the long run or towards the (unknown) end of PEPP, the distribution of stocks should converge to NCBs' shares in the ECB's capital, but is irrelevant until then.
>
> The 2020 ECB Decision gives the following explanation (ECB Decision 2020/440 of 24 March 2020, recital (6)): 'A flexible approach … is nonetheless essential to prevent current dislocations in the aggregate euro area sovereign yield curve from being translated into further distortions in the euro area risk-free yield curve.' Although this official formulation appears somehow cryptic, it seems to suggest that the divergence of PEPP's country allocations from the capital key is justified by fighting sovereign risk spreads that appear distorted. ECB chief economist Philip Lane has confirmed that the ECB wants to prevent risk premia from diverging from their fundamentally justified level in the situation of the acute crisis. So far, however, the ECB has not made this risk premia targeting explicit nor has it made specific

[55] ECB, Decision (EU) 2020/440 (n 49) recital 6.
[56] ibid recital 10.

> how it quantifies fundamentally justified risk spreads for countries with high and currently quickly increasing public debt levels that objectively point to a severe deterioration in fundamental creditworthiness.[57]

6 THE POSSIBLE INFRINGEMENT OF ARTICLE 123(1) TFEU: IS THE PEPP A BRIDGE TOO FAR?

Having analysed the technical features of the PEPP, it is now necessary to try to understand whether (and to what extent) this programme is compatible with the jurisprudence of the CJEU, particularly in relation to the possible infringement of the prohibition of monetary financing established by Article 123 TFEU.

6.1 THE PEPP AND THE "SUFFICIENT SAFEGUARDS": IS THERE STILL ANYTHING LEFT?

As explained above, the CJEU has repeatedly stated that the ECB has the option of intervening on secondary markets but that 'sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU'.[58] The key point to highlight is that many of the 'safeguards' provided for over the years by the ECB's decisions (and confirmed as relevant by the jurisprudence of the CJEU) have not been applied or have been significantly weakened in the case of the PEPP.

First, the PEPP does not envisage any 'conditionality mechanism' – represented by the signing of a structural macroeconomic adjustment programme with the ESM – as was established in relation to the OMT and explicitly identified by the Gauweiler judgment as a 'relevant safeguard'.[59]

Second, the decision establishing the OMT (and previously the decision establishing the SMP)[60] provided that the liquidity created through this mechanism would be totally sterilised so as to keep the monetary base unchanged. This guarantee has not been provided in the case of the PEPP, as confirmed by the growth in the monetary base recorded[61] (growth that had begun previously with the PSPP).

Third, it is important to highlight the fact that, in the context of the PEPP, there has been a substantial relaxation – compared to both the OMT and the PSPP – of the criteria used to determine the eligibility of bonds for inclusion in the purchase programme, to the extent of including Greek bonds, which had been excluded by the PSPP. As stated above, these limits had been explicitly identified by the CJEU as a relevant 'safeguard'.[62]

Moreover, it is crucial to highlight that – in the implementation of the PEPP – the ECB has abandoned the '33% limit' on the purchase of a particular issue of bonds or of

[57] Havlik and Heinemann (n 52).
[58] *Gauweiler* (n 26) para 102.
[59] *Gauweiler* (n 26) para 120.
[60] ECB, 'Monthly Bulletin May 2010' (n 15) 8.
[61] For the data concerning the growth of the monetary base in the eurozone, see European Central Bank, 'Base Money, Euro Area (Changing Composition), Monthly' (*European Central Bank*, last updated: 18 September 2025) <https://data.ecb.europa.eu/data/datasets/ILM/ILM.M.U2.C.LT00001.Z5.EUR> accessed 11 October 2025.
[62] *Gauweiler* (n 26) paras 116-117 and *Weiss* (n 26) para 138.

the outstanding securities of a member state. This limit had been considered relevant, and particularly important, by the CJEU in the *Weiss* judgment.[63]
The decision to abandon this limit has opened the door to the possibility that the ESCB might become one of the main creditors, if not the main creditor, by holding a significant percentage of the public debt of a member state.

Lastly, it must be recalled that under the PEPP there has been a further relaxation of the limitation represented by observance of the so-called capital key, namely the fact that the ECB's purchases should be proportionate to its capital shares held by each eurozone member state. As explained above, while, on the one hand, there is still an explicit reference to the need to comply with the capital key at the end of the programme, this principle has lost any practical relevance in the implementation phase, allowing for significant deviations in both the flow and stock levels. This further relaxation concerning compliance with the capital key implies that the ECB's purchases can de facto assume a significantly 'selective nature'.

6.2 THE PEPP AND THE 'DE FACTO CERTAINTY' OF PURCHASE BY THE ESCB ON SECONDARY MARKETS

One of the criteria developed by the CJEU to establish the legitimacy of an ECB intervention on secondary markets is the criterion concerning the fact that the ECB is able to induce 'de facto certainty' in private investors that the ESCB will purchase on secondary markets the securities issued by member states (and purchased by them) on the primary market. If that were the case, private investors would find themselves acting on the primary market as mere intermediaries between the member states (as issuers of the government bonds) and the ESCB (as purchaser of the same bonds on the secondary market).

From this point of view, it is important to highlight the specific circumstances in which the PEPP was launched: unlike other monetary policy tools developed by the ECB over the years, the PEPP was conceived and implemented to address a specific crisis and the need for member states to implement highly expansionary fiscal policies within a specific time window. In fact, the existence of a causal link between the economic crisis caused by the COVID-19 pandemic and the need to implement the PEPP was explicitly recognised by the ECB both in its press release of 18 March 2020 and in the following official Decision. The PEPP was explicitly conceived as a tool intended to support the expansionary fiscal policies that member state governments were going to implement to deal with the economic crisis caused by the pandemic.

Moreover, the perception by private investors of the existence of such a link was amplified by the actual course of events in the initial phase of the crisis, and particularly by the statement from ECB President Christine Lagarde and the following U-turn described in the introduction to this Article.

Consequently, it is legitimate to argue that – in the specific circumstances of 2020 – private investors were in a position to believe rationally that there was a serious and strong commitment from the ESCB to repurchase on the secondary market almost all of the government bonds issued on the primary market by eurozone member states.

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[63] *Weiss* (n 26) paras 124, 141.

A first argument in ruling out the existence of such 'de facto certainty' is the argument relating to the limit of 750 billion euros set as the maximum amount of the purchases originally envisaged in the decision establishing the PEPP. However, this argument seems weak, given that the ECB itself – since the statement of 18 March 2020 –declared that it was ready to increase the overall amount of purchases if necessary. This position was subsequently confirmed by Decision 2020/440. Furthermore, as will be shown below, the ECB's decisions demonstrated how strong this commitment was. Still in relation to the existence of 'de facto certainty', it must be added that this reasonable 'de facto certainty' was in practice also fuelled by the absence or the weakening of the 'safeguards' described in the previous paragraph and indicated by the CJEU as relevant on this issue.

In particular, both the additional flexibility introduced in relation to compliance with the capital key and the non-application of the '33% limit' have led to the disappearance of two specific and objective limits on the ECB's actions that – had they existed – would logically have increased uncertainty on the part of private investors as to whether the securities they purchased on the primary market would actually be repurchased on the secondary market.

It is crucial to emphasise the 'signalling function' played by the removal of these two limits. The abandoning of the 33% limit and the further weakening of the capital key rule sent private investors the clear signal that the ECB did not feel 'quantitatively constrained' in the execution of the programme, either with respect to the overall scale of purchases or with respect to the allocation of purchases among the different member states. This perception was confirmed by subsequent decisions taken by the ECB.

In particular, on 4 June 2020 – less than three months after the programme was launched – the ECB decided to increase the maximum total amount of purchases by a further 600 billion euros, to 1,350 billion euros (+80%). It also decided to extend the programme's deadline by six months (this was initially scheduled for December 2020) to at least June 2021.

Moreover, on the following 10 December, the ECB decided to increase the maximum total amount of purchases by a further 500 billion euros, to a total of 1,850 billion euros, more than double the original amount of 750 billion euros (+146%), at the same time extending the programme's deadline to March 2022.

A few days later, on 16 December, in a largely underestimated decision, the ECB announced that 'the maturing principal payments from securities purchased under the PEPP would be reinvested until at least the end of 2024'.[64] In this regard, it must be emphasised that these decisions were taken specifically in the months in which eurozone member states were required to determine their budgetary policies – by approving the relevant national budgets – and were clearly stating their intention to implement highly expansionary fiscal policies to cope with the economic consequences of the COVID-19 crisis.

Moreover, budgetary policy was determined in a broader context in which the application of the Stability and Growth Pact had been suspended specifically to allow member states to implement these expansionary fiscal policies. In this context, since the second half of 2020, it had become quite clear to private investors that the ECB had decided

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[64] ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4); European Central Bank, 'Combined Monetary Policy Decisions and Statement' (*European Central Bank*, 16 December 2021) <www.ecb.europa.eu/press/press_conference/monetary-policy-statement/shared/pdf/ecb.ds211216.en.pdf> accessed 11 October 2025.

to become the 'guarantor' of expansionary fiscal policies put in place by member states – particularly of those highly indebted member states – through its commitment to repurchase securities issued on the secondary markets.

A second argument used to rule out the existence of the abovementioned 'de facto certainty' relates to the existence of a 'blackout period', a minimum waiting period that the ESCB was obliged to observe before repurchasing bonds on the secondary markets. In this regard, it is important to note that the ECB itself 'stated, in its written observations, that the length of the period is measured in days rather than weeks'.[65] In noting this duration, the CJEU concludes that such a period is not conducive to giving potential purchasers in the primary markets 'de facto certainty' of repurchase by the ESCB on secondary markets. However, it is worth noting that such a 'blackout period' has not been included in the official decision that established the PEPP.[66] Moreover, even if a 'blackout period' was respected, it can be argued that i) 'the mere existence of a blackout period does not justify the conclusion that purchases of government bonds were not foreseeable'[67] and ii) that in the case of PEPP it is at least legitimate to doubt about its ability to guarantee the legality of the programme.

The counterargument is quite simple and requires reasoning on a country-by-country basis by considering the key variable represented by the quantity of bonds purchased by the ECB for each country. If the ECB were to purchase on secondary markets a too large quantity of bonds of certain countries, private investors (who bought those bonds on primary markets) could become 'de facto certain' that – at a certain point in time – they will be able to exploit the ECB's backstop to sell those specific bonds.

As Bobić and Dawson[68] pointed out:

> Earlier ECB programmes, […] were judged by the CJEU to be Treaty consistent only on the basis of a number of pre-conditions. In *Gauweiler*, the CJEU set out the necessary safeguards against the circumvention of Article 123(1) TFEU when the ECB is purchasing bonds: (1) a lack of certainty must exist concerning whether, when, which, and for how long the purchases will be made; (2) the buying programme must not disincentivize Member States from following a sound budgetary policy; (3) holding purchased bonds until maturity is allowed only as long as the market operators cannot be certain that this option will be used; and (4) the risk to which the ECB is exposed must be mitigated by the condition of compliance with the European Stability Mechanism financing, attached to potential purchases. These safeguards have been of particular importance to the German Constitutional Court.
>
> The current COVID-19 programme poses challenges regarding each of these criteria. In terms of the first, PEPP signals a drastic increase in the volume of ECB

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65 *Weiss* (n 26) para 115.

66 Annelieke A M Mooij, 'The legality of the European Central Bank's Pandemic Emergency Purchase Programme' (BRIDGE Network - Working Paper 5, 2020). Available at SSRN:<https://ssrn.com/abstract=3677152>or <http://dx.doi.org/10.2139/ssrn.3677152>.

67 That is exactly the argument developed by the German Constitutional Court in: BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15 -, paraf. 189.

68 Ana Bobić and Mark Dawson, 'COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?' (*VerfassungsBlog*, 27 March 2020) <https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/> accessed 1 December 2025.

> purchases: according to one recent analysis almost 68% of new Italian debt is likely to be purchased under the programme. While governments and investors, therefore lack complete certainty that particular bonds will be purchased, they are hardly in the dark either.

In other words, it seems reasonable to argue that a 'de facto certainty' is something qualitatively different from a 'complete certainty' or from a 'legal certainty' and that it may arise when the ECB overcomes a certain threshold of purchases for one or more member states.

As Mooij pointed out:

> Flexibility does make it unpredictable which bonds will be purchased. If the ECB, however, starts to buy too large quantities of bonds this might result in a violation of article 123TFEU. If large too many bonds are bought primary dealers are near certain their bonds will be bought and they become intermediaries.

This counterargument becomes even more relevant because the ECB itself signalled – since the beginning of the programme - its willingness to remove the quantitative limits to purchases on secondary markets.

Once again, Bobic and Dawson[69] get this critical point:

> More important may be the long-term signaling implicit in this announcement: the PEPP press release ends by announcing that the ECB 'is fully prepared to increase the size of its asset purchase programmes and adjust their composition, by as much as necessary and for as long as needed'. The Bank therefore retains the possibility of reviewing the size of its purchase programmes, their scope and length. This includes a promise to revisit 'some self-imposed limits' which might hamper action necessary for the ECB to fulfil its mandate. This approach is clearly at odds with the relevant case law. As much as the case law diverges on particular points, it converges on one point: limits on the ECB's activities in the economic domain are not 'self-imposed' but follow from the Treaty itself and the principle of conferral (or of enumerated competences) it represents. The press-release's wording thus casts legitimate doubt over whether the ECB takes into account possible legal requirements and/or barriers in its decision-making.

This commitment reinforced private investors' expectations to benefit from a very large ECB's backstop on secondary markets.

6.3 THE PEPP AND THE DISINCENTIVE FOR MEMBER STATES TO FOLLOW A SOUND BUDGETARY POLICY

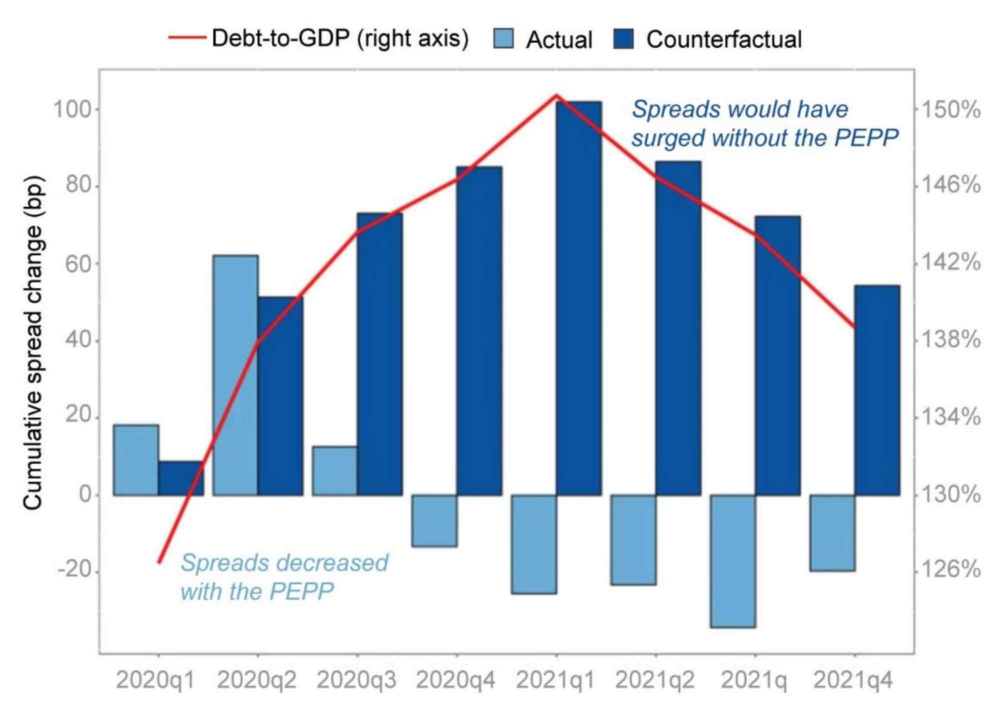
The second argument developed by the CJEU to assess the possible infringement of Article 123 TFEU concerns the fact that an ESCB intervention on secondary markets could constitute a disincentive for some eurozone member states to follow a sound budgetary policy. This second argument is logically connected to the previous one: the disincentive to

[69] Bobić and Dawson (n 68).

follow a sound budgetary policy could exist only if eurozone member states were in a position to calibrate their own budgetary policy according to the monetary policy tools implemented by the ECB. In turn, this could happen only to the extent that private investors acted as 'de facto intermediaries' between primary and secondary markets. In other words, member states could have calibrated their monetary policy on the PEPP only if, between 2020 and 2022, private investors – having the substantial certainty of repurchase on the secondary market by the ESCB – acted as mere intermediaries between the primary and secondary markets.

If that were the case, this intervention would have had the effect of disincentivising eurozone member states from following a sound budgetary policy. The best way to understand the mechanism described above is to consider a counterfactual perspective: if the ECB had not intervened through the PEPP – or if it had intervened to a significantly lesser extent – would member states (and particularly the most indebted ones) have been able to sustain the same fiscal deficits, under the same conditions in terms of interest rates?

A negative answer to this question – other than being suggested by common sense – has been provided by several recent studies: for example, Alberola et al[70] build a model to understand how spreads would have moved for three high debt countries (Italy, Spain and Portugal) in the counterfactual scenario in which the ECB had not intervened through the PEPP. The result is that 'the debt surge at the onset of the pandemic would have caused an average increase in spreads of up to 100bp. Instead, we observed that spreads compressed as PEPP was rolled out'.[71]



[70] Enrique Alberola-Ila et al, 'Debt Sustainability and Monetary Policy: The Case of ECB Asset Purchases' (2022) BIS Working Papers, No 1034 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254184> accessed 11 October 2025. For a short version of the article, see Enrique Alberola-Ila et al, 'How Effective Has the Pandemic Emergency Purchase Programme Been in Ensuring Debt Sustainability?' (*Bruegel*, 12 September 2022) <www.bruegel.org/blog-post/how-effective-has-pandemic-emergency-purchase-programme-been-ensuring-debt-sustainability> accessed 11 October 2025.

[71] ibid.

The graph is taken from the article 'Debt sustainability and monetary policy: the case of ECB asset purchases' by Enrique Alberola, Gong Cheng, Andrea Consiglio and Stavros A Zenios.

The graph shows what the eurozone's spreads would have been without the PEPP in the counterfactual scenario developed by the authors. It seems clear that the PEPP has resulted precisely in the harmonisation of interest rates that the CJEU considered should be avoided, because it created a disincentive to follow a sound budgetary policy.[72] In this regard it must be emphasised that this dynamic is partly continuing through the PEPP reinvestments, which are having the effect of distorting the interest rate structure of the eurozone member states:

> The euro area's interest rate structure plays a key role in the new debt sustainability framework at the centre of the European Union's refashioned stability and growth pact.
>
> However, PEPP reinvestments, by distorting euro area capital market interest rates, appear to be obscuring the true cost of public debt in the euro periphery. In the interest of euro area stability, the ECB has clear reasons to bring about a precisely focused debate on Europe's fiscal rules. So that this can happen, PEPP reinvestments should end far earlier than the present cut-off of December 2024.
>
> The debt sustainability framework at its centre has as its single most important variable, the interest rate, that will prevail on future debt issuance over the medium term. Typically, this interest rate is derived from the current term structure of interest rates. If interest rates are distorted by PEPP reinvestments, as appears to be the case, how is a balanced debate on debt sustainability supposed to take place?[73]

It is now valuable to examine the arguments provided by the CJEU to identify a situation in which an intervention on secondary markets does not constitute a disincentive for member states to follow a sound budgetary policy.

The first argument concerns the temporary nature of the programme, and thus the fact that it is only implemented to the extent that it contributes to the achievement of the objectives identified by the ECB, and that within the framework of the programme the ECB retains the possibility of selling the securities purchased at any time. This argument, when applied to the PEPP, requires some clarification.

It is undoubtedly true that the PEPP had a temporary nature, having been introduced for a period of two years. However, it should be noted that the temporary nature of the programme does not automatically exclude the fact that it might temporarily act as a disincentive to follow a sound budgetary policy during its implementation. In other words, it cannot be ruled out that the 'disincentive effect' might be temporary, starting with the implementation of the programme and coming to an end with the end of that programme.

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[72] *Gauweiler* (n 26) para 113.

[73] Robin Brooks and David Marsh, 'ECB Bond Reinvestments Muddy Europe's Fiscal Rules' (*Official Monetary and Financial Institutions Forum*, 29 June 2023) <www.omfif.org/2023/06/ecb-bond-reinvestments-muddy-europes-fiscal-rules/> accessed 11 October 2025.

In the case of the PEPP, however, the issue of 'PEPP reinvestments' raises the point that this effect can last even after the programme has formally concluded.

Second, when it comes to assessing the temporary nature of the PEPP, it should be noted that it started after five years of implementation of the APP, which, moreover, continued between 2020 and 2022. Thus, in terms of the assessment of the possible disincentive to follow a sound budgetary policy, it would be incorrect to assess only the PEPP and it would be more appropriate to assess its effects by considering the broader framework of the ECB's monetary policy.

Moreover, the CJEU – in relation to the temporary nature of the programme – emphasises the fact that the ECB has retained the option of selling the securities purchased under the programme at any time. However, if we consider the overall context in which the PEPP was activated, this option appears to be an 'empty gun': in fact, it seems clear that if this option had actually been exercised in the context of the economic crisis caused by the pandemic, the ECB would have jeopardised the smooth transmission of monetary policy and the stability of the euro area itself, and would thus have compromised the very objectives of the programme and increased the risks that its action was intended to prevent. In this case, there is a risk associated with validating the legitimacy of a monetary policy tool on the basis of an option that – if used – would undermine the goals of the tool itself.

The second argument concerns the fact that the ECB limits the volume of government bonds that can be purchased. However, in the case of the PEPP, this argument appears to be virtually inapplicable, to the extent that some of the constraints supporting it have been abandoned: specifically, on the one hand, the fact that purchases were limited only to the securities of countries engaged in a structural macroeconomic adjustment programme and, on the other hand, the '33% limit'.[74]

The third argument concerns the fact that 'stringent eligibility criteria' are established to identify government securities eligible for purchase. However, this argument, in the case of the PEPP, seems to lose weight insofar as – as documented above – the programme was characterised by a substantial relaxation in the definition of securities eligible for purchase, culminating in the inclusion of Greek securities in the programme.

Lastly, the CJEU indicated the criteria concerning compliance with the capital key.[75] However, even in this case, as documented above, this safeguard was greatly relaxed, to the point of becoming virtually irrelevant during the implementation phase of the programme.

To sum up, three of the four main arguments put forward by the CJEU to argue that a monetary policy programme does not constitute a disincentive to following of a sound monetary policy are in fact severely weakened in the case of the PEPP. With reference to the argument concerning the temporary nature of the programme, this too, requires particular consideration in the specific case of the PEPP, which tends to support the idea of a weakening of the mechanism. Overall, the argument that the PEPP did not create a disincentive to follow a sound budgetary policy seems to be much weaker than it was in the case of the OMT and the PSPP.

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[74] The fact that the '33% limit' was not to be complied with in the context of PEPP is laid down in Decision 2020/440 art 4.

[75] *Weiss* (n 26) para 140.

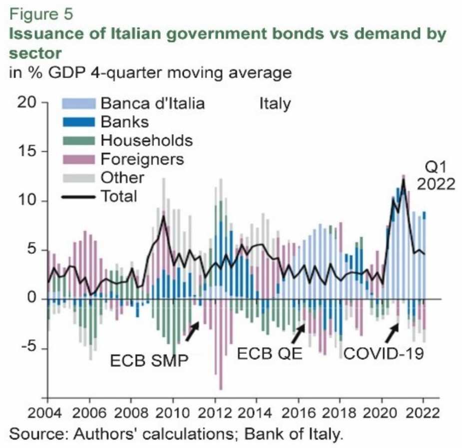
7 THE MACROECONOMIC CONSEQUENCES OF THE PEPP

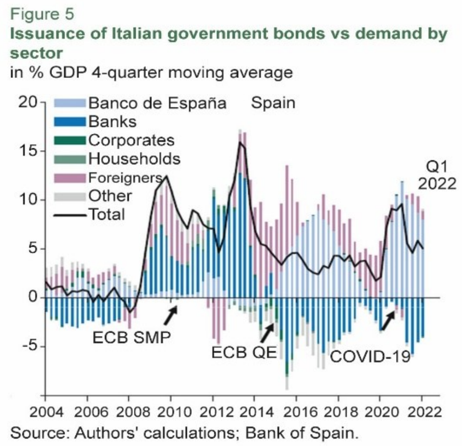
At this point, before concluding the analysis, there is a need to investigate what the 'economic consequences' of the PEPP were so as to verify whether the empirical evidence available is consistent with the analysis developed above.

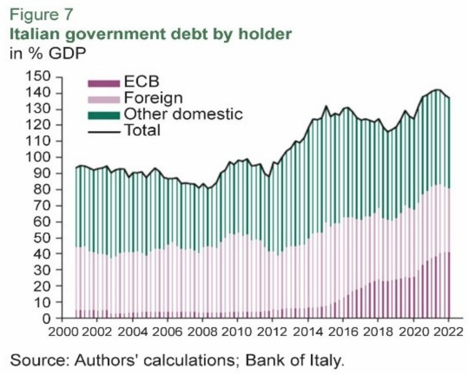
First, data show quite clearly that the new debt issuance of southern European countries between 2020 and 2022 was entirely absorbed by the ECB, with a consequent 'crowding-out effect' on private investors:

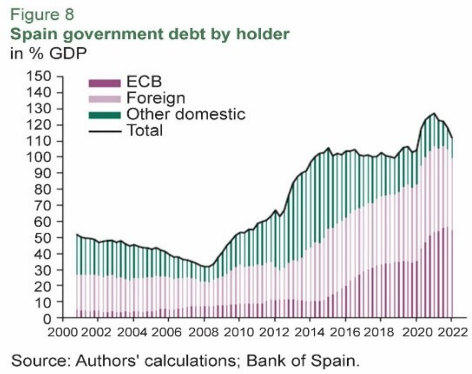
> The bulk of funding for euro area periphery issuance in the past decade has come from the ECB. When the ECB announced the expanded asset purchase program to include sovereign bonds in early 2015, inflation was low and had remained low until recently (European Central Bank, 2015). With European inflation currently at its highest levels in history, the solidified dependence on ECB funding has become an issue. Figures 5 and 6 highlight the issuance of government debt versus demand by sector for Italy and Spain, respectively. As shown, the public sector purchase program (PSPP) and purchases during the pandemic have accounted for most of the demand for government debt in these two countries. During these periods, there has been little demand and even outflows from foreign and domestic private investors. Before ECB QE, new issuance was demanded by a healthy mix of sectors, while at lower yields, it has become dominated by ECB demand.
>
> Figures 7 and 8 show the same issue in debt level terms. They show that net new issuance has been absorbed entirely by the ECB over the past decade, while foreign demand and demand from domestic sources has been weak. The overall picture is therefore that low yields can be somewhat deceptive. Yields are low, but that is due almost entirely to ECB buying, not strong private sector demand.[76]

[76] Robin Brooks and Jonathan Pingle, 'The Euro Area Periphery Debt Conundrum' (2022) 57 Intereconomics 283.









The four figures are taken from the article 'The Euro Area Periphery Debt Conundrum' by Robin Brooks and Jonathan Pingle.

Similar conclusions can be drawn by analysing the combined weight of the PSPP and the PEPP with respect to the GDP of the eurozone member states[77]:

> In Spain, Portugal, and Italy, total cumulated PSPP and PEPP purchases until December 2022 have surpassed 35% of GDP and that the PEPP-GDP holdings for Portugal, Spain, and Italy are far above the Euro area average.[78]

Moreover, it is worth noting the particular situation of Greece, which had not benefited from purchases under the PSPP but which has benefited from (by far) the largest share of PEPP's purchases in relation to GDP. This is an important point because it underlines the country's significant dependence on the PEPP and its persistently poor reputation in international financial markets:

> The Greek PEPP to GDP ratio with 18.4% is remarkable as it exceeds any other countries' by far and suggests a crucial role for the small Greek sovereign bonds market.[79]

[77] Carlo Birkholz and Friedrich Heinemann, 'Magnitudes and Capital Key Divergence of the Eurosystem's PSPP/PEPP Purchase' Update April 2023, ZEW Expert Brief, No 23-02 (Leibniz Centre for European Economic Research 2023), 12.
[78] ibid 12.
[79] Birkholz and Heinemann (n 77) 12.

Second, another crucial issue concerns the deviations in the purchases made under the PEPP from the capital key. In this regard, as mentioned above, the ECB has applied even greater flexibility than it had already applied under the PSPP. It is therefore important to understand how the ECB has used this high level of flexibility in practice and which countries have benefited the most from this approach.

Here again, data[80] shows that Italy and Spain – and, specifically in relation to the PEPP, Greece also – were the countries that benefited the most from non-adherence to the capital key limits:

> Countries receiving the biggest overweighting are Italy with +9% in PEPP and +5% in PSPP, Spain with +5% in both programmes and Belgium with +3% and +4% in PEPP and PSPP respectively. Austria and France are over indexed by +5% and +3% in the PSPP, whereas Germany received +2% of net purchases in the PEPP. France is a particular case with a significant overweight in the PSPP (+3%), and an equally significant underweight in the PEPP (-3%). On the other hand the Baltic States, as well as Slovakia, Netherlands and Luxembourg are strongly underrepresented in both the PSPP and PEPP portfolio. This partially reflects low availability of public bonds in these countries.
>
> It appears that both PSPP and PEPP were applied with some flexibility in terms of deviations from the capital key, and that Italy and Spain are still most strongly overrepresented. In light of the particular severe economic consequences of the pandemic for Spain and Italy, their overweight corresponds to the PEPP's intention. But also for the PSPP, the results show that the ECB was not able to steer the programmes as originally intended with a strong capital key orientation. In our earlier analyses we have shown that the overweight to Italy and Spain has already existed as early as 2018, and thus well before the pandemic shock.[81]

These data raise critical questions in terms of compliance with the CJEU's jurisprudence concerning Article 123 TFEU. In fact, 'they are not inconsistent to a reaction function where the ECB – besides inflation objectives – also follows a fiscal policy agenda with the intention to support the financing needs of highly indebted euro countries'.[82]

8 CONCLUSIONS: DESPERATE TIMES, DESPERATE MEASURES? THE (LIKELY) DIFFERENT PERSPECTIVES OF THE CJEU AND THE BVERFG

To conclude the analysis, it becomes necessary to reflect on what the CJEU's legal assessment of the PEPP would be if the Court had to rule on it. To answer this question, it is first necessary to briefly recall one fact: the economic context in which the ECB intervened in March 2020 on the PEPP was completely different from the one in which it intervened on the OMT and the PSPP, in 2012 and 2015 respectively.

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[80] Birkholz and Heinemann (n 77) 7.
[81] ibid 6.
[82] ibid 14.

When the ECB implemented the PEPP, it did not intervene to remedy a break-down in the monetary policy transmission mechanism. The PEPP was implemented to deal with the need for member states – especially those with less fiscal space – to implement highly expansionary fiscal policies, within a specific time window, in order to face up to the Covid crisis.

Secondly, it is necessary to determine the theoretical framework that would be used by the CJEU to perform this assessment. In particular, the crucial point to understand is whether the peculiar economic and financial situation that occurred at the beginning of the pandemic could be 'used' by the Court to justify the assessment being excepted from the criteria it had previously outlined, particularly in the *Weiss* and *Gauweiler* judgments. A possible approach could be that of considering that the above-mentioned economic context does not justify the abandonment of such jurisprudence for the PEPP assessment. In this case, the legality of the PEPP would be determined by assessing whether its technical features comply with the criteria established in the above-mentioned cases.

A second approach might be that of considering the fact that the economic context of early 2020 was truly exceptional, and as such requires an exceptional response by the ECB. In this case, the assessment would not take into account the objective limits identified by CJEU case-law. The Court could argue that (i) if the ECB had not intervened in March 2020, the very existence of the eurozone would have been at risk, and that (ii) under no circumstances can the ECB's mandate be interpreted in a way that ends up endangering the very existence of the eurozone itself.

This approach, however, would pose two relevant theoretical challenges: the first is that in the EU treaties, when it comes to the ECB's mandate, there is no clause relating to 'exceptional situations'. This would be a legal interpretation that manifestly goes beyond the letter of the Treaties, being driven by extralegal factors: namely the importance of preserving the European integration process. The second is that this approach would end up creating a sort of dual regime in relation to the ECB's mandate: there would be 'ordinary' circumstances in which the ECB's action should be assessed on the basis of the criteria defined by CJEU case-law, and 'exceptional' circumstances, in which the ECB would somehow be 'free' to act in order to preserve the existence of the eurozone. A consequence of this would be the need for the CJEU to define the perimeter of these exceptional circumstances.

The author's opinion is that – even though it seems objectively difficult to reconcile the criteria in *Gauweiler* and *Weiss* with the PEPP's technical features – the CJEU would choose, in order: (i) to adopt the first approach and (ii) to declare the legality of the PEPP. The reasons are those correctly recalled by Dawson and Bobić:

> The CJEU is notoriously generous when reviewing the proportionality of measures adopted by the EU institutions – it has tended to give the ECB a particularly large margin of discretion. If part of the job of the EU Courts is to 'limit' in some way the EU's executive institutions, the CJEU has tended in its monetary policy case law to accept limits on ECB activity of any kind, however remote and hypothetical, as demonstrating the necessity of ECB programs (or has simply not engaged in the 'necessity' element of the proportionality test). In so far as PEPP contains limitations on its overall size and could be terminated by the Bank at a time of its choosing, it is also limited in a formal sense. In short, the CJEU found creative ways

> to find OMT and APP legal, developing relatively open and expansive tests. There is thus plenty of room to judicially endorse the PEPP too.[83]

However, it is crucial to reflect on the consequences of this hypothetical decision.
The author's opinion is that it would determine the de facto end of the ECB's mandate – as defined by the EU Treaties – by definitively recognizing the evolution of the ECB into a quasi-fully interventionist central bank. A central bank capable of intervening on secondary markets virtually without any significant constraint on member states' bonds purchases. A role that is completely different from that assigned to the ECB when the eurozone was created.

Against this backdrop, it is particularly interesting to highlight that the assessment of the German Constitutional Court (GCC) on the same monetary policy tool would probably be completely different. In this case, the author's opinion is that – given the criteria defined by its own case-law – the GCC would likely declare the program illegal, at least in relation to its compliance with Article 123 TFEU.
As Mooij pointed out:

> the GCC found that the announcement of the volume of bonds together with the capital key creates an amount of certainty for the market players. If the GCC finds this to be the case for the PSPP it is likely to find the same for the PEPP. The PEPP volume is large [Author's note: since the publication of this article, it has increased significantly] and in addition to the other purchase programs. This combined with the earlier discussed fears about the amount of peripheral purchases makes the pandemic purchases unlawful under the GCC framework. The perhaps increased flexibility of the ECB might change the mind of the GCC. This is, however, unlikely as little is explained with the flexibility and the GCC seems attached to lengthy and detailed explanations from the ECB (see proportionality section). It attaches similar explanations regarding blackout period to prevent certainty from arising state bonds. In its decision in May the GCC considered that the 'mere existence of a blackout period does not justify the conclusion that purchases of government bonds were not foreseeable'. Considering the lack of further information on the blackout period in combination with the low maturity rate it is unlikely the GCC would consider art. 123 TFEU safeguarded.[84]

To conclude, a possible judgment on the legitimacy of the PEPP might reopen the conflict between the CJEU and the GCC, raising it to a new, more dangerous, level.
As the judgment of 2020 shows,[85] it is hard to believe that the GCC might end up accepting the ECB's evolution into a quasi-fully interventionist Central Bank.

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[83] Bobić and Dawson (n 68).
[84] Mooij (n 66).
[85] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15.

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MINIMUM WAGES IN SOFT GRASP – THE CJEU RULING ON THE ADEQUATE MINIMUM WAGES DIRECTIVE

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This case note discusses the Court of Justice's judgment in Denmark v Parliament and Council, concerning the validity of the Adequate Minimum Wages Directive (AMWD) in light of the exclusion of 'pay' and the 'right of association' from EU social policy competences under Art. 153(5) TFEU. While Advocate General Emiliou had proposed annulling the Directive in its entirety on the ground that it impermissibly regulates 'pay', the Court upheld the core of the AMWD and annulled only limited parts of the Directive. In doing so, the Court allows the EU legislature to maintain a soft grasp on minimum wages despite the explicit competence exclusions. The judgment reaffirms the test from previous case law, according to which EU instruments must not 'directly interfere' in the determination of pay within the EU, but this note argues that the Court's reasoning still provides only limited guidance on how this standard should be applied. Nonetheless, the ruling is of constitutional significance and provides several insights into how the Court interprets the competence exclusions in practice.

1 INTRODUCTION

On 11 November 2025, the Grand Chamber of the Court of Justice of the EU (the 'Court') issued its judgment in *Denmark v Parliament and Council*[1] on the action for annulment of the Adequate Minimum Wages Directive[2] (AMWD). This new instrument represents a momentous development in EU socio-economic policy, for which there was, despite early concerns about its compatibility with EU competences, broad political agreement among Member States to pursue it and ensure fair minimum wages across the EU.

The only Member States that voted against the AMWD were Denmark and Sweden, with Denmark subsequently bringing the annulment action. This political disagreement is no coincidence. Labour law in these countries has traditionally relied on extensive autonomy for social partners and a central role of collective bargaining for determining wages and working conditions, rather than leaving these matters to legislation. Although Denmark and Sweden recognised that, given an already high collective bargaining coverage and a mere duplication of certain existing obligations under international law, the practical impact of the AMWD would be limited for them, EU actions affecting the 'Nordic model' remain a sensitive

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[1] Case C-19/23 *Kingdom of Denmark v European Parliament and Council* EU:C:2025:865.

[2] Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L275/33.

subject.[3] In this regard, the case has clear parallels to the decisions in *Laval*[4] and *Viking*,[5] which were perceived as threats to the Nordic collective bargaining systems and proved highly politically contentious at the time.[6]

The Court's judgment in *Denmark v Parliament and Council* occurs within this political tension. This note argues that it aligns with and develops the Court's previous case law to some extent, while still leaving ambiguities regarding its practical application. The ruling also provides interesting methodological insights, illustrating a change in the Court's language in interpreting exceptions.

2 THE ANNULMENT ACTION

The judgment arose from annulment proceedings against the AMWD, initiated by Denmark and supported by Sweden. As set out in its Art. 1, the Directive has three objectives, namely to establish a framework for (i) the adequacy of statutory minimum wages with the aim of achieving decent living and working conditions, (ii) promoting collective bargaining on wage-setting, and (iii) enhancing effective access of workers to rights to minimum wage protection where provided for in national law or collective agreements. To this end, it sets out minimum requirements and imposes procedural obligations on Member States.

The action centres on Arts. 4 to 6 of the Directive. According to Art. 4, Member States are obliged, with the involvement of social partners, to promote collective bargaining on wage-setting by strengthening capacities of social partners, encouraging wage negotiations between them, and protecting the actors participating in collective bargaining on wage-setting from discrimination and interference. It also provides that Member States with a collective bargaining coverage below 80% must establish and regularly review and update, in consultation or agreement with social partners, an action plan with a clear timeline and concrete measures to progressively increase the collective bargaining coverage. Under Art. 5, those Member States with statutory minimum wages are required to establish clear procedures and criteria for setting and updating them and to ensure their adequacy, aiming to achieve a decent standard of living, reduce in-work poverty, promote social cohesion and upward social convergence, and reduce the gender pay gap. Notably, Art. 5(2) AMWD sets out minimum criteria to be included, while Art. 5(3) permits automatic indexation of statutory minimum wages, provided that they are not decreased by such mechanism. Article 6 AMWD provides that any variations or deductions from statutory minimum wages for specific groups are not mandatory but must respect the principles of non-discrimination and proportionality.

The problem of the case concerns the competence of the EU to adopt this Directive,

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[3] For details on the Nordic perspective on the AMWD, see Petra Herzfeld Olsson and Mette Søsted Hemme, 'Scandinavian States' in Luca Ratti, Elisabeth Brameshuber, and Vincenzo Pietrogiovanni (eds), *The EU Directive on Adequate Minimum Wages. Context, Commentary and Trajectories* (Hart Publishing, 2024); Niklas Selberg and Erik Sjödin, 'The Directive (EU) 2022/2041 on adequate minimum wages in the European Union: Much ado about nothing in Sweden?' (2024) 15(4) European Labour Law Journal 939.

[4] Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet and Others* EU:C:2007:809.

[5] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* EU:C:2007:772.

[6] See Nicola Countouris, 'Avoiding another "*Viking and Laval*" moment – a critical analysis of the AG opinion on the Adequate Minimum Wage Directive, Case C-19/23' (2025) 16(2) European Labour Law Journal, 315.

as required by the principle of conferral.[7] The AMWD is based on Art. 153(2)(b) TFEU, in combination with Art. 53(1)(b) TFEU, granting the EU competence over 'working conditions'. However, under the prominent exclusion in Art. 153(5) TFEU, the provisions of this Article do not apply to, among others, pay and the right of association. Competence conflicts are thus apparent from the outset. The AMWD pursues multiple objectives beyond working conditions and the adequacy of minimum wages, with 'pay' potentially at the forefront. Even before its adoption, the legislature was aware that it was teetering on the edge of acting ultra vires.[8] The Directive is carefully drafted and emphasises that it does not aim to harmonise the level of minimum wages or establish a uniform mechanism for setting them.[9] It also claims full compliance with the right to collective bargaining, in particular by leaving Member States free to introduce statutory minimum wages or declare collective agreements universally applicable.[10] Nevertheless, the annulment action challenged the EU's competence to adopt the AMWD and sought, primarily, the annulment of the Directive in its entirety on two grounds.[11] The first alleged that the legislature disregarded Art. 153(5) TFEU and misused its powers. The second claimed that Art. 153(1)(b) TFEU could not be a valid basis, as the AMWD regulates not only 'working conditions' but also workers' representation and collective defence of interests, which fall under Art. 153(1)(f) TFEU and require a differing legislative procedure with unanimity within the Council.

3 THE ADVOCATE GENERAL'S OPINION

When Advocate General Emiliou issued his Opinion[12] in early 2025, this intensified the already ongoing debate over the legal and political implications of AMWD. The Advocate General opined that the AMWD is incompatible with Art. 153(5) TFEU, so the Court should uphold the annulment action and annul the Directive in full. His Opinion is essentially based on a broad interpretation of the exclusion of 'pay' from EU competences. Its starting point, drawing on the Court's case law, is that Art. 153(5) TFEU, as a derogation from the other paragraphs of that Article, must be interpreted strictly so as not to unduly affect the scope of those paragraphs or the objectives of Art. 151 TFEU, and covers only measures that directly interfere in the determination of pay within the EU.[13] On the other hand, the Advocate General stresses that the provision must not be interpreted so strictly as to deprive it of its effectiveness.[14] On this basis, while seeing no breach of the exclusion relating to the right of association, he concludes that the AMWD does not comply with the exclusion of 'pay'. He argues that this exclusion should not, given its wording and the context of earlier

[7] Art. 5(1)(2) TEU.
[8] See Sacha Garben, 'Choosing a Tightrope Instead of a Rope Bridge – The Choice of Legal Basis for the AMW Directive' in Luca Ratti, Elisabeth Brameshuber, and Vincenzo Pietrogiovanni (eds), *The EU Directive on Adequate Minimum Wages. Context, Commentary and Trajectories* (Hart Publishing, 2024).
[9] See esp Recital 19 and Art. 1(3) AMWD.
[10] Recital 19 and Art. 1(4) AMWD.
[11] In the alternative, and based on the same arguments as for the primary head of claim, the action sought the annulment of Arts. 4(1)(d) and/or (2) AMWD.
[12] Opinion of Advocate General Emiliou in Case C-19/23 *Denmark v Parliament and Council* EU:C:2025:11.
[13] ibid paras 39 f.
[14] ibid para 55.

case law, be confined to the level of pay.[15] Instead, he maintains that any instrument directly interferes with 'pay' in a manner incompatible with Art. 153(5) TFEU if its object is to regulate pay, even when this is done flexibly through general and loosely framed requirements for national wage-setting frameworks and irrespective of whether it encroaches upon the contractual autonomy of social partners.[16] The Opinion argues that the very title of the AMWD is a clear indication that its object is to regulate 'pay', which he considers confirmed by Arts. 1 and 3, which aim to regulate how wages are determined, and the method relied on. The same, according to the Advocate General, goes for Arts. 4 and 12 AMWD, which he considers intervening in how wages are to be organised.[17]

4 THE JUDGMENT

The Court does not follow the Advocate General's Opinion proposing full annulment of the AMWD. Unlike the Advocate General, it does not consider the entire Directive to exceed the boundaries set by Art. 153(5) TFEU but only does so in part, annulling specifically Art. 5(2) and, insofar as it requires indexation adjustments not to decrease statutory minimum wages, Art. 5(3) AMWD. The remainder of the action is dismissed.

The Court begins its analysis of the first plea by examining, in line with its settled case law, whether the chosen legal basis can be based on objective factors. It finds that the purpose and content of the AMWD, while relating to pay, nevertheless prima facie fall within the matters listed in Art. 153(1) TFEU, including the EU competence over 'working conditions'.[18] The Court then considers whether the exclusion of 'pay' from this competence is respected. Referring to its previous case law, it recalls that the exclusion exists because pay-setting falls within the contractual freedom of national social partners and the competence of the Member States, and that it only covers measures amounting to a 'direct interference by EU law in the determination of pay within the EU'.[19] Consequently, not every matter linked to pay is excluded under Art. 153(5) TFEU, and EU competence is not precluded merely because the AMWD concerns this field or may affect the level of pay.[20]

Having set out this standard of review, the Court examines whether the Directive's contentious provisions – Articles 4 to 6 – amount to direct interference in the determination of pay. It largely answers in the negative. Regarding Art. 4 AMWD, it argues that there is no interference with the Member States' choice as to the wage-setting model, that neither the content nor the result of collective bargaining is governed or prescribed, and that the autonomy of social partners is fully guaranteed.[21] Regarding Art. 5 AMWD on statutory minimum wages, the Court identifies direct interference in the determination of pay only in the harmonisation of some of the wages' constituent elements in Art. 5(2), and in the requirement of a non-regression clause if they are subject to automatic indexation adjustments under Art. 5(3).[22] By contrast, the obligation on Member States to establish

[15] Opinion of AG Emiliou in Case C-19/23 *Denmark v Parliament and Council* (n 12) paras 51–59.
[16] Ibid paras 60–70.
[17] Ibid paras 89–94.
[18] *Denmark v Parliament and Council* (n 1) paras 56–66.
[19] ibid, paras 67 f.
[20] cf. ibid paras 70–74.
[21] ibid paras 76–85.
[22] ibid paras 94–98.

procedures and criteria for setting and updating statutory minimum wages, as well as the rules on indicative reference values, regular updates, and consultative bodies in the remainder of Art. 5, do not, in its view, amount to direct interference. The Court emphasises that the Directive neither defines the concept of 'adequacy' of statutory minimum wages nor confers an individual right to those,[23] that it lays down no mandatory elements or harmonised components of statutory minimum wages,[24] and that Arts. 5(5)–(6) merely set out procedural rules without prescribing mandatory substantive elements[25]. Similarly, as regards Art. 6 AMWD, the Court notes that Member States remain free to introduce variations or deductions from statutory minimum wages.[26]

The Court then conducts the same analysis with regard to the exclusion of competence relating to the right of association. It begins by interpreting this concept, stating that the exclusion's primary purpose is to preserve the autonomy of social partners. Drawing on Arts. 153(1)(f) and 156 TFEU, as well as the Charter of Social Rights and the European Social Charter, it interprets the 'right of association' as protecting the freedom to form and join organisations, but not as encompassing rules on collective bargaining.[27] It then examines whether Art. 4 AMWD amounts to a direct interference with this right, more specifically in 'the establishment, functioning and administration of associations', which it concludes is not the case.[28]

Turning to the second plea, the Court relies on its established case law that an instrument's main purpose or component determines the legal basis. It argues that this is the improvement of living and working conditions, with the promotion of collective bargaining on wage-setting merely a means to this end, not an autonomous objective, so that the EU legislature relied on the correct legal basis.[29]

5 COMMENT

Many will likely welcome that the Court did not follow the Advocate General's Opinion, given the extensive criticism levelled at its legal reasoning.[30] The judgment is particularly interesting for how its approach aligns with existing case law on the 'pay' exclusion, the difficulties arising in its application, and the way the Court handles the interpretation of the competence exclusion as an exception.

5.1 A FIT INTO PREVIOUS CASE LAW

In interpreting the 'pay' exclusion in Art. 153(5) TFEU, the Court could draw on its previous

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[23] *Denmark v Parliament and Council* (n 1) paras 88–92.
[24] ibid para 99.
[25] ibid para 100.
[26] ibid paras 102 f.
[27] ibid paras 106–115.
[28] ibid paras 116–126.
[29] ibid paras 132–139.
[30] See e.g. Emanuele Menegatti, 'Why the Directive on Adequate Minimum Wages does fit within EU competence – A response to the Advocate General's opinion' (14 April 2025) ETUI Policy Brief 2025.02 <http://dx.doi.org/10.2139/ssrn.5227333> accessed 10 December 2025; Countouris (n 6); Claire Kilpatrick and Marc Steiert, 'A little learning is a dangerous thing: AG Emiliou on the Adequate Minimum Wages Directive' (2025) EUI Law Working Paper 2025/2 <https://hdl.handle.net/1814/77887> accessed 10 December 2025.

case law concerning this provision. In *Del Cerro Alonso*, the Court held that as a derogation from the other paragraphs of that Article, the exclusions must be interpreted strictly so as not to unduly affect the scope of those paragraphs or the objectives of what is today Art. 151 TFEU.[31] It explained that 'fixing the level of wages' falls within the national social partners' freedom and the Member States' competence, so that it is the 'determination of the level of wages' that is excluded from harmonisation.[32] The 'direct interference' doctrine originated a few months later in *Impact*. Building on *Del Cerro Alonso*, the Court interpreted the exclusion as covering measures, such as equivalence of constituent parts of pay or its level, which amount to direct interference by EU law in the determination of pay within the EU.[33] This has been confirmed repeatedly,[34] and in the present case the Court applied this approach to assess the AMWD.

The judgment thereby both confirms and further develops this line of case law in several respects. First, the Court clarifies that the 'direct interference' test is its general interpretation of Art. 153(5) TFEU and not confined to the contexts of previous cases.[35] Thus far, the Court has dealt with the 'pay' exclusion in the context of Directives on fixed-term[36] and part-time work,[37] equal treatment,[38] and working time.[39] These earlier contexts involved a more remote connection to pay and merely potential implications for wage levels. In contrast, the AMWD addresses workers' wages more overtly. *Denmark v Parliament and Council* makes clear that this does not alter the standard of reviewing the competence provisions.

Secondly, the Court expands on the role of its notion of 'direct interference in the determination of pay within the EU'. In *Del Cerro Alonso*, *Impact*, and *Bruno and Pettini*, the Court primarily relied on the strict interpretation of Art. 153(5) TFEU as an exception and argued that the principle of non-discrimination, which was at issue in these cases, cannot be interpreted restrictively, even if it affects pay.[40] In *Specht* and *VB*, it argued that pay as part of employment conditions does not directly relate to the 'setting of a level of pay' or that the case is not concerned with the 'amount of remuneration'.[41] In *Denmark v Parliament and Council*, the Court reaffirms that the mere fact that the AMWD relates to and can impact the level of pay is not sufficient for a breach of the 'pay' exclusion. It uses the concept of 'direct interference in the determination of pay' more clearly as the central benchmark for guiding the assessment. While this appears as a more structured approach based on the object and content of the respective provisions, it is generally consistent with the previous case law. Specifically, the Court identifies a direct interference by the AMWD only where it had

[31] Case C-307/05 *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* EU:C:2007:509, para 39.
[32] ibid para 40.
[33] Case C-268/06 *Impact v Minister for Agriculture and Food and Others* EU:C:2008:223 para 124.
[34] Joined Cases C-395/08 and C-396/08 *INPS v Tiziana Bruno, Massimo Pettini, and INPS v Daniela Lotti, Clara Matteucci* EU:C:2010:329 para 37; Joined Cases C-501/12 to C-506/12, C-549/12, and C-541/12 *Thomas Specht and Others v Land Berlin and Rena Schmeel, Ralf Schuster v Bundesrepublik Deutschland* EU:C:2014:2005 para 33; Case C-262/20 *VB v Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'* EU:C:2022:117 para 30.
[35] cf. *Denmark v Parliament and Council* (n 1) para 69.
[36] *Del Cerro Alonso* (n 31); *Impact* (n 33).
[37] *Bruno and Pettini* (n 34).
[38] *Specht* (n 34).
[39] *VB* (n 34).
[40] *Del Cerro Alonso* (n 31) para 38; *Impact* (n 33) para 114; *Bruno and Pettini* (n 34) para 32.
[41] *Specht* (n 34) para 34; *VB* (n 34) para 31.

previously indicated the dividing line, namely in Art. 5(2), which in its view harmonises constituent elements of wages, and in Art. 5(3), which regulates their amount through obligatory non-regression.

The third clarification of the judgment relates to the exclusion of the right of association. In this regard, the Court had the opportunity to set out, for the first time, the meaning of this exclusion and to clarify that the 'direct interference' test also applies in this regard.[42] This suggests that there is a coherent underlying rationale to this test, so that it will likely govern all elements of Art. 153(5) TFEU.

5.2 ASSESSING DIRECT INTERFERENCE

If the Court had only to reaffirm and apply its previous case law, one might wonder how the Advocate General reached a different conclusion. One view could be that he simply sought to extend the Court's standpoint towards a broader understanding of the 'pay' exclusion. However, his Opinion largely relies on the Court's previous case law and indicates an intention to apply it. The same applies to the applicant, Denmark, and its supporting intervener, Sweden, whose principal argument was that the AMWD provisions, taken together, amount to direct interference in the determination of pay. In other words, this test itself was not in dispute. As has been noted,[43] the Opinion arguably committed some fallacies in its recourse to the relevant case, including over-reliance on the wording and insufficient regard to the travaux préparatoires of the Maastricht Treaty. This may have led to an overly broad conclusion that EU instruments must not have as their object the regulation of pay. On the other hand, some commentators have found, unlike the Court, that in applying the direct interference test the entire AMWD is compatible with Art. 153(5) TFEU, including its Art. 5(2)(3).[44] This suggests that the test for whether an instrument directly interferes in the determination of pay may not be as workable or straightforward as it initially appears.[45]

It seems that the judgment offers only limited guidance on making this assessment more predictable. Unlike its approach to the right of association, it does not clearly set out a more holistic understanding of what constitutes 'determination of pay'. Some passages indicate that this includes the level of wages and their constituent elements,[46] but elsewhere the argumentation is framed broader and also refers to the free choice of Member States as to the wage-setting model and of workers on joining a trade union.[47] At the same time, even the concept of constituent elements of wages remains ambiguous. Consider Art. 5(2) AMWD, for example, which sets out minimum criteria that shall only 'guide' the setting and updating of statutory minimum wages, leaving it to the Member States to determine their content and weight. It is notable that the Court regards this as directly

[42] *Denmark v Parliament and Council* (n 1) paras 105–117.
[43] See above n 30.
[44] Giacomo Di Federico, 'The Minimum Wages Directive Proposal and the External Limits of Art. 153 TFEU' (2020) 13(2) Italian Labour Law e-Journal 107; Menegatti (n 30) 4 f.; Kilpatrick and Steiert (n 30) 7 ff.
[45] See also Niklas Selberg and Erik Akseli Sjödin, 'The Adequate Minimum Wage Directive Decision: A Remembrance Day Ruling' (*Global Workplace Law & Policy*, 10 November 2025) <https://legalblogs.wolterskluwer.com/global-workplace-law-and-policy/the-adequate-minimum-wage-directive-decision-a-remembrance-day-ruling> accessed 10 December 2025, arguing that the outcome of the case was difficult to predict.
[46] cf. *Denmark v Parliament and Council* (n 1) paras 96, 99 f.
[47] cf. ibid paras 78–84.

affecting the level of wages and harmonising statutory minimum wages' constituent elements. The role of those criteria could have, after all, significantly varied across Member States.

This links to the further question on the 'directness' of the interference, which lies on a spectrum, with underlying normative considerations determining what falls within the competence exclusion and what does not. There is no clear threshold for when EU instruments' interference in pay is so 'direct' to exclude EU competence. Unlike the Advocate General, the Court does not elaborate this issue.[48] It distinguishes, although the term 'determination' can arguably entail procedural aspects, between permissible procedural rules and non-permissible mandatory substantive elements as regards the level or constituent elements of minimum wages.[49] The normative foundation and practicability of this approach are debatable, not least as substantive rules may take the form of procedural obligations in disguise.[50]

5.3 A CONTEXTUAL APPROACH TO EXCEPTIONS

On a methodological and more positive note, it is noteworthy that, unlike in previous decisions and the Advocate General's Opinion, the Court does not make the explicit argument that exceptions must be interpreted strictly. In prior rulings, a principally strict interpretation of exceptions such as Art. 153(5) TFEU had guided, in combination with other considerations, the Court's reasoning. This remains a widely used approach.[51] At closer look, however, the mere statement reminding of the Roman principle '*exceptio est strictissimae interpretationis*' is of limited practical value and also conceptually problematic. It leaves unclear what such strict interpretation entails, and it can be questioned that the restrictive interpretation of derogations is a general principle of EU law.[52] Ultimately, both the general rule *and* the exception reflect a norm that must be given effect in interpretation. What matters, therefore, is a purposive reading of the exception, which gives practical effect to its objective while aligning it with the purpose and meaning of the general rule from which it derogates. This methodological exercise does not need the claim that exceptions must generally be interpreted strictly.

The Court's approach in *Denmark v Parliament and Council* is in line with these considerations. Its reasoning departs from the interpretation of 'pay' as excluding direct interferences in the determination of pay, an ultimately strict interpretation which is, however, not strict for its own sake but based on the specific context of Art. 153(5) TFEU. Similarly, when developing an interpretation of the 'right of association', the Court does not, as in *Del Cerro Alonso*, *Impact*, and *Bruno and Pettini*, take a necessary strict meaning as its starting point; instead, it relies directly on the wording, objectives, context, and other EU law.[53] This is a small but welcome shift in the approach to Art. 153(5) TFEU.

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[48] See Opinion of AG Emiliou in Case C-19/23 *Denmark v Parliament and Council* (n 12) paras 62–64.
[49] cf. *Denmark v Parliament and Council* (n 1) para 100.
[50] cf. Opinion of AG Emiliou in Case C-19/23 *Denmark v Parliament and Council* (n 12) para 84.
[51] See Marie Herberger, *Ausnahmen sind eng auszulegen: Die Ansichten beim Gerichtshof der Europäischen Union* (Duncker & Humblot 2017).
[52] Opinion of Advocate General Geelhoed in Case C-334/00 *Fonderie Officine Meccaniche Tacconi Spa v Heinrich Wagner Sinto Maschinenfabrik GmbH* EU:C:2022:68 para 34; Opinion of Advocate General Jacobs in Case 96/00 *Rudolf Gabriel* EU:C:2001:690 para 46.
[53] *Denmark v Parliament and Council* (n 1) paras 105 ff.

6 CONCLUSION

The ruling is certainly an influential and thought-provoking decision. By upholding the majority of the AMWD, the Court allows the EU legislature to maintain a soft grasp on minimum wages despite the exclusion of 'pay' and 'right of association' from EU social policy competences. The partial annulment is not problematic, as the annulled parts are severable from the remainder of the Directive. While the judgment will have practical significance in this policy area, this note has shown that its importance also lies, more fundamentally, in its implications for the principle of conferral under EU constitutional law. The Court reaffirms its test of direct interference in the determination of pay within the EU and offers some insights into how it applies this test. Its broader guidance nevertheless remains limited, particularly because much of the reasoning is tied to the specifics of the AMWD. For the legal certainty and clarity about the criteria governing the division of competences, which the Court aims at,[54] there is thus still some way to go.

[54] *Denmark v Parliament and Council* (n 1) para 70.

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EUROPEAN UNION LAW IN FINNISH COURTS: TRACING THE CASE-LAW

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European Union law can be examined at Union level and at Member State level. While the research of case law at an EU level is greatly facilitated by well-indexed databases maintained by the CJEU and EurLex, access to national case law is more complicated due to absence of similarly well-organised sources. This article expands on a line of inquiry introduced in my recent book setting out the application of EU law by selected Finnish courts during the first 30 years of EU membership (1995-2024). The article proposes first a hierarchical order of four concentric circles of national case law applying EU law. Second, it applies a system of three categories of cases – clear, unfolding and latent EU cases – to help identify and organise national case law. The categorisation can be helpful in identifying national case law which is relevant to the EU, as much of it may otherwise remain undiscovered. The national courts and their case law are essential in enforcing rights stemming from EU law.

1 INTRODUCTION

In Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), the Court of Justice of the European Union (CJEU) articulated the roles of the Member States and the national courts in the area of EU law. On the one hand, the Member States are bound by the principle of sincere cooperation to ensure the application of and respect for European Union law. On the other hand, it is for the national courts and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law.[1]

It follows from this setting that the EU law can be examined at Union level and at Member State level. The research on application of EU law by the courts at Union level is greatly facilitated by the fact that the relevant case law is produced by a single institution in Luxembourg and is easily accessible in Union databases, and it is accurately indexed and available in all languages. It is more difficult to examine national application practices. National application is decentralised across all courts in the 27 Member States and is not currently indexed in Finland, for example. Furthermore, unlike case law at Union level, national case law does not focus solely on the EU legal perspective, but all national decisions involve a varying degree of Union law and national law. Even recognising when a case should be classified as an EU application case can be a challenge.

The objective of this article is to present two aspects of application of EU law by the courts in Finland. It sets out a schema for hierarchy of the EU cases of the Finnish courts (Section 2) and proposes of threefold classification for the cases based on the obviousness

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[1] CJEU, Opinion 1/09 *Agreement creating a Unified Patent Litigation System* EU:C:2011:123 para 68.

of the EU law aspect (Section 3). The staring point when examining the national application of the EU law at the Member State level is the fact that every national judge is also an EU judge.[2] In the Finnish context, this means that the EU judges at the apex of the judicial system in Finland are the Supreme Court (*korkein oikeus* – KKO; *högsta domstolen* – HD) and the Supreme Administrative Court (*korkein hallinto-oikeus* – KHO; *högsta förvaltningdomstolen* – HFD).[3] The cases cited below stem from these two courts.

2 HIERARCHY IN FOUR CONCENTRIC CIRCLES

According to the statistics of the National Court Administration, in 2024, Finnish courts decided a total of 617,080 cases.[4] Of these decisions, all the precedents issued by the two supreme courts are systematically published, whereas the publication of the decisions of the courts below is much more sporadic and selective. The published decisions are accessible free of charge on Finlex database.[5]

In view of EU law, it would be useful to know, how many of these cases involved an element of EU law. However, statistics regarding this particular aspect are not available. Consequently, it is not possible to provide a reliable estimate of their number.

For the purposes of this article, the term 'EU case' has been selected to denote cases adjudicated by a national court, in this instance, a Finnish court, that contain one or more elements pertaining to EU law.[6] The intensity of the EU law element varies. Sometimes only a minor aspect of such a case concerns EU law. Even these matters should be considered EU cases in this classification. In so far as EU law is mentioned and discussed to a notable extent by the decision in question, the case should fall in this category. The purpose of the classification is only to illustrate the existence of these two groups and not to suggest that national cases and EU cases would be two completely separate, 'watertight compartments'.

In light of the aforementioned context, the cases adjudicated by the Finnish courts can be categorized into two distinct groups: (a) 'national cases', which encompass cases determined exclusively on the basis of national law, and (b) 'EU cases', which pertain to cases that involve an element of EU law in conjunction with national law.

One method of presenting the group of EU cases and better setting out their mutual hierarchical relation is to start from a concept of four concentric circles. In this concept, the 'core', or the innermost circle, refers to the specific instance in which one of the Finnish supreme courts formally requested a preliminary ruling from the CJEU before deciding the case. A reference point for these can be found in the CJEU's case law database, and the national cases are published as precedents in the Finlex database. These cases are the sources

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[2] This is true both in the EU Member States and in the EEA states.

[3] Basic structure of the court system is as follows: Below the Supreme Court are the courts of appeal (*hovioikeus* / *hovrätt*) and the district courts (*käräjäoikeus* / *tingsrätt*). Under the Supreme Administrative Court there are the administrative courts (*hallinto-oikeus* / *förvaltningsdomstol*). There is also a Market Court (*markkinaoikeus* / *marknadsdomstolen*), from which the appeal lies to either of the supreme courts, according to the case. However, the application by these courts, or other judicial instances, is not discussed here. See <https://tuomioistuimet.fi/en/index/tuomioistuinlaitos/tuomioistuimet.html> accessed 1 February 2026.

[4] <https://tuomioistuinvirasto.fi/en/index.html> accessed 1 February 2026.

[5] <https://www.finlex.fi/en> accessed 1 February 2026.

[6] The notion of EU case is a technical term, which is inspired by a study concerning Poland. Monika Domańska, Dawid Miąsik, and Monika Szwarc-Kuczer, *National courts and the application of EU law: lessons from Poland* (Routledge 2024).

of law at the level of precedent in the national system, and their content has been guided by the interpretation requested from the Court of Justice of the European Union.[7]

The second circle comprises additional precedents from the two supreme courts that pertain to EU law and explicitly cite EU law as a source of law. However, the decisions included in this category have not been preceded by a request for preliminary ruling to the CJEU.

The third circle consists of decisions by other national judicial courts (district courts, courts of appeals, administrative courts, special courts, etc.) subsequent to preliminary ruling procedures. While the value of these as sources of national law may be more limited, their significance in relation to EU law is determined by the dialogue initiated between the national court and the Court of Justice. From the perspective of EU law, however, these are important cases, as the Court of Justice has been involved by issuing a preliminary ruling in the course of these cases.[8]

The fourth and outermost circle encompasses rulings issued by tribunals other than the highest judicial bodies, pertaining to EU law, and lacking a request for preliminary ruling. This circle consist thus of cases decided by the courts below and the decisions of which are not normally published in Finlex.

Even if the two innermost circles are the most important ones and the cases therein are easily accessible when published as precedents, they may still be somewhat difficult to find as they are not indexed as EU cases.

3 THE CLEAR CASES, THE UNFOLDING CASES AND THE LATENT (HIDDEN) CASES

For the purposes of a recent study by the author of the current article *(EU-oikeus Suomessa*, AlmaInsights 2025), extensive research was carried out manually in the databases to identify the Finnish EU cases for the period 1995-2024.[9] In that book, the case law is presented as classified according to different sources of EU law (the treaties, the Charter, the international agreements, regulations, directives, and other instruments). Based on the book, this article proposes a threefold framework for the classification of national EU cases. The objective of the framework is to facilitate a deeper understanding of the variations in the national EU cases and to cast light on the various formats in which these cases manifest. As a kind of conceptual model, the EU cases can be divided into three groups: (1) clear EU cases, (2) unfolding EU cases, and (3) latent (hidden) EU cases. The following examples are presented to illustrate these three categories of the case law examined in the aforementioned study.

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[7] The role of this judicial dialogue is discussed in Niilo Jääskinen, 'Judicial dialogue between national supreme administrative courts and the Court of Justice of the European Union' in Koen Lenaerts, Jean-Claude Bonichot, Heikki Kanninen, Caroline Naômé and Pekka Pohjankoski (eds), *An ever-changing Union?: perspectives on the future of EU law in honour of Allan Rosas* (Hart 2019) 129.

[8] The role of these cases at EU level is discussed in Graham Butler, 'Lower Instance National Courts and Tribunals in Member States, and Their Judicial Dialogue With the Court of Justice of the European Union' (2021) 4(2) Nordic Journal of European Law 19.

[9] Pekka Aalto, *EU-oikeus Suomessa* (AlmaInsights 2025) 57.

3.1 CLEAR EU CASES

The first and most obvious group consists of '*clear EU cases*' where the EU law dimension is evident. This is the situation, for example, in cases involving the application of an EU regulation. This instance involves a source of Union law, and its application is also directly visible in the text of the decision. To illustrate this, we take one example of each supreme court.

In a decision of 12 March 2025, the Supreme Court gave a ruling in a case concerning enforcement (KKO:2025:30).[10] A Finnish company had made a payment to a company registered in Dubai, but the assets that were the subject of the payment had been seized by the enforcement authority in accordance with Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.[11] Following the action for annulment concerning the decision of asset seizure, the Supreme Court concluded, at last instance, that the Ministry of Foreign Affairs had presented credible evidence that the seized funds were intended to be made available or used by a person subject to coercive measures. This is an example of a clear EU case: the contested decision was from the beginning based on a directly applicable EU Regulation and it was evident from the outset that the case had a direct base in EU law.

The Supreme Administrative Court gave a decision on 3 February 2025 on reuse of public data on for journalistic purposes concerning the taxation of natural persons (KHO:2025:15) .[12] In Finland, certain elements of natural persons' tax data are public and there is a long tradition that this information is republished by various journals for persons with income above a certain level (100,000 or 150,000 EUR, for example). In this case, a natural person requested from a journal, on the basis of the GDPR Regulation,[13] that his tax data is removed from the publisher's web site. The Supreme Administrative Court put in balance the protection of personal data and the exercise of freedom of expression and information. The Court determined that the processing and publication was made for journalistic purposes, for which there is an exception in the regulation, and therefore dismissed the claim. Here it can be observed that as in the case above, the link to EU law was present from the beginning, as the essence of the claim for the removal of personal data was based on the directly applicable GDPR Regulation.

3.2 UNFOLDING EU CASES

The second group includes cases where the EU dimension emerges perhaps somewhat unexpectedly. These could be characterised as '*unfolding EU cases*'. In the course of proceedings in a national court, EU law is invoked even though it may not have been

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[10] Korkein oikeus / Högsta domstolen, 12 March 2025, ECLI:FI:KKO:2025:30 (<https://www.finlex.fi/ecli?uri=ECLI:FI:KKO:2025:30&locale=fi>).
[11] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2024] OJ L78/6.
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[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2026] OJ L119/1.

previously raised in the case or the effect of EU law has not been assessed, for example, for procedural reasons. It is then up to the court to consider whether the source of EU law invoked is finally applicable and what its significance is in the case. As a general example one could mention the directives. In many situations, when the national law fully transposes a directive, there may be no need to refer to the directive itself in a judicial decision, as refences to national law suffice. However, it may be necessary to resort to the text of the directive and to the case law of the CJEU in case of incorrect or incomplete implementation of a directive, which may pop up in a specific situation.

Supreme Court decision of 25 May 2023 has, at first sight, little to do with EU law (KKO:2023:35).[14] A Finnish citizen had travelled by pleasure boat from Finland to Estonia and back during the same day. On his return, he was controlled by the border guard. He had a valid passport, but he did not have it with him on the trip. As a Finnish citizen, he could enter the country without a valid travel document, but the fact that he had left the country without such a document constituted a minor border offence. He was ordered to pay 15 daily fines for the offence, but as he was a rather wealthy person the amount of each daily fine was set as 6,350 EUR, resulting thus in 95,250 EUR in total. In the course of the proceedings, the defendant invoked that in this instance EU law was applicable as he had indeed exercised his right to free movement under EU law and that such a penalty is a disproportionate sanction in view of the principle of proportionality. The Supreme Court held, after requesting a preliminary ruling from the CJUE that traveling abroad without a valid travel document constituted a minor border offense.[15] However, given the right to free movement and the principle of proportionality, the Supreme Court found that imposing the standard fine would be excessively severe and disproportionate, adjusting the penalty accordingly. In this case, although originally there was apparently no EU law aspect at hand, that aspect unfolded during the court proceedings.

Supreme Administrative Court was called to consider the possible effect of EU law for its decision of 15 November 2016 (KHO:2016:180).[16] The case related to taxation of pensions. Finland had enacted a 6% additional tax on pension income which was above a certain level. A person whose pension income was 460,000 EUR in 2013 was charged with this additional tax. In the proceedings that followed, the person contested the legality of the additional tax on various grounds and finally, on his appeal to the Supreme Administrative Court, he invoked its potential incompatibility with the EU law and equal treatment directive 2000/78.[17] Following a preliminary ruling concerning also the applicability of the Charter of Fundamental Rights,[18] the Supreme Administrative Court gave a decision, following the ruling of the CJEU that the question of taxation of pension income in this case was not in the scope of EU law and no violation of EU law in that regard could be found. In this case, there was originally no hint as to the possible relevance of

[14] Korkein oikeus / Högsta domstolen, 25 May 2023, ECLI:FI:KKO:2023:35 (<https://www.finlex.fi/ecli?uri=ECLI:FI:KKO:2023:35&locale=fi>).
[15] Case C-35/20 *A (Crossing of borders in a pleasure boat)* EU:C:2021:813.
[16] Korkein hallinto-oikeus / Högsta förvaltningdomstolen, 15 November 2016, ECLI:FI:KHO:2016:180 (<https://www.finlex.fi/fi/oikeuskaytanto/korkein-hallinto-oikeus/ennakkopaatokset/2016/180>).
[17] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[18] Case C-122/15 *C* EU:C:2016:391.

EU law. In the course of the proceedings, that aspect unfolded and the question whether there is a relevant EU aspect was resolved after a request made to the court in Luxembourg.

3.3 LATENT (HIDDEN) EU CASES

The third and most challenging group to identify consists of '*latent (or hidden) EU cases*'. These are cases where, for example, the applicable domestic law is based so fully on the provisions of a directive that it may not be necessary to refer to an EU instrument or to the relevant EU case law. These may also be cases where the EU dimension is so minor that it is not necessary to refer to the relevant EU case law. In areas where regulation has been implemented in detail, for example by means of regulations or directives, the emergence of EU law in the application situation is hardly surprising. On the other hand, the application of more general provisions may be less precise, so that it may come as something of a surprise when applied, as in the case of the Treaties.

In its decision of 17 April 2025, the Supreme Court addressed an issue relating to the equality between women and men (KKO:2025:50).[19] In this case, an association had excluded the applicant, who had applied for an expert position, from the job application process before the job interviews and subsequently hired another person, who was of the opposite sex, for the position. The Supreme Court found that the recruitment process had given rise to a presumption of discrimination in working life within the meaning of relevant provision of the Act on Equality between Women and Men. However, it ruled that the association's actions were due to other acceptable factors than gender; the Supreme Court took the view that the applicant had been excluded because the salary the applicant had requested in his job application was clearly excessive in relation to the salary level for the position in question. In reading the published version of this decision, there seems to be no mention of any EU law instrument. However, the EU law aspect comes out clearly in a dissenting opinion, where the judge writing the opinion notes that the relevant provision of national law has contributed to the implementation of the Employment Equality Directive 2006/54[20] and discusses in some detail the relevant case law of the CJEU.

On May 30, 2016, the Supreme Administrative Court rendered a decision relating to trademarks (KHO:2016:82).[21] The ruling concerned the distinctiveness of a trademark. The case was adjudicated according to the provisions established by the national Trademark Act. There is an absence of overt references to EU legal instruments, such as the Trademark Directive, in the legal reasoning of the decision.[22] The potential relevance of EU law is only made evident through extensive references to the case law of the Court of Justice and the Court of First Instance.

[19] Korkein oikeus / Högsta domstolen, 17 April 2025, ECLI:FI:KKO:2025:50 (<https://www.finlex.fi/ecli?uri=ECLI:FI:KKO:2025:50&locale=fi>).
[20] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23.
[21] Korkein hallinto-oikeus / Högsta förvaltningdomstolen, 30 May 2016, ECLI:EU:FI:KHO:2016:82 (<https://www.finlex.fi/fi/oikeuskaytanto/korkein-hallinto-oikeus/ennakkopaatokset/2016/82>).
[22] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [2008] OJ L299/25.

4 CONCLUSION

Tracing national case law applying European Union law at Member State level is in many ways a challenge. At EU level, the national decisions are not available in one location, not at least with full coverage even if there are databases which present summaries of national case law in a sporadic manner.[23] At national level, as has been discussed for Finland, there is no direct way of accessing the national case law applying the EU law, as these cases are not indexed systematically either by the Courts themselves nor the easily available. Yet the national application is the essential other half of EU law, offering the judicial protection at the national level for the rights and obligations emanating from EU level.[24] The examples presented above may be useful in further identification of national cases. This is of particular significance for EU law research, as it helps lawyers in arguing the EU aspects of cases before national courts and may be of assistance to national judges in deciding new EU cases.[25]

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[23] See for example the database maintained by the EU Fundamental Rights Agency (<https://fra.europa.eu/en/case-law-database>) or the database of ACA-Europe (<https://www.aca-europe.eu/index.php/en/dec-nat-en>).

[24] The national application has been assessed at the European level in some works of comparative nature, see for example Pekka Aalto, Samuli Miettinen and Juha Raitio, 'Finland' in Botman M and Langer J (eds), *National Courts and the Enforcement of EU Law The Pivotal Role of National Courts in the EU Legal Order*. The XXIX FIDE Congress in the Hague (Eleven International Publishing 2020).

[25] The essential role of the national courts has been underlined by President Koen Lenaerts of the Court of Justice of the European Union, see for example an interview in Europa Felix podcast (April 25, 2023), "Unierecht is nationaal recht" (<https://www.europafelix.eu/>) accessed 1 February 2026 (working translation of the Dutch original): "The judiciary of the Union is not the Court of Justice of the European Union. It's the national courts. If you want to say, yes, but where is the Court of Justice, I would say: the invisible part of the iceberg carries the iceberg. The visible tip may be the Court of Justice and the General Court in Luxembourg, but that is not the essence. At the heart of the system are national courts – civil courts, commercial courts, criminal courts, tax courts, administrative judges, constitutional judges sometimes – who apply and enforce EU law. […] The Court now receives a 600 preliminary ruling cases per year. And these are all rulings that raise a problem for the first time – by and large – and that is good. For this purpose, the system of references for a preliminary ruling was envisaged. However, if there are sufficient indications, the national courts, including the highest courts, must do their own work […]. The real courts of the European Union are the national courts. We are a court with jurisdiction assigned to us, of which the preliminary ruling procedure is an important competence — not the only one, but an important one. But for the rest: all disputes between private parties, all disputes between, on the one hand, a private party and, on the other, a public authority of the Member States, fall within the exclusive jurisdiction of the national courts. Even where the substance is concerned with EU law. So that's something we must always bear in mind."

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