
INFRINGEMENT PROCEEDINGS AS A TOOL FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION

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List of abbreviations

CJEU	Court of Justice of the European Union
DG	Directorate-General
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	Fundamental Rights Agency
NGOs	Non-governmental organisations
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Article 2 of the Treaty on the European Union (TEU) states that the Union is founded on the values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. This report explores the potential of infringement proceedings filed against the European Union (EU) member states to ensure compliance with EU law, to uphold the values enumerated in Article 2 TEU, and in particular, to ensure that member states fully adhere to fundamental rights in the scope of application of Union law.

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), the Commission may file an action to obtain from the Court of Justice of the European Union (CJEU) a judgment finding that a member state has failed to comply with EU law. However, the potential of using this power remains partly untapped in the area of fundamental rights.

This report argues that infringement proceedings should become part and parcel of a fundamental rights policy of the EU. As set out in Article 7 TEU, the values listed in Article 2 TEU are subject to a form of political monitoring. Moreover, discrete violations of fundamental rights that stem from measures adopted by national authorities in the scope of application of EU law can be challenged before domestic courts which, in turn, can refer a question of interpretation of EU law to the CJEU, in accordance with Article 167 TFEU. However, neither the “nuclear option” of Article 7 TEU -- addressing recommendations to a member state, in order to establish whether there is a clear risk of a serious breach of the values of the Union or sanctioning a member state who is in serious and persistent breach of such values -- nor the case-by-case approach relying on the filing of individual claims before domestic courts and the subsequent referral to the CJEU, are adequate substitutes for a more robust use, by the European Commission, of infringement proceedings. The activation of Article 7 TEU faces a number of procedural hurdles before effective sanctions can be imposed on a member state committing human rights violations. Preliminary rulings by the CJEU, come too late, many years after violations have occurred: as a result, they have a limited impact as a tool to ensure the adequate protection of fundamental rights.

The report first describes how infringement proceedings work (chapter II). It examines both the sequence of events that may lead to a judgment of the CJEU finding that a member state is in violation of its obligations under EU law, and the use that, in practice, the Commission has made of its power to file such proceedings against member states. Since December 2016, the Commission has made it explicit that it would make more “strategic” use of its powers under Article 258 TFEU: infringement proceedings shall be filed only as a last resort, in cases that shall be carefully selected, and only where no agreement can be reached with the member state who is suspected of failing to comply with their obligations under EU law. This clarification confirms what is already a practice of the Commission, which tends to file such proceedings, if at all, only when it feels highly confident about its chances of convincing the CJEU that EU law has been violated. In more borderline cases, it appears to prefer to count on the referrals from domestic courts to the CJEU as a means of ensuring compliance with EU law. Such referrals present the advantage that the Commission invests less political capital, and fewer resources, in the enforcement of EU law. Moreover, national courts have been regularly invoking the Charter of Fundamental Rights in the requests for preliminary rulings sent to the CJEU, which may create the impression that such references are an adequate substitute for infringement proceedings. The current practice is therefore understandable, and it has a certain institutional logic to it.

Chapter III of the report questions the assumptions behind the existing practice. In order to do so, it examines the added value of infringement proceedings, by comparing them with the other mechanisms through which the values listed in Article 2 TEU may be upheld. Article 7 TEU establishes a form of monitoring of compliance with such values, which includes both preventive and remedial branches. This monitoring is political in the sense that the European Council and the Council of the EU have the final say in these procedures, the CJEU having no role in controlling the validity of their assessments. Where fundamental rights are violated in the field of application of Union law, the individuals aggrieved may file claims before the national courts of the member state concerned, and these courts in turn may request from the CJEU a preliminary ruling providing an authoritative ruling on the requirements of EU law.

Infringement proceedings nevertheless have a unique function to fulfil. Some breaches of the values of Article 2 TEU shall not reach a level that would justify the “nuclear options” of Article 7 TEU. Equally the balance of political forces within the Council may make it impossible to activate the procedures it provides for. Nor may preliminary rulings be considered a perfect substitute for infringement proceedings to ensure full enforcement of EU law. Individuals or groups face various obstacles in filing claims before domestic courts. Infringement proceedings, moreover, are specific in that they can be filed even prior to the adoption of individual measures applying general rules or policies to specific situations: they can operate preventively, forcing a State to comply with the requirements of EU law before specific measures are adopted that might affect individuals. This advantage is particularly important in the area of fundamental rights where, given the potentially irreversible consequences of a violation, compensation cannot be seen as equivalent to prevention. Infringement proceedings, filed by the Commission on its own initiative, are also not contingent upon the ability of individual litigants to file claims before domestic courts. They are therefore particularly effective as a means of ensuring full compliance with EU law, since they overcome a range of obstacles - both financial and practical - that impede individuals’ access to justice at the domestic level. Moreover, if it were to file actions for failure to comply with EU law more systematically where fundamental rights are at issue, the Commission would avoid a situation in which alleged violations would be presented to the European Court of Human Rights (ECtHR) prior to the CJEU being given the opportunity to provide an authoritative determination of the requirements of EU law.

In contrast to Article 7 TEU procedures or the delivery by the CJEU of preliminary rulings, infringement proceedings depend neither on political support from the member states, nor on the cooperation of domestic courts. Therefore, where fundamental rights, as part of the values of the Union, are violated in the field of application of Union law, infringement proceedings remain an indispensable tool of which the potential is currently underestimated.

Chapter IV of the report considers how the practice of infringement proceedings could be improved to strengthen the ability of such actions to uphold the values on which the Union is founded, and in particular, to strengthen the protection of fundamental rights in the application of Union law. The recommendations explored concern the status of the complainant who brings an alleged violation of EU law to the attention of the Commission; the use by the Commission of sources of information other than individual complaints; and, finally, the incentives that the member states could be given to better comply with fundamental rights in the implementation of EU law. None of these options require an amendment of the Treaties. Rather, they would consist in introducing new practices in how the Commission discharges its role of guardian of the Treaties.

Chapter V lists the key conclusions and recommendations. In order to avoid having to depend either on hypothetical political majorities within the Council (as required under Article 7 TEU procedures), or on zealous individual litigants bringing their case to domestic courts in the hope of obtaining justice many years after the facts, the Commission may wish to revisit how it exercises its powers under Article 258 TFEU: this report is an invitation to explore this possibility.

I. INTRODUCTION

In the Strategy it announced in October 2010 for the effective implementation of the Charter of Fundamental Rights, the Commission stated that infringement proceedings have a key role to play to ensure that the Charter would be fully complied with whenever the European Union (EU) member states act in the field of application of Union law:

The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. Whenever necessary it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law. Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority.¹

This report assesses what could be improved in order for this pledge to be adhered to. It is prepared at a time when developments in Poland and Hungary vividly illustrate that adherence by the EU member states to the values on which the Union is founded upon cannot be presumed, and when mutual trust is under serious threat. The report argues that neither the “nuclear options” of Article 7 TEU - to address recommendations to a member state in order to establish whether there is a clear risk of a serious breach of the values of the Union, or to sanction a member state in serious and persistent breach of such values - nor the case-by-case approach relying on the filing of individual claims before domestic courts and the referral to the Court of Justice of the European Union (CJEU) of questions of interpretation of Union law, are a substitute for a more robust use, by the European Commission, of infringement proceedings.

The Treaty on the European Union (TEU) tasks the Commission with “oversee[ing] the application of Union law under the control of the Court of Justice of the European Union”.² The Charter of Fundamental Rights, which has the status of primary law since the entry into force of the Treaty of Lisbon, obliges the Commission to “promote the application” of the Charter in accordance with its powers under the Treaties,³ and the CJEU has already noted that this, consistent with its role as guardian of the Treaties, could impose on the Commission certain positive obligations.⁴ By using more systematically its power to file direct actions against EU member states for failure to comply with EU law, or at least by making a more principled use of such power, the Commission would improve its supervision of compliance with the Charter of Fundamental Rights (and, more generally, with fundamental rights recognised in the EU legal order), thus discharging its duties under the Treaties.

The emergence of “illiberal democracies,” despite the threat of Article 7 TEU being activated, is only one indication that the current system of supervising compliance with the values on which the Union is founded upon is deficient. Beyond that specific issue, the stakes are significant from the broader perspective of the future of European integration. When the Commission adopted its 2003 communication on the values on

1 Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final of 19.10.2010, p. 10.

2 Article 17(1) of the Treaty on European Union, OJ C 326 of 26.10.2012, p. 13–390.

3 Article 51(1) of the Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 1.

4 C-8/15 P to C-10/15 P, *Ledra Advertising Ltd, et al.*, Judgment of 20 September 2016, (EU:C:2016:701), para. 59 and 67.

which the Union is founded,⁵ it explicitly linked monitoring of fundamental rights compliance with “the mutual trust on which Union policies are founded”.⁶ Indeed and illustrated recently by the *Pál Aranyosi and Robert Căldăraru* cases (see box 1), strengthening the protection of fundamental rights in the area of freedom, security and justice, may serve to cement the mutual trust on which mutual recognition of judicial decisions depends, and the mutual trust that plays a comparable role in the establishment and functioning of the internal market.⁷ A more systematic and principled use of infringement proceedings to address fundamental rights issues arising in the EU member states has the potential of improving mutual trust within the EU; but it also presents a number of challenges.

BOX 1. How a more proactive use of infringement proceedings could cement mutual trust: the example of the *Pál Aranyosi and Robert Căldăraru* cases

The judgment the CJEU delivered on 5 April 2016 in the *Pál Aranyosi and Robert Căldăraru* cases may serve to illustrate the role that compliance with fundamental rights plays in respect of integration within the EU.⁸ In these cases, the CJEU took the view that national authorities of a member state should refuse to execute a European Arrest Warrant delivered by the judicial authorities of another member state if there exists a real risk that the person against whom the arrest warrant is delivered will be subject to inhuman or degrading treatment in the receiving State (Hungary, in these cases), in violation of Article 4 of the Charter of Fundamental Rights. The CJEU arrived at the conclusion that the conditions of detention in Hungary do not allow the European Arrest Warrant to be executed by surrendering the applicants to this country taking into account, *inter alia*, a judgement delivered on 10 March 2015 by the ECtHR in the case of *Varga and Others*, according to which Hungary was in violation of the prohibition of inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR) because of the overcrowding of prison cells.⁹ The CJEU was also alerted to the reports of the European Committee for the Prevention of Torture, which the ECtHR also relied on, documenting the poor conditions of detention in overcrowded prisons in Hungary at various times between 2009 and 2013.

This is a highly significant decision. The 2002 Framework Decision on the European Arrest Warrant and the surrender procedures between member states provides in its Preamble that “the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union [now Art. 2 TEU], determined by the Council pursuant to Article 7(1) of the said Treaty [now Art. 7(2) TEU]

- 5 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.
- 6 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, cited above, para. 2.1., p. 10.
- 7 For an elaboration on this theme see, O. De Schutter, ‘Fundamental Rights and the Transformation of Governance in the European Union’, *Cambridge Yearbook on European Legal Studies*, 2007, pp. 133-175; or O. De Schutter, ‘The Implementation of Fundamental Rights through the Open Method of Coordination’, in O. De Schutter and S. Deakin (eds), *Social Rights and Market Forces. Is the open coordination of employment and social policies the future of Social Europe?*, Bruxelles, Bruylant, 2005, pp. 279-343.
- 8 Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment of 5 April 2016 (EU:C:2016:198).
- 9 The judgment was a “pilot judgment”, representative of a total of 450 similar applications filed against Hungary before the ECtHR alleging inhuman or degrading conditions of detention in that country: the Court thus considered that the six applicants before it in the *Varga and Others* case were indicative of a broader structural problem (ECtHR, *Varga and Others v. Hungary* (Appl. nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13), Judgment of 10 March 2015).

with the consequences set out in Article 7(2) thereof [now Art. 7(3) TEU].¹⁰ However, the text of the Framework Decision itself states clearly that it “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union” (Article 1(3)), and it follows from Articles 6(1) and 6(3) TEU that member states are bound to comply with fundamental rights, as listed in the Charter of Fundamental Rights and as included among the general principles of Union law, in the implementation of Union law. According to the Court, it follows that the member states involved in the execution of the European Arrest Warrant cannot set aside the requirements of fundamental rights, even when they seek to discharge a duty to cooperate with other EU member states in accordance with the principle of mutual recognition.

The Court thus rightly rejects the view according to which only if a member state has been found to be in serious and persistent breach of the values of Article 2 TEU, may a request to surrender a person subject to a European Arrest Warrant be (temporarily) denied. Instead, it sees compliance with fundamental rights as a condition for the mutual recognition of judicial decisions: cooperation in the area of freedom, security and justice, in other terms, presupposes that the EU member states can trust one another’s commitment to upholding fundamental rights. Were such mutual trust to dissolve, it is the very cement of such cooperation that would disappear.

Strengthening the use of infringement proceedings might serve to strengthen the mutual trust on which cooperation between the EU member states ultimately relies.

This report explores both the promises of a more robust use of infringement proceedings to address the situation of fundamental rights in the EU, and the challenges associated with such an approach. It proceeds in four steps. Chapter II describes infringement proceedings. It examines both the sequence of events that may lead to a judgment of the CJEU finding that a member state is in violation of its obligations under EU law, and the use that, in practice, the Commission has made of its power to file such proceedings against member states. Readers already familiar with the procedure may skip that chapter, although s/he may be surprised by what the statistical data shows concerning the evolution of infringement proceedings in recent years.

Chapter III then examines the role of infringement proceedings in upholding the values on which the Union is founded. Article 2 TEU defines these values as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Since the Treaty of Amsterdam, which entered into force on 1 May 1999, Article 7 TEU establishes a form of monitoring of compliance with such values and the mechanism was subsequently amended to include a preventive branch after the Treaty of Nice entered into force. The European Council and the Council of the EU have the final say in the procedures established under Article 7 TEU: in that sense, the monitoring is political in nature, rather than juridical. Moreover, where fundamental rights are violated in the field of application of Union law, the individuals, aggrieved may file claims before the national courts of the member state concerned, and these courts in turn, may request from the CJEU a preliminary ruling providing an authoritative ruling on the requirements of EU law.

¹⁰ Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, OJ L 190 of 18.7.2002, p. 1, Preamble, para. 10.

Do infringement proceedings nevertheless have a useful role to play? Is there any added value in increasing reliance on such proceedings, where relatively large-scale breaches of the values listed in Article 2 TEU can be addressed through the procedure established under Article 7 TEU, and where individual breaches of fundamental rights can be remedied by national courts under the supervision of the CJEU? Chapter III compares infringement proceedings to these other procedures, and seeks to identify the specific added value that infringement proceedings can provide.

Chapter IV considers how the practice of infringement proceedings could be improved in order to make them more effective in upholding the values on which the Union is founded, and in particular, in strengthening the protection of fundamental rights in the scope of application of Union law. The reforms explored concern the status of the complainant, who brings an alleged violation of EU law to the attention of the Commission; the use by the Commission of sources of information other than individual complaints; and, finally, the incentives that the member states could be given to better comply with fundamental rights in the implementation of EU law. None of these reforms requires an amendment of the Treaties. In fact, they are a matter of introducing new practices in how the Commission discharges its role as guardian of the Treaties, rather than of legal reform. They do, however, require a deliberate political choice, to tap the full potential of infringement proceedings. In order to avoid having to depend either on hypothetical political majorities within the Council (as required under Article 7 TEU procedures), or on zealous individual litigants bringing their case to domestic courts in the hope of obtaining justice many years after the facts, the Commission may wish to revisit how it exercises its powers under Article 258 TFEU: this report is an invitation to explore this possibility.

II. INFRINGEMENT PROCEEDINGS IN GENERAL: THEORY AND PRACTICE

Article 258 TFEU defines the conditions under which infringement proceedings may be brought against an EU member state for failure to comply with the requirements of EU law:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

This chapter of the report recalls the different stages of the procedure that may lead the CJEU to find that a member state has failed to comply with its obligations under EU law. It then presents a statistical overview of infringement proceedings, so as to allow the reader to understand the role played in recent years by this means of enforcement of EU law.

1. The sequence

Infringement proceedings follow a complex sequence, which starts with the Commission receiving information about potential breaches of EU law and which may or may not lead to a case being referred to the CJEU under Article 258 TFEU. The scheme on page 12 provides a summary.

A) The pre-litigation stage

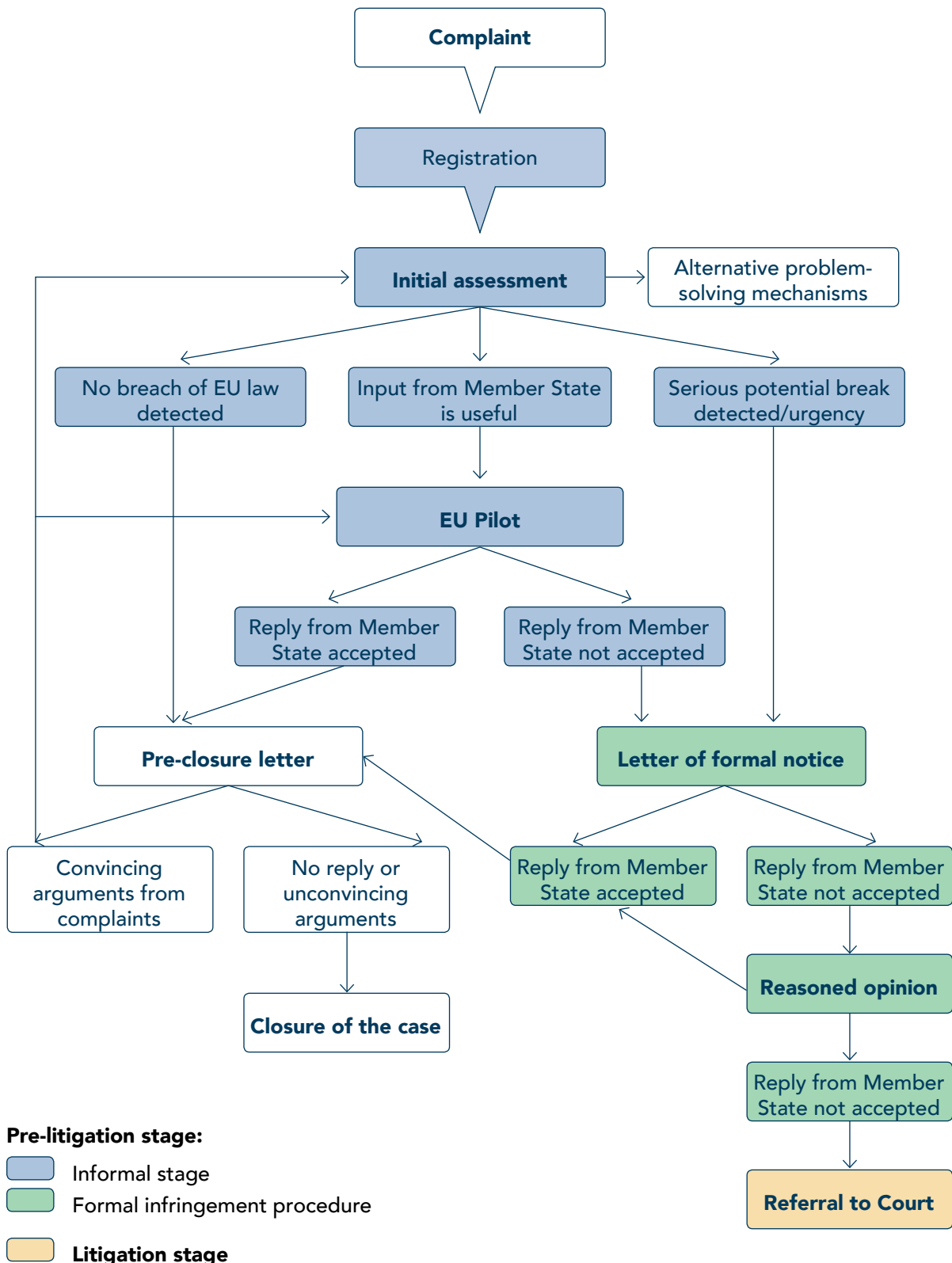
Although the scheme presented above starts with the Commission receiving a complaint, the Commission is in fact alerted to potential violations of EU law through various channels. In addition to complaints from individuals or from organisations, for which a specific form is made available since 1999,¹¹ the sources of information may include: petitions filed with the Petitions Committee of the European Parliament; complaints filed with the European Ombudsman; cases referred to the CJEU through the referral procedure of Article 267 TFEU. This list is non-exhaustive, however, and the Commission may be informed about potential infringements through any other means. A relevant question is therefore whether the Commission could make a more systematic use of certain sources of information concerning the situation of fundamental rights in the EU member states, for instance on the basis of work of the Fundamental Rights Agency (FRA) or of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament: this question is addressed further in this report (chapter IV, section 2).

On the basis of the information received, the Commission first develops informal contacts with the national authorities of the member state concerned, in order to obtain all the information required to prepare the “Letter of Formal Notice”.¹² Until recently, the search for a solution with the member state was facilitated by a systematic reliance on the “EU Pilot” tool. This tool has been reformed in December 2016, and it shall only be used on an exceptional basis in the future (see box 2).

11 The form is available at the following address: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/. The use of the form is not compulsory, however.

12 C-293/05, *Commission v. Italian Republic*, Judgment of 30 November 2006 (EU:C:2006:750), para. 22.

FIG. 1. The handling of infringement proceedings



Source: European Ombudsman, Decision following the strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints (14 September 2017), at: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/83646/html.bookmark>.

BOX 2. EU Pilot: facilitating the resolution of suspected violations of EU law through horizontal contacts between the Commission services and national administrations

EU Pilot was introduced in 2008, largely inspired by SOLVIT, a mechanism developed since 2002 to facilitate compliance by member states with internal market legislation without having to resort to infringement proceedings.¹³ EU Pilot consists of an online tool to facilitate the contacts between the Commission and national authorities, allowing the Commission to receive information about the situation in a member state (and in particular, on whether or not that State complies with EU law). By 2016, all the 28 EU member states were taking part in the scheme, which boasted a high rate of successful resolution of the cases: in 2014 and 2015, 75% of the cases were closed after the Commission received a satisfactory answer from the State, and the average time national administrations took to answer a request for information from the Commission was 78 days, barely more than the target benchmark of 70 days.¹⁴ EU Pilot also contributed to the enforcement of legislation related to fundamental rights: although suspected infringements related to fundamental rights do not form a specific category in the data collected on EU Pilot, 12% of the 881 EU Pilot files opened in 2015 concerned the justice and consumers area, which includes, *inter alia*, free movement and citizenship rights.¹⁵

The December 2016 ‘Better Regulation’ communication now provides that reliance on EU Pilot shall henceforth be less systematic: it shall become the exception, not the rule; and it shall in any case be subject to approval at the political level within the Commission, i.e., by the cabinet of the relevant Commissioner. According to the Commission: “The structured problem-solving dialogue between the Commission and Member States, known as EU Pilot, was set up to quickly resolve potential breaches of EU law at an early stage in appropriate cases. It is not intended to add a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State. Therefore, the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case”.¹⁶

The choice not to rely systematically on EU Pilot is thus ostensibly explained by the need to move to a more expeditious processing of infringement files. Another consideration, however, which seems to have played a role in the ‘new approach’ described in the ‘Better Regulation’ communication, is that infringement proceedings must go through the College of Commissioners. They are thus subject to a form of political control. In contrast, the horizontal exchanges between the relevant Commission services and the national administrations of the EU member states on which the EU Pilot procedure relies, are quasi-informal, providing a discreet means of addressing problems, but (until the recent changes were introduced) with little transparency and no form of political control within the Commission.

¹³ See <http://ec.europa.eu/solvit/>.

¹⁴ See http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm (last consulted on 6 April 2017).

¹⁵ *Id.*

¹⁶ Communication from the Commission, EU Law: better results through better application, OJ C 18 of 19.1.2017, p. 10 (initially published on 13 December 2016).

It is still too early at the time of writing to assess the impact of the ‘new approach’ introduced by the December 2016 ‘Better Regulation’ communication, both on the speed at which suspected breaches of EU law shall be addressed, and on the effective resolution of the problems caused by such breaches. The recent changes shall make contact between the Commission services and the national authorities subject to political authorisation. This can have the effect of increasing the pressure on the member state concerned to comply at an early stage, since a signal shall be sent that the Commission is taking seriously the allegations that EU law is infringed. However, it could also discourage the Commission services from being proactive, and some powerful member states, with more support within the political levels of the Commission, could escape scrutiny as a result. Thus, the ‘new approach’ further raises the stakes of a principled approach to infringement proceedings: it makes it even more important that the Commission exercises its powers under Article 258 TFEU in ways that are transparent and consistent with its role as guardian of the EU Treaties.

If the answer provided by the member state concerned is not satisfactory, the Commission may choose to commence formal infringement proceedings. This is considered to be a discretionary choice of the Commission.¹⁷ In practice, a proposal to launch such proceedings emanates from the Directorate or Directorates General concerned, after consultation with the Legal Service and the Secretariat General of the Commission. Once such a proposal is made by the competent services, it goes to the political level. The members of the cabinets of the different Commissioners may reach a consensus (or, in the more sensitive cases, a consensus may be reached at the level of the chefs at a “HEBDO” meeting), in which case the matter will be presented as part of the ‘A points’ on the agenda of the College of Commissioners. Political considerations play an important role, however, in the shaping of such a consensus, and these considerations unfortunately are not limited to views about how the general interest of the EU should be defined. According to one commentator, horse-trading is common practice: “More than one cabinet responsible for the area concerned lost credibility with its peers by frankly doing the bidding of the Member State from which its member of the Commission comes, instead of actually following the advice of the services that proceedings should be commenced against that Member State”.¹⁸

If a consensus is not reached among the representatives of the different Commissioners, the cabinet of the Commissioner responsible may refer the issue back to the services; close the dossier by taking no further action, sometimes as part of a “deal”, with other dossiers being given priority to appease other cabinets; or,

17 There is an abundance of case-law to the effect that the Commission has a discretionary choice in this regard: the CJEU confirms that “Under the system laid down by Article 169 of the Treaty [now Art. 258 TFEU], the Commission has a discretion to bring an action for failure to fulfil obligations and it is not for the Court to assess whether it was appropriate to exercise that discretion” (C-152/98, *Commission v. The Netherlands*, Judgment of 10 May 2001 (EU:C:2001:255), , para. 20); “It is not for the Court to judge whether that discretion was wisely exercised” (Case C-383/00, *Commission v. Federal Republic of Germany*, judgment of 14 May 2002 (EU:C:2002:289), para. 19 (citing Case C-236/99 *Commission v Belgium* [2000] ECR I-5657, para. 28). Thus for instance, after the Commission filed proceedings against Luxembourg because of the conclusion of a bilateral agreement between Luxembourg and the United States of America on air transport, an area in which the Commission considered member states to not be competent, Luxembourg argued that the case should really have been filed against the Council, which has failed to give a mandate to the Commission to negotiate an agreement with the United States on behalf of the European Community. The Court answered that “in its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations, and on account of which conduct or omission attributable to the Member State concerned those proceedings should be brought (see Case C-431/92, *Commission v Germany* [1995] ECR I-2189, paragraph 22)” (C-472/98, *Commission v. Luxembourg*, Judgment of 5 November 2002 (EU:C:2002:629), para. 37).

18 L. Gormley, “Infringement Proceedings”, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, Oxford University Press, 2017, p. 65-78, at 67.

the matter may be brought to the College of Commissioners as part of the “B points” on the agenda, that call for a discussion within the College, in which again political considerations of expediency - in which not all member states shall be treated equally - shall predominate.

If the dossier passes those hurdles - that is, if agreement is found within the College of Commissioners - the formal phase of the infringement procedure may commence. It starts with a request for information to the member state concerned, in the form of a “Letter of Formal Notice”. The letter is prepared by the Directorate-General (DG) responsible, with comments from other relevant DGs and after review by the Legal Service. The Letter of Formal Notice is a legal document, essential for circumscribing the scope of the dispute. As noted by the CJEU, “it follows from the function assigned to the pre-litigation stage of proceedings for failure of a State to fulfil its obligations that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence (Case C-289/94 *Commission v Italy* [1996] ECR I-4405, paragraph 15) and, second, to enable the Member State to comply before proceedings are brought before the Court (Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraphs 23 and 24).”¹⁹

The Letter of Formal Notice specifies within which timeframe the request must be answered: the member state is usually given two months. If the national authorities fail to answer or if the Commission is not satisfied with the answer and is reinforced in its suspicion that the member state in question is failing to fulfil its obligations under EU law, the Commission may then send a formal request to comply with EU law. This is the “Reasoned Opinion”, which calls on the member state to inform the Commission of the measures taken to comply within a specified period, which again shall usually be two months. Though it may expand on the Letter of Formal Notice and make certain points more explicit,²⁰ the Reasoned Opinion must, in principle, be founded on the same grounds and submissions as the initial Letter of Formal Notice, since the rights of defence of the member state concerned would otherwise be violated.²¹ Of course, if a change occurs in the legislation or policy of the member state concerned, the Reasoned Opinion may reflect this, or a new formal notice may be sent.

Both the Letter of Formal Notice and the Reasoned Opinion are adopted by the College of Commissioners. In part because it concerns the use of the discretionary powers of the Commission, the principle of collegiality is in principle fully applicable to these decisions, according to which the Commissioners participate equally in the adoption of decisions. It follows, in particular, that such decisions “should be the subject of collective deliberation and that all the members of the College of Commissioners should bear collective responsibility at political level for all decisions adopted”.²² The Court has made it clear, however, that, although “both the Commission’s decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfil obligations must be the subject of collective deliberation by the college of Commissioners”, requiring that “the information on which those decisions are based” be made available to the members of

19 C-230/99, *Commission v. France*, Judgment of 15 February 2001 (EU:C:2001:100), para. 31.

20 As noted by the Court, “although the reasoned opinion provided for [in Article 258 TFEU] must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice” (Case C-279/94, *Commission v Italy*, Judgment of 16 September 1997 (EU:C:1997:396), para. 15; Case C-191/95, *Commission v. Germany*, Judgment of 29 September 1998 (EU:C:1998:441), para. 54).

21 Case 166/82, *Commission v. Italy*, Judgment of 27 April 1988 (EU:C:1988:206), para. 16.

22 Case C-191/95, *Commission v. Germany*, Judgment of 29 September 1998 (EU:C:1998:441), para. 39.

the College, it is “not necessary for the College itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form”.²³ Indeed, in practice, it is common for Letters of Formal Notice, Reasoned Opinions and decisions to file infringement proceedings, to be decided by the College of Commissioners through a written procedure: the draft decision is communicated to all the Commissioners, who are considered to approve the proposal unless, within a specific time frame, objections or reservations are expressed. The Court has made it clear that such a procedure complies with the principle of collegiality, provided the information made available to the Commissioners is sufficiently comprehensive.²⁴

BOX 3. Deadlines and provisional measures

Both the “Letter of Formal Notice” and the subsequent “Reasoned Opinion” impose a certain deadline to the member state concerned to answer to the Commission. Although, as mentioned above, the standard deadline is two months at both stages, the deadline can be quite short in exceptional cases (i.e., a week or two weeks) where the matter is particularly urgent. Of course, since the Commission notifies in these documents that it believes the State is in violation of EU law, one reaction of the State may be to suspend or annul the measure that the Commission seeks to challenge; the member state will thus avoid infringement proceedings being filed.

The Commission may be explicit about which measures the State may have to take in order to comply, namely by addressing a recommendation to the State concerned. A recommendation by the Commission that the State should suspend a measure or adopt a particular conduct to put an end to the violation does not impose a legal obligation upon the State, however,²⁵ and the State may thus choose to ignore it. It does so, however, at its own peril, since by choosing not to comply, it faces the risk of infringement proceedings leading to a finding of non-compliance.

Once the infringement action is filed, since it may take time to be decided (about 20 months on average - see figure 2), the Commission may request from the Court under Article 279 TFEU that to avoid serious and irreparable harm, the Court grant provisional measures.²⁶ In contrast to the recommendations addressed to a member state by the Commission, such provisional measures are obligatory for the State concerned.

Such interim measures may be granted where four conditions are satisfied: the main action for infringement appears *prima facie* well founded; the interim measure requested relates to the case; the

23 Case C-191/95, *Commission v. Germany*, Judgment of 29 September 1998 (EU:C:1998:441), para. 48.

24 See in particular Case C-251/09, *Commission v. Cyprus*, Judgment of 17 February 2011 (EU:C:2011:84), para. 17.

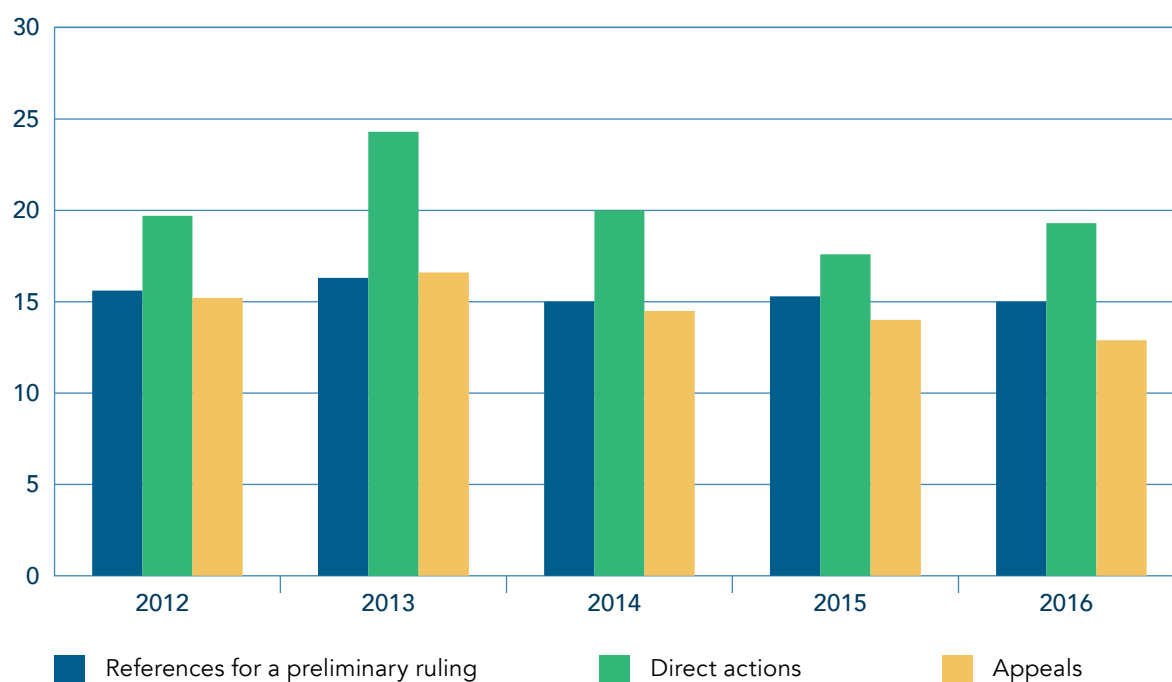
25 See Joined Cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, *Arizmendi*, Judgment of 18 December 2009 (EU:T:2009:530), para. 87: “The objective of the pre-litigation procedure provided for in Article 226 EC [now Article 258 TFEU] is to give the Member State concerned an opportunity to comply with its obligations under Community law or to avail itself of its right to defend itself against the complaints made by the Commission (Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 25). The Member State is thus under no obligation to follow that reasoned opinion but may, if it considers that the Commission is wrong to accuse it of failing to fulfil its obligations, not comply with that opinion”.

26 Article 278 TFEU, OJ C 326 of 26.10.2012 provides that: “Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.” Article 279 TFEU (ex Article 243 TEC) provides for the possibility for the CJEU to prescribe any necessary interim measures in any case before it.

measure requested is required in order to avoid serious and irreparable harm, thus guaranteeing “the full effectiveness of the definitive future decision [of the CJEU]”²⁷; and the grant of the provisional measure is justified based on a balance of all interests involved.²⁸

Article 160(7) of the Rules of Procedure provide that the President of the Court “may grant the application even before the observations of the opposite party have been submitted”. This rule allows the swift adoption of an order granting provisional measures, where the urgency of the matter justifies this. The Court has acted with remarkable speed on some occasions. In C-441/17 R, *Commission v Poland* (interim order against authorising logging in protected forests), the Court ordered interim measures 7 days after the application was made, before receiving observations from the Polish Government. In C-293/85 R, *Commission v Belgium* (fees charged to foreign students), the Court ordered a hearing 21 days after the application and granted the interim measures in an order 2 days later. In C-320/03 R, *Commission v Austria* (ban on driving lorries on an A12 motorway), the Court granted interim relief 5 days after the Commission application was made (before hearing Austria), held an oral hearing 3 weeks later and maintained the interim relief.

FIG. 2. Duration of proceedings in months (2012-2016)



Source: Report of activities of the Court of Justice of the European Union - 2016, p. 100.

27 C-76/08, R, *Commission v Malta*, Order of the President 24 April 2008, para. 31 (interim order against authorising hunting of protected birds).

28 Article 160 of the Rules of Procedure of the Court of Justice of 25 September 2012, OJ L 265 of 29.9.2012, as amended on 18 June 2013, OJ L 173 of 26.6.2013, p. 65 and on 19 July 2016, OJ L 217 of 12.8.2016, p. 69.

B) The litigation stage

In the vast majority of cases in which a Letter of Formal Notice, and where necessary a Reasoned Opinion is sent, either the explanations provided by the member state dispel any misunderstanding that might have occurred, or the State concerned adopts a measure ensuring that it complies with EU law.²⁹ However, if the matter is not solved to the satisfaction of the Commission, it may choose to file an action for infringement of EU law against the member state to which the Letter of Formal Notice has been sent, followed by the Reasoned Opinion. Here too, however, the Commission is considered to have full discretion as to whether or not it should file such proceedings, as well as, within certain limits, when to do so.³⁰ As such, however, the decision to file infringement proceedings does not change the legal situation of the member state: this is one reason why the decision to bring an action for failure to comply is not considered to be an act challengeable within the meaning of Article 263 TFEU, which describes the conditions under which actions for annulment may be filed.³¹

Indeed, if, having failed initially to provide a satisfactory response to the Commission following the sending of the Reasoned Opinion, the member state subsequently acts in order to fulfil its obligations, the Commission may choose either to withdraw the action, or to maintain it: whether or not there is a failure to comply is assessed by the Court at the time set by the Commission in its Reasoned Opinion, and the Court shall not dismiss the infringement action for the sole reason that the State has remedied the situation after that deadline.³² One reason for allowing the Commission to maintain its action in such circumstances is that the subsequent judgment “may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties”.³³

29 The Commission states that “in around 95% of infringement cases, Member States comply with their obligations under EU law before they are referred to the Court” (Infringements: Frequently Asked Questions, MEMO/12/12 of 17.1.2012, available at: http://europa.eu/rapid/press-release_MEMO-12-12_en.htm?locale=en (last consulted on 6 April 2017)). The figure is unverifiable per definition, since not all situations which lead the Commission to suspect that a member state does not comply with EU law are reported. It is in any case likely that a significant proportion of cases do not go to Court, not because the member state complies, but because the case is politically too sensitive and the Commission decides that filing infringement proceedings would be counter-productive. Lawrence Gormley notes for instance that: “During the recent financial crises with, in particular, Greece, it was common knowledge that many, if not all of the infringement proceedings were put on ‘hold’ to avoid alienating Greek public opinion still further” (L. Gormley, “Infringement Proceedings”, cited above, at 68).

30 There is one exception to the rule: where the excessive duration of the pre-litigation procedure makes it difficult for the defending member state to refute the arguments of the Commission, such a delay “is capable of constituting a defect rendering an action for failure to fulfil obligations inadmissible”; in such cases, “it is for that Member State to provide evidence” of the fact that the delay compromised its rights of defence (see Case C-33/04, *Commission v Luxembourg*, Judgment of 8 December 2005 (EU:C:2005:750), para. 76; Case C-562/07, *Commission v Spain*, Judgment of 6 October 2009 (EU:C:2009:614), para. 21).

31 See Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International, Inc and Others v Commission of the European Communities*, Judgment of 15 January 2003 (EU:T:2003:6), para. 79: “The commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment but does not *per se* determine definitely the obligations of the parties to the case. That determination can result only from the judgment of the court. The decision to commence legal proceedings does not, therefore, in itself alter the legal position in question (...). When it decides to commence proceedings, the Commission does not intend (itself) to change the legal position in question, but merely opens a procedure whose purpose is to achieve a change in that position through a judgment. In principle, therefore, such a decision by the institution cannot be considered to be a decision which is open to challenge”.

32 See for instance C-48/10, *Commission v. Spain*, Judgment of 18 November 2010 (EU:C:2010:704), para. 30; C-186/09, *Commission v. United Kingdom*, Judgment of 4 February 2010 (EU:C:2010:60), para. 10 (“the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes”).

33 Case 39/72, *Commission v. Italy*, Judgment of 7 February 1973 (EU:C:1973:13), para. II.

The action filed under Article 258 TFEU to obtain a judgment finding that a member state has failed to comply with its obligations under EU law, is filed before the CJEU. Though other member states and the institutions of the Union have in principle a right to intervene in the proceedings in support of one of the parties, private parties - individual or legal persons - are denied this possibility.³⁴ This also applies to the complainant on the basis of the information from which the infringement proceedings were launched. Thus, not only is the complainant not a party to the case; it is also not possible for the complainant to present the Court with its views as to the existence of a violation. In theory, this could be compensated, in part, by the possibility for the Court to request an expert opinion from any “individual, body, authority, committee or other organisation”, as stated in Article 25 of the Statute of the CJEU; this author is not aware, however, of such a possibility ever being used to allow the complainant to provide its views to the Court as to whether or not a member state has failed to comply with Union law.

Throughout the different stages of the procedure leading up to the judgment on the alleged failure of the State to comply with its obligations, the complainant is almost entirely absent. The complainant may not force the Commission to file an action for failure to comply with EU Law. According to the CJEU, the discretionary power of the Commission to decide whether or not to file proceedings implies that such a decision “cannot give rise to non-contractual liability on the part of the Community”, even in cases where, during the investigation of the complaint, the Commission allegedly infringed “general principles of law, in particular the applicants’ procedural rights, such as the right to be heard or the duty to state reasons.”³⁵ Indeed, in contrast to complainants in competition cases, for instance, in the case of a procedure for failure to comply with EU law under Article 258 TFEU, complainants may not challenge the decision to take no further action on the basis of their complaint; “nor do they have any procedural rights [...] enabling them to require the Commission to inform them and to grant them a hearing”.³⁶ The reason for this is both that complainants are not parties to the proceedings (the action for failure to comply with EU law is filed by the Commission against a member state, and therefore the principle *audi alteram partem* does not benefit the complainant), and that the Commission and the member state concerned may still come to some sort of agreement as to how the State could comply with its obligations under EU law, in some cases rendering the filing of a case unnecessary. This report returns to this issue below.³⁷

34 Statute of the Court of Justice of the European Union (see consolidated version of Protocol (No 3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012, OJ L 228 of 23.8.2012, p. 1, by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ L 112 of 24.4.2012, p. 21, by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015, OJ L 341 of 24.12.2015, p. 14 and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ L 200 of 26.7.2016, p. 137, Article 40.

35 T-202/02, *Makedoniko Metro and Michaniki AE v Commission of the European Communities*, Order of 14 January 2004 (EU:T:2004:5), paras. 43 and 45.

36 *Id.*, para. 46.

37 See chapter IV, section I.

C) The follow-up

In addition to clarifying the exact scope of the member states' obligations,³⁸ and to increasing pressure on the member state concerned to fulfil its obligations under EU law,³⁹ a finding according to which that State has failed to comply can lead to the State being liable for any damages caused by the violation.⁴⁰ The CJEU explicitly notes that “a judgment by the Court under [Article 258 TFEU] may be of substantive interest as establishing the basis of a liability that a Member State can incur as a result of its default [...]”.⁴¹

A judgment delivered following infringement proceedings can also lead to a procedure by which the CJEU may impose on the State, if it persists in failing to adopt the measures required to comply with the judgment of the Court, a lump sum or penalty payment. Unless the failure of the State to comply with the judgment concerns the notification by the State of the measures adopted to transpose a Directive adopted under a legislative procedure, such lump sum or penalty can only be proposed by the European Commission after giving the State an opportunity to present its observations.⁴²

2. Infringement proceedings in practice

Some general trends may be identified in how, in recent years, the Commission has exercised its powers under Article 258 TFEU. However, such an assessment is difficult to provide with precision, in particular because most datasets do not distinguish between different types of direct actions filed before the Court. What the statistics do show is that the vast majority of the cases presented to the Court are requests for a preliminary ruling, emanating from domestic courts. For 2016, for instance, of the 692 new cases presented to the Court, 470 (almost 70 per cent of the total) were requests for a preliminary ruling. By contrast, during the same year, the number of direct actions (for annulment, for failure to act or for failure to fulfil obligations) was at a historically low level, with a total of only 35 (or slightly above 5 per cent of the total).⁴³ In fact, in comparison to the peak reached in the years 1980-2010, during which the annual average was around 200, the number of direct actions has decreased significantly in recent years, a fact that is even more striking considering that, throughout the period, the European Communities and now the European Union have expanded their membership in successive phases of enlargement.⁴⁴ As illustrated by figures 3 and 4, which cover the years 2012-2016, the year 2016 is representative of the recent years of activity of the CJEU.

38 Case 7/71, *Commission v. France*, Judgment of 14 December 1971, para. 49 (“the procedure for a declaration of the failure on the part of a State to fulfil an obligation itself affords a means of determining the exact nature of the obligations of the Member States in case of differences in interpretation”).

39 Article 260(1) TFEU provides that “If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court”.

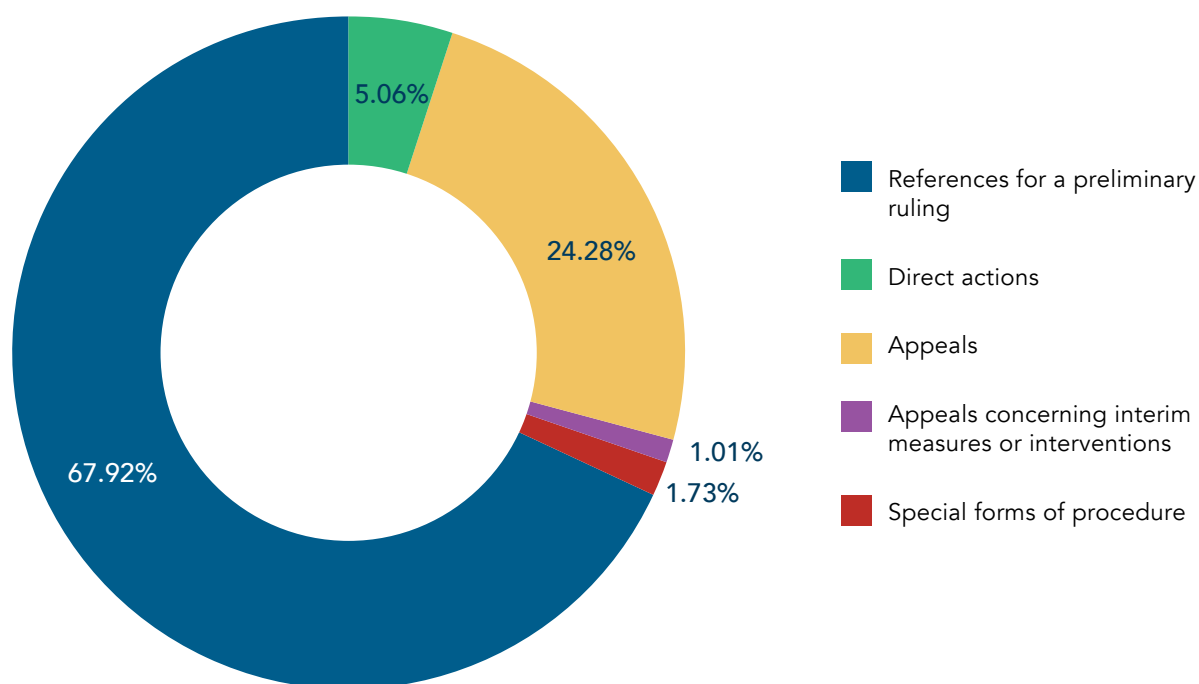
40 Joined Cases C-6 and C-9/90, *Francovich and Others*, Judgment of 19 November 1991 (EU:C:1991:428).

41 Case 39/72, *Commission v. Italy*, Judgment of 7 February 1973 (EU:C:1973:13), para. 11.

42 Article 260(2) and (3) TFEU.

43 *Report of activities of the Court of Justice of the European Union - 2016* (completed on 1 January 2017), p. 80.

44 See in this regard the data provided in the *Report of activities of the Court of Justice of the European Union - 2016*, pp. 105-106.

FIG. 3. Nature of proceedings (2012-2016) in proportion of the total number of cases


Source: Report of activities of the Court of Justice of the European Union - 2016, p. 88.

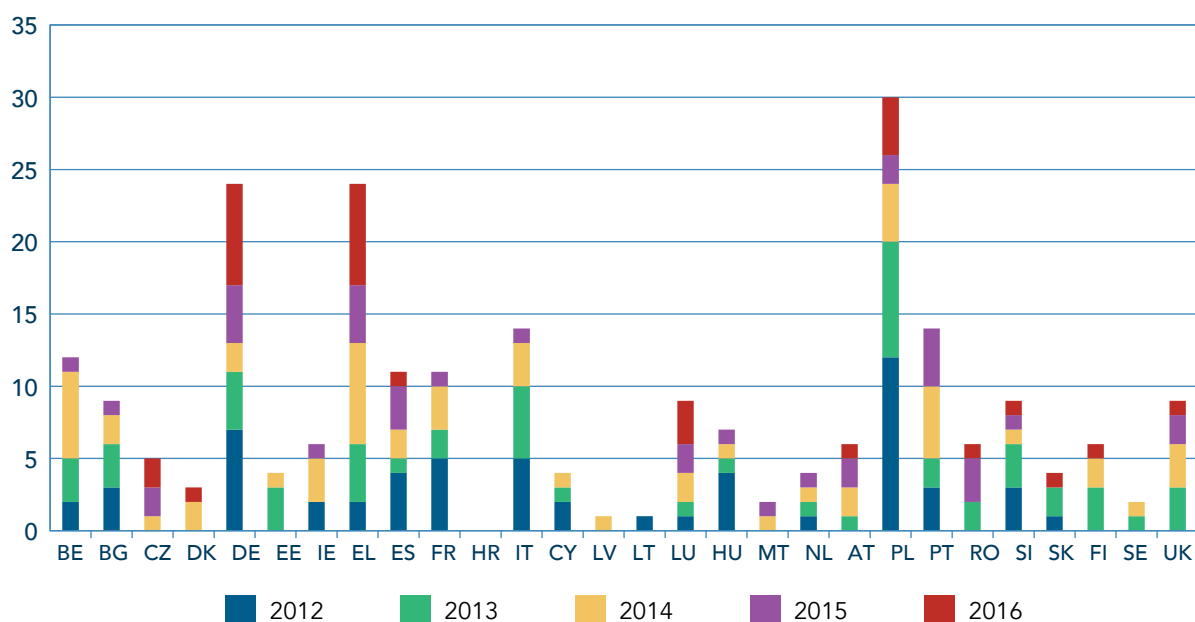
FIG. 4. Nature of proceedings (2012-2016) in absolute numbers

	2012	2013	2014	2015	2016
References for a preliminary ruling	404	450	428	436	470
Direct actions	73	72	74	48	35
Appeals	136	161	111	206	168
Appeals concerning interim measures or interventions	3	5		9	7
Requests for an opinion	1	2	1	3	
Special forms of procedure 2	15	9	8	11	12
Total	632	699	622	713	692
Applications for interim measures		1	3	2	3

Source: Report of activities of the Court of Justice of the European Union - 2016, p. 88.

Although the Commission has regularly, and still recently, emphasised the high priority it gives to the effective enforcement of EU law, *inter alia* by the filing of infringement proceedings,⁴⁵ the statistics show that such proceedings are less frequently used in recent years: whereas more than 50 such proceedings were filed each year in 2012-2014 (58 for 2012, 54 for 2013 and 57 for 2014), in 2015 and 2016 37 and 31 cases respectively were filed. Figure 5 gives an idea of the breakdown by member state, illustrating strong disparities between States. The more limited reliance on infringement proceedings in recent years seems to be related to a deliberate choice of the Commission to file actions for failure to comply with EU law only where it rates the chances of success highly. To a large extent, the statistics of the years 2012-2016 confirm this impression. This is illustrated by figure 6. Except for the year 2013 when the Commission lost 23 cases of a total of 63 infringement cases decided by the Court, the other years show that a conclusion that the member state has failed to comply with EU law is reached in the vast majority of cases that reach the Court: in 47 cases out of a total of 52 cases in 2012, in 41 cases out of a total of 44 cases in 2014, in 26 cases out of a total of 31 in 2015, and in 27 cases out of a total of 31 in 2016.

FIG. 5. Actions for failure of a member state to fulfil its obligations (2012-2016)



Source: *Report of activities of the Court of Justice of the European Union - 2016*, p. 90.

45 See in particular Communication from the Commission, *Better Regulation: Delivering better results for a stronger Union*, COM(2016) 615 final of 14.9.2016; and Communication from the Commission, *EU Law: better results through better application*, OJ C 18 of 19.1.2017, p. 10 (initially published on 13 December 2016).

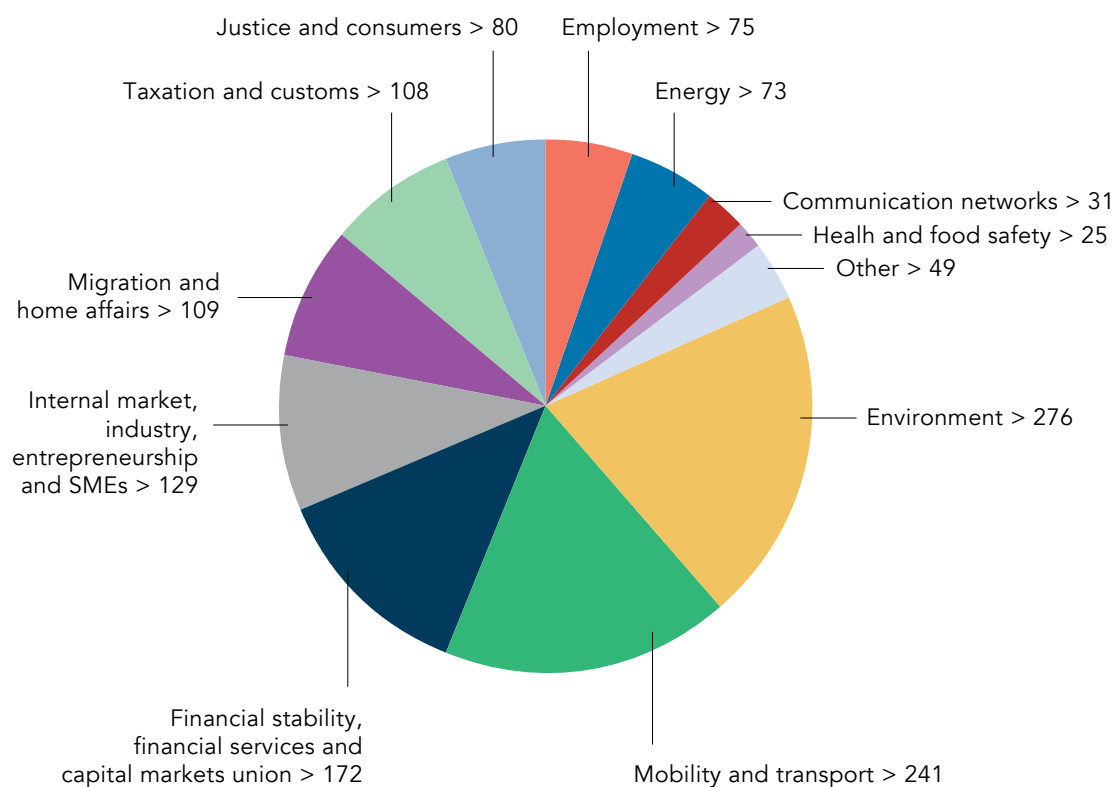
FIG. 6. Judgments concerning a failure of a member state to comply with its obligations: outcomes (2012-2016)

	2012		2013		2014		2015		2016	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	5	1	2	1	4		2		1	
Bulgaria					1	1	2		1	
Czech Republic	1		2	2					1	
Denmark			1	1	1		1			
Germany	1	2		2	3	1	3		1	
Estonia	1									
Ireland	2		3	1				1		
Greece	5		2	1	4		3		4	
Spain	3		6		6				3	
France	4		5	3	1		4		1	
Croatia										
Italy	3		7	1	6		2		1	
Cyprus	2		1						1	
Latvia							1			
Lithuania					1					
Luxembourg			1	1			2		1	
Hungary	1		1		2				1	
Malta										1
Netherlands	3	1	2	2		1			1	1
Austria	3			1						1
Poland	3		4	2	4		3	1	2	
Portugal	5			1	3				6	
Romania									1	
Slovenia	1		1				1			
Slovakia		1	1					2		
Finland	1			2						
Sweden	1		1	1	1		1			
United Kingdom	2			1	4		1	1	1	1
Total	47	5	40	23	41	3	26	5	27	4

Source: Report of activities of the Court of Justice of the European Union - 2016, p. 99.

There are no reliable statistics, however, on the number of infringement proceedings that allege that the member state has violated fundamental rights. Although the annual report of activities presented by the CJEU does include a table identifying the subject matter of the procedure, the table does not include a separate line on fundamental rights. This reflects the status of fundamental rights in EU law, which are only invoked in combination with another provision of primary or secondary law, and do not apply independently. In its latest annual report on ‘Monitoring the application of European law’, the Commission does provide some information about infringement proceedings filed in 2015 concerning this area of EU law.⁴⁶ The report does not provide statistics to this effect, however, which makes it difficult to assess the extent to which this area is given priority in the efforts of the Commission to enforce EU law. Nor does the breakdown by subject matter of infringement proceedings filed in 2015, treat fundamental rights as a separate category. Fundamental rights are referred to in infringement proceedings, if at all, as part of actions for failure to comply with EU law in areas such as migration and home affairs, justice and consumers, or employment, which are among the categories listed in figure 7:

FIG. 7. Infringement cases open at the end of 2015, by policy areas

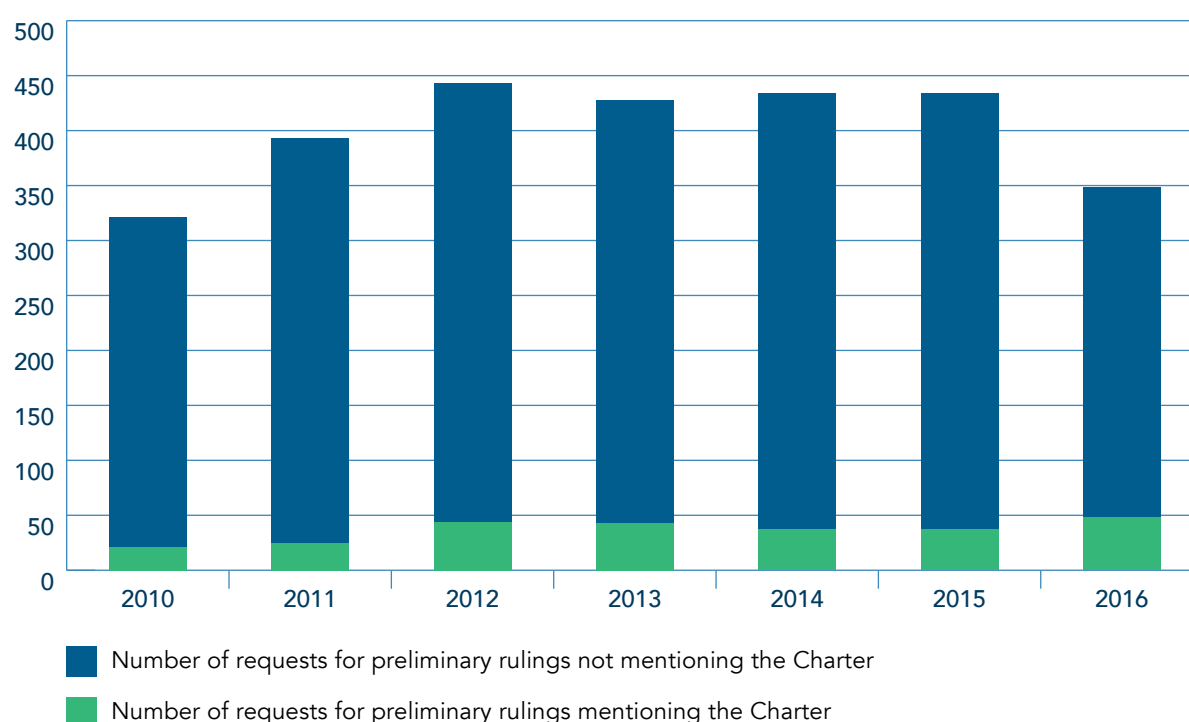


Source: European Commission, *Report from the Commission. Monitoring the application of European law - 2015 Annual Report* (2016), p. 25.

⁴⁶ See *Report from the Commission. Monitoring the application of European law - 2015 Annual Report*, COM(2016) 463 final of 15.7.2016, pp. 9-II, under the heading “An area of justice and fundamental rights”.

Even the most detailed analysis of the application of the Charter of Fundamental Rights - the report presented annually by the European Commission, as part of the strategy it announced in 2010 to promote the implementation of the Charter - does not provide data on the role of infringement proceedings in enforcing the Charter.⁴⁷ What we do know, however, is that domestic courts communicating with the CJEU by using the referral procedure have been regularly invoking the Charter of Fundamental Rights (referring to a provision of the Charter in their request for an interpretation of EU law, or - more exceptionally - requesting an assessment of the validity of EU secondary legislation). The proportion of requests for preliminary rulings invoking the Charter peaked in 2012, but since then has remained relatively low since the Charter became legally binding, as illustrated in figure 8.

FIG. 8. Proportion of requests for preliminary rulings invoking the Charter of Fundamental Rights (2010-2016)



Source: Fundamental Rights Agency, Annual report on the situation of fundamental rights in the European Union (2017)

The picture that emerges from this data is that of a Commission that shows little enthusiasm for relying on infringement proceedings against member states to force compliance with EU law. The number of such proceedings has been remarkably decreasing over the years, which can only be partially explained by the fact that a solution is often found following initial contacts with the member states concerned (contacts which, until the recent changes, the EU Pilot mechanism greatly facilitated - see box 2), or - prior to the filing of a judicial action - after the sending of a formal notice or of a reasoned opinion. The Commission tends to file infringement proceedings, if at all, only when it feels highly confident about its chances of convincing the

⁴⁷ See European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2015 Report on the application of the EU Charter of Fundamental Rights*, COM(2016) 265 final; and the accompanying *Commission Staff Working Document. Accompanying document to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2015 Report on the application of the EU Charter of Fundamental Rights*, SWD(2016) 158 final of 19.5.2016.

CJEU that EU law has been violated. In more borderline cases, it appears to prefer to count on the referrals from domestic courts to the CJEU as a means of ensuring compliance with EU law. Such referrals present the advantage that the Commission invests less political capital, and fewer resources, in the enforcement of EU law. Moreover, national courts have been regularly invoking the Charter of Fundamental Rights in the requests for preliminary rulings sent to the CJEU, which may create the impression that such references are an adequate substitute for infringement proceedings.

It is striking that neither the general annual report of the Commission on monitoring the application of European law, nor its annual report on the implementation of the Charter of Fundamental Rights, provide an analysis of how infringement proceedings contribute to upholding fundamental rights. The implication is that it is not possible to assess how seriously the Commission fulfils its pledge to give priority, in its general policy on infringement procedures, to alleged violations of EU law that raise concerns related to fundamental rights. The next chapter assesses the role of infringement proceedings in this regard. It asks how infringement proceedings can serve to uphold the values on which the Union is founded, of which fundamental rights - together with democracy and the rule of law, in particular - are part.

III. THE ROLE OF INFRINGEMENT PROCEEDINGS IN UPHOLDING THE VALUES ON WHICH THE EUROPEAN UNION IS FOUNDED

By joining the European Union, all member states have agreed to adhere to the values which Article 2 TEU lists as the values on which the Union is founded: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Actions filed by the Commission under Article 258 TFEU in order to obtain from the CJEU a judgment finding that a member state has failed to comply with its obligations under EU law may be a powerful tool to ensure that member states respect these values, and in particular, that they do not violate fundamental rights.

This chapter discusses how infringement proceedings contribute to upholding the values on which the Union is founded. It proceeds in three steps. First, it outlines the three scenarios in which infringement proceedings may serve this purpose, in particular, where a member state is allegedly acting in violation of fundamental rights. These scenarios shall be referred to, respectively, as treaty-based, legislation-based, and Charter-based. Second, the chapter compares infringement proceedings, as a legal procedure through which fundamental rights may be enforced at the initiative of the Commission, and under the ultimate supervision of the CJEU, with the political monitoring established by Article 7 TEU. Third, it compares the effectiveness of infringement proceedings with that of referrals from domestic courts to the CJEU, where violations of fundamental rights in the scope of application of EU law are invoked before the national jurisdictions of the EU member states.

Some areas of overlap exist between infringement proceedings on the one hand, and the political monitoring under Article 7 TEU and the referral procedure on the other hand. This chapter argues however that, despite such an overlap, infringement proceedings have a unique role to play: neither political monitoring, nor actions filed by individual claimants before domestic courts, are a perfect substitute to the Commission bringing a State to court for failure to comply with EU law.

1. Infringement proceedings as a tool for fundamental rights enforcement: three scenarios

Infringement proceedings may be used to impose compliance with the values on which the Union is founded in three cases: where the Treaties impose specific obligations on the member states, that correspond to these values; where secondary legislation has been adopted which implements such values; and, finally, where a member state fails to comply with fundamental rights, as part of these values, in the field of application of Union law. Each of these scenarios is presented in turn.

A) Treaty-based infringement

The European Treaties themselves impose certain human rights obligations upon member states. For instance, the member states must respect the rights of the citizens of the Union, as listed in Articles 18 to 25 TFEU; they are obliged to refrain from introducing or maintaining any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment (Article 45(2) TFEU); they must apply the principle of equal pay for male and female workers for equal work or work of equal value (Article 157(1) TFEU). Typically, infringement proceedings will be based, not on these treaty provisions alone, but also on the secondary legislation that implements them. For example, in the area of the free movement of persons, proceedings will be based on Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states,⁴⁸ or in the area of equal remuneration between men and women, on Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).⁴⁹

Whether the Commission could file a direct action against an EU member state for its failure to comply with the values listed in Article 2 TEU, once a certain threshold is reached, remains debated. In a resolution it adopted on 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights,⁵⁰ the European Parliament suggests that the Commission could “decide to launch a “systemic infringement” action under Article 2 TEU and Article 258 TFEU, bundling several infringement cases together”, where this appears justified based on the findings included in an annual report⁵¹ on democracy, the rule of law and fundamental rights incorporating the reporting done by FRA, the Council of Europe, and other relevant authorities in the field.⁵² More recently, in a resolution of 7 May 2017 concerning the situation of Hungary, in which it concludes that the country presents a “clear risk of a serious breach” of the values of the EU, the European Parliament “regrets” that the Commission did not respond to its earlier calls to activate its EU framework to strengthen the rule of law with regard to Hungary, “in order to prevent, through a dialogue with the Member State concerned, an emerging systemic threat to the rule of law from escalating further”. The European Parliament “takes the view that the current approach taken by the Commission focuses mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of measures on the rule of law and fundamental rights”, and expresses its conviction that “infringement proceedings, in particular, have failed in most cases to lead to real changes and to address the situation more broadly”.⁵³

However, relying on Article 2 TEU in the context of infringement proceedings comes up against several important obstacles, and it is doubtful that the CJEU would consider this a proper use of Article 258 TFEU (see box 4).

48 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states, OJ L 158 of 30.4.2004, p. 77.

49 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204 of 26.7.2006, p. 23.

50 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

51 This report is to be prepared by the Commission in consultation with a panel of independent experts.

52 See Article 10 of the draft Inter-institutional Agreement on arrangements concerning monitoring and follow up procedures on the situation of Democracy, the Rule of Law and Fundamental Rights in the Member States and EU institutions, proposed as an Annex to the resolution of 25 October 2016.

53 European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)) (P8_TA-PROV(2017)0216), op. para. 7.

BOX 4. “Systemic infringement” based on Article 2 TEU

The proposal for “systematic infringement” cases based on Article 2 TEU was put forward in 2013 by Kim Lane Scheppele, a professor at Princeton University and a specialist of Hungarian constitutional law. Taking as an example the action filed against Hungary after it decided to lower the age at which judges should retire (see box 5 below), she noted that the choice of the Commission to address the case as related to age discrimination under the Employment Equality Directive⁵⁴, in fact took it away from the case’s political dimension, since the move by Hungary really was about the independence of the judiciary in the country, once put in its context : “A systemic infringement action could put the various pieces of the puzzle together as a coherent whole under Article 2 TEU to enable the Commission to demonstrate that the specific issue (e.g. the lowering of the judicial retirement age) is connected to a larger pattern (e.g. a set of sudden changes to the way that judges are appointed, promoted, demoted and disciplined in Hungary). This set of legal changes could then be presented as evidence of a systemic threat to judicial independence which itself is a crucial component of the rule of law as protected by Article 2 TEU. A systemic infringement action under an Article 2 TEU banner would then enable the Court of Justice to assess systemic violations, which would be necessary to establishing a threat to the basic values of the treaties”.⁵⁵

This is a worthwhile suggestion, and it certainly deserves to be explored. However, if the Commission were to take that route, two obstacles would need to be overcome.

First, were the Commission to file infringement proceedings on the basis of Article 258 TFEU alleging that a member state has taken a series of actions that amount to a violation of the duty implicit in Article 2 TEU to comply with the values on which the Union is founded, the CJEU could decide that the specific procedure for the enforcement of Article 2 TEU - the political sanctions mechanism of Article 7 TEU - precludes the use of the normal infringement route. Like most academic observers, L. Pech and D. Kochenov believe it likely that the Court would adopt such a position: “Article 7 TEU does refer explicitly to the values laid down in Article 2 TEU and to that extent, it may be argued that Article 2 TEU comes within the *lex specialis* of Article 7 TEU and as such, cannot be used to trigger legal actions outside of this framework. In other words, Article 2 TEU cannot be relied upon by the Commission to initiate an infringement action under Article 258 TFEU”.⁵⁶ If this is correct, as this author believes it is, infringement proceedings based on an alleged violation of Article 2 TEU alone (that is, not referring to other, more specific violations of EU law) would be declared inadmissible by the CJEU.

54 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 02/12/2000, p.16.

55 Kim Lane Scheppele, What can the European Commission do when Member States violate basic principles of the European Union? The case of systemic infringement actions (blog on *Hungarian Spectrum*). See <https://hungarianspectrum.wordpress.com/2013/11/27/kim-lane-scheppele-what-can-the-european-commission-do-when-member-states-violate-basic-principles-of-the-european-union-the-case-for-systemic-infringement-actions/> (last consulted on 15 May 2017). For a more recent formulation of the proposal, see K.L. Scheppele, “Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures”, in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016.

56 D. Kochenov and L. Pech, “Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality”, *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540, at p. 520.

Second, for a “systematic infringement” case to be filed on the basis of Article 2 TEU, the Court would need to treat Article 2 TEU as justiciable. Doubts have been expressed, however, as to whether this provision is sufficiently precise to give rise to legal obligations that are enforceable through a judicial procedure. Laurence Gormley, among others, is sceptic: “Absent a sea change from the Court holding that the values in Article 2 are enforceable at the behest of individuals - and it is clear that under the existing understanding of the conditions for direct effect they are not (they are simply a statement relating to the foundations of the Union) - the likelihood of the Commission acting via the infringement proceedings route in relation to Article 2 TEU seems little more than zero”.⁵⁷ In sum, desirable though as it is, this scenario still faces formidable hurdles.

B) Legislation-based infringement

Fundamental rights may be protected under certain Regulations or Directives addressed to the EU member states, which they are bound to apply directly or to implement within their domestic legal systems. This is the case, notably, of the Racial Equality and Employment Equality Directives adopted in 2000⁵⁸, of various instruments protecting the right to respect for private life in the internal market⁵⁹ and in the processing of personal data by law enforcement authorities⁶⁰, or of a series of measures adopted in the areas of asylum and immigration⁶¹ or for the protection of the rights of defendants in criminal proceedings.⁶² Similarly, victims’ rights are protected under Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims,⁶³ and this instrument, together with Directive 2011/99/EU on the European protection order in criminal matters⁶⁴ and Regulation 606/2013/EU of 12 June 2013 on mutual recognition

57 L. Gormley, “Infringement Proceedings”, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values*, Oxford University Press, 2017, pp. 65-78, at p. 78. This scepticism is shared by D. Kochenov and L. Pech, in the paper cited above: these authors assess that Article 2 TEU “cannot in and of itself be a cause of judicial action. ... because of the relatively open-ended nature of the values laid down in Article 2 TEU, this provision lacks justiciability. In procedural terms, this means that no legal proceedings against any EU country can be brought on this sole legal basis, either before national or EU courts”.

58 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000, p. 22; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000, p. 16. See also the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426), and the position of the Parliament on this proposal, adopted on 2 April 2009, OJ C 137 E of 27.5.2010, p. 68.

59 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), OJ L 119 of 4.5.2016, p. 1.

60 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, OJ L 119 of 4.5.2016, p. 89.

61 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180 of 29.6.2013, p. 60; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337 of 20.12.2011, p. 9.

62 For instance, Directive 2010/64/EU of the EU Parliament and Council on the right to interpretation and translation in criminal proceedings, OJ L 295 of 4.12.2009, p. 1.

63 OJ L 315 of 14.11.2012, p. 57.

64 OJ L 338 of 21.12.2011, p. 2.

of protection measures in civil matters⁶⁵, can also be relied upon to protect women and girls from violence. The European legislator has thus adopted a wide range of instruments which protect fundamental rights in areas in which competences have been attributed to the European Union, and examples abound where infringement proceedings have been used to enforce secondary EU legislation, while at the same time contributing to upholding the values on which the Union is founded. This has been relied on, for instance, to address the situation in Hungary, on the basis of the prohibition of age-discrimination in the Employment Equality Directive (see box 5).

At the time of writing for instance, infringement proceedings are pending against Hungary for various aspects of its asylum legislation.⁶⁶ An initial Letter of Formal Notice was sent on 10 December 2015 after asylum legislation was reformed in July and September 2015,⁶⁷ and a complementary letter was sent on 17 May 2017,⁶⁸ in which the Commission alleges that the Hungarian asylum procedures do not comply with various requirements of the 2013 Asylum Procedures Directive⁶⁹; that “the systematic and indefinite confinement of asylum seekers, including minors over 14, in closed facilities in the transit zone without respecting required procedural safeguards, such as the right to appeal, leads to systematic detention, which are in breach of the EU law on reception conditions^[70] and the Charter of Fundamental Rights of the EU”; and that “Hungary is currently returning migrants (including asylum seekers) who cross the border irregularly to Serbia” in violation of the 2008 Return Directive.⁷¹ In April 2015 and in May 2016 respectively, Slovakia and Hungary were sent Letters of Formal Notice concerning segregation of Roma in education, on the basis of the Racial Equality Directive.⁷² All these examples illustrate the potential of infringement proceedings for ensuring compliance with the values on which the Union is founded, where European legislation has been adopted which serves such values.

65 OJ L 181 of 29.6.2013. This Regulation seeks to ensure that victims of violence (including in particular domestic violence) or persons at risk and who benefit from a protection measure taken in one member state enjoy the same level of protection in other member states to which they would move. See also Commission Implementing Regulation (EU) No 939/2014 of 2 September 2014 establishing the certificates referred to in Articles 5 and 14 of Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, OJ L 263 of 3.9.2014, p. 10.

66 Ref. 2015/2201. See also 2015/0433 and 2015/2046, concerning alleged violations respectively of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180 of 29.6.2013, and of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection as cited above.

67 See press release of 10 December 2015, IP/15/6228.

68 Press release of 17 May 2017, IP/17/1285.

69 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection as cited above.

70 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection as cited above.

71 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, OJ L 348 of 24.12.2008, p. 98.

72 Ref. 2015/2025 and 2016/2206.

BOX 5. Infringement proceedings to address Hungary’s drift towards “illiberal democracy”: the forced retirement of judges at 62 years of age

As part of a number of moves aimed at strengthening its control over Hungarian society, the government of Prime Minister Viktor Orbán led by the Fidesz Party adopted a scheme which, *inter alia*, obliged all judges and prosecutors who had reached the age of 62 before 1 January 2012 to retire on 30 June 2012. It also provided that for those who reached 62 between 1 January and 31 December 2012 that those persons were to retire on 31 December 2012. One of the troubling features of the scheme was that, in parallel, the general retirement age was to be progressively increased between 2014 and 2022 from 62 to 65 years. The Commission decided to file an action against Hungary for failure to comply with EU law, noting in particular the political aims behind the reform: “the combination of those two reforms”, it remarked, “will lead to an extremely unbalanced situation concerning the recruitment and promotion of young lawyers, in so far as, during 2012 and 2013, it may be expected that the State will carry out extensive recruitment for persons to fill vacant posts while, from 2014 – by reason of the raising of the age-limit for compulsory retirement – that recruitment process will have to slow down significantly”.⁷³

The Court concluded that Hungary had acted in violation of Articles 2 and 6(1) of the Employment Equality Directive. Although the more directly political dimensions of the case were barely alluded to by either the Court or by Advocate General Kokott, there were strong reasons to believe that the scheme under attack was a means for the majority of Prime Minister Orbán to ensure that the judiciary would rapidly, and significantly, see its composition change during those few years when it would be able to appoint a large number of judges and prosecutors. Moreover, as noted by AG Kokott in her Opinion, referring in this regard to the case-law of the ECtHR under Article 6 ECHR, although the case did not concern “measures taken by the executive in relation to individual judges or proceedings, it does concern a serious interference with the justice system, that is to say the removal of a large number of judges who, under the previous legislation, would have remained in office for up to a further eight years. The significance of such interference is not confined to circumstances where it actually seeks to influence the course of justice. On the contrary, any semblance of the exerting of influence must be avoided”.⁷⁴ This preoccupation was clearly part of the background of the case. However, as noted by K.L. Scheppele (see box 4), the filing of an infringement action alleging the violation of the Employment Equality Directive barely allowed for this broader dimension of the case to be highlighted.⁷⁵

C) Charter-based infringement

When they act in the sphere of application of EU law, the EU member states should fully comply with the EU Charter of Fundamental Rights (Article 6(1) TEU). They also must take into account the fundamental rights included among the general principles of Union law, which the CJEU derives from the ECHR or other international human rights instruments to which the EU member states have acceded to or in the elaboration of which they have cooperated, as well as from the constitutional traditions common to the member states (Article 6(3) TEU). The duty to comply with the Charter of Fundamental Rights and with

⁷³ Case C-286/12, *Commission v. Hungary*, Judgment of 6 November 2012 (EU:C:2012:687), para. 38.

⁷⁴ View presented on 6 October 2012, para. 56.

⁷⁵ See K. L. Scheppele, ‘Making Infringement Procedures More Effective’, *Eutopia Law*, 29 April 2014, available at: www.eutopialaw.com.

fundamental rights as part of the general principles of Union law is enforceable by domestic courts, under the ultimate supervision of the CJEU. A violation of this duty may also lead to infringement proceedings against the State concerned. The Commission tends to give low priority, however, to cases that do not suggest a violation of a specific provision of primary or secondary EU law, in addition to - and independently from - a violation of the Charter itself.

The typology of infringement proceedings

The typology above relates infringement proceedings to the different legal avenues through which fundamental rights are protected under EU law. This typology intersects with the more classic typology of infringement proceedings, which distinguishes infringement for failure to notify; for lack of transposition; for non-conformity of domestic legislation with EU law; and finally, for incorrect application:

	Treaty-based	Legislation-based	Charter-based
Failure to notify: a member state fails to inform the Commission about the measures adopted to transpose a Directive		The adoption of EU legislation requires member states to: notify the Commission of the transposition; transpose fully; and apply legislation correctly in individual instances.	
Lack of transposition: a member state fails to take measures to transpose a Directive			
Non-conformity of domestic legislation: the member state has incorrectly transposed a Directive or has not otherwise adapted its regulatory framework to the requirements of EU law	Acting in conformity with the EU Treaties requires that member states adapt their regulatory framework, but also ensure their correct application.		The Charter of Fundamental Rights should be taken into account in the implementation of EU law
Incorrect application: EU law is not applied, or not applied correctly, by national authorities			

2. Infringement proceedings and political monitoring of compliance with fundamental rights

This section briefly outlines the two tools of political monitoring that exist under the Treaties to allow the institutions of the Union to help uphold the values on which the Union is founded. It then explains why infringement proceedings are complementary to these tools, and why the issue is not one of competition between the various avenues through which member states can be pressured to comply with the values of Article 2 TEU, but of mutual support. Political monitoring through these two tools has proven insufficient to address the fundamental rights challenges in the EU member states: infringement proceedings therefore appear as an indispensable, albeit until now underestimated, complementary mechanism to that effect.

A) The role of Article 7 TEU

The EU member states are expected to comply with the values listed in Article 2 TEU. The Treaties provide for this duty to be enforced through non-judicial means, both preventive and remedial, outlined in Article 7 TEU.

The preventive component

Article 7 TEU stipulates the conditions under which the Council of the EU may address recommendations to a member state with a view to ensuring that the values of Article 2 TEU shall be fully complied with. Though such recommendations would only be adopted where there is a serious concern that the values of the Union may be threatened, it is not required that such recommendations are based on a prior determination that there is a “clear risk of a serious breach by a Member State” of such values. Indeed, Article 7(1) TEU provides that such recommendations can be made prior to the Council determining the existence of such a risk.

The Council of the EU may decide to address such recommendations to a member state at the request of the European Parliament, or one third of the member states, or of the Commission. The Council decides on such recommendations by a majority of four fifths of its members,⁷⁶ after obtaining the consent of the European Parliament.⁷⁷

Acting with the same majority and following the same procedure, the Council of the EU may also “determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2” (Article 7(1) TEU). Such a determination is, of course, of high political significance. It also contains a clear warning to the State concerned that, if the situation remains unchanged, it faces the threat of sanctions.

These *preventive* components of Article 7 TEU were inserted into the Treaties following the 2001 Treaty of Nice, which entered into force on 1 April 2013. Although the majorities required are important, the hurdles are not such that the preventive branch of Article 7 TEU shall remain dormant. Indeed, in a resolution adopted on 17 May 2017 by 393 votes to 221 with 64 abstentions, the European Parliament expresses its belief “that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7(1) TEU procedure”.⁷⁸ It accordingly “Instructs its Committee on Civil Liberties, Justice and Home Affairs therefore to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU”.⁷⁹ This initiative of the European Parliament may thus provide the Council with an opportunity to address recommendations to Hungary, or even to arrive at the determination that there exists a “clear risk of a serious breach” of the values of Article 2 TEU in Hungary. Whereas this could put important political pressure on Hungary, it still would not impose on Hungary a legal duty to comply with the expectations of the Council: recommendations, in the terminology of the Treaties, have no binding force.⁸⁰

⁷⁶ A majority of at least 21 member states (or 20 member states following the withdrawal of the United Kingdom) is therefore required within the Council. Indeed, in accordance with Article 354 TFEU, the Member of the European Council or the Council representing the member state in question shall not take part in the vote, and the member state concerned shall not be counted in the calculation of the majorities for these determinations.

⁷⁷ To give this consent, the European Parliament needs a two-thirds majority of the votes cast by Members of European Parliament, representing at least a majority of its members.

⁷⁸ European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)) (P8_TA-PROV(2017)0216).

⁷⁹ *Id.*, para. 10.

⁸⁰ Article 288, al. 5, TFEU.

At the time of writing, developments in Poland have led the Commission to consider invoking Article 7 TEU to propose that the Council of the EU address recommendations to that member state, or perhaps even consider the adoption of sanctions.⁸¹

The remedial component

The remedial branch of Article 7 TEU shall be more difficult to activate. Article 7(2) TEU provides that the European Council “may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2” (Article 7(2) TEU). The threshold is set at a very high level, however. Unanimity is required within the European Council: such a determination can only be made at the level of Heads of States and governments, and each member state (except for the State concerned by the procedure) has a veto right on such a determination. Once a finding has been made that a State has acted in “serious and persistent breach” of the values on which the Union is founded, the Council of the EU in turn, acting by a qualified majority, may “decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question” (Article 7(3) TEU).

This *remedial* mechanism allows, in effect, a political sanction to be imposed on the EU member state which commits a serious and persistent breach of the values on which the Union is founded. It was introduced with the 1997 Treaty of Amsterdam, at a time when the EU’s powers in justice and home affairs were being expanded and when the accession of new member states from Central and Eastern Europe was being actively prepared. The clause was meant, in particular, to deliver a clear message to the new member states about the importance that the EU attaches to the preservation of the rule of law and of democracy.

Both the preventive and the remedial procedures provided for under Article 7 TEU are political in nature. The CJEU plays no role in the decision to address recommendations or to impose sanctions under Article 7 TEU. Should the Council of the EU decide to take such measures, however, they could be challenged before the Court within a month by the member state concerned, but solely for the purpose of protection of the State’s rights of defence.⁸²

81 On the eve of the date at which this report was finalised (27 July 2017), President Juncker stated: “The Commission is determined to defend the rule of law in all our Member States as a fundamental principle on which our European Union is built (...) If the Polish government goes ahead with undermining the independence of the judiciary and the rule of law in Poland, we will have no other choice than to trigger Article 7” (Commission press release of 26/07/2017).

82 This would take the form of an action for annulment, as provided for in Article 263 TFEU. Article 269 TFEU provides however that “The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article”. This corresponds to the former Article 46(e) of the TEU (prior to the entry into force of the Lisbon Treaty). As noted by the European Commission, “despite the repeated suggestions made by the Commission in the run-up to the Amsterdam and Nice Treaties, the Union Treaty does not give the European Court of Justice the power of judicial review of the decision determining that there is a serious and persistent breach of common values or a clear risk of such a breach” (Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based (COM(2003)606 final of 15.10.2003), p. 6). For the same reasons, the General Court (formerly the Court of First Instance) considered it had no jurisdiction to assess whether the Commission acted unlawfully in deciding to refrain from initiating the procedure under Article 7 TEU against Spain following a complaint alleging breaches by this country’s courts of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law: see Case T-337/03, *Bertelli Gálvez v Commission*, Order of the Court of First Instance (Fifth Chamber) of 2 April 2004 (EU:T:2004:106), para. 15 (“The EU Treaty ... gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned”).

B) The rule of law framework

The Commission issued on 11 March 2014 a communication on a new “EU Framework to strengthen the Rule of law”.⁸³ This procedure is intended to allow the Commission to answer situations that, while not raising to the level that would justify the use of Article 7 TEU, nevertheless do seem to call for a reaction of the EU institutions.⁸⁴

The Rule of Law Framework was activated for the first time on 13 January 2016 following developments in Poland. The Commission sought to react to the political and legal dispute concerning the composition and the powers of the Constitutional Tribunal after the newly elected Polish government refused to appoint three members of the Tribunal elected under the former majority and shortened the mandate of its sitting president and vice-president. Following an “intensive dialogue” with the Polish authorities, the European Commission “deemed necessary” to formalise its concerns in a Rule of law Opinion, first step of the Rule of Law Framework process, adopted by the College of Commissioners on 1 June 2016.⁸⁵ Since Poland did not satisfactorily address the concerns expressed by the European Commission, the Commission then addressed a Rule of Law Recommendation to Poland, adopted by the College of Commissioners on 27 July 2016.⁸⁶ The Recommendation defines a number of measures that Poland is expected to take within a time limit of three months. It was followed by a complementary Rule of Law Recommendation on 21 December 2016⁸⁷ and a third Recommendation on 26 July 2017.⁸⁸ The Commission justifies its assessment that there is a “systematic threat to the rule of law” as follows :

The fact that the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland. Where a constitutional justice system has been established, its effectiveness is a key component of the rule of law.

Respect for the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 of the Treaty on European Union. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law, and for establishing mutual trust of citizens, businesses and national authorities in the legal systems of all other Member States.⁸⁹

83 COM(2014) 158 final.

84 For an assessment, see D. Kochenov and L. Pech, “Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality”, *European Constitutional Law Review*, vol. 11(3), December 2015, pp. 512-540.

85 European Commission, press release IP/16/1828 of 18 May 2016; and IP/16/2015 of 1 June 2016.

86 Commission recommendation of 27.7.2016 on the rule of law in Poland, C(2016) 5703 final.

87 http://europa.eu/rapid/press-release_MEMO-16-4479_en.htm

88 http://ec.europa.eu/newsroom/document.cfm?doc_id=46116

89 See footnote 86, paras. 72-73.

BOX 6. The Rule of Law Framework: doubts expressed by the EU member states

Although the Rule of Law Framework may be seen as a response of the Commission both to various resolutions of the European Parliament⁹⁰ and to a request of the Justice and Home Affairs Council,⁹¹ the member states appear to have reservations about the role that the Commission sees for itself in the Framework it has proposed. In a legal opinion it adopted at the request of the Council on 27 May 2014, the Council Legal Service has taken the view that “there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU”.⁹²

However, while the Treaties do not provide for a monitoring of the compliance of member states with the values of Article 2 TEU, Article 7 TEU defines clear roles for the Commission and the Parliament: both the Commission and the Parliament may present a reasoned proposal requesting the Council to determine whether, in a member state, there exists a “clear risk” of a serious breach of these values by a member state (Article 7(1) TEU); the Commission may propose to the European Council that it determines the existence of a “serious and persistent breach” by a member state of such values, and the European Parliament must give its consent to such determination (Article 7(2) TEU). More implies less. It would appear contradictory with the tasks assigned by the Treaty to the Commission, to interpret the Treaty as prohibiting the establishment by the Commission, of a procedure which - without imposing binding obligations on the member state concerned - leads to a dialogue preceding the launching of a procedure under Article 7 TEU.⁹³

C) The complementarity of legal and political monitoring of fundamental rights

It is not the purpose of this report to provide an extensive commentary of the potential of Article 7 TEU. Rather, it aims to emphasise the potential complementarity between that procedure, providing for a form of “political monitoring” of compliance with the values of Article 2 TEU, and infringement proceedings, filed on the basis of Article 258 TFEU.

90 In various resolutions, the European Parliament requested that member states be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law. These include: resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)); resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament’s resolution of 16 February 2012) (2012/2130(INI)); resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law (2014/2006(INI)).

91 On 6 June 2013, noting that “respecting the rule of law is a prerequisite for the protection of fundamental rights”, the Justice and Home Affairs Council called on the Commission to “take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues” (Council doc. 10168/13).

92 Council doc. 10296/14.

93 This is also the view of L. Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States’ Compliance*, Oxford University Press, 2017, pp. 128-144, at p. 139 (arguing that the institutions which can initiate Article 7(1) TEU proceedings by submitting a “reasoned proposal” to that effect necessarily should be recognised monitoring powers, since “Without possessing monitoring powers, a proposal could hardly be reasoned. The adjective ‘reasoned’ is used only in the context of the initiative for triggering the preventive mechanism, and is a decisive argument to conclude that there must be powers of monitoring included in the right to initiative”); or D. Kochenov and L. Pech, “Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality”, cited above, at p. 529.

Indeed, both the Article 7 TEU and the Rule of Law mechanisms could be reinforced by a more robust and principled use of infringement proceedings against the member states concerned. It is noteworthy that, in the case of Hungary, the resolution adopted by the European Parliament on 17 May 2017, in which the Parliament expresses its conviction that the situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7(1) TEU procedure, relies both on a number of decisions of the ECtHR finding violations by Hungary of the ECHR, and on a number of alleged infringements by Hungary of EU law, including such allegations as contained in actions for failure to comply with EU law filed by the European Commission. As to the Rule of Law Framework adopted by the Commission in March 2014, it seeks, according to the communication of the Commission presenting the Framework, “to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to, but rather precedes and complements, Article 7 TEU mechanisms. It is also without prejudice to the Commission’s powers to address specific situations falling within the scope of EU law by means of infringement procedures under Article 258 of the Treaty on the Functioning of the European Union (TFEU)”.⁹⁴

A more systematic use by the Commission of its powers under Article 258 TFEU could strengthen the credibility of the use, by the various actors listed in Article 7(1) TEU (the European Parliament, one third of the member states, or the Commission itself), of their competence to present the Council of the EU with a reasoned proposal for the activation of the preventive branch of Article 7 TEU. It could, furthermore, help the Commission to build a case justifying the launch of a Rule of Law Framework procedure, a procedure whose credibility as a tool to put pressure on a member state, in fact, depends ultimately on whether the legal and political conditions for the activation of Article 7 TEU are present. In both scenarios, a more robust and principled use of the power of the Commission to file actions for failure to comply with EU law would justify presenting reliance on Article 7 TEU or on the Rule of Law Framework as an *ultima ratio*, justified only because infringement proceedings either cannot be introduced (the breach of the values of democracy, the rule of law or fundamental rights concerns situations outside the scope of application of EU law), or have been filed but have proven to be ineffective (the member state concerned has refused to comply or has only minimally complied, for instance, amending a legislation on the appointment of judges without addressing the question of the independence of the judiciary more broadly). Thus, the use of Article 7 TEU or of the Rule of Law Framework procedure would be made more legitimate by a systematic reliance on infringement proceedings when certain violations of EU law implicate fundamental rights or other values listed in Article 2 TEU. At the same time, by relying on infringement proceedings, the Commission remains fully responsible for assessing the opportunity to act, based on its conception of the general interest of the Union, and it does not depend on the collaboration of other institutions or of the member states, with all the potential veto points included in Article 7 TEU.

The complementarity between the legal and political monitoring tools for violations of fundamental rights is more complex, however, than is usually described. The Commission sees the Rule of Law Framework and the procedures established under Article 7 TEU as subsidiary to infringement proceedings. The former procedures, it states, are “applied where the ‘national rule of law safeguards’ no longer seem capable of effectively addressing a systemic threat to the rule of law in a Member State, and where such a threat cannot be addressed through infringement proceedings”.⁹⁵ Indeed, the Rule of Law Framework and the political

⁹⁴ COM(2014) 158 final, p. 3.

⁹⁵ Communication from the Commission, *EU Law: Better Results through Better Application* (December 2016), p. 3 (published in OJ C 18 of 19.I.2017, p. 10).

monitoring under Article 7 TEU may apply in circumstances where infringement proceedings cannot be considered. This may be the case, first, when the breach of the values on which the Union is founded neither constitutes a violation of other specific obligations imposed under EU primary or secondary law, nor occurs within the scope of application of Union law (so that the Charter of Fundamental Rights does not apply and the CJEU has no jurisdiction to address the violation). Second, the political monitoring established under Article 7 TEU (and the Rule of Law Framework) applies when there exists a “clear risk” that the values on which the Union shall be breached, but when the violation *has not occurred yet*, so that infringement proceedings are excluded.

It is in that sense that the the Rule of Law Framework is subsidiary to the filing of infringement proceedings. However, in situations where both procedures might apply (that is, where a violation of fundamental rights occur within the scope of application of EU law), infringement proceedings may be envisaged where political monitoring under Article 7 TEU or the Rule of Law Framework would not. Indeed, whereas any failure of the member state to comply with EU law can in principle give rise to infringement proceedings, whatever the importance of the violation or the number of people affected (though purely individual instances of non-compliance would not warrant the filing of such proceedings⁹⁶), the Rule of Law Framework and the triggering of Article 7 TEU presuppose that the alleged violation of fundamental rights reaches a certain scale. As noted by the Commission, Article 7 TEU “is not designed to remedy individual breaches. ... there must be a breach of the common values themselves for the existence of a breach within the meaning of Article 7 to be established. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem”.⁹⁷ Although infringement proceedings shall only be considered when the failure by a member state to comply with EU law goes beyond an individual instance, and is of a more structural nature, the “scale” required for infringement proceedings to be brought - or the threshold to be met - is not as high as for the “nuclear option” of Article 7 TEU to be considered or for the Rule of Law Framework where its preparatory phase is in the hands of the Commission, to be activated.

96 However significant and important they may be in the eyes of the victim, *individual* breaches of fundamental rights (breaches that do not reveal a systemic problem) could only be addressed through normal judicial procedures before domestic courts (with the assistance of CJEU if the breaches occur within the scope of application of EU law). Indeed, as the Commission explains, the CJEU “is not a judicial body or a court of appeal against the decisions of national or international courts. Nor does it, as a matter of principle, examine the merits of an individual case, except if this is relevant to carry out its task of ensuring that the Member States apply EU law correctly. In particular, if it detects a wider, e.g. structural, problem, the Commission can contact the national authorities to have it solved, and ultimately it can take a Member State to the CJEU” (*Commission Staff Working Document. Accompanying document to the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - 2015 Report on the application of the EU Charter of Fundamental Rights*, cited above, p. 3). See also Communication from the Commission, *EU Law: better results through better application* OJ C 18 of 19.1.2017, p. 10 (“Certain categories of cases can often be satisfactorily dealt with [rather than by infringement proceedings] by other, more appropriate mechanisms at EU and national level. This applies in particular to individual cases of incorrect application not raising issues of wider principle, where there is insufficient evidence of a general practice, of a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law. In such cases, if there is effective legal protection available, the Commission will, as a general rule, direct complainants in this context to the national level”). Nevertheless, infringement proceedings can be considered against a member state even where the problem does not reveal a State acting in bad faith, or systematically challenging the values on which the Union is founded.

97 Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union. Respect for and promotion of the values on which the Union is based (COM(2003)606 final, of 15.10.2003), p. 7.

The complementarities between the two forms of monitoring are summarised in the following table:

	Risk of breach		Effective breach	
	Systemic	Individual	Systemic	Individual
Outside the scope of application of EU law	Article 7(1) EU (“clear risk of a serious breach”); may be preceded by Rule of Law Framework proceedings	Domestic courts may protect the individual, provided they may act to prevent (imminent) violations	Article 7(2) EU (“serious and persistent breach”); may be preceded by Rule of Law Framework proceedings	Domestic and international courts (including the ECtHR) may protect the individual
Within the scope of application of EU law or involving a violation of EU primary or secondary law		Domestic courts may protect the individual, provided they may act to prevent (imminent) violations; referral to the CJEU is possible (Article 267 TFEU)	Infringement proceedings (Article 258 TFEU)	Individual remedies may be used (with possible referral to the CJEU under Article 267 TFEU); as well as, exceptionally, where individual violations reveal more structural problems, infringement proceedings (Article 258 TFEU)

BOX 7. Can infringement proceedings play a role in preventing human rights violations?

In order to assess the complementarity between the different avenues for the protection of fundamental rights, and in particular the added value of infringement proceedings, it is important to clarify the conditions under which such proceedings may be filed by the Commission. Article 7(1) TEU allows the Council of the EU to address recommendations to a member state, or to find that there exists a clear risk that a member state shall be in breach of the values on which the Union is founded. The latter determination requires that the risk be “clear”: this, the Commission argued, excludes “purely contingent risks”, however it does not require the risk to have “actually materialised”.⁹⁸ In contrast to Article 7 TEU proceedings in their preventive component, infringement proceedings cannot be launched merely based on the existence of a *potential* (or hypothetical) violation of EU law by the State concerned⁹⁹ Such proceedings, however, may be filed even before the measures concerned affect

98 Communication from the Commission to the Council and the European Parliament on Article 7 TEU. Respect for and promotion of the values on which the Union is based (COM(2003)606 final, of 15.10.2003), p. 7.

99 According to the CJEU, for a Letter of Formal Notice to be issued, opening up the possibility of infringement proceedings, “a prior failure by the Member State concerned to fulfil an obligation owed by it must be alleged” (C-230/99, *Commission v. France*, Judgment of 15 February 2001 (EU:C:2001:100), para. 32). Therefore, infringement proceedings cannot be filed if the measure exists only in draft form (id., para. 33; see also Case C-341/97, *Commission v Netherlands*, Order of the Court of 13 September 2000 (EU:C:2000:434), para. 19). As stated by Advocate General Alber in his Opinion delivered on 7 November 2000 in the *Commission v. France* case, “the procedure to establish an infringement of obligations under the Treaty, which starts with the letter of formal notice, is a repressive procedure. It is designed to restore observance of the Community legal order” (para. 28). It cannot be excluded, however, that in some exceptional situations, infringement proceedings may be filed preventively. See T. Materne, *La procédure en manquement d’Etat. Guide à la lumière de la jurisprudence de la Cour de justice de l’Union européenne*, Brussels: Larcier, 2012, pp. 109-110.

specific individuals: the Commission must not wait for a particular legislation to be implemented in specific cases, for instance, to take action, if it considers that the legislation in question is in violation of EU law. In that sense, infringement proceedings provide a protection against violations of EU law that is potentially more effective than the protection provided by domestic courts. Typically, and although situations vary from member state to member state, such courts can only intervene once the individual has been affected by the measure complained of, or at best, if the violation is imminent.

In order to illustrate the relationship between the political monitoring of Article 7 TEU and the filing by the Commission of an action against a member state for failure to comply with EU law, where the violation of the values of Union also amounts to a violation of primary or secondary EU law, the table below considers a hypothetical case in which a member state adopts a new piece of legislation that threatens fundamental rights, and falls under the scope of application of EU law:

		Political monitoring: Article 7 TEU and Rule of Law Framework	Legal monitoring: infringement proceedings
Stage 1	The member state announces its intention to adopt a particular legislation that would clearly breach the values of Article 2 TEU	The preventive branch of Article 7 TEU may apply. Recommendations may be addressed to a member state where serious concerns emerge that it may breach Article 2 TEU values. Moreover, a finding may be made that there is a “clear risk of a serious breach” of the values of Article 2 TEU; this may be preceded by applying the Rule of Law Framework	Premature
Stage 2	The member state adopts the legislation in question		Infringement proceedings may be considered (Article 258 TFEU), provided the measure is in the scope of application of EU law or would otherwise violate EU primary or secondary law
Stage 3	The member state applies the legislation to particular individuals, thus violating the rights of these individuals	Both the preventive and the remedial branches of Article 7 TEU may be triggered; infringement proceedings may be filed under the same conditions as above; in addition, the individual may challenge the measure applied to him/her before domestic courts (under the supervision of the CJEU if the measure is in the scope of application of EU law or may otherwise violate EU primary or secondary law)	

Thus, where a member state acts in breach of the values listed in Article 2 TEU, the relationship between infringement proceedings under Article 258 TFEU and the political mechanism provided for in Article 7 TEU is a complex one. Certain situations would only fall under one of these tools: where a violation of the values of the Union occurs through the adoption of measures that are outside the scope of application of EU law, only Article 7 TEU would potentially apply; conversely, where the violation is not widespread enough (does not reach a certain scale or level of gravity), only infringement proceedings might be envisaged. There is, however, also an area in which both procedures overlap: this is the case where a State acts in breach of the values of the Union on a significant scale, in an area that falls under the scope of application of Union law. In situations such as these, however, infringement proceedings would only be possible once the State has adopted a particular measure, and has not merely made a policy announcement it was considering adopting

such a measure: as long as we remain at the level of a State simply making such an announcement, only Article 7 TEU proceedings (in its preventive branch), or the activation of the Rule of Law Framework, can be considered.

In situations where infringement proceedings and reliance on Article 7 TEU would both be possible, there are clear advantages to a more robust and principled use of infringement proceedings. First, if and when they may be filed, infringement proceedings are a highly effective tool to bring about compliance with EU law. The possibility to impose financial penalties on the member state that does not comply with a judgment finding that that State has acted in violation of EU law, in particular, strengthens the pressure on the State to comply.¹⁰⁰ Second, by choosing to file infringement proceedings, the Commission puts pressure on the State concerned to amend its legislation or practices, without having to go through the various political hurdles required under Article 7 TEU. Thirdly, when they can both be used, the two routes are not mutually exclusive, and instead may be seen as strengthening one another. By filing one or more actions for failure to comply with EU law, without requiring that the member state concerned takes the structural measures required to avoid a repetition of the violation, the Commission can strengthen the legitimacy of its reliance on the Rule of Law Framework, and it can build its reasoned proposal for the launch of Article 7 TEU proceedings (whether preventive or repressive) on solid ground. For all these reasons, the Commission should be encouraged to rely more systematically on infringement proceedings where fundamental rights are breached in the field of application of EU law. Article 7 TEU proceedings are simply not a plausible substitute for that route.

3. Infringement proceedings and the referral for preliminary rulings

There has been a tendency in recent years to prioritise ensuring member states' compliance with EU law by relying on the procedure by which national courts refer questions of interpretation of EU law to the CJEU when they are confronted with such questions in the context of cases filed before them, allowing the Court to deliver a preliminary ruling providing an authoritative interpretation of the requirements of EU law. The procedure is described in Article 267 TFEU, and there is no need to describe it in any detail here. Rather, the question to be addressed is whether the delivery of preliminary rulings by the CJEU can be an alternative to infringement proceedings in ensuring full compliance with EU law. This author believes it does not. This conclusion is reached on the basis of four considerations.

A) The importance of a preventive approach

There are specific difficulties involved in an expectation that individuals file a claim before a domestic court in order to denounce a failure of the State to comply with EU law. In some cases, where a State adopts a rule which, though arguably in violation of EU law, imposes obligations on individuals backed by the threat of sanctions, the rule can only be challenged by individuals violating the rule at the risk of being imposed with such sanctions.

¹⁰⁰ See Article 260(2) TFEU.

Such a situation, if it occurs under the scope of application of Union law, would be contrary to the requirement that each individual must have access to effective judicial protection, a requirement formulated both by the Charter of Fundamental Rights and by the Treaty on the European Union.¹⁰¹ The CJEU itself has acknowledged that it would be unacceptable if, in order to have access to an effective judicial remedy as required under Article 47 of the Charter, the individual or legal person had to commit an unlawful act, thereby risking the imposition of penalties.¹⁰² “Effective” therefore should mean, in this context: judicial protection that does not oblige the individual to take the risk of facing certain sanctions, as a condition for that individual to have access to a judicial remedy. In practice, however, it shall be difficult in most member states for individuals to seize domestic courts preventively, i.e., before a measure applies to an individual, simply on the ground that such a measure could be adopted and that the risk of violation is sufficiently well established. Generally, the individual shall have to wait until the measure applies to him/her (including sanctions imposed on him/her), in order to be recognised standing to file a claim in court.

The more general point is that, in the area of fundamental rights in particular, *preventing* violations is arguably more effective than *remedying* violations *post hoc*. In the case of *Sürmeli v. Germany*, concerning remedies available to challenge the unreasonable length of judicial proceedings, the ECtHR - while acknowledging that, in principle, “remedies available to a litigant at domestic level for raising a complaint ... are “effective” within the meaning of Article 13 of the Convention if they prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred” - noted that “the best solution in absolute terms is indisputably, as in many spheres, prevention”^A a preventive approach, the Court said, “offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same [issue] and does not merely repair the breach *a posteriori*, as does a compensatory remedy”.¹⁰³

In this regard, infringement proceedings present a major advantage in comparison to the referral of questions of interpretation of EU law to the CJEU, on an *ad hoc* basis, by national courts before which individual claims are filed. Infringement proceedings can proceed without any individual having to run the risk of being sanctioned for violating the rule he or she seeks to challenge. And they can proceed prior to a particular rule or a particular policy or practice being applied in an individual case, with potentially irreversible consequences for the individual affected. In other terms, infringement proceedings can operate preventively, forcing a State to comply with the requirements of EU law before specific measures are adopted that might affect individuals. This advantage is particularly important in the area of fundamental rights where, given the potentially irreversible consequences of a violation, compensation cannot be seen as equivalent to prevention.

101 See, respectively, Article 47 of the Charter of Fundamental Rights and under Article 19(1) TEU, which provides that member states “shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law”.

102 See C-432/05, *Unibet*, Judgment of 13 March 2007 (EU:C:2007:163), para. 64 (“...If [the applicant were] forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it [...] effective judicial protection”); or see Case C-583/11, *Inuit Tapiriit Kanatami and Others*, cited above, Judgment of 3 October 2013 (EU:C:2013:625), para. 104 (suggesting that the EU member states may have to reform their judicial system of protection “if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully”).

103 ECtHR (GC), *Sürmeli v. Germany*, (Appl. No. 75529/01), Judgment of 8 June 2006 paras. 99-100.

B) Obstacles to the initiation of judicial proceedings at the domestic level

There are other obstacles facing the reliance on referrals from national courts as a means of enforcing EU law. In many cases where a member state may be acting in violation of EU law, domestic rules too may be violated, and national courts may prefer to frame the issue before them as one of domestic law alone - thus allowing the failure to comply with EU law to go unnoticed. The individuals aggrieved by the violation of EU law may have their individual situation addressed, i.e. by obtaining certain concessions from the national authorities or even a judgment from national courts, but without the issue of EU law ever reaching the CJEU. Or, such individuals may lack the financial means to exercise judicial remedies. In the presence of widespread but diffuse violations, individual litigants have little incentive to come forward with a claim: in the absence of collective redress mechanisms in the form of class actions or of associational standing allowing organisations to file claims on behalf of a group of individual victims or in the public interest, violations affecting large numbers of individuals, but causing only minor prejudice to each, may thus remain unchallenged. In certain cases, moreover, individuals may remain unaware of the violations that are occurring, though they may be victims: this will be the case, for instance, where personal data are being processed secretly, either in the name of public security and the prevention of crime, or for commercial purposes.¹⁰⁴

Infringement proceedings, filed by the Commission on its own initiative, are not contingent upon the ability of individual litigants to file claims before domestic courts. They are therefore particularly effective as a means of ensuring full compliance with EU law, since they can be used to overcome the range of obstacles - both financial and practical - that impede individuals' access to justice at the domestic level.

C) The pre-emption of a human rights assessment by the European Court of Human Rights

A third argument against an over-reliance on referrals from domestic courts to bring to the attention of the CJEU problems in the application of EU law by the member states, is that this may lead to an unhealthy competition between the CJEU and the ECtHR.

Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 2 October 2013, provides for the highest courts and tribunals of the Contracting Parties to be able to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the Protocols thereto. At the time of writing (July 2017), only three EU member states (Finland, Lithuania and Slovenia) have ratified this instrument - although a number of other EU member states have signed the Protocol and may proceed towards ratification. The Protocol, moreover, has not entered into force yet, since the minimum number of ratifications (10) has not been reached. The danger, however, as noted by the CJEU in its Opinion 2/13, is that the procedure established by Protocol No 16 may apply "even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU".¹⁰⁵

¹⁰⁴ This is why the ECtHR takes the view that "in recognition of the particular features of secret surveillance measures and the importance of ensuring effective control and supervision of them, ... under certain circumstances, an individual may claim to be a victim on account of the mere existence of legislation permitting secret surveillance, even if he cannot point to any concrete measures specifically affecting him" (ECtHR (4th sect.), *Szabó and Vissy v. Hungary*, (Appl. No. 37138/14), Judgment of 12 January 2016), para. 33).

¹⁰⁵ Opinion 2/13 (Compatibility with the treaties of the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) of 18 December 2014 (EU:C:2014:2454), para. 196.

Postponing the filing of infringement proceedings, in the hope that actions will be filed before domestic courts providing an opportunity for the CJEU to clarify, upon referral from these courts, the requirements of Union law, may thus turn out to be a high-risk strategy following the entry into force of Protocol No 16. The risk the Commission would be creating is that the ECtHR would decide first. This may not be a bad thing from the point of view of the protection of the rights of the individual, but it certainly would make the position of the CJEU more fragile, in practice leaving it to the ECtHR to decide whether a particular action adopted within the scope of application of EU law is consistent with fundamental rights, with the CJEU having little choice but to follow that assessment. Indeed, though the entry into force of Protocol No 16 to the ECHR would significantly increase that risk, the risk is not diminished even in the present situation, since domestic courts may in certain cases be reluctant to refer a question of interpretation to the CJEU (particularly where the fundamental rights dimension of the case is predominant), or they may consider that they face no question of interpretation justifying such a referral.

D) Conclusion

For all these reasons, it would be wrong to consider that referrals from national courts are a substitute for filing infringement proceedings to ensure compliance with EU law. One could advance that the two procedures are complementary and contribute, by different means, to the same end. It would be incorrect, however, to suggest that, provided domestic courts cooperate loyally with the CJEU, as they must, in enforcing EU law, preliminary rulings are a sufficient tool to ensure full enforcement of EU law. Because they can be filed even prior to the adoption of individual measures applying general rules or policies to specific situations, because they do not depend on the ability and willingness of individuals to file claims before domestic courts, and because they limit the possibility that the ECtHR will pronounce itself on the compatibility of Union law with human rights prior to any assessment by the CJEU (thus weakening the position of the latter), infringement proceedings should remain a key tool for ensuring that the member states fully comply with EU law.

IV. OUTSTANDING OBSTACLES: HOW TO IMPROVE INFRINGEMENT PROCEEDINGS AS A TOOL TO UPHOLD THE VALUES OF THE EUROPEAN UNION

This chapter reviews a number of recommendations that could be made to improve the effectiveness of infringement proceedings as a tool to enforce fundamental rights and, more broadly, the values on which the Union is founded. Infringement proceedings are just one means of ensuring such enforcement, and they can be combined with other tools such as, for instance, implementation plans¹⁰⁶ or interpretative communications issued by the Commission. However, infringement proceedings are an underestimated tool, yet they are of particular importance in the area of fundamental rights.

Proposals to improve the effectiveness of infringement proceedings concern the status of the complainant, who brings an alleged violation of EU law to the attention of the Commission; the use by the Commission of sources of information other than individual complaints; and, finally, the incentives that the member states could be given to better comply with fundamental rights in the implementation of EU law. Although this third proposal concerns less infringement proceedings *per se* than the prevention of breaches, it fits within the broader concern of this report to further strengthen the efforts of the Commission, as guardian of the Treaties, to ensure full enforcement of EU law.

1. Strengthening the position of the complainant

A) The discretionary powers of the Commission and the role of complainants in the infringement procedure

As mentioned above,¹⁰⁷ the complainant traditionally is recognised as having no rights in the procedure leading to the filing by the Commission of an action for failure to comply with EU law. This situation was denounced in a complaint filed with the European Ombudsman in 1998 concerning the refusal of the Commission to file infringement proceedings against Greece for what the complainant alleged was a violation of Community procurement legislation.¹⁰⁸ Apparently against the advice of its services (particularly of DG Competition), the Commission decided to close the case subject to satisfactory assurances from the Greek authorities as to their future policy. It argued that “its decision as to whether or not to pursue infringement proceedings ... depends upon a global assessment of the case and of the measures necessary to ensure the respect of Community law by the Member State concerned, which would include the assurances given by the Member State on its future policy in the matter under consideration” and that “its decision to

¹⁰⁶ In its Better Regulation Package, the Commission pledged to better support member states' efforts towards transposition and implementation of legislation by preparing such 'implementation plans' for certain Directives and Regulations. Such plans list the “challenges which the Member States will face and which need to be taken into account when they prepare to transpose and implement the law”, and they “provide for a wide range of tools to help Member States implement EU laws, such as guidance documents, expert groups and dedicated websites” (European Commission, *Report from the Commission. Monitoring the application of European law - 2015 Annual Report*, COM(2016) 463 final of 15.7.2016, p. 12).

¹⁰⁷ See chapter II, section 1.

¹⁰⁸ Case 996/98/OV, opened on 18 November 1998, decision of 30 January 2001.

close the file was sufficiently reasoned and that it took into account all the elements provided by the parties and the assessment made by its services".¹⁰⁹

The Ombudsman disagreed with this conclusion. He noted that whereas the Commission had informed the complainant that the case has been closed because it could not be demonstrated that a clear infringement of EU law on public procurement had taken place, the real reason for not filing infringement proceedings was that the Greek authorities had pledged to act in conformity with the requirements of Community legislation on procurement in the future: thus misleading the complainant, the Ombudsman found, was a case of maladministration, as codified most recently, at the time of the opinion, in Article 41 of the Charter of Fundamental Rights.¹¹⁰ The Ombudsman also found that the Commission had not provided the complainant a fair opportunity to present his observations.

Two important conclusions emerged from the Ombudsman's inquiry. First, the Ombudsman made a clear distinction between being attributed a discretionary power, and exercising such power in an arbitrary or discriminatory fashion, or in violation of principles such as the principle of proportionality or fundamental rights. The initial answer provided by the President of the European Commission to the Ombudsman, as expressed in a letter of 3 January 2000, stated :

Without going into the question of whether the allegations are founded, I think that it is first essential to draw a clear dividing line between the power to investigate matters of maladministration and the discretionary power of the Commission as a political institution. In this connection it should be borne in mind that the Court of Justice has, in its judgements, invariably accepted that the Commission enjoys a large measure of political discretion in the performance of the role assigned to it by the Treaty.

The assumption was, in other terms, that since the Commission had a discretionary power as to whether or not to file infringement proceedings against Greece, how it exercised such a power could not be assessed against the requirement not to commit maladministration. To this, the Ombudsman answered:

1.7 The Ombudsman [...] recalls that discretionary power is not the same as dictatorial or arbitrary power. A public authority must always have good reasons for choosing one course of action rather than another. A normal part of exercising a discretionary power is to explain the reasons why a particular course of action has been chosen.

1.8 Furthermore, an institution must act within the limits of its legal authority when making a discretionary decision [...]. Very broad discretionary powers may exist, but they are always subject to legal limits. General limits on such authority are established by the case law of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms.

¹⁰⁹ Id., decision of 30 January 2001, paras. 3.5. and 3.6.

¹¹⁰ Article 41 of the Charter of Fundamental Rights guarantees the right to a good administration, defined as the right of every person "to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union" (para. 1). The right includes in particular "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken" and "the obligation of the administration to give reasons for its decisions" (para. 2, a) and c)).

1.9 Finally, the Ombudsman points out that in carrying out his task of inquiring into possible instances of maladministration, he does not seek to question the exercise of a discretion, provided that the institution or body concerned has acted within the limits of its legal authority.

The Ombudsman referred in this regard to Recommendation N° R (80)2 concerning the exercise of discretionary powers by administrative authorities, adopted by the Committee of Ministers of the Council of Europe on 11 March 1980. The Recommendation defines “discretionary power” as “a power which leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate”. It lists six “Basic Principles” which, in the exercise of such power, any administrative authority should take into account. In exercising a discretionary power, an administrative authority should:

1. Not pursue a purpose other than that for which the power has been conferred;
2. Observe objectivity and impartiality, taking into account only the factors relevant to the particular case;
3. Observe the principle of equality before the law by avoiding unfair discrimination;
4. Maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
5. Take its decision within a time which is reasonable having regard to the matter at stake;
6. Apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.¹¹¹

The Recommendation also provided that, where general administrative guidelines orient the exercise by an administrative authority to the exercise of its discretionary power, such guidelines should be made public and communicated to the person concerned, at the request of that person, before or after the adoption of an act concerning that person.¹¹² Finally, “where an administrative authority, in exercising a discretionary power, departs from a general administrative guideline in such a manner as to affect adversely the rights, liberties or interests of a person concerned, the latter is informed of the reasons for this decision”.¹¹³

A second important conclusion the European Ombudsman draws from this episode is that the rights of the complainant in the procedure of examination of the complaint should be better specified. The Ombudsman recommended that the Commission should “clarify the procedural aspects of the administrative stage preceding the eventual decision to issue the reasoned opinion which concludes the pre-litigation procedure”, by adopting “a clear procedural code for the treatment of such complaints”. “The establishment of such a code”, he stated, “would mark an important step towards making a living reality of the citizen’s right to good administration, as recognised in the Charter of Fundamental Rights of the European Union”.

111 Council of Europe, Committee of Ministers, Recommendation N° R (80)2 concerning the exercise of discretionary powers by administrative authorities of 11.03.1980 paras. 1-6.

112 Id., para. 7.

113 Id., para. 8.

It is in accordance with this Recommendation that, in 2002, the Commission adopted a communication to clarify the status of the complainant in infringement procedures.¹¹⁴ This communication was first updated in 2012.¹¹⁵ These communications unambiguously reaffirm the discretionary power of the Commission, when presented with a complaint, whether or not to send a Letter of Formal Notice to the member state, and to follow up with a Reasoned Opinion and with the filing of an action under Article 258 TFEU. They do, however, list the reasons why a particular complaint may not be registered - for instance, because it is anonymous or does not refer to a situation that falls under the scope of application of Union law. More importantly, they include a commitment to inform the complainant, at various stages of the proceedings, of the results of its inquiry. In December 2016, in an Annex to its communication *EU Law: better results through better application*, the Commission amended certain points of its description on its relationship with the complainants.¹¹⁶ In its most relevant parts, the current version reads as follows :

7. Communication with complainants

Following registration, a complaint can be examined further in cooperation with the Member State concerned. The Commission will inform the complainant thereof in writing.

If subsequently infringement procedures are launched on the basis of a complaint, the Commission will inform complainants in writing of each procedural step (letter of formal notice, reasoned opinion, referral to the Court or closure of the case). Where a number of complaints are lodged in relation to the same grievance, this written correspondence may be replaced by publication of a notice on Europa.

At any point during the procedure complainants may ask to explain or clarify to the Commission, at its premises and at the complainants' own expense, the grounds for their complaint.

8. Time limit for investigating complaints

As a general rule, the Commission will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than 1 year from the date of registration of the complaint, provided that all required information has been submitted by the complainant.

Where this time limit is exceeded, the Commission will inform the complainant in writing.

9. Outcome of the investigation of complaints

After investigating the complaint, the Commission may either issue a letter of formal notice opening procedures against the Member State in question, or close the case definitively.

The Commission will decide within its margin of discretion on opening or terminating an infringement procedure.

10. Closure of the case

Unless there are exceptional circumstances requiring urgent measures, where it is envisaged that no further action will be taken on a complaint the Commission will give the complainant prior notice

114 COM (2002) 141 final of 20.3.2002. For a comment, R. Muñoz, «La participation du plaignant à la procédure d'infraction au droit communautaire diligentée par la Commission», *Revue du marché commun et de l'Union européenne*, n° 472 (2003), p. 614.

115 See Communication from the Commission to the Council and the European Parliament. Updating the handling of relations with the complainant in respect of the application of Union law, COM(2012) 154 final, of 2.4.2012.

116 Communication from the Commission, *EU Law: better results through better application* (2017/C 18/02), Annex: Administrative procedures for the handling of relations with the complainant regarding the application of European Union law OJ C 18 of 19.1.2017, p. 10 (initially published on 13 December 2016).

thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of 4 weeks. Where a number of complaints are lodged in relation to the same grievance, this written correspondence may be replaced by the publication of a notice on the Europa website.

Where the complainant does not reply, or where the complainant cannot be contacted for reasons for which he/she is responsible, or where the complainant's observations do not persuade the Commission to reconsider its position, the case will be closed.

Where the complainant's observations persuade the Commission to reconsider its position, investigation of the complaint will continue.

The complainant will be informed in writing of the closure.

The 2012 communication on the handling of relations with the complainant in respect of the application of Union law¹¹⁷, and the update provided in 2016, provide useful clarifications as to the information that the complainant may expect to receive. As such, they contribute to the procedure being made more transparent, and they improve trust in the handling, by the Commission, of the complaints received. At the same time, the communications reiterate that the Commission has a total discretion as to whether to investigate a particular complaint, and which conclusions to draw from the investigation - and in particular, whether to move to a Formal Notice or to a Reasoned Opinion being addressed to the State concerned, and whether to file legal proceedings. In that respect, the communication is not fully consistent with Council of Europe Recommendation N° R (80)2 concerning the exercise of discretionary powers by administrative authorities: at the very least, the Commission could have been expected to commit to comply with the six "Basic Principles" listed in the Recommendation, and it could have been expected that the CJEU assesses the choices made by the Commission in accordance with these principles.¹¹⁸

Indeed, in other areas of EU law, in which the Commission is granted a similar (though not identical) power of appreciation, the CJEU has not hesitated in imposing on the Commission that it "examine carefully and impartially all the relevant aspects of the individual case", and that it respect "the right of the person concerned to make his views known and to have an adequately reasoned decision".¹¹⁹ Such guarantees, the Court noted, are all the more important where the Commission is recognised discretionary powers: "where the Community institutions have ... a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance".¹²⁰ It is true that the Court has imposed such guarantees where the discretionary power of the Commission is not unfettered: the Court makes a distinction, in particular, between situations where the Treaty provides that the Commission may adopt certain measures "where necessary", and situations where the power of the Commission is "entirely

117 Communication from the Commission to the Council and the European Parliament Updating the handling of relations with the complainant in respect of the application of Union law, COM/2012/0154 final of 2.04.2012.

118 A separate, but related issue, would be, of course, whether the complainant would have any legal standing to challenge a decision by the Commission, for instance not to file infringement proceedings in a situation that the complainant brings to its attention, alleging that it constitutes a violation of EU law. Since such a decision is not one that would be addressed to the complainant, an action for failure to act (filed under Article 265 al. 3 TFEU) would be inadmissible; nor of course would it be possible to file an action for annulment of the decision (under Article 263, al. 4 TFEU), since such a decision would not be of direct and individual concern to the complainant.

119 See C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, Judgment of 21 November 1991 (EU:C:1991:438), para. 14 ("where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present").

120 *Id.*

discretionary”, as is the case with respect to the decision to commence infringement proceedings.¹²¹ However, that distinction appears to prioritise minor language variations in the Treaties above the overarching principle that the Commission is guardian of the Treaties, tasked with “oversee[ing] the application of Union law under the control of the Court of Justice of the European Union”,¹²² and that (as recognised in Article 41 of the Charter of Fundamental Rights), in whichever action it takes, it cannot exercise its functions without taking into account the principles of good administration. The time has come to revisit this case-law. Indeed, the Commission itself acknowledges the need to file infringement proceedings “where necessary”, recognising thereby the need to adopt a principled approach towards the choices it makes in this regard - and adding that it shall be guided, *inter alia*, by considerations related to whether the alleged failure to comply with EU law “raise issues of principle or ... have particularly far-reaching negative impact for citizens”.¹²³

Of course, the requirements of objectivity, impartiality and consistency - and more generally, the requirements that follow from the “Basic Principles” that have been recalled - do not imply that each allegation made by a civil society organisation concerning the failure of a State to comply with EU law should impose on the Commission services a duty to prepare a Letter of Formal Notice and address it to the State concerned, or even to seek information from that State. How much the Commission should be expected to do shall depend on the quality of the information received. The role of non-governmental organisations (NGOs) is particularly important where the alleged failure to comply with EU law relates to administrative or judicial practices within a State, rather than to the state of the legislation or of the regulatory framework. Whereas the legal or regulatory framework can be relatively easily ascertained by the Commission services, it shall be much more difficult for the Commission to assess informal practices (which do not simply implement administrative guidelines), or even to be informed about such practices, without the help of civil society, which is uniquely placed to provide such information thanks to its contacts with actors in the field. This, however, requires that NGOs prepare briefings that are solidly documented, highlighting patterns of conduct rather than mere anecdotal evidence based on a small handful of individual cases, and that include a clear explanation about the methodology followed. A dialogue between the Commission services on the one hand (particularly the Fundamental Rights Unit within DG Justice and Consumers), and human rights NGOs on the other hand, as to what evidence has the best chance of convincing the political levels of the Commission of the need to launch inquiries about certain allegations and, potentially, to file infringement proceedings, might help NGOs understand better what can be expected from them in this regard.

121 For instance, Article 106(3) TFEU provides that “The Commission shall ensure the application of the provisions of [Art. 106 TFEU, which relates to the application of competition rules to public undertakings and undertakings to which Member States grant special or exclusive rights] and shall, *where necessary*, address appropriate directives or decisions to Member States” (emphasis added). The Court appears to attach great weight to the “where necessary” clause, in assessing the duties of the Commission to justify its decision to act or to refrain from acting. See Court of First Instance, T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission*, Judgment of 30 January 2002 (EU:T:2002:20), para. 54 (“whilst under Article 169 of the EC Treaty [now Article 258 TFEU] the Commission ‘may’ commence Treaty-infringement proceedings against a Member State, Article 90(3) of the same Treaty [now Article 106(3) TFEU] provides, on the other hand, that the Commission is to adopt the appropriate measures ‘where necessary’. Those words clarify the power granted to the Commission by Article 90(3) of the EC Treaty and thereby indicate that the Commission must be in a position to decide as to the ‘necessity’ of its intervention, which in turn implies that it has a duty to undertake a diligent and impartial examination of complaints, on completion of which it regains its discretion as to whether there are grounds for conducting an investigation and, if there are, for taking measures against the Member State or States concerned to the extent necessary. In contrast to the position regarding its decisions to commence Treaty-infringement proceedings under Article 169 of the EC Treaty, the Commission’s power to apply Article 90(3) of the EC Treaty is thus not entirely discretionary”).

122 Article 17(1) TEU.

123 Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final of 19.10.2010, p. 10 (“The Commission is determined to use all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law. *Whenever necessary* it will start infringement procedures against Member States for non-compliance with the Charter in implementing Union law. Those infringement proceedings which raise issues of principle or which have particularly far-reaching negative impact for citizens will be given priority”) (emphasis added).

In closing her strategic inquiry into the timeliness and transparency in the European Commission’s handling of infringement complaints, which she completed in September 2017 (though this strategic inquiry builds on earlier own-initiative inquiries about the handling of complaints by the Commission¹²⁴), the European Ombudsman recalls that the Ombudsman has “consistently taken the view that, while the Commission does have a margin of discretion [as regards the decision on whether or not to file infringement proceedings], it should always give valid reasons for a decision to close an infringement complaint. The Ombudsman also considers that good administration requires the Commission to act diligently and to fully examine all the complainant’s arguments. Where the complainant submits new arguments following receipt of the pre-closure letter, and where the Commission nevertheless maintains its decision to close the complaint, in the letter confirming the closure of the case, the Commission should address the new arguments and explain in detail why they are not sufficient to change its position”.¹²⁵ The considerations above are fully consistent with this recommendation of the European Ombudsman.

B) Access to information

Could the list of prerogatives of the complainant provided in the communication on the handling of relations with the complainant in respect of the application of Union law be gradually expanded, by relying on other instruments related to access to documents withheld by the institutions of the European Union? The 2012 communication and the 2016 update both recall that the rules on access to documents as laid down in Regulation (EC) No. 1049/2001¹²⁶ (and in the Decision by which the Commission implements its prescriptions¹²⁷) also apply in the context of infringement proceedings. However, the right of the complainant to have access to the documents related to the procedure has traditionally been interpreted narrowly by the CJEU, again in the name of preserving the widest possible margin of appreciation of the Commission in the conduct of infringement proceedings. The question is whether this traditional approach can still be maintained against the background of recent developments that have strengthened the principles of transparency and openness of the EU institutions, and that acknowledge the status of the right of access to information held by public authorities as a human right.

The traditional approach of the Court of Justice of the European Union

The traditional approach of the CJEU predates the adoption of Regulation No. 1049/2001¹²⁸. In *World Wildlife Fund UK v. Commission*, the environmental organisation World Wildlife Fund, supported by Sweden, challenged a refusal by the Commission to provide access to documents concerning the choice of the Commission not to file infringement proceedings against Ireland following the use of structural funds to finance a project developed, allegedly, in violation of EU environmental legislation. In its judgment of 5

124 See decisions closing inquiries OI/2/2009/MHZ on “public access to infringement procedure documents held by the Commission” and OI/2/2011/OV on “the Commission’s Communication on relations with complainants in respect of the application of EU law”: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/4390/html.bookmark> <https://www.ombudsman.europa.eu/en/cases/decision.faces/fr/54039/html.bookmark>

125 Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission’s handling of infringement complaints (14 September 2017), para. 30, available at: https://www.ombudsman.europa.eu/en/cases/decision.faces/en/83646/html.bookmark#_ftn2 (last consulted on 23 October 2017).

126 Parliament and Council Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.5.2001, p. 43.

127 Regulation (EC) No 1049/2001 was implemented in the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure, OJ L 345 of 29.12.2001, p. 94.

128 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 of 31.05.2001.

March 1997, the Court of First Instance (as it then was) rejected the action for annulment filed against the decision of the Commission. It agreed that the Commission could deny the complainant organisation access to the documents of the procedure, so that the dialogue between the Commission and the member state concerned could develop unimpeded, in a spirit of mutual trust: such a dialogue might be jeopardised, the Court considered, if the correspondence exchanged (including the formal Letter of Notice and the Reasoned Opinion) were to be shared with a third party. The Court stated that “the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of the protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation”.¹²⁹

This position has been maintained since. In *Petrie and Others*, another leading case in this area, the applicants were seeking the annulment of a decision by the Commission refusing access to documents relating to an infringement procedure brought against the Italian Republic concerning the situation of foreign-language lecturers employed in Italian universities.¹³⁰ In support of their claim, they were invoking Decision 94/90 adopted by the Commission in 1994,¹³¹ by which the Commission formally endorsed the Code of Conduct concerning public access to Council and Commission Documents initially agreed on 6 December 1993 by the Council and the Commission.¹³²

In its judgment of 11 December 2001, the Court of First Instance considered that Decision 94/90 could not be invoked in support of the alleged right of the applicants to obtain access to the Letter of Formal Notice and to the Reasoned Opinion adopted by the Commission. While noting that the objective of the Code of Conduct and of the subsequent Decision of the Commission formally pledging to apply it was “to give effect to the principle of the widest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration”,¹³³ the Court recalled that, according to the very terms of the Decision, the right to access to documents withheld by the Commission was to be denied “where disclosure could undermine [*inter alia*] the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)”.¹³⁴ Though the Court of First Instance had in the past noted that any exceptions to the principle of access to documents “fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public ‘the widest possible access to documents held by the Commission’”,¹³⁵ it agreed here with the Commission that providing access to the Letters of Formal Notice and to the Reasoned Opinion might jeopardise the search by the Commission and the member state concerned for an amicable solution.

The Commission argued that “infringement investigations call for genuine cooperation and an atmosphere of mutual trust between the Commission and the Member State concerned so as to enable those two parties to open discussions with a view to a rapid resolution of the dispute”, and that the disclosure of letters of formal notice and reasoned opinions, “which concern proceedings that are pending ..., could have an

¹²⁹ Case T-105/95, *WWF UK (World Wildlife Fund for Nature) v Commission of the European Communities*, Judgment of 5 March 1997 (EU:T:1997:26), para. 63.

¹³⁰ Case T-191/99, *Petrie et al. v. Commission*, Judgment of 11 December 2001 (EU:T:2001:284).

¹³¹ Decision 94/90/ECSC, EC, Euratom on public access to Commission documents OJ 1994 L 46 of 8 February 1994, p. 58.

¹³² Code of Conduct concerning public access to Council and Commission Documents OJ 1993 L 340 of 31.12.1993, p. 41.

¹³³ Case T-191/99, *Petrie et al. v. Commission*, cited above, para. 64.

¹³⁴ *Id.*

¹³⁵ *Id.*, para. 66 (citing Case T-309/97, *Bavarian Lager v Commission*, Judgment of 14 October 1999 (EU:T:1999:257), para. 39).

adverse effect on another public interest referred to in the Code of Conduct, namely the proper conduct of court proceedings. Such disclosure would be liable to affect the interests of the parties involved and could adversely impact on the specific rules governing submission of documents in connection with those proceedings”.¹³⁶ The Court agreed. It explained:

... Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter’s voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC [now Article 258 TFEU] proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90.¹³⁷

Both *World Wildlife Fund UK* and *Petrie and Others* predate the adoption of Regulation (EC) No. 1049/2001. Since 3 December 2001, it is this Regulation that defines the principles, conditions and limits for the right of access to documents of the European Parliament, the Council and the Commission.¹³⁸ As regards the information held by the institutions that relates to judicial proceedings however, the Regulation largely replicates the earlier regime. Although the Regulation establishes that “in principle, all documents of the institutions should be accessible to the public”, “certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.”¹³⁹ The list of exceptions in Article 4 of the Regulation includes (in para. 3) a reference to the need to protect the internal decision-making procedures of the institutions:

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

¹³⁶ Id., para. 67 (quoting the arguments of the Commission).

¹³⁷ Id., para. 68.

¹³⁸ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145 of 31.05.2001, p. 43. Though the implementation of Regulation No 1049/2001 by the Commission does provide certain clarifications, particularly as regards procedural issues, it does not deviate from the principles of the Regulation itself; in particular, the full range of the exceptions listed in Article 4 of the Regulation applies. See Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure, OJ L 345 of 29.12.2001, p. 94.

¹³⁹ Preamble, 11th Recital.

The most relevant provision of Regulation No 1049/2001 in the context of infringement proceedings is Article 4(2), the third indent of which provides that:

The institutions shall refuse access to a document where disclosure would undermine the protection (...) court proceedings and legal advice [or] the purpose of inspections, investigations and audits, (...) unless there is an overriding public interest in disclosure.

Consistent with its traditional approach referred to above, the CJEU has interpreted this exception as allowing the Commission to refuse to provide the complainant access to the documents relating to the pre-litigation phase of the infringement proceedings, both as a means to protect the prerogatives of the Commission (its exclusive right to decide whether or not to file infringement proceedings) and in order to allow the exchanges between the Commission and the member state concerned to develop in a spirit of mutual trust. This position is fragile, however, as it is based on contestable factual assumptions. Moreover, it is now further weakened by the rise of the right of access to information as a human right, recognised by Article 42 of the Charter of Fundamental Rights and by Article 10 of the ECHR (box 8). At the very least, this requires that we take a fresh look at the justifications traditionally put forward in order to justify the refusal to provide access to the documents concerning infringement proceedings to the complainant, and that we assess, in particular, whether the exceptions to the right of access are truly necessary for the fulfilment of the interests allegedly protected by confidentiality.

BOX 8. Access to information held by public authorities as a fundamental right

The right of access to information held by public authorities has acquired the status of a fundamental right, recognised by Article 42 of the Charter of Fundamental Rights and, on the basis of the protection of freedom of expression guaranteed by Article 10 of the ECHR, by the recent case-law of the ECtHR. Article 42 of the Charter of Fundamental Rights provides, under the title “Right of access to documents”, that “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents”. In accordance with Article 52(3) of the Charter, this right is to be exercised in accordance with the stipulations of Article 15(1) TFEU, which provides that “In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”.¹⁴⁰

As to Article 10 of the ECHR, although it does not refer explicitly to the right to seek information held by public authorities,¹⁴¹ it has recently been interpreted to include such a right. The judgment delivered by the ECtHR (sitting in Grand Chamber) on 8 November 2016 in the case of *Magyar Helsinki Bizottság v. Hungary* is the first in which the right to seek information from public authorities is considered

¹⁴⁰ It follows, according to paragraph 3 of the same Article, that “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined [in regulations]”.

¹⁴¹ Article 10 ECHR refers to freedom of expression as including the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”, but without making reference to the right to “seek” information held by public authorities.

explicitly as inherent in the exercise of freedom of expression.¹⁴² A Hungarian NGO alleged in that case that the refusal of certain police departments to provide information relating to the appointment of public defenders made it more difficult for the NGO to conduct an inquiry on the provision of legal aid in the country, thus creating an obstacle to its ability to provide information to the public and to exercise its function as a human rights watchdog.

The Court acknowledged in that context that, whereas “Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual [...], such a right or obligation may arise [...] in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular “the freedom to receive and impart information” and where its denial constitutes an interference with that right”.¹⁴³ This shall be the case in particular, according to the Court, where (a) information is sought for the purpose of sharing information with the public, i.e., in order to exercise freedom of expression; (b) the information relates to a matter of public interest; (c) the person or organisation seeking the information is a journalist, a social watchdog or a NGO whose activities related to matters of public interest; and (d) the information is “ready and available” and does not require to be collected by the public authorities.¹⁴⁴ Applying these general criteria to the facts of the case, the Court found that “the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders’ scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO’s exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights”.¹⁴⁵

The Court felt encouraged to thus broaden the scope of the protection afforded by Article 10 ECHR by the fact that Article 19 of the International Covenant on Civil and Political Rights¹⁴⁶ and Article 42 of the EU Charter of Fundamental Rights both recognise a right to access to information. It also took into account the general trend in domestic legislation within the Council of Europe member states guaranteeing an individual right of access to State-held information. The adoption within the Council of Europe of the Convention on Access to Official Documents (opened for signature on 18

142 ECtHR (GC), *Magyar Helsinki Bizottság v. Hungary*, (Appl. No. 18030/11). Judgment of 8 November 2016. See, however, the judgment delivered in 2009 in the case of *Társaság a Szabadságjogokért v. Hungary* (Appl. no. 37374/05), Judgment of 14 April 2009, where this conclusion was foreshadowed.

143 *Magyar Helsinki Bizottság v. Hungary*, cited above, para. 156.

144 Id., paras. 157-170.

145 Id., para. 180.

146 Article 19(2) of the International Covenant on Civil and Political Rights refers to freedom of expression as including “freedom to seek, receive and impart information and ideas of all kinds...”. The Human Rights Committee took the view in its General Comment No. 34 on Article 19 of the Covenant (Freedoms of opinion and expression), published on 12 September 2011, that “Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production” (para. 18). State-held information, the Committee also emphasised in the context of individual communications, “should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied” (*Toktakunov v. Kyrgyzstan* (Communication No. 1470/2006, 28 March 2011)).

June 2009)¹⁴⁷, though it has been ratified only by a limited number of States, also illustrates this evolution, since this instrument codifies “the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities”, though listing a number of conditions under which the right could be restricted. These developments, the Court considered, illustrate the emergence of a consensus on “the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society”.¹⁴⁸

Two arguments are typically invoked in order to justify denying access to documents to the complainant in the context of infringement proceedings (during the period preceding the final decision not to file such proceedings or the judgment of the CJEU following the filing of an action for failure to comply with EU law). The first argument relates to the protection of the prerogatives of the Commission. The second argument concerns the spirit of trust in which the dialogue between the Commission and the member state concerned should be allowed to develop. Neither of these arguments is truly convincing.

Preserving the “full discretion” of the Commission in the decision to commence infringement proceedings

It is argued, first, that the full discretion the Commission claims for itself in deciding whether or not to file an action against a member state and how to set its priorities in infringement proceedings, would be incompatible with the complainant being provided access to information. Indeed, the complainant may rely on such information in order to criticise the choices made by the Commission - for instance, by denouncing the role that considerations of political expediency may have played in how the priorities are set.

This argument in favour of denying access to the documents exchanged in the procedure leading to infringement proceedings seems to be based on the presumption that the discretionary nature of the powers of the Commission excludes any duty to justify the use that is made of such powers. That, however, may be a false opposition, as already noted by the European Ombudsman, and as appears clearly from the Recommendation of the Committee of Ministers of the Council of Europe concerning the exercise of discretionary powers by administrative authorities. Discretionary powers are not arbitrary powers. Though the Commission is left to choose whether or not to file infringement proceedings, and more generally, which pressure it wishes to exercise on member states to ensure compliance with EU law, this does not mean that it can make these choices on the basis of illegitimate considerations, such as the political weight of the State concerned or the risk that the State shall retaliate by refusing to work constructively with the Commission in another file: acting on the basis of such considerations would arguably be inconsistent with the role of the Commission as guardian of the Treaties. The CJEU takes the view that “given the Commission’s role as guardian of the treaties, that institution alone is competent to decide whether it is appropriate to initiate the procedure under [Article 258 TFEU]. The Commission also enjoys sole competence to decide whether the pre-litigation procedure should be taken further by delivering a reasoned opinion and, on completion of that procedure, it has the right, but not the duty, to commence proceedings before the Court for a declaration

147 Council of Europe Convention on Access to Official Documents, CETS No.205, opening of the Treaty in Tromsø, 18.06.2009.

148 *Magyar Helsinki Bizottság v. Hungary*, cited above, para. 140.

that the Member State concerned is in breach of its obligations as alleged”.¹⁴⁹ However, even a competence thus defined, implying a broad margin of appreciation, does not mean that it can be exercised without justification.

Moreover, the argument can lead towards the exact opposite direction: it is precisely because granting access to information concerning the dialogue between the member state concerned and the Commission would not in any way restrict the exclusive competence of the Commission to bring infringement proceedings against that State or to refrain from doing so, that such access to information may be granted to the complainant. Thus, improving the transparency of the procedure would not question the Commission’s monopoly on filing Article 258 TFEU cases; it would merely improve the public’s trust in how the Commission exercises the powers it has been granted by the Treaties. The Treaties attribute to the Commission the role of guardian of the Treaties: far from implying that the Commission may act arbitrarily in defining its policy as regards the filing of infringement proceedings, this may be seen as implying certain duties on the Commission to exercise its powers in a principled manner, that contributes to ensuring full compliance by the member states with their Treaty obligations.

It is true that the objective of granting the Commission the competence to file infringement proceedings is not simply to obtain from the CJEU a judgment finding that the member state has failed to comply with EU law; it is to ensure such compliance, preferably, without having to rely on such a judgment. The filing of infringement proceedings may be considered as an *ultima ratio* in that regard: as an option open to the Commission only if and when it fails to ensure compliance through its dialogue with the member state in question. The CJEU has taken the view that this would be incompatible with providing the complainant access to the documents exchanged during the pre-litigation phase:

The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would [...] be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings.¹⁵⁰

This is not a convincing argument. If indeed reaching an amicable agreement with the member state concerned is made more difficult by allowing the complainant access to the documents exchanged between the parties, it is *not* because the agreement reached would “enable European Union law to be respected”: it is instead because, in some cases, the agreement does not ensure full compliance with EU law, and may therefore be criticised for prioritising other considerations. Allowing greater access would not distract from the full enforcement of EU law, it would enhance it: it is in the interest of the complainant that EU law is complied with, not that deals are struck that would diverge from that objective. If the concern of the Court is truly with ensuring compliance with EU law, it should impose respect for the right to access to the documents exchanged during the pre-infringement phase, and not take at face value the arguments of the Commission that this would make it more difficult for the Commission to act as guardian of the

¹⁴⁹ C-207/97, *Commission v. Belgium*, Judgment of 21 January 1999 (EU:C:1999:17), para. 24 (citing to that effect Case C-431/92, *Commission v Germany*, Judgment of 11 August 1995 (EU:C:1995:260), para. 22; Case 247/87, *Star Fruit v Commission*, Judgment of 14 February 1989 (EU:C:1989:58), para. 12, and Case C-191/95, *Commission v Germany*, Judgment of 29 September 1998 (EU:C:1998:441), para. 46). This position is reiterated in recent cases: see, e.g., C-145/14, *Commission v. Bulgaria*, Judgment of 16 July 2015, (EU:C:2015:502), para. 24.

¹⁵⁰ Joined Cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) v. Commission*, Judgment of 14 November 2013, (EU:C:2013:738), para. 63.

Treaties. The end objective of the pre-litigation stage of infringement proceedings, it should be emphasised, is not to arrive at an agreement between the Commission and the member state concerned: it is to ensure that the member state fully complies with EU law. Improving transparency and accountability in how the negotiations are conducted between the parties serves that objective, and should be seen as a safeguard against the risks of horse-trading and of placing considerations of expediency above respect for the rule of EU law.

Preserving the spirit of “mutual trust” in the dialogue between the Commission and the member state concerned

A second but related argument in favour of denying the complainant access to the documents of the procedure is that the dialogue between the Commission and the member state concerned should be able to develop unimpeded, in a spirit of mutual trust, and that this might be jeopardised if the correspondence exchanged (including the formal Letter of Notice and the Reasoned Opinion) were to be shared with a third party.

The argument played a major role in the leading case of *World Wildlife Fund UK*, discussed above. The Court of First Instance in that case mentioned “the confidentiality which the Member States are entitled to expect of the Commission in such circumstances”.¹⁵¹ It does not justify this blanket assertion, however, for which it cites no other authority. Nor do tautological statements such as a reference to “the need to safeguard the proper conduct of [the infringement] procedure”¹⁵² provide more clarity on why granting access to documents to third parties would jeopardise the dialogue between the Commission and the member state. In fact, the only real impact of allowing the complainant access to such documents would be to force both the Commission and the State concerned to put forward reasons related to the public interest (or the general interest of the Union, in particular its interest in full compliance with Union law, as regards the Commission), and (as regards the member state concerned) not to mislead the Commission by making false claims about its policies or practices, and whether such policies or practices comply with Union law.¹⁵³ This measure of publicity would lead to the dialogue between the Commission and the member state concerned being better informed, not less; based on more solid arguments, and not on half-truths. It would create trust, rather than breeding mistrust. It would in fact help the Commission assess the veracity of the claims made by the State with which it corresponds, since the Commission may have limited means to assess such claims by itself. A complainant, presumably much better acquainted with the situation to which it draws the attention of the Commission to, might usefully contribute to the fact-finding exercise by the Commission. In order to do this effectively, however, the complainant may have to be familiarised with the nature of the arguments presented by the State concerned.

In other terms, twenty years after *WWF v. Commission* was decided, it remains difficult to perceive the rationale of the decision adopted by the Court of First Instance then (prior to, it is worth repeating, the adoption of Regulation No 1049/2001), and that has been guiding its approach ever since.

¹⁵¹ Case T-105/95, *WWF UK (World Wide Fund for Nature) v Commission of the European Communities*, Judgment of 5 March 1997 (EU:T:1997:26), para. 63.

¹⁵² Opinion of Advocate General M. Wathelet delivered on 5 September 2013, in the Joined Cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) v. Commission*.

¹⁵³ Article 4(5) of Regulation No. 1049/2001 provides: “A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”. The Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure, reflects this rule in Article 4(5). In the context of infringement proceedings, this provides an easy route for the member state to escape scrutiny by citizens or NGOs, allowing that State to present the state of its legislation, policies or practice in the most favourable light without fearing to be contradicted.

Access to information held by public authorities as a fundamental right

These doubts are further reinforced by the status that the right of access to information held by public authorities has acquired since the case-law of the CJEU initially shaped these matters (see box 8). It is indeed striking that this case-law mentions neither Article 42 of the Charter of Fundamental Rights, nor Article 10 of the ECHR, and that no reference is made, in assessing the justifications provided by the Commission for denying access to the documents related to the infringement procedure, to the specific role of NGOs pursuing public interest objectives - particularly in the field of human rights - in ensuring transparency and accountability in the exercise by the Commission of its powers under Article 258 TFEU.

Yet, recognising the status of the right to access to information held by the Commission as a fundamental right would lead to examine more strictly, on a case-by-case basis, whether the refusal to provide documents requested by complainants is indeed justified, since any restriction to the right to access to information should be limited to what is necessary and proportionate to the fulfilment of the legitimate aim justifying the restriction.¹⁵⁴ It would follow that, even where full access to the file can be denied, there should be a duty imposed on the Commission to examine, for each individual document, whether access could be granted without jeopardising its ability to fulfil its functions, and if access to the document cannot be granted, whether at least part of the document can be released (as explicitly required by Article 4(6) of Regulation No. 1049/2001), or whether the applicant could not be provided with a summary of the information contained therein.

Even more importantly, where, in the specific context of infringement proceedings considered against a member state who has allegedly been acting in violation of the values on which the Union is founded, information is sought by a complainant NGO for the purpose of alerting the public to the fundamental rights issues concerned, the NGO is acting in such a case as a watchdog working in favour of the public interest. In such a case, as is clear from the 2016 case of *Magyar Helsinki Bizottság v. Hungary* (see box 8), the refusal to provide access to information held by the Commission should be seen as a restriction to the ability of the NGO to exercise its freedom of expression (i.e., to act as a “watchdog” in the public interest), and should only be acceptable if this is strictly necessary for the protection of a public interest of a greater weight. Protecting the freedom of the Commission and the member state concerned to arrive at an agreement that could not be consistent with the requirements of EU law does not constitute such a compelling interest.

In closing her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission’s handling of infringement complaints, the European Ombudsman recommended that “[w]hen complainants express an interest in closely following the progress of their case”, the Commission should “inform them of any new significant step in its investigation under “EU Pilot”, including by providing them with a summary of the Member State’s reply, whenever possible”.¹⁵⁵ The arguments presented in this section further strengthen this suggestion.

¹⁵⁴ This has already been recognised by the CJEU, outside the specific context of infringement proceedings: see, *inter alia*, C-353/99 P, *Council v. Hautala*, Judgment of 6 December 2001 (EU:C:2001:661); C-353/01 P, *Mattila v. Council and Commission*, Judgment of 22 January 2004 (EU:C:2004:42).

¹⁵⁵ Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission’s handling of infringement complaints (14 September 2017), para. 27, available at: https://www.ombudsman.europa.eu/en/cases/decision.faces/en/83646/html.bookmark#_ftn2 (last consulted on 23 October 2017).

2. Moving towards a principled use of the power to bring infringement proceedings

As seen above, a number of arguments may be put forward in favour of an interpretation of the Commission's powers that would lead it to give priority to infringement proceedings in situations where fundamental rights are at stake. A key question, however, is where the Commission shall receive its information from and how can it be most effectively alerted to the need to take action?

The nature of the data relating to the situation of fundamental rights in the EU

The Commission is not currently provided with any systematic review of the developments related to fundamental rights in the member states. It therefore investigates situations on its own initiative, based on the information it is able to collect, often depending on external sources. In addition to the reports filed by the member states to the Commission in order to notify measures adopted to implement EU law, among these external sources are the complaints it receives from individuals, businesses or NGOs (3450 new complaints were received in 2015, for instance¹⁵⁶); the petitions addressed to the European Parliament's Petitions Committee under Article 227 TFEU; the questions addressed to it by Members of the European Parliament; or, of course, on the referrals received by the CJEU from national jurisdictions, which may also alert the Commission to certain problems linked to the implementation of EU law. This latter source of information is generally seen as particularly useful, insofar as it establishes a form of complementarity between the referral procedure of Article 267 TFEU and infringement proceedings filed under Article 258 TFEU. However, when a particular issue reaches the CJEU in the context of a referral procedure, a number of years typically have elapsed since the facts giving rise to the dispute occurred: by that time, much of the added value of infringement proceedings, which is to address a situation before a large number of individuals are affected by individual measures of application, shall be lost. As to individual complaints, petitions or parliamentary questions, they remain *ad hoc* and cannot be considered to provide a comprehensive picture of how fundamental rights are taken into account by the EU member states in the scope of application of EU law, which would allow for a systematic (and thus impartial) treatment.

How could this gap be filled? One option could be to establish a mechanism providing a systematic screening of the situation of fundamental rights in the EU, allowing the institutions involved in the political monitoring of Article 7 TEU to rely on this screening in order to discharge their functions in a manner that shall be objective, impartial and non-discriminatory - in other terms, that shall not be politicised. The establishment of such a mechanism was initially considered by the Commission in a communication it adopted on the values on which the Union is founded in 2003.¹⁵⁷ Though the idea was initially met with scepticism, both from the Council of the EU and from the European Parliament, it was revived by the European Parliament

¹⁵⁶ Report from the Commission. *Monitoring the application of European law - 2015 Annual Report*, cited above, p. 17.

¹⁵⁷ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final of 15.10.2003.

in 2009,¹⁵⁸ and more recently, following the emergence of “illiberal democracies” in Hungary and in Poland, in resolutions adopted in 2015¹⁵⁹ and 2016.¹⁶⁰

However, it may be impractical for the Commission to process all the information available - from Council of Europe and United Nations monitoring bodies, to NGO reports, or general media - that relates to the situation of fundamental rights in the 28 (27) member states. The wealth of information would soon appear overwhelming, and in order to be adequately analysed, a knowledge of all the languages spoken in the EU as well as of the different national legal systems would be needed.¹⁶¹ Moreover, most of this information would relate to situations outside the scope of application of EU law, and therefore irrelevant to the potential filing of infringement proceedings. For the purposes of a more systematic use of Article 258 TFEU as a human rights protection tool, therefore, an indiscriminate reliance on data collection tools that cover all human rights violations in the member states would be relatively inefficient: the net would be cast far too wide.

Another more targeted and perhaps more manageable option would be to provide for a similar systematic assessment of the fundamental rights impacts of measures adopted by the EU member states, but only in the field of application of EU law. This would allow the Commission to prioritise for infringement proceeding situations where fundamental rights are at stake, consistent with the pledge made when, in 2010, the Commission announced its strategy for the effective implementation of the Charter of Fundamental Rights. Indeed, only a small fraction of all the violations of fundamental rights that take place under the jurisdiction of a member state may lead to the filing of infringement proceedings: this will be the case as regards the violations that take place in the field of application of EU law - whether because they have their source in measures that restrict economic freedoms protected by EU law, or because they originate in measures that implement or apply EU law.

FRA could be tasked with collecting this information. Specifically, the Commission could request from FRA that it provides conclusions, at least on an annual basis, but perhaps ideally on a trimestrial basis, on member states’ compliance with the Charter of Fundamental Rights in the field of application of Union law. This would guarantee a consistent, objective, impartial and non-selective assessment of the situation of the member states. FRA, moreover, is well equipped to collect and analyse such information, both because it can rely on a network of experts covering all the member states and who are familiar with the legal systems of each, and because it has established a relationship with approximately 600 human rights NGOs, covering all the domains of the Charter of Fundamental Rights across all member states, which may greatly facilitate fact-finding. While Regulation No. 168/2007 establishing the Agency does not specifically include

158 Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145 (INI)), OP 5 (requesting the EU institutions to “establish a monitoring mechanism and a set of objective criteria for the implementation of Article 7 of the EU Treaty”).

159 European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)) (calling on the Commission to present a proposal “for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, as a tool for compliance with and enforcement of the Charter and Treaties as signed by all Member States, relying on common and objective indicators, and to carry out an impartial, yearly assessment on the situation of fundamental rights, democracy and the rule of law in all Member States, indiscriminately and on an equal basis, involving an evaluation by the EU Agency for Fundamental Rights, together with appropriate binding and corrective mechanisms, in order to fill existing gaps and to allow for an automatic and gradual response to breaches of the rule of law and fundamental rights at Member State level”).

160 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV (2016) 0409.

161 A biweekly review of developments within the Council of Europe monitoring bodies seems to have become established practice within the Fundamental Rights Unit (DG Justice and Consumers) of the European Commission. However, such a review - important and promising as it is - is still based on secondary sources, in English and French, and it is no substitute for a country-level monitoring tracking developments in each member state, on the basis of data (including legislative and regulatory initiatives, case-law and NGO reports) which often are only available in the language of the country concerned.

such a task as part of its mandate, addressing such a request to FRA would be consistent with the general definition of this mandate, which is “to provide the relevant institutions, bodies, offices and agencies of the [Union] with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”.¹⁶² Moreover, Article 4(1)(d) of Regulation No. 168/2007 provides that it shall, *inter alia*, “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions ..., either on its own initiative or at the request of the European Parliament, the Council or the Commission”. Thus, it would be consistent with the existing framework under which the Agency performs its functions to request that it provides the institutions with such a systematic assessment, on a regular basis.

3. Systematically inquiring about whether fundamental rights are taken into consideration in the implementation of EU law

Providing the Commission with the right kind of information allowing it to react swiftly once its attention is brought to potential violations of EU law that have their source in breaches of the values on which the Union is founded, may also occur at the earliest stage possible - at the time member states adopt measures implementing Union law.

Directives already systematically impose on the member states a duty to inform the Commission about the implementation measures they adopt. The CJEU takes the view that such information must be “clear and precise”: “It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive”. Indeed, in “the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely”.¹⁶³ A failure by a member state to provide this information could justify, in its own right, a finding that the State concerned failed to comply with its obligations under EU Law.

This is a practice that can be further built on. The Commission could make it clear that the information to be provided by the member state should include a statement as to how fundamental rights were taken into consideration in the choice of the implementation measures. Indeed, the member states and the Commission have agreed that the quality and the comprehensiveness of the information provided by the member states concerning the implementation of Directives could greatly facilitate the role of the Commission in overseeing the correct application of Union law under the ultimate supervision of CJEU. The Joint Political Declaration of 28 September 2011 of member states and the Commission on explanatory documents states in this regard that “where the Commission considers that documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments are required, it shall justify on a case by case basis, when submitting the relevant proposals, the need for, and the proportionality of, providing such documents, taking into account, in particular and respectively, the complexity of the directive and of its transposition, as well as the possible additional administrative burden”.¹⁶⁴

¹⁶² Article 2 of Council Regulation (EC) No. 168/2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22.2.2007, p. 1.

¹⁶³ C-427/07, *Commission v. Ireland*, Judgment of 16 July 2009 (EU:C:2009:457), para. 107.

¹⁶⁴ OJ C 369 of 17.12.2011, p. 14. See also Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents, OJ C 369 of 17.12.2011, p. 15.

Although the additional information required from the member states generally takes the form of correspondance tables, linking specific provisions of the Directive to provisions in domestic legislation, there is no reason in principle why the role of the Commission in ensuring that the implementation of Union law takes fundamental rights into account, should not be facilitated by the member state, which could explain the safeguards built into domestic legislation to ensure consistency with the requirements of fundamental rights, where the Directive, which is to be transposed, is particularly sensitive in this regard. This would allow the Commission to be alerted, at an early stage, of the risks that a particular piece of European legislation is implemented in violation of fundamental rights, and to act accordingly - in many cases, preventing breaches of rights of the individual - as its intervention shall occur before individual measures of implementation are adopted by the member state.

V. CONCLUSIONS AND RECOMMENDATIONS

Two recent evolutions lend a particularly urgency to the question of how infringement proceedings can develop into a tool for the enforcement of the values listed in Article 2 TEU. First, despite the important concerns raised by the emergence of “illiberal democracies” in Hungary and Poland, in which governments having emerged victorious from parliamentary elections seek to use their power to silence critics, reliance on the political monitoring tool of Article 7 TEU has proven ineffective. Secondly, in its ‘Better Regulation’ communication announced on 13 December 2016, the Commission announced a “new approach” towards infringement proceedings: its approach henceforth shall be more “strategic”, which in practice means that the commencement of infringement proceedings shall be treated not as a routine matter, but as a decision of a more political nature. Whereas this can have the effect of increasing the pressure on the member state concerned to comply at an early stage, it could also discourage the Commission services from being proactive, and it could allow some more powerful member states, with more support within the political levels of the Commission, to evade scrutiny.

Considered both alone and in combination, these developments make it even more important that the Commission exercises its powers under Article 258 TFEU in ways that are transparent and consistent with its role as guardian of legality within the EU Treaties, and that it delivers on the pledge it made in 2010 when it announced its Strategy for the effective implementation of the Charter of Fundamental Rights - to file infringement proceedings “whenever necessary”, particularly in cases related to fundamental rights “which raise issues of principle or which have particularly far-reaching negative impact for citizens”.

The Commission

The key recommendations emerging from the report are addressed, primarily, to the Commission, which under Article 258 TFEU has been recognised to be given broad discretionary powers as to whether or not to commence infringement proceedings against a member state where there are reasons to believe that it is not complying with Union law. In particular:

- i. In order to ensure that priority is effectively given to cases which raise issues related to fundamental rights (and thus not only seriously impact ordinary citizens, but also undermine the mutual trust on which cooperation between the EU member states is founded), the Commission could collect data on the role played by infringement proceedings in upholding the Charter of Fundamental Rights. It is indeed striking that such data are absent even from the report presented annually by the European Commission, as part of the Strategy it announced in 2010 to promote the implementation of the Charter.

2. The 2002 and 2012 communications on the handling of relations with the complainant in respect of the application of Union law, and the update provided in 2016, clarify the information that the complainant may expect to receive from the Commission. Though they were inspired by the recommendations from the European Ombudsman, the commitments made in these communications remain short of what is prescribed by Council of Europe Recommendation N° R (80)2 concerning the exercise of discretionary powers by administrative authorities. In a further update of these communications, the Commission could pledge to comply with the six “Basic Principles” listed in the Recommendation.
3. The same communications recall that the rules on access to documents as laid down in Regulation (EC) No. 1049/2001 apply in the context of infringement proceedings. However, the right of the complainant to have access to the documents related to the procedure has been interpreted narrowly, in the name of preserving the widest possible margin of appreciation for the Commission in the conduct of infringement proceedings. The arguments justifying such a refusal to provide access to the documents until the finalisation of the procedure appear unconvincing and should be re-examined. The result of the current practice is that the Commission may be deprived from a useful (and potentially decisive) source of information, allowing it to assess more rigorously the presentation of the facts by the member state concerned. The current practice, moreover, may be incompatible with the status of the right of access to information held by public authorities as a human right, recognised by Article 42 of the Charter of Fundamental Rights and more recently by Article 10 of the ECHR. Moreover, it does not take into account the specific role of NGOs pursuing public interest objectives - particularly in the field of human rights - in ensuring transparency and accountability in the Commission’s exercise of its powers under Article 258 TFEU.
4. Directives already systematically impose on the member states a duty to inform the Commission about the implementation measures they adopt, in order to allow the Commission to make an informed assessment as to whether the state of implementation in any particular member state is consistent with the requirements of EU law. Building on this existing practice, the Commission could require that the information to be provided by the member state include a statement as to how fundamental rights were taken into consideration in the choice of the implementation measures. This would allow the Commission to be alerted at an early stage where the implementation of EU legislation may raise fundamental rights issues in certain domestic settings.
5. The Commission could seek to collect information, on a more systematic basis, on whether member states comply with fundamental rights in the scope of application of EU law. FRA could be tasked with collecting such information. This could allow a more systematic and principled use of the powers of the Commission, as guardian of the Treaties, to file infringement proceedings, prioritising cases which raise issues related to fundamental rights.

The Court of Justice of the European Union

1. In contrast with the member states and the institutions of the EU, complainants are barred by Article 40 of the Statute of the CJEU from intervening in proceedings filed before the CJEU under Article 258 TFEU. This makes it impossible for the complainant to present the Court with its views as to the existence of a violation, although it is not uncommon for the complainant to be more fully informed than the Commission itself concerning the administrative and judicial practices in the member state alleged to be acting in violation of EU law. In order to compensate for this, the CJEU could, in the future, request from the complainant an expert opinion, as allowed in Article 25 of its Statute.

2. The CJEU could also depart from its traditional approach towards the powers of the Commission acting under Article 258 TFEU, by imposing on the Commission a duty to “examine carefully and impartially all the relevant aspects of “the case presented to it by the complainant”, and that it respect the right of the complainant “to make his views known and to have an adequately reasoned decision”. This would ensure that the Commission effectively discharges its role as guardian of the Treaties, tasked with “oversee[ing] the application of Union law under the control of the Court of Justice of the European Union”. It would also ensure that, as required by Article 41 of the Charter of Fundamental Rights, the Commission exercises its functions in accordance with the principles of good administration. In the context of which procedure the Court can be provided an opportunity to impose such requirements, is, unfortunately, unclear, since the complainant has no standing to file an action for failure to act (Article 265 al. 3 TFEU) or an action for annulment (Article 263, al. 4 TFEU) of a decision taken by the Commission not to pursue infringement proceedings. However, such requirements could be mentioned by the Court in future infringement cases, perhaps in response to arguments raised by intervening parties.

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