

A close-up photograph of a marble statue of Lady Justice. The statue is blindfolded with a gold band and holds a golden scale of justice in her right hand. The background is a plain, light grey.

INFRINGEMENT GUIDELINES: DEFENDING TEU VALUES

RIGHTS
DEMOCRACY

RECLAIM

TOWARDS INFRINGEMENT GUIDELINES TO DEFEND TEU VALUES

The purpose of this document is to explain the need for the European Commission to adopt infringement guidelines to effectively defend the values of Article 2 TEU.

[Section 1](#) describes the shortcomings that the Commission should tackle and provides recommendations on how to do so, while [Section 2](#) explains the steps that should be taken for those guidelines to materialise.

1. Why are infringement guidelines on TEU values needed?

The past decades have witnessed a substantial decline in the number of infringement cases opened by the European Commission for the incorrect implementation of EU law.¹

Illiberal governments have seized this opportunity and have attacked the values on which the Union is based. The European Commission, as Guardian of the Treaties, has the duty to remedy the underutilization of infringement procedures when values like the rule of law or LGBTIQ+ rights are at under attack.

Hence, RECLAIM is advocating for the introduction of infringement guidelines to effectively uphold the values of Article 2 TEU and to ensure that its enforcement is 1. Fast, 2. Depoliticised and Foreseeable and 3. More effective.

The Member States have repeatedly pledged to support the European Commission when carrying out this task.²

1.1. FAST

The European Commission has taken insufficient action in response to rule of law and fundamental rights backsliding in the EU. And, even when the Commission acts, it does so late – with unreasonably long EU Pilot and pre-infringement periods – and with mixed results.

Examples. The case of Hungary is illustrative. By the time the Commission managed to get a judgment condemning Hungary's attack on academic freedom, universities had already left the country.³ Even though it has challenged an infamous anti-LGBTIQ law, it has not requested interim measures,⁴ and the law has already been applied for three years. And when the country not only deficiently implements CJEU judgments on its anti-

¹ R. Daniel Kelemen and Tommaso Pavone '[Forbearance and Enforcement at the European Commission: A Response to von der Leyen](#)' (31 May 2022).

² Diplomatic statement '[Declaration of fourteen European Member States on the protection of LGBTIQ persons in the European Union](#)' (17 May 2021); Diplomatic statement '[Declaration on the continued advancement of the human rights of LGBTIQ persons in Europe](#)' (17 May 2024).

³ The Guardian '["Dark day for freedom": Soros-affiliated university quits Hungary](#)' (3 December 2018).

⁴ Action brought on 19 December 2022 in [Case C-769/22 European Commission v Hungary](#).

NGO laws,⁵ but also redoubles its attacks on civil society,⁶ it stays inactive or provides Hungary with long deadlines to justify its actions.⁷

Hence, we call upon the Commission to act fast and decisively when a Member State attacks TEU values, by:

1. Skipping the use of the EU pilot procedure altogether.
2. Reducing the deadlines in the pre-litigation procedure under Article 258 TFEU and defining clear periods of time for compliance with CJEU judgments before bringing a Member State back to Court under Article 260(2) TFEU.
3. Requesting interim measures.

1.2. DEPOLITICISED AND FORESEEABLE

The European Commission has struggled to separate its role of policymaker from its role as watchdog of Member States' compliance with EU law. Enforcement decisions have been influenced by political priorities, and there has been a worrying lack of transparency in the handling of cases. Even when the Commission has acted to uphold EU fundamental rights and values, it has done so in an erratic and sometimes incoherent manner, ignoring the alerts raised through the existing mechanisms or by civil society. Such politicization is felt within the institution, whose political leaders have taken away the autonomy and the motivation civil servants used to enjoy to open and build infringement cases.⁸

The Commission should adopt an approach on infringements that is depoliticised and foreseeable, leading to the opening of infringements systematically after courts or experts identify breaches of EU law.

Examples. Even though the Commission decided to defend LGBTIQ+ rights by lodging a case against the Hungarian anti-LGBTIQ law, it has done nothing to ensure the implementation of the Court's case-law on rainbow families in other Member States,⁹ remaining impassive on years of breaches of EU law.

At the same time, it seeks to introduce legislative initiatives to advance LGBTIQ rights, like on the mutual recognition of parenthood between Member States.¹⁰ However, the enforcement of the existing Court's case-law is a necessary prior step to ensure that legislative advancements are respected.

⁵ Hungarian Helsinki Committee, '[LexNGO2021 – A look into Hungary's LexNGO2021 on its first anniversary](#)' (12 May 2022).

⁶ RECLAIM, International Federation for Human Rights, European Civic Forum, Human Rights Watch, Transparency International EU and Forbidden Colours '[Urgent Call to Suspend Hungary's Law on the Defense of National Sovereignty](#)'.

⁷ RECLAIM, '[Factsheet: Viktor Orbán McCarthist Law](#)'.

⁸ R. Daniel Kelemen and Tomaso Pavone, '[Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union](#)' (21 December 2021), pp 23-24.

⁹ European Parliament LGBTI Intergroup, '[MEPs write to President von der Leyen on Coman & Hamilton's 4 year non-implementation anniversary](#)' (7 June 2022).

¹⁰ See European Commission, '[Communication "Union of Equality: LGBTIQ Equality Strategy 2020-2025"](#)' Communication COM(2020) 698 final (12 November 2020), section 3.2.

Hence, we call upon the Commission to act depoliticised and in a foreseeable way against existing and future breaches of Article 2 TEU and CFREU rights, by:

1. Launching infringement procedures for the non-implementation of CJEU judgements.
2. Launching infringement procedures when the existing mechanisms for the protection of EU values (e.g. rule of law cycle) or EU institutions and agencies identify violations of TEU values and CFREU rights.
3. Paying enhanced consideration to the complaints brought by NGOs and civil society organisations working on fundamental rights.¹¹
4. Increase transparency in the handling of infringement procedures, guaranteeing broader access to documents once the cases are closed.
5. Restore civil servants' autonomy to build up infringement cases on TEU values and CFREU rights.

1.3. MORE EFFECTIVE

Even when the Commission acts to defend fundamental rights, it many times focuses on a narrow infringement and disregards other breaches that, together, denote systemic violations of EU values. Hence, the European Commission should launch systemic infringement procedures bundling together various violations of EU law under an overarching infringement of Article 2 TEU values or CFREU rights, rather than addressing infringements one by one.¹² This would also show the Court that the Member States' violations are "systemic, structural, and cannot be fixed only with small patches of technical compliance".¹³ This approach is doctrinally well-supported.¹⁴

In addition, those violations justify higher sanctions at the CJEU than individualised infringements and, thus, provide greater deterrence.

Examples. In 2011 Hungarian judges were forced into retirement after a law retroactively lowered their retirement age. The Commission brought Hungary to the Court on the basis of a breach of the EU directive that prohibited age discrimination in employment and won the case.¹⁵ This pyrrhic victory allowed the illegally retired judges to either be reinstated in lower court positions or to obtain financial compensation. Most judges opted for the

¹¹ The current complaint handling system works akin to a black box: complainants do not know whether and how their complaints lead to investigations and to the launch of infringements.

¹² Scheppele K.L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in C Clossa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016) 105, 7.

¹³ Scheppele K.L., 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions' *Verfassungsblog* (November 2013). If the Court establishes that Article 2 TEU has been breached, the Member State should be required to cease infringing upon specific EU law provisions – the bundled set of alleged systemic violations – and to address the systemic threat itself. Otherwise, the Court could adopt "intermediate judgments between finding no violation and finding a systemic violation" that reaches the threshold of Article 2 TEU.

¹⁴ *Ibid.*

¹⁵ Case [C-286/12 Commission v. Hungary](#) ECLI:EU:C:2012:687.

latter. However, the broader issues of the attacks on judicial independence were left unaddressed.¹⁶

Hence, we call upon the Commission build infringement cases that consider structural violations of TEU values, by:

1. Launching infringement procedures that consider several individual EU law breaches which belong to a unified violation of EU values or CFREU rights.
2. Use the 'structural infringements' to request the CJEU to impose higher sanctions for breaches of TEU values.

2. Recommendations and next steps

The current Commission guidelines on EU law enforcement¹⁷ are broad and do not provide clarity on the way the Commission decides to bring cases before the CJEU on Article 2 TEU cases.

We ask the Commission to address the problems mentioned above and to give explicit and comprehensive guidance on how it will handle infringements of TEU values and CFREU rights, explaining:

- i. The criteria used to decide whether to lodge infringement proceedings and to prioritise between cases;¹⁸
- ii. The procedure in terms of deadlines, the request of interim measures, consultations with experts from the FRA and civil society and complaint management.
- iii. The linkages with other rule of law instruments – namely on the protection of the Union budget and Article 7 TEU. E.g. the authoritative Court judgements interpreting Article 2 TEU or the CFREU could be used as milestones under the conditionality mechanisms.

¹⁶ Bárd P., Pech L., '[How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The "Hungarian Model"](#)' (2019) RECONNECT Working Paper No 4, 2019, 18-19.

¹⁷ European Commission '[Enforcing EU law for a Europe that delivers](#)' Communication COM(2022) 518 final (13 October 2022).

¹⁸ The European Commission has not answered the European Parliament and the European Court of Auditors' questions related to the Commission's methodology regarding the criteria used to determine whether to launch a court proceeding. See European Court of Auditors '[Putting EU law into practice: The European Commission's oversight responsibilities under Article 17\(1\) of the Treaty on European Union](#)' (2018); Sophia in 't Veld parliamentary question '[Are you still there, Guardian of the Treaties?](#)' (10 January 2022).

NEXT STEPS

- **The Member States and the European Parliament should request the European Commission to adopt a communication developing clear and concrete guidelines on enforcement of Article 2 TEU values and CFREU rights, by the end of 2025.**
- **The guidelines should address the shortcomings identified in the upcoming European Court of Auditors report on infringements and the existing one on the EU funding conditionality rules.¹⁹**
- **The European Commission should come up with an internal plan with topics to address – as a result of its guidelines on enforcement – by the end of 2025.**

¹⁹ European Court of Auditors, 'The rule of law in the EU An improved framework to protect the EU's financial interests, but risks remain' (2024).