

# The boundaries of the Commission's discretionary powers when handling petitions and potential infringements of EU law <sup>1</sup>

## From legal limits to political collaboration in enforcement?

### ABSTRACT

This study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Petitions (PETI) analyses the legal limits on the discretion of the Commission when deciding to launch, or not to launch, an infringement action, especially in response to a petition. In addition, it assesses how the Commission uses this discretion in practice, and formulates recommendations on improved political collaboration between the European Parliament and the Commission, in the interest of EU citizens.

Petitions are an important yet underused part of the EU's democratic toolkit. In part, the effectiveness and attractiveness of petitions depends on the collaboration between the European Parliament and the Commission. It is the Commission that, as the enforcer of EU law, has to decide if it will further pursue potential violations of EU law raised in petitions forwarded to it by the European Parliament. Yet in recent years the Commission has taken an increasingly strategic approach to enforcement, including in the context of infringements. This raises the question if the Commission applies the same strategic approach to petitions, and if so, if this is legal and desirable from a policy perspective.

To address these questions, this study first explores what the legal limits to the Commission's discretion are when deciding to initiate an infringement or another enforcement mechanism. It subsequently assesses how the Commission applies its discretion in practice when dealing with petitions and complaints, combining a quantitative and qualitative approach. Based on this analysis, this study subsequently sets out and assesses the Commission's practice, both from a legal and from a policy perspective, and develops some key policy recommendations to address the main challenges identified. The key findings and recommendations are as follows.

### Key findings

The Commission enjoys **a near absolute discretion when deciding to initiate an infringement procedure under Article 258 TFEU**. This discretion is composed of a substantive and a procedural dimension. Substantively, the Court of Justice of the EU has confirmed that both *whether* the Commission initiates an infringement, and *why* it does so, is within its "entire discretion". As a result, the Commission has complete discretion in setting the criteria it will use to guide its own discretion, as well as in applying these criteria to an

<sup>1</sup> Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703589/IPOL\\_STU\(2022\)703589\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703589/IPOL_STU(2022)703589_EN.pdf)



individual case. Procedurally, the CJEU has consistently held that individuals do not even have standing to challenge the substantive reasoning of the Commission on why it decides to start an infringement or declines to do so. In short, the CJEU will not even go into a substantive assessment of why the Commission decides not to pursue a petition or complaint, even if substantive limits to the Commission's discretion were to exist. As this study shows, this discretion goes beyond the already significant discretion seen in other fields of EU law. At the same time, none of the limits on the Commission's discretion seen in these other fields, including competition law, the Citizens' initiative and the excessive deficit procedure, can be transposed to the context of the infringement procedure.

Considering this near absolute discretion, **it is extremely unlikely that the CJEU will ever step in to limit the discretion of the Commission to initiate an infringement or not.** At the same time, even if not enforced by the CJEU, several legal principles continue to apply and should guide the Commission's use of its discretion, being the **obligation to state reasons, the positive obligation to enforce EU law and protect EU (fundamental) rights and the horizontal duty of sincere cooperation.** The European Parliament can and should rely on these principles when politically scrutinising the enforcement choices made by the Commission. As such, these principles can help to structure and improve the collaboration between the European Parliament and the Commission in the context of petitions and enforcement more generally.

When it comes to its practice, our analysis shows that **the Commission has indeed embraced an ever more strategic and restrictive approach to infringement proceedings, including in the context of petitions and complaints.** In the 50 petitions examined, the *2017 Communication EU law: Better results through better application* is strictly and consistently applied. The Commission especially relies on the two negative criteria in the 2017 Communication to decline further enforcement action. **In 96% of the petitions reviewed, further action is declined at least in part because the alleged violations could be sufficiently or better addressed by national remedies. In 46% of the petitions reviewed, the Commission declines to act at least in part because the petition concerns an individual case, and not a systematic violation.** Both grounds, moreover, seem closely related. In cases that are considered individual, the Commission often also finds that national remedies are better suited. **At the same time, it is not clearly defined when a case is 'individual' or 'structural', or when a 'sufficient' national remedy is available. Two of the key criteria that guide the Commission's discretion therefore remain rather vague.**

Consequently, it appears that under the 2017 strategic approach of the Commission, **individual petitions have virtually no chance of leading to an infringement.** In light of its near absolute discretion, **the current practice remains, however, squarely within the discretion awarded to the Commission under Article 258 TFEU and the case law of the CJEU.**

Whilst the Commission's current practice is legal and grounded in a practical need for strategic selection, it can nevertheless **produce some negative, unintended consequences.** Firstly, **citizens that petition or complain may become disappointed** in the EU. Secondly, and relatedly, **the petitions mechanism may lose appeal.** Both consequences may negatively affect the legitimacy of the EU and might lead to fewer complaints and petitions, though these form an important source of information for EU institutions. Thirdly, the Commission's **shift to an increasingly politicised enforcement policy may create the need for more political scrutiny of its discretion, rather than more legal scrutiny by the CJEU.** Briefly put, the legal discretion awarded to the Commission was largely based on its technocratic nature and expertise. If the Commission starts to apply this discretion more politically, it will be near impossible to constrain these political choices through enforceable legal limits. Instead, political discretion may need to be checked by political scrutiny.

In addition, this study shows that **the information about complaints, petitions and other enforcement actions is not sufficiently connected, comprehensive and integrated.** Existing data, moreover, are not sufficiently available to external parties such as individuals or NGOs, or even the European Parliament. This makes it harder to bundle complaints and determine which violations of EU law actually are systemic.

More generally, this study shows that **forcing the Commission to start more infringements, even if legally possible, would not be the solution to the challenges identified above.** The infringement procedure, or

other enforcement mechanisms like the EU Pilot, are inherently unsuited for this task. Infringement procedures, and the EU Pilot, are necessarily largely confidential, and hence unsuited to offer citizens more recognition or transparency.

## Recommendations

To address these underlying challenges, the main policy recommendation of this study, therefore, is to **design new or complementary enforcement procedures, tools and mechanisms that improve the collaboration between the European Parliament and the Commission, lead to better interconnection and accessibility of data, and hence also better serve the needs of citizens without having to redesign or undermine the infringement process.** Such tools could include a single portal for complaints and petitions, better connecting existing databases with new sources of information, and a more active role for the European Parliament in investigating and bundling petitions, requesting and carrying out studies to identify systemic breaches, and applying more political pressure on the Commission to prioritise enforcement for such breaches. Lastly, we offer **insights from social psychology, especially concerning procedural justice**, to respond to the reality that it is not practically feasible or desirable to pursue enforcement in all cases that are the subject of a petition. Incorporating these insights from social psychology into how the Institutions' act and communicate could promote a positive citizen experience, regardless of substantive outcome, and bolster the perceived legitimacy of the EU.

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External Authors:

Prof. Dr. Armin CUYVERS, Leiden University

Dr. Darinka PIQANI, Dr. Frederik BEHRE, Corlijn REIJGWART LL.M, Leiden University

Research Administrator responsible: Martina SCHONARD

Editorial assistant: Sybille PECSTEEN de BUYTSWERVE

Contact: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

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