STUDY

Requested by the LIBE committee

European Parliament

Enforcement of EU law in the Area of Freedom, Security and Justice

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Enforcement of EU law in the Area of Freedom, Security and Justice

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, provides a quantitative and qualitative analysis of how EU law in the Area of Freedom, Security and Justice (AFSJ) is currently enforced. It discusses traditional enforcement tools like infringement actions, budgetary conditionalities and other policy-based monitoring and evaluation methods. Based on this it formulates policy recommendations to further improve AFSJ-enforcement in a comprehensive manner.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

AFCO	EP Committee on Constitutional Affairs
AFSJ	Area of Freedom, Security and Justice
AMIF	Asylum, Migration and Integration Fund
BMVI	Border Management and Visa Instrument
BUDG	EP Committee on Budgets
CERV	Citizens Equality Rights and Values Fund
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
ECHR	European Convention on Human Rights
EP	European Parliament
EU	European Union
EUAA	European Union Agency for Asylum
FRONTEX	European Border and Coast Guard Agency
HOME	Migration and Home Affairs
ISF	Internal Security Fund
JHA	Justice and Home Affairs
JURI	EP Committee on Legal Affairs
JUST	Justice and Consumers
LIBE	EP Committee on Civil Liberties, Justice and Home Affairs
PETI	Committee on Petitions
RRF	Recovery and Resilience Facility

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EXECUTIVE SUMMARY

Where have the Guardians gone? Scholars Kelemen and Pavone asked that question in a recent academic article. They analysed a remarkably sharp decline (about 80%) in the number of infringement actions brought by the European Commission (Commission) over the last twenty years. Their work attracted considerable political attention and led to European Parliament (Parliament) questions to the Commission on the matter. This, in turn, forced the Commission to adopt a new Communication on Enforcing EU Law.[1] Denying that it has gone missing in action, or that it now prioritises its role as initiator of legislation over its role of Guardian of the Treaties and of EU law, the Commission argues that enforcement of EU law involves more than just infringements.

But how convincing is this? This study seeks an answer by analysing **enforcement of EU law in the Area of Freedom, Security and Justice (AFSJ)**. This substantive field is a useful laboratory for scrutinising the rationality, reality, and consequences of the Commission's "enforcement 2.0"-vision. As this policy area only started substantively developing when the decline in infringements had already set in, it has no legacy of strong(er) infringement action. Moreover, in the AFSJ different tools are *already* used simultaneously to strive to ensure Member States' compliance with EU law. These include binding budgetary conditionalities in AFSJ-specific EU funds as well as general budgetary conditionalities involving AFSJ-related standards, such as judicial independence. These also concern a variety of AFSJ-specific non-binding monitoring and evaluation methods employed by EU institutions, EU agencies and Member States. Tracking the state of play vis-à-vis each of these tools, and how these interrelate in law and in practice, this study critically assesses the Commission's record in the light of *its own* (updated) vision on enforcement and suggests how Parliament can use and further improve its political oversight with the aim of achieving stronger and better enforcement of EU law.

A first finding is that **the Commission's use of its powers to launch infringement actions (Article 258 TFEU) is unbalanced and varies significantly across AFSJ sub-areas**. In particular, it does not consistently follow through on its stated strategic focus of prioritising problems with judicial independence and non-implementation of judgments of the Court of Justice (Court) (Article 260 TFEU). Fully acting on its own strategy should particularly be implemented vis-à-vis Member States subject to Article 7 TEU monitoring as a matter of automaticity, not discretion. After all, rule of law problems pose the gravest threat to the Union legal order. More generally, the study recommends that the Commission at least follows up in a consistent manner on its declared priorities and adopts a stronger enforcement approach. The study also calls on the Commission to provide more transparent and easily available information about the state of play of infringement actions it has launched, distinguishing different stages in the same file and clarifying the timeline (for example modelled on Parliament's "legislative train" lay-out).

Secondly, the Commission has often stated that its decision-making on when and how to enforce EU law depends on questions asked by national judges using the **preliminary reference procedure** (Article 267 TFEU). However, crucially, the study reveals that the practice of national judges using this possibility in the AFSJ is extremely **uneven, both geographically and substantively**. About 80% of all AFSJ-related preliminary questions originate from just 20% of Member States, and many national judges focus exclusively on "national hobby areas" or specific substantive areas of interest. The study recommends for the Commission to clarify the implications of this. Given that this points to uneven knowledge about AFSJ-law across the EU, it also suggests that the Commission and Parliament make

[1] European Commission (2022) Communication from the Commission on "Enforcing EU law for a Europe that delivers". COM(2022)518.

decisions on EU funding regarding judicial training on AFSJ-law based on this diverse reality. More generally, it is also recommended that Parliament asks the Commission to publish all its Court submissions in the context of preliminary ruling procedures. This would greatly facilitate a more transparent discussion on, and political oversight over, the Commission's positions on substantive issues across the AFSJ at a moment when it has already defended these in open court.

Thirdly, the study analyses the application of binding **budgetary conditionalities as methods to achieve enforcement and their interplay with other enforcement methods**. It focuses both on the five HOME and JUST funds and on the general Common Provisions Regulation (CPR), Rule of Law Conditionality Regulation and Recovery and Resilience Facility Regulation operating conditions based on AFSJ-law. The analysis reveals that different AFSJ-specific EU funds are subject to different legal regimes. Whereas HOME funds are covered by the CPR, and therefore its requirement for all spending to comply with the Charter of Fundamental Rights (Article 9 CPR), JUST funds are not. This raises the question of whether this matters in practice. In its Implementing Decisions on funding the Commission now often applies this "Charter conditionality" by referring to Court judgments as evidence of non-compliance with the Charter. But what is the link between CPR application and launching infringements under Article 258/260 TFEU? The governance of the "Charter conditionality" raises a further question: when is it (un)triggered, by whom and based on what criteria? A final issue concerns the overlap and interplay of the different general budgetary conditionalities tools. Would (un)blocking decisions taken by the Commission or Council under one tool automatically have consequences for the assessment of Member State's compliance with AFSJ-law under other tools? The study recommends that the Commission elaborates on all these elements to clarify them on the occasion of the Rule of Law Conditionality Regulation's evaluation expected in January 2024, and for Parliament to ask the Commission to do so.

Fourthly, the study highlights the **importance of non-binding AFSJ-related monitoring and evaluation modalities focusing on Member States' compliance with various aspects of AFSJ-law, including the Schengen Evaluation Mechanism, the FRONTEX vulnerability assessment and new EUAA modalities** modelled on that. The Commission plays a role in each of these methods, either as a secretariat or a member of EU agencies' management boards and has access to the monitoring and evaluation results. At this stage, even if these mechanisms explicate being without prejudice to Article 258 TFEU, it is an open question whether this set-up facilitates or rather delays or dilutes the Commission's enforcement. The study recommends the Commission to formulate clear criteria as to how and when it uses the fruits of non-binding AFSJ-monitoring and evaluation for binding enforcement, such as applying budgetary conditionality or infringement action. More generally, the Commission should explain how it can ensure that its different tasks are combinable under "enforcement 2.0", or whether – as proposed by Kelemen/Pavone – it should separate its decision-making about launching infringement actions from its executive and managerial roles. The study also recommends for Parliament to call on the Commission to provide these clarifications.

The study's overall conclusion is that while the Commission should certainly be more resolute and coherent in ensuring stronger and better enforcement of the Treaties and of EU law, as requested by Parliament in its resolutions, **Parliament has many possibilities of its own already to use and strengthen its political control over how the Commission ensures Member States' compliance with EU law**. Perhaps paradoxically, "enforcement 2.0" *expands* Parliament's ways to control the Commission in the light of how the *Commission itself* understands its "Guardian role". Infringements have the downside of granting the Commission broad discretion, placing concrete decisions beyond the reach of political control. Parliament has greater leverage over other aspects of "enforcement 2.0", such as designing legislation to facilitate control over enforcement action, including what effects

should be given to monitoring findings and when and how legislation is evaluated. Moreover, deciding on whether, where and when to spend EU funds in ways that encourage compliance with EU law when and where it most matters (and that discourage non-compliance in ways that have real consequences for Member States) has proven a very powerful method. These are all aspects where Parliament already has possibilities and a crucial role.

Based on the Treaties and secondary legislation the Commission is the *only* institutional actor involved in *all* aspects of enforcement of EU law, including in the AFSJ. It needs to step up its game and show it guards enforcement of Union law like a veritable Guardian of the Treaties. Parliament in turn can step up its political pressure and oversight on the Commission (and the specific individual Commissioners, who make proposals for infringements actions), consistently engage with the Commission on all aspects of "enforcement 2.0" and scrutinise its enforcement actions at all levels (committee level, plenary level, through parliamentary questions, studies, etc). This would ensure a permanent focus on the overarching imperative of effective compliance with EU law by Member States. This issue could be raised by Parliament also on the occasion of the appointment of a new Commission and during the hearings of candidate Commissioners, so as to obtain assurances on the matter. Indeed, the overall key message of this study is that the extent to which the Commission, as *the* EU institution with ultimate responsibility for enforcement, can and does actually achieve *that* should remain the focus – and a consistent top priority in the EU as a community of law, in the AFSJ and beyond.

1. INTRODUCTION

Enforcement of EU law in the Area of Freedom, Security and Justice (AFSJ), understood broadly and comprehensively[2], takes place in different ways by different actors. The central traditional method is **infringement action**. Article 258 of the Treaty on the Functioning of the European Union (TFEU) gives the European Commission (Commission), acting as Guardian of the Treaties, the power to take legal action against a Member State if it considers that the Member State is not respecting its obligations under EU law. In that case the Commission, under Article 258, second sentence, TFEU, may ultimately refer the issue to the Court of Justice (Court). The Court can then rule on the matter. If the Member State in question consequently fails to implement the judgment by not taking the measures necessary to do so, the Commission can decide to return to the Court, which can then **impose financial penalties** (Article 260(2) TFEU).

The use of this traditional enforcement tool, which is a key aspect of the EU legal order, and which gives the Commission an exclusive role, has recently received renewed attention. In a widely read academic article,[3] that also received a lot of media coverage, the scholars **Kelemen and Pavone show that the Commission, starting in 2004, became more reluctant to launch infringements. As a result, their number decreased significantly**. Kelemen and Pavone's central argument is that the Commission opted to do this because it "grew alarmed that aggressive enforcement was jeopardising intergovernmental support for its policy proposals". They problematise this "**forbearance**" (i.e. deliberate and revocable under-enforcement) in that "**by embracing dialogue with governments over robust enforcement, the Commission sacrificed its role of Guardian of the Treaties to safeguard its role as engine of integration**".[4] According to them, in moving from being a mostly technocratic to a **more political actor** due to subsequent treaty changes and institutional developments, the Commission has led slip on strict enforcement of legislation and policy agreed *in the past* to secure Member States' cooperation in developing *new* legislation and policy – essentially

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[2] This study employs a broad conception of "enforcement" of EU law. This understanding includes not only legally binding traditional methods to ensure compliance with EU law, such as the Commission's general powers of enforcement under infringement actions under Articles 258-260 TFEU, but also other legally binding implementation tools, such as budgetary conditionalities, as well as legally non-binding auxiliary methods and procedures to induce compliance with EU law, such as peer review methods and monitoring methodologies and procedures that EU institutions, EU agencies and Member States use to track compliance with EU law at Member State level. In taking this broad approach, the study follows both academic literature and policy practice. In her book "Enforcement of EU law: the role of the Commission" (OUP, 2012), Stine Andersen used this most helpful distinction, discussing the traditional enforcement methods first (chapters 2 and 3), then enforcement through binding implementation tools, i.e. the broad range of instruments available to the Commission to ensure compliance despite not being part of its enforcement powers *stricto sensu*, such as budgetary conditionalities (chapter 4), and, lastly, non-binding auxiliary enforcement procedures, i.e. "compliance management tools", such as peer-to-peer monitoring methods (chapter 5). As she explained (p. 4): "since the Commission deploys these [other, non-traditional, JM] measures in conjunction with the general infringement procedure or as an alternative with the less discernible aim of ensuring compliance, **a comprehensive EU enforcement analysis must take note of them**" (emphasis added). From this perspective, a broad and comprehensive understanding of "enforcement" allows for a better framework and standpoint to critically assess the Commission's record in ensuring compliance with EU law in the AFSJ, and to propose any improvements that link to its full toolbox. This analytical approach also tracks with the current state of the general policy debate about ensuring Member States' compliance with EU law and the Commission's self-understanding. In its most recent Communication on the matter, the Commission equally discusses each of these tools, and their interaction, under the banner of "Enforcing EU law"; COM(2022)518, Commission Communication, "Enforcing EU law for a Europe that delivers", 13 October 2022. In this Communication the Commission characterised the task of implementing and applying EU law as "a combined effort" (p. 4), and discussed both budgetary conditionalities (p. 13-15) and non-binding peer-to-peer monitoring mechanisms such as Schengen evaluation as a method of "early detection" (p. 16).

[3] Kelemen, R. D. and Pavone, T., 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', (2023) 75(4) *World Politics* 779-825, available at https://ssrn.com/abstract=3994918.

[4] Ibid, p. 3, 30 of the working paper version.

prioritising its role of exclusive initiator of EU legislation (Article 17(2) TEU) over its equally exclusive role as Guardian of the Treaties (Article 17(1), second and third sentence, TEU).

However, specifically **for the AFSJ, there are other binding and non-binding ways too, laid down in EU secondary legislation, in which compliance with EU law is enforced or monitored**, often involving other actors than just the Commission. Most of these tools and methods are very recent, or even still under development, but no less consequential. They change the way in which AFSJ-related EU law can be and is being enforced.

A first, and very recent development of considerable note is attaching **AFSJ-related substantive conditions for Member States to the issuance of various EU funds in a legally binding way**.[5] This relates to both the regular budget, such as governed by the **Financial Regulation**[6] and **Common Provisions Regulation**[7] (CPR), as well as additional funds earmarked to make Member States governments bounce back from COVID 19 more quickly, i.e. monies from the **Recovery and Resilience Facility**[8] (RRF). The new so-called **Rule of Law Conditionality Regulation**[9] is applicable to both these types of funding. Notably, a variety of the conditions that Member States need to fulfil, such as concerning judicial independence, fighting corruption or remedying non-implementation of Court judgments, are AFSJ-related aspects of EU law in substance. In addition, there are many EU funds that are specifically aimed to assist Member States to achieve the specific policy-objectives laid out in the AFSJ. The financial consequences of non-compliance or stopping or postponement of funding would be immeasurably larger than any penalty the Court could impose for non-implementation of a judgments under Article 260(2) (and 260(3)) TFEU. In this way, this new development - if well used and enforced - could have tremendously significant consequences for enforcement of EU law in the AFSJ,[10] as well as – consequently – the number of tools and methods that the Commission and other actors, such as Parliament, have available to induce enforcement based on legally binding tools.

Secondly, there are further **non-binding, auxiliary methods and procedures to promote compliance** with EU law in the AFSJ at the Member State level. As a relatively new EU policy area, Justice and Home Affairs (JHA) cooperation has one of the highest densities of agencies and bodies. Some of these agencies, such as the **European Border and Coast Guard Agency (FRONTEX**) and the **European Union Asylum Agency (EUAA**, formerly European Asylum Support Office – EASO), have recently been tasked with significant monitoring roles and methods of whether and how EU law is

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5 For an excellent comprehensive discussion, see Rubio, E., Kiss-Gálfalvi, T., Nguyen, T., Ruiz de la Ossa, T., Corti, F., and Gómez, A.F., *The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context* (European Parliament (BUDG committee), April 2023) PE 747.469, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747469/IPOL_STU(2023)747469_EN.pdf

6 Regulation (EU, Euratom) 2018/1046 of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

7 Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

8 Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility.

9 Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

10 See Scheppele, K.L., and Morijn, J., 'What Price Rule of Law?' in: Södersten, A. and Hercock, E. (eds.) *The Rule of Law in the EU, Crisis and Solutions (*Swedish Institute for European Politics/SIEPS, 2023), available at: https://www.sieps.se/en/publications/2023/the-rule-of-law-in-the-eu-crisis-and-solutions/ (a shorter version is available at *Verfassungsblog*: "Frozen: How the EU is blocking funds to Hungary and Poland Using a Multitude of Conditionalities" (4 April 2023), at: https://verfassungsblog.de/frozen/).

complied with at Member State level. Moreover, as a legacy of its intergovernmental origins and unlike in many other areas of EU cooperation, peer-to-peer monitoring mechanisms, such as the **Schengen Evaluation and Monitoring Mechanism**, are still in operation. Next to the Commission this also includes the Council of Ministers (Council) as one of the prime actors in promoting enforcement of EU law. The European Parliament (Parliament) must also be regularly kept up to date. As a result, the AFSJ is likely one of the most heavily *monitored* and intensely *discussed* fields of EU cooperation. Quite whether this leads to more *enforcement* of EU law, or rather only complicates things further or even justifies postponement of enforcement, is then a follow-up question that deserves to be addressed.

In any event, it is important to take as a legal and factual starting position that traditional methods to induce compliance with EU law in the AFSJ – in enforcement discussions often still the be-all-and-end-all – now go hand in hand with binding and non-binding newer methods to enforce the law in sub-fields of the AFSJ. As a result, with **multiple enforcement methods running simultaneously**, a new pattern of enforcement action is currently developing, the lasting contours and implications of which may yet be largely undefined.

Importantly, however, **Parliament has considerable agency here to help shape the direction of development**. It plays a role in democratic control over each of these ways of enforcing EU law in general and in the AFSJ specifically. It adopts resolutions on many issues where it denounces violations, late transposition and incorrect implementation of EU law, and calls on the Commission to take enforcement action; it adopts resolutions on the Commission Annual Report on Monitoring the Application of Union law;[11] it handles petitions in this field and adopts very critical resolutions;[12] it has discussions with Commissioners responsible for enforcement of EU law in the AFSJ specifically,[13] debates and scrutinises the situation in Member States in relation to enforcement of the rule of law and of EU law and the activities of agencies active in the AFSJ generally[14] or in their presence through specific sub-committee monitoring groups (Schengen scrutiny group; Frontex scrutiny group; Democracy, Rule of Law and Fundamental Rights Monitoring Group, etc.), and has been a vocal advocate for using budgetary conditionalities relating to various aspects of the law governing the AFSJ.[15] Different Parliamentary committees, including LIBE, BUDG, AFCO, JURI and PETI, are therefore simultaneously involved. Moreover, and importantly, in each of these activities Parliament addresses the Commission in a *different aspect* of the performance of its tasks under Article 17 TEU. Most crucially,

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[11] E.g. Parliament's resolution that was passed in 2019 and which reacts to the Commission's Annual Reports of 2017, 2018 and 2019 is available here: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2019/2132(INI)

[12] See Cuyvers, A., Piqani, D., Behre, F. and Reijgwart, C., *The boundaries of the Commission's discretionary powers when handling petitions and potential infringements of EU law – From legal limits to political collaboration in enforcement?* (European Parliament Policy Department for Citizen's Rights and Constitutional Affairs, study for the Committee on Petitions (PETI committee), November 2022) PE 703.589, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703589/IPOL_STU(2022)703589_EN.pdf

[13] A good example of this is the exchange of views that took place on 6 February 2023 between the Commissioners for Home Affairs (Ylva Johansson) and Justice (Didier Reynders) and Parliament's LIBE Committee based on the latter's request of 21 February 2022, motivated by the Kelemen/Pavone article mentioned above n. 1, to be provided with an overview of infringement actions in the LIBE covered policy fields for the period of 2004 to 2018 (the Commission reply of 11 July 2022 is on file with the author), at: https://www.europarl.europa.eu/committees/en/the-enforcement-of-eu-law-in-the-area-of/product-details/20230201EOT07201 and https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-civil-liberties-justice-and-home-affairs_20230206-1500-COMMITTEE-LIBE.

[14] See e.g. Busuioc, M., *EU Justice and Home Affairs Agencies: Securing Good Governance* (European Parliament, Policy Department for Citizen's Rights and Constitutional Affairs, study for the LIBE Committee, October 2017) PE 596.812, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596812/IPOL_STU(2017)596812_EN.pdf

[15] See e.g. "Rule of law: new mechanism aims to protect EU budget and values" (European Parliament, 2021), available at: https://www.europarl.europa.eu/news/en/headlines/priorities/eu-s-long-term-budget/20201001STO88311/rule-of-law-new-mechanism-aims-to-protect-eu-budget-and-values

however, enforcement of EU law broadly conceived, including in the AFSJ, is not a technocratic or automatic exercise, nor is democratic control over it. As was recently perceptively observed:

> "Forbearance or not, [the fact that enforcement decisions have become based more on political and policy considerations than on "objective" legal considerations] raises the more fundamental challenge of whether the overall EU institutional system, including the relation between the Commission and the … Parliament, should be tweaked to readjust to a more political Commission with a more political approach to enforcement. … **A more political approach to enforcement might also require increased political oversight of the Commission's enforcement activities … Parliament would be the obvious candidate for such a task**". [16]

As the AFSJ is one of the most recently developed EU policy fields (indeed, it only started growing *after* the steep decline in the number of infringement cases brought by the Commission started that Kelemen and Pavone problematised), as well as a unique area where old and new binding and non-binding monitoring and enforcement methods, including budgetary conditionalities, are simultaneously employed, studying the enforcement of compliance with obligations flowing from EU law in this field represents an opportunity to analyse **"Commission enforcement of EU law 2.0"** at work - and **the role Parliament could or should play in it, and how**. This study aims to contribute to that debate by providing a quantitative and qualitative analysis of enforcement data in the AFSJ and identifying areas of attention to develop political oversight over enforcement of EU law in that area specifically, and perhaps more generally. In doing so, **the study will explicitly build on, and seek to be complementary to three further studies very recently conducted for Parliament, specifically for the PETI [17], BUDG [18], and AFCO/LIBE [19] committees**, respectively. This study will extensively refer to these three studies and is structured to avoid repetition with the analysis and findings presented in each of them.

This study is structured as follows: chapter 2 provides a brief overview of the variety of binding and non-binding tools and methods available to enforce compliance with EU law in the AFSJ. It distinguishes the different roles the Commission, Parliament and other EU-level and national actors play vis-à-vis each method of enforcement. Chapter 3 then presents and structures available data about traditional enforcement of EU law in the AFSJ, distinguishing between different sub-fields of the AFSJ, different enforcement methods and different EU- and national level actors involved. Chapter 4 aims to crunch this AFSJ enforcement data. It first provides some observations on infringement actions and preliminary references, and then discusses the further binding and non-binding non-traditional enforcement through budgetary conditionalities and new monitoring and evaluation methods to enforce AFSJ-law at Member State level. Based on the analysis, policy recommendations will be formulated. Recommendations are also addressed to Parliament for it to engage with the Commission in a targeted way, particularly where it concerns ways for LIBE and other parliamentary committees to improve its/their role in ensuring political oversight over enforcement of EU law in the AFSJ.

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16 Above n. 12 (at p. 78).

17 Above n. 12.

18 Above n. 5.

19 Pech, L., Bárd, P., *The Commission's rule of law report and the EU monitoring and enforcement of Article 2 TEU values* (European Parliament (LIBE and AFCO committees), February 2022), PE 727.551, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf

2. ENFORCEMENT OF EU LAW IN THE AFSJ: TOOLS, METHODS AND PARLIAMENTARY CONTROL

2.1. Traditional ways to enforce EU law in the AFSJ

As is well known, **Article 17 TEU** lays out the **Commission's different tasks and roles**:

> 1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties…
>
> 2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

Article 17(1), second and third sentences, TEU, famously encapsulate the **Commission's role as Guardian of the Treaties**. The infringement procedure under Article 258 TFEU is the Commission's main tool to carry out this role. However, also in its **budget execution and programme management roles** (Article 17(1), fourth sentence), in its coordinating, executive and management functions (Article 17(1), fifth sentence), as well as when acting as virtually exclusive **initiator of legislation** (Article 17(2), first and second sentence), the Commission's tasks are governed by its overarching duty to promote the general interest of the Union as laid down in the first sentence of Article 17(1), first sentence, TEU. In these other, "non-Guardian" roles as well, therefore, it can – and must – engage in ensuring, facilitating and promoting the enforcement of, and compliance with what underlies, and gives shape to it: EU law. It may have different roles, and indeed will need to sometimes choose between them in a strategic way[20], but it is guided by a single spirit.

Yet even at first sight it is evident that there can be **significant tension**[21] between the Commission's various Article 17 TFEU-tasks, as it switches between a **prosecutor-type role as legal enforcer** and **cooperative and dependent roles as initiator, manager and facilitator**. This will be even more the case if it fulfils these tasks simultaneously and contemporaneously, regarding the *same* policy field and working with the *same* stakeholders. It is a matter of course that it is not easy to be a team player in the morning and a referee in the afternoon.

As a crucial consequence, too, the nature of **(political) control by Parliament** over each of these aspects of the Commission's activities can and must vary to add up to a coherent whole for Parliament to be in a meaningful conversation with the Commission about ensuring Member States' compliance with EU law in a broad and comprehensive sense, and ultimately to hold it accountable in an effective and consequential manner.

This section will briefly lay out the main aspects of the framework against which to understand the legal, policy and political aspects of enforcement of EU law in the AFSJ. It will first focus on the strategy currently applied by the Commission on the use of its enforcement powers *stricto sensu*, i.e. in deciding

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[20] Andersen, above n. 1, p. 199: "acting as a strategic institutional actor, the Commission can pursue enforcement aims in multiple ways".

[21] See also Editorial Comments, 'A revival of the Commission's role as guardian of the treaties?' (2012) 49 Common Market Law Review 1553, at 1554.

whether and when to launch infringement actions and draw attention to some of the specificities of the AFSJ in this regard as well (2.1). Next it will look at other binding and non-binding methods and tools to induce Member States' compliance with AFSJ-related EU law, such as the operation of AFSJ-specific EU funds and the application of AFSJ-related substantive budgetary conditionalities across an increasing number of other EU funds, as well as the Schengen Evaluation and Monitoring Mechanism and FRONTEX and (future) EUAA evaluation and monitoring capabilities (2.2). This will be followed by a brief reflection upon the complex nature of parliamentary control vis-à-vis these various aspects of inducing compliance with EU law in the AFSJ (2.3). The overall aim of this section is to provide relevant context in which to assess how each of the traditional and non-traditional tools are now being used in parallel in daily practice (section 3). Against that background, the state of play will be critically analysed, including how the various ways in which compliance is sought relate, and the options available to Parliament to act on these findings (section 4).

2.1.1. Basic distinctions and the Commission's strategy

The Commission has laid down its approach to enforcement in several consecutive Communications[22] and has significantly developed it over time.[23] Its current strategic approach to infringement actions, formulated in a well-known **2016 Communication**[24] **and a more recent one from 2022**[25] (which was clearly a **reaction to the discussion following the Kelemen/Pavone paper**, which also formed the trigger for the present study[26]), is to **focus on what it views as the most important breaches of EU law**. The Commission explained it will give **priority**[27] to:

1. Cases where Member States have **failed to communicate transposition measures** or where those **measures have incorrectly transposed directives**;
2. Cases where Member States have **failed to comply with a judgment of the Court** as referred to in Article 260(2) TFEU;
3. Cases where Member States have caused serious **damage to EU financial interests or violated EU exclusive powers** as referred to in Article 2(1) TFEU read in conjunction with Article 3 TFEU.

In a later, technical document[28] the Commission gave a more straightforward and nuanced breakdown:

a. **Failure to notify**: a Member State does not notify the Commission on time of its measures to transpose a directive ("non communication" cases)
b. **Non-conformity/non-compliance**: the Commission considers that a Member State's legislation is not in line with the requirements of EU legislation ("own initiative" cases)

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22 E.g., European Commission (2003) Communication from the Commission on "Better monitoring of the application of Community law", COM(2002)725, and European Commission (2007) Commission Communication "A Europe of Results – Applying Community Law", COM(2007)502.

23 For a good overview of its development, see *The Boundaries of…* above n. 12.

24 European Commission (2017) Communication from the Commission on "EU law: Better results through better application", COM(2016)8600.

25 European Commission (2022), above n. 1.

26 In this regard, it is useful to note that the 2022 Communication was preceded by a Parliamentary question, and a reply by Commission President von der Leyen (Parliamentary question | Answer for question P-000097/22 | P-000097/2022(ASW) | European Parliament (europa.eu)); for the reaction to this Commission President von der Leyen's response, see Kelemen, R.D, and Pavone, T., 'Forbearance and Enforcement at the European Commission: A response to von der Leyen', May 2022, available at: https://eulawenforcement.com/?p=8299.

27 European Commission (2017), above n. 24, p. 14.

28 European Commission (2018) Commission Staff Document, 'Part I: General Statistical Overview Accompanying the Commission Report on Monitoring the Application of European Union law 2017', SWD(2018)377, p. 5.

c. **Incorrect/bad application**: EU law is not applied correctly, or not applied at all, by national authorities ("own initiative" cases)

The first category of infringements, failure to notify the transposition of a directive, which consequently implies a delay in its transposition into national law, is **automatically** triggered by the Commission based on lack of notification and of self-reporting by the Member State. The two types of "other" infringements – i.e. non-conformity/non-compliance and incorrect/bad application cases – are also launched at the own initiative of the Commission, but in an exercise of its **discretion**.[29] It boils down to a highly selective approach. The Commission in this way aims to carefully **prioritise based on seriousness of breaches and their impact** on policies concerned. The Commission is not limited in the sources that it uses to assess whether an investigation into compliance with EU law is merited. Citizens can signal complaints.[30] Another important source for grasping compliance, including in the AFSJ, is that almost every piece of legislation includes an **evaluation clause**, by which the Commission is required to assess the state of play, usually after the legislation has been in force for a certain period. This report is based on information delivered by Member States, leading to a fine-grained and comparative overview. It may lead the Commission to propose adaptation or amendment of legislation or to decide on enforcement action. However, the Commission has often repeated that the primary purpose of an infringement is to ensure that Member States give effect to EU law in the general interest, not to provide individual redress, i.e. a solution in a specific situation or for a specific (legal) person.[31] In the Commission's perception, infringement actions, being very labour-intensive, are a when-all-else-fails means-of-last-resort, not ends in themselves.

Because of the labour-intensive nature, the Commission uses **informal tools to ensure compliance** with EU law, either before, or in combination with the formal infringement procedure. "**EU-pilot**" is such a pre-infringement tool. Although there was a time when it was more widely used, as a step preceding virtually all infringement actions, it is now employed in a more targeted fashion.[32] It is often put to use to gather information on factual or technical aspects or the position of a Member State in order to assess the scope of a potential violation of EU law on the assumption that it may lead to swifter compliance than opening a formal infringement.[33] The Commission recently reported that in 2021 only about 10% of "own initiative" infringement cases opened that year had been preceded by an EU pilot case.[34] In any event, the Commission can also address any worry with regard to Member States' (in)action in political letters or by means of high level dialogue. However, part of the Commission's discretion is that it can at any time "upgrade" to a formal procedure. The weapon, as it were, is always in the handbag.

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29 It should be noted, however, that the Commission's discretion is not unlimited and subject to other legal obligations, such as good administration. In a recent ruling the European Ombudsman found maladministration on the part of the Commission for not acting decisively in decision-making on whether or not to bring an infringement action, taking an unreasonably long time (thirteen years) to deal with the initial administrative stages of the infringement procedure; European Ombudsman, Cases 2238/2021/MHZ & 2249/2021/MHZ, Decision of 16 December 2022 (at: https://www.ombudsman.europa.eu/en/case/en/60695). See for an excellent, much more elaborate discussion of the nature and extent of the Commission's discretion, and the way in which the Court has largely accepted this, *The boundaries of the Commission's discretionary powers..*, above n. 12.

30 Ibid.

31 European Commission (2022), above n. 1, p. 20.

32 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* Landscape Review (2018), p. 38-39.

33 European Commission (2022), above n. 1, p. 18.

34 Ibid.

When the Commission does cross the Rubicon and decides to start an **infringement**, it takes several steps.[35] It first sends a **letter of formal notice** under Article 258 TFEU, requesting an explanation within a given time limit. In 2021 almost 70% of infringement cases were closed after this.[36] If this does not lead to a satisfactory reply on the part of the Member State, the Commission further formalises the procedure by issuing a **reasoned opinion**. It then asks the Member State to comply within a given time limit. If the Member State fails to do so, the Commission may decide on **referral of the case to the Court**. For non-communication (failure to notify timely transposition of directives) cases it may propose financial penalties under Article 260(3) TFEU at this stage. Both the issuance of a reasoned opinion and a referral to Court are **political decisions, subject to deliberations of the College of Commissioners**.[37] 90% of infringement cases started in this manner are settled before reaching Court.[38] The Commission attributes this to the effectiveness of its structured dialogue with Member States. If the Court finds the Member State in breach of EU law, it orders the Member State to take the necessary action to comply and the Commission's task is then to check the Member State's compliance with the Court's ruling. If the Member State does not take the necessary steps, the Commission may continue the infringement under Article 260(2) TFEU by sending a letter of notification to the Member State and referring the case back to the Court, potentially asking for **financial penalties** to be imposed by the Court. This is not an automaticity.

The Commission has consistently stated that it views the use of the **preliminary rulings** procedure (Article 267 TFEU) by national courts as crucial, given their key role in applying EU law effectively.[39] Indeed, instances of national rules or general practices which impede the procedure for a preliminary ruling by the Court, of national law preventing national courts from acknowledging the primacy of EU law, are a priority focus for the Commission.[40] A very visible way for it to act as Guardian of the Treaties is that it systematically intervenes in each of these cases to bring forward the viewpoint on behalf of the European general interest before the Court in Luxembourg. On the other hand, the Commission has made clear that it will exercise its discretion not (yet) to start an infringement where preliminary ruling proceedings are pending on an issue that would otherwise be a priority area. Here it would only start an infringement action in case it would significantly accelerate the resolution of the issue.[41]

To provide an overview of the state of play about enforcement of EU law, the Commission has, since 1983, prepared an **annual report on monitoring the application of EU law**.[42] Each year it looks back on the previous year, providing quite general information such as statistical data and a policy interpretation and justification of the choices made. The primary target public for the report is Parliament[43], where the lead-committee is **Legal Affairs (JURI)**. Notwithstanding the fact that Parliament often denounces violations or incorrect implementation of EU law and calls on the Commission to launch infringement proceedings in its resolutions on specific issues or areas of EU action, it is rather striking, given that this is such a consequential topic, that Parliament does not consistently and systematically react each year to the Commission annual report, often lumping

35 See also European Court of Auditors (2018), above n. 32, p. 10.

36 European Commission (2022), above n. 1, p. 21.

37 Prete, L. and Smulders, B., 'The coming of age of infringement proceedings' (2010) 47 Common Market Law Review 9. 29.

38 European Commission (2022), above n. 1, p. 21.

39 European Commission (2022), above n. 1, p. 2.

40 European Commission (2017), above n. 24, p. 14.

41 European Commission (2017), above n. 24, p. 15.

42 https://commission.europa.eu/publications/annual-reports-monitoring-application-eu-law_en

43 European Court of Auditors (2018), above n. 32, p. 48.

together different years. It has only adopted one resolution in the current legislature.[44] Moreover, many Parliamentary committees do not participate actively. For instance, LIBE itself only provided input for the resolution on the Annual Reports on 2012 and 2013. The following important statement in its input, however, was not even reflected in Parliament's general resolution:

> "considers … that the information on the implementation of EU law in the AFSJ should be more structured, detailed, transparent and accessible; points out that the annual monitoring report could be supplemented by other measures that would allow Parliament to be more regularly and thoroughly informed about the state of implementation, delays, incorrect transposition, incorrect implementation and infringement procedures, with regard to each legal instrument adopted in the [AFSJ], as well as in other fields".

Overall, in Parliament's periodic reaction on that specific Commission document, there seems to be relatively limited attention given to specifically the AFSJ.[45] Preparations are ongoing to formulate a Parliamentary reaction to the last three Annual Reports, i.e. those covering 2020, 2021 and 2022.[46] LIBE did not provide an opinion.[47]

At the same time, since LIBE deals with democracy, rule of law and fundamental rights issues, MEPs of that committee have been very vocal on the lack of implementation of EU law and of Court of Justice judgments, notably in relation to Hungary and Poland, but also on specific cases related to LGBTIQ+ rights, free movement and the lack of implementation of the *Coman & Hamilton* ruling. This issue was also raised in a PETI resolution approved by the EP and requesting the Commission to "examine whether the Member States comply with the *Coman & Hamilton* judgment and take enforcement action under Article 258 TFEU against those that do not comply", including taking "enforcement action against Romania over its ongoing failure to comply with this judgment and the lack of legal remedy which forced the plaintiff to resort to the ECtHR for redress".[48]

Despite the traditional focus on infringement actions when discussing the Commission's enforcement activities, a recent overview article concluded:

> "[T]the Commission has never considered its role to be that of a (quasi-)prosecutor which monitors compliance and, where a breach is detected, must automatically act to enforce

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[44] European Parliament (2014) Resolution of 4 February 2014 on the 29th annual report on monitoring the application of EU law (2011), A7-0055/2014; European Parliament (2015) Resolution of 10 September 2015 on the 30th and 31st annual reports on monitoring the application of EU Law (2012-2013), A8-0242/2015; European Parliament (2016) Resolution of 6 October 2016 on monitoring the application of Union law: 2014 Annual Report, A8-0262/2016; European Parliament (2017) Resolution of 26 October 2017 on monitoring the application of EU law 2015, A8-0265/2017; European Parliament (2018) Resolution of 14 June 2018 on monitoring the application of EU law 2016, A8-0197/2018; European Parliament (2021) Resolution of 20 January 2021 on monitoring the application of Union law 2017, 2018 and 2019, A9-0270/2020.

[45] For some exceptions, see European Parliament (2015), above n. 42 (i.e. the only resolution LIBE actively contributed to), mentioning that the GDPR was a major source of infringement actions in 2012 and 2013 (para. 38), as well as the asylum policy area (par. 40), which should, according to the resolution, be given priority (para. 39). In general, it is recognised that the AFSJ needs to be set as a priority for the Commission (para. 45), as (what is now) the DG HOME remit (para. 45) as well as the DG JUST area (para. 41) appeared to be suffering from a big gap between EU law and its corresponding implementation in national law; European Parliament resolution of 14 June 2018 on monitoring the application of EU law 2016, A8-0197/2018, mentioning the value of promoting judicial training in Member States to promote better implementation and application of EU law (para. 5) and drawing specific attention to the asylum area (para. 42 and 43); European Parliament resolution of 20 January 2021 on monitoring the application of Union law 2017, 2018 and 2019, A9-0270/2020, stressing how it is problematic that the commission failed to bring infringement actions in the Schengen area (preambular consideration N and para. 18), as well as the need to put greater attention to the AFSJ (para. 27).

[46] See https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/2080(INI)&l=en

[47] Ibid.

[48] European Parliament (2021) Resolution of 14 September 2021 on LGBTIQ rights in the EU, par. 10, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html

> compliance and penalise the guilty parties. Unsurprisingly, the Commission considers actions to avoid infringements to be just as valuable as actions to sanction them, if not more so. This is *a fortiori* true, in recent times, when the commission has sought to enlarge its toolbox of instruments and mechanisms designed to assist and co-operate with national authorities, and to encourage (with carrots, but also with sticks) their compliance".[49]

It is indeed quite notable that the Commission itself has recently, and increasingly explicitly, broadened its framing of what it is after when pursuing enforcement with EU law. It has explained that it **views infringements as only one tool in a much wider arsenal**, and its own role as one actor amongst others.[50] Some of these new "carrots and sticks" in the AFSJ are discussed in subsection 2.2. Implications of a broader conception of enforcement for parliamentary control are discussed in subsection 2.3.

2.1.2. The (non-) specificity of the AFSJ

On the one hand, the **AFSJ is specific** in nature for a few different reasons. It is relatively young compared to other areas of EU cooperation, and only really started developing when the decline in the use of the traditional enforcement method of bringing infringement actions, as reported by Kelemen and Pavone, set in. As a result, both areas making up the AFSJ, JUST and HOME, are still relatively light on secondary legislation as compared to other EU policy areas.[51] As a policy area AFSJ is also often more politically sensitive in nature than other areas. Moreover, it is characterised by elements of its specific intergovernmental legacy, giving Member States and the Council a stronger role in governance than many other EU policy areas. Finally, the AFSJ is peculiar for its density of agencies with many different executive, evaluative and monitoring tasks. In that sense, enforcement trends in this area could to an important extent be quite specific and difficult to generalise.

On the other hand, what happens in the **AFSJ is also by definition relevant more widely for (enforcement of) EU law** in the widest sense. Legal obligations and political imperatives to comply with the Charter of Fundamental Rights and to ensure rule of law protection and protection of other EU values laid down in Article 2 TEU, responsibility for which traditionally sits with the Commissioners responsible for JUST, are *cross-cutting* by their very nature. Compliance with each of these aspects is a condition for legality of action within *each* field of EU law. They are a precondition for the functioning of the internal market. Moreover, problems with many issues protected as part of the AFSJ, such as judicial independence or the fight against corruption, have a direct impact on the reliability of how EU funds can be spent in and by Member States. AFSJ-related considerations are at the heart of what makes use of EU funds in accordance with the principles of sound financial management (Article 317 TFEU) sound.

In that sense the AFSJ is both a quite specific sub-field but also a meta-field of EU law that is of general legal and political significance.

2.2. Other methods and tools to enforce EU law in the AFSJ

The AFSJ is characterised by a great density of methods, tools and actors with a role in enforcing, in one way or another, EU law in the field. Below, firstly, it will be assessed how EU law in the AFSJ has also

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[49] Prete, L. and Smulders, B., 'The age of maturity of infringements proceedings' (2021) 58 Common Market Law Review 285, 330.

[50] European Commission (2022), above n. 1, p. 6. The name of heading III is telling: "implementing and applying EU law: a combined effort". Moreover, infringements are only substantively discussed on p. 20 of a 29-page paper.

[51] European Court of Auditors (2018), above n. 32, p. 15 (box 3).

come to be enforced through AFSJ-specific EU funds[52] and general EU funds that apply AFSJ-related general conditions (section 2.2.1). Then three[53] non-binding, auxiliary tools in the AFSJ explicitly designed to monitor and evaluate Member States' compliance with the law, i.e. the Schengen Evaluation and Monitoring Mechanism, the FRONTEX Vulnerability Assessment and the EUAA monitoring and evaluation capacities, are discussed (section 2.2.2).

2.2.1. Budgetary tools: AFSJ-related substantive conditions and AFSJ-specific EU funds

The Commission recently characterised linking EU policies and support to financial support as "**smart enforcement**", a way to **prevent breaches of EU law from the outset**. It has argued that this has proven to be an effective tool to encourage Member States to carry out reforms and, where appropriate, to accelerate achievement of EU law' objectives.[54] But what are they in the AFSJ, and how do AFSJ-related substantive conditions play a role more generally?

The five most important[55] EU funds financing priorities in the AFSJ are the following. In the **HOME**-area there are, respectively, the **Internal Security Fund (ISF)[56], the Asylum, Migration and Integration**

[52] For a good discussion of the first mechanisms, see also Rijpma, J., and Fotiadis, A., *Addressing the violations of fundamental rights at the external borders of the European Union – Infringement proceedings and conditionality in EU funding instruments*, June 2022.

[53] For reason of space, focus and complementary with other studies conducted for Parliament, this study will only analyse and discuss monitoring tools in the AFSJ that (1) focus on checking compliance with the law at the Member State level, (2) are non-binding and auxiliary in nature, and (3) have a basis in secondary Union law, This excludes, first, the European Data Protection Supervisor. This agency ensures compliance with Union law *at EU-level* under Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies. Under the General Data Protection Regulation (Regulation 2016/679) it contributes to Member State-level enforcement only *indirectly*, i.e. as a member of the European Data Protection Supervision Board (Article 68), where its sits together with national data protection supervisory bodies which are in the lead in enforcing the data protection law at Member States level. This set-up raises specific questions for compliance with a specific subset of AFSJ-law, including its links with the traditional enforcement powers of the Commission, that go beyond the scope of this general study. The focus chosen also excludes the *binding* activities of EU agencies vis-à-vis enforcing AFSJ-related law by EU agencies such as the European Union Agency for Law Enforcement Cooperation (Europol), the European Union Agency for Criminal Justice Cooperation (Eurojust) and the European Public Prosecutor's Office (EPPO). The political control by Parliament over this kind of application of AFSJ-law is specific and limited in nature, including because it is in large part conducted by independent and impartial magistrates and because law enforcement activities raise specific issues. The focus also excludes, finally, very relevant further policy tools without a basis in secondary Union legislation. This extends to the Commission's rule of law mechanism that has resulted in the relatively recent Annual Rule of Law Report (see: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en). This is also aimed at promoting enforcement of EU law in the AFSJ, falls squarely within the AFSJ-remit in terms of scope and is prepared by JUST services, in coordination with other DGs and the General Secretariat of the Commission. For a very good and comprehensive discussion of this new tool, see *The Commission's rule of law report and the EU monitoring and enforcement of Article 2 TEU values*, above n. 19. The non-binding auxiliary AFSJ-related monitoring and evaluation tools that have a basis in EU secondary law and focus on Member State level compliance are specifically relevant for the purpose of a general study into enforcement of the law in the AFSJ because many of these also contain wording about how their existence and operation should be perceived in parallel to the Commission's traditional task of Guardian of the Treaties, and therefore focus on the way in which the Commission can combine its different roles as manager, financer and enforcer within the scope of activities of these EU agencies (see the discussion in section 2.2.2 below).

[54] European Commission (2022), above n. 1, p. 13.

[55] There are a number of other EU financial vehicles that also finance AFSJ-related (training) activities, but for which the AFSJ commissioners are not always directly responsible, including: European Social Fund Plus (ESF+), Erasmus: the Union programme for education, training, youth and sport and Erasmus +; Creative Europe, a Programme for the Environment and Climate Action (LIFE), the EU Anti-Fraud Programme (formally Hercule III), and the Instrument for Pre-accession Assistance (IPA III).

[56] Regulation (EU) 2021/1149 of 7 July 2021 establishing the Internal Security Fund.

Fund (AMIF)[57], and the Integrated Border Management Fund (ISF).[58] For the **JUST**-field it concerns the **Citizens, Equality, Rights and Values (CERV) Programme[59] and the Justice Programme**.[60] For AMIF, ISF and BMVI, annual performance reports are due by 15 February each year, and a mid-term evaluation is due by 31 December 2024, including contributing to the decision-making about any revision of the Regulations. For CERV and Justice no annual performance reports are required. There is also no specific deadline for (interim) evaluation mentioned, the obligation being that this should take place "once there is sufficient information available about the implementation of the Programme" and will then be carried out "in a timely manner with a view to feeding into the decision-making process".[61]

In terms of broader governance of the way in which these funds can be spent, it is clarified that both **the Financial Regulation[62] and the CPR[63] apply to the HOME funds**. Both the Financial Regulation and the CPR contain specific requirements. In particular, the reference to the Financial Regulation implies that in spending them the financial interests of the Union are to be protected by means of AFSJ-related measures to **prevent, detect, correct and investigate irregularities, including fraud**.[64] The CPR reference implies that so-called "**enabling clauses**" are applicable. These include, inter alia, a general obligation to comply with the rights laid down in the **Charter of Fundamental Rights**.[65] Notably, as the CPR does not mention them, ***only* the Financial Regulation applies to the JUST funds**. Nonetheless, all of these requirements are linked to rule of law requirements, and therefore themselves substantively related to the policy-area of the AFSJ.[66] In other words, to spend money meant to advance the development of the AFSJ and ensure the enforcement of EU law in this field, basic principles underlying the same AFSJ need to be guaranteed.

The scope of the Financial Regulation and the CPR is much broader than just the AFSJ policy-area. Importantly, therefore, the described requirements and conditions are potentially relevant to a much

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57 Regulation (EU) 2021/1147 of 7 July establishing the Asylum, Migration and Integration Fund.

58 Regulation (EU) 2021/1148 of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy. For a good discussion of the BMVI, AMIF and ISF, see Rijpma & Fotiadis, above n. 52, as of p. 12.

59 Regulation (EU) 2021/692 of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) 1381/2013 and Regulation (EU) 390/2014. This programme merges two previous programmes, i.e. the Rights, Equality and Citizenship Programme and the Europe for Citizens Programme.

60 Regulation (EU) 2021/693 of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) 1382/2013. This is also the vehicle through which the Commission implements the European judicial training strategy with a view to facilitating that judges, prosecutors and lawyers know EU law and EU judicial cooperation instruments. See European Commission (2022), above n. 1 p. 7, referring to European Commission (2020), Communication from the Commission on "Ensuring justice in the EU – a European judicial training strategy for 2021-2024", COM(2020)713.

61 Regulation (EU) 2021/692, Article 17(1) and 17(2); Regulation (EU) 2021/693, Article 14(1) and Article 14(2).

62 Regulation (EU, Euratom) 2018/1046 of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

63 Regulation (EU) 2021/1060 of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

64 Regulation (EU, Euratom) 2018/1046, Articles 61(2), 61(3), 131 and 135.

65 Regulation (EU) 2021/1060, Article 9(1). As was rightly noted with regard to this CPR Charter requirements, the legislator avoids spelling out the exact criteria under which fundamental rights criteria are (or are not) fulfilled; See Rijpma & Fotiadis, above n. 52, p. 15.

66 For a very comprehensive general discussion, see *The tools for protecting the EU budget…*, above n. 4.

broader array of regular EU funding. The reasoning is that these (rule of law) principles are key for the sound financial management of the Union budget and for effective and efficient use of the funding.[67]

Recently, even more layers of modalities were added. To react to the economic challenges of the COVID-19, the **Recovery and Resilience Facility** was set up.[68] Like instruments governing regular EU funding, obligations to protect the financial interests of the Union were included, including measures to prevent, detect and correct fraud and corruption.[69] More notably, however, given the legal base of this instrument (Article 175 TFEU: strengthening economic, social and territorial cohesion), Member States must show how they aim to address weaknesses in that regard to get access to its loans and grants. For that purpose, by way of *economic* conditionality, the Regulation requires Member States to show how any plans would work to address **country-specific recommendations adopted under the European Semester**.[70] Along with other economic indicators they would be included as "**milestones**" on which financing under this instrument would be conditioned. For a considerable number of Member States, the country-specific recommendations for the years 2020-21[71] **related to issues that are substantively in the AFSJ**, including the necessity of reforms to secure different aspect of assuring judicial independence, anti-fraud and anti-corruption as well as anti-money laundering.[72]

On top of that, finally, the so-called **Rule of Law Conditionality Regulation**[73] came into force in 2021. It applies to both EU regular funding and RRF-funding[74], and lays down its own subset of **rule of law (and therefore AFSJ-)related breaches**[75] that could lead to measures to be taken if they seriously risk affecting sound financial management of the Union budget or the protection of the Union's financial interests in a sufficiently direct way.[76] The relevant breaches relate to endangering the independence of the judiciary, failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including law-enforcement authorities, involved in the handling of EU monies or limiting the availability of effectively remedies, or limiting effective investigation, prosecution or sanctioning of breaches of law. The Commission needs to report on the effectiveness of any measures taken on its basis and its complementarity vis-à-vis other EU financial instruments, by 12 January 2024.[77]

In sum, as can be gleaned from the below table, substantive **AFSJ-related requirements apply** to both ASFJ-related funds and to all other EU funding **but are not harmonised** across different funds and serve different rationalities. The different binding instruments overlap too. But **the financial amounts involved when these AFSJ-related conditions are applied are substantially more important than any financial penalties that the Court could impose** based on Article 260(2) (and 260(3)) TFEU. In

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67 European Commission (2022), above n. 1, p. 14.

68 Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility.

69 Regulation (EU) 2021/241, Article 22(2)(b).

70 Regulation (EU) 2021/341, Article 19(3)(b).

71 These country-specific recommendations are available here: https://commission.europa.eu/publications/2020-european-semester-country-specific-recommendations-commission-recommendations_en (2020) and https://eur-lex.europa.eu/EN/legal-content/summary/2021-european-semester-country-specific-recommendations.html (2021).

72 See *The tools for protecting the EU budget…*, above n. 5, p. 53.

73 Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

74 Regulation (EU) 2021/241, Article 8.

75 Regulation 2020/2092, Article 3.

76 Regulation 20202092, Article 4(1).

77 Regulation 2020/2092, Article 9 and rec. 28.

that sense the fact that these elements now appear to be enforced more strictly[78] potentially has a very far-reaching, and potentially game-changing effect for overall enforcement of EU law in the AFSJ.

Table 1: AFSJ funds and applicability of the Financial Regulation, CPR, RoL conditionality

Area	HOME			JUST		Various, including AFSJ
EU Funds	Internal Security Fund (ISF)	Asylum Migration Integration Fund (AMIF)	Integrated Border Management Fund (BMVI)	Citizens Equality Rights and Values Fund (CERV)	Justice Programme	Recovery and Resilience Facility (RRF) - European Semester
Financial Regulation	applies					
Common Provisions Regulation (CPR, Charter Fundamental Rights enabling clauses)	applies			does not apply		applies
Rule of Law Conditionality Regulation	applies					

2.2.2. AFSJ specific methods to monitor Member States' compliance with EU law: Schengen Evaluation and Monitoring Mechanism, and FRONTEX and EUAA monitoring activities

2.2.2.1. The Schengen Evaluation and Monitoring Mechanism

Peer-to-peer evaluation and monitoring of the application of the Schengen *acquis* – i.e. management of the external borders, absence of controls at internal borders, visa policy, return, large-scale supporting IT systems, police cooperation, judicial cooperation in criminal matters and data protection – has been a core element of controlling enforcement in this area since 1998, when cooperation in the AFSJ was still intergovernmental in nature. Council Regulation 2022/922[79] recently further updated the procedure with a view to streamlining it.

The stated aim of the instrument is to provide for objective and impartial evaluations of the Schengen *acquis* in Member States through peer-to-peer review, a form of cooperation between **the Commission, Member States and the Council**.[80] The mechanism centres around evaluations through questionnaires and (un)announced visits. Teams of experts (coming from both the Member State as well as the Commission) are sent to observe the state of affairs and draft an evaluation report. The

[78] As will be explained below, in section 3.7.

[79] Council Regulation (EU) 2022/922 of 9 June on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013.

[80] Council Regulation (EU) 2022/922, Article 1(2).

report analyses the qualitative, quantitative, operational, administrative and organisational aspects and identifies deficiencies, areas of improvement and best practices identified during the evaluation. It also contains recommendations for remedial actions aimed at addressing the deficiencies and areas of improvement identified during the evaluation visit.

Crucially, the Council plays a central role, as peer-to-peer evaluation is meant to contribute to maintaining a high level of accountability and ownership of results and to resulting in strengthening mutual trust among Member States.[81] Initially **the Commission adopts the evaluation report** by means of an implementing act. After any deficiencies in the application of Schengen rules are identified and remain unresolved, it is **the Council that needs to adopt recommendations to the Member States for remedial action**.[82] A **special reporting regime** applies to findings of "serious deficiencies" which include findings fundamental rights violations.[83] The Council and the Commission need to **inform Parliament and national parliaments** of the contents and results of evaluations of both nature.[84] Each Member State is to be assessed every 7 years.[85] Moreover, an annual report is announced to explain progress in the field.[86]

Regulation 2022/922 does not itself mention whether and when the traditional enforcement method of bringing **infringement actions** are part of the process, even in the case of serious deficiencies. It positions the Commission in a mostly coordinating, facilitating and managerial role. However, the EU legislator does mention the interplay with the Commission's role as Guardian of the Treaties in general terms in the Regulation.[87] In a recent Communication[88] the Commission made this more specific, however. It stressed its intention to make more systematic use of the synergies between the Schengen Evaluation and Monitoring Mechanism and infringement procedures, following a "structured approach, applying more flexible and transparent criteria to decide on the circumstances that may trigger an infringement procedure in line with the Commission's overall policy on the enforcement and implementation of EU law". More specifically, it clarified:

> "Situations in which infringements could be pursued include important '**non-compliant**' findings that could have a **substantial and immediate impact** on the proper functioning of Schengen, when a Member State does **not systematically follow recommendations** to remedy 'non-compliant' deficiencies, or when there are '**persistent deficiencies**' because the Mechanism has not succeeded in ensuring Member State compliance by the end of the cycle".[89]

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81 Council Regulation (EU) 2022/922, rec. 2.

82 Council Regulation (EU) 2022/922, Article 20(5)

83 Council Regulation (EU) 2022/922, Article 2(10) and Article 22.

84 Council Regulation (EU) 2022/922, rec. 32 and Articles 20(4) and 20(5), as well as Articles 22(4) and 22(5).

85 Council Regulation (EU) 2022/922, Article 12(1).

86 Council Regulation (EU) 2022/922, Article 25.

87 Council Regulation (EU) 2022/922, rec. 30: "the evaluation and monitoring mechanism established by this Regulation should fulfil a complementary function of monitoring the effectiveness of the practical implementation of Union policies through peer review. The general power of the Commission to oversee the application of Union law under the control of the Court of Justice of the European Union through infringement procedures should not be affected".

88 European Commission (2021) Communication from the Commission on "A strategy towards a fully functioning and resilient Schengen area", COM(2021)277, p. 21.

89 See also Rijpma & Fotiadis, above n. 52, at p. 11: "neither [the SEMM or FRONTEX VA] prejudices the enforcement powers of the commission and, in fact, both could form a powerful source of information for the Commission in the in the framework of infringement proceedings".

2.2.2.2. FRONTEX Vulnerability Assessment

A more recent AFSJ-specific monitoring and evaluation tool is the **FRONTEX Vulnerability Assessments**. This is laid down mostly in Regulation 2019/1896[90] and aims to **assess the capacity and readiness of Member States to face threats and challenges at the external borders**. Based on a Vulnerability Assessment Methodology[91] FRONTEX monitors and assesses the availability of the technical equipment, systems, capabilities, resources, infrastructure and adequately skilled and trained staff of Member States necessary for border control.[92] The Vulnerability Assessment methodology is carried out once a year[93] and is structured around one single overall process resulting in annual base-line assessments. Member States provide data regarding their border control capacities (staffing level, quality and amount of surveillance equipment, financial resources and contingency plans) as well as their capabilities for dealing with vulnerable groups. The collected data is analysed by FRONTEX in order to determine the individual countries' readiness to face challenges at their external borders and provide an individual assessment for each Member State.

The assessment can lead to a **recommendation for a Member State by the FRONTEX Executive Director**.[94] If the Member State does not implement, the executive director can **refer the matter to the FRONTEX Management Board**[95] (of which the Commission is a part).[96] If that still does not lead to results, the Management Board needs to **notify the Council and the Commission**. The Council, based on a Commission proposal, can then adopt an **implementing act** to identify and mitigate risks jeopardising the functioning of the Schengen area.[97] In that scenario, Parliament needs to be informed too.[98]

While the Vulnerability Assessment is the task of FRONTEX, which prioritises risk and capacity-assessment of Member States at external borders more from a strategic than a legal perspective, it has a **strong connection with the Schengen Evaluation Mechanism** as, according to the Regulation, these "… are two complementary mechanisms for guaranteeing Union quality control on the proper functioning of the Schengen area and ensuring constant preparedness at both Union and national levels to respond to any challenges at the external borders."[99] The Commission and FRONTEX are instructed to seek synergies.[100] In that light the Commission is encouraged[101] to use the results of relevant evaluation mechanisms, *inter alia* the Frontex Vulnerability Assessment, in preparing the Schengen evaluation and monitoring activities, both with the objective "…to improve awareness on the functioning of the area without internal border control and to avoid the duplication of efforts and conflicting measures."

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90 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, Article 10(1)(c) and 32.

91 FRONTEX Management Board Decision 39/2016 of 23 November 2016 adopting the Common Vulnerability Assessment Methodology, at: https://frontex.europa.eu/assets/Key_Documents/MB_Decision/2016/MB_Decision_39_2016_on_adopting_the_CVAM1.pdf

92 Regulation (EU) 2019/1896, Article 32(2).

93 Ibid.

94 Regulation (EU) 2019/1896, Article 32(7) and 32(8).

95 Regulation (EU) 2019/1896, Article 32(7) and 32(10).

96 Regulation (EU) 2019/1896, Article 101(2).

97 Regulation (EU) 2019/1896, Article 42(1).

98 Regulation (EU) 2019/1896, Article 42(2).

99 Regulation (EU) 2019/1896, rec. 45.

100 Regulation (EU) 2019/1896, Article 33.

101 Council Regulation 2022/922 (on the Schengen Mechanism), Article 10.

2.2.2.3. EUAA Mechanism on the implementation of the CEAS

The **European Union Agency for Asylum (EUAA) is tasked to conduct various reporting and monitoring** activities. Firstly, it is to gather and analyse information of a qualitative and quantitative nature on the **situation of asylum and on the implementation of the Common European Asylum System**.[102] For that purpose it publishes an annual report, that provides up-to-date information on root causes, migratory and refugee flows, the presence of unaccompanied minors, the overall reception capacity and resettlement needs of third countries and possible arrivals of large numbers of third-country nationals which might subject the Member States asylum and reception systems to disproportionate pressure.[103] Secondly, it is to develop operational standards, indicators, guidelines and best practices in regard to the implementation of Union law on asylum.[104] For this purpose it is to organise and coordinate various activities promoting a correct and effective implementation of Union law in this area.

A newer, at this stage not yet operational[105] method that the EUAA came to be tasked with is **to monitor the operational and technical application of the Common European Asylum System with a view to assisting Member States to enhance efficiency of their asylum and reception systems**.[106] The scope of monitoring under this Mechanism, clearly inspired by the FRONTEX Vulnerability Assessment Methodology, would be on substantive, operational and technical issues, varying from the system of determining the Member State responsible for examining applications for international protection, procedures for international protection, the application of criteria for assessing the need for protection and the type of protection, staffing issues, as well as reception conditions, capacity, infrastructure and equipment.[107] Notably, here too, the linkage with other enforcement methods is laid down in the Regulation, which clearly states that this new monitoring method is "**without prejudice to the Commission's responsibility as Guardian of the Treaties**".[108]

The EUAA will be able to collect data from Member States or conduct evaluation visits by itself based on a common methodology.[109] Member States will be monitored once every five years[110] or when analysis carried out for its annual report raises serious concerns.[111] The data will be sent to the Member State concerned, giving it a short period to submit its comments. On that basis the EUAA executive director draws up **recommendations** in consultation with the Commission which outline the measures to be taken by the Member State concerned, including a time limit by which any necessary measures need to be taken.[112] If recommendations need still to be adopted, this can be done by two-thirds of the

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[102] Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, Article 2(1)(b) and Article 5. See, generally, the excellent overview article by van Gils, S., Michelotti, C. and De Pascali, A., 'L'évolution de l'Agence de l'Union européenne pour l'asile', (2022) 4 Revue du droit de l'Union européenne 79.

[103] See https://euaa.europa.eu/asylum-knowledge/asylum-report

[104] Regulation (EU) 2021/2303, Article 2(1)(o) and Article 13.

[105] Regulation (EU) 2021/2303, Article 73 (Articles 2(1)(q), 14 and 15(1), 15(2) and 15(3) shall apply from 31 December 2023, and the rest of Article 15 from the date on which Regulation (EU) No 604/2013 (the so-called Dublin Regulation) is replaced). This so-called (double) "sunrise"-clause was the result of a political comprise to accommodate the so-called Med-5 Member States and has facilitated that the EUAA could already start preparing for this new task. See also Van Gils, S. c.s., above n. 102, pp. 93-94.

[106] Regulation (EU) 2021/2303, Article 2(1)(q) and Articles 14 and 15.

[107] Regulation (EU) 2021/2303, Article 14(3).

[108] Regulation (EU) 2021/2303, rec. 20.

[109] Regulation (EU) 2021/2303, Article 14(5).

[110] Regulation (EU) 2021/2303, Article 15(1).

[111] Regulation (EU) 2021/2303, Article 15(2).

[112] Regulation (EU) 2021/2303, Article 15(4).

vote of the **EUAA Management Board** (of which the Commission is part)[113], and Parliament and the Commission will be informed.[114] In case a Member State does not implement the measures outlined in the recommendations of the EUAA, resulting in serious consequences for the functioning of the CEAS, **the Commission shall, on the basis of its own assessment, adopt recommendations** addressed to that Member State identifying the measures needed to remedy the shortcomings. Also here, Parliament and Council would be informed.[115]

2.3. Parliamentary control

In discussing the role of the **Commission as Guardian of the Treaties** it has not been uncommon to approach it as something the Commission somehow can, must and does go about "**neutrally**". This implies that acting in the European general interest leads to wholly natural choices that can be made purely **technocratically**. In truth, however, the question has never been *whether* the Commission, in applying its discretion vis-à-vis the use of its powers under Article 258 TFEU, acts in a way that is political in nature. Rather the question has always been *how*. As far back 2006, Parliament rightly acknowledged as much in a resolution reacting to the Commission's Annual Reports on monitoring of EU law:

> "If [Article 258 TFEU] is essentially a **political procedure** – granting powers but not legal obligations to the Commission – then **political control** over guardian of the Treaties on behalf of EU citizens should be exercised by the Parliament or by interested parties themselves."[116]

Therefore, it is suggested here that an issue that Parliament should consequently focus more on is the question of **in what way(s) political control by Parliament over the Commission could be constructed and acted upon (more) effectively**. Here it is striking that enthusiasm and interest in enforcement *stricto sensu* from within Parliament itself has traditionally concerned mainly the **PETI committee** in relation to petitions raising issues of non-compliance of EU law (AFSJ included), or specific pieces of legislation deemed as particularly relevant. For instance, PETI has very recently adopted an **Oral Question** to the Commission (for a debate in plenary) on "Improving the strategic approach to the enforcement of EU law". The question expresses frustration at the Commission strategic approach and notably at the fact that "when a petitioner alleges a breach of EU law, the Commission often declines to act at least in part because the petition concerns an individual case and not a systemic violation" and "tends to refer petitions to the national level, in particular to national courts". This "could be perceived as inadequate by EU citizens, as it can result in these procedures being stalled for years in the pre-contentious phase, without referral to the CJEU and with no access to documents and information on the actions undertaken for these infringement procedures".[117] A report adopted in the same committee calls on the Commission to clarify its approach on deciding on follow-up action on petitions, for example "issue of wider principle" and "systemic failure to enforce EU law", and underlined the need for better follow-up and information-sharing on infringement procedures

[113] Regulation (EU) 2021/2303, Article 40(1).

[114] Ibid.

[115] Regulation (EU) 2021/2303, Article 15(8).

[116] European Parliament (2006) Committee on Legal Affairs Report on the Commission's 21st and 22nd Annual Reports on monitoring the application of Community law, 24 March 2006, A6-0089/2006 final, p. 17 (quoted in Rijpma & Fotiadis, above n. 52, p. 8.)

[117] European Parliament (2023) Committee on Petitions, Question for Oral Answer on Improving the strategic approach to the enforcement of EU law, examined and approved on 23 October 2023, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/PETI/QO/2023/10-23/1287826EN.pdf

from the Commission, welcoming the Commission's proposal to create an inter-institutional digital platform to increase the transparency of the petitions process.[118]

The EP also adopts so-called "**implementation reports**" which focus on transposition into national law, implementation and enforcement of the Treaties and other Union legislation, soft law instruments and international agreements in force or subject to provisional application. Still, in most of the cases the issue was largely seen as a for-lawyers-by-lawyers domain. As Kelemen and Pavone wrote: "… there was no powerful political constituency pressing for vigorous law enforcement … Several [MEPs] conceded that most MEPs 'find infringements awfully boring' and focus their efforts on 'putting more and more legislation on the table'".[119]

In recent years this has decidedly changed and the need for more checks and balances has been more generally acknowledged.[120] Perhaps this has been especially so in the **AFSJ, with issues like rule of law backsliding and alleged pushback practices by Member State authorities at the EU's external borders being at the political centre of attention, including where it comes to why the Commission is *not* using its powers**. However, if a more comprehensive understanding of enforcement is taken as a starting point for what it means to induce compliance with EU law in Member States, as the Commission itself now more openly advocates, it should be acknowledged too that the Commission goes about it taking on the full array of different roles it has in accordance with Article 17(1) and 17(2) TEU. If this much broader conception of enforcement of EU law is accepted, therefore, this also has wide ranging implications for understanding of what signifies parliamentary control over enforcement of EU law. Enforcement can then no longer be the quasi-private domain of lawyers.

When looking at legislation, for example, there are important enforcement elements that are of direct interest to Parliament as co-legislator. The Commission initiates legislation and sees to it that Member States implement what is agreed upon in a proper and timely manner. Moving to a somewhat different role, the Commission then reports to Parliament on progress of implementation under most of these legislative instruments. Progress report deadlines are not harmonised, but typically linked to a date after the entry into force of a legislative instrument. An interesting aspect of parliamentary control, in which the Commission does not have a leading role, may also be **interparliamentary cooperation** when it comes to **(control of) the full, correct and timely transposition of EU directives and implementation of certain regulations through national law**. Parliament, as co-legislator of most EU secondary legislation, could rely more on national parliamentary involvement to implement matters nationally. For that reason, the Commission identifies national parliaments as having an important role

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[118] See European Parliament Annual report on the outcome of the Committee on Petitions' deliberations during 2022, Committee on Petitions, adopted on 23 October 2023, draft version and amendments available under point 8 at https://emeeting.europarl.europa.eu/emeeting/committee/en/agenda/202310/PETI. In the Commission reply to a former EP resolution, the Commission had stated that it "is ready to assess the feasibility of an interinstitutional IT tool between the Commission and Parliament, provided that the budgetary resources, as well as the technical solutions would be identified. As a first step, a link between the Europa pages and the Petition web portal could be set up to help citizens to be regularly informed on how the Commission is already addressing their petitions via infringements procedures. The Commission publishes its decisions on every step of an infringement procedure on the Europa webpage. This ensures transparency on the decision-making process, on the type of infringement pursued and on benefits that the resolution of these cases can bring to citizens and businesses.", see the Commission "Follow-up to the European Parliament non-legislative resolution on the outcome of the Committee on Petitions' deliberations during 2021", SP(2023)153, accessible from https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/2024(INI).

[119] Kelemen/Pavone, above n. 3, p. 31-32.

[120] E.g. Editorial Comments, above n. 21, at 1562-63: "This renewed interest for the Commission's role as guardian of the treaties prompts the question whether in exercising this task it should be subject to more control than it currently is, for instance in order to avoid inertia, discrimination, abuse or *détournement de pouvoir*. Even though the powers it has in this context are, as a rule, nor direct or exclusive, the use thereof may have such an impact on the effective enforcement of EU law that a minimum of checks and balances seems to be justified".

to play in that regard, particularly because transposition of directives is a priority area of enforcement.[121] And Parliament might try to reinforce inter-parliamentary dialogue also on matters of enforcement of EU law. In any event, evaluation of legislation, and adapting it, is a crucial element of facilitating enforcement.

The **Commission is also involved in enforcement through its executive and (programme) management and its role in proposing and implementing the budget**. It helps manage EU agencies and bodies, often both as a privileged interlocutor and as part of the management structure. And, in addition, it takes on the role of Guardian of the Treaties, deciding what aspects of EU law implementation to prioritise at any one time. Each of these roles have a direct bearing on how the Commission, by its own definition, helps ensure enforcement of EU law. The different elements then together make up the full enforcement strategy.

Importantly, **Parliament** controls each of these non-legislative activities of the Commission. It helps decide priority areas of funding, designs conditions for EU funding and discusses activities undertaken by EU agencies that the Commission co-manages. On many occasions, it also calls on the Commission to launch infringement actions regarding specific topics or Member States. In short, Parliament *already has* very considerable agency vis-à-vis each of the Commission's Article 17 TEU roles in inducing compliance with EU law - although it cannot, of course, itself start infringement proceedings against Member States on these matters. But this requires a comprehensive view on its part too, notably in **calling on the Commission *politically* to adopt a more proactive and coherent enforcement strategy of EU law and of the AFSJ. The appointment of the new Commission and of the Commissioners will be an important occasion to raise this request and follow up the Commission *political* commitments.** This will be considered when formulating policy recommendations.

[121] European Commission (2022), above n. 1, p. 8.

3. INFRINGEMENTS, PRELIMINARY REFERENCES AND OTHER METHODS AND TOOLS: DATA ABOUT ENFORCEMENT OF EU LAW IN THE AFSJ

3.1. Collecting and analysing AFSJ enforcement data

Enforcement activity in the AFSJ in the period of 2011-2022 cannot be accurately summarised by a single characteristic or trend. When it comes to traditional enforcement methods, apart from a rough general increase in infringement activity by the Commission's DG JUST (Justice and Consumers) and DG HOME (Migration and Home Affairs), the data varies depending on policy areas and policy sector, types of infringement action, Member States targeted, Member States from which national judges refer questions from a preliminary ruling as well as the topics they tend to ask questions about. Each of these aspects will be discussed below.

The methodology used for data collection and analysis in this study, and the significant limitations run into when conducting open-source collection of enforcement data, is set out in more detail in a dedicated annex.[122] As explained there, **due to limitations in the way in which the Commission and Court currently make available data, all graphs presented below must be taken not as mathematical reflections, but rather as general approximations to visualise trends**. Yet, given that reliable and comparable information on enforcement is essential, some policy recommendations have been formulated through which Parliament could improve its information position.[123]

The use of other methods to enforce compliance with EU law in the AFSJ is more policy focused, recent and still in flux. Some of the agreements made with Member States under specific EU funding streams are not automatically made public, even if the Commission has so far swiftly granted all requests for access to them under transparency legislation. Although this makes it difficult to infer clear lessons regarding these methods at this stage, what is known and available publicly does provide pointers as to the state of play, and the significance and potential for enforcement of EU law through these means.

In combination, available data on traditional enforcement mechanisms and other monitoring methods provides a rich and nuanced picture. It facilitates reflection on the state of enforcement of EU law in the AFSJ, and formulating policy recommendations, in the next section (section 4).

3.2. Infringement data by AFSJ policy areas and policy sectors

The **Commission's annual reports on monitoring the application of EU law**, which disclose the Commission's infringement activity for the previous year, present the data on infringement activity per responsible Directorate General of the Commission. To observe the data that falls within the scope of the **AFSJ**, it is necessary to combine data falling under the responsibility of **DG JUST** (Justice and Consumers) as well as **DG HOME** (Migration and Home Affairs). The reports use the names of the DGs to characterise the '**policy area**' of infringement activity. The two most relevant for the scope of this study are the **policy areas of *Justice and consumers* and *Migration and home affairs***, which will be analysed here.

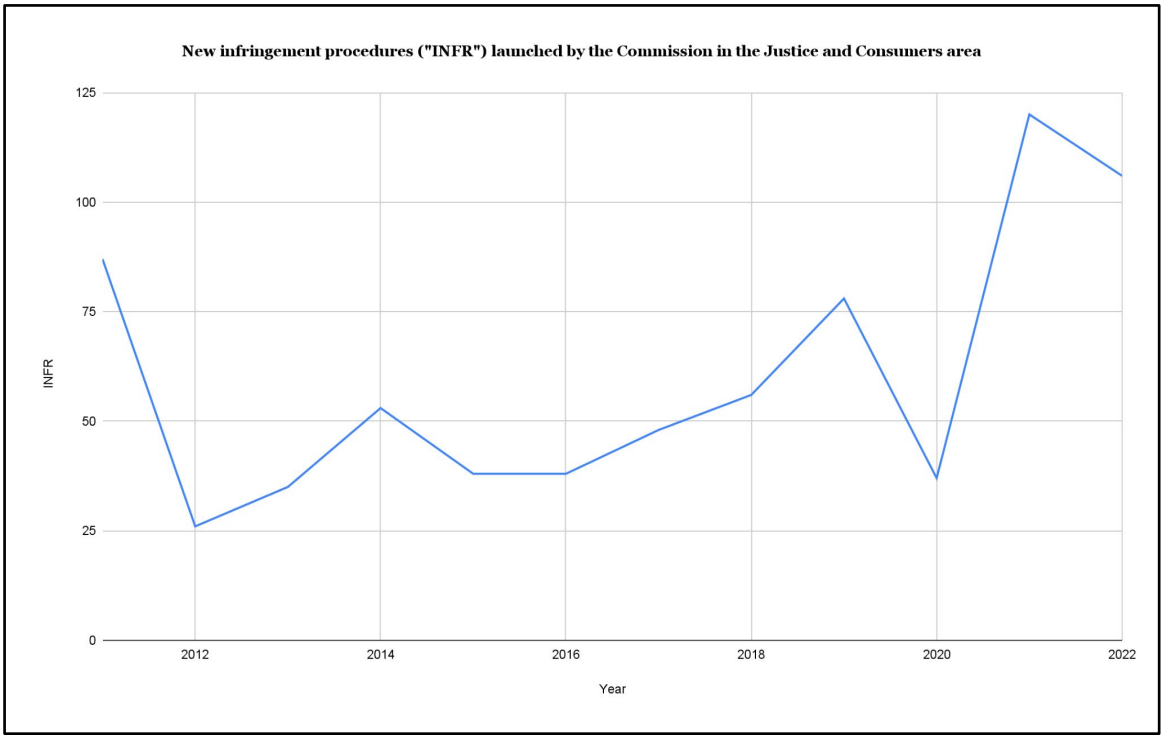
[122] See Annex 1.

[123] These are mentioned at the end of Annex 1, and in reproduced in Annex 2, the overview of policy recommendations.

3.2.1. Policy area: Justice and Consumers (JUST)

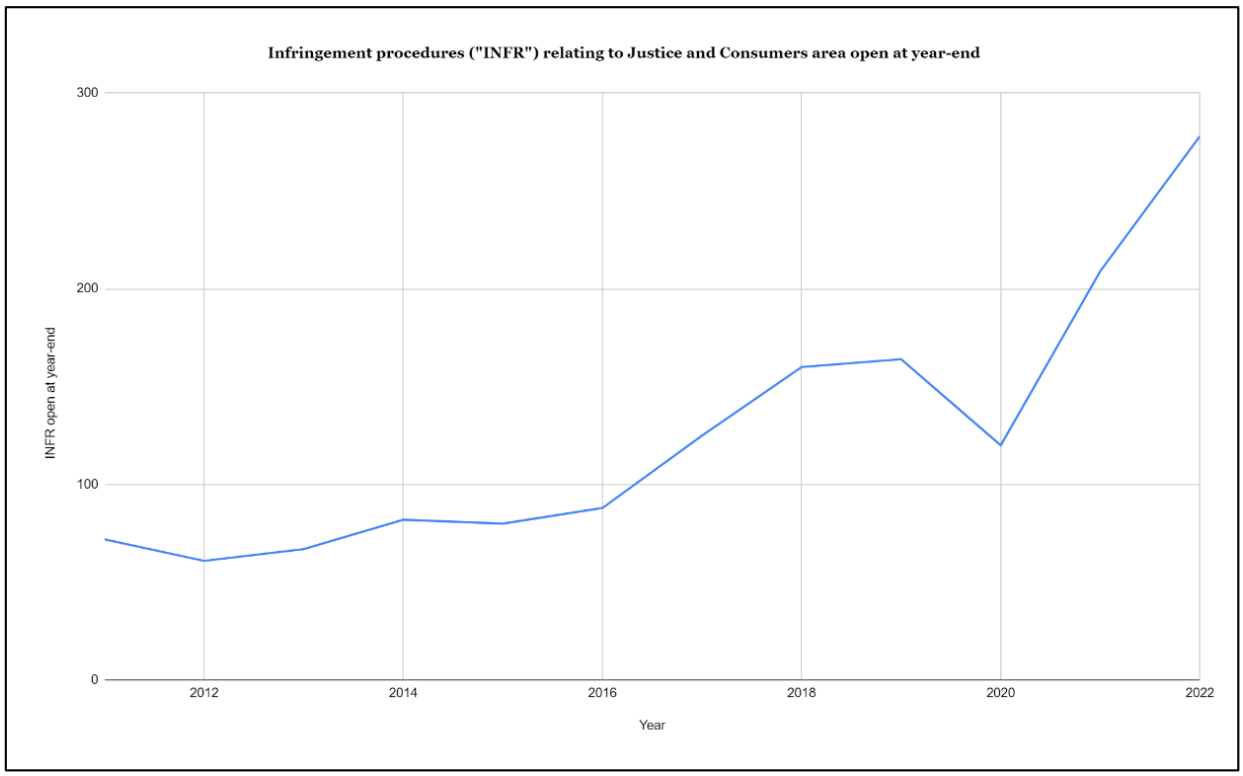
Based on the data collected on the Commission's infringement activity in the **policy area of Justice and Consumers** for the years 2011-2022, the following can be observed: the Commission launched 87 new infringement procedures in this policy area in 2011, before the numbers plummeted to 26 new cases the following year (2012). From 2012 until 2019 the number of new infringement procedures rose slowly (even with minor setbacks in 2015 and 2016) before reaching the new high of 78 new infringement procedures in 2019. The following years, 2020 and 2021, then observed two major shocks, with a big drop of cases to only 37 new procedures launched in 2020 and **120 new procedures launched in 2021** - the highest number of new infringement cases by some distance.

Figure 1: New infringement procedures in the Justice and Consumers area



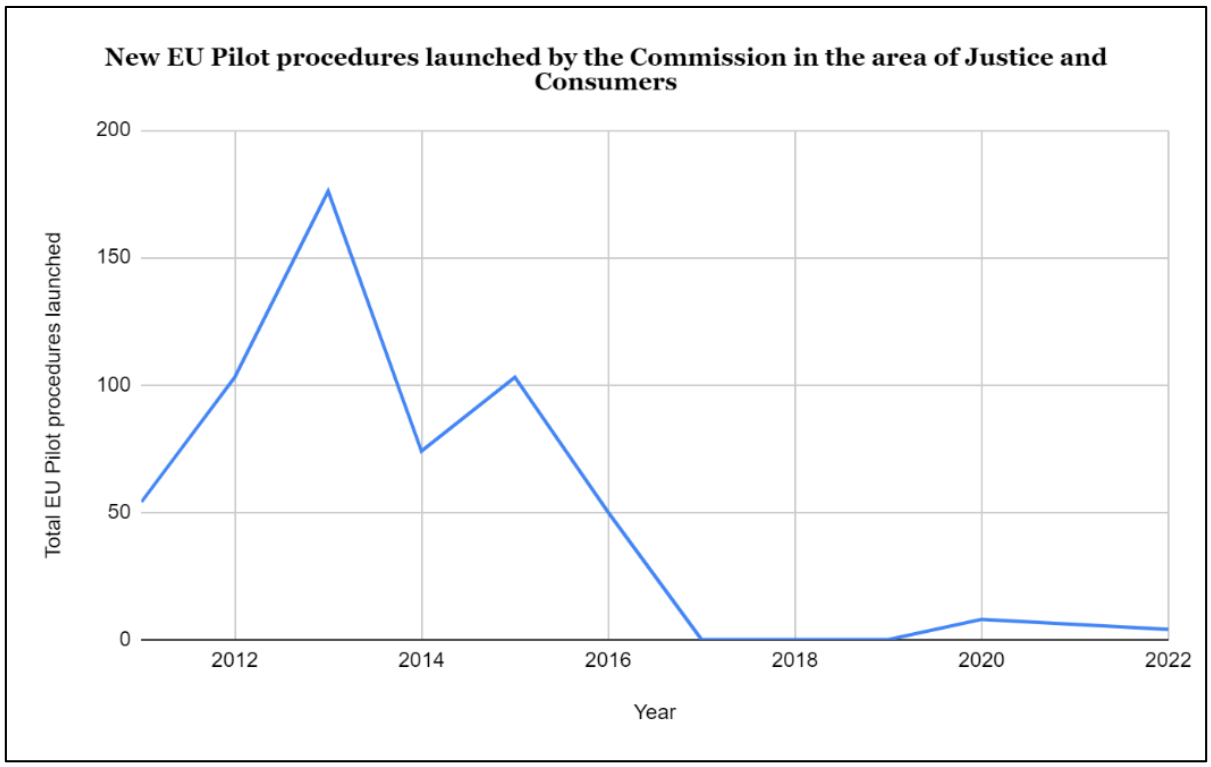
On the other hand, it is interesting to observe that the number of **infringement procedures open at year-end** in the policy area of Justice and Consumers in the period of 2011-2022 show a significantly steadier increase, reaching 257 opened infringement procedures at the end of 2022. That justifies the conclusion that while the Commission did initiate more infringement procedures in 2021 as it did the past decade in this particular policy area, it also needed more time to process such infringement procedures, leaving open more and more infringement procedures at year-end.

Figure 2: Infringement procedures in the Justice and Consumers area open at year-end



There are two further sets of data that can be observed from the Annual Reports that are worth mentioning: data relating to **EU Pilot procedures** launched in this policy area as well as the data on **complaints received** by the Commission.

Figure 3: New EU Pilot procedures in the Justice and Consumers area



As can be observed, **the Commission held back on its EU Pilot activity** in this specific policy area from 2013 onwards, with extremely minimal use since 2017. The **complaints** received by the Commission on the other hand **exponentially grew**, reaching an almost triple-fold increase compared to 2011 and 2012. This goes to show that the non-compliance and/or incorrect application of EU law in this policy area, or perhaps the public's perception of it, has not decreased but in fact increased exponentially in the last decade.

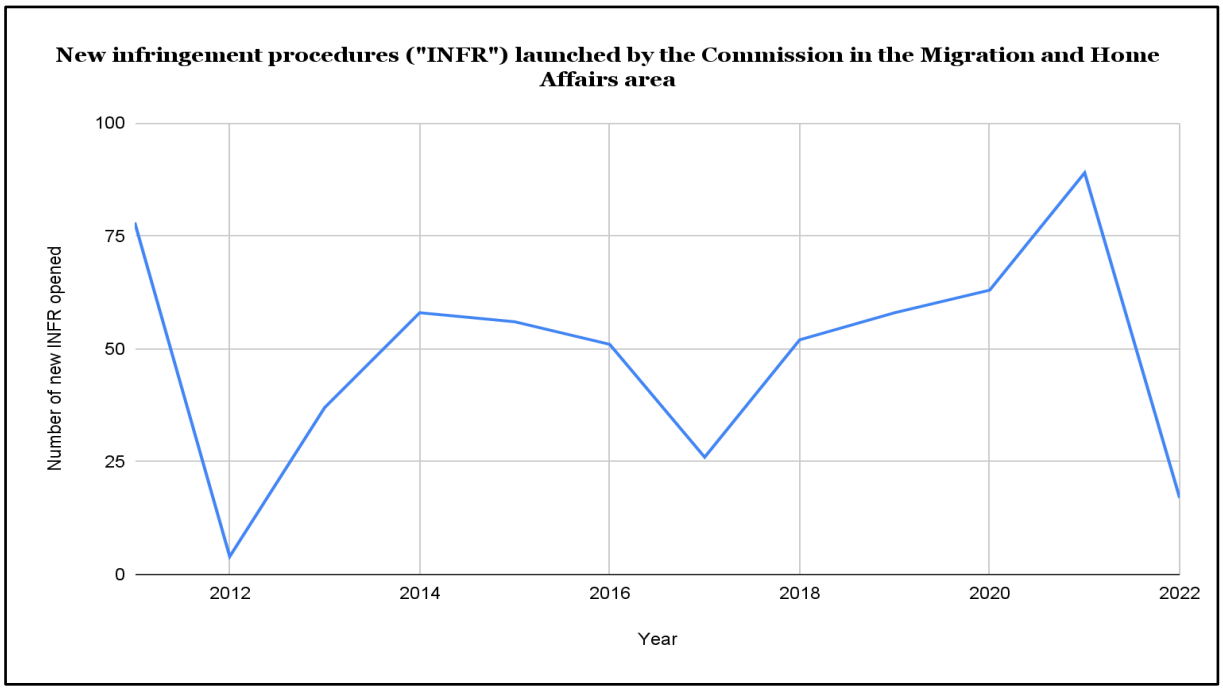
Figure 4: Complaints received in the Justice and Consumers area

3.2.2. Policy area: Migration and Home Affairs (HOME)

Based on the data collected on the Commission's infringement activity in the **policy area of Migration and Home Affairs** for years 2011-2022, the following can be observed: initially starting at 78 new infringement procedures in 2011, the Commission's activity plummeted to a mere 4 cases in 2012. Starting in 2013, the DG's activity can be roughly observed as increasing, with a slight downturn in 2017, where the Commission launched only 26 new infringement cases, before reaching its peak at **89 new infringement cases in 2021**. 2022 however showcases a new drop, this time to 17 new infringement cases.

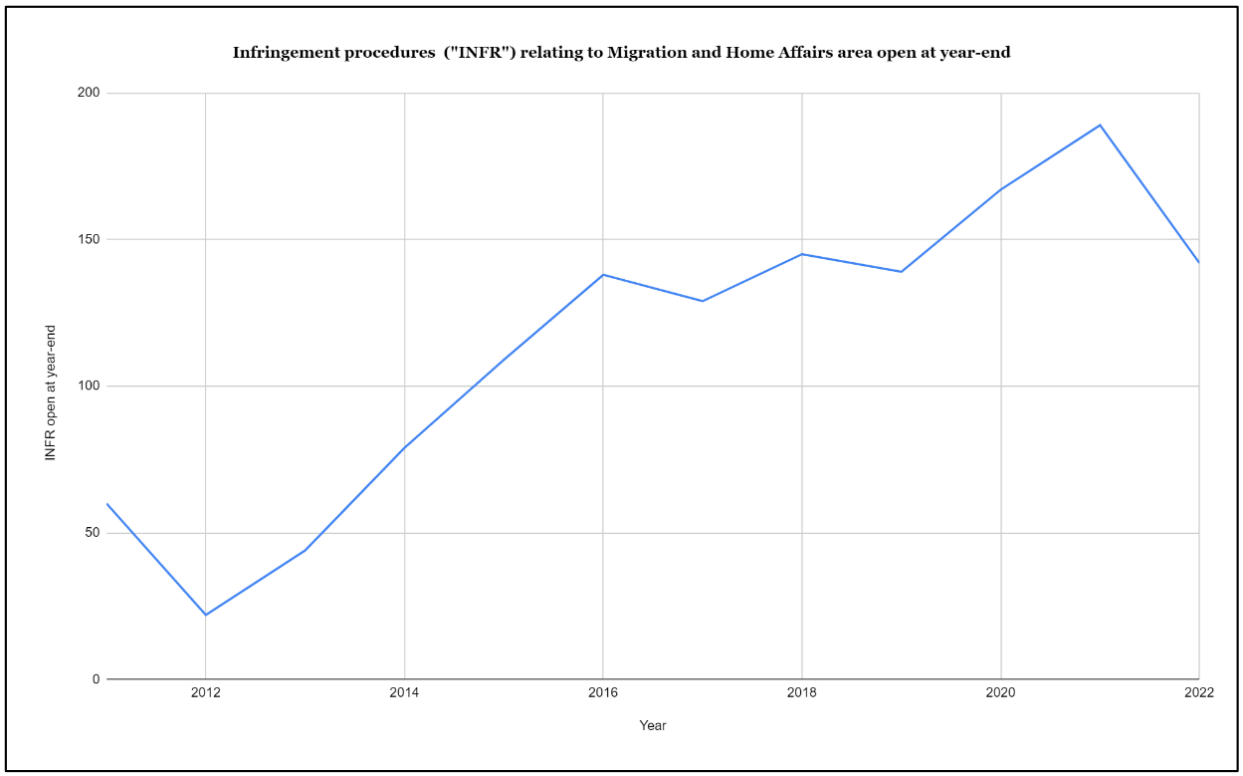
Compared to the policy area of JUST, **the general number of infringement cases launched is lower** in HOME. However, there are some similarities that can be observed across the two areas: **both observed a big decline in activity in 2012 before proceeding to slowly (and somewhat steadily) increasing in numbers and reaching their respective peaks in 2021**.

Figure 5: New infringement procedures in the Migration and Home Affairs area



The observation made for the JUST policy area regarding **infringement cases open at year-end**, can be made for HOME as well. The number of open infringement cases in the HOME area has significantly increased from 2012 (22) to 2021 (189).

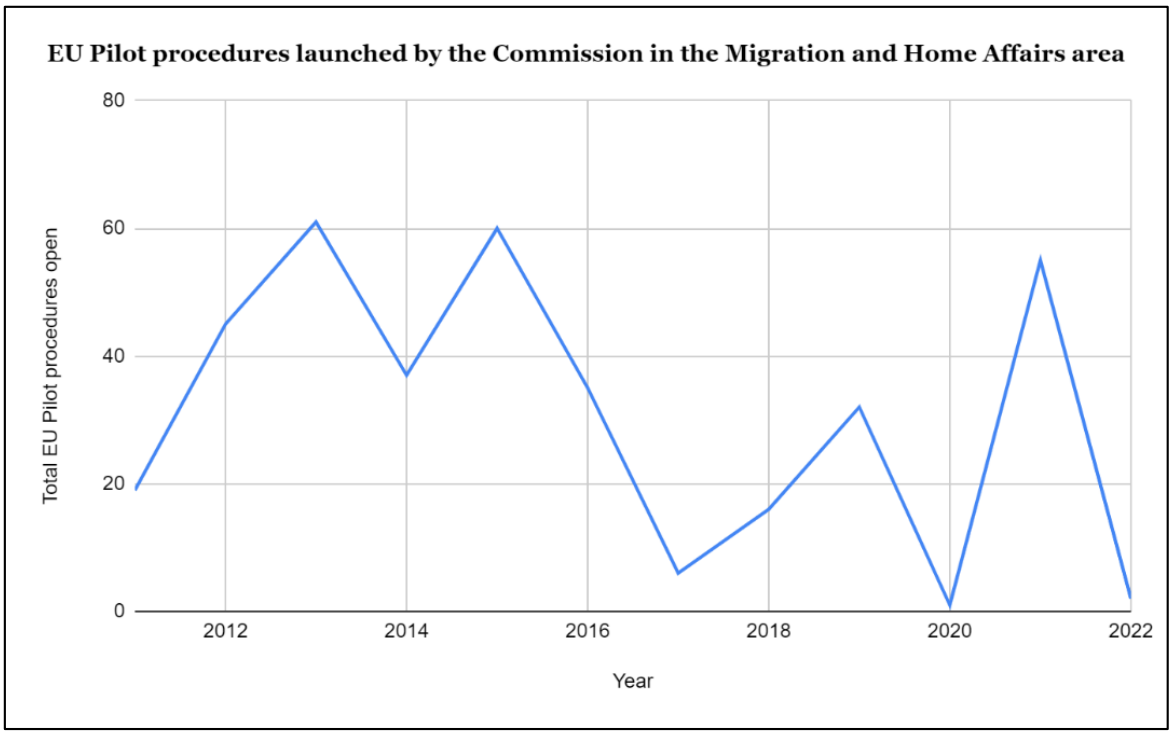
Figure 6: Infringement procedures in the Migration and Home Affairs area open at year-end



The data on **EU Pilot procedures** and **complaints received** in the HOME area observe a *somewhat* similar trend as the JUST area: the Commission has decreased its use of EU Pilot procedures, albeit not

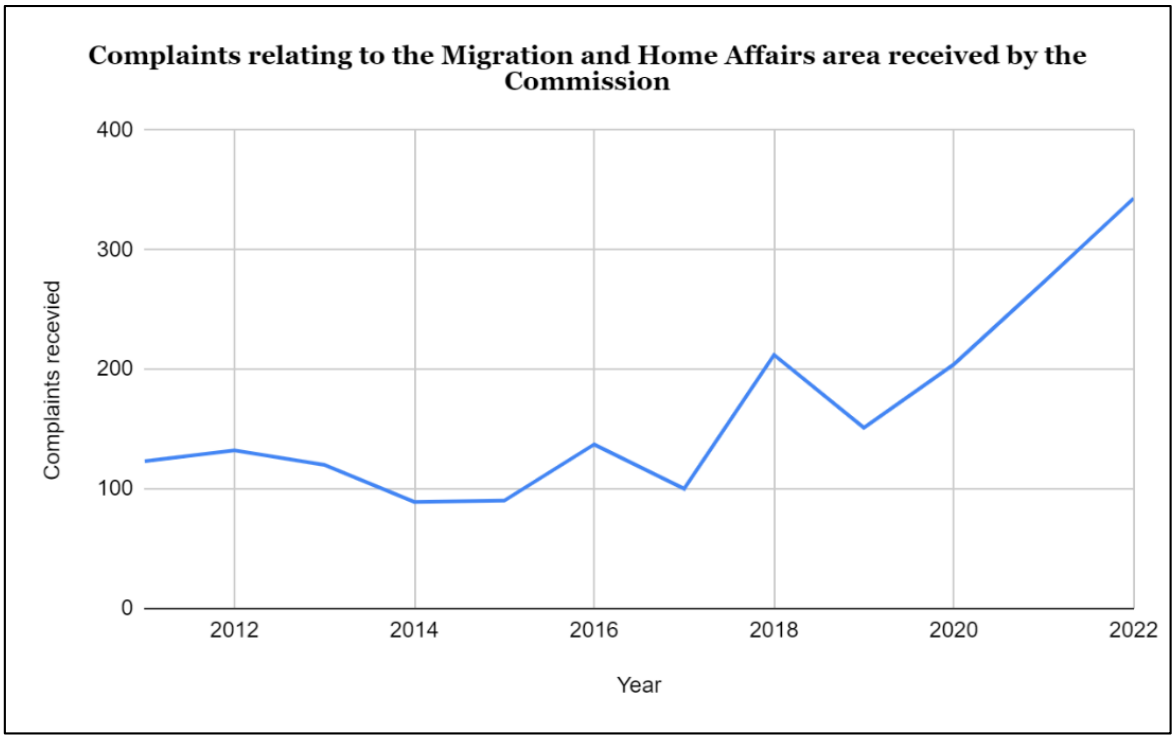
as steadily as in the JUST area, with EU Pilot procedures being again substantially used in 2021 (55 new procedures launched).

Figure 7: EU Pilot procedures in the Migration and Home Affairs area



The data on complaints on the other hand shows an **increase in complaints** received by the Commission, but to a lesser exponential increase over the last decade as in the JUST area (from 123 in 2011 to 343 in 2022).

Figure 8: Complaints received in the Migration and Home Affairs area



3.2.3. AFSJ policy sectors

The Commission's Annual Reports further provide data, albeit in a very brief manner, of infringement procedures per **policy sector** - policy sub-areas of law, such as, for example, *criminal law and procedure* (policy sector) in the main policy area of *justice and consumers* (policy area). The data regarding policy sectors is however **rather limited**, and **not used consistently across different Annual Reports**. In other words, it does not seem that the categories used by the Commission are pre-determined in relation to particular legal (sub-)fields, but rather descriptively categorise cases that the Commission observed in a particular year. That makes the data that can be presented here somewhat **patchy**.

Nonetheless, it can be observed that **most of the policy sectors that were studied – *Asylum, Schengen acquis, GDPR, and Non-discrimination and equality* – have experienced an increase in infringement procedures in the past decade, at least at some point**. A firm pattern cannot, however, be established.

Figure 9: Infringement procedures relating to Asylum open at year-end

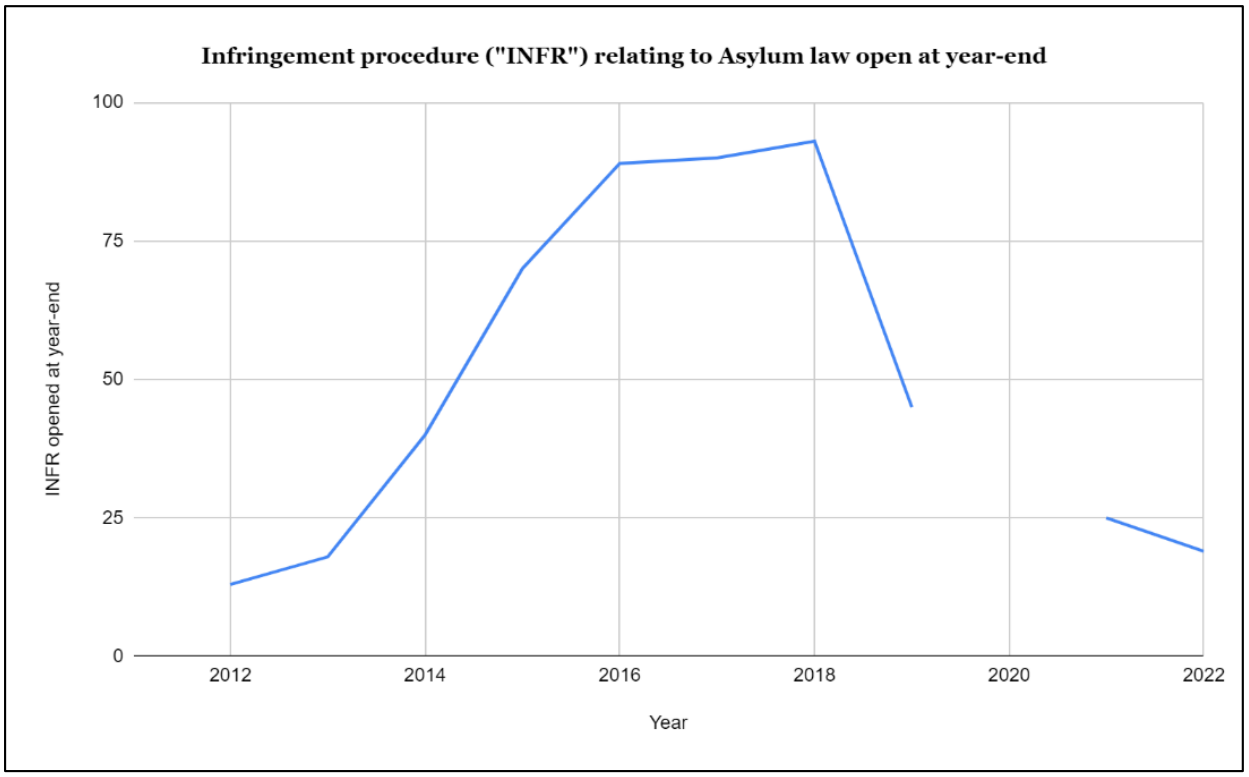


Figure 10: Infringement procedures relating to the Schengen acquis open at year-end

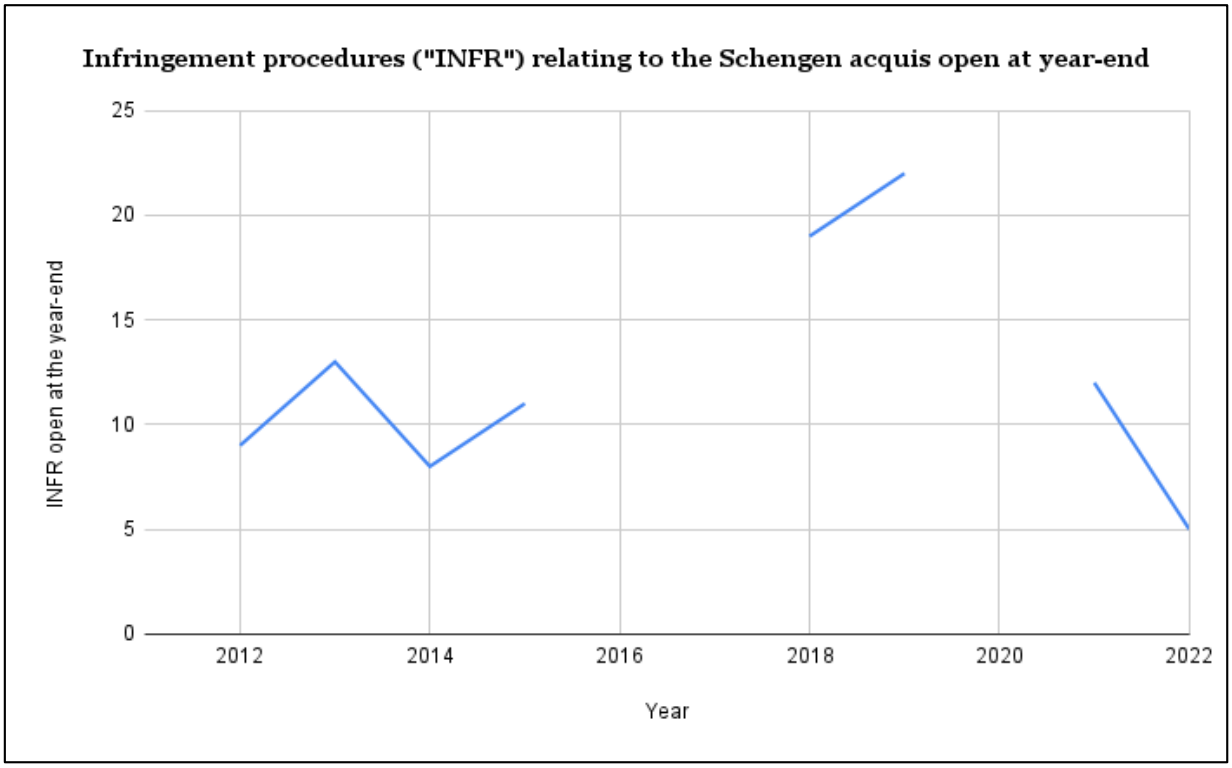


Figure 11: Infringement procedures relating to Data protection open at year-end

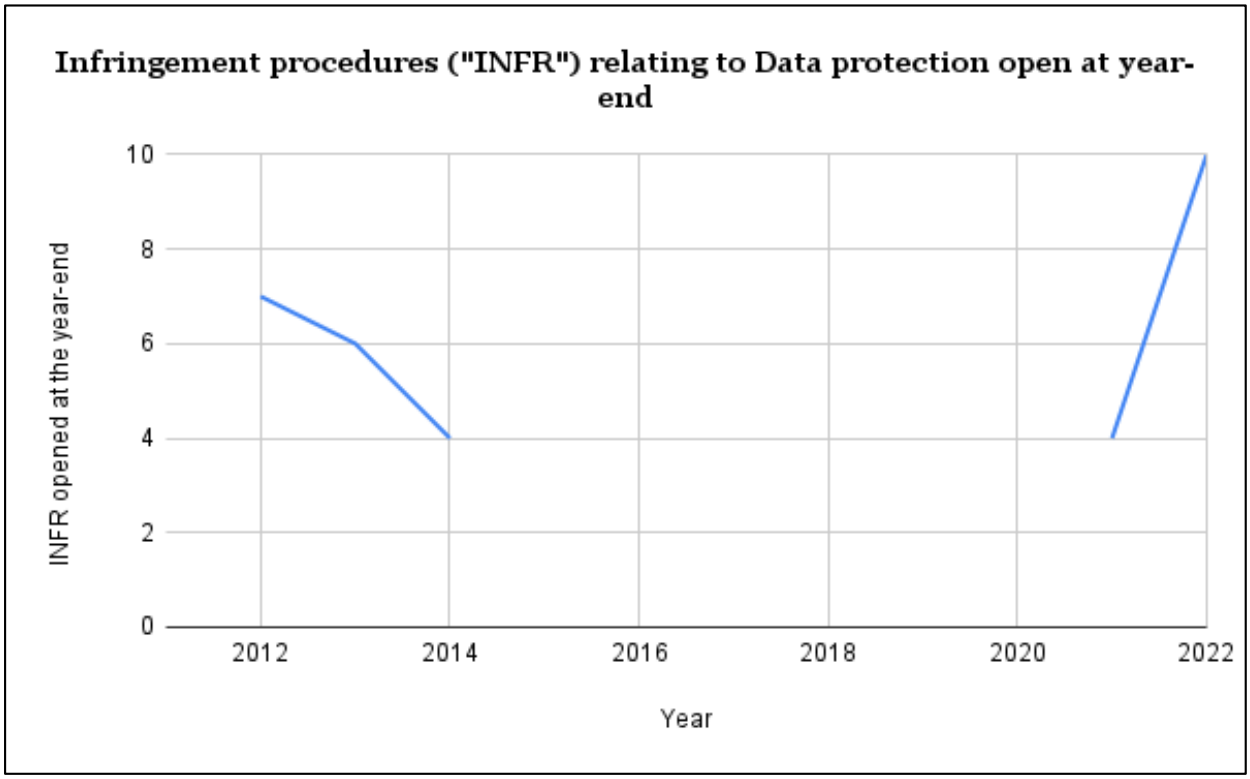
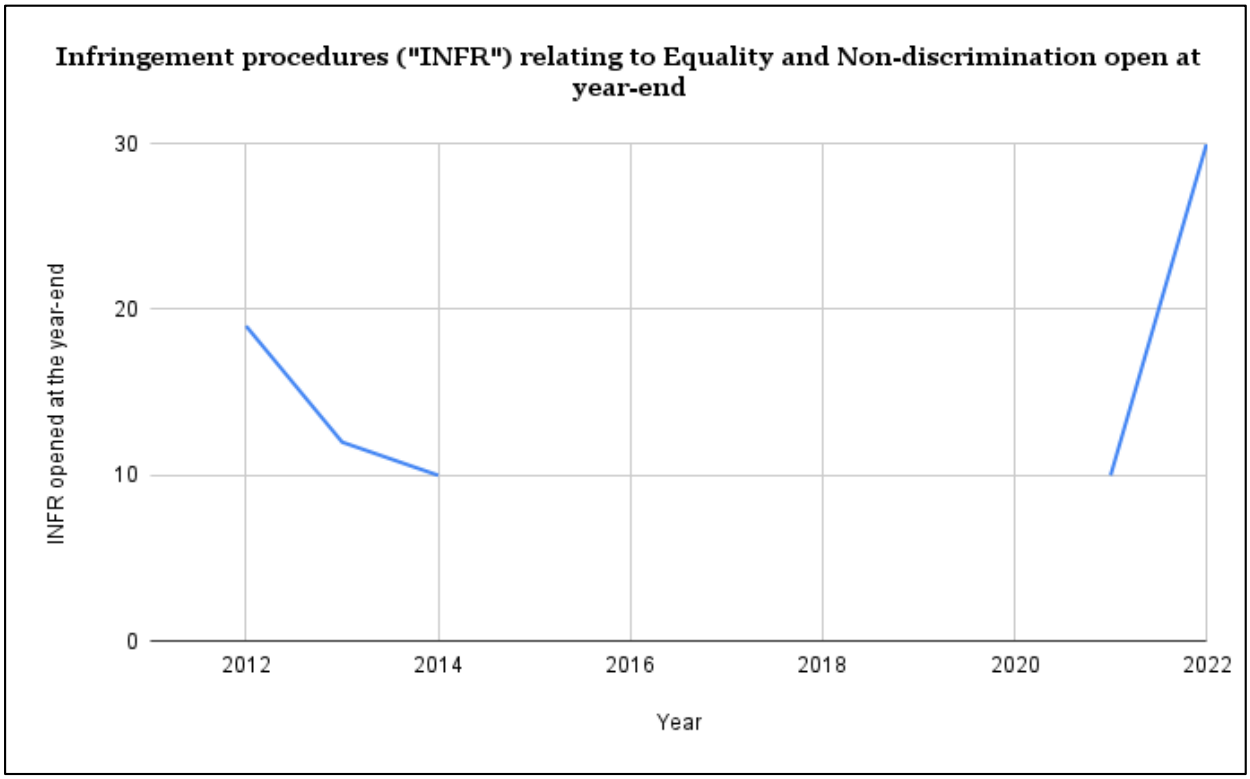


Figure 12: Infringement procedures relating to Equality and Non-discrimination open at year-end



3.3. AFSJ infringement data by type of infringement

When cross-referencing the data from the Commission's Annual Reports with the Commission's Infringement database, data on the **type of infringement** launched can be collected. As was explained in the previous section, the Commission distinguishes between two types - **non-communication infringement procedures** (launched automatically in case of a Member States' failure to notify a transposition of a directive in national law within the agreed time frame) and "**other" infringement procedures (meaning non-conformity/non-compliance and incorrect/bad application).** Since the launch of the new Commission website on monitoring the application of EU law in 2021, the Commission further distinguishes between infringements relating to incorrect transposition or application of directives, or incorrect application of regulations, treaties and decisions. However, such data can only be collected for the past 6 years, i.e. 2017-2022.[124]

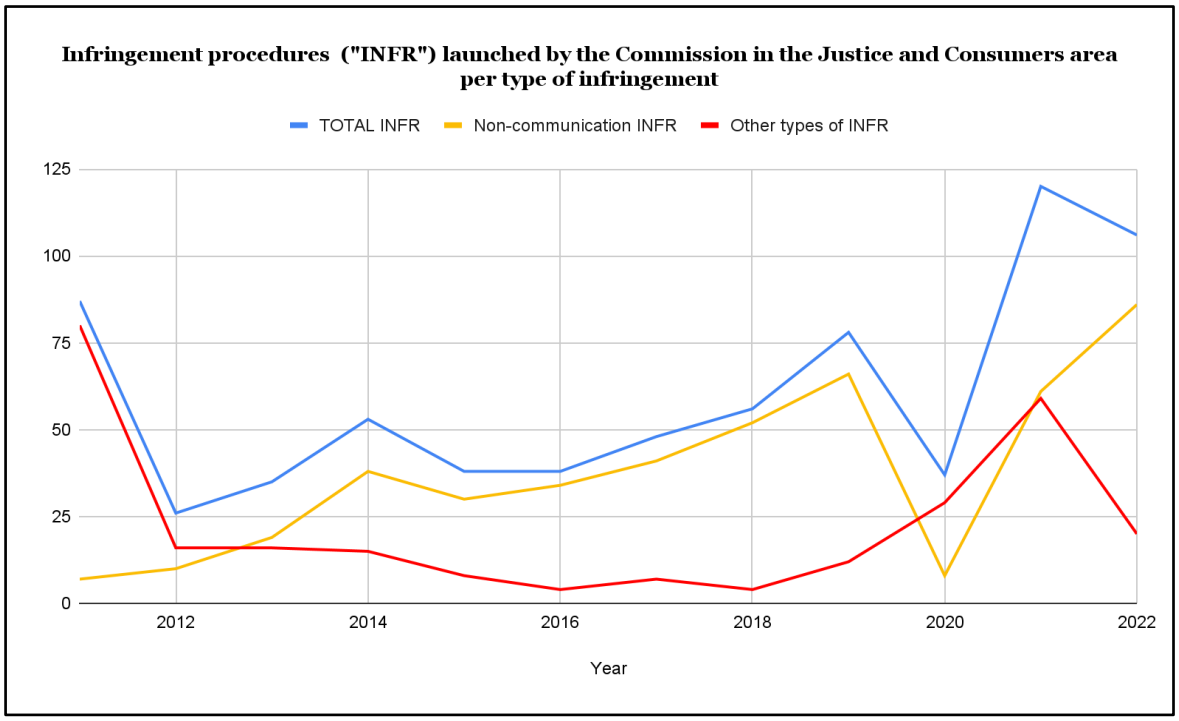
3.3.1. JUST policy area: types of infringements

The **policy area of Justice and Consumers** observed a drop in "other" infringement procedures (i.e. non-conformity/non-compliance and incorrect/bad application) from 2011 until 2016 (80 to 4, respectively), before the Commission increased its enforcement activity, culminating in 59 new "other" infringement procedures launched in 2021. Almost all "other" infringement cases relate to incorrect transposition or application of directives, rather than incorrect application or breach of regulations, treaties or decisions (58 versus 1 for 2019, respectively). Non-communication infringement cases, on the other hand, increased in the period of 2011 to 2019 before observing a significant drop in 2020.

[124] See at: https://commission.europa.eu/law/application-eu-law/role-member-states-and-commission/infringement-procedure/2021-annual-report-monitoring-application-eu-law_en#overview-of-enforcement-activity

Since then, the Commission has increased its activity in regard to non-communication infringements again, with 86 new non-communication infringements being launched in 2022.

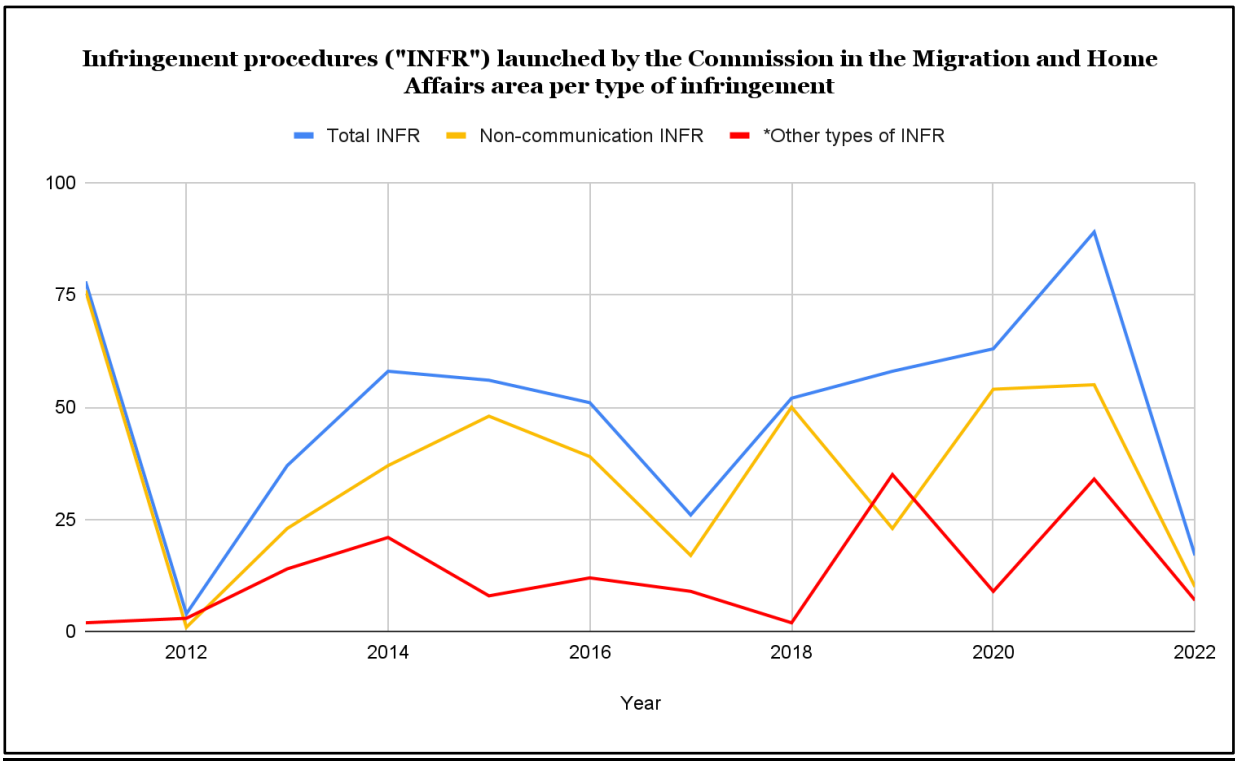
Figure 13: Infringement procedures in the Justice and Consumers area per type



3.3.2. HOME policy area: types of infringements

The **policy area of Migration and Home Affairs** on the other hand observed an unpredictable pattern of increase and decrease in the number of "other" (i.e. non-conformity/non-compliance and incorrect/bad application) infringement procedures in the past decade. The Commission's activity in the area reached its peak in 2019 with 35 other infringement cases launched (34 of which related to incorrect transposition or application of EU law and 4 to incorrect application or beach of regulations, treaties and decisions), with 2021 closely following suit (34 new cases). Non-communication infringement activity, on the other hand, witnessed a significant drop in 2012 before slowly and irregularly increasing its numbers, reaching its peak in 2021 at 55 new cases launched.

Figure 14: Infringement procedures in the Migration and Home Affairs area per type



3.4. AFSJ infringement data by Member State

In this section, the study will examine the data on the targets of infringement procedures: **which Member States were most frequently subjected to infringement procedures in the AFSJ?** In order to obtain this data, the information from the Commission's Annual Report was cross-checked with the data collected from the Commission's infringement database. The most interesting information to observe here is where **the Commission used its discretion** to start such an action. Therefore, non-communication infringements, which are started automatically when the Member State does not give implementation details after the passing of a deadline (and where the Commission, therefore, does not use its discretion), were excluded from this overview.

Another methodological caveat should be mentioned at this point in regard to the infringement database and its categorisation of policy areas. The database features an option to filter through "policy areas" or "department in charge". However, the latter do not fully correspond to the current internal structure (DGs) of the Commission. This means that data can be assumed (but not assured) to correspond to the categorisation used by the Commission in its Annual Reports.

> *For example, when looking for cases that fall under the auspices of the DG Justice and Consumers, it was necessary to choose between "Justice, Freedom and Security" and "Justice, Fundamental Rights and Citizenship", neither of which directly correspond to the current DG in question.*

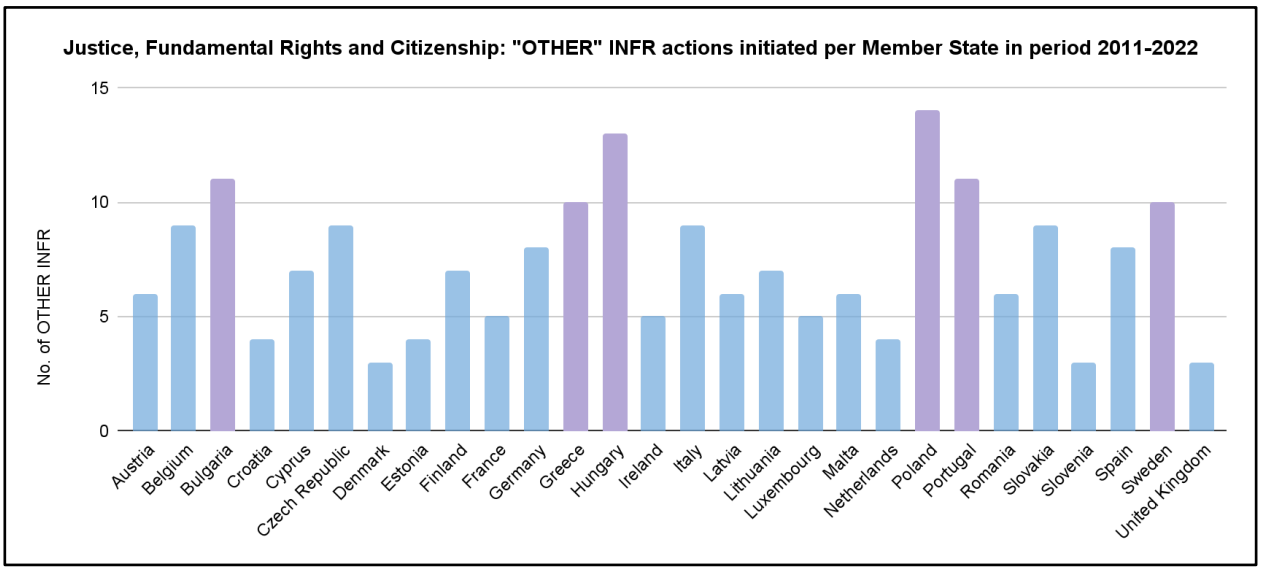
Therefore, the below tables are **approximations**.

3.4.1. JUST policy area: data on "other" (non-conformity/non-compliance and incorrect/bad application) infringements by Member State

As can be observed from the chart, the infringement procedures in the area *presumably* relating to Justice and consumers, are relatively fairly dispersed over different Member States. While there are a

few that received more infringement actions than others, such as **Bulgaria, Hungary, Poland and Portugal**, the differences between others are arguably not particularly significant.

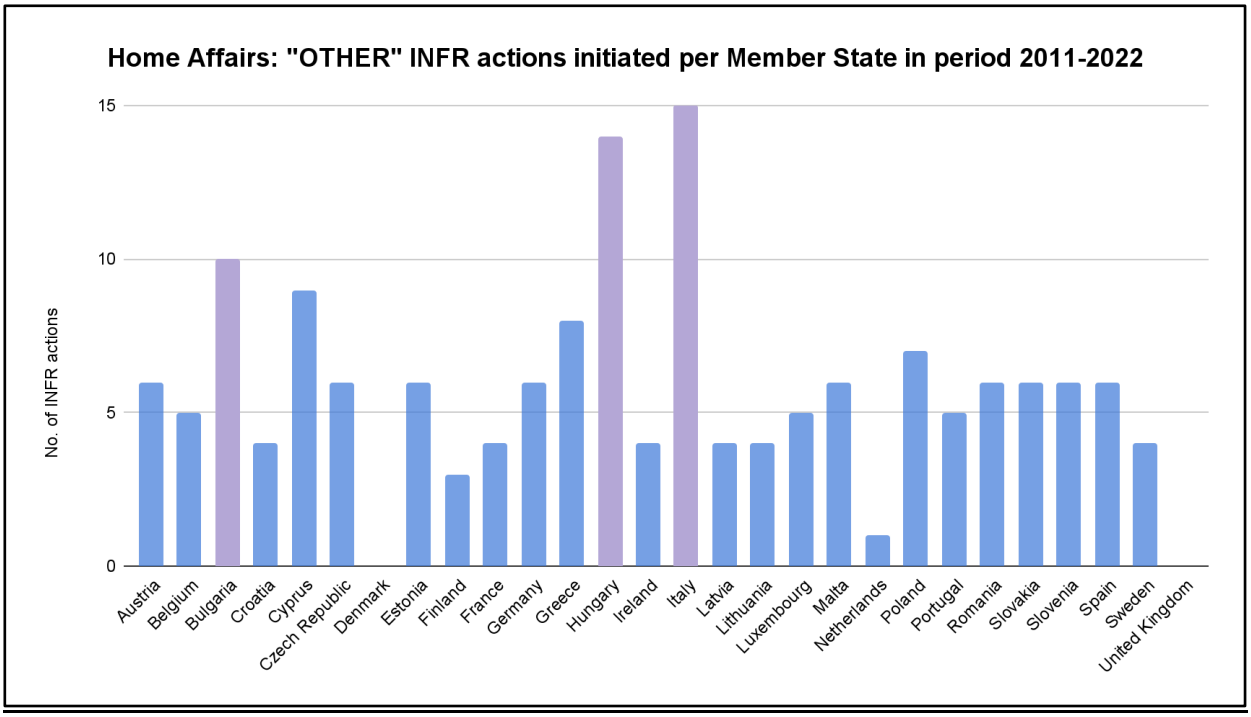
Figure 15: Justice, Fundamental Rights and Citizenship: "Other" infringement actions, by Member State (2011-2022)



3.4.2. HOME policy area: data on "other" (non-conformity/non-compliance and incorrect/bad application) infringements by Member State

Data relating to the policy area of Migration and Home affairs on the other hand shows two noticeable frontrunners – **Hungary and Italy**, with 14 and 15 "other" infringement cases launched against each of them, respectively. Most other Member States have also observed at least a certain level of attention from the Commission – with **a majority reaching at least 5 infringement cases**.

Figure 16: Home Affairs: "Other" infringement actions, by Member State (2011-2022)



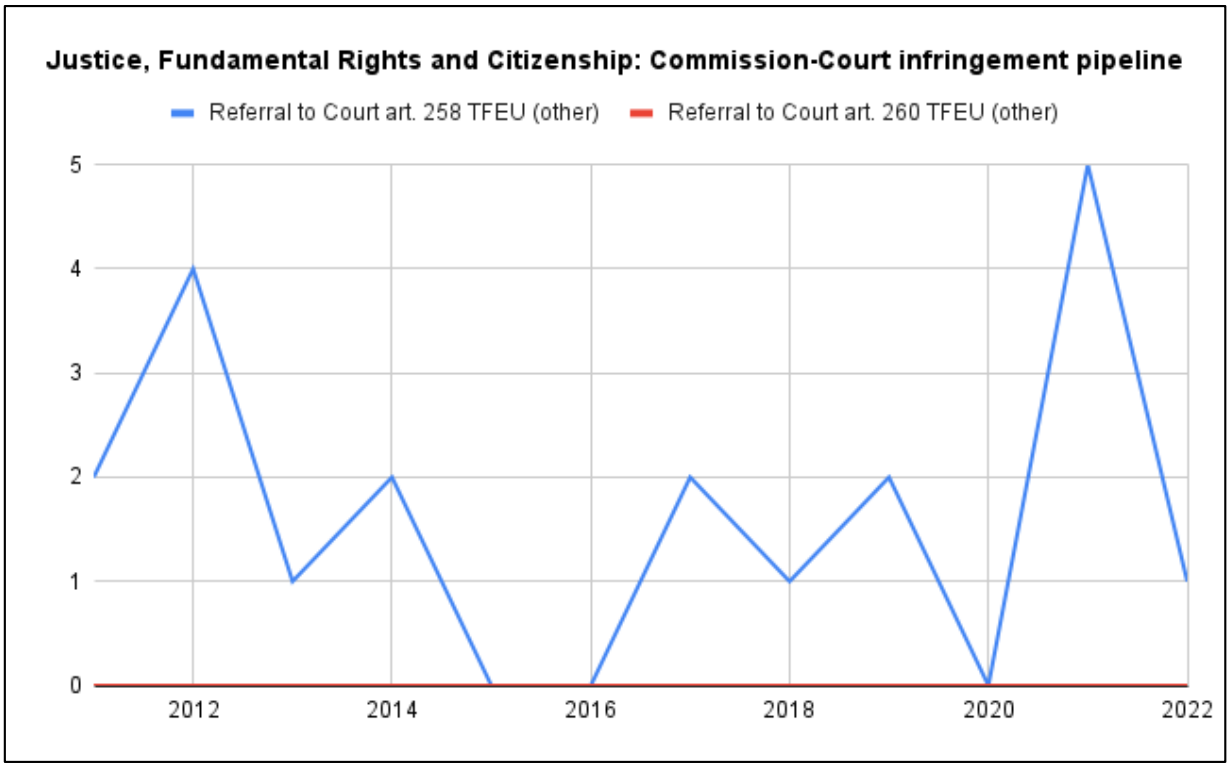
3.5. The Commission-Court pipeline in the AFSJ: Articles 258 and 260 TFEU cases

The next information that is interesting to analyse is data on the **Commission's referrals to the Court based on Art. 258 TFEU or, later on, Art. 260 TFEU**, specifically as the Commission has been frequently criticised for lacking the political will to take infringement actions all the way, i.e. before the Court.[125]

3.5.1. JUST policy area: Article 258 and 260 referrals

Figure 17: Justice, Fundamental Rights and Citizenship: Commission-Court infringement pipeline

[125] Scheppele, K.L. 'The Treaties without a Guardian: The European Commission and the Rule of Law' (forthcoming), p. 73; Kelemen/Pavone, above n. 3.



The pattern in referrals based on art. 258 TFEU being brought to the Court in this area **seems random**. While the highest number (5 cases) was observed in 2021, the lowest number of cases (0) was observed two years in a row (2015 and 2016) just a couple of years before. To our knowledge there have **been no cases brought before the Court based on art. 260 TFEU in this area so far**.[126]

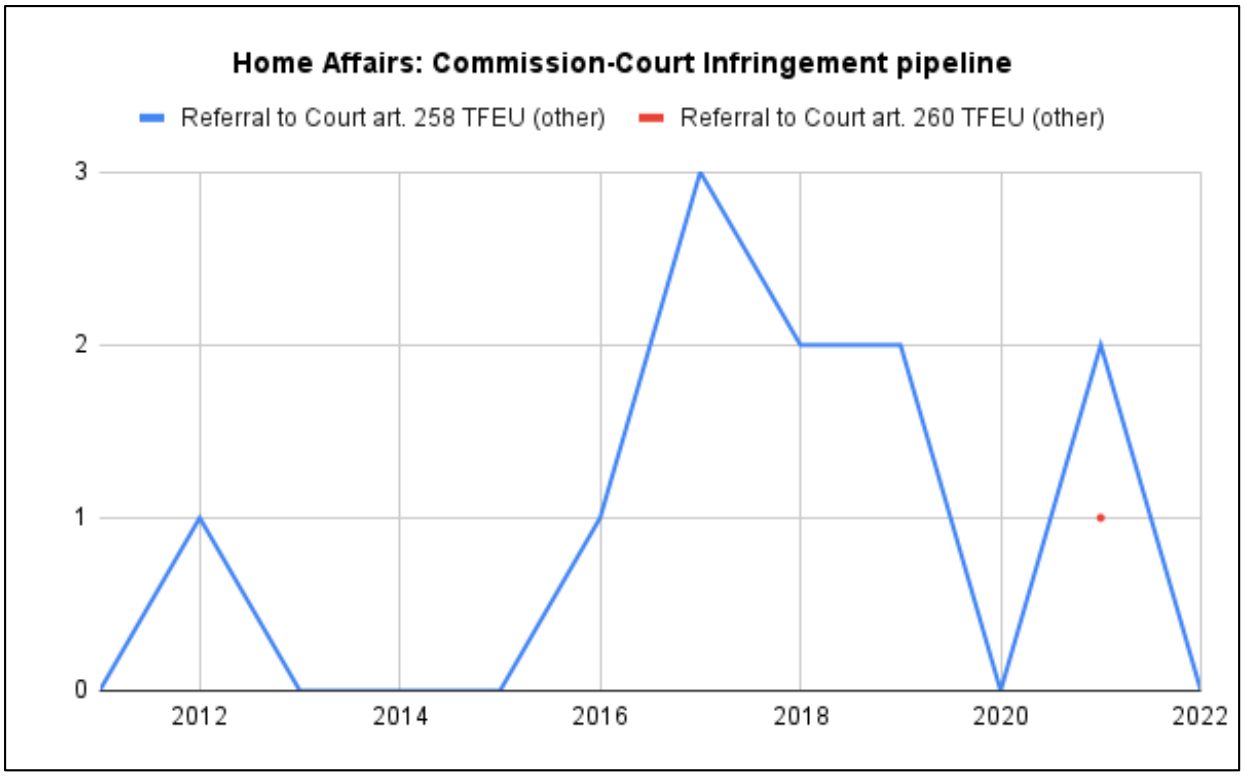
It is important to mention the caveat of the Commission's infringement database categorisation at this point again. While the Commission uses the category of "Justice, Fundamental Rights and Citizenship", there may well be other cases which that could be reasonably associated with the AFSJ but belong to a different category depending on the Commission's internal division of competences. **For example, the Hungarian infringement case on the topic of LGBTQI right and audiovisual media,[127] although clearly based on fundamental rights and core values of the EU, is classified under the policy area of "Communication Networks, Content and Technology"** and is therefore not counted in this chart.

3.5.2. HOME policy area: Article 258 and 260 referrals

Figure 18: Home Affairs: Commission-Court infringement pipeline

[126] The Court has further observed two referrals of infringement actions under art. 258 TFEU in 2023 (not presented in the graph).

[127] INFR(2021)2130 and subsequent Case C-769/22, Commission v. Hungary.



The Commission's activity in the area of Home Affairs seemed to fluctuate as well over the past decade - whilst having some years with 0 cases referred to the Court (2013, 2014, 2015 and then 2020 and 2022), the years 2015 and 2018, 2019 and 2021 observed the highest number of cases with 3 and 2 cases per year being referred to the Court, respectively. While not presented in the graph, the Commission referred another case to the Court in 2023.

The Commission only brought one case before the Court based on art. 260 TFEU, i.e. a case for non-implementation of a previous Court ruling: **in 2021, it referred Hungary back to the Court for it not complying with the Court's judgment of 17 December 2020 (C-808/18) on Hungary's legislation on the rules and practice in the transit zones situated at the Serbian-Hungarian border** was contrary to EU law.[128]

3.6. Decentralised AFSJ enforcement: preliminary references

References for a preliminary ruling that national courts submit to the Court are considered a decentralised form of EU law enforcement. While not sharing the same immediate goal with the infringement procedure under article 258 TFEU, they are able to point to systemic deficiencies within national legal orders as well as receive authoritative interpretation by the Court in how to address and/or remedy the specific situation. The **Commission** evidently shares the opinion that the preliminary reference procedure can serve as an **alternative enforcement mechanism**, as it has been adding a section of 'important preliminary reference procedures on the topic' as part of its annual reports on the monitoring of application of EU law.

For this reason, it is interesting to observe the data on preliminary reference procedures in the AFSJ, not only regarding the overall numbers but also as to what it reveals as to the origin of the references

[128] 'October infringements package: key decisions' (European Commission, 12 November 2021) https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_5342

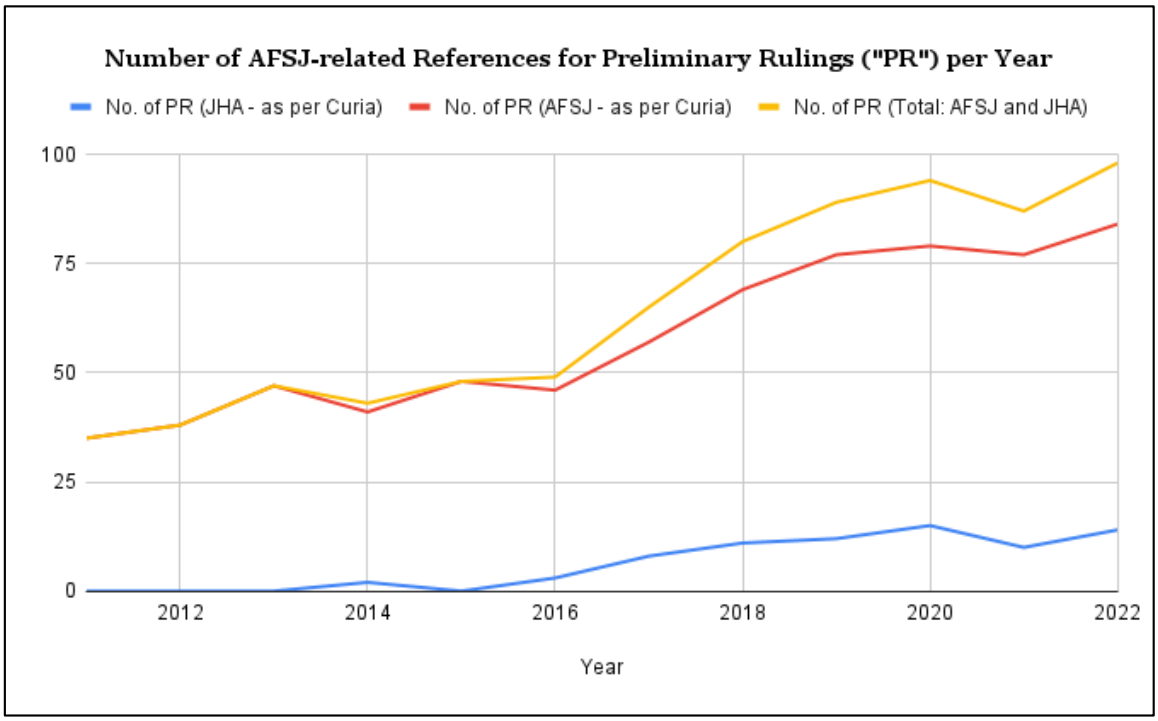
and the policy sectors covered. The Court's *Curia* database conveniently allows for the search and display of such data, which is analysed in the following subsections. A *caveat* that needs to be mentioned here, however, is the fact that **Curia does not use the same classification or categorisation of policy areas or policy sectors as the Commission** does.[129]

More specifically, it uses both "area of freedom, security and justice" and "justice and home affairs" as search criteria, while it not being clear whether JHA is as sub-category or AFSJ or comes in addition to it.[130] To account for both eventualities, the below visualises both options. Moreover, the policy sectors "fundamental rights, non-discrimination and data protection" are not positioned as sub-categories of "area of freedom, security and justice" in Curia. Therefore, it is uncertain whether the full totals of AFSJ-related preliminary references presented below include or actually exclude questions falling into any of these policy sectors.

3.6.1. Full AFSJ numbers and national origin of references

Preliminary references relating to the AFSJ have gained in frequency since the beginning of the previous decade: as can be seen from the chart below, while there were a limited number in 2011 and 2012, the numbers have gone up significantly since.

Figure 19: AFSJ-related references for Preliminary Rulings per year

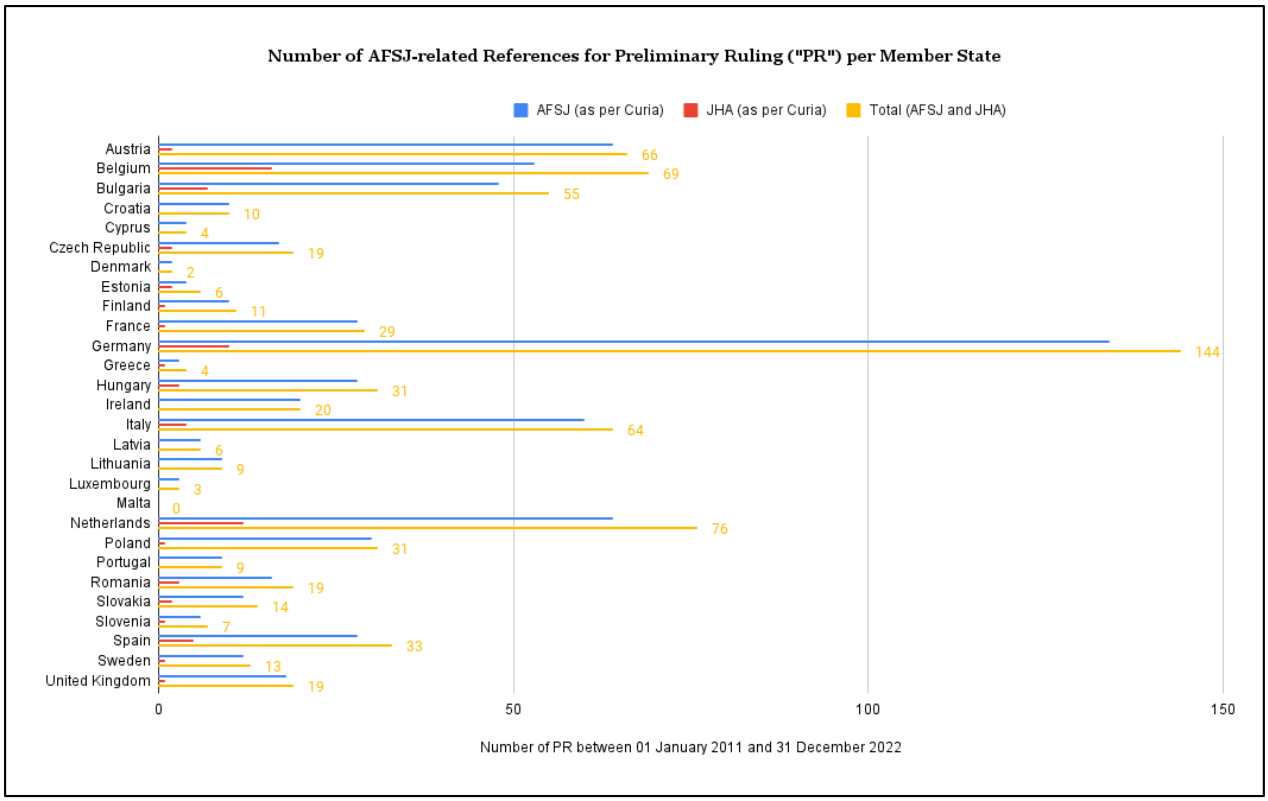


While the main addressees of the Commission's infringement actions in the AFSJ were shown above, **judges who sent the most preliminary reference questions to the Court** come mostly from an entirely different part of the EU, particularly **Germany, The Netherlands, Austria, and Belgium**.

Figure 20: AFSJ-related references for Preliminary Rulings per Member State

[129] More on the Methodology, its limitations and shortcomings in Annex I.

[130] The author contacted the services of the Court of Justice but did not get this matter clarified.



3.6.2. AFSJ policy sectors covered in preliminary references

Curia further allows for the search of data on specific policy sectors that seem to overlap with the Commission's policy sectors, such as *asylum policy, fundamental rights, judicial cooperation in criminal matters and data protection, border checks and non-discrimination*, as well as an additional section on *fundamental rights.*

All these policy sectors, apart from non-discrimination, show a **dramatic increase in preliminary reference procedures in the past decade**. Preliminary references on the topic of **asylum** policy have thus jumped from 2 in 2011 to 26 in 2022, **fundamental rights** from 11 in 2011 to 71 in 2022, **judicial cooperation in criminal matters** from 1 in 2011 to 18 in 2022 and **data protection** from 4 in 2011 to 16 in 2022.

Figure 21: Asylum Policy: number of references for Preliminary Rulings per year

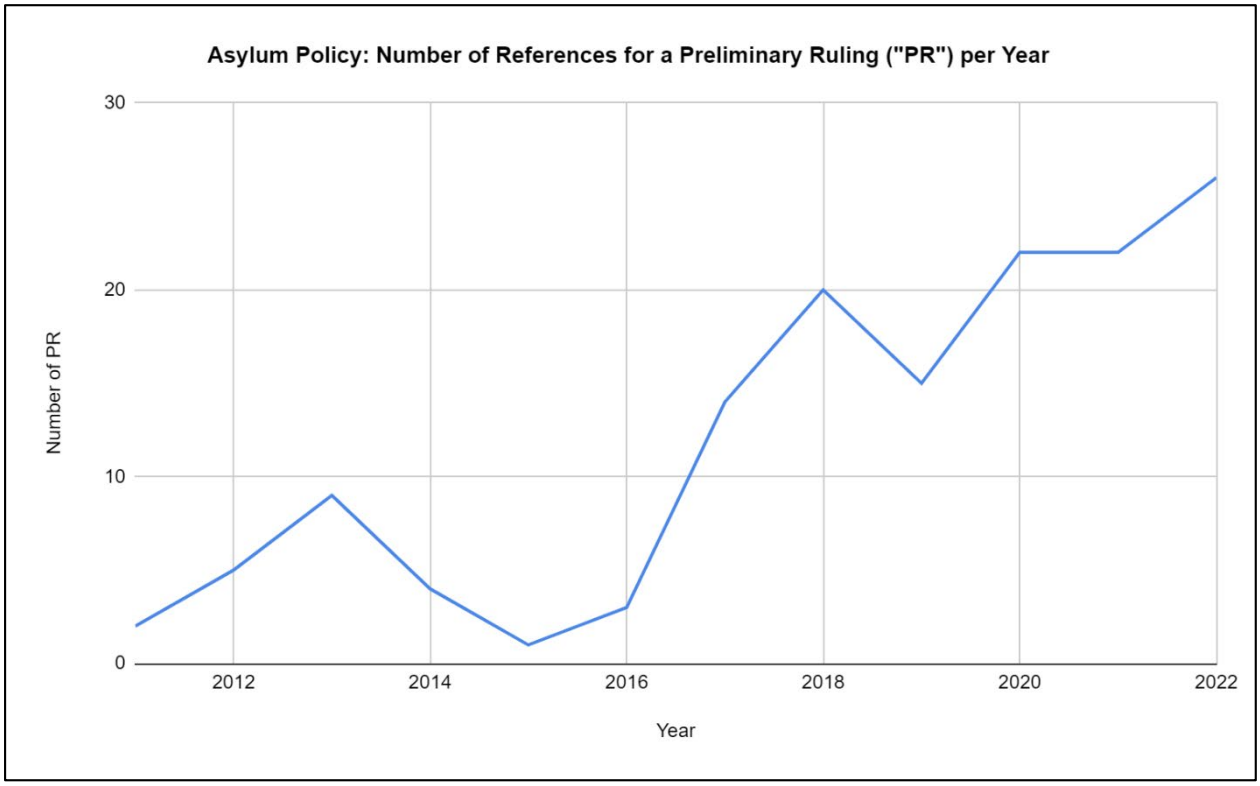


Figure 22: Fundamental Rights: number of references for Preliminary Rulings per year

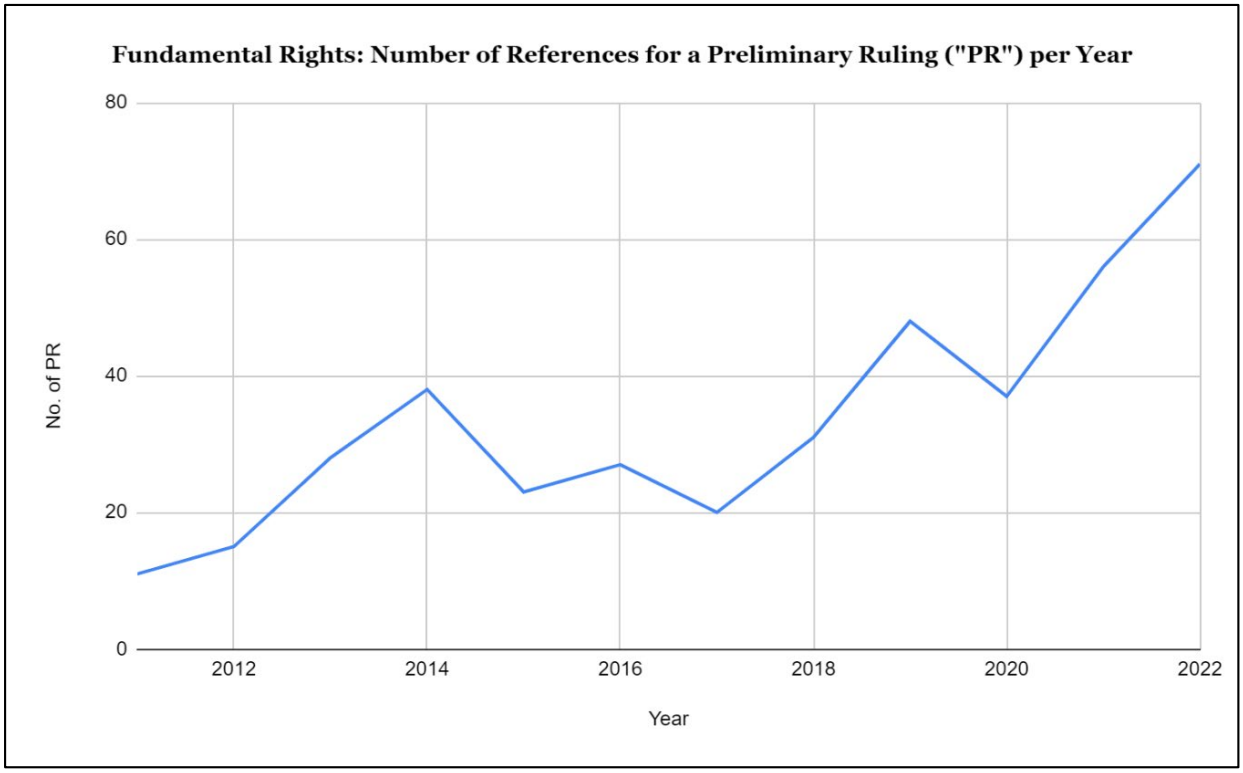


Figure 23: Judicial Cooperation in Criminal matters: number of references for Preliminary Rulings per year

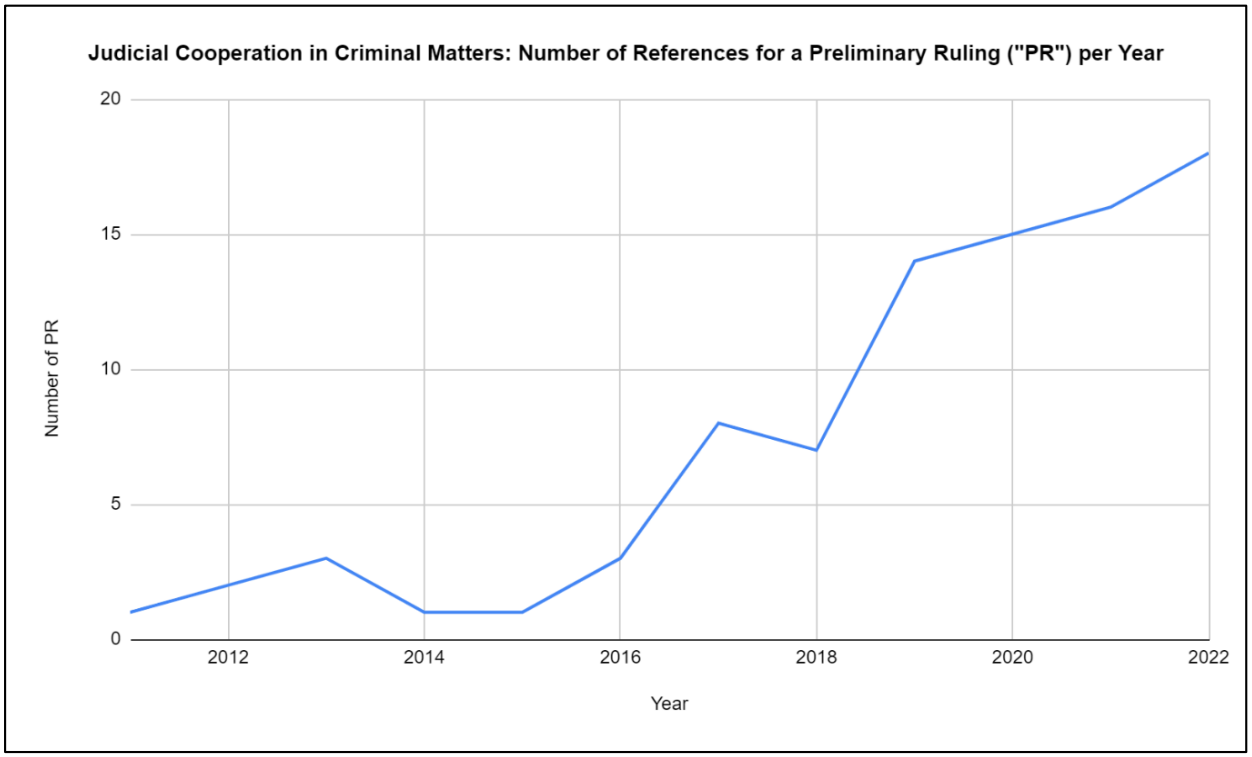


Figure 24: Data Protection: number of references for Preliminary Rulings per year

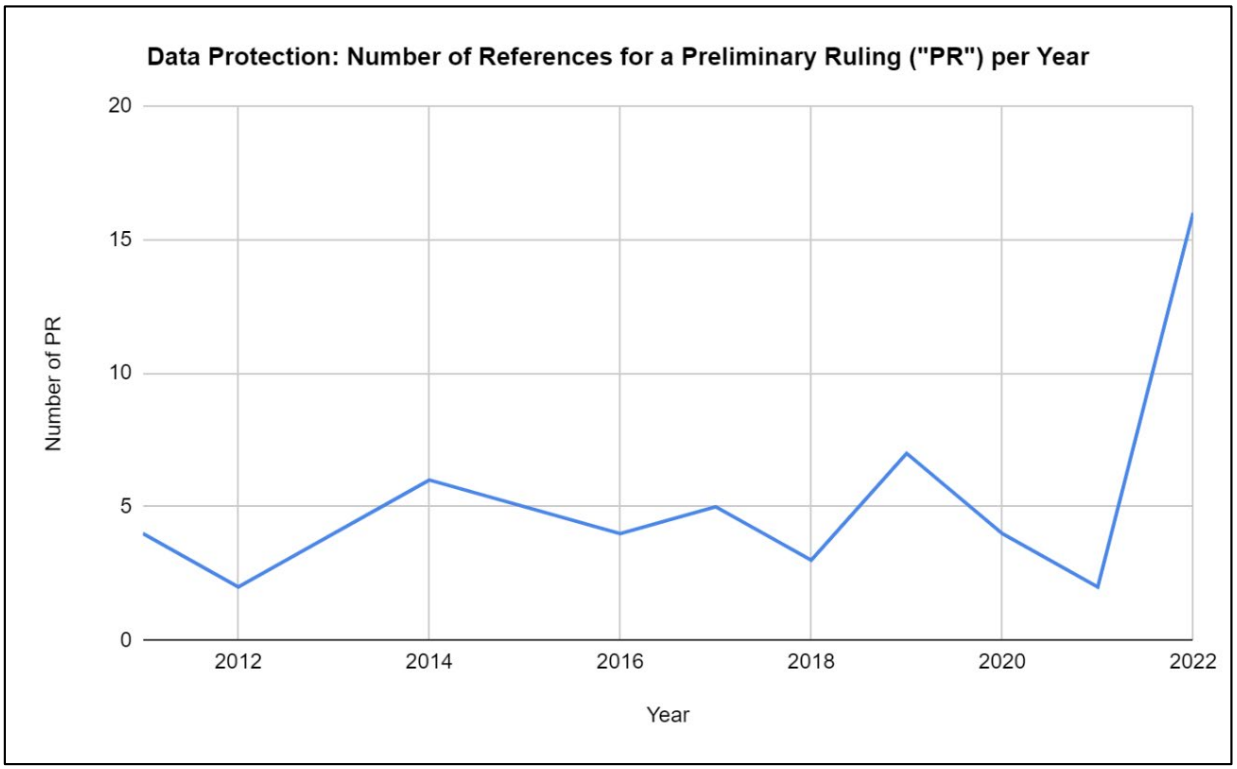


Figure 25: Border checks: number of references for Preliminary Rulings per year

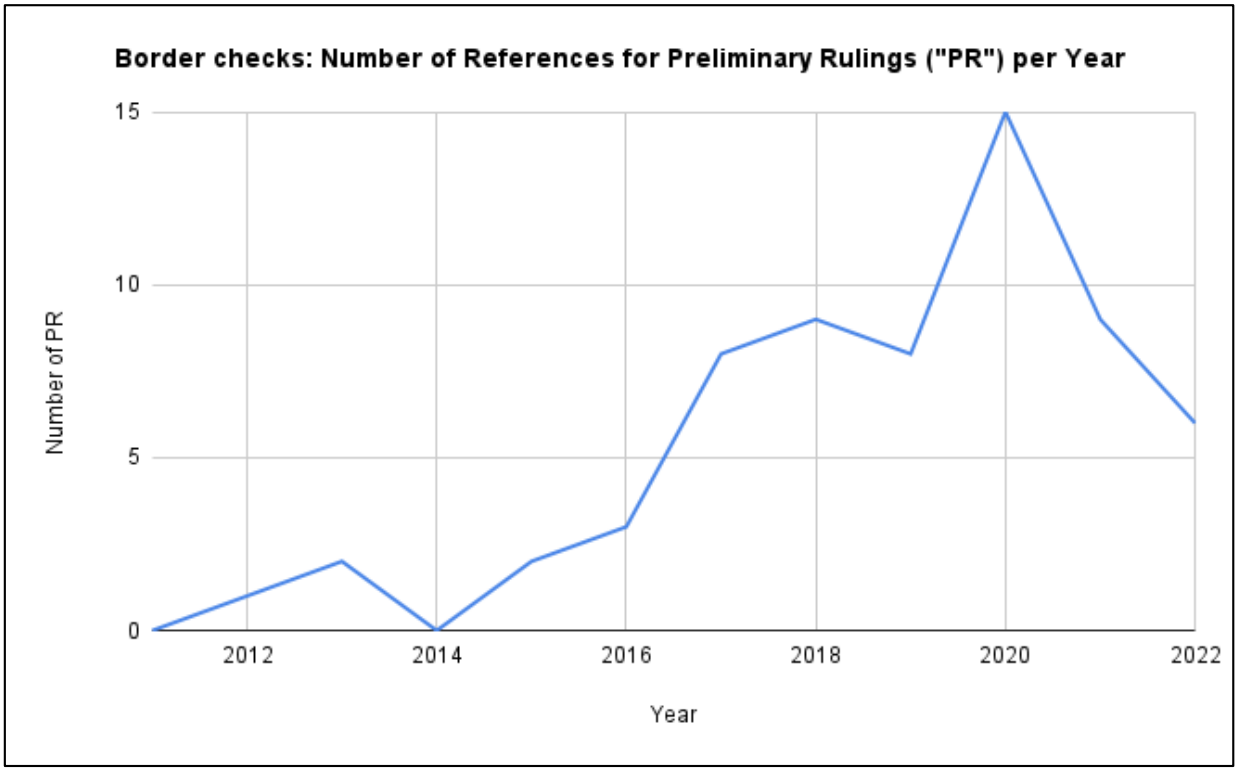
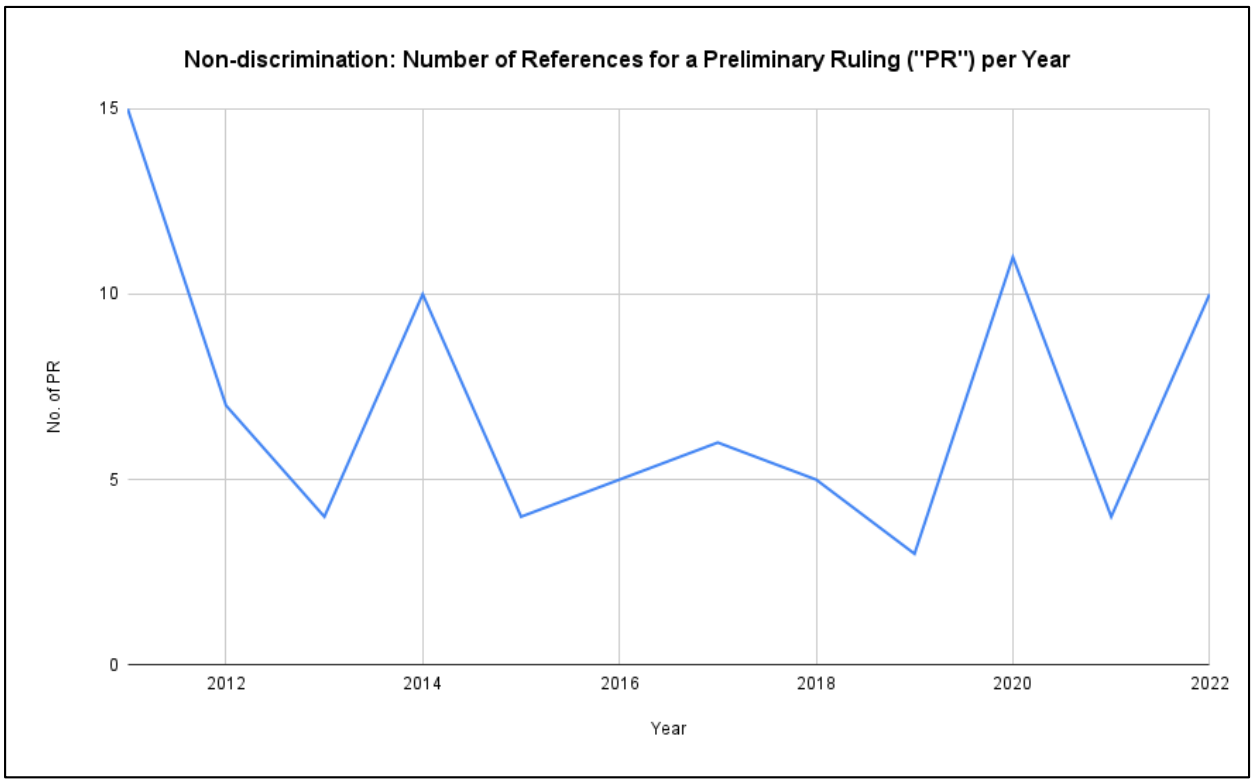


Figure 26: Non-discrimination: number of references for Preliminary Rulings per year



3.6.3. National origin of AFSJ-related preliminary references

The national origin of the preliminary references in these policy sectors is interesting to observe as well: **judges from Germany and The Netherlands dominate in the sectors of asylum policy, border checks and data protection, with Belgium joining in the first and the latter as well. The field of fundamental rights on the other hand is spearheaded by judges from, again, Germany and Belgium, but also Romania, Italy and Austria. Moreover, it is striking that the Hungarian judiciary seems particularly focused on clarifying the law in the field of asylum policy and border checks.**

Figure 27: Asylum Policy: number of references for Preliminary Rulings per Member State

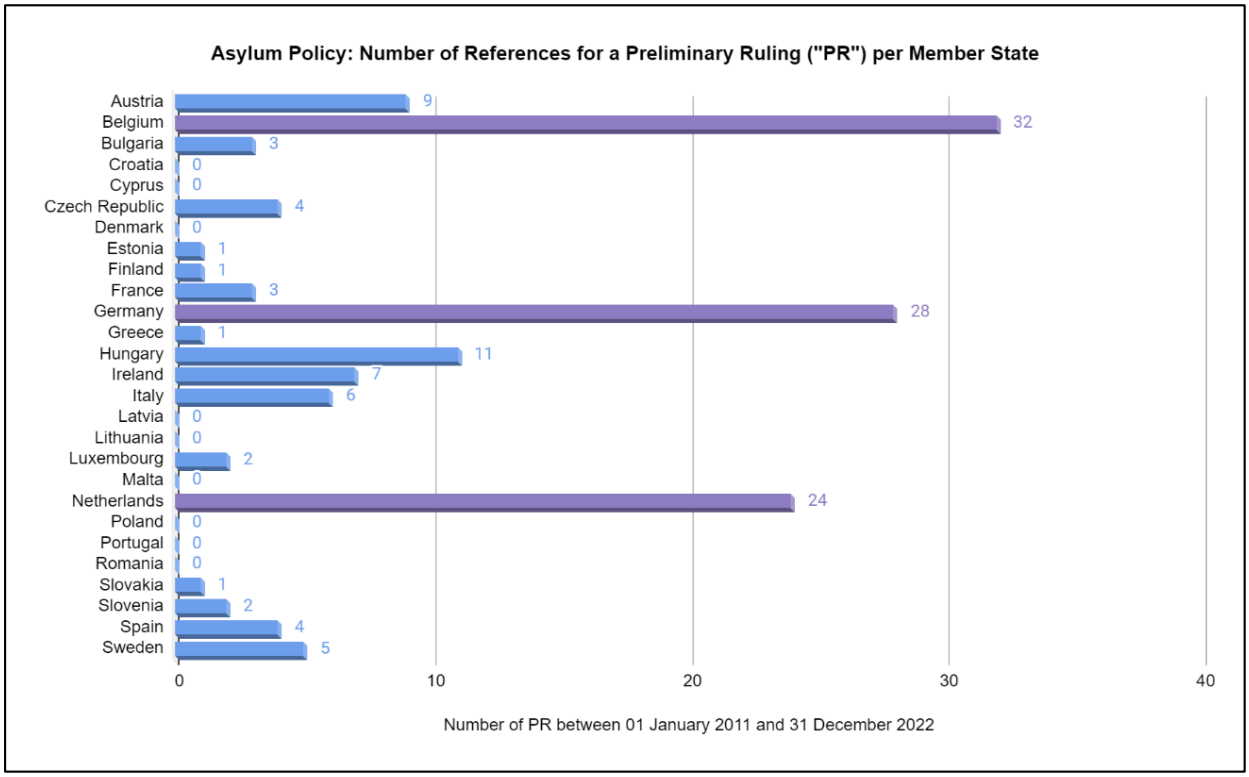


Figure 28: Border checks: number of references for Preliminary Rulings per Member State

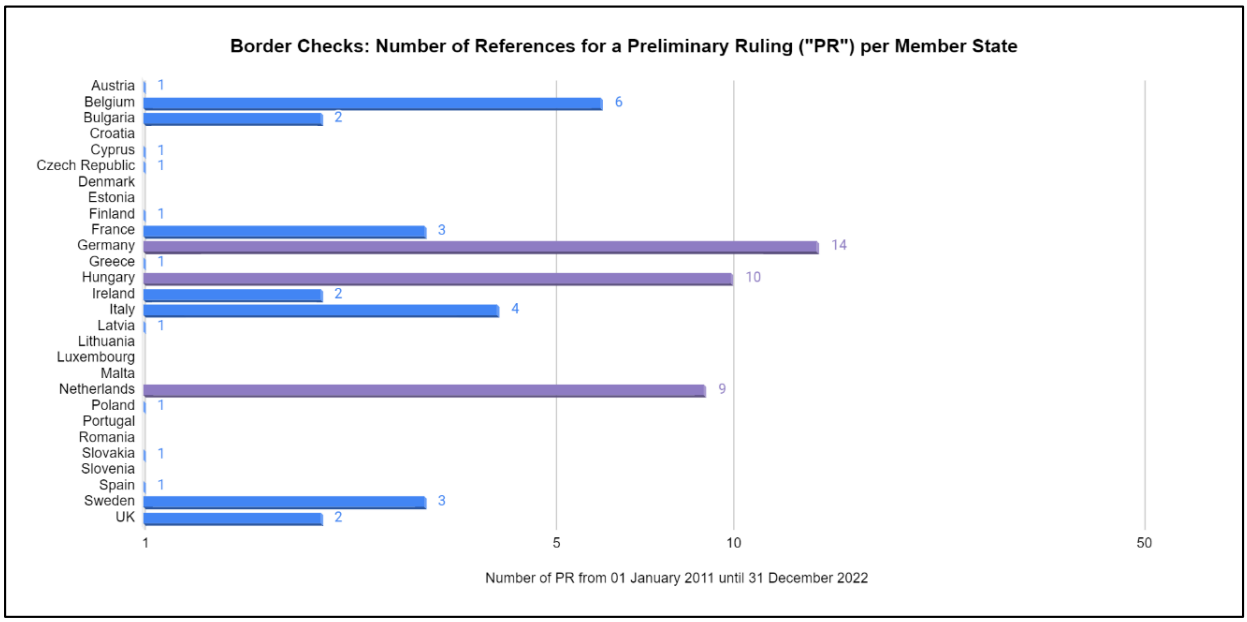


Figure 29: Data Protection: number of references for Preliminary Rulings per Member State

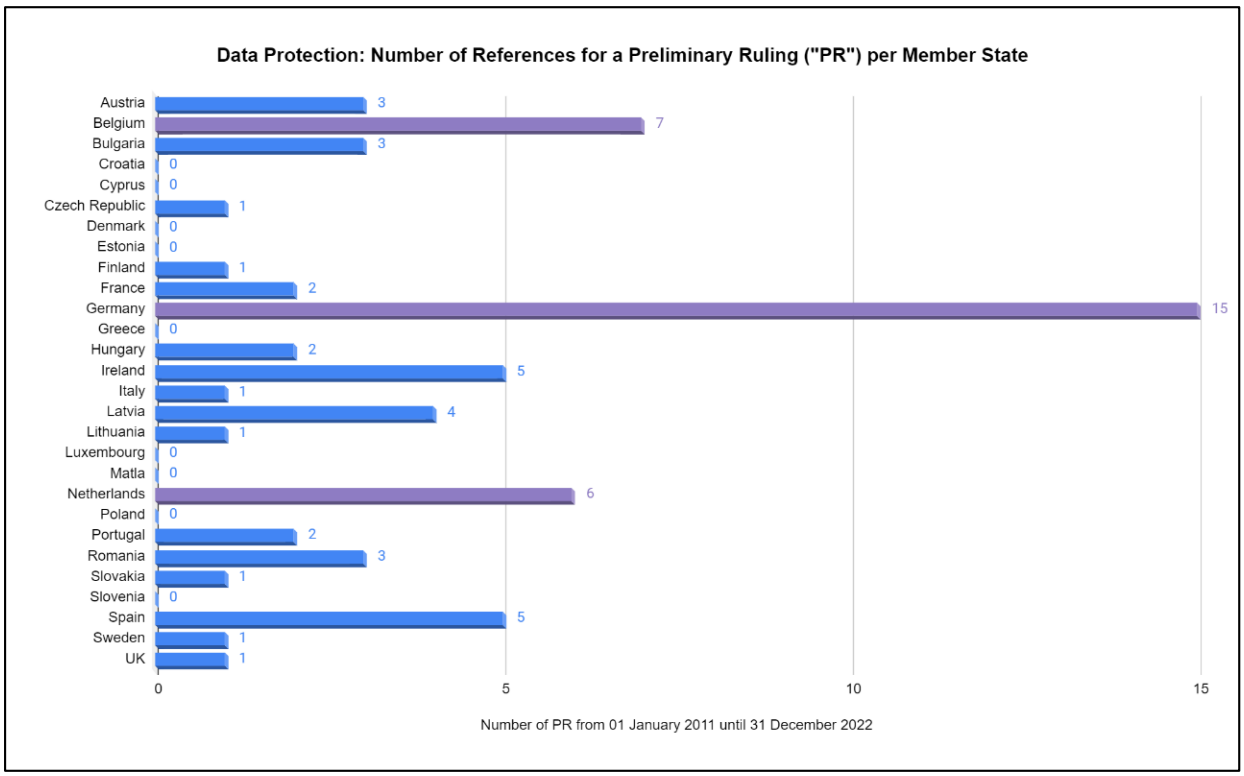


Figure 30: Data Protection: number of references for Preliminary Rulings per Member State

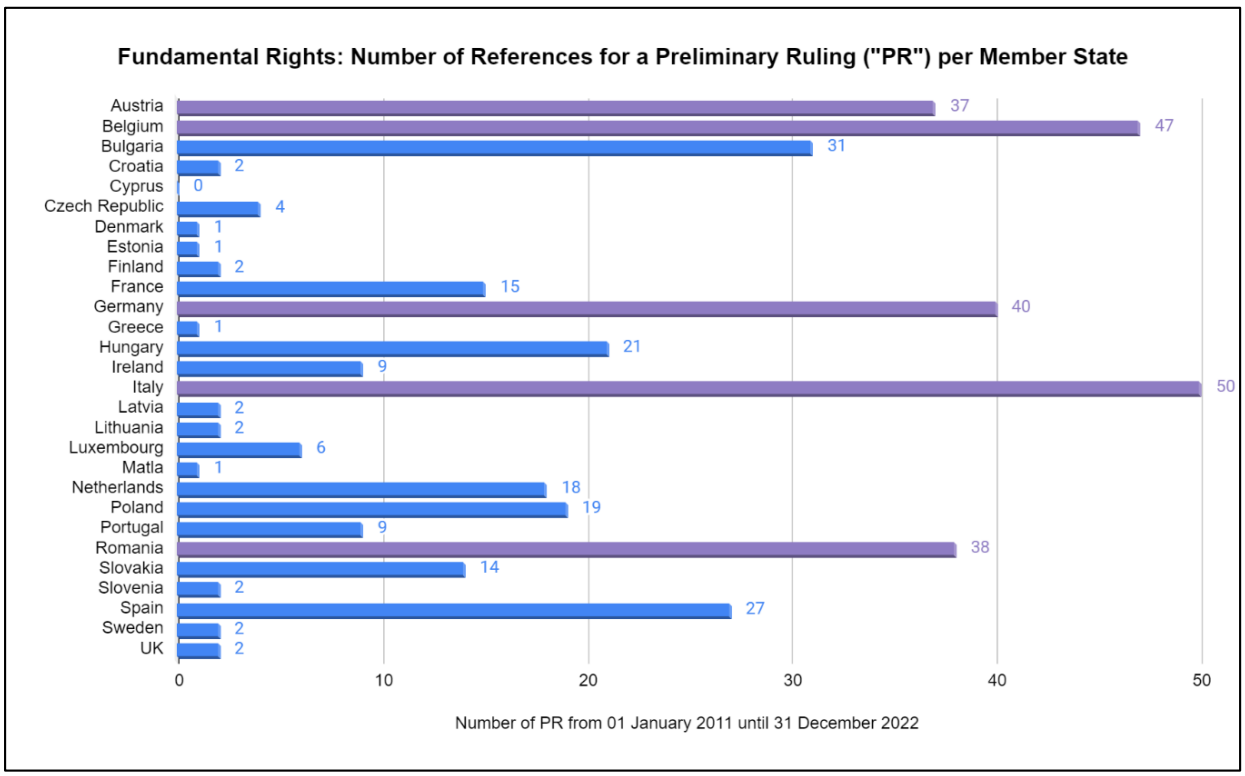
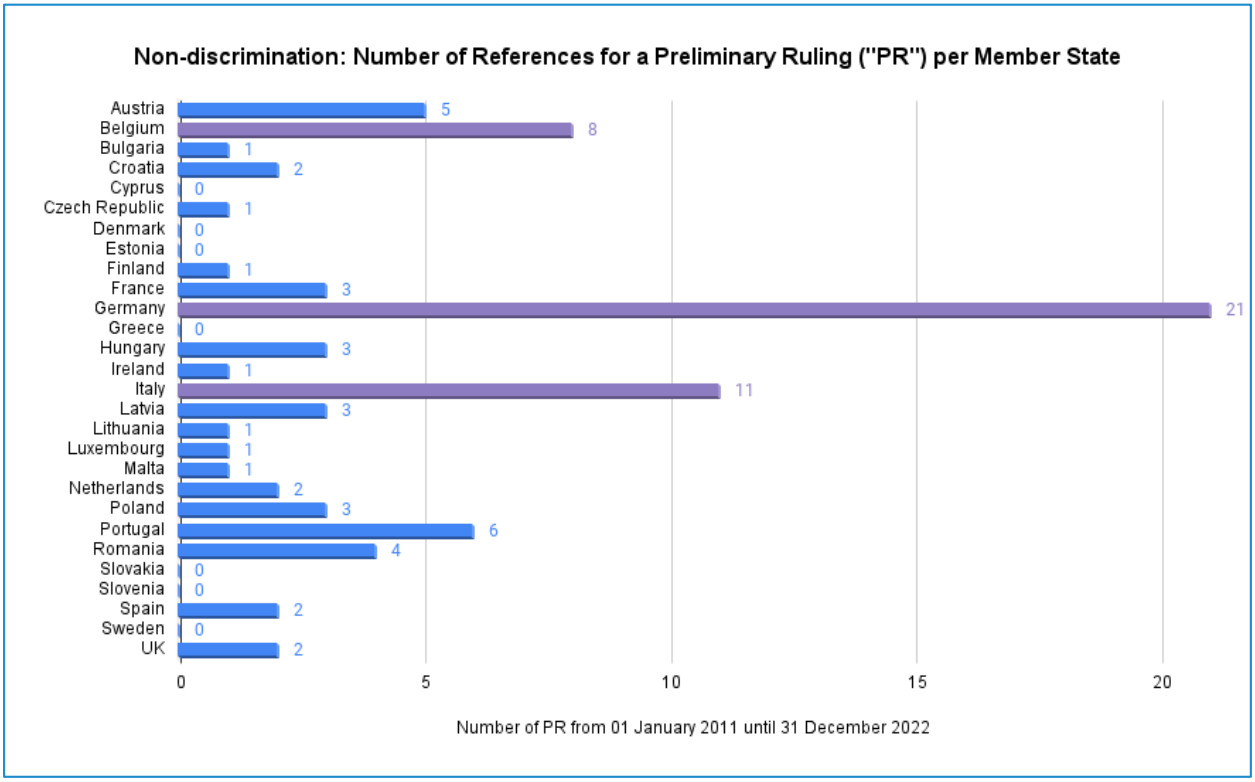


Figure 31: Non-discrimination: number of references for Preliminary Rulings per Member State



3.7. Use of other methods and tools to enforce EU law in the AFSJ

3.7.1. Budgetary tools

In terms of how EU funds are applied, following the discussion in section 2.2.1, a distinction needs to be made between AFSJ-specific funds and EU general funds with AFSJ-related conditions.

3.7.1.1. The AFSJ funds

Each of the **five AFSJ-specific EU funds**[131] is now in operation for the current budgetary cycle. Reporting on performance towards each of their stated goals, as well as mid-term reforms, is underway. This will provide an opportunity for an exchange of views with Parliament about the extent of accomplishment of the funds' aims, including how they contribute to enforcement of EU law in the AFSJ (as well as on how the CPR and the Charter conditionality apply to them - three HOME funds - or do not apply to them - two JUST funds).

3.7.1.2. The Rule of Law Conditionality Regulation

AFSJ-related conditions in the general budgetary tools have come to be applied too recently.[132] Firstly, **the Council, upon proposal of the Commission, applied the Rule of Law Conditionality Regulation to Hungary on 15 December 2022**.[133] At the basis of this were strong reservations about the effectiveness of various aspects of ensuring sound financial management of EU funds. Firstly, there

[131] See above, section 2.2.1.

[132] For general discussions, see Scheppele/Morijn, above n. 10, and *The tools for protecting the EU budget…*, above n. 5.

[133] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

is concern about serious systemic irregularities, deficiencies and weaknesses in public procurement procedures in Hungary, including non-application of public procurement and conflict of interest rules to 'public interest trusts' and the entities managed by them, and the lack of transparency with regard to the management of funds by those trusts.[134] Second, there are additional issues as regard limitations to the effective investigation and prosecution of alleged criminal activity, the organisation of the prosecution services, and the absence of a functioning and effective anti-corruption framework.[135] Against this background, **the Commission had requested 17 remedial measures to be taken. The Council followed the Commission in finding the concerns were not met and decided to suspend 55% of the budgetary commitments under 3 programmes in cohesion policy** as well as any legal commitment that would have to be entered into with any "public interest trust".[136]

To date, in the Commission's analysis, the problems have not been resolved. Therefore, funding remains suspended. It is noteworthy that the legality of these Council and Commission decisions have been **challenged before the General Court** by several different Hungarian universities (each of which are "public interest trusts").[137] These judgments may prove to be very important for the way in which the Conditionality Regulation is to be interpreted and can be applied in the future.

Even if the AFSJ/rule of law-related conditions were relevant for a variety of different Member States, based on the country-specific recommendations they had each received under the European Semester in 2020 and 2021[138], it seems that in practice it has only led to discussions with two Member States: indeed, **to date no RRF monies have been released for either Hungary and Poland**. As to Hungary, the Commission and Council expanded their analysis already undertaken under the Conditionality Regulation and added 10 further topics of worry related to judicial independence to the 17 remedial measures.[139] The full set of **27** required measures are now in place as "**super milestones**"[140] (meaning ***all* of them will need to be resolved** before any RRF can start to flow). As explained above, in the analysis of the Commission and the Council, they have not been met. As a result, no RRF monies have so far gone to Hungary.

Earlier, **in June 2022, the Council, on the proposal of the Commission, had agreed on conditions under which RRF funding to Poland could be released**.[141] Amongst these were measures to **strengthen the independence and impartiality of courts**, including particularly to remedy the situation of **judges** affected by the decisions of the **Disciplinary Chamber** of the Polish Supreme Court in disciplinary cases and judicial immunity cases, with a view to their reinstatement following

[134] Ibid, rec. 11.

[135] Ibid, rec. 12.

[136] Ibid, Article 2(1) and Article 2(2) respectively.

[137] See Case T-115/23 (Debreceni Egyetem v Council); Case T-132/23 (Óbudai Egyetem v Council and Commission); Case T-133/23 (Állatorvostudományi Egyetem v Council and Commission); Case T-138/23 (Semmelweis Egyetem v Council); Case T-139/23 (Miskolci Egyetem v Council and Commission) and Case T-140/23 (Dunaújvárosi Egyetem v Council and Commission).

[138] See above section 2.2.1.

[139] European Commission, Press release: Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its recovery and resilience funds, 30 November 2022, at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273

[140] Council implementing decision on the approval of the recovery and resilience plan for Hungary, at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15230_2022_INIT The full list, including detailed benchmarks for judicial independence reforms, is included in the annex to the document: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15230_2022_ADD_1 (pp. 86-160).

[141] Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, ST 9728 2022 INIT.

positive review proceedings by the new Chamber, to be conducted without delay.[142] At the time of writing **Poland had not taken measures to comply** with even the first set of these requirements.

It is noteworthy that **the decision to greenlight RRF funding for Poland under these conditions has been challenged before the General Court** on the argument of principle that, regardless of the fact they have not been implemented, **they do not fully implement the Court's further caselaw on Polish judicial independence issues**. In particular, **four judges' associations** argue that the contents and sequencing of the milestones agreed as they relate to getting rid of the disciplinary regime for judges are incomplete, and therefore undermine the authority of the Court's case law on judicial independence. The cases are currently pending.[143]

3.7.1.3. The Charter conditionality

A final way that AFSJ-related conditions were imposed has been through Article 9(1) CPR, which lays down the so-called **Charter conditionality**. The Commission does not automatically make public the Commission implementing decision by which it lays down the conditions for granting funding covered by the CPR. A request for access to documents is necessary for each. For the purposes of this study access was requested (and always granted) for the same two Member States, Hungary and Poland. This revealed detailed evidence that, and how, the enabling conditions relating to the Charter is being applied.

The relevant documents about CPR covered funds for Hungary were all published on 22 December 2022. Particularly the 3 HOME funds are worthy of mentioning. The Commission implementing decision approving support from the Internal Security Fund provides a very lengthy analysis about Article 47 Charter (right to an effective remedy). It lists all the issues mentioned in the RRF-discussion, and concludes that, since Hungary is committed to remedying the deficiencies, the horizontal enabling condition is considered fulfilled *once Hungary has adopted legislative amendments to address those issues and those amendments have entered into force and are being applied.* [144] The same approach was followed for the Instrument for Financial Support for BMVP[145] and AMIF.[146] The latter, however, also includes language on Article 18 and 19 Charter (right to asylum and non-réfoulement)[147], and mentions non-compliance with two asylum related rulings of the Court of Justice.[148] In this way, **the Charter-conditionality is a significant additional way to enforce compliance with caselaw**.

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[142] Ibid, rec. 19, rec. 44-46, and the various milestones mentioned under F1 (Justice system) with several different deadlines.

[143] T-530/22 (Medel v. Council), T-531/22 (International Association of Judges v. Council), T-532/22 (Association of European Administrative Judges v. Council) and T-533/22 (Rechters voor Rechters v. Council), as well as T-116/23 (Medel and others v. Commission). For a discussion, see: Marques, F., Sessa, D. and Morijn J., '**The Action Brought by European Organisations of Judges against the Council of the European Union over the release of EU Recovery and Resilience Funds to Poland'** (2023) 45 Journal of Constitutional History 103, available at: https://medelnet.eu/wp-content/uploads/2023/07/Sessa-Marques-Morijn_GSC_45.pdf

[144] Commission Implementing Decision of 22 December 2022 approving the programme of Hungary for support from the Internal Security Fund for the period from 2021 to 2017, C(2022) 10019, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10019&lang=en (rec. 6-14, and wording in rec. 14 and Article 2(2), second sentence).

[145] Commission Implementing Decision of 22 December 2022 approving the programme of Hungary for support from the Instrument for Financial support for Border Management and Visa Policy from 2021 to 2027, C(2022) 10020 at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10020&lang=en

[146] Commission Implementing Decision of 22 December 2022 approving the programme of Hungary for support from the Asylum, Migration and Integration Fund from 2021 to 2027, C(2022) 10022, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10022&lang=en

[147] Ibid, rec. 7

[148] Ibid, rec. 9 and 10, referring to Case C-808/18, Commission v Hungary, judgment of 17 December 2020 and Case C-821/19, Commission v Hungary, judgment of 16 November 2021.

In addition, **the Commission is applying the Charter-related conditionality (based on Charter articles 1, 7, 11 and 21) to withhold funding to try and force the repeal of the 'child protection law' that infringes LGBT+ equality rights**.[149] In this way **the enabling conditions functions to support the infringement action started by the Commission on 15 July 2022 on the same file.**[150] **It is taking a similar approach with regard to restoring of academic freedom (Article 13 Charter) by requiring changes to the politicised boards of trustees of the newly privatized universities.**[151] **All of this serves as evidence for potentially very far-reaching new ways to enforce EU law, including as it relates to the AFSJ.**

Poland, on the other hand, seems to have taken a different approach by simply **informing the Commission that it has not yet complied with the enabling condition relating to the Charter**. This has resulted in Commission Implementing Decisions that state just that without going into details. An example of this approach is the Commission Implementing Decision regarding the Polish funding under AMIF.[152] Here the following wording appears:

> "In accordance with Article 15(2) of Regulation (EU) 2021/1060, the programme sets out the Poland's assessment of the fulfilment of the horizontal enabling conditions as defined in Article 15(1), first and third sub-paragraph of that Regulation. In its assessment, Poland concludes on the lack of fulfilment of the horizontal enabling condition on the 'Effective application and implementation of the Charter of Fundamental Rights'. In that respect, the conditions in question *should be declared as non-fulfilled*."[153]

Clearly, once Poland has returned to this topic and provided the Commission with an assessment, the Commission will need to analyse this and make the condition for funding specific.

Even if, therefore, application of the **CPR-enabling condition regarding Charter conditionality** seems to be happening, it should be pointed out **the governance is not clear**. Quite **who decides and on what basis that Charter requirements are (not) fulfilled, and who can change that assessment over time, and why, remains entirely unclear**.[154] This makes this vital new method of enforcement of EU law relating to the AFSJ somewhat undefined, and as yet undercooked. It is essential for the **Commission to clarify the governance of the Charter-conditionality – when is it invoked, based**

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[149] Commission Implementing Decision of 22 December 2022 approving the programme "Human Resources Development Operational Programme Plus" for support from the ERDF and the ESF + under the Investment for jobs and growth goal in Hungary, C(2022) 10010, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10010&lang=en (rec 6 and Article 3(2), second sentence), and Commission Implementing Decision of 22 December 2022 approving the programme "Economic Development and Innovation Operational Programme Plus" for support from the ERDF and the ESF + under the Investment for jobs and growth goal in Hungary, C(2022) 10009, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10009&lang=en (rec. 6 and Article 3(2), second sentence) .

[150] European Commission, Press release: Commission refers Hungary to the Court of Justice of the EU over violation of LGBTIQ rights, 15 July 2022, at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2689

[151] Commission Implementing Decision of 22 December 2022 approving the programme "Economic Development and Innovation Operational Programme Plus" for support from the ERDF and the ESF + under the Investment for jobs and growth goal in Hungary, C(2022) 10009, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10009&lang=en (rec. 8 and Article 3(2), second sentence)

[152] Commission Implementing Decision of 12 December 2022 approving the programme of Poland for support from the Asylum, Migration and Integration Fund from 2021 to 2027, C(2022) 9060, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)9060&lang=en

[153] Ibid, rec. 4.

[154] See also Rijpma & Fotiadis, above n. 52, p. 15 (pointing out the legislator avoids spelling out the exact criteria under which fundamental rights criteria are (or are not) fulfilled).

on what criteria, and when is it un-invoked, and based on what criteria? – so that Parliament can exercise more effective (political) control over it.

3.7.2. AFSJ-specific tools to monitoring Member States' compliance

3.7.2.1. The Schengen Evaluation and Monitoring Mechanism

The **Schengen Evaluation and Monitoring Mechanism** in its renewed form has been in operation only **since October 2022**.[155] The Commission had originally proposed changes to it as part of an effort to revamp Schengen area governance and has started a new practice by adopting an **annual "State of Schengen" report**. The first was published in May 2022[156], and the second in May 2023[157]. The stated aim of the reports is to

> "Launch a yearly reporting exercise on presenting the state of Schengen, identifying priorities for the year ahead and aiming to ensure discussions on progress made at the end of a given year. The State of Schengen report should be the basis for increased *political dialogue, monitoring, and enforcement of the Schengen acquis*.[158]

Indeed, the reports provide a detailed overview of **peer-to-peer based recommendations** made per Schengen policy area, and also provide **compliance rates** (by the Commission's own measurement). The second report stated in that regard that the cumulative national implementation rate is above 75%[159], the scores per policy area being 78% for external borders, 75% for return, 79% for police cooperation, 79% for Schengen Information System, and 82% for common visa policy. It also described in some detail how problems that were found in Spain, Iceland and The Netherlands were taken up by these national authorities.[160] The Commission also reported that, as a result of political demands, it is developing a **Schengen Scoreboard** to visualise progress.[161]

Although the new State of Schengen reports would seem to provide an excellent basis for a political exchange of views, it is unclear whether and to what extent the Commission and Council also keep Parliament and national parliaments abreast of outcome of evaluations under the Mechanism in other ways. The Schengen Reports do not report either on any developments on the use of other enforcement tools by the Commission in the area, such as infringement actions.

3.7.2.2. The FRONTEX Vulnerability Assessment

The most notable development with regard to the **FRONTEX Vulnerability Assessment** is that it formed part of a **recent critical evaluation** of Frontex's support to external border management by the **European Court of Auditors** (ECA).[162] The ECA found that ongoing issues of data completeness and quality, due mainly to Member States lacking behind in their information supply, beset its data-

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[155] See https://eur-lex.europa.eu/EN/legal-content/summary/schengen-evaluation-and-monitoring.html

[156] European Commission (2022b) Communication from the Commission on "State of Schengen Report 2022". COM(2022)301.

[157] European Commission (2023) Communication from the Commission on "State of Schengen Report 2023", COM(2023)274 (the report includes two Annexes, the first of which providing main developments, the state of play and next steps related to the Schengen evaluation and monitoring mechanism, and the second a compendium of best practices).

[158] European Commission (2022b), above n. 156, p. 2 (emphasis added).

[159] European Commission (2023), above n. 157, p. 2.

[160] Ibid.

[161] Ibid.

[162] European Court of Auditors (2021) *Special Report 08/2021: FRONTEX – Frontex's support to external border management: not sufficiently effective to date*, available at: https://op.europa.eu/webpub/eca/special-reports/frontex-8-2021/en/

collection process and hamper its effectiveness.[163] It also noted that although FRONTEX does publish an overview of its activity in the area of vulnerability assessments, this has restricted circulation, as does reporting on the number of recommendations issued and the degree of implementation by the Member States.[164] In the context of its assessment of the Vulnerability Assessment, the ECA recommended that FRONTEX become better at reporting about its actual performance, making the connection to the importance of political control: "Legislative decision-makers need robust information to make informed decisions".[165]

3.7.2.3. The EUAA Mechanism on the implementation of the CEAS

As explained above in section 2.2.2, the most relevant new **EUAA monitoring method** to assess the operational and technical application of the Common European Asylum System, which modelled on the FRONTEX Vulnerability Assessment, is **not yet in operation**.

[163] Ibid, pp. 24-26, and 43-44.

[164] Ibid., p. 30.

[165] Ibid, p. 44.

4. CRUNCHING AFSJ ENFORCEMENT DATA: SOME FIRST OBSERVATIONS AND RECOMMENDATIONS

This section will present some **reflections on what the data on enforcement in the AFSJ collected thus far reveals**. In doing so, it will first attempt to crunch the findings regarding the traditional infringement methods, i.e. infringement actions (4.1.1) and preliminary references (4.1.2), and then the other methods of AFSJ enforcement, being the different budgetary conditionalities (4.2.1) and policy-based monitoring and evaluation tools (4.2.2). The findings reveal many more interesting aspects than those that can be discussed here. Rather than aiming to be exhaustive or repeat the very useful findings from other recent studies prepared for Parliament [166], the purpose here is to highlight some of the more obviously notable aspects, including how **the application of different traditional and newer enforcement tools should be thought of in combination**. In that way, a more elaborate conversation about enforcement of EU law in the AFSJ can be commenced, notably in relation to how to better scrutinise it, both at EU level and at EP level. The overarching question then becomes: **what enforcement tool, or combination of tools, is most effective to induce compliance with AFSJ-law in Member States when, and why**?

However, surprisingly, perhaps one of the most important lessons in preparing this report precedes any finding of substance. It has been to realise just how **challenging** it is **to gather data on traditional enforcement methods in the AFSJ** that allow for policy-relevant observations to be made. As explained in detail in Annex 1 (methodology), **basic information essential for facilitating debate and (political) oversight was almost never readily available and had to be assembled to prepare approximations**. Therefore, the first set of policy recommendations relates to this basic finding.

Policy recommendations:

- The Commission should **re-design its Infringement Database** using intuitive and harmonised language to describe the subject-matter of the infringement, grouping all steps related to the same file (so that sub-steps can be understood in their wider context) and visualising progress (and timelapse) to improve transparency and facilitate political oversight; Parliament should call on the Commission to do so in order for the EP to be able to exercise its scrutiny role fully;

- The Commission and the Court (and possibly other actors in the AFSJ, such as agencies) should work together to **develop and implement consolidated and harmonised descriptions of sub-categories of AFSJ policy-areas, and "subject-matters" within them**, to improve transparency and comparability, and facilitate political oversight; Parliament should encourage and eventually sponsor such inter-institutional dialogue and coordination, and call on institutions to take these steps as soon as possible;

- The Commission should **include data prior to 2017** in its highly useful new online interactive data display (which is part of its annual reports on monitoring the application of EU law) in order to facilitate longer term comparability and trend analysis of the Commission's enforcement activity in the AFSJ, and Parliament should call on the Commission to do so.

[166] See above n. 5, 12 and 19.

4.1. Traditional centralised and decentralised enforcement methods

4.1.1. Infringement actions

In a clear reply to the Kelemen/Pavone critique, the Commission recently stated that:

> "Figures of infringements procedures alone are not necessarily a good measure of the Commission's enforcement efforts, which seek to avoid breaches from materialising and, if they occur, to bring these to an end as quickly as possible".[167]

Indeed, a qualitative assessment seems to hold more value than a purely quantitative one. But from that perspective as well, several issues stand out here. And numbers, particularly very low numbers, can and do tell a story too.

Firstly, and further to other criticism raised elsewhere both by the EP and by academic studies, **the Commission can be criticised for not fully acting on *its own strategic priorities* as to launching infringement actions**. For example, if it states that it applies a strategic approach requiring that national rules provide effective redress procedures for a breach of EU law though an independent and efficient judicial system,[168] some of its choices have been hard to understand. For example: why did it only very recently start a case against **Poland** over its Council for the Judiciary[169] while appointment through this irregularly composed body, that was expelled by the European Network for Councils of the Judiciary[170], has been the source of very many problems with judicial independence? Why has the Commission not started such cases against **Hungary** even if judicial independence related conditions were included in very many recent decisions to freeze funding for Hungary under both the RRF Regulation and the CPR?[171]

Secondly, when the Commission wins its cases in Court, and the Member State fails to implement the judgment, under **Article 260(2) TFEU a follow-up case needs to be launched**. It is part of the Commission's stated enforcement strategy that this is a priority area. However, **this now also requires a separate political decision to be taken as to whether to launch a follow-up infringement at all**. This begs the question as to why that political (re-)evaluation should at all be needed when the issue is non-implementation of a judgment that was the result of acting on the same enforcement strategy. The Commission, as Guardian of the Treaties, also has a role to play in protecting the Court. More frequent use of Article 260(2) TFEU would also be a statement about the importance the Commission attaches to the non-negotiable nature of the Court's authority.

This situation is even more urgent in cases where infringement actions are started, and the Court's judgments delivered, against a **Member State subject to Article 7(1) TEU monitoring (as is currently the case for both Poland and Hungary).** Such a judgment is delivered in a situation where "a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU" has already been found by the Commission and the EP. At this moment the Commission does not treat this scenario any different from situations where Member States on the losing side of an infringement action are not under Article 7 TEU-monitoring. An example is the Commission winning a case against **Hungary** in

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[167] European Commission (2022), above n. 1, p. 2.

[168] European Commission (2022), above n. 1, p. 21.

[169] Action brought on 17 July 2023, Case 448/23, Commission v. Poland (denial of supremacy of EU law by the Polish Constitutional Tribunal).

[170] European Network of Councils for the Judiciary (ENCJ), "ENCJ votes to expel Polish Council for the Judiciary (KRS)", 28 October 2021, at: https://www.encj.eu/node/605

[171] For an overview see Scheppele/Morijn, above n. 10.

June 2020 for suppressing **foreign-funded NGOs**.[172] Even if, clearly, the holding of that judgment has not been implemented in letter and spirit[173], so that the "deterrent/dissuasive effect" on donors of NGOs (as the Court put it)[174] remains, more than three years after winning the case no follow-up action has been undertaken by the Commission. This is problematic, as **the likelihood of (continued) non-implementation of a judgment is clearly much higher when a Member State continues to be subject to Article 7(1) TEU** monitoring. **Political discretion of the Commission** to move to enforcement under Article 260(2) TFEU, already problematic, **should be even more limited** in these cases, as the very **integrity of the Union as a legal order** is at stake.

Yet given that non-implementation of the Court's judgments has now also become relevant for budgetary conditionality – indeed, the Commission refers to the non-implementation of the abovementioned judgment to withhold EU funds to Hungary under one of the CPR-covered funds – the relative importance of Article 260(2) TFEU may have come to stand in a different light. On the one hand, a definitive statement *by the Court* that, indeed, its judgment is not being followed may give the Commission firmer ground to stand on when it came to negotiations with the Member States about whether substantive conditions under EU funds were met. On the other hand, perhaps budgetary conditionality would be enough. This is an **important issue to discuss** openly and clarify.

Policy recommendations:

- The Commission should **strengthen its activities as Guardian of the Treaties and of EU law** and take immediate action, including infringement action, when these are violated, incorrectly transposed or implemented, with the aim of ensuring the respect and application of the Treaties and of EU law; Parliament should continue and possibly **strengthen its scrutiny and oversight role** towards the Commission and Member States in relation to (lack of) implementation of EU law;

- The Commission should explain **why it has not consistently acted to start infringement actions on some files that, by its own definition laid down in its strategy, are or should be priority areas**, such as regarding all aspects of protecting judicial independence in Member States; Parliament should ask the Commission for such a clarification and call it to ensure coherence in the application of its own strategy, including for the future.

- The Commission should **clarify (a) its approach vis-à-vis starting Article 260(2) TFEU cases**, particularly with a view to elaborating what could be justifications for not acting on non-implementation of the Court's judgments on matters that it had previously itself selected as of priority relevance, and **(b) its views on the difference between Article 260(2) TFEU enforcement and referring to non-implementation of the Court's judgments in the context of budgetary conditionality**; Parliament should call on the Commission to provide clarity in this regard.

- The Commission, in the interest of protecting the integrity of the Union as a legal order, should take a **more stringent approach to infringement actions in case Member States are**

[172] Case C-78/18, Commission v. Hungary (Transparency of Associations), Judgment of the Court of Justice (Grand Chamber) of 18 June 2020, EU:C:2020:476.

[173] Morijn, J., 'Separate Charter invocation as a new enforcement method: the Lex NGO case' (2022) 59(4) Common Market Law Review 1137, at 1167-68.

[174] Case C-78/18, para. 116 and 118.

subject to Article 7 TEU procedures, including expedited proceedings, automatically asking for interim measures, and automatically moving to Article 260(2) TFEU enforcement in case of non-implementation within a certain deadline; Parliament should raise these proposals with the Commission.

4.1.2. Preliminary references

The data on **preliminary references** can be read and appreciated in different ways. On the one hand the sheer number of questions asked, and the range of AFSJ issues covered, is impressive. On the other hand, digging a little deeper is rewarding too. Firstly, what is remarkable is that some 80% of the references seem to come from judges of only 20% of the Member States. In that sense these numbers also tell a story that **in many of the EU Member States, national judges only very rarely seek the guidance of the Court**. Secondly, it is also remarkable that **judges from several Member States strongly dominate preliminary references with regard to specific sub-topics**. This may be revealing of "national hobbies" or of specific national sensitivities on certain policy areas of application of EU law. Both these aspects also allow for a more critical assessment. **Decentralised enforcement varies considerably**.

This would appear to be information that justifies discussions about more targeted action. Firstly, it would be useful to find out more, perhaps with the help of judicial training networks, **why** in so many Member States national judges quite rarely ask preliminary questions relating to the AFSJ. Moreover, a lot of EU resources are used to train legal professionals, including judges, about EU law. In light of the record vis-à-vis decentralised enforcement it could be considered whether funding more specifically tailored to Member States' need would be useful, e.g. in the context of structuring the Justice Programme. That approach would correspond well with the recommendation of the European Court of Auditors that it is useful to think about ways to **promote compliance in a manner that is more targeted to the needs of individual Member States**. [175]

The numbers also reveal the **enormity of the task for the Commission** that fulfils its task as Guardian of the Treaties by intervening in every single preliminary reference case. There it pronounces, in open court, its position on all matters of EU law as it relates to the AFSJ. It would be useful for these publicly expressed views to **be *published*** after the Court has pronounced its judgment. This would make it possible for a circle beyond the small realm of legal agents representing their Member State to understand and follow the (evolution of the) Commission's view on the state of EU law in the AFSJ, and beyond. Such a **structured and transparent record** of the Commission's interventions would facilitate discussion about the use of other methods of enforcement of EU law, and (political) oversight.

Policy recommendations:

- The Commission should initiate **research**, with the help of judicial training networks, into explanations for **why national judges in the majority of Member States issue few references** for a preliminary ruling in the AFSJ, and why **national judges of just a small number of Member States issue many references** for a preliminary ruling, and to report back to Parliament on it; Parliament should ask for such study to be done by the Commission, or carry it out itself, in the future;

- When evaluating the **Justice funding-programme**, EU institutions should consider **raising the budget** for it and making financing for training of legal professional under this funding

[175] European Court of Auditors (2018), above n. 32, p. 6.

programme (partly) **Member State-specific**, based on the AFSJ-record (and, once established, their records in other policy fields) of national judges so as to **tailor to the particular needs**;

- The Commission should be **applauded for intervening, in open court, in all preliminary ruling cases before the Court**, and it should **make public all its interventions** once the Court has ruled on the matter, in order to showcase its role as Guardian of the Treaties and provide a clear record of its position on the state of EU law in the AFSJ and beyond; Parliament should recognise the work of the Commission in this regard and join the call to the Commission to publish its interventions.

4.2. Other methods of AFSJ enforcement

4.2.1. Enforcement of AFSJ-related law through the EU budget

Interestingly, one of the main recommendations by the **European Court of Auditors**, when it conducted a so-called landscape review about enforcement of EU law at Parliament's request in 2018, was to develop a **consistent and coordinated approach to using EU funds to reinforce its ability to promote, monitor and enforce Member State's application of EU law both within and across policy areas**.[176] At that time, it could not have been reasonably foreseen to what extent just a few years later this recommendation has been taken to heart. Indeed, it is laudable how forcefully budgetary conditionalities have been applied by the Commission and Council. However, like any new development, these developments also raise new questions.

As to **AFSJ specific funds**, those financing policy-priorities in the policy-areas of **HOME** and **JUST**, it is important to note that they are governed by **different legal regimes**. It is not quite clear whether this leads to substantive changes in approach or potential outcome, although the fact that **the JUST funds are not under the CPR umbrella also means that the Charter-related enabling conditions cannot be applied to them**. It would appear useful to look into whether **harmonising the substantive requirements** across AFSJ-specific funds is advisable.

Moreover, more procedurally, the achievements under these five funds are to be evaluated under **different timelines**. For the AMIF, the ISF and the BMVI, a mid-term evaluation is due by **31 December 2024**. For the Justice and CERV-programmes, **no clear evaluation deadline is set**. It seems advisable to **discuss these five funds together**.

When it comes to general budgetary conditionalities relying on AFSJ-related grounds, it is striking that the way they are now applied in parallel creates **considerable unclarity in terms of substance and governance**. Not only because Commission Implementing Decisions on each of the CPR-covered funds are not automatically made public, and because the Commission does not provide public information about why it considers certain RRF milestones unfulfilled. But the governance and interplay of the different instruments throws up more substantive and procedural questions too. For example, it is unclear quite what is **the governance of the Charter-related enabling condition under the CPR**. **Who decides** whether or not to trigger it, by **what standard, and how and when** is it assessed when the conditions justify altering the assessment? And given that the same concerns, e.g. about **judicial independence in Hungary**, trigger multiple budgetary conditionalities simultaneously, i.e. those under the RRF and CPR, but are measured in the light of a different rationality, it is unclear

[176] European Court of Auditors (2018), above n. 32, p. 6 and 55.

whether a **re-assessment** under one of the instruments would immediately **influence the assessment** under the other. These issues require urgent clarification to ensure effective political oversight.

Policy recommendations:

- The Commission should study how to best **harmonise substantive conditionality requirements across AFSJ-specific funds**, given that HOME and JUST funds are not currently governed by the same legal requirements, and Parliament should raise this request with the Commission;

- The Commission should use its **mid-term evaluation of the AMIF, ISF and BMVI, due by 31 December 2024, and invite the Commission also to include its mid-term evaluation of the CERV and Justice programmes** so as to facilitate a comprehensive review of all AFSJ-related specific funding; Parliament should call the Commission to do such a comprehensive evaluation;

- The Commission should proactively **make public all Commission Implementing Decisions** laying down funding under the **Common Provisions Regulation**; Parliament should ask the Commission to do so;

- The Commission should **clarify the governance of the enabling conditions relating to the Charter** of Fundamental Rights under the CPR (Article 9(1)) so as to facilitate discussion about how this modality is triggered, and who decides, by what standard, whether and when Charter-conditions laid down in Commission Implementing Decisions are fulfilled; Parliament should call on the Commission to do so;

- Parliament should applaud the Commission and Council for including **AFSJ/RoL-related substantive conditions** in formulating country-specific recommendations under the **European Semester** Framework, request them to continue enforcing them strictly under the current RRF regime and to continue including these type of rule of law related country-specific recommendations when any new funding arrangements are designed in the future with a view to strengthening economic, social and territorial cohesion of Member States;

- The Commission should, on the occasion of its **evaluation of the rule of law conditionality regulation**, due by 12 January 2024: (a) provide a big picture on the state of play of implementation vis-à-vis all the different rule of law activities and budgetary conditionalities; (b) reflect on the ways in which these different rule of law protection tools and EU funding conditionalities relate; and (c) clarify what are their respective strengths and weaknesses. Parliament should use that occasion to call on the Commission to carry out such comprehensive evaluation.

4.2.2. AFSJ specific policy methods to monitor Member States' compliance with EU law

Many of the non-binding, auxiliary policy methods for monitoring and evaluation of Member States' compliance with AFSJ-law are just renewed or very recent. For the most part, therefore, there is no established practice to evaluate. But their very set up raises some important questions of principle and point to how they could be debated by Parliament.

First, there are general questions as to **how the Commission combines different roles and tasks in its activities with regard to AFSJ-agencies**, particularly when it works on the same file with the same stakeholders contemporaneously.[177]

Secondly, it is striking that in developing the policy methods for monitoring and evaluation, each time language was inserted that their existence and operation **should be without prejudice to the Commission's traditional enforcement powers**. But does this language mean anything? The Commission has not explained, nor does data reveal patters about whether and when findings of any of these AFSJ-related monitoring methods, and particularly non-implementation of recommendations under it, have led it to start infringement action, and whether the Commission has developed criteria for when it should. A new practice such as the Commission's State of Schengen Annual Report appears to provide Parliament with opportunities to probe these issues.

Policy recommendation:

- Parliament should ask the Commission, for example in the context of a debate about the new State of Schengen Annual Report, to **clarify the meaning and value of language in AFSJ-related policy monitoring and evaluation tools that they are without prejudice to its powers to bring infringement actions**, in particular when findings of any of these AFSJ-related monitoring methods, and particularly non-implementation of recommendations under it, have led it to start infringement action, and whether the Commission has developed criteria for when it should.

4.3. Towards a comprehensive vision of (political oversight over) enforcement of EU law in the AFSJ

Enforcement of EU law in the broad sense, in the AFSJ and elsewhere, is a multi-faceted endeavour. It goes beyond binding traditional enforcement methods. Binding implementation tools such as budgetary conditionality and other non-binding auxiliary policy-based monitoring tools and methods increasingly play a large(r) role. The different methods influence one another. Discussions about enforcement of EU law, and (re)shaping political oversight over it, need to acknowledge that. A discussion on a more comprehensive and coordinated approach and vision is needed.

One of the obstacles standing in the way of obtaining a good overview of the state of implementation of the law, including in the AFSJ, at any time is that the different legislative instruments in this area are evaluated under different timetables. These evaluations are often a very good source of information about the way in which the law is implemented – and enforced. It would therefore be immensely helpful to **harmonise the evaluation cycles of legislative instruments**, at least by AFSJ-policy area, so as to facilitate a more targeted political discussion about the state of enforcement in the AFSJ. Parliament could propose this as a co-legislator, or request the Commission to start this practice on its own motion.

The Commission, in its latest Communication on Enforcing EU law[178] has described that it is undertaking a stocktaking exercise to ensure that the right enforcement tools are available to make EU law work. **Parliament**, with JURI in the lead (and without LIBE being involved as one of the reporting

[177] In this regard, see the policy recommendations formulated under section 4.3.

[178] European Commission (2022), above n. 1, p. 28 (referring to Communication from the Commission on, "Better Regulation: joining forces to make better laws". COM(2021)219)

committees) adopted a resolution[179] on the underlying matter of better regulation in July 2022. In it, Parliament once again **called on the Commission to increase its efforts in enforcing the EU's laws and to effectively address all breaches of EU law**[180] and stressed the importance of all EU institutions engaging in a more structured cooperation in order to assess the implementation and effectiveness of Union law with a view to improving it.[181] It also called on the Commission to **enforce EU legislation in full and without undue delay and to leverage all existing tools**.[182]

On the one hand this illustrates that the issue remains on Parliament's agenda and increasing attention seems to be devoted to it. On the other, it evidences the difficulty of moving beyond mere general calls. If the question remains unfocused, so will the response be. Perhaps follow-up conversations with the Commission, for example when it **reports back on the outcome of the stocktaking exercise[183] in late 2023, could offer Parliament an occasion for a more targeted exchange of views about the finer details** of its recent, more comprehensive vision of enforcement of EU law. Alternatively, efforts to formulate a Parliamentary reaction to the 2020, 2021 and 2022 Annual Reports on the monitoring of EU law, could be used for that purpose.[184]

Numbers do not tell the whole story, but they reveal a pattern or new practice that deserves discussion. **Kelemen and Pavone have argued that the Commission should move to more clearly separate** (what they call) **its "prosecutorial function" from its other, more clearly political, or policy-oriented roles and responsibilities** under Article 17 TEU. In this way **the Commission's role as Guardian of the Treaties could be insulated from direct political directions and considerations within the Commission**. This idea deserves a clear reaction from the Commission.

But **Parliament** itself too needs to reflect on whether its **oversight** possibilities would benefit more from viewing and approaching infringement actions as **political**, or accepting and authorising decision-making more **independent** from day-to-day political considerations. This appears to be a discussion worth having (more) openly.

There is also a possible an aspect of interparliamentary cooperation with regard to enforcement of EU law in the AFSJ. As EU-level co-legislator Parliament has a privileged position to consult with Member

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179 European Parliament (2022) Resolution of 7 July 2022 on Better Regulation: joining forces to make better laws, A9-0167/2022.

180 Ibid, para. 87.

181 Ibid, para. 88.

182 Ibid, para. 89.

183 As the Commission announced; European Commission (2022), above n. 1, p. 29.

184 Progress on this file can be tracked here: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/2080(INI)&l=en It is noteworthy in this respect that on 20 September 2023 AFCO made a contribution that touches on many of the issues covered by this report, including support for the Commission's practice to include rule of law related topics in its country-specific recommendations under the European semester cycle (see above section 4.2.1): https://www.europarl.europa.eu/doceo/document/AFCO-AL-752658_EN.pdf. The draft report with amendments was approved by the JURI committee on 24 October 2023 and the EP press release states that JURI called on the Commission not to hesitate to infringe EU countries for not applying EU legislation properly and improve cooperation with national parliaments in the law-making process; the committee pointed out that the number of infringements procedures against Member States decreased substantially during the current Commission compared to its predecessors; the committee is particularly concerned about the rule of law infringements. JURI requires the Commission to shorten dialogue period with Member States and clarify the timeframe for infringement procedures to avoid horse-trading or application of double standards. MEPs also expressed concern about the number of infringement cases started but never referred to the Court of Justice. They also considered that in order to avoid problems related to transposition of EU legislation at the national level, Parliament, the Council and the Commission should favour regulations as opposed to directives whenever possible. See https://www.europarl.europa.eu/news/en/press-room/20231023IPR08143/eu-law-making-ensure-enforcement-and-assess-impact-on-competitiveness.

State-level parliaments to facilitate implementation, particularly because the number of late transpositions remains problematically high.[185] This is an element that could be further explored and used.

In sum, what Parliament needs perhaps above all is to develop a strategy of its own to control the Commission's enforcement strategy, using its own full agency to match all the different roles and tasks the Commission has under Articles 17(1) and 17(2) TEU. Enforcement of EU law, including in the AFSJ, goes to the core of how the EU's formidable human and financial resources are put to use, and what will be the effects on the ground for Parliament's electorate. Therefore, enforcement practice is worth a discussion among more than just lawyers.

Policy recommendations:

- The Commission should **harmonise**, when it evaluates application of different legislative instruments in (sub-areas of) the AFSJ, and clarify in such evaluation reports, all of **its different efforts to ensure compliance with the law in that (sub) policy area**, so as to facilitate better informed and more comprehensive political oversight by Parliament; Parliament should request the Commission, or propose as co-legislator, such a harmonisation and clarification effort;

- **The Commission should expand on the justifications for its vision of enforcement of EU law**, including in particular as it relates to (a) how it views the relationship between different binding traditional tools and newer binding and non-binding enforcement tools, (b) how it views their relative strengths and weaknesses in terms of inducing compliance with EU law, (c) whether it considers that the increasing prevalence of application of legally binding budgetary conditionalities necessitates recalibration of the strategy underlying the use of infringement actions; (d) how it combines its different Article 17 TEU roles as Guardian of the Treaties, initiator of EU legislation, manager of EU agencies and executive functions regarding budgets, and (e) whether, based on that, it sees a need for insulating its role as Guardian of the Treaties from its other roles; Parliament should use its resolution in reaction to the 2020, 2021 and 2022 Commission Annual Reports on Monitoring EU law, or the Commission's report on the Better Regulation stocktaking exercise, to invite the Commission to address the abovementioned issues;

- **Parliament's LIBE Committee should consistently participate in discussions about all aspects of enforcement of EU law**, given both the specific and the overarching significance of the AFSJ.

- Parliament should explore the potential for more structural **cooperation with national parliaments regarding enforcement of EU law**, including in the AFSJ, particularly to reduce instances of late transposition of directives that it co-legislated, but also with regard to other tools and methods of inducing compliance with EU law in order to strengthen political oversight;

- An inter-institutional **digital tool** presenting all the information and documents related to legislative or non-legislative acts and procedures, as well as the decision-making process,

[185] European Commission (2022), above n. 1, p. 8.

should be developed; such tool should also include and give access to information on transposition, implementation, infringements, petitions, complaints, reports, etc.

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ANNEX 1: METHODOLOGY USED FOR DATA COLLECTION AND ANALYSIS

Introduction

Data collection about traditional enforcement methods of EU law in the AFSJ was central to this study. For this purpose, two principal **Commission sources** were used: the "**infringement database**"[186] as well as its **annual reports on monitoring the application of EU law**.[187] Additional data on preliminary references was collected through the **database of the Court of Justice, Curia**.[188]

The process of data collection proved to be **time-consuming, burdensome and complex** for two main reasons. Firstly, the different information sources are either tailored to facilitating searches for particular cases (infringement database, Curia), or to presenting a picture of the Commission's year progress in a particular area (Commission's annual reports). This makes it challenging when one is to collect a broad range of data from various sub-areas of the AFSJ over a prolonged time period of time (e.g. "infringement actions in the AFSJ in the period of 2011-2022"). As a result, all data had to be collected and processed manually, which made the progress lengthy and potentially open to error. Secondly, **data characteristics (search parameters), and characterisations of data as part of the AFSJ, are not harmonised throughout different sources and across different EU institutions**. This may be a result of how the AFSJ has organically grown over time, how subsequent Treaties have dealt with the topic, and how political and policy responsibility for it within the Commission has also developed over time. In any event, this made it very labour-intensive (and to some extent uncertain how) to compare the data, as will be explained below in more detail.

As a result of these two complications and uncertainties, **all graphs in this study must be taken not as strict mathematical reflections, but rather as general approximations to visualise trends about enforcement of EU law in the AFSJ through traditional methods**. However, the finding about what is publicly visible and findable in this area has policy relevance in and of itself. **Oversight over enforcement hinges on the availability and controllability of data**. Against this background, some policy recommendations are formulated here as well.

Below, the methodology behind data collection employed in this study is described in detail.

Methods of data collection

1. Commission Infringement database

When specifically indicated in the study, data was collected via the Commission's infringement database, which allows for searches through all infringement cases by "type, status, country, policy area or infringement number."[189] A user can conveniently find a specific infringement case by ticking specific boxes or filling in specific criteria about an infringement case that she is looking for. The database in that regard works in a way similar to the Court's *Curia* database.

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[186] 'Infringement decisions' (*European Commission*) https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en

[187] 'Annual reports on monitoring the application of EU law' (*European Commission*) https://commission.europa.eu/publications/annual-reports-monitoring-application-eu-law_en

[188] 'Search form' (*InfoCuria Case-law*) https://curia.europa.eu/juris/recherche.jsf?language=en#

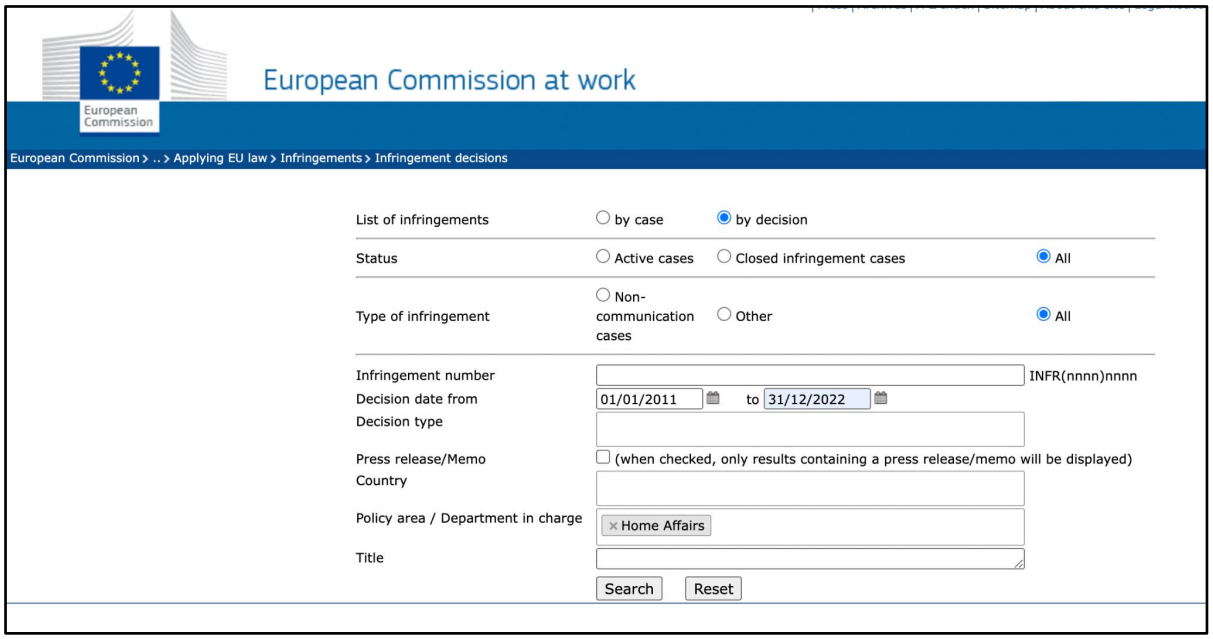
[189] 'Infringements' (*European Commission*) <https://commission.europa.eu/law/infringements_en

1.1 Process of collecting data

When collecting and further analysing the data from this source for the purposes of this study, the following search parameters were used:

- List of infringements "by case" (as opposed to "all decisions" which shows all the decisions that the Commission made within the same specific infringement case)[190]
- Status "all"
- Type of infringement "all" (when looking to differentiate between different types of infringement cases, also by "non-communication cases")
- Decision date from "01/01/2011" to "31/12/2022"
- Policy area "Home Affairs" and "Justice, Fundamental Rights and Citizenship"
- For Title, specific criteria were used for every particular policy topic (see below)

From the results obtained by using said search criteria, the end data were filtered through manually.

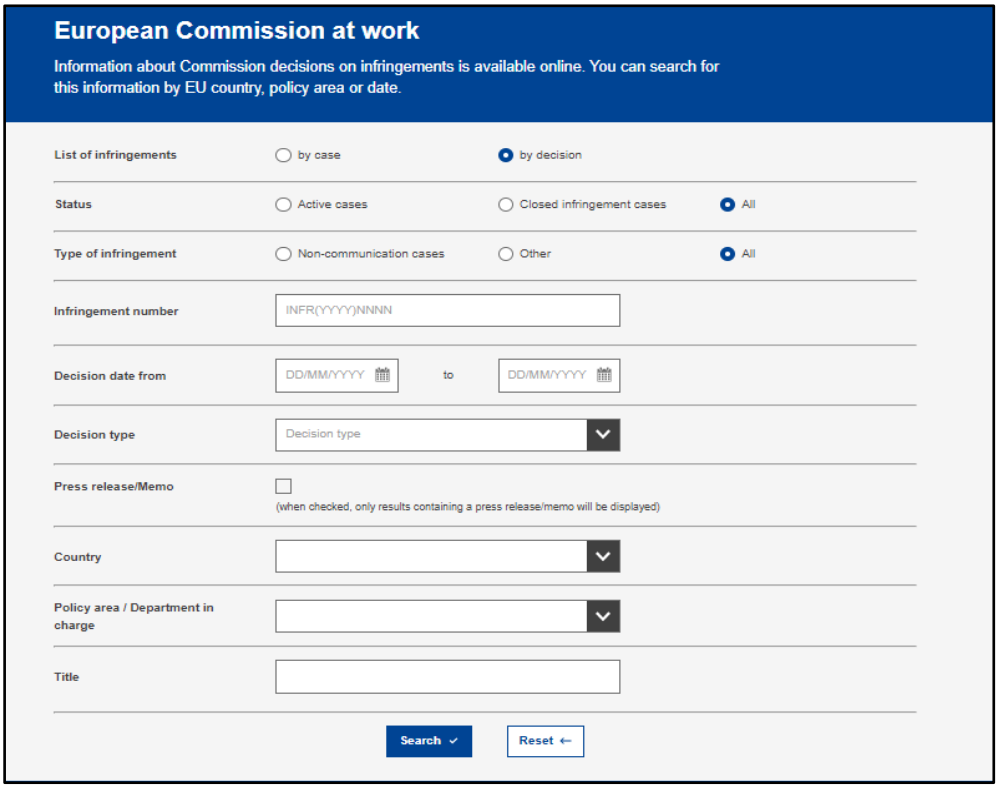


[191]

During this research the infringement database adopted a new interface design. Functionalities remained the same, however.

[190] Whether one chooses the search criterion of 'by case' or 'by decision', the Infringement database does view different stages of a respective infringement action – much like one can observe different stages of the legislative process in the Parliament's legislative train. The difference lies only in its categorization – in the case of 'by decision' criterion, each separate Commission decision within one infringement action enjoys a separate entry in the database, whereas with the criterion 'by case', all actions relating to one infringement action are clumped into one respective entry.

[191] Picture depicts the Commission's infringement database filled with the search criteria that were used for this study.



1.2 Challenges

While this database does conveniently contain all infringement cases in one place, due to its search criteria it **allows only for specific rather than holistic searches**. In particular, it utilises a search form by the 'title of infringement case', rather than by 'sub/policy area of policy sector' (e.g. asylum policy cases, data protection cases etc.) which limits the possible output of results when one is looking for infringement cases on the basis of their general characteristics rather than knowing their specific titles.

To work around these limiting search parameters, various proxy words or catch-phrases were used for which it was speculated that they would appear in the title of the sought-after infringement cases.

> *For example, when searching for infringement cases relating to the GDPR, the following words were used as possible title/part of the title: "GDPR", "data protection", "Directive (EU) 2016/680" (also full name) and "Regulation (EU) 2016/679 "(also full name) and "data". From all the results received, the ones relating to the GDPR were manually filtered through in the end.*

Clearly, data collected thus can potentially present an incomplete depiction by missing some infringement cases that carried titles without the keywords used.

A further limitation in relation to the Commission's infringement database proved to be its **categorisation of policy areas**. The database features an option to filter through "policy areas" or "department in charge". However, the latter **do not (or no longer) correspond to the current internal structure (DGs) of the Commission**.

> *For example, when looking for cases that fall under the auspices of the DG Justice and Consumers, it was necessary to choose between "Justice, Freedom and Security" and "Justice, Fundamental Rights and Citizenship", neither of which directly correspond to the DG currently in existence.*

In conclusion, while useful when looking for a particular infringement case, finding data on enforcement of EU law in the AFSJ through the Commission's infringement database proved to be **challenging and time-consuming** due to the necessary manual input when sorting through the results, as well as the fact that it does not correspond to the current internal Commission structure (DGs). As it was concluded that data collected in the above-mentioned manners was **insufficiently reliable, policy-sector specific infringement data was eventually only collected through the Commission's annual reports** (as described below). **The infringement database was used solely to collect data on specific infringement cases and to cross-check** the general number of non-communication infringement cases versus "other" types of infringement cases (both search options provided by the Infringement database; see photo above).

2. Commission annual reports on monitoring of the application of EU law

The Commission publishes reports on the application of EU law annually, presenting its observations on the application of EU law by Member States. The reports include a **highlight of the most important infringement case**s that were initiated that specific year, **statistical overviews** of infringement cases per Member State and per policy area as well as data concerning the EU **Pilot** procedure and the complaints received by the Commission.

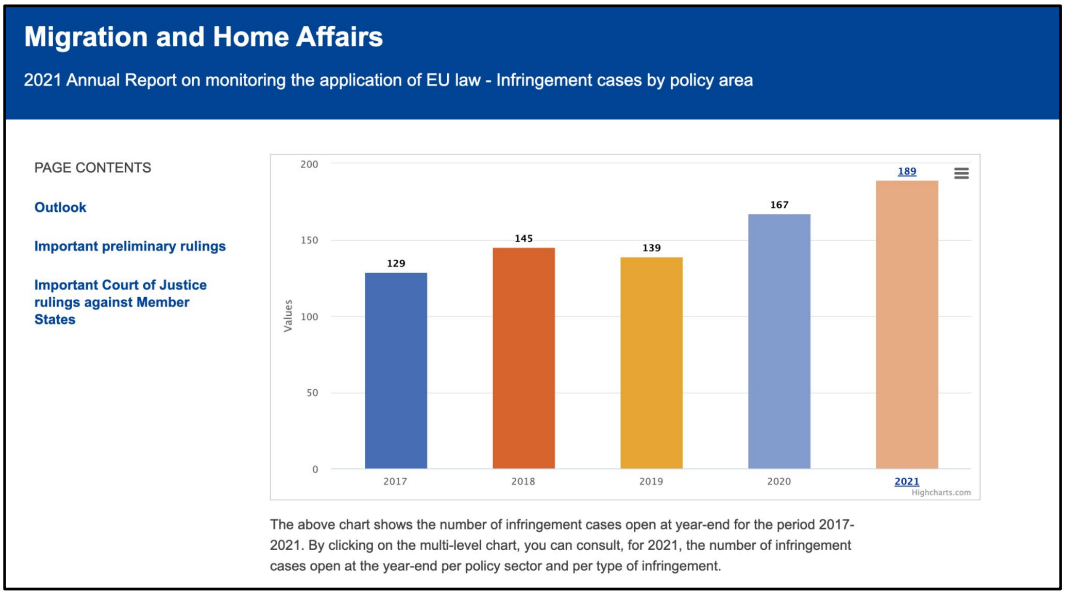
2.1 Process of collecting data

To collect data from years prior to 2017, one must go through each particular annual report and collect the data manually. The Commission's annual reports contain staff working papers on 'monitoring application of EU policy areas', where one can find data relating to infringement procedures per policy area (e.g. Justice and Consumers, Migration and Home Affairs). Each specific policy area moreover contains a further breakdown of data, particularly in terms of the categorisation of newly launched infringement cases per policy sectors (Migration and Home Affairs > Asylum; Migration and integration etc.). This categorisation proved to be extremely useful for this study.

The data from 2017 onwards can be found on the Commission's recently updated website[192], which shows relevant data through interactive graphs and charts. Whilst being very useful for data collection relating to the EU Pilot procedure and complaints, a side effect of the novel interactive data presentation is the elimination of the former section of data on infringement cases per policy sector for specific year(s).

> *The data on categorisation of cases within DG Migration and Home Affairs, e.g. cases in relation to asylum law, data protection etc., in that vein cannot be accessed for 2020.*

[192] '2021 Annual Report on monitoring the application of EU law' (*European Commission*) https://commission.europa.eu/law/law-making-process/applying-eu-law/infringement-procedure/2021-annual-report-monitoring-application-eu-law_en



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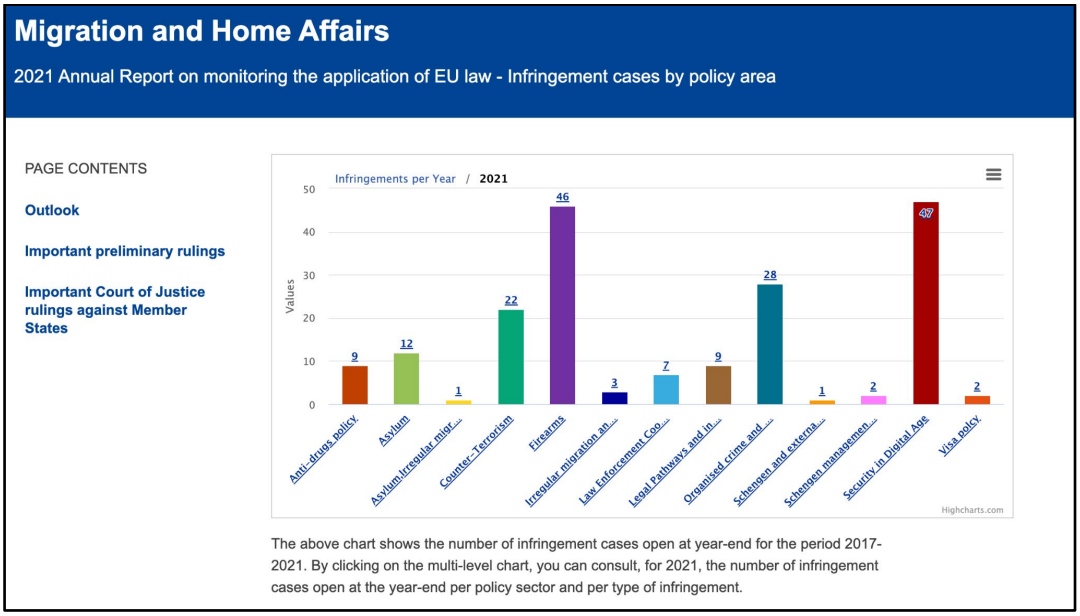

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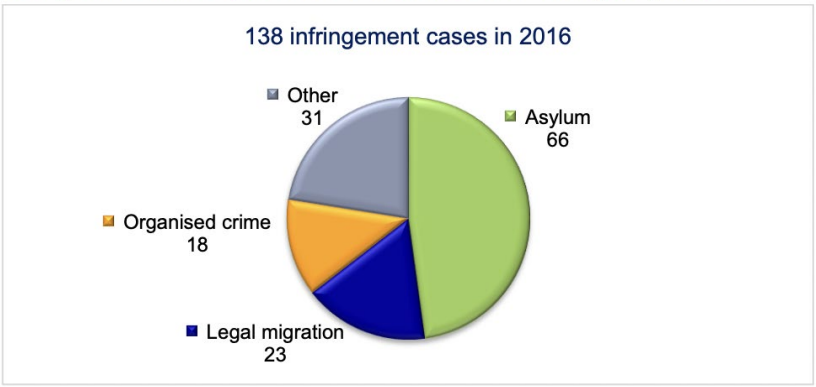
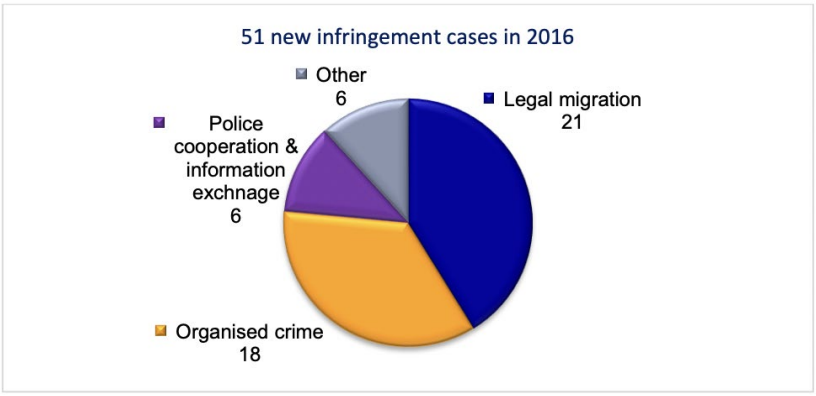
193 The interactive graph shows infringements launched by the Commission (DG Migration and Home Affairs) per year-end for the years 2017-2021, which further allows to see the breakdown of cases per policy sector for 2021 (only).

194 Specifically for 2021, data on infringement cases per policy sector can be accessed.

2. Infringement cases open on 31 December 2016: main policy sectors



3. New infringement cases opened in 2016: main policy sectors



[195]

After all the data was obtained, it was transferred manually into an Excel sheet, where it was tabled and transformed into charts.

2.2 Challenges

Apart from the inconsistent sub-categorisation of infringement cases per policy sectors, data collection via the Commission's annual reports on the monitoring of application of EU law contains another caveat, namely the **descriptive and somewhat arbitrarily composed categories of policy sectors**. When categorising infringement cases into policy sectors (e.g. as above: Migration and Home Affairs (Policy area) > Asylum policy (Policy sector)), the Commission uses categories of policy sectors, which are however not categories established Commission-wide. Rather, these are more descriptive phrases that relate to the subject-matter of the infringement case at hand, which in particular situations can lump similar cases together. Not only are these "descriptive categories" not consolidated throughout different sources, e.g. between the Commission's annual reports and the infringement database, but they also seem to change a bit throughout different annual reports as well. On the other hand, since the Infringement database does not contain such policy sector categories, it is **very arduous to compare data collected from the Commission's annual reports with the data collected from the Infringement database**.

[195] In the Commission's annual reports, data on infringement cases per policy sector can be found manually.

E.g. As evident from the above screenshot from the Commission's 2016 annual report, the Commission launched 51 new infringement cases (in the policy area of Migration and Home Affairs - not shown above, but this is written in the title of the chapters) in 2016, 21 of which related to legal migration. This category is, firstly, somewhat loosely descriptive and does not provide further information as to the exact meaning of "legal migration". Secondly, such data also cannot be adequately cross-checked with data collected with the Infringement database, as the latter does not contain the search criteria of "legal migration". To try to compare data, one would have to search for all infringement cases that the Commission launched in 2016 in the policy area of Migration and Home Affairs (through the Infringement database) and then try to manually distinguish those that relate to "legal migration", based only on the infringement titles. The other option would be to try to come up with possible titles that could relate to "legal migration" and put that into the Infringement database's search form. However, with that option, one runs the risk of ending up underrepresenting the data as many cases that do not contain the utilised phrases in its infringement title can be missed and therefore not taken into account.

3. Curia database

The Curia database was used to obtain data on preliminary references.

3.1 Process of data collection

The Curia database contains a **very comprehensive search form** that can be used either when looking for a particular court case or when compiling case law data on a specific topic.

To obtain data for this study, the following criteria were put in/ticked in the Curia's search form:

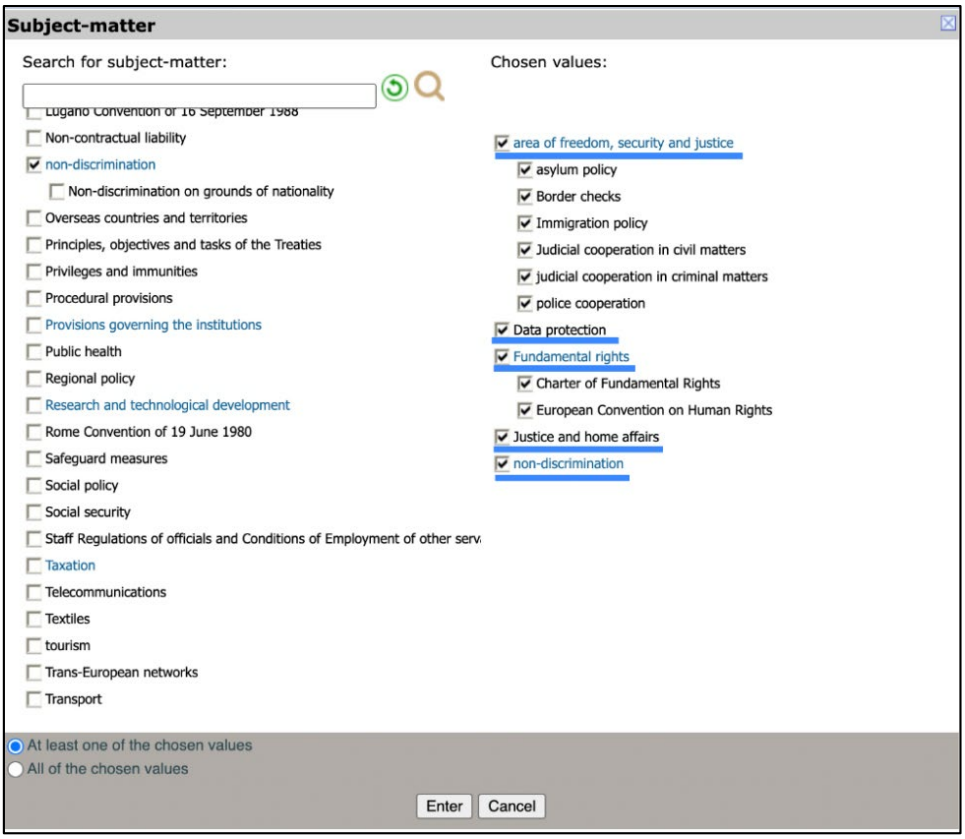
- Period or date: if per specific calendar year, then 01/01/2011 - 31/12/2011 e.g., if in general then 01/01/2011 - 31/12/2022;
- Subject matter: depends on the search; overall all the subject-matter criteria that were utilised were: "area of freedom, security and justice", "asylum policy", "border checks", "immigration policy", "judicial cooperation in criminal matters", "police cooperation", "data protection", "fundamental rights", "justice and home affairs", "non-discrimination";
- Procedure and result: Reference for a preliminary ruling;
- Source of a question referred for a preliminary ruling: depending on the particular data search, but for Member State-specific data, data was sought one Member State at a time.

After all the data was obtained, it was transferred manually into an Excel sheet, where it was tabled and transformed into charts.

3.2 Challenges

Curia, much like the Commission's infringement database, **uses its own categories** when delineating the subject-matter of a particular search. In a similar fashion, the categories **are not consolidated**. Some terms seem inter-changeable, such as "area of freedom, security and justice" and "justice and home affairs". Furthermore, the respective scope of the terms is unclear at times.

E.g. it is possible to choose to search for court cases relating to the "area of freedom, security and justice" together with "border checks" or "immigration policy", without it becoming obvious what information to expect when. The category of "justice and home affairs", which can be found separately from "area of freedom, security and justice", on the other hand does not offer any further sub-categories.



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While these search parameters are useful for particular searches, the categories make it difficult to do general searches as it is **hard to reliably cross-check data** with the Commission's sources given that the Curia's set subject-matters do not necessarily overlap with the Commission's categorisation from the annual reports as well as from the infringement database.

Another element of note here is that the categories "data protection, fundamental rights and non-discrimination" are not categorised as a sub-category of "area of freedom, security and justice". This means that it is not impossible that full totals counted based on searches under "AFSJ" and "JHA" do not yet include judgments under these topics. This should be seen as a considerable caveat when reading the data based on Curia data.

Policy recommendations

- The Commission should **re-design its Infringement Database** using intuitive and harmonised language to describe the subject-matter of the infringement, grouping all steps related to the same file (so that sub-steps can be understood in their wider context) and visualising progress (and timelapse) to improve transparency and facilitate political oversight; Parliament should call on the Commission to do so in order for the EP to be able to exercise its scrutiny role fully;

- The Commission and the Court (and possibly other actors in the AFSJ, such as agencies) should work together to **develop and implement consolidated and harmonised descriptions of sub-categories of AFSJ policy-areas, and "subject-matters" within them**, to improve

196 Curia follows its own specific criteria for subject-matters. E.g. "AFSJ" is a separate category from "Justice and Home Affairs", "Data protection", "Fundamental Rights" or "Non-discrimination" (each underlined phrase is its own category). Some of these categories however also feature sub-categories. E.g. AFSJ with "asylum policy", "border checks" etc. and "Fundamental Rights" with "Charter of Fundamental Rights" and "European Convention on Human Rights".

transparency and comparability, and facilitate political oversight; Parliament should encourage and eventually sponsor such inter-institutional dialogue and coordination, and call on institutions to take these steps as soon as possible;

- The Commission should **include data prior to 2017** in its highly useful new online interactive data display (which is part of its annual reports on monitoring the application of EU law) in order to facilitate longer term comparability and trend analysis of the Commission's enforcement activity in the AFSJ, and Parliament should call on the Commission to do so.

ANNEX 2: OVERVIEW OF POLICY RECOMMENDATIONS

1) The Commission should **re-design its Infringement Database** using intuitive and harmonised language to describe the subject-matter of the infringement, grouping all steps related to the same file (so that sub-steps can be understood in their wider context) and visualising progress (and timelapse) to improve transparency and facilitate political oversight; Parliament should call on the Commission to do so in order for the EP to be able to exercise its scrutiny role fully;

2) The Commission and the Court (and possibly other actors in the AFSJ, such as agencies) should work together to **develop and implement consolidated and harmonised descriptions of sub-categories of AFSJ policy-areas, and "subject-matters" within them**, to improve transparency and comparability, and facilitate political oversight; Parliament should encourage and eventually sponsor such inter-institutional dialogue and coordination, and call on institutions to take these steps as soon as possible;

3) The Commission should **include data prior to 2017** in its highly useful new online interactive data display (which is part of its annual reports on monitoring the application of EU law) in order to facilitate longer term comparability and trend analysis of the Commission's enforcement activity in the AFSJ, and Parliament should call on the Commission to do so.

4) The Commission should **strengthen its activities as Guardian of the Treaties and of EU law** and take immediate action, including infringement action, when these are violated, incorrectly transposed or implemented, with the aim of ensuring the respect and application of the Treaties and of EU law; Parliament should continue and possibly **strengthen its scrutiny and oversight role** towards the Commission and Member States in relation to (lack of) implementation of EU law;

5) The Commission should explain **why it has not consistently acted to start infringement actions on some files that, by its own definition laid down in its strategy, are or should be priority areas**, such as regarding all aspects of protecting judicial independence in Member States; Parliament should ask the Commission for such a clarification and call it to ensure coherence in the application of its own strategy, including for the future.

6) The Commission should **clarify (a) its approach vis-à-vis starting Article 260(2) TFEU cases**, particularly with a view to elaborating what could be justifications for not acting on non-implementation of the Court's judgments on matters that it had previously itself selected as of priority relevance, and **(b) its views on the difference between Article 260(2) TFEU enforcement and referring to non-implementation of the Court's judgments in the context of budgetary conditionality**; Parliament should call on the Commission to provide clarity in this regard.

7) The Commission, in the interest of protecting the integrity of the Union as a legal order, should take a **more stringent approach to infringement actions in case Member States are subject to Article 7 TEU procedures, including expedited proceedings, automatically asking for interim measures, and automatically moving to Article 260(2) TFEU** enforcement in case of non-implementation within a certain deadline; Parliament should raise these proposals with the Commission.

8) The Commission should initiate **research**, with the help of judicial training networks, into explanations for **why national judges in the majority of Member States issue few references** for a preliminary ruling in the AFSJ, and why **national judges of just a small number of Member States issue many references** for a preliminary ruling, and to report back to Parliament on it; Parliament should ask for such study to be done by the Commission, or carry it out itself, in the future;

9) When evaluating the **Justice funding-programme**, EU institutions should consider **raising the budget** for it and making financing for training of legal professional under this funding programme (partly) **Member State-specific**, based on the AFSJ-record (and, once established, their records in other policy fields) of national judges so as to **tailor to the particular needs**;

10) The Commission should be **applauded for intervening, in open court, in all preliminary ruling cases before the Court**, and it should **make public all its interventions** once the Court has ruled on the matter, in order to showcase its role as Guardian of the Treaties and provide a clear record of its position on the state of EU law in the AFSJ and beyond; Parliament should recognise the work of the Commission in this regard and join the call to the Commission to publish its interventions.

11) The Commission should study how to best **harmonise substantive conditionality requirements across AFSJ-specific funds**, given that HOME and JUST funds are not currently governed by the same legal requirements, and Parliament should raise this request with the Commission;

12) The Commission should use its **mid-term evaluation of the AMIF, ISF and BMVI, due by 31 December 2024, and invite the Commission also to include its mid-term evaluation of the CERV and Justice programmes** so as to facilitate a comprehensive review of all AFSJ-related specific funding; Parliament should call the Commission to do such a comprehensive evaluation;

13) The Commission should proactively **make public all Commission Implementing Decisions** laying down funding under the **Common Provisions Regulation**; Parliament should ask the Commission to do so;

14) The Commission should **clarify the governance of the enabling conditions relating to the Charter** of Fundamental Rights under the CPR (Article 9(1)) so as to facilitate discussion about how this modality is triggered, and who decides, by what standard, whether and when Charter-conditions laid down in Commission Implementing Decisions are fulfilled; Parliament should call on the Commission to do so;

15) Parliament should applaud the Commission and Council for including **AFSJ/RoL-related substantive conditions** in formulating country-specific recommendations under the **European Semester** Framework, request them to continue enforcing them strictly under the current RRF regime and to continue including these type of rule of law related country-specific recommendations when any new funding arrangements are designed in the future with a view to strengthening economic, social and territorial cohesion of Member States;

16) The Commission should, on the occasion of its **evaluation of the rule of law conditionality regulation**, due by 12 January 2024: (a) provide a big picture on the state of play of implementation vis-à-vis all the different rule of law activities and budgetary conditionalities; (b) reflect on the ways in which these different rule of law protection tools and EU funding conditionalities relate; and (c) clarify what are their respective strengths and weaknesses. Parliament should use that occasion to call on the Commission to carry out such comprehensive evaluation.

17) Parliament should ask the Commission, for example in the context of a debate about the new State of Schengen Annual Report, to **clarify the meaning and value of language in AFSJ-related policy monitoring and evaluation tools that they are without prejudice to its powers to bring infringement actions**, in particular when findings of any of these AFSJ-related monitoring methods, and particularly non-implementation of recommendations under it, have led it to start infringement action, and whether the Commission has developed criteria for when it should.

18) The Commission should **harmonise**, when it evaluates application of different legislative instruments in (sub-areas of) the AFSJ, and clarify in such evaluation reports, all of **its different efforts to ensure compliance with the law in that (sub) policy area**, so as to facilitate better informed and more comprehensive political oversight by Parliament; Parliament should request the Commission, or propose as co-legislator, such a harmonisation and clarification effort;

19) **The Commission should expand on the justifications for its vision of enforcement of EU law**, including in particular as it relates to (a) how it views the relationship between different binding traditional tools and newer binding and non-binding enforcement tools, (b) how it views their relative strengths and weaknesses in terms of inducing compliance with EU law, (c) whether it considers that the increasing prevalence of application of legally binding budgetary conditionalities necessitates recalibration of the strategy underlying the use of infringement actions; (d) how it combines its different Article 17 TEU roles as Guardian of the Treaties, initiator of EU legislation, manager of EU agencies and executive functions regarding budgets, and (e) whether, based on that, it sees a need for insulating its role as Guardian of the Treaties from its other roles; Parliament should use its resolution in reaction to the 2020, 2021 and 2022 Commission Annual Reports on Monitoring EU law, or the Commission's report on the Better Regulation stocktaking exercise, to invite the Commission to address the abovementioned issues;

20) **Parliament's LIBE Committee should consistently participate in discussions about all aspects of enforcement of EU law**, given both the specific and the overarching significance of the AFSJ.

21) Parliament should explore the potential for more structural **cooperation with national parliaments regarding enforcement of EU law**, including in the AFSJ, particularly to reduce instances of late transposition of directives that it co-legislated, but also with regard to other tools and methods of inducing compliance with EU law in order to strengthen political oversight;

22) An inter-institutional **digital tool** presenting all the information and documents related to legislative or non-legislative acts and procedures, as well as the decision-making process, should be developed; such tool should also include and give access to information on transposition, implementation, infringements, petitions, complaints, reports, etc.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, provides a quantitative and qualitative analysis of how EU law in the Area of Freedom, Security and Justice (AFSJ) is currently enforced. It discusses traditional enforcement tools like infringement actions, budgetary conditionalities and other policy-based monitoring and evaluation methods. Based on this it formulates policy recommendations to further improve AFSJ-enforcement in a comprehensive manner.

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