

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**The relationship between the
Commission acting as Guardian
of the EU Treaties and
complainants: Selected topics**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

The relationship between the Commission acting as
Guardian of the EU Treaties and complainants:
Selected topics

NOTE

Abstract

This briefing note addresses three topics concerning the relationship between the Commission acting as Guardian of the EU Treaties and complainants. First, it investigates the link between non-contractual liability and the Commission's discretion under Article 258 TFEU. Secondly, it examines Article 258 TFEU and the introduction of EU Pilot (a confidential on-line database for communication between Commission services and Member State authorities concerning potential infringements). Finally, it discusses limitations of the procedure under Article 258 TFEU and the capability of mutual evaluation as a supplementary enforcement tool.

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LIST OF ABBREVIATIONS

AFSJ Area of Freedom, Security and Justice

TFEU Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background

This briefing note contains a critical assessment of Article 258 TFEU proceedings as a tool for ensuring EU law application.¹ It addresses three specific questions concerning the relationship between the Commission and complainants, by reference to EU primary and secondary law, as well as case-law from the Court of Justice of the EU. First, it investigates the link between non-contractual liability and the Commission's discretion under Article 258 TFEU. Secondly, it examines Article 258 TFEU and the introduction of EU Pilot (a confidential on-line database for communication between Commission services and member state authorities concerning potential infringements). Finally, it discusses limitations of the procedure under Article 258 TFEU and the capability of mutual evaluation as a supplementary enforcement tool. Specifically, it raises potential rule-of-law problems and implications for the European Parliament (EP). It moreover enquires whether Article 70 TFEU concerning the Area of Freedom, Security and Justice (AFSJ) could provide a model framework for mutual evaluation, including the role of the EP.

Aim

- Provide a critical assessment of Article 258 TFEU proceedings as a tool for ensuring EU law application and the relationship between the Commission and complainants.
- Investigate the link between non-contractual liability and the Commission's discretion under Article 258 TFEU.
- Examine Article 258 TFEU and the introduction of EU Pilot (a confidential on-line database for communication between Commission services and member state authorities concerning potential infringements).
- Discuss limitations of the procedure under Article 258 TFEU and the capability of mutual evaluation as a supplementary enforcement tool.

¹ This briefing note is based on my forthcoming monograph entitled "Enforcement of EU-Law: The Role of the European Commission" (Oxford University Press).

1. GENERAL INFORMATION

KEY FINDINGS

- Only the Court of Justice can determine rights and duties of Member States and appraise their conduct under Article 258 TFEU proceedings
- The pre-litigation phase of Article 258 TFEU emphasises the joint problem-solving capacity of the Commission and the given Member State
- The Commission appears to be a facilitator above all

One of the Commission's core roles according to the Treaty on European Union (TEU) is to supervise Member State compliance with EU law.² The general EU infringement procedure constitutes the Commission's main tool of enforcement. It consists of two distinct procedures stipulated in Articles 258 and 260 TFEU, each with its own subject-matter. The procedure established under Article 258 TFEU is designed to obtain a declaration that the conduct of a member state is in breach of EU law and that the conduct will be terminated. The procedure provided for under Article 260 TFEU is designed to induce a defaulting Member State to comply with a judgement establishing a breach of obligations, i.e. repetitive infringements, and it has a much narrower ambit than Article 258 TFEU.³ The procedural construction thus distinguishes between compliance with Treaty obligations, 'first order compliance', and compliance with judgements of the Treaty regime's dispute settlement body, 'second order compliance'.⁴ The two procedures however have the same purpose, that is to say, to ensure the effective application of EU law.⁵

Prior to the Maastricht Treaty entering into force, the two procedures were largely identical despite tackling different types of non-compliance.⁶ They both consisted of a two-stage pre-litigation phase and a judicial phase. However, the Maastricht Treaty empowered the Commission to request the Court of Justice to award pecuniary penalties against member states for failure to take the necessary measures to comply with a judgement of the Court of Justice. Moreover, the Lisbon Treaty amended 260 TFEU in important ways.⁷ Among those amendments, the fast-track sanctioning mechanism stipulated in Article 260(3) targeting late transposition of directives has direct implications for the procedure stipulated in Article 258 TFEU.

Only the Court of Justice can determine rights and duties of member states and appraise their conduct according to Article 258 TFEU proceedings.⁸ The Commission however enjoys wide discretion whether to initiate and terminate infringement proceedings. This allows room for less legalistic approaches to non-compliance and places emphasis on the joint

² Article 17(1) TEU.

³ Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] not yet published in the ECR, para 119.

⁴ See generally R Fisher, *Improving Compliance with International Law* (University Press of Virginia, 1981) for this distinction. Fisher is not concerned with EU law specifically.

⁵ Joined Cases C-514/07 P, C-528/07 P and C-532/07 *Sweden v API and Commission* [2010] not yet published in the ECR, para 118.

⁶ Treaty establishing the European Community (consolidated text) [2002] OJ C 325.

⁷ Treaty on European Union and the Treaty on the Functioning of the European Union (consolidated text) [2010] OJ C 83.

⁸ T- 258/06 *Germany v Commission* [2010] not yet published in the ECR, para 153 and case-law cited.

problem-solving capacity of the parties, i.e., the Commission and the given member state. Due to its particular type of powers under Article 258 TFEU the Commission appears to be a facilitator above all.⁹

⁹ Stine Andersen, *Enforcement of EU Law: The Role of the European Commission* (Oxford University Press, forthcoming).

2. NON-CONTRACTUAL LIABILITY AND THE COMMISSION'S DISCRETION UNDER ARTICLE 258 TFEU

KEY FINDINGS

- According to recent case-law, and under certain conditions, the Commission's initiation of infringement proceedings can give rise to non-contractual liability
- The examples of situations provided by the General Court do not appear to extend to decisions to terminate infringement cases as such
- Thus, the Commission's crucial discretion in this regard cannot indirectly be subject to judicial review

The Court of Justice has consistently confirmed the Commission's exclusive competence to decide on the initiation of infringement proceedings.¹⁰ The Commission's discretionary decision-making power precludes the right of individuals to require the Commission to take a particular position.¹¹ It may nevertheless be considered whether case-law on non-contractual liability on the part of the EU could bring about such rights through the backdoor. The answer differs between situations where the Commission has not initiated infringement proceedings and where it has.

Since the Commission is not bound to commence infringement proceedings under Article 258 TFEU, 'its decision not to institute such proceedings is not in any event unlawful'. Consequently it cannot give rise to non-contractual liability on the part of the EU.¹² The only conduct which might possibly be adduced as a source of damage in this situation is the conduct of the member state concerned.¹³ In the case *Asia Motor France*, the Court of Justice ruled that an application for damages is 'patently inadmissible' in so far as it concerns liability arising from the Commission's inaction in relation to the alleged infringement.¹⁴

It cannot, however, be entirely overlooked that, when the Commission has initiated infringements, it might incur non-contractual liability.¹⁵ In the judgement *Arizmendi and Others* the General Court noted that in principle, a reasoned opinion can adversely affect an individual due to its content. This may, for instance, be the case if the Commission divulges confidential information obtained from complainants or if a reasoned opinion contains inaccurate information about certain persons.¹⁶ These examples however do not appear to extend to the Commission's decisions to terminate an infringement case as such. Thus, the Commission's crucial discretion in this regard remains unfettered.

¹⁰ Joined Cases T-479/93 and T-559/93 *Commission v Giorgio Bernardi* [1994] ECR II-01115.

¹¹ Joined Cases C-205/10 P, C-217/10 P and C-222/10 P *Heinz Helmuth Eriksen, Bent Hansen and Brigit Lind v Commission*, [2011] not yet published in the ECR, para 42; Order of 6 April 2006 in C-408/05 P *GISTI v Commission*, para 14 and case-law cited.

¹² T-202/02 *Makedoniko Metro and Michaniki v Commission* [2004] ECR II-181, para 43 and case-law cited.

¹³ T-202/02 *Makedoniko Metro and Michaniki v Commission* [2004] ECR II-181, para 43 and case-law cited.

¹⁴ C-72/90 *Asia Motor France v Commission* [1990] ECR I-2181, paras 13 and 15. See also T-201/96 *Smanor and Others v Commission* [1997] ECR II-1081, para 31; and case T-202/02 *Makedoniko Metro and Michaniki v Commission* [2004] ECR II-181, para 44. Wennerås argues that there might nevertheless be circumstances under which liability could potentially occur. P Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007), 300.

¹⁵ Joined Cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Jean Arizmendi and Others v Council and Commission* [2009] ECR II-04883, para 68. See also K Gutman, 'The Evolution of the Action for Damages against the European Union and Its Place in the System of Judicial Protection' (2011) *Common Market Law Review*, 48:3, 695-750 (707-8).

¹⁶ Joined Cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Jean Arizmendi and Others v Council and Commission* [2009] ECR II-04883, para 69.

3. THE RELATIONSHIP BETWEEN THE COMMISSION AND COMPLAINANTS UNDER ARTICLE 258 TFEU AND EU PILOT

KEY FINDINGS

- Confidentiality remains inextricably linked to the very purpose of the pre-litigation phase of Article 258 TFEU; that is to say, the search for an amicable settlement between the Commission and a given Member State
- Confidentiality is not, however, a *carte blanche*. Thus, the Court of Justice establishes, new investigations under Article 260 TFEU do not warrant confidentiality concerning Article 258 TFEU proceedings
- Case-law consistently confirms that the general EU infringement procedure is not a remedy for citizens and enterprises against Member State infringements
- EU Pilot makes no formal, legal changes to this
- However, EU Pilot provides complainants with important means to activate processes of compliance-dialogue between the Commission and the Member States

3.1. Access to documents

According to the second indent of Article 4(2) of Regulation No 1049/2001, the Commission shall refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice.¹⁷ Furthermore, the third indent of Article 4(2) of Regulation No 1049/2001 stipulates that the institutions shall refuse access to a document, where disclosure would undermine the protection of the purpose of inspections, investigations and audits. According to the last sentence of the second subparagraph of Regulation No 1049/2001 this applies, unless there is an overriding 'public interest' in disclosure. Case-law has consistently upheld the objective of reaching an amicable settlement in infringement cases. Notably, the requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the grounds that bilateral compliance negotiations may continue during the court proceedings and up to the delivery of the judgement. The aim is not to protect the investigations as such, but to induce the given Member State to comply with EU law.¹⁸ Thus, the purpose of obtaining an amicable settlement remains at the very heart of the infringement procedure and it serves as the justification for confidentiality.

The merits of transparency, in terms of bringing greater openness to the work of the institutions and strengthening the principle of democracy and respect for fundamental rights, are specifically acknowledged in Regulation No 1049/2001.¹⁹ What is more, the Court of Justice holds, in relation to the legislative procedure, that openness is critical for citizens' confidence in the institutions.²⁰ There are, however also factors that militate in favour of confidentiality concerning Article 258 TFEU. Notably, there is a risk of prematurely politicising cases at EU and domestic levels. Member States frequently enjoy a margin of

¹⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145, 31.5.2001.

¹⁸ T-36/04 *API v Commission* [2007] ECR II-3201, para 133.

¹⁹ Points three and 10 in the preamble.

²⁰ Joined Cases C-39/05 P and C-52/05 P *Sweden and Maurizio Turco v Council* [2008] ECR I-4723, para 59.

discretion concerning *how* to comply. At the same time, infringement cases are often about contested norms and the Commission does not possess prescriptive powers under Article 258 TFEU and it cannot establish infringements. These procedural features require the Commission to engage in a responsive dialogue with Member States. This dialogue essentially presupposes some degree of secrecy.

On a related and more practical note, there are frequently parallel domestic cases involving several stakeholders, which hold conflicting viewpoints on the correct interpretation and application of EU law.²¹ The risk of creating legal uncertainty and the potential political and economic cost for Member States by engaging in an open and frank dialogue may therefore outweigh the benefits. The alternative (i.e., more openness and individual access to case-files) could well be that more non-compliance cases are dealt with informally, which would make the processes even less transparent, or that cases are dealt with more formally and thus at the expense of the practice of amicable settlements. This would in turn jeopardise the effectiveness of the infringement procedure as a means to remedy non-compliance informally.

By the time a case is ruled upon by the Court of Justice, the Member State can no longer resort to voluntary compliance. Hence, the proper conduct of the pre-litigation procedure no longer warrants confidentiality. Moreover, it cannot be presumed that disclosure of documents lodged in a procedure which ultimately led to the delivery of a judgement undermines investigations leading to proceedings being brought under Article 260 TFEU (concerning failure to comply with a judgement establishing a breach of obligations). At this point in time, the continuation of negotiations between that Member State and the Commission is no longer designed to establish the existence of the infringement, but to determine whether the necessary conditions for the bringing of new proceedings under Article 260 TFEU are met. Hence, an amicable settlement is no longer possible.²²

3.2. The Commission's handling of complaints

The Commission does not possess powers to investigate compliance within the member states' territories. This is one reason why complainants and private bodies (as well as the press) constitute important sources of information, in addition to the information submitted by the member states.²³ Ultimo 2009, the Commission was handling circa 2900 complaints and infringement files; complaints accounting for not less than 54% of the total.²⁴ The Commission has published a set of rules on its handling of complaints,²⁵ and in 2009 it introduced a complaints and enquiries registration system (CHAP).²⁶ According to these, complaints which the Commission considers incompatible with EU law must be examined within a month to decide if it should be classified as a complaint. In addition, the

²¹ According to Report from the Commission on the application in 2010 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM/2011/492 final, most applications for access are made by the academic sector, by NGO's, interest groups and law firms. The report provides statistics relating to the application of Regulation (EC) No 1049/2001.

²² T-36/04 *API v Commission* [2007] ECR II-3201, paras 135 to 140; and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] not yet published in the ECR, paras 118-123.

²³ C-494/01 *Commission v Ireland* [2005] ECR I-3331, para 43; C-135/05 *Commission v Italy*, para 28; C-297/08 *Commission v Italy* [2010] I-01749, para 101.

²⁴ Commission '27th Annual Report on Monitoring the Application of EU Law', COM/2010/538, section 2.2. At the same time, the number of cases initiated on the Commission's own initiative decreased by 11 % compared to 2008.

²⁵ See the Commission's web-page at http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm. In 1999 the Commission published a notice containing a standard form for complaints to be submitted to it where a member state fails to comply with EU law (then, Community law) in the context of the infringement procedure laid down by Article 258 TFEU, [1999] OJ C 119/5. See also Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM/2002/141; and Commission '27th Annual Report on Monitoring the Application of EU Law', COM/2010/538 (Introduction).

²⁶ The Commission terms CHAP and EU Pilot 'management (pre-infringement) tools'. See Commission '28th annual report on monitoring the application of EU law', COM/2011/588, 3.

Commission endeavours to take a decision on the substance of a complaint within twelve months of its registration with the Secretariat-General. Thus, in principle, the complainant is told within a year whether the Commission will open infringement proceedings or close the case.²⁷ These measures, and specifically the publication of the Commission's internal procedural rules, have led Advocate General Mengozzi to comment that '[t]here is ... a tendency towards progressive depoliticisation of the infringement procedure and towards proceduralisation of it, at least in cases where a complaint by an individual is at the origin of the Commission's action.'²⁸ Along the same lines, Prete and Smulders, both Commission officials, argue that '... from a rarely used, opaque and policy-driven procedure, it [the infringement proceedings] has now become a common, fairly transparent and highly technical procedure'.²⁹

Whether the general EU infringement procedure is sufficiently transparent is contested. Smith, for instance, criticises the Commission's lack of procedural recognition of private complainants and the absence of a clearly defined policy for its use of discretion.³⁰ Both the European Ombudsman³¹ and the European Parliament³² have criticised the Commission's complaint handling and advocated citizen rights in the administrative phase of Article 258 TFEU. This would include, in addition to the above discussed access to documents where a complainant is affected, right to be heard and a compulsory explanation as to why a case has been terminated.³³

Complainants undoubtedly constitute a vital source of information for the Commission acting as Guardian. However, this does not translate into a right for complainants to submit comments or an obligation for the Commission to discuss its decisions under Article 258 TFEU with individuals. This is a reflection of the system of remedies established in the EU Treaties system. Accordingly, individuals ultimately have to rely on their remedies before national courts.

In addition to the objections against the Commission's individual complaint handling, the EP has requested that the Commission displays data on the resources it allocates to infringement cases in the respective Directorates-General as well as to EU Pilot.³⁴ The legal justifications for secrecy in concrete infringement cases have already been discussed in more detail. The underlying line of reasoning (i.e., reaching friendly settlement) does not extend to the Commission's expenditure more generally. By contrast, more openness in this regard would be an important way to constructively engage citizens in a debate on non-compliance and concerning the manner in which the Commission exercises its enforcement powers. Although in relation to expenditure under the European Agricultural Guarantee Fund and thus not in relation to Article 258 specifically, the Court of Justice links the principle of transparency stated in Articles 1 TEU and 10 TEU and in Article 15 TFEU

²⁷ See the Commission's web-page at http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm. Wennerås points out the risk that this internal rule is used as a 'formalistic justification for closing cases'. P Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press, 2007), 294.

²⁸ Opinion of Advocate General Mengozzi in C-523/04 *Commission v The Netherlands* [2007] ECR I-3267, footnote 49.

²⁹ L Prete and B Smulders, 'The Coming of Age of Infringement Proceedings' (2010) *Common Market Law Review* 47:1, 9-61 (13).

³⁰ See R Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes' in C Kilpatrick, T Novitz, P Skidmore (eds.), *The Future of Remedies in Europe* (Hart Publishing, 2000), 268; and M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2009).

³¹ Decision of the European Ombudsman in the own initiative inquiry 303/97/PD into the Commission's administrative procedures in relation to citizens' complaints about national authorities - Commission reference: Letter of 11 August 1997 PhG/es SG/D(97) 35503; and R Rawlings and C Harlow, 'Accountability and Law Enforcement: the Centralised EU Infringement Procedure' (2006) *European Law Review* 31, 447-475, 466.

³² See also European Parliament Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004) (2005/2150(INI)).

³³ For an analysis of the European Ombudsman's impact on the Commission's interaction with complainants, see M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2009), 161-202.

³⁴ European Parliament Report on the 26th Annual Report on Monitoring the Application of European Union Law (2008), A7-0291/2010.

with general EU principles of legitimacy and accountable to the citizen in a democratic system.³⁵

3.3. EU Pilot and the emergence of supplementary, practical problem-solving programmes

Regardless of the Commission's in-house rules for dealing with complaints, the general EU infringement procedure is not a remedy for citizens and enterprises against Member State infringements. Consequently, the Commission can reserve the procedure for priority cases and structural issues.³⁶ At the same time, the Commission attempts to assist citizens and enterprises to tackle compliance obstacles through other channels. These include practical, problem-solving programmes such as SOLVIT, created in 2002 (concerning internal market law) and EU Pilot. SOLVIT centres established in the member states cooperate directly via an on-line database to solve problems submitted by citizens and businesses.³⁷ EU Pilot is a confidential on-line database for communication between Commission services and Member State authorities. The system is operated through a network of contacts that oversee practical solutions of complaints as well as Commission own-initiative cases, and cases raised by the European Parliament Petitions' Committee or individual members of the European Parliament. It deals with questions concerning the correct application of EU law or the conformity of the law in a Member State with EU law. Member States receive individual files, including a description and questions about a particular compliance issue. Within ten weeks the national authorities shall reply to the questions raised and propose a solution to the alleged infringement. Within a further ten week deadline, in principle, the Commission has committed to examine the answer and uploads an assessment in the EU Pilot database.³⁸

The EU Pilot method has come about on the initiative of the Commission and it does not have a legal basis in the EU Treaties.³⁹ However, it has quickly turned into the Commission's main tool to communicate with the member states concerning suspected infringements. EU Pilot is not used to manage issues that are subject to infringement proceedings. However, cases not properly resolved through EU Pilot may afterwards be pursued according to the general EU infringement procedure.⁴⁰ Clearly, supplementary methods, such as EU Pilot, can bring to light structural non-compliance and thus provide some degree of synergy with the general EU infringement procedure.⁴¹

Because EU Pilot, as a rule, applies before infringement proceedings are launched under Article 258 TFEU, it effectively constitutes a "pre-pre-litigation" phase. According to the

³⁵ Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* [2010] not yet published in the ECR, paras 68-71.

³⁶ Commission Staff Working Document '*Situation in Different Sectors - Accompanying document to the Report from the Commission 27th Annual Report on Monitoring the Application of EU Law*', SEC/2010/1143 final.

³⁷ See generally Commission staff working document '*SOLVIT 2006 Report - Development and Performance of the SOLVIT network in 2006*', SEC(2007)585. According to the Commission's report '*Development and performance of the SOLVIT network in 2008*', the average case handling time for SOLVIT in 2008 was just under two months. The report (at 6) also compares the number of complaints resolved through infringement proceedings and through SOLVIT. In 2007 and 2008 the majority of cases were solved through SOLVIT. The report can be accessed at http://ec.europa.eu/solvit/site/docs/solvit2008_report_en.pdf. The Commission's annual SOLVIT reports and background information can be found at http://ec.europa.eu/solvit/site/background/index_en.htm.

³⁸ See Commission report '*Second Evaluation Report on EU Pilot*', COM/2011/930 final with references.

³⁹ Commission communication '*A Europe of Results - Applying Community Law*', COM/2007/502 (section 2.2. "Improving working methods").

⁴⁰ Commission '*28th Annual Report on Monitoring the Application of EU Law*', COM/2011/588, 8-9; Commission '*EU Pilot Evaluation Report*', COM/2010/70 final; and Commission staff working document '*Facts on the functioning of the system up to beginning of February 2010*' accompanying document to the Commission's EU pilot evaluation report, SEC(2010) 182. See also the Commission's web-page at http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm. For a critical appraisal of the scheme and the implications of the new process, see M Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge, 2009), 152-160.

⁴¹ Commission '*27th Annual Report on Monitoring the Application of EU Law*' (2009), COM/2010/538 (Introduction).

Commission 4035 cases were created in CHAP in 2010. Of those cases, 83% were complaints and 17% were enquiries. 52.5% of complaints were closed directly in CHAP 'on the basis of a comprehensive response by the Commission' and a further 14% were closed on the grounds of a lack of EU competence. For 17% of the cases the examination continued via EU Pilot and only 9% were transferred into infringement proceedings.⁴² At the same time, the Commission notes that EU Pilot might explain the decrease of ongoing infringement cases in 2010 compared to previous years and it intends to broaden the scope to include all Member States.⁴³

Due to the secrecy of EU Pilot proceedings there are admittedly apparent problems in validating these statistics. This touches upon broader problems of accountability to the citizen directly and indirectly through the EP. By institutionalising ways to address complaints consistently and in a speedier manner than under Article 258 TFEU, the Commission undertakes to assist complainants in a way not required or anticipated by the Treaties or case-law. This is in itself laudable. However, it should not detract from the serious criticism voiced by the EP that a lack of transparency prevents it from adequately performing its role of scrutiny.⁴⁴ The Commission acting as Guardian is politically accountable to the European Parliament. This implies responsibility to make sure that its actions can, in the first place, be monitored by the European Parliament. Given the secrecy surrounding individual infringement cases the Commission has to find other ways to enable review. Greater openness (or indeed, openness) about the funding allocated to the Commission's enforcement endeavours is one way to do this. Moreover, the Commission can report to the EP about infringement problems in much more detail than it currently does in its yearly reports without having to disclose confidential information about concrete cases.⁴⁵ Because EU Pilot, it was argued, effectively constitutes a "pre-pre-litigation" phase the Commission is under an obligation to make sure that its actions are fully reviewable *per se* and in combination with the statistics pertaining to the general EU infringement procedure.

3.4. EU Pilot in Context

The responsibility of giving effect to EU law rests primarily with the Member States.⁴⁶ At the same time, the Commission's investigatory powers are combined with a significant degree of Member State autonomy concerning *how* to implement, apply and enforce EU law. The resultant division of competence and the procedural features of Article 258 TFEU display characteristics often ascribed to (new) governance types of steering-mode. For instance, the Commission negotiates compliance solutions with Member States bilaterally and offer legal and technical assistance. In addition to the iterative, interpretive deliberation, the parties engage in fact-finding and assessment. The Member State is the primary source of information in this regard. It is settled case-law that Member States shall cooperate in good faith with the Commission's enquiries and provide the Commission with all the information it requests.⁴⁷ Both formally and informally the general infringement procedure depends to a large degree on deliberation and knowledge-creation.

The EU Pilot method of dealing with compliance issues is very much aligned with the purpose of Article 258 TFEU, namely to ensure effective application of EU law through amicable settlement. Like the administrative phase of Article 258 TFEU, it relies on dialogue and technical and legal exposition. In addition, the mere initiation of an EU Pilot procedure

⁴² Commission '28th Annual Report on Monitoring the Application of EU Law', COM/2011/588.

⁴³ Commission '28th Annual Report on Monitoring the Application of EU Law', COM/2011/588, 6 and 15.

⁴⁴ European Parliament resolution of 14 September 2011 on the twenty-seventh annual report on monitoring the application of European Union law (2009) (2011/2027(INI)), para 10.

⁴⁵ The reports can be accessed at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

⁴⁶ See, e.g., the answer given by Commissioner Fischler on behalf of the Commission to European Parliament Written Question P-1052/2000; and Articles 4 TEU and 292 TFEU.

⁴⁷ See, e.g., C-490/09 *Commission v Luxembourg* [2011] not yet published in the ECR, para 59, case C-82/03 *Commission v Italy* [2004] ECR I-6635, paras 15-18.

implies a degree of pressure through exposure to the Commission. Thus, EU Pilot is consonant with the flexible and deliberative tradition of enforcement in the EU and the central role attributed to the Member States in this connection. In particular regarding the latter point, the perhaps most important invention of EU Pilot is that it requires the Member States to play a decidedly proactive role in solving potential infringements. According to Article 258 TFEU the burden of proof rests with the Commission.⁴⁸ It must provide the evidence necessary for the Court of Justice to establish that the obligation has not been fulfilled, and it may not rely on any presumption.⁴⁹ EU Pilot is less about proving an infringement. Hence, it does not activate the procedural steps and requirements established under Article 258 TFEU with a view to guaranteeing the Member State's interest in submitting its observations and preparing a defence. It more simply asks the member state to address and tackle a concrete, practical problem. This resonates well with the Member States' primary responsibility for ensuring implementation, application and enforcement of EU law.

Article 258 TFEU does not contain any citizen rights. Besides, the relevant provisions pertaining to access to documents protect confidentiality to the extent necessary for the Commission to reach an amicable settlement with a given Member State. At this point in time, the Commission can thus opt to conduct the administrative phase in confidentiality. EU Pilot makes no changes to this and complainants will not gain access to the administrative phase of Article 258 TFEU. Yet, EU Pilot is significant in that it ensures complainants that the Commission will take action, that it will engage the Member State and, not least, produce an assessment of the Member State's reply. It thus enables, for the first time, complainants to influence the Commission's decision-making process.

Not surprisingly, the Commission has consistently defended its right to secrecy, stating that there is a broader public interest in keeping negotiations at this stage undisclosed. Against this background and in view of case-law, the Commission's commitment to evaluate Member States replies under EU Pilot to complainants help reinforcing the Commission's accountability to individual complainants.⁵⁰ Significantly, with EU Pilot complainants are provided a means to activate processes of compliance-dialogue between the Commission and Member States. Some insights from political science are interesting in this regard.

A study by Falkner *et al* systematically looks at compliance patterns at the State level concerning selected secondary law acts.⁵¹ The authors examine the success and failure of implementation by looking at application and enforcement, in addition to formal transposition. Interestingly, their survey reveals remarkably low degrees of perfect compliance within the established time limits and considerable variations between the then 15 member states. In their explanatory analytical framework, the authors operate with 'different worlds of compliance' under the categories 'a world of law observance',⁵² 'a world of domestic politics',⁵³ and 'a world of neglect'.⁵⁴ Notably, none of these worlds of compliance account for defection as a rational choice.

⁴⁸ See generally K Lenaerts and D Arts, 'Action for Infringement of Community Law by a Member State' in K Lenaerts, D Arts, and R Bray (eds.), *Procedural Law of the European Union* (Sweet & Maxwell, 1999), 107; and AJG Ibáñez, *The Administrative Supervision and Enforcement of EC Law* (Hart, 1999), 99-101.

⁴⁹ See, e.g., case 96/81 *Commission v Netherlands* [1982] ECR 1791, para 6; C-404/00 *Commission v Spain* [2003] ECR I-6695, para 26; and C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, para 21; C-438/07 *Commission v Sweden* [2009] ECR I-09517.

⁵⁰ Commission 'EU Pilot Evaluation Report', COM/2010/70 final, 5.

⁵¹ G Falkner, O Treib, M Hartlapp, S Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005). See also G Falkner, M Hartlapp, S Leiber, and O Treib, 'In Search of the Worlds of Compliance: Promises and Pitfalls of Quantitative Testing'. *IHS Political Science Series Paper No. 113*, July 2007.

⁵² Finland, Sweden, Denmark.

⁵³ Germany, UK, Austria, the Netherlands, Spain and Belgium.

⁵⁴ Greece, Portugal, Luxembourg, France, Ireland and Italy.

Jensen demonstrates that failure to comply with EU labor policy comes down to the Member State governments' ability rather than willingness.⁵⁵ Börzel *et al* find empirical evidence that variations in longitudinal non-compliance patterns (i.e., repetitive infringements under Article 260 TFEU) can be ascribed to differences in capacity and power. Consequently, they argue, capacity-building in terms of financial resources and managerial know-how 'might actually be a feasible way to substantially reduce the persistence of non-compliance the stages of the infringement proceedings'.⁵⁶

To the extent that Member States' are not rational defectors, EU Pilot and the Commission's commitment to consistently address complaints bodes well in terms of solving compliance obstacles. The extent to which this is actually the case is for the Commission to substantiate. Again, the EP should be equipped to review the Commission's actions as Guardian, including under EU Pilot.

The guarantees offered to complainants under EU Pilot have merely come about based on Commission self-commitments. Therefore, the EP plays a vital role in monitoring that the Commission responds adequately to the concerns of complainants. One way to do this is to engage with the Commission in a dialogue about the quality of the assessments offered to individuals. Thus, how, concretely, will the Commission honour its self-imposed obligations and substantiate its actions? Although the EP does not legally speaking have right of access to individual infringement files, the EP's responsibility to review the Commission's actions as Guardian necessitates access to clear statistics concerning infringement cases. This extends to the Commission's actions under EU Pilot.

⁵⁵ CB Jensen, 'Implementing Europe. A Question of Oversight' (2007) *European Union Politics* 8:4, 451-477.

⁵⁶ T Börzel, T Hofmann and D Panke, 'Caving in or sitting it out? Longitudinal patterns of non-compliance in the European Union' (2011) *Journal of European Public Policy*, 1-18, 14.

4. MUTUAL EVALUATION AS A SUPPLEMENTARY TOOL OF ENFORCEMENT

KEY FINDINGS

- The Commission increasingly relies on mutual evaluation as a tool for ensuring EU law application, in addition to proceedings under Article 258 TFEU
- The method enables inclusive processes of informal exchange of views between the Commission and the Member States
- Moreover, mutual evaluation allows the Commission and the Member States to tackle underlying compliance obstacles in a comprehensive manner
- The method, however, also gives rise to potential rule-of-law problems
- Article 70 TFEU concerning the AFSJ provides a potential model framework for mutual evaluation, including the role of the EP

4.1. Mutual evaluation in comparison with Article 258 TFEU proceedings

In addition to infringement proceedings according to Article 258 TFEU, the Commission has experimented with alternative, or complementary, methods of bringing about Member State compliance. Among those, twinning projects between newcomers and 'older' member states have facilitated learning processes. This is one development, which is part of a more general move towards enabling, facilitating and multilateral methods used to obtain better compliance rates. These practices have by and large come about on the initiative of the Commission. They include package meetings, technical guidance, interpretive communications, SOLVIT, EU Pilot and mutual evaluation mechanisms. The Commission has established a number of groups of experts concerned with mutual evaluation of EU law and in particular of directives. Whereas some groups are composed of Member State representatives, others include non-state stakeholders. They are established on an *ad hoc* basis and cover a broad spectrum of EU policy areas, including temporary agency work, air safety and law regulating the right of EU citizens to move and reside freely within the territory of the Member States.⁵⁷ Both EU member states and the Council have on various occasions expressed support for mutual evaluation. In Report on the 26th Annual Report on Monitoring the Application of European Union Law (2008), the EP likewise asked 'the Commission to consider innovative mechanisms, such as the mutual evaluation procedure envisaged in the Services Directive, to ensure more effective application of EU law'.⁵⁸

As discussed above, the administrative phase of Article 258 TFEU (where the vast majority of infringement cases are settled) is bilateral and remains largely confidential. Moreover,

⁵⁷ See, e.g., Commission '27th Annual report on monitoring the application of EU law', 5; and Commission Report on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2008/840 final. Implementation working groups are established in many and different policy areas. Often they are coupled with practical implementation reports. Commission staff working document 'Situation in different sectors', SEC/2010/1143 final. See also Commission Communication 'Better Monitoring of the Application of Community Law', COM/2002/725, 6.

⁵⁸ European Parliament Report on the 26th Annual Report on Monitoring the Application of European Union Law (2008), A7-0291/2010.

this confidentiality allows Member States to engage in informal exchanges of views with the Commission and to discuss solutions to compliance problems. According to the Court of Justice there is a close link between this secrecy and the aim of the procedure, which is to reach an amicable agreement. The bilateral and confidential method has advantages in terms of solving concrete cases. In terms of effectiveness it also has drawbacks. This is in addition to legitimacy concerns from a citizen perspective, in terms of transparency and good administration.

Notably, infringement cases do not become learning opportunities for other Member States. Likewise, the general EU infringement procedure cannot function as a method to examine comprehensively exactly how the Member States interpret and implement specific provisions of EU law. Genuine compliance is complicated to establish and thus to monitor even when Member States report national transposition measures to the Commission. Significantly, what constitutes correct interpretation and application of EU law is often contestable. In addition, because infringement proceedings are inherently case-specific, they cannot deal with more systemic compliance hurdles. Mutual evaluation by contrast enables informal exchange of views between the Commission and the Member States. It has a number of advantages with respect to effectiveness compared with the general EU infringement procedure. Both methods can bring about changes in Member State behaviour. Expert groups in addition, can tackle underlying compliance obstacles in a comprehensive manner, and thus further general policy objectives.⁵⁹

An example of this is the group of experts from Member States established with a view 'to identify difficulties and clarify issues of interpretation of the [Free Movement] Directive'.⁶⁰ This group of experts has singled out central issues that require clarification including questions pertaining to criminality and abuse. According to case-law the application of EU law does not cover abusive practices.⁶¹ In addition, Article 35 in the Residence Directive explicitly stipulates that member states may adopt the necessary measures to refuse, terminate or withdraw any right conferred by the directive in the case of abuse of rights. The risk is that member states apply a broad interpretation of the notion of abuse and thereby mitigate the individual rights anchored in the Directive. Compliance in this aspect is particularly difficult to monitor by the Commission because Member States enjoy a margin of discretion (within the limits imposed by the Treaty, of course) and given that the Commission does not have access to the facts of specific cases.

The Commission itself holds that management of Member State compliance through for instance meetings of national experts 'ensures efficiency in the application of the law, technical up-dating and ideas for further development of the law'.⁶² This of course requires some sort of substantiation from the Commission's side.

This briefing note is specifically concerned with the relationship between the Commission acting as Guardian of the EU Treaties under article 258 TFEU and complainants. An interrelated question concerns the accountability of the Commission acting as Guardian and the degree of transparency it inevitably requires generally and vis-à-vis the EP specifically. The EP has already established a number of clear requirements to the Commission concerning its actions under Article 258 TFEU and exerted pressure on the institution to

⁵⁹ Compare K Raustiale and A Slaughter, 'International Law, International Relations and Compliance', in W Carlsnaes, T Risse, and BA Simmons (eds.), *Handbook of International Relations* (SAGE, 2002) on the notion of effectiveness.

⁶⁰ Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM/2008/840 final.

⁶¹ See e.g. C- 212/97 Centros [1999] ECR I- 1459, para 24 and case-law cited.

⁶² Commission communication 'A Europe of Results – Applying Community Law', COM/2007/502 final, 3.

introduce more transparency and openness.⁶³ Another area in which the EP could play a role concerns the black box of enforcement through mutual evaluation by Member State officials and by experts.

The EP has expressed principled support for supplementary enforcement methods like mutual review. In this regard it should be pointed out that the method also raises a number of policy issues. In particular, the method has potential to bring about (and internalise) harmonisation of Member State practices and norms.⁶⁴ However, because the process outcomes are non-binding they are not supervised by the Court of Justice of the EU. Thus, a potential rule of law problem occurs.

The mutual evaluation method also raises separate, yet interrelated, questions concerning the EP's access to supervise how the Commission exercises its powers of enforcement and fulfil its role as Guardian. The role and vigilance of the EP is particularly critical given that citizens and business stakeholders are not automatically involved in the discussed mutual evaluation processes. At the moment no unitary framework or general horizontal rules apply to mutual evaluation, including the *ad hoc* mechanisms established by the Commission without legal basis. The subsequent section will discuss Article 70 TFEU and the mechanisms in place under that provision to ensure that mutual evaluation remains objective and subject to parliamentary scrutiny.

4.2. Article 70 TFEU concerning mutual evaluation within the AFSJ – general lessons

Historically, mutual evaluation procedures concerned with member state implementation and application of EU law have emerged on an *ad hoc* basis without explicit legal basis in the EU Treaties. Whereas some procedures are established in directives, other and more informal procedures come about on the Commission's own initiative. Now the Lisbon Treaty establishes a legal basis for mutual evaluation in relation to the AFSJ.⁶⁵ The European Convention Group dealing with Freedom, Security and Justice was presented with expert evidence that this particular policy area suffered from inadequate implementation in general and concerning Third Pillar matters in particular.⁶⁶ In order to find ways to improve member state implementation, the Group suggested that mutual evaluation should be encouraged and stipulated directly in the Constitution. Different types of non-binding mutual evaluation procedures concerning national transposition measures and the implementation and enforcement of EU law had already emerged incrementally both concerning First and Third Pillar policy matters.⁶⁷ For instance, mutual evaluation seemed to have formed an effective tool ensuring compliance in relation to both combating organized crime and implementing the Schengen *acquis*.⁶⁸ Moreover, review arrangements were established as part of the preparatory framework facilitating the most recent enlargements.⁶⁹ The mutual evaluation mechanism survived the ill-fated Constitution and is now stipulated in Article 70 TFEU, which reads:

⁶³ See, e.g., European Parliament resolution of 14 September 2011 on the twenty-seventh annual report on monitoring the application of European Union law (2009) (2011/2027(INI)), para 8.

⁶⁴ It is beyond the scope of this paper to establish and appraise whether and to what extent that is the case.

⁶⁵ According to Article 3(2) TEU, the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

⁶⁶ Working Group X: Freedom, Security and Justice, Final Report, CONV 426/02, Brussels 2 December 2002, 20. The report can be accessed at <http://register.consilium.europa.eu>.

⁶⁷ See generally, A Klip, E Versluis and J Polak, 'Improving Mutual Trust amongst European Union Member States in the Areas of Police and Judicial Cooperation in Criminal Matters', 69-70. The text can be accessed at <http://english.wodc.nl/>.

⁶⁸ Working Group X: Freedom, Security and Justice, Final Report, CONV 426/02, Brussels 2 December 2002, 20.

⁶⁹ See e.g. 98/429/JHA: Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of Justice and Home Affairs (1998) *OJ L 191/8-9*.

‘Without prejudice to Articles 258 ... and 260 [the general EU infringement procedure], the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.’

Even though the provision is limited to the AFSJ it is instructive more generally. Importantly, it reveals principled policy considerations concerning mutual evaluation and it does so at the level of primary EU law. A number of traits emerge. Among those, mutual evaluation arrangements shall be without prejudice to the general EU infringement procedure. Thus, the procedures co-exist as independent mechanisms that both aim at monitoring adequate member state implementation of EU law. The language of Article 70 TFEU explicitly reaffirms the Commission’s general responsibilities as Guardian. Consequently there is still ultimate access to judicial recourse in concrete infringement cases. This is in line with scholars like Timmermans’ warning concerning administrative networks between Member State authorities and the Commission. Specifically, they should not generate ‘a devolution from Community to Member States’.⁷⁰

Another and interrelated element concerns the requirement that evaluation of implementation shall be ‘objective and impartial’. To the extent mutual evaluation is concerned with implementation and compliance, it opens up for a non-confrontational type of enforcement discourse. However, mutual evaluation may also blur the fact that much enforcement is essentially about contested norms. The requirement concerning objectivity and impartiality is difficult to operationalize. The wording of Article 70 TFEU nevertheless serves as a caution that the Member States and the Commission shall refrain from negotiating or renegotiating EU law.

Whereas the Council could act on its own motion in earlier versions, the Lisbon Treaty empowers the Council to act ‘on a proposal from the Commission’. This amendment reflects a proposal tabled by the Commission maintaining that it ‘should play a more significant role in the ... mechanism of evaluation’.⁷¹ Not only does this amendment enable the Commission to frame and influence the content of mutual evaluation, it also works to sustain an approach that is vested in the common interests of the EU and thereby ensuring policy consistency.

The final clarification concerns the obligation to inform the European Parliament and national parliaments of the content and results of the evaluation. The Convention Working Group links the involvement of national parliaments to characteristics that are particular to the AFSJ. Thus, it holds, ‘the work and the organisation of national police and the content of national criminal law are at the core of the competencies that define a state’.⁷² It is likewise in accordance with the general objectives of making the works of the Council more transparent and involving the national parliaments.⁷³ Finally, informing the European Parliament of the content and results of evaluation constitutes one way to constructively engage the European Parliament in a dialogue about enforcement problems *per se*. In addition, the Commission links feedback of evaluation results with the decision-making

⁷⁰ CWA Timmermans, ‘Judicial Protection against Member States’, in D Curtin and T Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers. Volume II* (Martinus Nijhoff Publishers, 1994), 406.

⁷¹ Suggestion for amendment of Article 4 by Convention member Commissioner Hübner, part II. The proposal can be accessed at <http://european-convention.eu.int/docs/treaty/pdf/847/4hubner.pdf>.

⁷² Working Group X: Freedom, Security and Justice, Final Report, CONV 426/02, Brussels 2 December 2002, 22.

⁷³ Compare Final report of Working Group IV on the Role of National Parliaments, CONV 353/02.

processes.⁷⁴ This too warrants greater involvement of the European Parliament, in particular given the institution's strengthened role as co-legislator under Article 293 TFEU. Granting the European Parliament observer status could be another way to involve it more closely in enforcement.

⁷⁴ See Commission communication '*Evaluation of EU Policies on Freedom, Security and Justice*', COM/2006/332 final; and O D Schutter, 'The Role of Evaluation in Experimentalist Governance: Learning by Monitoring in the Establishment of the Area of Freedom, Security, and Justice', in C F Sabel and J Zeitlin (eds.), *Experimentalist Governance in the European Union. Towards a New Architecture* (Oxford University Press, 2010), 281. The practice applies to other policy areas as well. The "Expert Group on the Implementation of the Services Directive", e.g., aims at ensuring 'a similar level of understanding by all the Member States of the work required and the priorities for action'. Commission Staff Working Document '*Situation in the Different Sectors*', Accompanying document to the Report from the Commission 27th Annual Report on Monitoring the Application of EU Law (2009), SEC/2010/1143 final, section 9.2.1.2; and Commission communication '*Third strategic review of Better Regulation in the European Union*', COM/2009/15 final.

CONCLUSIONS

This briefing note addressed three topics concerning the relationship between the Commission acting as Guardian of the EU Treaties and complainants.

First, it investigated the link between non-contractual liability and the Commission's discretion under Article 258 TFEU. More specifically, it discussed recent case-law according to which the Commission's initiation of infringement proceedings can, [under certain conditions](#), give rise to non-contractual liability. It concluded that the examples of situations provided by the General Court do not appear to extend to decisions to terminate infringement cases as such. Thus, to recap, the Commission's crucial discretion in this regard cannot indirectly be subject to judicial review.

The second section examined the general EU infringement procedure stipulated in Article 258 TFEU and the introduction of a confidential on-line database for communication between Commission services and member state authorities concerning potential infringements, i.e., EU Pilot. It argued that confidentiality remains inextricably linked to the very purpose of the pre-litigation phase of Article 258 TFEU; that is to say, the search for an amicable settlement. However, it demonstrated, confidentiality is not a *carte blanche*. Thus, the Court of Justice establishes, new investigations under Article 260 TFEU do not warrant confidentiality concerning Article 258 TFEU proceedings. Nevertheless, case-law on the general EU infringement procedure consistently confirms that Article 258 TFEU is not a remedy for citizens and enterprises against member state infringements. EU Pilot makes no formal, legal changes to this. However, it was argued, EU Pilot provides complainants with important means to activate processes of compliance-dialogue between the Commission and the member states.

The Commission's endeavours to address complaints consistently and in a practical manner under EU Pilot is in itself laudable. Moreover, the method is consonant with the flexible and deliberative tradition of enforcement in the EU and the central role attributed to the Member States. However, it should not detract from the serious criticism voiced by the EP that a lack of transparency prevents it from adequately performing its role of scrutiny. The Commission is under an obligation to ensure that its actions as Guardian can, in the first place, be monitored by the European Parliament. This applies to the Commission's action under Article 258 TFEU, including EU Pilot, which effectively constitutes a "pre-pre-litigation" phase.

The final section discussed limitations of the general EU infringement procedure established under Article 258 TFEU and the capability of mutual evaluation as a supplementary enforcement tool. Mutual evaluation has advantages in terms of effectiveness, it was argued. However, it also raises a number of policy issues, including potential rule of law problems. This in itself, but also the EP's general role as co-legislator post-Lisbon, warrants greater involvement of the EP under mutual evaluation procedures. It then proceeded to examine the legal basis for mutual evaluation explicitly provided for in the Lisbon Treaty regarding the AFSJ. It concluded that some general lessons can be inferred. They pertain to the role of the Commission as Guardian, the requirement that mutual evaluation shall be 'objective and impartial', but also to the role and involvement of national parliaments as well as the EP.

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