

## Enforcement of EU law in the Area of Freedom, Security and Justice <sup>1</sup>

### 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.

**Where have the Guardians gone?** Kelemen and Pavone asked in a recent academic article. They noted a **sharp decline (about 80%) in the number of infringement actions brought by the Commission over the last twenty years.**<sup>2</sup> Their work attracted attention and led to Parliamentary questions. The Commission adopted a new **Communication on Enforcing EU Law.**<sup>3</sup> It denied having 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, **and argued that enforcement of EU law involves more than just infringements.**

But how convincing is this? This study analyses **enforcement of EU law in the Area of Freedom, Security and Justice (AFSJ).** This 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 developing when the decline in infringements had set in, it has no legacy of strong(er) infringement action. Moreover, **in the AFSJ different tools are already used simultaneously 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** and a variety of **AFSJ-specific non-binding monitoring and evaluation methods** employed by EU institutions, EU agencies and Member States.

A first finding is that **the Commission's use of its infringement powers (Article 258 TFEU) is unbalanced and varies across AFSJ sub-areas. It does not consistently follow through on its strategic focus of prioritising problems with judicial independence and non-implementation of judgments of the Court (Article 260 TFEU).** More generally, **the study recommends that the Commission follows up on its declared**

<sup>1</sup> Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2024/755914/IPOL\\_STU\(2024\)755914\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2024/755914/IPOL_STU(2024)755914_EN.pdf)

<sup>2</sup> 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>.

<sup>3</sup> European Commission (2022) Communication from the Commission on "Enforcing EU law for a Europe that delivers". COM(2022)518.



**priorities and adopts a stronger enforcement approach.** It also calls on the Commission to provide **more transparent information about the state of play of infringement actions**, distinguishing different stages in the same file and clarifying the timeline.

Secondly, the Commission claims that its decision-making on when and how to enforce EU law depends on the **preliminary reference procedure** (Article 267 TFEU). The study reveals that the **practice of national judges using this possibility in the AFSJ is 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**. Given that this points to uneven knowledge about AFSJ-law across the EU, it also suggests that decisions on EU funding regarding **judicial training on AFSJ-law** are made based on this. More generally, it is also recommended that the Commission **publishes all its Court submissions in preliminary ruling procedures**. This would facilitate transparent discussion on, and political oversight over, the Commission’s positions on substantive issues across the AFSJ.

Thirdly, the study analyses the application of **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, Rule of Law Conditionality Regulation and Recovery and Resilience Facility Regulation**. The analysis reveals that different AFSJ-specific EU funds are subject to **different legal regimes (see Table 1 below)**. 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 the question of when it is (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 **clarifies these elements** when evaluating the **Rule of Law Conditionality Regulation**.

Fourthly, the study highlights **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. Even if these mechanisms explicate being without prejudice to Article 258 TFEU, it is **unclear whether this facilitates or delays 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. More generally, the Commission should explain how it can ensure that its different tasks are **combinable** under “enforcement 2.0”, or **whether it should separate its decision-making about launching infringement actions from its executive and managerial roles**.

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**. Parliament has greater leverage over **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.**

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

Area	HOME Funds			JUST funds		Various, including AFSJ
EU Funds	Internal Security Fund (ISF)	Asylum Migration Integration Fund (AMIF)	Integrated Border Management Fund (BMVI)	Citizens Equality and Rights 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					

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