

The rise and fall of the *EU Pilot* – an instrument for cooperation and dialogue¹

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Abstract

The aim of this article is to answer the question: why the *EU Pilot* (the European Commission's platform for eliminating infringements of EU law and preceding the procedure under Article 258 TFEU) has been reduced year by year by 77% fewer newly opened cases, while its effectiveness has remained consistently above 70%? By means of an analysis of relevant documents and a quantitative study of statistical data, the author of the article considers the issues of the platform's effectiveness, its presumed nature, the timeliness of responses, as well as the Commission's new policy towards infringements of states and the results of the European Ombudsman's inquiries into cases concerning the Commission's use of the platform *EU Pilot*.

Keywords: *EU Pilot*, infringement procedure, European Commission, enforcement, compliance

Wzlot i upadek platformy *EU Pilot* – instrumentu współpracy i dialogu

Streszczenie

Celem artykułu jest odpowiedź na pytanie, dlaczego *EU Pilot* (platforma Komisji Europejskiej służąca usuwaniu naruszeń prawa UE i poprzedzająca procedurę z art. 258 TFUE) została z roku na rok zredukowana o 77% mniej nowo-otwartych spraw, podczas gdy jej skuteczność utrzymywała się niezmiennie na poziomie powyżej 70%. Za pomocą analizy właściwych dokumentów oraz badania ilościowego danych statystycznych, autorka rozważa kwestie skuteczności platformy, jej domniemanego charakteru, czasowości odpowiedzi, jak również rozpatruje nową politykę Komisji wobec naruszeń państw oraz analizuje wyniki dochodzeń Europejskiego Ombudsmana w sprawach dotyczących stosowania przez Komisję platformy *EU Pilot*.

Słowa kluczowe: *EU Pilot*, skarga o naruszenie traktatów, Komisja Europejska, egzekwowanie prawa

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The *EU Pilot* is an “instrument for cooperation and dialogue” created by the European Commission for resolving issues of state non-compliance in the European Union (EU), existing outside or besides the infringement procedure under Article 258 TFUE (see: European Commission 2022b: p. 18). It was launched in 2008 as a pilot programme and, after some substantial improvements to its operation and scope, by mid-2012 it became the obligatory compliance measure preceding the Treaty infringement procedure by default, but with some exceptions (European Commission 2012b: p. 2). At its peak in 2013, the Commission was very satisfied with its resolution rate staying above 70%, however, since then, the amount of newly-opened files at the *EU Pilot* has been steadily dropping. In 2016, the Commission announced that it was moving away from its widespread reliance on the *EU Pilot* (European Commission 2016b: p. 10–20) and a year later it initiated 77% fewer cases at the *EU Pilot* than the year before, despite its success rate still remaining above 70% (European Commission 2017). From 2018 onwards, the Commission maintained the practice of opening only a limited number of files at the *EU Pilot*.

The aim of this article is to answer the question: why the Commission has been moving away from the *EU Pilot*, when it was satisfied with its operation and success rate? The answer to this question will be sought by examining the relevant documents such as communications, reports and complaints, as well as by means of quantitative analysis of the data from *EU Pilot*. The *EU Pilot* generates little (if any) interest in the academia, and for that reason this article is based almost entirely on the legal and quantitative sources.

The birth and evolution of the *EU Pilot*

The Commission launched the *EU Pilot* in 2008 with 15 volunteering Member States (European Commission 2010a: p. 2). It was devised as an online platform for dealing with issues that require the “clarification of the factual or legal position” through the establishment of national contact points and providing “more rapid answers to citizens and businesses and solutions to problems, including correction of infringements” (European Commission 2007: p. 7–8). In its original version, the Commission’s role was limited only to launching the *EU Pilot*, while subsequent interactions with national officials were to be carried out by complainants themselves, and only the final resolution communicated back to the Commission (European Commission 2007: p. 7).

In its first *EU Pilot Evaluation Report* (European Commission 2010a) a little less than two years after the *EU Pilot*’s commencement, the Commission ambiguously concluded that “this method of communication ha[d] not proved appropriate for all files” (European Commission 2010b: p. 8). The Commission was overall satisfied with the *EU Pilot*, claiming that it allowed for early resolution of compliance issues and, alternatively, prepared good ground for infringement proceedings, considering it as “a very effective complement to the range of means dedicated to ensuring the application of EU law” (European Commission 2010c: p. 7). Nonetheless, it did revise the operation of

the *EU Pilot* by introducing the possibility that, if a Member State felt it appropriate, it could communicate its response to the Commission, which would further it to the complainant, as well as provide both parties with its own evaluation of the response. At the same time, the Commission expanded the *EU Pilot*'s scope of application by including not only complaints but also own-initiative cases (European Commission 2010b: p. 8). This was when the Commission shifted the order of procedures, underlining the priority of the *EU Pilot* before the infringement proceedings under Article 258 TFEU (European Commission 2011a: p. 8).

Such transformation of the *EU Pilot* proved successful, in the Commission's view, and a year later (in 2011) in its *Second Evaluation Report on EU Pilot* (European Commission 2011b), it switched the *EU Pilot*'s optional nature into obligatory, making its application a "general rule" whenever there might be recourse to Article 258 TFEU (European Commission 2011b: p. 2, 5). By 2012, the Commission changed the way it talked of the infringement procedure, underlining how it first cooperated in a partnership with the Member States to resolve compliance issues and how Article 258 TFEU was a possibility only if those efforts failed (European Commission 2012b: p. 2). It also progressively extended the use of the *EU Pilot* to other members and, by mid-2012, all EU Member States participated in the new measure (European Commission 2013: p. 7). From then on, whenever an issue concerning state non-compliance arose, the relevant Commission department sent a request to the Member State for clarification and a solution to the presented problem. The competent authority had 10 weeks to respond and suggest a solution, and the Commission had another 10 weeks to assess that response. It could close the case, when the reply was satisfactory, ask for further information or launch the infringement procedure (European Commission 2011b: p. 3, 2010b: p. 4–7). The Commission was very specific about its discretionary power to initiate proceedings, when the *EU Pilot* failed to provide a result. In *Monitoring the application of Union law 2014 Annual Report* the Commission explicitly stated: "If no solution is found, the Commission pursues the bilateral discussion and may launch formal infringement proceedings" (European Commission 2015: p. 5). Consequently, the *EU Pilot* did not prevent the Commission from resorting to negotiations or other compliance measures (Ballesteros et al. 2013: p. 19).

Therefore, the *EU Pilot* became the EU-wide enforcement instrument that preceded infringement proceedings by default. Its main objective was voluntary compliance by means of "bilateral dialogue" obtained quickly² and without recourse to Article 258 TFEU (European Commission 2011b: p. 3). It applied to all problems concerning state non-compliance with EU law with the exclusion of non-communication cases and failures to respect judgments of the Court of Justice of the EU (CJEU), as well as urgent instances and those, where an overriding interest required an immediate launch of the infringement procedure (European Commission 2011b: p. 2; European Commission 2010b: p. 8–9). Its success rate was spectacular. At its peak in 2013, out of

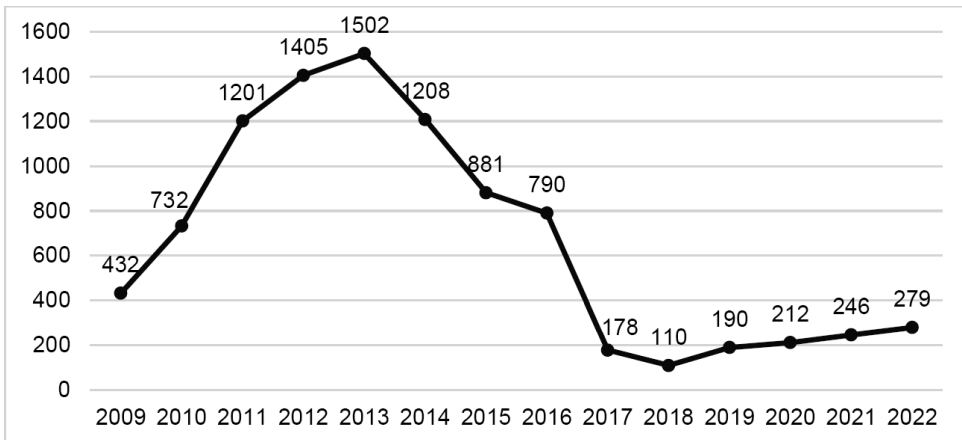
² Within 12 months from the registration or creation of the file.

1330 processed files, 945 were closed with a “satisfactory response” from the Member States, and only 385 files were proceeded to the infringement procedure, which placed its resolution rate at 71% (European Commission 2014: p. 9–10).

The downfall of the *EU Pilot*

As visible in *Figure 1*, after the peak in 2013, the amount of files at the *EU Pilot* started dropping. In 2014 the Commission registered 19,5% fewer cases. In 2015 that amount decreased by another 27% and in 2016 by another 10%. Neither of the Commission’s reports on monitoring for years 2014 and 2015 presented an explanation for this downward trend, and the Commission remained satisfied with the *EU Pilot*’s success rate of 75% for years 2014 and 2015. Only the Commission’s report for 2016 stated that the *EU Pilot* was not supposed to add a “lengthy step to the infringement process” (European Commission 2017: p. 20).

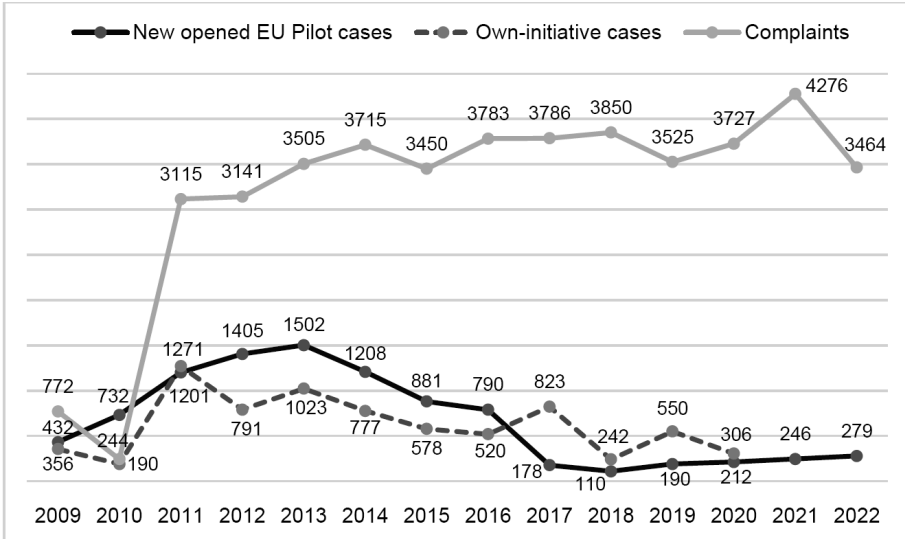
Figure 1: The number of files at the *EU Pilot* opened each year.



Source: European Commission 2010c, 2011a, 2012b, 2013, 2014, 2015, 2016a, 2017, 2018, 2019, 2020a, 2021, 2022a, 2023.

The turning point came in 2017, when the amount of new files at the *EU Pilot* decreased by a staggering 77%. In the report from that year the Commission said that the *EU Pilot* was no longer the default mechanism to engage in dialogue with the Member States on alleged breaches of EU law (European Commission 2018: p. 5). Year 2018 registered a further drop by 38% compared to the previous year. From 2019 onwards there was a slight increase each year, but the overall number of newly opened files at the *EU Pilot* remained nonetheless visibly low. As a result, over the course of nine years from its peak in 2013 to 2022, the number of newly opened files at the *EU Pilot* decreased by 81% despite its success rate staying almost uninterruptedly above 70%.

Figure 2: The number of newly opened EU Pilot files per year compared to the number of newly opened own-initiative cases and new complaints registered.³



Source: European Commission 2010c, 2011a, 2012b, 2013, 2014, 2015, 2016a, 2017, 2018, 2019, 2020a, 2021, 2022a, 2023.

Where did the decrease in EU Pilot files come from? *Figure 2* demonstrates that it has been partially paralleled by the decrease in the Commission’s own-initiative cases, although not so radically. Would that mean that the Member States had become better at complying with EU law, and the Commission no longer had to pursue them as vigorously? Firstly, complaints did not mirror this downward trend. Secondly, if we assumed that the number of own-initiative cases could be somehow reflective of general trends in state non-compliance (since complaints in the majority of cases do not concern factual violations of EU law⁴), then it would suggest that Member States’ non-compliance decreased in years 2013–2019 by 46%. It is hard to imagine that this could be the truth. The downward trend in the amount of files at the *EU Pilot* (as well as own-initiative cases) was rather due to political decisions.

Efficiency

The beginning of the *EU Pilot*’s downfall coincided with the nomination of the Juncker Commission in 2014 and was accompanied by a general shift in the enforcement policy

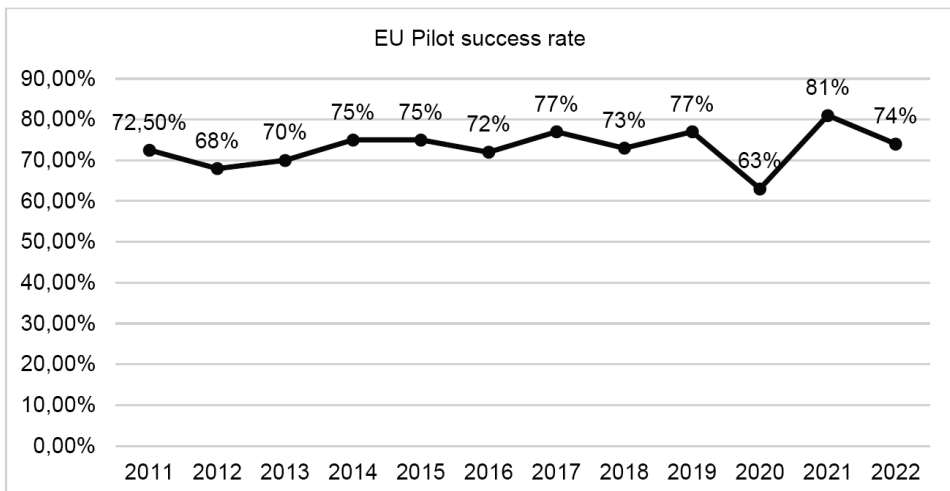
³ *Figure 2* does not include non-communication and Article 260(2)(3) TFUE cases as those are excluded from the scope of the *EU Pilot*. Own-initiative cases and complaints can, on the other hand, be subjected to the *EU Pilot*, indicating how many potential violations could warrant the involvement of that instrument. From 2021 onwards the Commission has no longer been reporting on how many of the opened cases were own-initiative.

⁴ For example, in 2019 out of 3813 handled complaints, 3663 were closed, because the EU law wasn’t breached (2712), correspondence did not qualify as a complaint (829), complaints were withdrawn (112) or transferred to other redress mechanisms such as SOLVIT (10). As a result, only 150 complaints were pursued further by means of the *EU Pilot* or the infringement procedure (European Commission 2020a: p. 15–16).

elaborated in the communication entitled *EU law: Better Results through Better Application* (European Commission 2016b). There, the Juncker Commission announced that, on the one hand, state compliance with EU law was vital for the general interest of the EU, and the process of enforcement was as important as decision-making. This meant that the EU needed “a robust, efficient and effective enforcement system” (European Commission 2016b: p. 1). On the other hand, the Commission was adopting “a more strategic and efficient approach to enforcement in terms of the handling of infringements” (European Commission 2016b: p. 5). Specifically, with respect to the *EU Pilot*, this meant that: “Infringements must be dealt with promptly. The Commission and the Member States need to proceed expeditiously in investigating breaches of the law. The structured problem-solving dialogue between the Commission and the Member States, known as *EU Pilot*, was set up to quickly resolve potential breaches of EU law at an early stage in appropriate cases. It is not intended to add a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State. Therefore, the Commission will launch infringement procedures without relying on the *EU Pilot* problem-solving mechanism, unless recourse to *EU Pilot* is seen as useful in a given case” (European Commission 2016b: p. 3).

What stands out in the above citation is the Commission’s focus on efficiency. This is the need to expeditiously investigate breaches of EU law, to resolve them quickly and refrain from adding another lengthy step to the infringement procedure. Where did this concern for efficiency come from?

Figure 3: The percentage rate of EU Pilot files closed with a satisfactory reply from a Member State.⁵



Source: European Commission 2010c, 2011a, 2012b, 2013, 2014, 2015, 2016a, 2017, 2018, 2019, 2020a, 2021, 2022a, 2023.

⁵ Figure 3 includes data only from year 2011 onwards, when the Commission’s reports on monitoring began detailing the success rate of the *EU Pilot*.

Looking at the statistics of the Commission's success rate depicted in *Figure 3*, it is visible that the *EU Pilot* was quite successful in years 2011–2016 leading up to the shift in policy with an average rate of 72% of cases closed with a satisfactory reply from a Member State. The Juncker Commission's problem could have then concerned the remaining 28% of cases where the *EU Pilot*, having failed to bring compliance, had indeed added an additional step to the infringement procedure, which has never been particularly short. It could be said that in those 28% of cases at the *EU Pilot* the Commission had incorrectly estimated the need for the informal, conciliatory measure. Instead of launching the *EU Pilot* by default, it should have transferred those cases directly to the infringement procedure. Was then the problem with the default nature of the *EU Pilot*?

The very fact that the Juncker Commission removed its default nature suggests as much. However, how 'default' was the *EU Pilot* really? Throughout the course of its existence, non-transposition cases, as well as failures to comply with the CJEU judgments, have correctly remained outside its scope, but these weren't the only declared exceptions to the *EU Pilot's* application. According to the Commission, with respect to all other types of infringements, urgency or overriding interest also justified the immediate launch of the infringement procedure. Did the Commission make such exceptions in its practice? In its annual reports on monitoring the application of EU law, it regularly mentioned that possibility, but the provided data suggests that between mid-2012 and 2016 all of its own-initiative cases were subjected to the *EU Pilot*.⁶ The same would seem to concern complaints withstanding initial scrutiny, but the Commission's reports are somewhat inconsistent about it.⁷

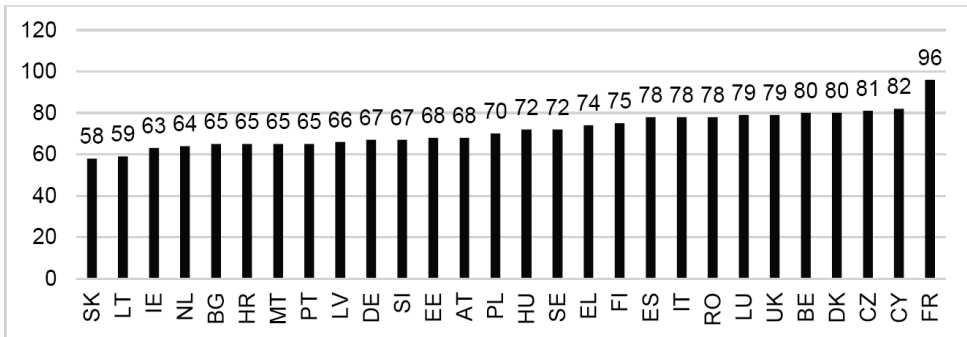
If, however, the Commission had indeed been utilising the *EU Pilot* in all eligible but not necessarily warranting cases, then it could be said that it had taken the concept of a default measure a little too literally, and a change in policy was necessary to bring more flexibility to its application. After all, it could be expected that at least some of the breaches subjected to the *EU Pilot* had either been serious or urgent enough to require immediate action by automatically initiating the procedure under Article 258 TFEU (such as in the environmental sector, where some infringements lead to irreversible consequences). However, aside from gaining access to the Commission's internal files, there is no way of verifying whether the data provided in the reports is complete, and how many of cases at the *EU Pilot* had to do with urgent or serious infringements warranting an exclusion from its scope. The shift came only with the change in policy, where – from 2017 onwards – the Commission began distinguishing between breaches eligible for the *EU Pilot* and those necessitating automatic launch of the infringement procedure.

⁶ In the reports for years 2013–2016, where own-initiative cases were discussed, the Commission never mentioned that any of them had indeed led to the immediate launch of the infringement procedure, only ever talking about the numbers, which opened investigations at the *EU Pilot* (European Commission 2016a: p. 17). The shift is visible with the report from 2017 onwards, where the Commission distinguished between own-initiative cases eligible for the *EU Pilot* and Article 258 TFEU.

⁷ In its report for 2015, the Commission suggests that all complaints which fulfilled the conditions (i.e. EU law breached, formal requirements met, etc.) were subjected to the *EU Pilot*, but this amount (462) does not match the number of new *EU Pilot* files triggered that year by complainants. The observed difference could, however, be explained by delays in the opening *EU Pilot* files (European Commission 2016a: p. 18–20).

It should be asked: whether the aforementioned average rate of failed cases at the *EU Pilot* (28%) justified such a considerable decrease in its usage from one year to the next by as much as 77%? In other words, if the Juncker Commission's problem with the *EU Pilot* stemmed from a too literal reading of its default nature, shouldn't it have decreased the application of the *EU Pilot* only by those infringements, which tended to fail under the informal measure and which amounted to only 28%? Looking at the provided data, of all infringements kept out of the *EU Pilot* in 2017 (77% of EU Pilot files from the previous year) approximately more than half had been likely to end with a satisfactory solution in the *EU Pilot*. Why then did the Juncker Commission choose so holistically to limit its reliance on the *EU Pilot* for efficiency's sake if only 28% of EU Pilot cases had been inefficient, requiring follow-up in the form of the infringement procedure?

Figure 4: Member States' average response time (in days) to EU Pilot inquiries in years 2014–2016, the deadline being 70 days.



Source: European Commission 2015, 2016a, 2017.

The answer may lie in the timeliness of the *EU Pilot*, which was expected to bring rapid solutions within the timeframe of one year. The application of this deadline is, however, difficult to assess, because the type of data presented by the Commission in its annual reports on monitoring is not uniform across the years of the *EU Pilot's* operation. For example, data on the Member States' response time to the Commission's inquiries under the *EU Pilot* is available only for three years: 2014–2016. However, it can be deduced from this data depicted in *Figure 4* that the time limit of ten weeks (or, otherwise, 70 days, during which the Member States were expected to respond to the Commission's inquiries) was respected by exactly 50% of the Member States, with Slovakia (58 days) and Lithuania (59) sporting the shortest response time.

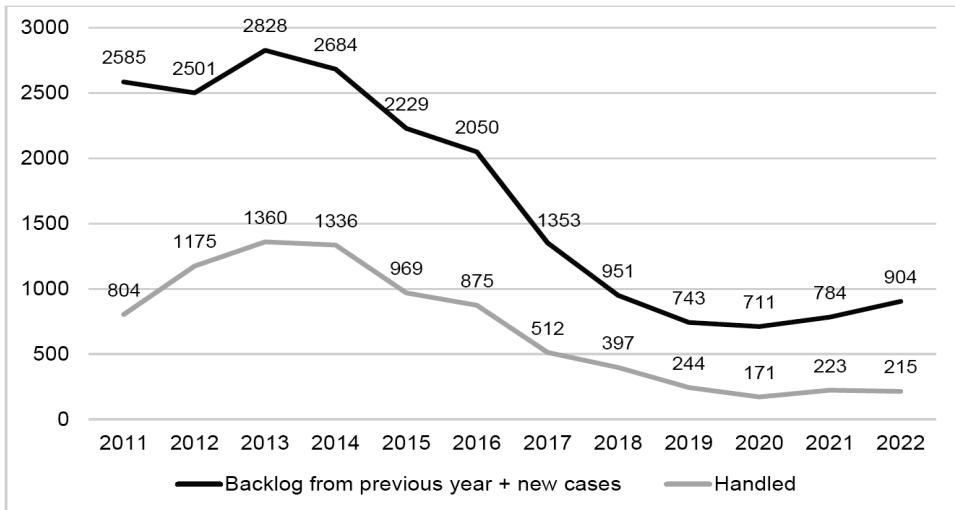
The fact that a half of the Member States did not on average fit within the time limit does not necessarily make the *EU Pilot* an inefficient measure. *Figure 4* demonstrates that the majority of negligent Member States were delayed no more than under ten days. This does not seem a severe postponement, with the exception of France, which had achieved the average rate of 96 days, exceeding the set deadline by almost four weeks. The average response rate for all Member States was 72 days, which was barely more

than the expected time limit. As a result, it can be said that the states' delays, although impacting the *EU Pilot's* efficiency, were not of a level to justify such a wholesome decrease in the *EU Pilot's* application.

The efficiency of the *EU Pilot* cannot be assessed by looking only at its general success rate and Member States' response time. The Commission's own respect for time limits is also important. Interestingly, the Commission has never published data on its own response times in assessing state replies, which should equally fit within the 70 days benchmark. However, some information on its performance can be glimpsed from the data it provided with respect to the ratio of handled EU files.

Figure 5 demonstrates, on the one hand, the amount of files at the *EU Pilot*, which the Commission had to process each year, including the backlog from the previous year and, on the other hand, the number of files the Commission handled each year. What is visible in Figure 5, is that the Commission was able to close only a percent of awaiting cases. While this was obviously impacted by the Member States' aforementioned (dis) respect to the 70 days' benchmark, their delays cannot account in their entirety for such a large disparity between opened and closed cases. It is possible that the Commission itself was unable to process files at the *EU Pilot* promptly, and the ratio between awaiting and handled cases decreased only after the Commission had considerably reduced the amount of newly opened files at the *EU Pilot* in 2017.

Figure 5: Comparison between the number of EU Pilot files handled each year by the Commission and the number of files needing handling that year (including backlog from previous years and newly opened files).⁸



Source: European Commission 2012b, 2013, 2014, 2015, 2016a, 2017, 2018, 2019, 2020a, 2021, 2022a, 2023.

⁸ Commission's reports on monitoring for years before 2011 do not provide the relevant data.

The Commission's reports – aside from showing the above build-up of the EU Pilot files each year – do not contain any other data, which could allow to understand what was truly happening with the *EU Pilot* and how efficient it really was or was not. If anything, the Commission seemed to be satisfied with its success rate, but its selective and deficient method of reporting does not allow to draw any more conclusions, not even with respect to the actual length of the investigations at the *EU Pilot*. We know that 50% of the Member States were delayed in their replies, but we can only guess how late was the Commission. Finally, what also cannot be interpreted from the Commission's reports, but which would have an impact on the *EU Pilot's* efficiency, is the comprehensibility of state replies, quality of achieved solutions or the ratio of non-infringements in the *EU Pilot's* success rate. However, answers to these questions can be glimpsed from complaints to the European Ombudsman and his own investigations.

Efficiency of the *EU Pilot* according to the European Ombudsman

During the study on effectiveness of the Commission's enforcement tools (commissioned by the European Parliament in 2013) there were conducted a series of interviews with state authorities and stakeholders regarding the functioning of the *EU Pilot*. National officials enjoyed the clarity and predictability of the *EU Pilot's* rules and considered it as a good incentive for resolving non-compliance issues, because it created a partnership between the state and the Commission without the element of coercion that is present in the infringement procedure (Ballesteros et al. 2013: p. 70–71). Stakeholders, *inter alia*, questioned the Commission's practice of measuring the success rate of the *EU Pilot* according to the number of closed cases and pointed to formalistic, shallow justifications of "satisfactory" closures (Ballesteros et al. 2013: p. 71), which was strengthened by the Commission's nomenclature, where it talked of "acceptable" state responses that sufficed to close cases (European Commission 2011b: p. 3). Similarly, the European Parliament itself doubted whether the high success rate was, in fact, the result of increased state cooperation or rather compromises (European Parliament 2015).

In 2011 the European Ombudsman (EO) launched an own-initiative inquiry (see: European Ombudsman 2012) in order to encourage the Commission to include the *EU Pilot* in updating communication on the handling of complaints (see: European Commission 2002; updated communication – European Commission 2012a). In 2016 the Ombudsman initiated a strategic inquiry (see: European Ombudsman 2017) to investigate whether there were underlying systemic problems in the Commission's handling of complainants under the *EU Pilot*. It is from this investigation that we can learn the most about the Commission's practice with the *EU Pilot*.

The European Ombudsman reviewed many EU Pilot files during its strategic inquiry and challenged the Commission on the timeliness of its conduct. It discovered that in years 2014–2015 only 15% of investigations at the *EU Pilot* were completed within the expected one-year deadline. Furthermore, at the end of 2015, as many as 21% of pending cases had remained open for more than three years. The EO also uncovered that, while

the Member States' average response time was 72 days, the Commission's response time was 91 days, which meant that it was on average three weeks delayed in assessing state replies. According to the Ombudsman, this meant that respecting deadlines by the Commission in the *EU Pilot* was a "serious challenge" (European Ombudsman 2017). The Commission was to be "blamed", after all.

The uncovered numbers are more indicative of the *EU Pilot's* efficiency problems than any information contained in the Commission's reports, and it is hard to resist the feeling that the Commission may have intentionally refrained from publishing information, which could have put the *EU Pilot* in bad light. This, however, does not mean that the Commission bears the sole responsibility for the *EU Pilot's* impaired efficiency. Yes, there were cases of unnecessarily excessive delays such as when it had failed to take action within 11 months from the registration of the complaint (European Ombudsman 2013b) and, after being questioned by the EO, was unable to explain why. However, some delays in the *EU Pilot* were due to reasons beyond the Commission's control, such as when the end of an infringement required infrastructure or an amendment to national law. Delays could also be impacted by organisational issues such as heavy workload or translations, states' incomplete or unsatisfactory replies, the volume of submitted files, etc. (European Ombudsman 2017: par. 8–10). The final result was, however, such that in the opinion of the Ombudsman – whether these delays were justified or not – the *EU Pilot* was not fulfilling its goal of finding "rapid and better solutions for infringement complaints" (European Ombudsman 2017: par. 10). In other words, it was not efficient enough for solving compliance problems. It would seem that it was in reaction to that investigation that the Commission decided to move away from its widespread use of the *EU Pilot* (European Ombudsman 2017: par. 12).

More than efficiency

The *EU Pilot* had been created at the peak of the Commission's criticism coming from stakeholders (Judgment of the Court 1999, 2007), the European Ombudsman (European Ombudsman 2002, 1997, 1996) and the Academia (Smith 2010; Krämer 2009; Harlow, Rawlings 2006; Mastroianni 1995). This criticism was focused *inter alia* on the Commission's insufficient respect for complainants' guarantees, the confidentiality of its dialogue with the Member States and the prioritisation of infringements, which brought suspicions of overlooked or dismissed violations, all in the context of such principles as transparency, accountability and good governance. Therefore, it could be postulated that the *EU Pilot* had been meant to be a response, even if only partial, to that criticism within the confines of the Commission's limited time and resources. As an informal and inexpensive but also structured measure, which avoided costly and lengthy infringement proceedings, the *EU Pilot* had the potential of ensuring transparency and respect for complainants' guarantees while allowing to address a larger number of complaints and responding to accusations of disregarded or dismissed infractions. If looked from the perspective of that criticism and taking into account its original shape from 2008, it could

be postulated that the *EU Pilot's* primary goal had been to resolve problems of citizens and business, not to precede the infringement procedure or become a vehicle for the Commission's own-initiative cases.

Of course, the *EU Pilot's* original design from 2008 needed to be improved, but losing sight of that initial goal and expanding the scope of the *EU Pilot* could have overloaded the system. By referring to the *EU Pilot* whenever it was possible, it may have been harder for the Commission to ensure not only the timely resolution of cases, but also respect for time- and resource-consuming complainants' rights. This is visible in types of issues raised by stakeholders. They brought cases before the General Court seeking to challenge the Commission's decisions on closures in the *EU Pilot* (Order of the Court 2014) and complained to the European Ombudsman raising such issues as negligent handling of their files (European Ombudsman 2014, 2015b), excessive delays (European Ombudsman 2013a,b) or failures to properly justify decisions (European Ombudsman 2015a). This fact suggests that problems, which the Commission had experienced in the handling of complaints before the era of the *EU Pilot*, instead of being alleviated, were simply transported to the new measure.

As a result, new enforcement policy was focused on prioritisation, and it shifted the burden of enforcement onto individuals and national courts (European Commission 2016b: p. 2–4, 7–8), while the Commission distinguished between cases on the basis of the added value that the infringement procedure could achieve (European Commission 2017). In other words, having failed to address such issues as complainants' rights with the *EU Pilot*, the Commission decided to shift it to the sidelines and return with double force to its old habits, such as prioritisation and lesser attention to complaints.

Was that a bad decision? Not necessarily as the infringement procedure had never been intended to be a vehicle for individual grievances (Borzák 2011). In the EU of 27 Member States and 448 million population, it can be questioned whether the European Commission – with its multiple functions and limited resources, staff and time – should be expected to address every breach of EU law, irrespective of its severity and scope. Its growing set of compliance tools demonstrates its desire to tackle as many issues as possible, and this is commendable, but there is a limit to how well this complicated machinery can function with only one institution at its helm. In that regard, it is possible that the *EU Pilot* was flawed at its core by trying to tackle all noncompliance issues arriving at the Commission's registry, and the shift to a more focused policy may have been a reasonable choice. The difference is that the Commission could have been more open about its own failures in the handling of the files at the *EU Pilot*. Critics expecting it to be a vehicle for individual complaints could then have better understood the challenges that the Commission faced in its enforcement function.

Since 2017, the Commission has only minimally increased its reliance on the *EU Pilot* (see: *Figure 1*), but it has also published two more communications (European Commission: 2020b, 2022b), where it clarified the rules on the *EU Pilot's* application. The Commission now resorts to the *EU Pilot* in two instances: "where it is likely to lead to swifter compliance than a formal infringement procedure," such as when the issue is of a technical nature or

“where the Commission wishes to collect factual and legal information needed to carry out its assessment” (European Commission 2022b: p. 18).

The first circumstance proves that the Commission’s main priority with the *EU Pilot* remains its efficiency. The von der Leyen’s Commission has maintained the objectives from 2016. As well it should have. The *EU Pilot* had never been intended to stretch endlessly and, as long as the Commission can guarantee its own respect for time limits, the *EU Pilot* can achieve its results. The second circumstance may seem new, but it ties to one of the original visions of the *EU Pilot* as a platform to clarify “the factual or legal position” (European Commission 2007: p. 7–8). In other words, it is meant to replace the process of information gathering, which often involves first contacts with the Member State, but which used to remain outside any formal constraints. The *EU Pilot* can give it a degree of transparency, structure and deadlines. This choice can be commended too.

The communication *Enforcing EU law for a Europe that delivers* (European Commission 2022b) can be questioned for its enumeration of instances, where the *EU Pilot* will not be used. For example: “where the breach is well-evidenced, obvious or self-acknowledged,” or when the issue at stake is sensitive (European Commission 2022b: p. 18). While it can be recognised that sensitive cases are unlikely to lead to swift solutions, it is surprising that “well evidenced, obvious or self-acknowledged” violations are excluded from the *EU Pilot*. If anything, it would seem that specifically such cases have higher chances of evoking state cooperation and achieving swifter compliance than complicated, unobvious or denied violations that could use the European Court of Justice to sort them out.

The changes in the Commission’s policy concerning the *EU Pilot* were welcome, but they have not yet resolved all the problems that the Commission encounters in its practice, as is visible in the latest complaints to the European Ombudsman. While nowadays many of those complaints end with the EO’s finding of no maladministration (European Ombudsman 2023a,b; 2022a; 2021) as they often concern the Commission’s justified refusals to give public access to documents concerning state infringements,⁹ the problem of delays can still be observed, especially in the handling of such requests for access to documents. The Commission has maximum 30 working days to handle confirmatory applications, but in three requests for public access to documents concerning the *EU Pilot* procedures related to procurements in the defence sector, the Commission adopted its replies as many as 109, 118 and 243 working days after the expiry of the deadline (European Ombudsman 2023c: par. 49). Similarly, in another case, where it took the Commission 10 months to issue the final decision, the Ombudsman stated that “the Commission’s performance in this case [fell] short of the standards that citizens are entitled to expect from a modern, citizen-friendly, and transparent administration” (European Ombudsman 2022b: par. 19). Interestingly, in a case where the Commission took nine years to conduct an investigation into an infringement complaint against the Netherlands (including the *EU Pilot* and the infringement procedure), the

⁹ The same can be observed in the case law. In years 2017–2022 the General Court gave four judgments (plus one appeal at CJEU) with relation to access to documents in the *EU Pilot* and in each case the application was dismissed: Judgment of the Court 2023; 2018a,b,c; Order of the Court 2019.

Ombudsman found no undue delay due to the "Commission's extensive information gathering and its analysis, and the extent of its engagement with the Dutch authorities and the complainant" (European Ombudsman 2020).

Overall, however, the problem of delays exists. In 2022 the Ombudsman opened an own-initiative inquiry regarding the time taken by the European Commission to deal with requests for public access to documents (European Ombudsman 2023d). In the course of its inquiry the Ombudsman discovered that in 2021 the Commission was delayed with respect to initial requests only in 16% of cases, and in 5% the delay took more than 60 days. Seeing the sheer number of requests submitted that year (8420), the timeliness of the Commission's responses does not look bad. The situation gets worse with confirmatory applications (355 cases in 2021). Here, as many 85% of decisions were delayed, and 60% took more than 60 working days (European Ombudsman 2023d: par. 8–10). This fact led the Ombudsman to the finding of maladministration and to a recommendation on how to correct the situation.

Interestingly, the delays predominantly concern nowadays issues of access to documentation, which indicates that the *EU Pilot's* operation no longer generates other problems. For example, in years 2019–2022, there were nine decisions made by the Ombudsman regarding the Commission's handling of complaints and/or infringements, and they were decided in favour of the Commission. The only cases that the Commission lost in those years concerned either aforementioned delays (European Ombudsman 2022b; 2019b) or failure to disclose information (European Ombudsman 2019a). In other words, even when complainants believed that they had reasons to complain about the Commission's handling of the *EU Pilot*, they were ultimately proven wrong, because the Ombudsman found the Commission's practice justified. This, in turn, suggests that the Commission's changes to the *EU Pilot* have indeed improved its operation and efficiency, aside from the never-ending issue of delays. However, even the delays have to do nowadays mostly with requests for documentation and not the Commission's management of the *EU Pilot* itself as used to be the case before.

Conclusions

Looking at the *EU Pilot's* evolution, it can be said that the Commission made some mistakes. It became too engrossed in the *EU Pilot's* success and overreached by ascribing it the default nature, which had the unintended result of overburdening it. As a result, the Commission failed to guarantee the measure's successful operation and had to reshape it once again in order to bring greater efficiency to its enforcement practice. However, this miscalculation was not just the Commission's fault. When analysing its enforcement practice, we should remember that the number of breaches it has to handle each year far exceeds its capacity, and it is in constant demand for finding new ways of managing its workload. More than that, the Commission is trapped between the objective of ensuring formal compliance and the need to achieve it as swiftly and easily as possible, preferably in cooperation with the Member States, which don't always reciprocate that sentiment

and seek to make the Commission's life difficult, all under the watchful eye of complainants who never cease expecting results.

The Commission is obviously more than aware of those difficulties. From one communication to another it expands and amends its array of supportive, preventive and monitoring tools (European Commission 2022b; 2020b) in order to decrease the number of state breaches, as well as lessen its enforcement workload. The Commission also constantly seeks to evolve and adapt its enforcement instruments to increase its own efficiency, but as we have seen in case of the *EU Pilot*, is not always immediately successful at it. That does not mean that it should not try.

Just now, the Commission is in the process of transforming SOLVIT into a default tool for single market dispute resolution with the help of the newly-established European Labour Authority (ELA) that is to assist in ensuring the enforcement of EU rules on labour mobility and social security coordination (European Commission 2020b: p. 13–14). The danger here is that the Commission might be repeating the same mistake that it had made with the *EU Pilot* by awarding SOLVIT a default nature. However, this time it may work in its favour that SOLVIT deals with only a portion of state infringements. At this point, it has also been running for a long time, and EU agency will be involved in its operation, which will hopefully lessen some of the Commission's burden. Whether it achieve its results, is yet to be seen. The lessons learnt with the *EU Pilot* should contribute to its success.

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