INTRODUCTION

Much of this volume focuses on and subjects to critical scrutiny and analysis many of the major legal instruments adopted since 1999, as well as considering associated policy plans, communications and such like. However, it is not just the final outcome of the legislation passed since 1999 that has been subject to critical scrutiny. The process of lawmaking itself has been the subject of significant discussion and critique. In particular, the exclusion of the European Parliament from co-decision in the lawmaking process was criticised as undemocratic, and has led to the exclusion and disempowerment of the Parliament during a critical time when the foundations of the EU’s new framework of migration law was being laid in the passage of a number of key Directives and Regulations. The frequency of discussion throughout the rest of this volume and in other academic analysis of instances where Parliament had proposed amendments but was unsuccessful in pressing the point home into the final legislative text bears witness to this point. The use of unanimity voting in the Council has perhaps justifiably been the

* I am pleased to acknowledge the generosity of Warwick University in granting me study leave during which this work was finally completed, and to the Centre for Migration Law at the Radboud University, Nijmegen for hosting me as a visiting researcher during that time. I am also grateful to several Commission and Parliament officials and administrators who took time to discuss some of these issues with me, both in specific interviews and more informally and spontaneously during academic conferences. Thanks to Anne Meuwese for sharing her work with me, and for providing me, as a migration scholar, with some interesting insights into the rather separate world of Impact Assessment and comments on a draft of this chapter, and to Evelien Brouwer who helpfully shared some of her expertise on the Visa Information System with me.
subject of rather more mixed views: some feeling that it has slowed progress unnecessarily and enabled a few states to hold out and impose unacceptably low minimum standards simply in order to get agreement. On the other hand, it could equally be seen as a potential safeguard to be exercised by those few states wishing to hold out against a majority but not unanimous view in favour of regrettably low standards of rights and protection for third country nationals. There are also undeniable constitutional sensitivities involved in transferring legislative power to the EU over matters of immigration and asylum to be exercised on this Qualified Majority Voting (QMV) basis. These issues have largely been addressed however and now most future decision-making\(^1\) will be on the basis of QMV and co-decision,\(^2\) and it is not the intention of this chapter to dwell on this at great length. Suffice it to say that whilst the greater involvement of Parliament certainly is, and the move to QMV may well be, changes that can be welcomed as long overdue improvements in the legislative process, it remains to be seen what, if anything, will change as a result of these altered lawmaking procedures. The completed Border Code\(^3\) and almost completed Visa Information System (VIS)\(^4\) Regulations may be encouraging early indications that Parliament is increasingly able to make some modest but significant improvements to legislation. The pending proposals on the Returns Directive,\(^5\) Visa Code Regulation\(^6\) and ‘RABITs’ (Rapid Border Intervention Teams) Regulation,\(^7\) which remain at an earlier stage of consideration, as well as the next stage of the Common European Asylum System and any of the reviews of existing legislation which may come up with proposals for

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1 The main exception being legal migration.
4 Proposal for a Regulation of the European Parliament and of the Council Concerning the Visa Information System (VIS) and the exchange of Data Between Member States on Short-Stay Visas. The latest partially accessible Council document is 11632/06 of 13 July 2006. Two later documents concerning this draft are currently not accessible on the Council document registry: docs 12190/06 and 13861/06.
amendments to the existing legislative *acquis* in the coming years, will provide further tests of whether the potential of these procedures will be borne out in practice as they work their way through the scrutiny process.

The main subject of this chapter is a somewhat different aspect of the lawmaking process. Readers of EU migration law may have noticed in the last few years the appearance of an entirely new kind of document – the ‘Impact Assessment’ accompanying draft legislative proposals and policy communications. Impact Assessment and Better Regulation are very much central to the agenda in Brussels at the present time, and are ‘buzz words’ of the moment around the corridors of the EU Institutions. Striking up a conversation with the words ‘Impact Assessment’ almost always provokes a reaction: sometimes a surprisingly strong one. The new ‘Integrated Impact Assessment’ procedure is intended to bring together a wide range of assessment variables in one single document during the early stages of legislative or policy-making process so that the final result is well informed as to the implications of the various options before any final choice is made between them. This technique, and its adoption by the Commission, has been the subject of increasing attention by academics and others since the inception of the ‘Integrated’ Impact Assessment programme from 2002, but as yet little or no

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8 The fact that an Impact Assessment has been carried out, and the reference to find the document, will be disclosed by the presence of an accompanying ‘SEC’ document. These are usually Impact Assessment documents but not always, as other Commission staff working papers also appear as SEC documents.

attention has been specifically directed to their use in the area of Freedom Security and Justice (FSJ)\textsuperscript{10} – most of the literature is either general or concerns environmental protection. This chapter is intended to begin to bridge the gap between these two disciplines by explaining what these documents are, why and how they are being produced, how they fit into the broader picture of EU lawmaking processes and of the development of EU migration law. Fundamentally, they are a tool for ‘better lawmaking’ and this chapter will provide a brief but critical introductory assessment of whether and to what extent they have achieved or are likely to achieve this aim in the context of EU migration law and policy. The chapter begins with a brief introduction to the technique of Impact Assessment and its introduction by the Commission since 2002. It identifies in outline some criteria that may be used to evaluate Impact Assessment processes and reports. It then illustrates some of these points in more detail using, amongst others, some of the migration law Impact Assessments to do so. The chapter also reflects on the concept of ‘better regulation’ – the agenda underlying the Impact Assessment programme. It considers what this might mean in the context of migration law and policy and considers what, if any, role Impact Assessments may have to play in furthering ‘better regulation’ and ‘better lawmaking’ in the field of EU migration law and policy.

THE EU’S INTEGRATED IMPACT ASSESSMENT PROCEDURE

Impact Assessments: An Introduction

\textsuperscript{10} For further rather more detailed discussion of the role of Impact Assessments in securing compliance with fundamental rights, see H Toner ‘Impact Assessments and Fundamental Rights Protection in EU Law’ (2006) 31 \textit{EL Rev} 316. Although there is clearly some significant overlap, in that securing compliance with fundamental rights is of particular importance in immigration and asylum law, that paper deals specifically with fundamental rights protection rather than migration law as such.
Many readers will not necessarily yet be fully familiar with the concept of Impact Assessment and its application in European Community law, so this introductory section gives an outline of developments so far, as of late 2006.

Impact Assessment is a mechanism whereby the fullest possible range of possible impacts of a range of proposed actions (whether building or other land use development, aid, legislation, regulation, or policy measures) may be considered during the legislative and policy development process. EU Impact Assessment has had some history in a narrower, sectoral sense, with Impact Assessments being used to examine, for example, business, or gender impact. The entire process entered a new era, however, with the initial phased development of the programme of Integrated Impact Assessments in 2002, and has continued to mature since then with an initial review and further development of the framework in 2004/5, including new guidelines for the conduct of Impact Assessments, and the full implementation of the programme in the legislative and policy drafting process from 2005. At this stage it is important to note that an Impact Assessment can now be expected for legislative proposals contained in the Work Programme, and for most significant policy communications, unless, for example, it is a Green Paper intended to be the very earliest exploratory state of policy formation opening the agenda for a wide discussion before any concrete policy proposals are developed. The programme is, therefore, extensive with each Directorate-General involved and significant numbers of Impact Assessments published each year. The Impact Assessments themselves obviously vary in details of style and content but are carried out to a common general

11 The main document setting out the aims and methods of the Commission’s Impact Assessment procedure is the Commission Communication on Impact Assessment, COM (2002) 276. It was accompanied by a ‘Handbook for Impact Assessment in the Commission’ (European Commission, 2002) which itself was accompanied by technical annexes to guide policymakers.
14 The central Commission’s Impact Assessment website can be found at the address www.ec.europa.eu/governance/impact/index_en.html, and a list of each year’s Impact Assessment work is available at www.ec.europa.eu/governance/impact/practice_en.html.
framework. They are intended to clarify the problem to be addressed, identify possible options, and to evaluate the impacts of these various options across three different categories – economic, environmental, and social. The 2002 Communication sets out the basic ‘reporting format’ covering (i) the issue/problem to be tackled; (ii) identification of the main objective(s); (iii) identification of the main possible policy options; (iv) what main impacts, both positive and negative, may be expected from pursuing each of these options; (v) how might the impacts be evaluated and monitored after implementation; (vi) stakeholder consultation; and (vii) the drafting of the legislative proposal or policy communication. The 2005 guidelines follow a very similar pattern although they include comparison of the options as step (v) and omit the final two issues of stakeholder consultation and drafting.\(^\text{15}\) As noted, there had previously been some Impact Assessment work done at EU level although split into particular sectoral schemes identifying particular types of impact (business, gender, equality, environment etc).

The aim of ‘integrating’ these impact assessments into one single document is to ensure that policymakers and legislators have the fullest possible information on all of these potential impacts in one single document and can identify cross-cutting impacts or trade-offs that may have to be made between different costs and benefits. Immediately one might think perhaps of the possible ‘trade-offs’ between minimising environmental impact versus the potentially negative economic impact on competitiveness of regulation to achieve this end, or proposed regulatory requirements suggested for the purposes of consumer protection\(^\text{16}\) or health and safety,\(^\text{17}\) which would have to be ‘traded off’ or balanced against the potential impact on businesses – often perceived in terms of negative impacts of compliance costs which may impair competitiveness. The Impact Assessment process and the resulting Impact Assessment Report

\(^\text{15}\) This however is not to say that consultation is not expected or that drafting the proposal or communication is not the culmination of the Impact Assessment process.

\(^\text{16}\) A high profile consumer issue that has arisen is the Impact Assessment on Mobile Phone roaming charges, where the intention of the Regulation is to protect consumers against what are seen as excessive charges for this ‘cross-border’ service.

\(^\text{17}\) A high profile health and safety issue – also an environmental one – that has been subject to a heavily contested Impact Assessment process is the REACH Directive on chemicals.
are prepared by the Commission, sometimes with the assistance of reports compiled by external expert policy consultant agencies. Consultation with civil society (in particular NGOs and industry as appropriate) is intended to make sure that the widest possible range of views and voices is heard at an appropriately early stage in the drafting process, and this process of consultation should comply with the Commission’s standards on consultation set out in its Communication on Consultation. The lead Directorate-General (DG) will vary with the subject-matter of the Impact Assessment, but with particularly high profile significant or ‘cross-cutting’ proposals (where significant aspects fall within areas of responsibility of different DGs), an Inter-Departmental steering group may be set up. There may indeed be some tension within the Commission if more than one DG wishes to be the ‘lead’ DG in relation to a cross-cutting proposal: this may have some significant consequences as it is to some extent inevitable that the way the problem is approached and formulated from the earliest stage may vary depending on the lead DG, and, despite inter-service consultation, this may have implications for how the Impact Assessment process proceeds. The Impact Assessment analysis and report is prepared and drafted by desk officers working on the particular dossier in question in the lead DG, but there is both a central Impact Assessment Unit (within the secretariat-general) performing a coordinating role and there are also individual officials within DGs whose role is to provide support to those writing the Impact Assessment reports.

The Impact Assessment document is not intended to be a definitive decision as to the shape or direction of policy or legislation, rather it is aimed at assisting those who make the final decisions, mainly in the Commission but also further on in the policy and legislative process. This kind of distinction is crucial to maintain the proper channels of political accountability – especially in cases in which fundamental rights are affected where it is important to have democratic legitimation of restrictive measures as well as independent judicial oversight. However, it is clear that the Impact Assessment may (indeed it usually does) identify a
“preferred” or “optimal” option or approach. It has indeed been envisaged that this preferred approach (at least in a broad general sense) may even emerge at quite an early stage and that a significant part of the process then may be refining the details of that broad preferred policy approach. The document then informs the process of legislative and policy drafting, in particular the process of drawing up Commission policy communications or proposals for legislation. It should be noted, however, that although the Impact Assessment process is to some extent meant to be a dynamic one through the policy development process, the Impact Assessment documents are published at the same time as the proposed Regulation, Directive or policy Communication, and the two are, therefore, presented externally as a single package. The Impact Assessment reports are all publicly available from the Commission document registry.

Their relevance is not, however, exhausted at this stage. It is intended that Impact Assessments should be used and even produced by other institutions. They may also be used to inform subsequent scrutiny of any legislative proposal by the Council, the European Parliament or national parliaments, and indeed by civil society, NGOs and industry and so on. The institutions have formulated a common approach to IA, and there are indications that the Parliament and Council are both becoming increasingly aware of the need to engage with Commission Impact Assessments later in the legislative process. In terms of the subsequent use of Impact Assessment during parliamentary scrutiny, the Environment Committee seems to be something of a leader on this issue, certainly the most active so far. It currently operates a framework contract which involves preparation of policy briefs providing a summary analysis/critique of the Impact Assessment documents. This kind of mechanism has some interesting potential to act as a source of counter-expertise and to ensure the Impact Assessment

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19 See the website addresses at n 14 above. Individual DGs may have individual webpages collecting together their own IA activities – see the DG FSJ page on Evaluation and Impact Assessment Activities.
20 See Meuwese (above n 9) which discusses some of these issues further and is the source of some of the references and examples that follow.
report is subjected to independent and if necessary critical analysis by suitably qualified experts, but there are obvious resource implications of rolling out this kind of approach more comprehensively. The LIBE Committee\(^{22}\) is currently working on a report on the ‘Fundamental Rights Monitoring Strategy’ Communication\(^{23}\) (which includes the use of Impact Assessments) which may address some of these issues and signal some discussion of practical steps to enhance engagement with Impact Assessments on the part of this particular Committee. This would be a welcome development both in terms of the potential for input into the work of other Committees to evaluate the adequacy of treatment of fundamental rights issues in other areas and in terms of the policy areas where it is the lead Committee including, of course, the FSJ agenda. It remains to be seen what the conclusions of this report will be. The Employment and Social Affairs Committee has also shown some interest in this issue, commissioning a report, published in January 2006,\(^{24}\) on the analysis of Social Impacts within the Commission’s Impact Assessment process in response to a perception that social impacts were under-analysed and not dealt with as well as economic impacts in the first years of the Impact Assessment programme. The Council has recently produced a document to guide working party chairs in the use of Impact Assessment reports.\(^{25}\) It should be noted, however, that there is no formal mechanism for recourse back to the Commission in the event that the Impact Assessment should prove inadequate or incomplete. The Council and Parliament are also considerably behind the Commission in production of Impact Assessments, even though the Common Approach envisages that the Parliament and Council should prepare their own Impact Assessments of substantive amendments. Precisely what this means is unclear and likely to be politicised, and may be subject to far more difficulties in relation to resources and expertise than is the case within the Commission. Also, it could be observed that if the Commission has undertaken a comprehensive Impact Assessment this may

\(^{22}\) Committee on Civil Liberties, Justice and Home Affairs.


(indeed perhaps should) already consider some of the more obvious directions which subsequent amendments might take. It should finally be noted that where Member States do retain their right to initiate legislation in the third pillar, there is no obligation to conduct an Impact Assessment when a Member State presents an initiative, although the Commission hopes that they will do so, and where the Commission presents a third pillar measure in the Work Programme, the expectation of an Impact Assessment remains. Now that the first transitional period of shared initiative has reverted to the normal position that legislative proposals in immigration and asylum law will be presented by the Commission, this is of less direct relevance for these areas, although of course the relationship between first and third pillar issues when law enforcement enters the picture remains an interesting one.26

**Impact Assessments and Better Regulation**

The impetus for the development of the Commission’s Impact Assessment programme is firmly grounded in the ‘Better Regulation’ initiative, and the drive both for better regulation and sustainability. It has been clear from the beginning that the aims of this programme are to promote ‘better’ regulation and competitiveness and also to ensure that sustainability concerns are built into the legislative and policy programmes. The process originated in commitments made by the European Council at the Laeken and Gotteborg summits, and is intended to be a key plank of the implementation of the ‘Lisbon Agenda’, responding to the challenges of globalisation and making the EU the most competitive and dynamic knowledge-driven world economy. Thus although there is, perhaps particularly now as the IA process matures, increasing awareness of and even some enthusiasm for it in some parts of the Commission, it is essentially an initiative that has its origins outside the Commission and was to some extent ‘imposed’ rather

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26 Note in the context of data protection the judgment concerning the EU-USA PNR data transfer agreement: Case C-317/04 **Parliament v Council**.
than genuinely ‘home-grown’. The aims of Impact Assessment have been described by the Commission in the following manner:

First of all it will guide and justify the choice of the right instrument at the appropriate level of intensity of European action. Secondly, it will provide the legislator with more accurate and better-structured information on the positive and negative impacts, having regard to economic, social and environmental aspects. Thirdly, it will constitute a means of selecting, during the work programming phase, the initiatives that are really necessary. ⁷⁷

Most recently, this emphasis on better regulation has been underlined by sharpening emphasis on competitiveness that is contained in IA documents in the new guidelines published in 2005, and also by the introduction of guidelines on assessing administrative costs in 2006. ⁷⁸ The next section of the chapter will consider what exactly ‘better regulation’ means and what underlies this agenda and consider whether this Impact Assessment process may have any useful role to play in promoting ‘better’ EU migration lawmaking. For the present, however, we may note that some – particularly environmental lobbyists – have criticised the ‘better regulation’ agenda for being too focused on reducing regulation, seeming to be rather too quick to equate better regulation and deregulation, at the expense of environmental protection and other similar values. Some of these commentators have suggested that the Impact Assessment process has done little to challenge this and have been disappointing in their ability to bring out clearly and effectively the benefits – especially non-monetary – of regulation that may be weighed against any costs. In particular the current effectiveness in evaluating non-monetary impacts has been questioned.

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From the environmental point of view one may, however, see the potential utility of the process – an opportunity to evaluate proposed regulatory mechanisms or environmental standards that might place burdens on businesses as well as having potential environmental costs or benefits of regulation or non-regulation.\textsuperscript{29} One of the critical questions from the point of view of migration law is whether this tool of Impact Assessment, with its origins in evaluating proposed business regulation and environmental concerns, has any useful role to play in the rather different area of migration law and policy.

**The Concept of ‘Better Regulation’**

The concept of better regulation is intimately connected with Impact Assessments, as the fundamental premise behind the Impact Assessment process is that it is part of a strategy that should lead to ‘better regulation’. What then does this concept mean generally in EU law – particularly from the point of view of the institutions (without losing sight of the fact that regulatory or legislative quality are not terms that are free from doubt or dispute and that different observers may have different perspectives on indicators of quality)?\textsuperscript{30} If we have little understanding of what is meant by ‘better regulation’ or ‘better lawmaking’ then we are not in a good position to assess whether Impact Assessments are leading to this. In order to understand this it may be helpful to turn to the 2001 White Paper on Governance\textsuperscript{31} and the report of the working group on ‘Better Regulation’.\textsuperscript{32} The White Paper suggests five principles of ‘good governance’: Openness, Participation, Accountability, Effectiveness, and Coherence, underpinned by another two, Proportionality and Subsidiarity. In the report of the ‘Better Regulation’ working group we find an overlapping but slightly different list of considerations setting out its working assumptions about what ‘better regulation’ means. These are

\textsuperscript{29} See from an environmental perspective, Okopu and Jordan, and Wilkinson (above n 9).
Proportionality: ‘regulation which achieves the stated public policy objectives without imposing unnecessary or disproportionate regulatory burdens’; Proximity: ‘regulation which is recognisable to and recognised by stakeholders’; Coherence: ‘regulation which fits in with other parts of the regulatory picture’; Legal Certainty; Timeliness: ‘regulation which is adopted in good time and which can be adapted efficiently so that it is not overtaken by technological and other events’; High Standards: ‘regulation which picks the solution offering the best protection for the public interest at stake, not just the one that represents the lowest common denominator of Member State positions’ and, finally, Enforceability: ‘regulation which is capable of achieving high levels of compliance’. It also adds – almost as a postscript – that it ‘(almost) goes without saying’ that regulation should be ‘subject to the appropriate measure of democratic control’.

**The Relevance of ‘Better Regulation’ for EU Migration Law**

What particular relevance then might better regulation and better lawmaking have in EU migration law? The agenda set out above – particularly in relation to the Impact Assessment programme – seems to be closely connected to the Lisbon Agenda of competitiveness and sustainable development. At first sight it may seem to relate primarily to regulation of economic/business or other private sector activities, and much of what is of central concern in migration law – regulation of flows of persons across borders, asylum law and policy, terms and conditions on which migrants are granted residence, the bureaucratic and operational activities, procedures and institutions that are necessary to implement all of this – may seen to be quite far away from this. Nonetheless, migration control and migration law clearly is a regulatory phenomenon of a kind in the sense that all lawmaking is regulation of a kind. Even non-legal policy may be seen to be a regulatory phenomenon in that it is an attempt, albeit not using legal mechanisms, to influence behaviour and/or to control the effects of certain behaviours or natural
phenomena in order to achieve certain desired policy goals, whether it be promoting desired or minimising undesired effects and consequences. It may well be sensible in some ways to talk of ‘better regulation’ or ‘better lawmaking’ applied to migration law, and this becomes all the more apparent when looking at some of the indicators of ‘better regulation’ set out above.

Each of the indicators above may have some relevance for migration law and policy. Proportionality might indicate a hard look at whether the burdens imposed on migrants – in terms of increased securitisation and strict conditions of entry – are justified. This, however, would necessitate a shift in thinking away from the current paradigm which all too often views would-be migrants as outsiders and with suspicion rather than as fully legitimate stakeholders in the process. Subsidiarity also is of importance and will point us towards seeking a sensible balance between what is legitimately the subject of EU harmonisation or common standards and what is legitimately left in the hands of Member States to determine. Proximity in the sense of the term above implies accessibility and transparency and some degree of ownership of the process and outcome by stakeholders – the role of civil society and NGOs is critical here, as well as the tourist and travel industry, and universities and industry which may view at least some migrants positively as potential students and workers. The ‘boundedness’ of the polity does seem to be re-emerging that the EU level and indeed the creation of EU citizenship has, arguably, done as much to underline the exclusion of third country nationals as it has to foster solidarity amongst and inclusion of EU citizens. So, despite the involvement of some NGOs at EU level, the status of migrants as full stakeholders in the political process of lawmaking and policy development remains open to question. Coherence is key to ensuring that policy objectives in one area are not undermined by other EU initiatives – the Group of Commissioners on Migration 33 may have some valuable co-ordinating role to play here (that is certainly the intention) but as this is a very

33 Commission Press Release 30/08/2006, ‘Setting Up a Commissioners Group on Migration Issues, Chaired by Vice-President Franco Frattini’. The group apparently was first due to meet before the September 2006 Council Meeting.
new initiative this remains to be seen. Legal certainty is important to signal clearly to migrants and to Member States their respective rights and obligations – this aspect of ‘better lawmaking’ can often suffer where messy political compromises have to be made to reach agreement on a text, and the chapters in this volume examining some of the legal instruments illustrate this all too well. High standards are obviously a critical point, and of particular interest in migration law where all too often the lowest common denominator is all that the Member States have been able to agree. Yet what exactly are the public interests to be pursued when dealing with migration law and how best to pursue them is not necessarily always evident or widely agreed, and this can make both inter-institutional agreement on legislative texts and evaluation of legislation and policy problematic. This particular aspect would also have to be amplified by noting in particular that a critical and central indicator of high standards in immigration and asylum law has be full and unambiguous compliance with relevant standards of international refugee and human rights law, and with the Refugee Convention, the ECHR and the EU Charter of fundamental rights in particular. Again, plenty of evidence of the difficulties faced in this area is apparent both in the concerns raised by authors in other chapters in this book and elsewhere. Enforceability is also a real issue, as both the enforcement of migration control and the enforcement of migrants’ rights come up against considerable difficulties in practice and the EU is not likely to be immune from this when it steps into the arena of attempting to build common minimum standards. Unfortunately, at times it can seem that more attention is paid to enforcement of controls than to enforcement of rights. Democratic control is clearly a cornerstone of accountable and legitimate migration law and policy: we have already noted above the difficulties with the marginalisation of the European Parliament. It remains to be seen to what extent the Impact Assessment process is able to enhance democratic scrutiny and oversight of the process through parliament, whether at the EU or national level.
Are there any other issues that may be relevant in assessing the quality of EU law and policy in this area? It may to some extent be linked to fulfilment of the guidance set out by the European Council: the EU should be seen to be living up to its own commitments and delivering on its own self-proclaimed agenda. It should also lead to regulation that is fair to all those involved, to migrants and would-be migrants as well as to those already resident in the EU: and in this respect it should be both morally and ethically defensible and agreed in a manner that is open to different points of view being expressed. Of course, there may be some reasonable differences as to what an ethical immigration and asylum policy might look like and what moral obligations states (and by implication the collectivity of EU Member States acting together) have to existing and would-be immigrants and refugees, and therefore, I say, ethically defensible rather than ethical as such. However, full good-faith compliance with agreed international standards has to be a basic starting point.

So which of these indicators of good governance or ‘better regulation’ or ‘better lawmaking’ might one see as the most pressing problems in EU migration lawmaking at the present time? Arguably, it would have to be full compliance with international law standards and fundamental rights, and the difficulty of Member States to compromise on anything beyond the lowest common denominator – the two being linked and traceable back to Member State governments’ defensive and increasingly restrictive and security-driven policy agendas. Could Impact Assessments have any relevance to these issues? Initially, one may be somewhat sceptical – it seems unlikely to have any fundamental impact on policy preferences and strategies of the Member States. As regards fundamental rights, Commission President Barroso indicated his intention that legislative proposals be screened for compliance with the Charter of fundamental rights in particular at an early stage in the process, and indicated that the use of Impact Assessments were to be a significant tool in order to achieve this – a process which could indeed be of relevance and importance in the immigration and asylum context. Yet, in an Impact
Assessment agenda dominated by ‘better regulation’, competitiveness and sustainable development, one may be forgiven for a degree of scepticism in this respect. Whilst there may indeed be potential for the Impact Assessment process to be helpful in this respect, it is not yet clear that it is designed and operated in an optimum way to do so, and more attention may be needed on this issue.\(^{34}\)

**Different Roles for Impact Assessment?**

Even if we accept, however, that Impact Assessments are intended to pursue ‘better regulation’ or ‘better lawmaking’ and are intended to do so by informing the legislator, that in itself is not necessarily self-explanatory or without ambiguity. Digging more deeply into the process, Meuwese\(^ {35}\) identifies five different typologies of Impact Assessment, using four different verbs that we have seen above being used to describe what Impact Assessment should do – guide, justify, inform, and select. The first function she identifies is ‘speaking truth to power’ in the sense of the Impact Assessment containing some kind of objective truth to inform the legislator of the ‘correct’ approach, although this does not fit with many aspects of the EU’s Impact Assessment process and its insistence that it is not a substitute for political decision-making. Her second is ‘reason-giving for legislative decisions’, in the sense of ‘help[ing] politicians to convince stakeholders and citizens of the virtues of the legislation or policy at hand.’ Again, this does not fit with the approach which is aimed at more than mere justification of decisions already taken – although it may be that some Impact Assessments seem to pursue this function more than others, particularly if conducted at a relatively late stage in the policy process once certain strategic decisions have been made. Her third is ‘providing a forum for stakeholder input’ – which could be a valuable function, but, as she points out, one may rightly be sceptical.


\(^{35}\) Meuwese, above n 9.
of the added value of such a process which may add up to little more than summarising the results of consultation with little evidence that this consultation is having a significant impact on the decision-making process. It is also worth noting that consultation should already take place, so the added value of this function can also be questioned in this respect. The remaining two, she suggests, are ‘more convincing because they are more comprehensive and more refined’ yet not necessarily mutually exclusive. Her fourth is ‘highlighting trade-offs’ which emerges from the Impact Assessment Communication as central to the aim of the entire process and perhaps may be primarily what some within the EU institutions may be expecting or anticipating. Yet, as she points out, ‘what happens when the European Parliament or the Council want to use a different decision-making criterion from the Commission?’ Trade-offs depend critically on the relative value that the decision-maker places on particular issues. When does environmental protection become too costly to business? If it will save lives, is the cost of a certain safety precaution relevant and if so, when does it become too costly? When and if so how are measures restricting liberty and freedom to be traded off against apparently increased security? What, if any, is too high a price to pay for providing a secure refuge from persecution in accordance with international obligations by providing high-quality asylum decision-making, or for providing effective access to justice and effective remedies for all migrants? The extent to which Impact Assessments are able to inform such decisions without prejudging them and to make the trading-off process transparent will be critical if this is their main function. What happens when the Impact Assessment process proceeds on the basis of assumptions about the relative values of various ‘goods’ or ‘impacts’ to be ‘traded-off’ against each other in selecting the optimum or preferred policy option that are later questioned by other EU institutions or by civil society will be an interesting question. Her fifth is ‘structuring the discourse’ in providing a structure for the discourse during the course of the passage of legislation to ensure that the information in the Impact Assessment is taken into account. In this way she suggests that Impact Assessments may contribute to the proceduralisation of the legislative process. As she goes on to discuss,
individual case studies may show different Impact Assessments tending towards various of these functions, and even perhaps different actors in the process having different visions of which of these functions the Impact Assessment process is intended to fulfil, and each of these functions may necessitate or suggest different institutional frameworks for the process to operate. Different actors having different visions of the function of the Impact Assessment process may also lead to a high degree of politicisation of the procedure where, for example, stakeholders have greater expectations in terms of steering the policy or legislative process in their desired direction than the Impact Assessment delivers, or have different expectations about the use to which the report will subsequently be put. There does not yet seem to be a single model that Impact Assessment follows. Later we will return to consider whether any identifiable pattern emerges from the Impact Assessments associated with migration law, and whether any of these functions could prove particularly relevant or valuable to remedy defects or shortcomings in the existing legislative process in this field.

Criteria for Evaluating Impact Assessments

Can we, therefore, move towards some criteria for evaluating the quality, effectiveness and utility of the Impact Assessment process and the resulting Impact Assessment reports? There is now some helpful literature emerging specifically dealing with the EUs Integrated Impact Assessments and making some preliminary assessments. Wilkinson, Renda, Lee and

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36 The REACH and Roaming Impact Assessments are quite well-known examples of contested Impact Assessment processes, both of which came in for serious criticism from industry in particular. See Meuwese on the REACH Directive, above n 9, and T Leggett, ‘EU Under Fire on Mobile Fee Cap’ BBC News Online, 18 September 2006. They are admittedly somewhat different as in the case of REACH, various other Impact Assessments were prepared by stakeholders and eventually the Commission revised its own IA work: this has not yet happened with the Roaming Regulation.

37 Wilkinson, above n 9.

38 Renda, above n 9.
Kirkpatrick\textsuperscript{39} and Mather and Vibert\textsuperscript{40} are some of those who have provided analysis, commentary and critique. Some construct very specific quantitative scoreboard-type arrangements for evaluating Impact Assessments, allocating marks for particular variables, others make more general and descriptive or subjective assessments whilst presenting the results in a scoreboard-type format. Precisely how the Commission’s Impact Assessment programme should be evaluated and monitored remains somewhat contentious, especially in relation to the question of any action to be taken in the event of an Impact Assessment being judged inadequate or incomplete. Nonetheless, drawing on a range of these sources, some of the most important indicators of quality and effectiveness of Impact Assessment documents and processes may be suggested – although it must be stressed that it is not the intention of this chapter to provide or to use any kind of quasiquantitative ‘scorecard’ as such, or indeed to carry out an entirely comprehensive evaluation. This would be impossible at this stage, both because of the relatively small number of migration law Impact Assessments and the fact that many of the resulting legislative proposals have not yet been adopted, so the ultimate impact on the outcome will not be clear at this stage. At the outset it should be noted that evaluation is commonly subdivided into three as follows:\textsuperscript{41} Compliance tests which focus on formal compliance with the overarching framework governing the process and are concerned more with process than outcome. Performance tests focus on the quality of analysis contained in the document, such as accuracy of prediction, comprehensiveness or at least adequacy of any analysis of alternative options. Again, these are focused more on the process than the legislative outcome, but pay more attention to the substantive quality of the report. Function tests are focused on assessing the impact on the final legislative or policy document, and are more focused on outcome than processes. Clearly, this final approach cannot be completed until more legislative measures for which Impact Assessments have been prepared have completed their passage through the

\textsuperscript{40} Mather and Vibert, above n 9.
legislative process. It should also be noted that one should not necessarily assume that a deviation from the ‘recommended’ option in the Impact Assessment report undermines its quality or value. The analysis may have been highly expert, accurate, relevant and complete but different political priorities may ultimately result in a different balance being struck than that recommended in the Impact Assessment report. The Impact Assessment process and report may nonetheless have been of high quality, it may have been a valuable informative process, and the report may have acted effectively as a focus for stakeholder input and in structuring the subsequent debate that resulted in a different option finally being settled on.

In evaluating Impact Assessment procedures and reports, I will suggest that comprehensiveness, proportionality, soundness and quality of analysis including issues of cost-benefit analysis and quantification, openness of procedure, accessibility and transparency, and subject-sensitivity (appropriate adaptation of the general framework to the particular issue), will be key criteria, and that sufficient training, expertise and resourcing will be important practical underpinnings to ensure adequate performance on these indicators. In suggesting that these are key criteria, I am drawing both on existing Impact Assessment literature as well as returning to first principles mapping out some of the obvious qualities needed to achieve the stated aims of the Impact Assessment programme discussed above. I shall return below to discuss and illustrate each of these criteria in more detail with specific reference to some of the migration law Impact Assessments.

General Evaluations of Early Impact Assessment Work

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42 Above n 9.
The evaluation of Impact Assessments so far has been distinctly mixed. Many evaluations paint a picture of Impact Assessment reports and processes that are distinctly variable in quality – at best moderately good, at worst of poor quality, and without any clear preponderance towards the good rather than the poor. Experience does tell us that there may be potential for improvement in a relatively short period of time – an often quoted example is one noted by Lee and Kirkpatrick in relation to Environmental Impact Assessments in Ireland. In the first year of operation of the EIA Directive, less than 30 per cent were assessed satisfactorily, whereas three years later this was more than 60 per cent.43 Whether there is any hope of anything like this rapid improvement in quality being replicated in the case of the Commission’s Impact Assessments programme rather depends on several factors: the extent to which subsequent Impact Assessments implementing the common framework are able to build on experiences of previous ones and gain from lessons learned, the extent to which staff are able to build up significant expertise by carrying out sufficient Impact Assessment work over time, the resources available to desk officers compiling the reports and to the administrators responsible for providing support to them in conducting Impact Assessment work, and the ability of the forthcoming review to provide an effective opportunity for reflection and evaluation of existing practice drawing on a wide range of perspectives. There are as yet fewer indications of such rapid improvements in quality of Impact Assessments over time in respect of the EU’s framework.44 This should certainly encourage observers to persevere and give constructive comment as to how the process can be improved in the hope that the next few years may see some significant improvement in quality. The Commission is right to monitor and evaluate the process, and that it should be open to constructive critique and not adopt an approach of

43 Lee and Kirkpatrick (2004), above n 9, at s 5.
44 Indeed on some indicators the quality is in fact deteriorating (see Renda, above n 9) although focusing excessively on quantification and cost-benefit analysis may be misleading as the increasing number of IAs may lead to many being conducted in which quantification and economic analysis is far from central to the issues at stake. This of course is particularly the case in the FSJ area, and so one should be reluctant to condemn the quality of IAs too quickly on this basis without proper analysis of whether the IAs deal with the issue at hand adequately, despite the absence of quantification.
complacency. The forthcoming review in 2006, which is just getting underway as this chapter is completed, will be an important focus for lessons to be learned.

IMPACT ASSESSMENTS IN EU MIGRATION LAW

At this stage there is not (yet) a ‘classic’ legislative instrument in the field of migration law that has been completely finalised after a legislative process that included an Impact Assessment. At this stage in the process of development of Impact Assessment work, this is probably not surprising and need not prevent some preliminary comments on some of these documents. In this next section of the chapter, I shall return to consider the criteria identified above relating to the quality of the Impact Assessment process and reports, using in particular several of the migration law Impact Assessments as examples to illustrate where instances of good and less good practice may be identified, and instances in which Impact Assessments tend towards one or other of the models discussed by Meuwese.

The migration law-related Impact Assessments are still relatively few but growing in number year by year. In 2003 there was one, in 2004 two, one of which related to a financial Decision (the European Refugee Fund). In 2005 there were three legislative/policy Impact Assessments and one particular and several general dealing with budgetary matters. Already

45 The Council Decision on the Establishment of a Mutual Information System Concerning Member State Measures in the Areas of Immigration and Asylum was adopted on 5.10.2006, [2006] OJ L 283/40. Other than this, the Visa Information System is the furthest advanced but at the time of writing has not been finally adopted.
in 2006 there are four: two policy Impact Assessments and two relating to legislative instruments.\textsuperscript{50} Several are general policy plans indicating that there will be or are likely to be further specific measures following, so more Impact Assessments may be envisaged in the future.\textsuperscript{51} In passing, it is worth noting that these migration-focused Impact Assessments are not the only ones in the more general FSJ policy field,\textsuperscript{52} so the questions raised here about the role of the Impact Assessment procedure outside what might be traditionally conceived of as ‘business regulation’ may well be of wider relevance. In line with the significant legislative activity in this field, the proportion of Impact Assessments that have to tackle such issues is significant.

\textbf{Comprehensiveness}

It is important that the Impact Assessments deal with all relevant issues and as far as possible contain no major or significant omissions: this is related to the quality of analysis below and an important aspect of it. In particular, it is important that a wide range of options is considered, as appropriate, and reasons given if not. Clearly, the range of options considered will vary depending at what stage of the process of policy development the Impact Assessment is carried out.


\textsuperscript{51} Significantly, dealing with the further development of the Common European Asylum System, and measures implementing the policy plan on legal migration and the fight against illegal immigration. Directives on admission of highly skilled migrants, the ‘horizontal’ Directive on the status of those admitted for economic activities, sanctions on businesses employing illegal migrants may be anticipated to be early in the next wave of legislative Impact Assessments. The review of the existing legislation might also result in Impact Assessments if any amendments are suggested.

\textsuperscript{52} The FSJ DG has a relevant website page on evaluation and Impact Assessment activities collecting all FSJ IAs together.

\texttt{http://ec.europa.eu/dgs/justice_home_evaluation/dg_coordination_evaluation_annexe_en.htm}.
– the earlier in the process, the more options will remain live. The later in the process the Impact Assessment comes into play, the more likely it will be that certain options may have been ruled out for political or practical reasons. Conversely, it may be that with fewer ‘live’ options under consideration, more detailed analysis may be possible in terms of the ones that do remain under serious consideration. If Impact Assessment is, as it is intended to be, not a static event but to some extent dynamic process through the initial stages of policy or legislative development, this should be reflected, if appropriate, in an initial wide-ranging discussion and subsequently in a more detailed analysis of one or more of the particular options. The Impact Assessment process may meet some difficulty and may seem rather superfluous if it turns into a process whereby the document merely surveys a range of broad approaches of which only one is realistically viable, but which still leaves unanswered some important questions about the implementation of that broad approach. In this particular respect, one does not have to look terribly far to find some questionable examples. It may perhaps be significant to note, when considering the Impact Assessment relating to the VIS Regulation, that the European Parliament’s LIBE Committee commissioned a separate report on the social impact of biometrics.\textsuperscript{54} It might be suggested that the social impacts of such a development were not considered adequately in the Impact Assessment report, and this other study would perhaps have added value to the IA process. Although commissioned before the VIS Impact Assessment was completed, it was not published until later, so the two reports overlap in timescale, and it probably goes too far from these documents alone to say that the European Parliament’s report was a direct result of perceived inadequacies of the Commission’s Impact Assessment report. One might question whether the Impact Assessment on the proposed Returns Directive adequately assessed impacts on children and gender, for example (or on countries to which individuals are returned) or on the practical difficulties and consequences for the host societies.

\textsuperscript{53} Danish Environmental Assessment Institute, above n 9, p 49.

\textsuperscript{54} Biometrics at the Frontiers: Assessing the Social Impact on Society: This report was commissioned before the IA was completed, but completed and published in 2005.
and states of origin of an ‘obligation’ to return (the starting point of an ‘obligation’ to return in the proposed Directive seems to be taken for granted rather than questioned), and the Impact Assessment on the ‘RABITs’ Regulation, arguably, fails to engage properly with the issues of accountability and control over border guards, being more concerned with the contribution that these teams could make to control of borders.

**Proportionality and Proportionate Analysis**

Proportionality and proportionate analysis are two different concepts. The first essentially means that the report considers the proportionality of the measures to be taken, and the second is to some extent a development of the idea of comprehensiveness discussed above. Proportionate analysis suggests that the Impact Assessment should analyse the various options and impacts in a proportionate manner. In other words, excessive time and money should not be spent on proposals with minimal impacts, nor should proposals with significant potential impacts, or a potentially significant dimension of a specific proposal, be subject to a merely superficial analysis. In this respect, some critical comments may be made about the generality and lack of detail of some Impact Assessment reports. There does seem to be a trend for Impact Assessments in respect of both policy communications and legislative proposals to be prepared at quite a high level of generality, to the extent that one may begin to question the real utility of some of these documents associated with specific legislative proposals. This level of generality has another consequence: that whilst the Impact Assessments related to the policy documents may play some useful role in acting as a focus for stakeholder input and structuring discourse about the way the agenda is developed further, this approach has rather different consequences in the Impact Assessments related to the specific legislative proposals. Here, some Impact Assessments tend to operate at such a level of generality that it is difficult to see how the documents can realistically be of use in shaping the discourse from then on, unless there is a real
live option of a significant strategic change of direction, which in some cases seems highly unlikely. (As we shall see below, certain strategic choices have sometimes been made by the Council before the Impact Assessment process by the Commission.) For example, contrast the Impact Assessments on legal immigration and the priorities in the fight against illegal immigration shaping general policy agendas and priorities in broad terms with those relating to the Visa Information System Regulation and the Returns Directive. In the Returns Directive Impact Assessment, only general issues are discussed relating to the type of legal instrument used: no action, soft law, full harmonisation by Regulation or partial harmonisation by Directive. It contains little in relation to the actual content of the Directive itself. Similar criticisms may be made of the ‘RABITs’ Regulation and Visa Code Regulation Impact Assessments. It may sometimes be useful to carry out such a general strategic Impact Assessment of broad policy approaches, as some may find the case for a particular legislative intervention not convincing. For example, the 2001 proposed Directive on Admission of Third Country Nationals for Employment met with little support from the Member States, and there remains some scepticism about the Returns Directive, at least in its present form. Some Impact Assessments may genuinely add value in terms of providing new information or analysis to demonstrate the scale or extent of a problem to highlight the need for regulation. Yet it is often in the detail of how these general policy choices are to be implemented as much as anything that the real difficulties will lie. If experience of the first years of exercising the Community’s new powers and competences in migration law has taught us anything, it is that the devil is in the detail. Perhaps they were never intended to do otherwise, but if Impact Assessments can only operate at this level of generality they will have a limited role to play in improving this aspect of lawmaking. The VIS Impact Assessment admittedly goes somewhat further and addresses not only the question of whether the preferred option should be no action, entry-exit system, or a VIS, but

55 The IA on pre-trial supervision might be an example of such a case: Impact Assessment accompanying the Proposal for a Council Framework Decision on the European Supervision Order in Pre-Trial Procedures between Member States of the European Union, SEC (2006) 1079.
also the critical question of whether the proposed VIS should contain biometrics. But the consideration of this important issue in the Impact Assessment report can certainly be regarded as somewhat superficial: one has to turn to the accompanying report prepared by the EPEC (European Policy Evaluation Consortium) for fuller discussion of this, and even then perhaps some more detailed treatment of social impacts and critical questioning of the reliability of biometrics could have been included.

Allied to the previous point but slightly separate is the lack of detail in the reports. Far more helpful are preliminary studies that are sometimes carried out by external policy consultants: an excellent example of this is in relation to the Visa Information System. This tackles the relevant questions in more detail, and recognises that the first two policy options can be discarded and that the latter two (VIS with or without biometrics) require much more detailed scrutiny. It addresses such issues as the information to be stored, period of time, and data protection considerations. This underlines the importance of some of the points discussed next: accessibility and transparency.

**Accessibility and Transparency**

It is important that the Impact Assessments are accessible generally in terms of systematic publication (which they are, on the websites of the relevant DGs, from the document registry of the Commission, or from the Commission’s Impact Assessment website) but also that they are accessible *in content*. Particularly with technical subjects, it is important that – without excessive simplification or ‘dumbing-down’ – the documents deal with the subject in an accessible way to enable them to be of use to end-users. The results and methodology should be explained clearly. It is important, therefore, to note that these end-users may range from technical experts and well-resourced specialist organisations to lawmakers and some lobbyists
and interest groups who may be less technically expert in the field and have fewer resources at their disposal, and even (although this may admittedly be wildly optimistic) the general public. Another issue is transparency. It is obvious from the Commission’s programme and from reading some of the Impact Assessments that it is envisaged that external policy consultants may and indeed do in some cases carry out a significant amount of the actual research involved. If this is the case, then this should be made clear and any such significant document relied upon should be easily accessible. On the positive side, one can at least give a qualified welcome to the transparency and accessibility of migration law Impact Assessments. Indeed this is closely connected to the issue I discussed above – the simplicity, lack of detail and general nature of some of the reports do contribute to making them accessible. Many of these documents set out in a manner that is quite clear and simple a limited range of general policy approaches. Anyone looking for a rationalisation of or explanation of the general policy approach taken will usually find it in these documents, with an idea of what evaluation was made of the various options and the criteria used to make the evaluation: often this is presented in the format of a ‘grid’ for ease of reference. Some attempt is often made to describe the potential intensity of impact (low, medium, high etc) even where quantification, let alone monetarisation, is difficult or impossible. Yet given the tendency to generalisation, it is helpful to know the evidential basis on which such generalisations are made, and there may be a difficult balance to be struck between accessibility and sufficient detail to conduct a proper analysis and to demonstrate sound methodology. The report on Including Social Impacts notes that the guidance suggests that 30 pages should be the maximum and implicitly criticises some of the Impact Assessments it considers for being longer – sometimes significantly longer – than this (as well as some that are significantly shorter).56

The key to this clearly lies in different levels of detail: executive summaries or Summary Impact Assessments, full Impact Assessment reports, and extended background studies all have their place. Different end-users may need or wish to use one or other or all of these documents, and

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56 Crepaldi et al, above n 24, p 83.
sometimes the same end-user may use different documents at different points and for different purposes. Sometimes, a report of 30 pages may be a helpful summary but may simply be too short to contain a full and rigorous analysis of the issues at stake. As we have seen, externally commissioned reports are sometimes used as the basis for Impact Assessment reports and they are often significantly longer than these reports themselves. In such situations these studies provide valuable additional resources to enable lawmakers and researchers to evaluate both the Impact Assessment and the subsequent proposal or communication. Whilst it is often easy to identify when this has taken place, and there is usually little difficulty as a researcher getting access to the document on request, some increased transparency and accessibility might be helpful in terms of identifying the correct official to ask, or preferably ensuring that any such document is routinely made publicly available, perhaps as a separate SEC document on the registry or on the relevant DG website. One such study – on divorce – is on the DG FSJ website even in advance of the Impact Assessment report which has not yet appeared.\(^\text{57}\) This kind of transparency is to be encouraged as a more systematic practice. Transparency and accessibility might also be improved without overloading the Impact Assessment reports too much by some clearer indication of what, if any, other significant documentation or evidence was relied upon in conducting the analysis and preparing the report – again the VIS extended study is helpful in this regard and can be seen as an example of relatively good practice as it contains a bibliography at the end to indicate the additional sources consulted. There are other examples indicating variable practice in this respect.

**Soundness and Quality of Analysis**

\(^\text{57}\) Study to Inform a Subsequent Impact Assessment on the Commission’s Proposal on Jurisdiction and Applicable Law in Divorce Matters, EPEC, April 2006. Published on the DG FSJ Impact Assessment and Evaluation Activities Website. At the time of writing the subsequent IA and Proposal are not yet on the website.
Soundness and quality of analysis is perhaps the most important core area. The quality of analysis of the subject matter is critical. Impact Assessments should be able to identify major areas of dispute, whether factual or otherwise, for example, different positions of principle and approach, different criteria being used to evaluate or significantly different priorities being attached to commonly accepted criteria, and the major reasons behind these different approaches. They should be able to guide the reader through the different points of view, advantages and disadvantages of different options, and should explain clearly whether and why there are any pre-suppositions or policy preferences taken for granted at the outset. Where the subject involves scientific, technical or any other kind of analysis, the methodology used should be made clear (as methodological issues may themselves be the source of contention and criticism, as was the case for example in the REACH/Mobile phone roaming Regulation Impact Assessments) and as far as possible, should be sound. They should not misrepresent any relevant issue or, as noted above, fail to address clearly identifiable options or points of view or potential impacts. This is perhaps one of the more difficult aspects of the quality of Impact Assessments to analyse in the general literature, particularly when Impact Assessments cover such a wide range of policies as is the case in the EU, because in order to make any kind of realistic assessment of the quality of the analysis (beyond a simple check that is more one of transparency and clarity than accuracy and methodological or analytical soundness), a degree of knowledge and expertise in the subject matter is required. Indeed, it is interesting to note that some of the general studies deliberately avoid attempting any such analysis of the analytical quality of the reports they look at. This is why it is important, for example, that environmental experts examine environmental Impact Assessments and that migration lawyers begin to engage systematically with the quality of Impact Assessments in the migration policy area.

Openness of Procedure and Consultation
It is important that relevant voices from civil society and industry are included effectively in the process of drawing up Impact Assessments, and at an appropriate time. Although important in all areas, this is particularly so when the subject matter lies more in the area of what might be broadly described as social policy (including migration law) than rather more technical regulatory measures. The policy plan on legal migration is perhaps one of the best examples of consultation, even though it was prompted by the inability of Member States to reach agreement on a proposal that had been presented as far back as 2001 and eventually had to be withdrawn as it became clear there was no prospect of sufficient political support. The 2005 policy plan was preceded by a Green Paper and a significant consultation exercise, and this emerges clearly in the Impact Assessment. Consultation is, of course, not a new exercise in the area of Freedom Security and Justice policy – as in many others – and perhaps the preliminary conclusion is that what is needed is not so much more consultation as more attention being paid to it. Again, the VIS and Returns Directive Impact Assessments demonstrate this vividly. To be fair, the VIS Impact Assessment and even more so the preliminary report are more thorough in their analysis of the concerns raised during consultation, but still one gets the impression that significant concerns about the necessity for biometrics and the adequacy of controls that had emerged during consultation were brushed aside rather lightly. The European Data Protection Supervisor (EDPS) indicated in his report on the Proposal that although he accepted – partly based on the Impact Assessment – that the case for a VIS had been demonstrated, he had to say that:

However useful biometrics may be for certain purposes, their widespread use will have a major impact on society, and should be subject to a wide and open debate. The EDPS must state that this debate has not really taken place before the development of the proposal. This underscores even more the need for stringent safeguards for the use of

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58 See on the background to this, and on employment admission policy more generally, ch 16 in this volume.
biometric data and for a careful reflection and debate in the course of the legislative process.\textsuperscript{59}

The Impact Assessment and preliminary report seem to proceed rather more on the basis that mounting a PR campaign to persuade the public of the use of biometrics is the way forward rather than seeing the undoubted opposition and scepticism about the necessity for biometrics as a reason not to adopt it in the VIS.

The Returns Directive Impact Assessment is even more concerning in this respect. A series of concerns were raised about the protection of migrants, issues surrounding the use of detention, protection of minors, access to justice and so on. It is indeed true that the final proposal was not without some limited safeguards, but the Impact Assessment report itself does precious little beyond simply recording the concerns briefly. The report is at such a level of generality (no action/soft law/partial or full harmonisation) that it fails to engage adequately with the issues of substance of what will actually go into the Directive. As we have seen, it effectively assumes rather than questions the starting point of an obligation to return, and contains little real discussion of the question of the conditions under which detention may or should be used, what if any should be the maximum permitted period of detention, the necessity for judicial oversight of such detention measures, and the issue of re-entry bans. The Impact Assessment fails to demonstrate in a convincing manner that the consultation and concerns expressed during it did have any significant relevance in shaping the detailed content of the Directive, if this was the case. Whilst it has to be acknowledged that not every comment will be followed or every point of view adopted, and it may be expected that these processes will to some degree be contentious and give rise to differences of opinion, an Impact Assessment process that systematically fails to engage the confidence of consultees that their views are

listened to seriously is not without its dangers. One example already exists of an Impact Assessment process becoming so politicised that some civil society/environmental groups refused to participate further.\textsuperscript{60}

**Subject-Sensitivity**

The general structure of the IAs must be implemented in ways that are appropriate to the specific sector. It has even been suggested\textsuperscript{61} that it could prove helpful or necessary to develop some different variations on the general Impact Assessment theme – different models of Impact Assessment for different kinds of legislative and policy measures, perhaps with each separate DG adopting a model particularly suited to its own area of work, partially reversing the streamlining into one single integrated framework in 2002. Whatever one thinks of the suggestion of deliberate construction of differently adapted models of the general Impact Assessment framework, it is certainly the case that care should be taken that Impact Assessments ask the right questions in the right ways to be of use to the particular context: whether by type of impact, such as ensuring social impacts are assessed adequately, or by policy area. Ultimately, if it turns out that the Impact Assessment tool is so focused towards business regulation, economic analysis and quantification of costs and benefits that it is unable effectively to deal with the rather different questions and issues that dominate the agenda of the FSJ DG, and immigration and asylum law in particular, it is necessary to be aware of this and to limit one’s expectations accordingly. Another relatively positive aspect is that Impact Assessments in the migration law area and FSJ generally do not seem to have been overly hidebound by the structure of economic, environmental and social impacts at the expense of making some real attempt to address relevant issues. Although some focus on economic cost is apparent (for example in the VIS Impact Assessment in relation to the cost of the System), a wide range of other somewhat more relevant

\textsuperscript{60} The REACH Directive – Meuwese, above n 9.

\textsuperscript{61} Renda, above n 9, at p 96.
criteria is used, which indicates a welcome potential for flexibility to adapt the general Impact Assessment framework to the specific context of migration law even though one may on occasion take issue with the relative prioritisation of various evaluation criteria, or some perspective that might usefully have been added or elaborated upon. These questions and criticisms seem to relate rather more to the issue of quality of analysis – the extent to which this flexibility actually highlights and helps to address the most critical issues, rather than the extent to which the framework itself is flexible enough to adapt to different policy areas. There is certainly some awareness within the Commission of the need to think carefully about how to conduct Impact Assessments within the FSJ DG, evidenced by the production of a guide for Impact Assessments by FSJ DG for its staff conducting Impact Assessments in this policy area. Since this document dates from September 2006, it seems likely that none of the existing Impact Assessments were prepared with this document in mind. It remains to be seen whether it will have significant impact on future Impact Assessments as they emerge.

Fundamental Rights Impacts

One of the disappointments has to be the depth and rigour of treatment of fundamental rights impacts. As we have seen, Commission President Barroso specifically relied on Impact Assessments as part of his strategy to ensure a rigorous monitoring process from the outset of planning any legislation where fundamental rights were affected, specifically to ensure compliance with the EU Charter. I have suggested elsewhere that one can hardly object to well-informed and rigorous rights-awareness from the outset of the legislative process, yet a somewhat more sceptical view may be justified in respect of how effective the Impact Assessment process as currently operated is in ensuring this. The way the Impact Assessment

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64 Toner, above n 10.
process operates within the FSJ DG generally and migration law in particular will, of course, be a critical litmus test of whether the process has anything useful to add to fundamental rights protection. So, what does a closer examination from a fundamental rights perspective reveal? The relevant Impact Assessment reports are indeed peppered with fine-sounding words and commitments – many mention respect for fundamental rights or impact on fundamental rights, and some go as far as indicating the relative intensity of expected rights impacts of the various overall strategic options being considered and note the need for compensatory protective measures to offset potential negative rights impacts. In some contexts, where rights impacts might be less obvious and less well known within an area of expertise of the lead DG, this in itself may perform a valuable function in raising the profile of the issue and in ensuring that some attention is given to it. However, in the context of migration law and FSJ policy generally, it does not seem too harsh to suggest that such bland general statements go little further than stating the obvious. Of course, standards of rights protection are important in constructing migration law and policy. The stated commitment of the EU institutions and states is not in question, and it is quite obvious that forced returns of illegal immigrants or collection and retention of biometric data are issues that may have significant rights impacts: one certainly hopes that we have progressed beyond the need to establish the basic proposition that rights protection is an important aspect of Community lawmaking! Yet it is often in the messy and inconvenient business of thrashing out the detailed content of the Directives that standards have been compromised. Any effective monitoring and scrutiny process does have to take account of that reality, and of the reality that the nature of fundamental rights protection is precisely that it is at times inconvenient and may constrain government from pursuing particular courses of action that it might otherwise favour. If this edge of inconvenience is lost then some of the effectiveness of rights protection may be too. Admittedly, the Impact Assessment process occurs at an early stage in the process and one cannot expect everything to be resolved at this stage. There may indeed be some trade-off to be made between proper consideration of a wide range of
options and rigorous scrutiny of any one of them for fundamental rights. Yet, once a legislative proposal is published, it contains specific suggested provisions – from which any further negotiations proceed as a starting point. Thus, proper screening and scrutiny for rights compliance at this stage is important.

Some of the Impact Assessments dealing with specific legislative measures in the migration law field deal with this more effectively than others. In the VIS Regulation Impact Assessment, some attention is paid to compensatory protective safeguards, and the background report is even more encouraging in that there is an annexe that specifically deals with data protection considerations, and does actually introduce the relevant legal framework regarding privacy and data protection and its application to the VIS system. This kind of approach is to be welcomed, but the necessity for biometrics and the adequacy of privacy and data protection included in the proposal still remains contentious. The Returns Directive is an example of an Impact Assessment which records concerns and commitments to act in accordance with fundamental rights but does far less to further this aim in concrete terms. It does little to clarify exactly what the specific standards of protection might be in terms of access to justice, detention, non-refoulement, or the use of force or compulsion in securing returns. The Impact Assessment does list some of these concerns at the end but in the overall context of the document, this hardly qualifies as adequate and rigorous evaluation of the various issues at stake. As noted before, although the proposal that resulted was not without some safeguards, some serious concerns have been expressed about it. This can hardly be seen as a resounding success in this respect.

In terms of dealing with specific rights protection concerns and more detailed policy choices within the general direction chosen (to adopt a Directive), it is instructive to compare this with,

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for example, the Data Retention Directive and its Impact Assessment. 67 Whilst not suggesting that this was itself without it flaws or problems, at the very least, the Impact Assessment addresses such issues as the specific time period for which data should be retained, and addresses concerns expressed by NGOs and the EDPS and the Article 29 Working Party. 68 Whatever the merits of the outcome, 69 at least one may say that the contentious content of the Directive was addressed in this report rather more successfully than one sees in some of the migration law Impact Assessments. Perhaps this was due to the fact that the demands here were on businesses, arguably a rather more classic use of regulatory Impact Assessment procedure, imposing regulatory burden on those conducting a telecoms or internet business? One wonders whether industry lobbying against the excessive burden of retaining data for long periods or those concerned with data protection and privacy were the critical voice here. A range of factors may be relevant in securing good practice: the availability of sufficient time and resources for the study, keen awareness of or commitment to investigating such questions on the part of the desk officer in the Commission with primary responsibility for the drafting of the Impact Assessment, and keeping the Impact Assessment process active into the stage of the process when the drafting of the details of the Proposal has begun, may all help. The inclusion of references to specific views expressed during consultation on key points within the Impact Assessment is surely good practice, but views on specific points such as this may only emerge if consultees are asked key relevant questions, and this may only be possible after some element of preliminary drafting has taken place. This underlines the importance of seeing the Impact Assessment as a dynamic process rather than a single one-off event. Whilst it would be premature to draw overly negative

68 The Article 29 Working Party is an advisory group set up under the EU Data Protection Directive to provide expert opinion and to advise the Commission and Member States on Data Protection Issues. It consists of representatives of the Data Protection authorities of the Member States, the EDPS and of the Commission. See the website http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm.
69 The ultimate compromise was a ‘window’ specifying minimum and maximum periods rather than a single fixed time period. The time suggested in the original proposal is within that time period.
conclusions at such an early stage and with a relatively limited record of legislative Impact Assessment thus far concerning migration law, this is certainly something that should be taken into account in future Impact Assessments. It is also the case that adequate treatment of fundamental rights does require adequate legal expertise and it may be that more attention needs to be paid to this.

The process will have to improve in this respect, following, building on and improving on examples of good practice dealing with the fundamental rights issues identified above. It remains to be seen whether the new guidance document issued by the FSJ DG may assist in addressing this issue. If this proves not to be possible, a more carefully targeted, focused – and transparent – legal screening for compatibility with fundamental rights may prove to be a necessary supplement to the Impact Assessment process if it is to provide the ‘systematic and rigorous monitoring’ that was promised by Commission President Barroso. General reluctance to make public any specific advice given on legal matters by the Commission’s Legal Service may pose some difficulties for the transparency of any such separate scrutiny, which is arguably an important part of the process: raising the profile of rights issues and demonstrating publicly the steps being taken to ensure Charter compliance was part of Barroso’s agenda in his 2005 Communication. Whilst a degree of confidentiality for some documents may be accepted, any separate screening process which is entirely secret will fail to convince in this respect. Similar sensitivities seem to be emerging as the role of the Fundamental Rights Agency is clarified70 and may impact on the nature of its role in pre-legislative scrutiny.

**Sufficient Resourcing**

Underlying all of this is the question of resources, training, practical support, and expertise. The quality of the Impact Assessment process will be undermined by a scheme which makes excessive and unrealistic demands in terms of Impact Assessment work given the resources, training and expertise that are available. Ultimately, if the resources cannot stretch to conducting the required quantity of Impact Assessment work or if the time available is insufficient, the quality and credibility of Impact Assessments will suffer. Without wishing to jump to too many conclusions, one wonders whether the insistence on an Impact Assessment for every regulatory/legislative proposal in the Work Programme as well as many policy communications and the consequent increase in the number of Impact Assessments produced over 2004, 2005 and 2006 might be one factor that has contributed to the failure to demonstrate a clear upward trend in quality since the first Impact Assessments in 2003. It seems unjustified at this stage to draw any conclusions that Impact Assessments are not being given sufficient time or resources, but this should certainly be monitored. It is also interesting to note that on several of the indicators set out above, the VIS Impact Assessment is an example of relatively better practice and was compiled after an extended expert study. It may be the case that there is a link between the use of such extended studies and the quality of the resulting Impact Assessments, at least in the case of significant and complex projects. If this is the case, this will have obvious resource implications and is certainly an issue that will have to be the subject of some candid assessment during the review that is just getting underway.

SOME FURTHER OBSERVATIONS

So much for an outline evaluation of early Impact Assessment practice, with particular reference to the field of migration law. There are, however, some further observations to be made before concluding.
Continuation of Previous Practice

In some ways it is striking how this very specific Impact Assessment procedure builds on some existing elements of previous policy analysis. Migration law is certainly a subject on which there is considerable research now underway, and the DG was accustomed to conducting at least some process of research and evaluation of different possible options before acting. Even leaving aside the obvious point that the Impact Assessment programme systematised already existing albeit fragmented and partial Impact Assessment processes, the Commission and other Community institutions have in the past commissioned and used studies outside of and independently of the Impact Assessment procedure, have weighed advantages and disadvantages of various options during the legislative and policy drafting process, and consultation with stakeholders is by no means a new departure. One is reminded of Molière’s ‘Bourgeois Gentilhomme’ who spoke prose all his life without realising it: have the Commission been doing Impact Assessment all along without knowing it? In some form or other, it may be true to say that they have. We should certainly expect some continuity, consolidation and development of existing practices rather than an entirely new process. Certainly, the Impact Assessment now provides a structured mechanism for channelling analysis of options and consultation into the decision-making process in a particular format, and indeed one that may make it more systematic and transparent. This may indeed be welcomed, but it is rather too early to tell to what extent the process will be a significant improvement on what went before, and whether additional financial and administrative costs involved are actually reaping significant additional benefits.

The Pre-eminence of Political Imperatives
It is also important to be aware of how the Impact Assessment process fits into the development of a particular policy agenda over time, and to consider where the primary political impetus for particular initiatives comes from. It is interesting to note the highly politicised nature of migration policy and the extent to which it still remains dominated and driven to a significant extent by the Member States reflected in the Impact Assessment process. Several of the Impact Assessments, unfortunately, seem to fall into the category of being extended explanatory memoranda elaborating on and justifying or explaining basic political orientations or commitments that have already been made. Again, the examples that have been examined before – the VIS Impact Assessment and the question of biometrics, the ‘RABITs’ Regulation, and the Returns Directive may all be seen to be examples of where the Commission is operating under constraints of prior political commitments and orientations – of the Member States through the Council as well as policy plans drawn up by the Commission. Whilst recognising that these Council Conclusions are often worded as invitations to study and present proposals, one wonders whether is it really realistic to think that the Commission has significant and meaningful freedom, for example, to advise against the use of biometrics, or to suggest that there is no case for a Directive harmonising returns procedures. Something of a contrast might usefully be made with other Impact Assessments where the Commission is not acting under quite the same political constraints and may perhaps have more of a genuinely independent role in developing legislative proposals – within the FSJ area perhaps, pre-trial supervision measures might be an example in which, although there had been previous discussion, the Impact Assessment and its associated study provided useful additional information to inform the choice of measure, or in an entirely different area, the mobile phone Roaming Directive. As Meuwese points out, an explanatory memorandum already performs this ‘justificatory’ role and it might be added that it does so without the veneer of what may be seen by some as the apparent added authority of

71 The political orientations and background is set out at the beginning of each Impact Assessment.
72 See above n 55.
73 Reading the introduction to this Impact Assessment – SEC (2006) 926 – certainly gives the impression that this Regulation is less clearly placed within a Council of Ministers or European Council framework of action than much of the FSJ agenda.
‘objective’ analysis of an Impact Assessment. There seems little to be gained from Impact Assessments turning into ex post facto justifications of pre-existing choices and orientations that essentially originate outside the Commission without adding significant new information into the process. Indeed, this risks simply fuelling disenchantment – whether with the Impact Assessment process or with the project of building the EU’s ‘Area of Freedom Security and Justice’. Clearly, the Commission’s mandate and instructions from the Council or guidance from the European Council may vary in urgency and level of detail, and it is not my intention to suggest that such guidance does not have a legitimate place in the policy development process. However, where there are pre-existing political commitments and orientations, the extent and nature of these do need to be made clear at the outset – as indeed is the case in many of these Impact Assessments.

Further, if an option is ruled out for reasons that are to a significant extent political and related to the (lack of) support from Member States for a particular option, this should be made clear: as, for example, is the case in the legal migration policy Impact Assessment with the option of a comprehensive Directive similar to the Proposal in 2001 and in the ‘RABITs’ Regulation Impact Assessment with the option of establishing a corps of EU border guards at this stage. It would be encouraging to think that Impact Assessments could have some role in shaping these commitments and orientations, but this depends on their taking place at an appropriate stage in the policy process. One must look to Impact Assessments relating to policy plans for this to happen – such as that on legal migration or policy priorities in the fight against illegal immigration: but we should be realistic about how often this is likely to happen and how profoundly the Impact Assessment process will be able to shape these priorities. Realistically, the Impact Assessment process may most usefully proceed from there, less in justifying existing prior commitments and orientations and more in shaping the way they are implemented. Another constraint is that one manifestation of the highly politicised nature of migration policy is
that political priorities may change fairly rapidly. If priorities change too quickly, it may become somewhat problematic for Impact Assessments to be produced in the time required in the level of depth and of the quality that would be wished. Some candid evaluation of this, as well as the matter of resources and staffing, may be required.

**Challenging the Prevailing Discourse and Portrayal of Migration and Migrants**

One function that the Impact Assessment process, as with any consultation mechanism, might perform is to be a forum where the prevailing discourse surrounding migration and migrants might be shaped and challenged. The increasing criminalisation and stigmatisation of migrants and the pronounced link between migration, terrorism and law enforcement are well documented. Can the Impact Assessment process be a forum where alternative voices are heard to challenge these discourses? The evidence thus far is, perhaps unsurprisingly, that expectations should be realistic. None of the Impact Assessments really seem to do this thoroughly and effectively: the closest is arguably that relating to the policy plan on legal migration discussing, amongst other things, the benefits of economic migration, Member States’ varying needs for it, and the case for minimum standards of protection for those admitted for work. Perhaps this is not surprising given that these are Commission documents. Early evidence suggests that the best that may be hoped for may be some limited increase in transparency in revealing the underlying assumptions and priorities driving migration policy and in the criteria used to choose between various possible alternative approaches, rather than any significantly increased or more effective opportunities to challenge or shape these assumptions at any fundamental level. Nonetheless, for those wishing to engage in the policy process and have

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75 See ch 16 in this volume.
some input by way of contributing these alternative points of view into the policy and legislative process, the Impact Assessment procedure will become increasingly important as a focus for stakeholder consultation.

**Is There a Predominant Model of Impact Assessment?**

If we return to the various different functions of Impact Assessments outlined above, there does not seem to be a single predominant model. It is clear that the function of ‘speaking truth to power’ does not seem to predominate – not in the sense of finding the ‘right’ answer to a genuinely open question, although some seem to fall somewhat between this and ‘reason-giving’. As to the provision of stakeholder input, this does certainly appear but we have seen that the record is variable and one must ask, in any event, whether the process does anything to advance on the relatively systematic stakeholder input already established in the FSJ DG. In this respect, what is, arguably, needed is not so much more input from civil society but more attention being paid to it. ‘Reason-giving for legislative decisions’ arguably fits well with many of the legislative Impact Assessments, although this can be at an abstract and general level which, arguably, robs them of much purpose beyond being an extended Explanatory Memorandum. It is also worth noting that many of these cases also have some hint of ‘speaking truth to power’ in terms of purporting to point to one clearly optimal policy approach (the VIS, Returns, and RABITs Impact Assessments could all be seen in this way). However, I would tend to see them more as justification rather than containing some kind of objective truth to inform of a correct approach, largely because of the extent to which there seem to be pre-existing policy orientations expressed by the Council of Ministers or the European Council, and the extent to which the ‘truth’ contained in these documents (preferred policy option) is to a significant degree a subjective, if persuasive, policy analysis rather than objective fact. As to ‘highlighting trade-offs’ and/or ‘structuring the discourse’, both functions can, arguably, be seen to some extent.
Some Impact Assessments do contain useful indications at a basic level of the differing issues at stake and some even contain brief indications of the relative level of importance attached to the various criteria being used and interests that must be balanced against each other in reaching a conclusion. The priority to be attached to competing interests, however, remains contestable, and the extent to which the Impact Assessment reports are able to move systematically beyond a simple enumeration of competing factors and act as a useful basis to structure the subsequent discussion as the proposals move through the legislative process remains to be seen. There is certainly potential for this to happen, even in the quite highly politicised migration law field, but a more systematic study of the existing and future Impact Assessments as they move through the legislative process will be necessary. Much will depend both on the quality of the Impact Assessment documents – we have seen this is mixed, some better than others – and the willingness of the European Parliament and national parliaments and their respective scrutiny Committees to engage with these documents in a constructive way.

**Is There an Underlying Difficulty with Impact Assessments in Immigration and Asylum Law?**

It is worth returning to contemplate briefly the different nature of various types of legislation. The Impact Assessment paradigm seems to be designed for – and thus perhaps may well work best with – what one might call the ‘classic’ regulatory pattern: regulatory authorities imposing rules which may have costs on businesses, or indeed on other not-for-profit or charitable organisations, but are intended to achieve certain environmental, safety, consumer protection or other social benefit. The purpose of Impact Assessments is to question in an adequately thorough manner, according to the issue at hand, the costs and benefits of these regulations before they are enacted. A freedom to operate in the business (or charity, educational, not-for-profit) sector with minimal interference, and such interference only when necessary, seems to be
at the heart of this. Whilst it may not be entirely fair to suggest that ‘better regulation’ is necessarily equated simply to ‘deregulation’ or ‘less regulation’, cutting red tape and minimising regulatory and administrative costs and burdens on business and other enterprises is certainly a significant driving force behind it. We have already noted the concern from the environmental perspective that the process may not yet be operating in such a way as to bring out sufficiently clearly the legitimate and beneficial reasons, sometimes not easily susceptible of quantification let alone monetarisation, why regulation may be a good thing even if there are economic costs. It would be interesting and in many ways heartening, although perhaps unrealistic, to see the Impact Assessment process begin to apply this paradigm thoroughly to the movement of persons. And yet that approach seems to be very slow in arriving outside the arena of the free movement of EU citizens, and this will inevitably shape the fundamental assumptions on which the regulatory and legislative processes proceed. Far from being an inherently legitimate activity which should be interfered with in as minimal a way as possible (as is now broadly the case in theory and also increasingly in practice for free movement of EU citizens and their family members), the surveillance and control of non-nationals in their entry to and residence in the state’s territory remains deeply ingrained and a practically non-negotiable starting point. What then happens when the Impact Assessment process is used in an area where the underlying assumptions of the role of the state, the legitimacy of state power, and the justification for the use of the state’s ultimately coercive regulatory power over the subjects of that regulation, are turned on their head? The Impact Assessment process, perhaps understandably, does not seem to have any real aim or ambition to challenge or change these underlying assumptions in the context of migration law – however much some may wish that it could or would do so. Nor do they seem very likely to be able to have a significant impact in shaping Member States’ fundamental underlying policy preferences in this highly politicised area, even if some influence on

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76 One might, interestingly, note the pre-trial supervision Impact Assessment (above n 55) as an interesting example in this field, where it could be suggested that the IA performed a valuable role in providing information to clarify the extent and cost of pre-trial detention and could be seen as significant in making the case for possible regulation to enhance the rights of migrant EU citizens when awaiting trial abroad.
negotiation and deliberation during the lawmaking process is possible. This does not mean that Impact Assessments may not have a useful role to play in informing the legislative process, or that there is any insuperable difficulty in using them in this context. However, we should be aware that this political background will influence the way they are able to do so just as it influences other aspects of the EU legislative process in this field.

CONCLUSION

Impact Assessments have thus far had a relatively low profile in the construction of the EU’s immigration and asylum law and policy. Nonetheless, they are now taking an increasingly important role and are potentially of significant interest to anyone analysing, commenting on, evaluating or seeking to influence its future direction. This chapter has introduced some of the major issues with reference to several recent Impact Assessment documents relating to migration law and policy. This technique, while it may be welcomed for the greater transparency it brings and its potential to contribute to well-informed decision-making, does give rise to some interesting questions in its application to migration law no less than in other policy areas, and indeed perhaps more so. What can a technique, fundamentally designed around ‘better regulation’, competitiveness and sustainability, offer in a field that often seems quite distant from these particular concerns? What does ‘better’ migration lawmaking mean? Can Impact Assessments deliver any useful contribution to well-informed evidence-based policy in this field, and in particular can they assist in shaping migration law and policy which complies fully with fundamental rights and international obligations? If they may in principle be capable of making some useful contribution to ‘better’ lawmaking, are they doing so as they are currently being produced? We have seen that, both on the basis of other evaluations and on the basis of examination of recent Impact Assessments in the migration law field, the current Impact
Assessment framework has some way to go before these questions can be answered systematically and confidently in the affirmative. Until these issues are addressed, expectations of what Impact Assessments can do to deliver ‘better (migration) law-making’ should be realistic, and relatively modest. Nonetheless, stakeholders and academics will have to engage with this process, both in relation to Impact Assessments dealing with individual policy and legislative measures, and more generally in the process of evaluating and hopefully in time improving the implementation of the Impact Assessment programme.