Integrated Impact Assessments have become an increasingly important part of the Commission’s legislative drafting and policy preparation process since 2002. Although structured around economic, social and environmental impacts, fundamental rights are increasingly seen as a significant element to be addressed in these Integrated Impact Assessments. The link between the IIA framework and fundamental rights protection also formed an important part of the Commission’s Strategy for fundamental rights protection in the legislative process published in May 2005. This article examines and evaluates these developments. Although potentially helpful if conducted rigorously and to the highest standards, it raises certain concerns around the practical operation of the framework, and questions the extent to which the IIA process as it is now, grounded in the concern for better regulation and sustainable development, may make a useful contribution to fundamental rights protection without some further though about how best to adapt and develop it to achieve this aim.

Impact assessments are an increasingly well-known phenomenon worldwide,¹ and are also becoming an important tool for the Commission in its work of policy-making and formulation of legislative proposals. Yet, outside specific areas,² there is as yet little literature examining the Commission’s new integrated impact assessment tool, and even less exploring the emerging link with fundamental rights protection and monitoring in the legislative process.³ This paper presents a critical exploration of these developments, with particular attention to the emerging synergy suggested by Commission

¹ Probably the most well-developed area of impact assessment is in the field of Environmental Impacts (see for example J Holder Environmental Assessment (OUP Oxford 2004), as well as entire journals dedicated to environmental impact assessment: Environmental Impact Assessment Review, and Journal of Environmental Assessment Policy and Management), although regulatory and business impact assessment also attract strong interest. The Impact Assessment Research Centre, University of Manchester and International Association for Impact Assessment, which runs a journal entitled Impact Assessment and Project Appraisal, are the focus of academic and professional activities. Specific Human Rights impact assessment is less well-developed, although it is not an entirely novel idea: see The Consideration of Fundamental Rights in Impact Assessments (EPEC, 2004).


President Barroso in May 2005 in his Fundamental Rights Protection Strategy Paper\textsuperscript{4} between impact assessments and fundamental rights protection in EU law. Part One outlines the introduction of the Commission’s \textit{integrated impact assessment (IIA) framework} in 2002 and its development since then. Part Two focuses specifically on the integration of Fundamental Rights impacts into the IIA framework and the links to the Fundamental Rights monitoring strategy outlined by Commission President Barroso. This relatively novel link between integrated impact assessments (with their strong roots in better regulation and sustainability) and fundamental rights protection opens up new possibilities and raises a number of questions. Part Three therefore concludes with some exploration of these questions and some critical thoughts about how far and if so in what way Impact Assessments may contribute to the developing agenda of fundamental rights protection in Community law.

\textbf{Part One: The Commission’s Integrated Impact Assessment Framework}

The concept of impact assessment is not new.\textsuperscript{5} The website of the International Association for Impact Assessment states that ‘Impact assessment, simply defined, is the process of identifying the future consequences of a current or proposed action’.\textsuperscript{6} Of course, many Community lawyers will be most familiar with the technique in the context of Environmental Assessment of development plans or projects, required within Member States by Community law.\textsuperscript{7} Impact assessments may also be used to examine and scrutinise \textit{proposed legislation and policy} rather than specific land use or development plans or projects, and it is this type of impact assessment that is the focus of this paper.

\textit{The development of the IIA Framework in 2002}

The origins of the Integrated Impact Assessment Framework of 2002 lie primarily in the drive for better regulation and sustainable development,\textsuperscript{8} and it forms part of the Better Regulation Action Plan.\textsuperscript{9} The Laeken and Göteborg European Councils were central in providing the impetus for the development of this new framework, which emerged in response to Commission commitments made then to develop Regulatory and Sustainability Impact Assessment tools. A Communication from the

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\textsuperscript{4} Commission Communication COM(2005)172 \textit{Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for Systematic and Rigorous Monitoring.}

\textsuperscript{5} Holder points to the old writ of \textit{ad quod damnum} as something of an historical antecedent of environmental impact assessment, addressing some of the same issues of the potential environmental impacts of proposed works. See Holder above n1, 3-5.

\textsuperscript{6} International Association for Impact Assessment website \url{www.iaia.org}.


\textsuperscript{8} Commission Communication on Impact Assessment, section 1.1.

\textsuperscript{9} COM(2002)278.
Commission on Impact Assessment, \(^{10}\) Guidelines on Impact Assessment, \(^{11}\) and attached to this, a more extensive practical Handbook ‘How to carry out an Impact Assessment’ with Technical Annexes, \(^{12}\) outline the rationale for and operation of the new framework. *Specific sectoral impact assessment* techniques have been used in the past in EU law, particularly in the areas of assessing impacts on business, trade, gender mainstreaming, environment, and health, \(^{13}\) and the IIA process incorporates these. Another influence on the development of the Commission’s IIA framework has been the use of similar tools elsewhere: it ‘has been developed after examining established procedures in Member States and other OECD countries’, but exactly how these other procedures have influenced the Commission’s programme is not entirely clear. The Commission also sees this initiative as part of a broader move, encouraging the use of Impact Assessments by other EU Institutions and by Member States - for example in the preparation of significant amendments of Commission Proposals, Member States using what right of initiative they have for example in the field of JHA, \(^{14}\) and even in draft national rules notified to the Commission. \(^{15}\) Again however, the extent to which (if indeed at all) the use of impact assessments in any other context has been influenced by the Commission’s own IIA initiative is not at all clear. It is probably too early to expect any significant development on this front.

**Aims of the IIA Framework**

The stated aim of the Commission’s IIA initiative is the following: ‘Within the general objective of ‘better regulation’, the aim of the impact assessment process is that the Commission bases its decision on sound analysis of the potential impact on society and on a balanced appraisal of the various policy instruments available’. \(^{16}\) The general framework is intended to cut across existing sectoral impact assessment boundaries, investigating all different dimensions at once in an attempt to engage in joined-up thinking. The assessments will however still proceed under particular categories of impact, of which there are three: environmental, economic and social. The roots of these three categories may be detected in some aspects of previous practice, so to a certain extent this is an exercise in consolidation of existing specialised impact assessment instruments and methods. Assessments of environmental impacts have been around for some time \(^{17}\) and clearly are a very significant focus for

\(^{10}\) COM(2002)276.


\(^{14}\) It is worth recalling that this Communication was issued in 2002.

\(^{15}\) Commission Communication on Impact Assessment, section 1.5.

\(^{16}\) Communication, section 2.

\(^{17}\) Although it is noteworthy that the primary use has been within Member States rather than requiring EIA of any Commission and EU activities. Projects gaining funding were something of an exception, but Holder nonetheless points
any sustainability programme. Most immediately this element has its roots in Sustainable Impact Assessment. Assessing economic impacts has also been done before and clearly this category has its roots in pre-existing Business and Regulatory Impact Assessment studies. This angle is given a sharper focus with the emphasis on competitiveness and better regulation. The social dimension is perhaps where the most development may be seen in the new IIA framework, but there is still discernible continuity with existing gender and equality assessment tools. It is also here, if at all, that any impact on fundamental rights would be most likely to be included in the assessment under the 2002 framework.

The immediate aim of impact assessments remains fundamentally one of information-gathering and analysis of different possible options. It is not a substitute for political decision-making. The technique can appear highly technocratic, with expert input (Impact Assessment Studies may be prepared by hired expert policy consultant agencies in preparation for the Commission’s Impact Assessment Report) and systematic and apparently dispassionate, objective analysis of the pros and cons of various options.

So what is the added value of ‘integrating’ these impact assessments, and are there any potential drawbacks to this approach? The Commission explains:

‘The Commission has considerable experience in single-sector type impact assessments. Existing tools cover for example impact on business, trade, the environment, health, gender mainstreaming and employment. These impact assessments are, however, often partial, looking only at certain sets of impacts. This partial approach has made it difficult for policymakers to assess trade-offs and compare different scenarios when deciding on a specific course of action’.

The aim is to have a single document which assesses a range of possible impacts, enabling a clearer focus on trade-offs between various positive and negative impacts. If effective, it certainly has some significant potential attractions as a ‘one-stop shop’ for decision-makers seeking to inform themselves, and for Parliamentary representatives, both in the European Parliament and national Parliaments, engaging in scrutiny of legislation. It will similarly be helpful for researchers interested in analysing and evaluating the pre-legislative genesis of proposals, and also for NGOs and other civil society organisations interested in participating in the process of legislative and policy formulation.

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18 Some Business Impact Assessment work was carried out within the Commission as early as 1986 but a further programme, the Business Impact Assessment Pilot Project, ran from 2000 to 2002 to analyse and improve on business impact assessment and also drew some lessons for the integrated impact assessment procedure. For further information and links to further material on this see the website pages of the Commission’s Enterprise and Industry DG, at http://europa.eu.int/comm/enterprise/regulation/better_regulation/impact_assessment/bia/archive_bia.htm.


20 Communication on Impact Assessment, section 1.2.

21 Communication on Impact Assessment, section 1.3.
There is however another potentially important role for impact assessments which must be recognised, that of acting as a catalyst for change in administrative decision-making culture within organisations.\(^{22}\)

It has been suggested that impact assessments may do more than just provide an opportunity for information to be gathered and presented as an input into the decision-making process. In time, they may contribute to a transformation of the decision-making culture and raise awareness of, for example, environmental or gender issues throughout an institution’s decision-making processes. Holder suggests that the Integrated Impact Assessment programme contains something of this approach.\(^{23}\)

The Commission’s Fundamental Rights Monitoring Strategy Communication envisages impact assessments as part of an overall strategy instilling a culture of respect for fundamental rights throughout the legislative process. The question of whether this is realistic in the context of multi-sectoral Integrated Impact Assessment will be addressed later.

*The IIA Framework in practice*

Flexibility and proportionality are key to the operation of the IIA framework in practice. Although a single framework ‘provides a common set of basic questions, minimum analytical standards and a common reporting format’ the Commission also envisages that it will be ‘sufficiently flexible to accommodate the differences between Commission policies and to take into account the specific circumstances of individual policy areas’.

The framework set out in the 2002 Communication split the impact assessment process into two: preliminary and extended impact assessments. The aim of the preliminary stage was largely to filter and identify from the larger number of proposals being developed, those which should be subjected to the fuller extended impact assessment procedure. All major proposals (regulatory/legislative items and those policy items with potential social, environmental or economic impacts) would undergo at least the first stage of impact assessment. This must be completed before inclusion in the Annual Policy Strategy or Work Programme. The College of Commissioners then made a decision as to which of the proposals subjected to Preliminary Impact Assessments will also be subjected to a fuller Extended Impact Assessment. The Preliminary stage culminated in a short analysis including:

1. Identification of the issue/objectives and desired outcomes.
2. Identification of the main policy options available, taking into account proportionality and subsidiarity considerations, and preliminary indications on expected impact.
3. Description of the preparatory steps already undertaken and foreseen; (consultation of interested parties, studies) and indication of whether an extended impact assessment is needed.

\(^{22}\) Holder n 1 above pps 22-29.

\(^{23}\) Holder n 1 above p 172.
The second phase was the full *Extended Impact Assessment (ExIA)*. Proposals were selected on the following basis:

1. Whether the proposal will result in substantial economic, environmental, and/or social impacts on a specific sector or several sectors, and whether the proposal will have a significant impact on major interested parties.
2. Whether the proposal represents a major policy reform in one or several sectors.

The second stage involved carrying out the detailed analysis that the first preliminary stage had found to be necessary, including consultation with interested parties and relevant experts, following guidelines laid down in the Communication on Consultation. The Commission adds that this consultation, as well as enhancing the process of information-gathering and ‘validating’ the process, should ‘allow a discussion of the wider considerations such as ethical and political issues’. Ideally, if this aspect of the process works well, it should allow room for expression of a wide range of views on the gravity of particular possible courses of action involving negative rights impacts, on the extent of any positive rights impacts, on the necessity and proportionality of possible courses of action interfering with protected rights for potentially legitimate reasons, and on possible alternative courses of action or offsetting measures to minimise or mitigate negative rights impacts.

In organising the structure of the ExIA report, the three categories of environmental, economic and social impacts was used. The Assessment would normally be conducted by the responsible Directorate-General of the Commission, although for particularly important proposals with cross-cutting impact, an inter-departmental working group chaired by the responsible DG may assist. It should be carried out ‘according to the principle of proportionality’ and with the necessary degree of flexibility to adapt it to the particular requirements of each Proposal. The relative importance of each section will vary with the nature of the proposal, and the Commission is keen to avoid both over-investigation where it is not necessary and overlooking measures where further investigation is warranted:

‘The depth of the analysis will be proportionate to the likely impact on society. Thus, proposed measures that are likely to have serious negative side-effects or particularly affect certain groups in society should be more thoroughly analysed than minor technical changes to regulations. Likewise, the analysis will be adapted to the specific circumstances of the policy domain concerned, to take into account differences between types of activities conducted by services and specific statutory obligations.’

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24 Commission Communication section 3.2(b), see also the further guidance in the Commission’s Handbook on ‘How to do an Impact Assessment’, p 31.

25 Communication, section 3.2(d).
The Communication includes an indicative reporting format for the Extended Impact Assessments, in seven sections:  

1. what issue/problem is being tackled,  
2. what is the main objective,  
3. what are the main policy options available,  
4. what are the impacts, positive and negative, expected from the different options identified,  
5. how to monitor and evaluate the results and impacts of the proposal after implementation,  
6. stakeholder consultation and  
7. Commission draft proposal and justification.  

As an aid to final political decision-making by the Commission (and eventually others later in the legislative process), it is envisaged the Assessment may well identify a preferred policy choice, the basic approach of which may emerge early or later on during the process.

Further Developments: IIA Framework fully operational from 2005

Further development of the IIA framework was always envisaged, and there was a review of the operation of Impact Assessments during 2004, by which time about 50 ExIAs had been completed. The Commission is broadly positive, while acknowledging that some improvement may be made in the operation of the Framework. Its focus is mainly on ensuring the proper use of the basic framework introduced in 2002, and fine-tuning and improving the details of the technique and its application by Commission Officials. Conceptually, the main focus of this review is competitiveness, better regulation and sustainability. The title of the Commission’s paper ‘Impact Assessment: Next Steps. In Support of Competitiveness and Sustainable Development’ itself is instructive, and competitiveness and administrative burden emerge as a major influence in amending and updating the guidelines for those preparing Impact Assessments. However, it is also at this stage that the integration of fundamental rights into these IIAs has attracted more serious attention than before – more on this in Part Two.

Independent evaluation is rather fuller and more informative, and some interesting appraisal of the quality of both the Impact Assessment process and the resulting IIA reports is available. Although noting that past experience with Environmental Impact Assessment in particular suggests that the quality of ExIA reports may be able to improve significantly from an initially low base, early evaluation indicates that the quality of the assessment process and the final reports requires sustained attention. Only a minority, one third, of the six ExIAs scrutinised by Lee and Kirkpatrick are reported

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26 Communication, Annexe 3.
29 Lee and Kirkpatrick, n2 above, analyse systematically the reports and processes involved in six ExIAs across a variety of policy areas. Specific attention is given to the integration of Environmental and Sustainability concerns into the IIA framework by Wilkinson at the Institute for European Environmental Policy – above n2. Another report examines fundamental rights in the IIA process: more on this later.
30 Lee and Kirkpatrick, n2 above, section 5, note that when similar assessments of initial Environmental Impact Assessment Statements in the UK and Ireland was carried out in 1989 relation to the first year of operation of the 1985 EIA Directive, less than 30% were considered satisfactory, but this had increased to over 60% three years later.
to be clearly of a satisfactory standard (but even then not overall of high quality), another third were assessed as marginal, and one third clearly (but not very) unsatisfactory. They also assessed provisionally the process leading to these ExIA reports and found one half to be satisfactory (but again none of high quality and some marginal) and the others regarded as marginally or clearly unsatisfactory. These evaluations also suggest that economic impacts get more detailed and satisfactory treatment than environmental or social impacts, quantification of non-financial impacts is problematic, the extent of consultation is variable, formulation of the problem (and therefore scope of the assessment) and identification of the various options remains somewhat problematic, and that there is a correlation between the quality of the process of assessment and the quality of the final IIA report. This, as they point out, is a provisional evaluation not a comprehensive or final analysis, and involves a limited selection of early ExIAs (many of which were completed without a Preliminary IA, under time pressure, and/or later in the development process than normal), but certainly indicates that there is no room for complacency. On the contrary there remains much room for improvement and learning as the IIA process matures and develops.

In practical terms, two particular developments are envisaged as a result of this review. First, we may expect a more widespread use of this technique from the 2005 Work Programme now that the IIA programme is fully phased-in. All items contained within the Commission’s Work Programme will be subject to initial scrutiny, previously Preliminary Impact Assessment, now through the initial ‘Roadmap’ relating to each measure that accompanies the Commission’s Work Programme. The two are not however exactly analogous and the Impact Assessment itself is now simply a single process rather than two stage preliminary and extended IA process. However this Impact Assessment procedure will remain selective. Second, a new set of guidance and questions to replace that issued in 2002 was envisaged and was published in June 2005.

Part Two: Fundamental Rights in Impact Assessments

Fundamental rights in the IIA Framework

The Commission’s integrated impact assessments have always had the potential to address the impact of proposals on fundamental rights and their compatibility with the EU Charter. Indeed it seems that DG JHA was contemplating some kind of specific Fundamental Rights Impact Assessment process but the more general Integrated IA process seems to have forestalled this development. As we have

31 Although striving too hard always to quantify non-financial impacts is not necessarily the best way forward.
32 In particular in relation to the process, there was for the version of the report read by the author little or no direct comment from the Commission on the process.
seen, there are indications that fundamental rights impact should be included in the assessment of social impacts, although the overall impression that emerges of the place this has had in the initial stages of the integrated impact assessment programme in 2002 is at best ambivalent. Some documents mention fundamental rights clearly as part of social impacts, others do not, and the programme has its origins in seeking competitiveness, better regulation and sustainability rather than specific concerns about fundamental rights. This is made quite clear at the outset of the IIA programme in 2002, where the Commission talks about the role of Impact Assessments ‘within the framework of better regulation’, and also emerges from the Commission’s Impact Assessment website. It also remains central to the 2004/05 review of the IIA Framework, but at this stage something of a new chapter does now seem to have opened with two related developments of particular relevance. The first is the Commission Communication on Securing respect for Fundamental Rights in Commission Legislative Proposals, the second is the way fundamental rights have been treated in the 2004 IIA Review.

**Barroso’s Strategy Paper and links to the Review of the IIA programme**

The Communication was unveiled in April 2005. It has several objectives. First to enable Commission services to monitor from the very earliest stages of development respect for fundamental rights in the development of legislative and policy initiatives. Second, to enable Commissioners and in particular the members of the Group of Commissioners on ‘Fundamental Rights and the Fight against Discrimination’ to follow the results of this monitoring and to promote a culture of fundamental rights. Third, to make these monitoring processes and their results more visible to the other institutions and to the public more generally.

The Communication stresses that compatibility of Commission acts and EU legislation with fundamental rights is already an essential aspect of the constitutional legality of such measures, and that examination of such issues of fundamental rights must remain a central part of general control of legality. The conclusion is that it is neither appropriate nor necessary to create entirely new structures or administrative procedures for this particular aspect of legality control. The Communication

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34 A survey of the documentation reveals the following. Communication on Impact Assessments COM(2002)276 (19pp) - no mention. Guidelines on Impact Assessment SEC(2002)1377 (28pp) - no mention. Annexes to these guidelines, the Handbook on ‘How to do an Impact Assessment’ – p6 mentions protecting personal rights and freedoms as an aim of intervention to achieve fundamental goal of society, and p20 mentions impact on fundamental rights and Charter compatibility as potential social impacts but does not elaborate further. Part II, the Technical Annexes, (41pp) – p7 again identifies protecting fundamental rights as a goal of society and pps 22 and 23 discrimination in particular and fundamental rights generally appear under a list of possible social impacts, but again without much further elaboration. At the end in Annexe 13, no further links appear to any specific guidance on how to identify or assess fundamental rights impacts. This makes a total of 122 pages of material of which five mention Fundamental Rights, but all only briefly and without further elaboration.


37 Communication paragraph 5.
nonetheless indicates building on existing strategies with documents that are already prepared during the pre-legislative process: both in impact assessments and explanatory memoranda, a new emphasis on fundamental rights may be expected. The Communication also envisages a role for the Group of Commissioners in following through the results of this internal monitoring process.

In respect of impact assessments, a series of new questions will be added to the existing ones, focusing on the impact on individual rights. Interestingly however, the document stops short of proposing a separate heading of ‘fundamental rights impact’ to add to the existing three or even adding a distinct separate subheading under ‘social impacts’, the main location where fundamental rights have been addressed thus far. The questions will be scattered throughout the three headings. This in itself does little to lay to rest the ambiguity concerning the place of fundamental rights in earlier documentation, particularly the main Commission Staff Working Paper reviewing the operation of Impact Assessments. Throughout the six pages reviewing progress and setting out general aims for improving the IIA framework, fundamental rights are not mentioned at all, and in Annex II, a draft list of new questions being prepared for the use of those drawing up Impact Assessments, fundamental rights and Charter compatibility does not at this stage rate a separate mention. Thus far, the impression is that fundamental rights were and still remain tagged onto the impact assessment framework as a subsidiary concern – but digging more deeply does produce some rather more hopeful signs. Annex I envisages fundamental rights as possible social impacts, and several recent Impact Assessments do address fundamental rights directly. Two more recent documents are more instructive and call for more detailed attention: an internal document prepared for the Commission by external consultants (hereafter called the EPEC report), and the new guidelines on how to conduct an impact assessment.

The EPEC report and new Impact Assessment Guidelines

The EPEC report was produced by an independent consulting agency and contains some helpful background to the use of impact assessments and similar tools elsewhere to monitor fundamental rights, as well as a brief evaluation of the treatment of fundamental rights in ExIAs, and outlines some

38 Paragraphs 7-9.
39 Communications paragraphs 25, 26.
41 From the later documentation it seems this was because at the time the report on the consideration of fundamental rights in impact assessments was being drawn up and the question was under consideration. EPEC report. Page 28.
42 Relating to proposed legislation, VIS Impact Assessment, SEC(2004)1628, and SEC(2004)491 on the rights of defendants in Criminal Proceedings, as well as the Assessment on Returns Procedure, SEC(2005)1057. A number of other ExIAs that deal with fundamental rights are discussed in the EPEC report; see below. Also worth mentioning is the ExIA relating to the establishment of the Fundamental Rights Agency, although detailed consideration of this ExIA and its contribution to fundamental rights protection is almost worth an entire paper in itself.
43 Above n 1.
further guidance for those actually drawing up future impact assessments. It was drawn up in 2004, after a process that included consultation with some NGOs. Despite some concerns about the lack of transparency and availability, it remains central as the only significant document considering in any depth the issues surrounding the integration of fundamental rights impacts into the overall IIA process. At the least it is heartening to see that such a document does in fact exist, and that it does not shy away from pointing out some defects in the current processes (on which, more in the next section) and calling for clearer and more systematic guidance on the issue, and indeed going some way in preparing such guidance itself. The draft guidance and questions contained in this report are focused specifically on fundamental rights, and include pointers to such issues as limited and absolute rights, proportionality, sources of further guidance such as case law of the ECJ and the ECtHR, as well as further material in the Annexes (in particular potential connections between different Charter Articles and potential policy areas which may be seen to be particularly likely to raise rights impact questions). This is a significant improvement on bland and unelaborated statements that fundamental rights and Charter compatibility questions are possible social impacts, and is a helpful supplement to the fuller list of questions contained in the new general guidelines on impact assessments (see further below). Nonetheless it will be interesting and important to see how these further guidelines and other material in the EPEC report are used in practice before coming to any settled conclusions about the success of assessment of fundamental rights impacts within the IIA framework.

The second relevant document is the new IIA guidelines, published in June 2005 and therefore after the EPEC report and able to draw on its conclusions - but with no specific reference to it. A few

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45 The report itself comments on how the monitoring and involvement of NGOs concerned with fundamental rights issues in the process of consultation with the Commission can be somewhat unsystematic, and dependent on personal contacts and networking. This may well also have been the case as regards the involvement of NGOs in the process of consultation that resulted in this document. The author has for some time been a member of the European Subcommittee of ILPA, a UK NGO of immigration lawyers (practitioners, academics and students), which has commented regularly on Proposals in the field of JHA/Freedom Security and Justice, immigration and asylum law in particular, and responded to the consultation in relation to the Visa Information System Impact Assessment. Yet, ILPA is not on the list of NGOs in this field attached to the EPEC report, nor was amongst the NGOs it consulted about the treatment of fundamental rights issues in the IIA framework for the EPEC report.

46 Although the final report was drawn up after a seminar and consultation with some NGOs, the final document is not readily available or publicised widely on the internet, either on the Freedom Security and Justice DG or Impact Assessment sections of the Commission’s website. Nor is it explicitly referred to in any other Commission documentation. The author learned of this report through an internet search and obtained a copy of it only after some persistence, although it was eventually provided by a Commission official without the necessity for a formal request for access. It is regrettable that this is not made public more proactively on the website or document registry, nor referred to more clearly and explicitly by name in the new Commission Guidelines as a source of further information. Particularly in so far as this document appears to be intended to act as some kind of further internal guidance for those involved in drawing up impact assessments, and is therefore likely to be of some practical importance in how the process operates, it is critical to the kind of participation that the Commission says it wishes to encourage, and to independent evaluation and monitoring of the IIA process.

47 A report of 61 pages with Annexes running to another 63, all dedicated to the question of integrating fundamental rights into the IIA procedure, is riches indeed compared to five passing references in the 122 pages identified earlier.

48 It seems likely that that this report may be adapted or the material used to form some kind of further internal guidance for Commission staff; perhaps web-based, but this is not clear from the report itself: the title of the final Annex to the report although not included in the version sent to the author suggests that this may be the case.
comments may be made here. First, and on a positive note, the guidance at the end does include a range of rights impacts in the list of questions to be addressed. This has to be a welcome development. Yet the list of questions in itself, perhaps inevitably, gives the impression of being somewhat superficial and lending itself to something of a checklist, tick-box mentality. If there is a healthy and well-informed culture of rights awareness, and the willingness and ability to pursue adequately any points raised by this checklist, then this may not be so problematic, but in a context where there is not necessarily that culture and knowledge throughout the Commission, there is a danger that it may be more so. So while this checklist may be a good start, on its own it may not be enough to secure systematic, thorough and well-informed treatment of rights impacts within impact assessments: further guidance and how it is used in practice will be significant. The role of the Commission’s Legal Service and DG Freedom Security and Justice in providing legal expertise on fundamental rights matters during the Inter-departmental consultation will be important too.

This checklist of questions aside, the document reinforces the impression that the entire impact assessment process is grounded in concerns about regulation (or perhaps deregulation or questioning the necessity for regulation), competitiveness, and sustainability, including of course environmental concerns. Other references to fundamental rights are minimal and do little to elaborate further. This is perhaps only to be expected given the provenance of the IIA procedure, but it does not instil great confidence about the centrality of the role of fundamental rights protection as a driving force behind IIAs.

These comments lead on to the next observation, the question of Fundamental Rights impact and Charter compatibility as a separate category. As noted above, the tripartite division between economic, social and environmental impacts is to be retained, and the checklist of questions contained in the June 2005 guidance is structured accordingly. The Commission explains:

The reason for this approach is that the fundamental rights of the Charter are diverse and cut across all sectors. Thus, impacts on, say, rights of ownership, on the freedom to run a business, or on occupational freedom, are best detected and assessed within the section on ‘economic impacts’. By the same token, questions on social rights should be dealt with in the

49 See the indicative list of economic, environmental and social impacts, from p 29. Page 28 indicates that some of these questions are inserted to ensure compatibility with the EU Charter of Fundamental Rights, but neither at that stage nor in the list of questions are these questions identified or any further guidance given as to how these questions might best be used in practice to ensure Charter compatibility. For a reader with some knowledge of fundamental rights law and the Charter in particular, several fundamental rights issues jump out immediately from the list of questions, but it would take a little time and some careful cross-checking with the particular Charter Articles to identify all the potential connections. For someone without a fundamental rights law background, identifying all of these links would be a more difficult and unreliable process. Yet the non-specialist reader wanting to know clearly how to identify and deal with fundamental rights questions is given in this document no further source of guidance.  
50 The extent of knowledge and expertise throughout the Commission is raised by De Schutter, above n 3 at p 55. The Commission itself, in answer to questions put by the House of Lords Committee during an inquiry into the Strategy paper, indicates that the role of the Legal Service and the DG Freedom Security and Justice in providing additional Fundamental Rights expertise where necessary is critical in this process.
section on ‘social impacts’. Introducing a fourth new heading ‘fundamental rights’ could lead to needless repetition by the assessing services instead of sharpening their focus on the practical impacts which might be relevant to those rights. The creation of a sub-heading in the chapter on ‘social impacts’ would not adequately reflect the variety of, and balance between, the social economic and political rights in the Charter.51

These sentiments may be admirable, but one wonders whether the strategy chosen may not jeopardise the transparency and high profile, and ultimately prejudice the effectiveness, of the addition of these questions and the new focus on fundamental rights. If fundamental rights are to be taken as seriously as economic factors, environmental concerns, or broader social impacts, it is difficult to see why they do not deserve their own (even if brief) category or subcategory. Recalling that impact assessments may have a dual role, both as a means of providing information to assist in decision-making and as a way of changing cultures of decision-making, in the context of fundamental rights it may be that this is not the optimal method of achieving either function. There are already some concerns expressed from an environmental protection point of view52 that one implication of the integrated assessment procedure is that a sharp focus on environmental issues may be diluted and compromised by these concerns having to take their place alongside a host of others (better regulation, business impact, competitiveness, social impacts …). To some extent this concern is borne out by early assessments of the way IIAs have dealt with sustainability issues.53 Similar concerns have to be raised in relation to fundamental rights impacts, which are arguably already less well-established and understood within the impact assessment process, and lack the clarity and focus of a separate heading which environmental concerns still retain.

Adding to this concern, the list of questions in the guidance does not clearly identify which questions raise fundamental rights issues and which do not. Of course the ultimate legislative decision whether a particular proposal is or is not a justified interference with a qualified right must be preserved for the proper, politically and democratically accountable, decision-makers. However, this does not detract from the importance of ‘locking-in’ (to use the terminology of the Communication) a culture of awareness of the fundamental rights nature of these potential impacts from the very outset. Particularly in the context of impact assessments that may be carried out in whole or in part by those without specific training in or detailed knowledge of fundamental rights law, it surely cannot be helpful to mask or hide the nature of a question as being one that raises fundamental rights issues. Again, this concern has at least some foundation in the preliminary evaluation made of the first set of impact assessments in as the EPEC report. This report suggests that the clearer and more obvious the potential fundamental rights issue, the better it is dealt with, and that the fundamental rights nature of

51 Paragraph 19.
52 Holder, n 1 above p 172, see n 77 above.
53 Wilkinson, n 2 above.
some of these issues when they are raised is not always drawn out explicitly.\textsuperscript{54} For example it mentions that it is not always clear whether the discussion of proportionality is consciously and deliberately part of a fundamental-rights approach or not. At least if fundamental rights questions are identified as such in this checklist, the issue is put on the table explicitly at the outset, and this would help in shaping and directing further investigation and consideration of the issue.

**Integrated impact assessments and fundamental rights in practice**

How then is the IIA process dealing with fundamental rights issues in practice? The EPEC report contains a small but interesting section on the way fundamental rights have been dealt with in impact assessments thus far.\textsuperscript{55} It examines a range of impact assessments, although interestingly these were apparently supplied by the Commission rather than at the initiative or suggestion of EPEC itself.\textsuperscript{56} They cover (1) Equal Treatment (Gender) in Access to Goods and Services,\textsuperscript{57} (2) Equal Treatment (Gender) in Access to Employment and Occupation,\textsuperscript{58} (3) Communication on Immigration, Integration, and Employment,\textsuperscript{59} (4) European Refugee Fund,\textsuperscript{60} (5) Procedural Rights in Criminal Proceedings throughout the EU,\textsuperscript{61} (6) Development Co-operation with Third Countries,\textsuperscript{62} and finally (7) Reforming the EU’s Sugar Policy.\textsuperscript{63} The conclusions of this summary are perhaps not surprising. The process is in its early stages, and as we have seen, other more general evaluation of early use of Integrated Impact Assessments\textsuperscript{64} indicate variable performance generally. From experience with Environmental Impact Assessments, perfection – or indeed consistently good or even universally satisfactory performance – of IIAs should not necessarily be expected immediately, but that performance should improve as experience of the procedures involved grows.

All but one of these Extended Impact Assessments do have some mention of fundamental rights, Sugar Policy being the exception, having been included as an example of a clearly written ExIA and an example of good practice rather than because of any perceived strong link to fundamental rights.\textsuperscript{65} This highlights one limitation of this report and its evaluation, which is that it does not systematically scrutinise other ExIAs to determine whether any potential fundamental rights questions – less obvious

\textsuperscript{54} EPEC report, section 3.
\textsuperscript{55} EPEC report, Sections 3.2 and 3.3, pps 29-31.
\textsuperscript{56} EPEC report, p 28.
\textsuperscript{64} See above n 29 and accompanying text.
\textsuperscript{65} A brief overview of the sections of each Impact Assessment which contain mention of Fundamental Rights or Human Rights is contained at p29. Page 30 contains some discussion of the way fundamental rights are treated in these documents, although in covering six in one page the consideration is necessarily brief.
ones – are being missed. To do this thoroughly and systematically would be a significant endeavour, and one that is beyond the scope of this article. However, even in respect to the IIAs identified and examined, the report does note some concerns about current practice and that more might be done. In particular, ‘Fundamental rights seem often to be referred to as a matter of form rather than actually considered and discussed in the impact assessments’, and once identified they are not always followed through consistently and thoroughly throughout the assessments. Unsurprisingly, the less obvious the link to fundamental rights the less clear it is whether any consideration has been given to them. Conversely, the more clear and obvious the potential effect on fundamental rights, the better and more detailed are the assessments and treatment of these issues. The report continues: ‘Yet it is not always clear, even then, whether the proportionality principle is applied as part of a conscious Fundamental Rights outlook or just by accident’. It concludes that further guidance is required ‘so that relevant questions regarding fundamental rights and their implications can be asked and addressed in a systematic and structured way’. It is difficult to disagree with the gist of this assessment: although some awareness of rights impacts is present in impact assessments where it would be expected and this is of course welcome, systematic, high quality and thorough treatment of these issues still seems some way off. The report certainly gives some weight to concerns about ensuring the visibility of issues as fundamental rights questions, about the expertise of those carrying out the assessments, and for the assessments to have a sustained and clear focus on following through the issues involved thoroughly when they do arise. We have already seen some of the steps taken in the new guidelines to integrate fundamental rights further into the IIA procedure and commented on some of the difficulties that still remain.

**Part Three: Some critical reflections and evaluation**

This section of the paper will draw some threads together by way of evaluation. Is this new strategy explicitly linking impact assessments and fundamental rights to be welcomed? What may we expect from it, what are its strengths and weaknesses, could it be improved, and how does it fit in the overall strategy of fundamental rights protection in the EU? Systematic scrutiny in order to ensure fundamental rights are considered from the outset of any significant legislative or policy proposal has to be a good thing, and therefore this initiative can be welcomed in the hope that it will be a positive and helpful development. However, a few more sceptical and critical points can also be made to balance this welcome, and to suggest ways of maximising the effectiveness of the IIA process as a method of monitoring and protecting fundamental rights.

*A tool to facilitate, not a substitute for, rights-compliant decision making*
The political commitment of the EU institutions and the Member States collectively not just to *talk about* rights protection but to *act* in such a way – in legislation and policy-making as well as implementation of EU law – as to ensure that rights are actually protected and not infringed remains central. All too often, when it comes to settling details of specific legislation and policy, concerns about rights seem to be ignored or overridden by other political imperatives. The most detailed and comprehensive Impact Assessment imaginable, documenting clearly every potential negative environmental or fundamental rights impact, will be only of very limited use if (for example) in judging the balance between environmental damage and economic prosperity the environment is always seen as dispensable, or in judging the much talked-about balance between freedom and security, it is always judged necessary to sacrifice basic liberties for whatever apparent gain in security is offered. It will take more than the publication of strategy papers and impact assessments to convince many that there has been any fundamental change of attitude. While this largely continues to be the case, any welcome given to the strategy paper and the use of impact assessments must be somewhat qualified. At least some degree of caution seems justified and the expectations from strategies such as those discussed here should not be exaggerated.

*The limits of Impact Assessments*

The limits of impact assessments should be clearly understood. We must be aware of what such a process may or may not achieve in the overall context of a human rights policy: in particular, de Schutter has written helpfully about the limitations of impact assessments in the overall context of mainstreaming fundamental rights, and stresses the need to distinguish between rights *promotion* and securing rights *compliance* in legislation.\(^{66}\) We should not expect pre-legislative monitoring through impact assessments to achieve what it is neither intended nor designed to do, nor criticise unfairly on the basis of unrealistic expectations.

First, although the impact assessment is prepared before the final policy document or legislative proposal is drawn up, the process of impact assessments only begins when it is being developed or considered – rather than at the stage of deciding whether to bring forward any proposal or policy document at all and whether there might be some obligation to do so.\(^{67}\)

Second, these IIAs only deal with the Commission’s own work. Concerns remain about monitoring and ensuring fundamental rights compliance at other stages of policy-making and legislative drafting, or when legislation is being implemented and applied. The Commission itself recognises this and indicates that it will encourage similar impact assessment techniques when proposals leave the

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66 De Schutter, above n pps 51–65.
67 De Schutter makes this point, above n 3 at p 63.
Commission and are amended by the Council and/or Parliament, and then beyond that when they have been adopted, specifically as legislative acts.\textsuperscript{68} The Strategy paper also raises the prospect – perhaps rather unlikely in practice – of the Commission pursuing the issue by taking annulment action as a last resort if standards of fundamental rights protection contained in the Commission’s Proposals are badly compromised during the process of amendment before adoption by the Council and Parliament.\textsuperscript{69} Equally important, and a separate question, is Member State compliance with Fundamental Rights when implementing and applying Community law – and more controversially beyond this in areas purely of Member State competence. There are continuing questions about the effectiveness of monitoring and enforcing compliance, but these issues need to be addressed separately.

Finally, even the wider coverage of impact assessments from the 2005 programme will not be comprehensive: measures will not be subject to the preliminary Roadmap if not in the Work Programme, and the full IA procedure remains selective. This has to be of some concern, although it is understandable that resources may be an issue and a more limited number of properly conducted IIAs is probably preferable to stretching available resources too far to ensure that the work done is of quality. Much will depend on how effectively the Roadmap process identifies at an early stage those Proposals that require further detailed attention on the basis of significant potential rights impacts and how effectively the Commission is able to identify any Proposals that are not in the main Work Programme but may still require scrutiny with fundamental rights impacts in mind. It may be helpful in due course to review how this process of selection works, and it will also be important for the Commission to be responsive to any concerns raised from civil society and NGOs about particular proposals – or even entire categories or types of proposal – that merit greater scrutiny than they are actually receiving.

\textit{Expertise and guidance in preparing Impact Assessments}

Concern has already been expressed about the way in which fundamental rights questions are to be addressed within the IIA process, in particular when a DG with only peripheral involvement in and expertise of fundamental rights issues is the lead DG.\textsuperscript{70} It is a hopeful sign that internal guidance has been prepared for those drawing up Impact Assessments, and in so far as it goes, the content of it seems sound enough. But some lingering questions must still remain, which can only be laid to rest (or demonstrated to have been fully justified) in the fullness of time when more impact assessments have been prepared using this guidance and when more experience of the working of the process is available. As noted above, the internal role of the Commission’s Legal Service and the Freedom

\textsuperscript{68} Communication on Impact Assessment COM(2002)276, section 1.5.
\textsuperscript{69} COM(2005)172 paragraph 29.
\textsuperscript{70} De Schutter, above n3, p 55.
Security and Justice DG will be important during Inter-departmental Consultation to ensure that high quality advice and guidance is readily available within the Commission whenever needed. Independent monitoring and analysis of the process will be important, and transparency on the part of the Commission will be necessary to enable this to take place. Even at this early stage, a somewhat greater degree of transparency seems desirable already – less in relation to particular impact assessment reports which are now quite readily available,\(^{71}\) than in relation to the manner in which fundamental rights are to be dealt with within the IIA process generally. The EPEC report and the guidance contained in it could and should be more accessible. It is not clear why this document in particular, or even any other further internal guidance based on it, is not more readily and directly available through the usual electronic sources such as websites and document registries.

*Participation in the Impact Assessment process*

Concerns have also been raised about the openness of and participation in the impact assessment process itself.\(^ {72}\) The nature of fundamental rights impacts make inclusiveness and listening to a wide range of voices from civil society and NGOs an important part of the process. Consultation with ‘relevant stakeholders’ is built into the impact assessment process,\(^ {73}\) so it is to be hoped that the concerns that have been expressed will be taken on board and that full and inclusive consultation will take place. The EPEC report explores this question and suggests that, although there is clearly a strong interest in participating on the part of NGOs, a willingness to get involved, and indeed a good amount of involvement, there remain some questions about how systematic the process of consultation is, and that sometimes it is a rather haphazard process dependent on personal contacts, individual initiative and financial resources. Continued vigilance will be required to ensure that the process of consultation works properly and fairly.

However, all the consultation that might be wished for will be of limited use if it is only given superficial consideration. How far critical voices will be able to influence the final shape of impact assessments rather than just being noted for the record and then ultimately dismissed, remains to be seen. A strong level of concern was expressed by consultees who responded regarding the Visa Information System,\(^ {74}\) and was duly recorded in the Impact Assessment but was ultimately dismissed,\(^ {71}\) Initial evaluation identified accessibility of IIA reports as a weakness of the process; but they are now readily accessible. A list of Impact Assessments and links to the documents are available on the Commission’s Impact Assessment website. In relation to particular documents (Legislative Proposals or Communications), the fact that an Impact Assessment has taken place is revealed by the presence of a cross-reference [in brackets, thus] to an associated Staff Working Paper SEC number on the title page: this identifies the document which may be obtained from the document registry or from the Impact Assessment website.\(^ {72}\) De Schutter, above n 3 at p 4.

\(^ {73}\) Impact Assessment Guidelines, SEC(2005)791 section 7, see also EPEC report, section 5.8. Consultation should take place in line with the Commission’s Communication on Minimum Standards for Consultation.

and a preferred policy option identified, one with very significant (although not the most extensive) impact on privacy and data protection issues. There was no specific consultation on the Returns Procedures Directive IIA, on the basis that consultation had already taken place previously. On the other hand, in the Criminal Proceedings Impact Assessment concerns about the need for EU regulation at all were sidelined in favour of views expressed that protection of suspects rights in criminal proceedings was an issue of importance for the EU and that neglecting it would send a negative message in terms of rights protection. In the end these Extended Impact Assessments present an ambiguous picture of how effective this kind of consultation and dialogue can be, in the face of determination that measures with significant negative fundamental rights impacts are necessary, and the possible development of a decision-making culture within the IIA process emphasising balancing and trade-offs rather than the primacy of rights as such.

What kind of decision-making culture?
We have seen the potential role of impact assessments not just in the provision of information but in the transformation of decision-making cultures: how might this role develop in the context of integrated impact assessments? In moving from specific targeted sectoral assessments to an integrated assessment of a number of different impact categories, and indeed one which deliberately envisages trade-offs being made, the sharp focus on any one category of impact may be lost. One may wonder how effective this kind of integrated assessment tool may be in the long run in instilling a widespread culture of awareness of and respect for specifically (as the case may be) environmental or fundamental rights issues. Some concern about the ‘dilution’ of environmental concerns has already been raised, and similar issues must arise in the context of rights protection. One wonders what kind of culture may develop: one truly committed to the highest possible standards of fundamental rights awareness and protection, or an ‘integrated decision-making’ culture in which balancing and trade-offs predominate rather than a wholehearted commitment to, for example, environmental protection or fundamental rights as such? This is particularly concerning in the context of fundamental rights where there are systematic substantive constraints on government action. There are some unqualified rights where justification is simply not permitted, and even where rights are qualified, however necessary some degree of balancing may be within the constraints of fundamental rights law, this should be exceptional and scrutinised with great care rather than routine. If an outlook develops that emphasises and expects balancing and trade-offs rather than one which sees protection of rights as the

76 N61 above.
77 Holder, p 173, referring to a DG Environment internal paper. The Environment DG does welcome the procedure and ‘recommends seizing the opportunities presented’ by the IIA procedure while ‘minimising the main risks’ including that environmental objectives may be diluted. Early assessment by the Institute of European Environmental Policy also indicates some concern about the way sustainability is dealt with in IIAs – Wilkinson et al n2 above, see also D Wilkinson n2 above.
default position that may only be departed from exceptionally and with justification of necessity, this would be a troubling development.

The particularity of fundamental rights?
This leads to a more fundamental point about the nature of fundamental rights, and the potential differences between rights impacts and other impacts examined by impact assessments.

In particular we may contrast fundamental rights impacts with certain regulatory or business impacts, but also to a lesser extent environmental and sustainability impacts or more generally social impacts lacking any additional fundamental rights dimension. In neither case is there in quite the same way a ‘protected area’ of rights into which authorities may intrude only where necessary and proportionate in a democratic society. Now, this is not to say that some decisions about regulatory or business impacts may not have politically sensitive aspects to them – and indeed the rejection of the Constitution in France and elections in Germany may signal a more high profile public debate about the EU’s regulatory future than has hitherto been the case. Environmental and sustainability impacts perhaps share to an even greater extent some of the nature of decisions on questions of fundamental rights - in terms of complex balancing of incommensurable values and assessing of non-financial impacts, as well as the contentious issue of the precautionary principle. How exactly, for example, does one assess the value of a clean environment or biodiversity (rather than just recording pollution levels or numbers of species), any more easily than that of freedom of speech or liberty? There is already some literature pointing out the necessity of recognising the subjective nature of some of these value judgments within the environmental assessment process, and very similar points may be made about questions of necessity and proportionality of interferences with fundamental rights and how non-financial rights impacts are assessed. Such issues must be settled in an open, transparent and accountable manner, whilst also always being subject to the rule of law in the form of appropriate judicial scrutiny.

Nonetheless, fundamental rights may arguably be seen as qualitatively different. Although this is not the place for a comprehensive theoretical analysis of the nature of fundamental rights, two possible points of difference are worth raising. Environmental and regulatory questions have not quite yet gained the kind of status as guiding principles of institutional and political morality as fundamental rights. Nor, in most cases, does environmental law systematically embody substantive standards that may ultimately be legally enforceable in the same way as fundamental rights. To use the words of Justice Stevens (commenting in the specific context of the US National Environmental Protection Act)

78 Holder n 1 above pps 94-96
79 De Schutter, pps 57-62.
it is often thought that Impact Assessment procedures generally are intended to avoid ‘uninformed’ rather than guide away from wrong or ‘unwise’ decisions. The lack of such substantive standards and constraints and the largely procedural nature of environmental impact assessment is regarded by some as an inherent limitation or even weakness of the process. In the fundamental rights context, however, we should perhaps question even more critically the orthodoxy that the role of the IIA process is to avoid ‘uninformed’ rather than ‘unwise’ or even ‘wrong’ decisions. There are critical questions of legality where fundamental rights are involved and a set of systematic substantive constraints on action. An awareness of these constraints should be built into the IIA process, and the Assessments should proceed with an awareness that even in providing information to assist neutrally in subsequent decisions, this inevitably involves assisting in identifying and complying with these constraints. In other words, whilst not losing sight of the potential role in rights promotion and securing highest possible rather than minimum standards, these IIAs should become a tool to avoid not just uninformed decisions but unlawful ones. There is little recognition of that role outside the EPEC report.

Are Impact Assessments (as one might hope) likely to contribute to greater transparency, openness and subsequent independent judicial scrutiny, with the different options and approaches being set out to enable better, more fully reasoned, defensible and rights-compliant decision-making? Or (as one might fear) is the use of such a mechanism with its roots in the somewhat technocratic, bureaucratic and often objectively measurable world of better regulation, competitiveness and sustainability simply not ideally suited to the different nature of decisions involving fundamental rights? Or even if not inherently unsuitable, is there a risk that it will end up being used in a way that is? These are interesting questions – to which there is not necessarily an obvious answer at this early stage. Some, no doubt, will be more sceptical and others more optimistic. However, the strong roots of the Commission’s particular IIA framework in the quest for better regulation and sustainability must give some pause for thought as to how much hope it is wise to pin on this specific technique in the different context of fundamental rights protection without some rather more careful attention to how best to adapt it.

Subsequent use of impact assessments: compatibility statements and recitals

80 In Robertson v Methow Valley District Council 490 US 322, 104 LEd2D 351 (1989) at 350-1, quoted in Holder n 1 above p 255.
81 The necessity to comply with fundamental rights as an essential part of legality is mentioned briefly in some of the IIA documentation. However, the EPEC report is the only document that dwells on this point in any detail and emphasises clearly that options that are incompatible with fundamental rights are not permissible. It is also the only place in the IIA documentation that any real useful guidance is given by way of identifying what these fundamental rights are, and what the specific legal constraints on Community action might be.
This is where the second element of Barroso’s strategy (compatibility statements) is also worth some attention alongside the use of impact assessments. Again, this is not entirely new: these have been in use since the solemn declaration of the Charter where a significant link to Fundamental Rights is apparent in the legislation.\textsuperscript{82} This should ensure not simply that possible fundamental rights considerations and potential impacts are taken into account through the provision of information but that an appropriate and well-informed legal analysis takes place about the compatibility of various courses of action with specific legal standards, particularly the ECHR and Strasbourg case law, the ECJ’s own jurisprudence and the EU Charter (despite its lack of formal legally binding status). Monitoring should also continue so that any such statements of compatibility made at an early stage (such as when a Proposal is made) remain valid and can also be supported when the final legislation is adopted. Here, the Strategy Paper contains little new, some consolidation of existing practice about when it is appropriate to include compatibility recitals in legislation, a welcome commitment both to greater reasoned justification for them in exploratory memoranda, and to following through the results of this early monitoring through the rest of the legislative process.

It is however worrying to see the results of this process so far – and the contexts in which some of the compatibility statements/recitals have been made. It is a banal point and it is perhaps unnecessary to spell it out, but nonetheless the point must be made: such compatibility statements are only as good as the yardstick by which compliance is judged. If a low standard of rights protection is judged sufficient, then such statements may be made where they are of questionable validity and worth (for example, in the preamble of Directives parts of which are later challenged in the Court of Justice by the European Parliament,\textsuperscript{83} or in those that have been condemned by such organisations as the UNCHR).\textsuperscript{84} The matter however goes beyond merely a matter of complacency and regrettably low standards being used to judge whether such statements may be made. Two further issues in particular may be noted; first, the impact of statements made or views expressed during early stages of developing Proposals on the ultimate legislative or policy outcomes, and second, potential impact on later judicial scrutiny of legally binding measures.

Whether deliberate or not, we should reflect on whether and how scrutiny processes may subsequently act to influence or prejudge in some way the level of rights protection contained in the final legislative instrument. Impact assessments are intended to assist in decision-making and it is naive to think that

\textsuperscript{84} Eg the pending Asylum Procedures Directive, Amended Proposal COM(2002)326, see further Council Document 14203/04 and Report A6-0222/2005 – debated in Plenary 27\textsuperscript{th} Sept 2005 and passed by a very narrow majority, although certain aspects of the Proposal were rejected. UNHCR has commented critically, a detailed commentary is available on its website www.unhcr.ch, and there is plenty of other critical commentary from other NGOs.
they will – or indeed should – be ignored when decisions are being made. Yet we must not let the apparent objectivity of expertise used, or the apparently objective evidence and arguments for and against particular policy options set out in the impact assessments hide the fundamentally political nature of these choices. It would be all too easy to hide behind impact assessments in the subsequent stages of legislative and policy drafting, where justification could simply proceed by way of bare assertion: ‘the impact assessment judges this to be justified’, ‘the impact assessment judges this to be the preferred option’ ‘the impact assessment judges this benefit to outweigh that disadvantage’ … These choices must remain political ones and accountability must remain firmly with the political decision makers. The IIA process should be used as a tool to drive up standards and to enhance effective and democratic scrutiny of decision-making and legislative processes rather than to shift the locus where these critical judgments are made away from public scrutiny and into the hands of unaccountable policy experts and Commission officials.

Another related and important point is this: to the extent that these impact assessments, compliance statements, recitals and explanatory memoranda might well increase the apparent legitimacy of subsequent legislation or policy documents, everything possible should be done to make sure this is in fact justified by the process. Additional legitimacy must be fully earned by the nature and quality of the IIA process and subsequent legal analysis leading to any statement of Charter compatibility. As we have seen, initial evaluation of Impact Assessments, both generally and with particular emphasis on fundamental rights monitoring, indicate that the quality of the IIA process and the resulting reports requires continued attention, and some would suggest that dubious standards of rights protection are being applied in judging whether Charter compatibility statements can rightly be made in respect of legislation. Work still remains to be done in these areas.

The process must also be transparent and open. A wide range of expertise and opinions should be reflected in the drawing up of impact assessments, they should be disseminated widely, and the ways in which they are used subsequently in further policy and legislative development should be open and accountable. In particular, it would be regrettable if the role of civil society and/or of national parliaments in the deliberative process of scrutinising legislative Proposals and Policy papers and deliberating between different policy options were in any way compromised by this process of Impact Assessment. On a positive note however, far from compromising this process of scrutiny, the Integrated Impact Assessments may in fact enhance it. They may prove to be a valuable tool indeed for putting information at the disposal of National Parliaments and the European Parliament and its Committees when they undertake their work of scrutiny (and increasingly in the case of the EP of passing legislation through the Co-decision procedure). It will be important to ensure that this potential is fully realised.
Subsequent use of Impact Assessments: adequate independent judicial scrutiny should be maintained

What impact will, and should, IIAs and compatibility statements have on the work of independent judicial scrutiny of the strategic political and legislative decisions made? The fact that a fully reasoned, transparent and well-informed judgment has been made on the balancing of rights, or the necessity for interference with particular rights, is likely to be at least one relevant factor in the degree of judicial ‘deference’ accorded to, or earned by, the original decision-maker. Murray Hunt has brought out these questions well in the context of the UK Human Rights Act, but there is plenty of other literature engaging with this debate. The search continues for the right balance between judicial deference to decisions taken by others (either democratically elected and accountable or properly empowered to make decisions by those who are) when this is properly earned and deserved, and intervention when it is not (whether because of the manner in which it was taken, the substance of the decision, or indeed both combined). Neither systematic unwillingness ever to question judgments made by other authorities, nor systematic interference on any and every occasion that a court might not be in full agreement, is appropriate. A way to navigate between these extremes and judge appropriately according to the circumstances of each case the proper extent of deference and respect due by courts to decisions made by others is required.

There is a lot to be said for this kind of approach, and of course, all other things being equal, fully informed, reasoned and defended decisions or legislative measures can and probably should earn a rather greater degree of respect and deference in the event of subsequent challenge and judicial scrutiny. However, Hunt is not convinced that the UK courts are yet developing this approach of ‘earned deference’ as strongly as they should be. Is there any more evidence that the ECJ can or will develop an adequately sophisticated methodology to address these issues? It must also be reiterated that the most transparent, democratic and defensible manner of reaching decisions should never be allowed to preclude a robust and independent role for subsequent judicial scrutiny and the possibility of an ultimate judgment that the balancing process that has taken place has, quite simply, resulted in a disproportionate measure. This possibility remains an essential element of any legal system committed to the rule of law and to fundamental rights in any meaningful way. Moreover, it is one thing to take a long hard look at the way a decision has been reached as well as its substance and to conclude that, all things considered, it has properly earned a degree of respect from the judiciary, but quite another to suggest that because a legislative proposal has gone through a particular kind of pre-legislative scrutiny process, this can or should be taken to operate as some kind of presumption in

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86 Rather, he sees an alternative language of “areas of discretionary judgment” being used and argues that this is not the most helpful approach.
favour of fundamental rights compliance or Charter compatibility. While one may be willing to accept that the process of pre-legislative Impact Assessment should not be entirely disregarded in the event of subsequent judicial scrutiny, any such presumption should certainly be avoided. Moreover, in the EU context, mechanisms of political accountability are weaker than at national level, and this must make these concerns all the more relevant. While IIAs may go some way to enhance transparency and ensure fully informed decision-making, this cannot be seen as a substitute for politically accountable decision-making, or as cancelling out any shortcomings in mechanisms of political and democratic accountability in the EU.

It would be a shame indeed if the combined result of these impact assessments and compatibility statements were to be an unjustified widening of the degree of deference accorded to decisions later challenged. How this is eventually dealt with by the ECJ will be a critical and important question, but at this stage is quite difficult to predict.

_Genuinely open-minded process rather than justification of a pre-determined or preferred outcome_

Finally, the process should not turn into one whereby pre-determined policy choices or preferences are simply legitimated and justified rather than questioned seriously. The way the problem is framed at the outset may colour the entire IIA process – and different DGs may have different approaches to an issue. The lead DG preparing the IIA report will be in a powerful position to proceed from the starting point of its vision of the problem, and unless some care is taken alternative perspectives may not be integrated at this critical early stage. Later on in the process, if for example one possible option is missed – or unjustly and hastily dismissed as unworkable or ineffective at the outset – the entire process may serve to sideline that possible option and then further serve to mask that fact or even to legitimate it.

In the existing process of environmental assessment, some concerns have been expressed that the process has at times acted as one whereby the developer is able to justify and legitimate its development plans, and that the consideration of alternative options to reduce or mitigate environmental damage is not always as systematic and rigorous as might be desired. Admittedly this kind of Environmental Impact Assessment is not identical to the Commission’s IIA process, being largely structured around and integrated into the process of developers presenting their preferred plans for approval by way of development consent or planning permission. IIAs, by contrast, are intended to guide the process of legislation and policy-making in advance, before any preferred option is

87 Wilkinson n2 above p 20.
88 Holder, n 1 above at pps 97-99.
89 Holder, n 1 above Ch 5 generally on the consideration of alternatives.
identified. There is considerable emphasis in the IIA documentation that a full range of options, including no new action at all, should be considered. The entire purpose of the process is to avoid pursuing pre-determined, ‘preferred’ approaches without systematic analysis of a wide range of alternative options. Is it too cynical to suggest that IIAs are intended to be, or will act as, a method of legitimating and justifying pre-determined preferred options? Perhaps a degree of cynicism is involved, but nonetheless, concerns have been expressed that this remains a risk. It is difficult to imagine that there will never be any preconceptions at all about what might be a preferred option. Indeed, even the Commission’s own documents, if read carefully, admit as much. It suggests that sometimes, it may be possible to identify at an early stage a preferred general approach, and that a significant role of impact assessments in that case will be refining the preferred general approach into an optimal particular format. It is also worth noting that one of the situations where an Impact Assessment may not be required is a Green Paper where policy is still at an early stage of formation: this may mean that strategic decisions about the overall direction of policy, which may influence the future direction of other policy documents or legislative measures, may be taken without Impact Assessment that might be beneficial if carried out well. This concern is also backed up by some evidence from evaluations of early Extended Impact Assessments. One report notes that although some consider a range of options, some consider as few as two and some only one, only rarely do the IA reports truly ‘think outside the box’ in terms of considering options outside the remit of the lead DG, and another also notes weaknesses in the identification and consideration of alternative options at an early stage. So, although it is difficult to avoid certain preferences already being in place before the IIA takes place, care should be taken that opportunities are given to challenge such preferences during the Impact Assessment process, and that the consideration given to alternative approaches is genuine and serious, not simply a matter of form.

**Ongoing evaluation and monitoring**

All of these concerns point to a real need for greater awareness of the impact assessment process amongst those concerned with human rights in the EU, whether in an academic, activist, or indeed legislative and scrutiny capacity. Bizarre and circular though it may sound, a process of independent evaluation and monitoring – ‘impact assessment of impact assessments’ – should follow to assess whether the procedure is developing in a positive and helpful manner, or whether some or all of the concerns discussed here turn out to have some foundation. The Commission also envisages an appraisal of its internal fundamental rights monitoring strategy, including the use of Impact

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90 See Statewatch evidence to HL SubCommittee E inquiry on ‘Human Rights Proofing EU Legislation’.
92 See n 2 above.
93 Wilkinson et al above n2 pps 21-21, 30 noting that often the options reflect existing policy or legislative commitments.
94 Lee and Kirkpatrick, n 2 above.
Assessments, to be presented in 2007. It remains to be seen what this process of scrutiny and evaluation, both within the Commission itself and by independent observers, will reveal in due course.

**Conclusion**

Integrated Impact Assessments are an increasingly important mechanism for ensuring well-informed legislative and policy drafting. They have the potential to enhance the quality and also, if used carefully and appropriately, the legitimacy of these processes. The Commission’s IIA programme may be welcomed cautiously, as having usefully rationalised and streamlined, as well as added additional helpful dimensions to, the EU’s already existing specific sectoral impact assessment tools. However, these IIAs are intended to be, and must remain, firmly subservient to the ultimate decision-making by those who are politically accountable, and the quality of the IIA work requires continued attention.

The use of impact assessments to monitor fundamental rights in EU legislative drafting and policy-making is a more novel one that has emerged gradually but gained more prominence during 2004 and 2005, alongside more fully reasoned explanatory memoranda to accompany Charter compatibility statements and recitals in legislation. Increased awareness of fundamental rights from the outset of legislative and policy planning is always to be welcomed, and IIAs may indeed make a helpful contribution here. Moreover, in the context of a fully integrated impact assessment procedure, consideration of fundamental rights impacts as part of a wide range of relevant factors is a natural and potentially helpful development. It would be far more worrying if fundamental rights were not addressed within the IIA framework in any way. The attention this issue is now getting is welcome, but some concerns remain about how the process of assessing fundamental rights impacts will work in practice. It is not entirely clear that recent developments have gone quite far enough, nor that the commitment to integrating fundamental rights impacts fully and comprehensively into the IIA framework is as great as it might be. Continued vigilance will also be required to ensure that political accountability for decisions ultimately taken is not diluted, that efficiency of outcomes and the attainment of particular policy goals are not systematically allowed to override basic rights protections, and that impact assessments and in making compatibility statements do not prejudice later adequate and independent judicial scrutiny of alleged infringements of fundamental rights. This is not all purely speculative as many of these concerns have at least some foundation in early evaluations of the way the IIA process has worked in its initial stages. This is not to say that these concerns will all necessarily be proved fully justified as the process of implementing the Integrated Impact Assessment

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Framework develops further, but of course the first step towards ensuring that they are not is to articulate and discuss them openly. It is hoped that this paper will go some way to opening this discussion to a wider audience than it has had thus far.