

2014 Revision of the European Commission Impact Assessment Guidelines

Consultation Response from Prof. Fiona de Londras & Dr. Josephine Doody, Durham Law School,
Durham University, United Kingdom

Contact: fiona.de-londras@durham.ac.uk

This response builds on insights gleaned through the FP7-funded project SECILE (Securing Europe through Counter-Terrorism: Impact, Legitimacy and Effectiveness). For more on the project see www.secile.eu

Key points raised:

- A re-balancing of quantitative and qualitative analysis in ex ante impact assessment is recommended
 - The concepts of economic, social and environmental impact ought to be more clearly defined
 - All initiatives with clear appreciable impacts on rights should undergo an impact assessment
 - A wide, plural, diverse and representative range of stakeholders should be engaged with including those with clear expertise on human rights and societal impact. The views of such stakeholders ought to be treated as expert evidence in the same way as evidence on, for example, prospective economic impacts are
 - Impact assessments must clearly identify meta- and specific objectives for measures being contemplated so that, if introduced, the effectiveness of these measures can be properly assessed by reference to these clearly articulated objectives
-

Q1. In line with international best practice, the Commission's Impact Assessment system is an integrated one, covering costs and benefits; using qualitative and quantitative analysis; and examining impacts across the economic, environmental and social areas. Do you agree that this is the right approach?

Predicting and understanding the impact of any measure is recognised as a key element of providing the evidence base for political decision-making within the EU, which in turn improves the quality of output as well as contributing to good governance. This answer will address two individual parts of this question: the types of analysis and impact across three defined areas.

Firstly we will address the issue of qualitative and quantitative analysis. While there is reference to both qualitative and quantitative analysis within the Guidelines, we would argue that there is a practical bias towards quantitative analysis. Guidance on assessing subsidiarity, for example, values

"qualitative, and where possible, quantitative evidence" (pg. 11). When assessing impacts, the Guidance advises that "impacts should be monetized whenever possible" (pg. 18). It continues that "when quantitative analysis is not possible or proportionate, you should assess impacts qualitatively" (pg. 19) demonstrating a clear hierarchy and preference for quantitative analysis. Indeed, several of the suggested methods for comparing options are all quantitative and economic based methods of analysis: cost-benefit analysis, cost-effectiveness analysis, compliance-cost analysis (pg. 21). In practical terms, this marginalises assessment of societal impacts (including impacts of rights, fundamental values, and democracy), which are not generally capable of quantitative assessment and forecasting of this kind. We submit that the value attributed to social and economic factors ought to be reassessed, with increased value placed on the former. This is particularly the case so that the societal impact of proposed measures—including their impacts on individual rights—are properly predicted and taken into account in the impact assessment process.

We will now turn to the question of examining impacts across the economic, environmental and social areas. In this context, impact is not well defined. While the Guidelines make reference to economic, social and environmental impact, these phrases are vague and the relative weight to be given to them is not clear. The concepts themselves, and what is to be taken into account in assessing these impacts, ought to be more clearly outlined in the Guidelines, particularly so that impacts that are more difficult to assess *ex ante* from a quantitative perspective (such as societal impacts on fundamental rights) are understood. Ultimately the question of relative weighting may be a political matter when it comes to the exercise of decision-making in respect of whether and, if so, how to pursue a particular policy objective. However, while the political process may give more weight to one kind of impact than another in its final decision-making, the *ex ante* impact analysis is designed to provide an evidence base and ought, therefore, to provide substantial information on each of the three factors, clearly outlining the implications for each of any of the proposals made.

Q2. Do you agree with the scope of coverage of proposals requiring an impact assessment? If not, why not?

The Guidelines state that "An IA is required when the Commission has to decide whether EU action is needed and there are both (1) choices among noticeably different policy alternatives; and (2) significant direct economic, environmental or social impacts expected" and continue that "when the above conditions are not met, no impact assessment is needed regardless of the nature of the initiative" (pg.6). The scope of coverage of proposals requiring an IA is too narrow according to these criteria. We would suggest that all initiatives with clear appreciable impacts on rights undergo an impact assessment regardless of the number of policy alternatives or the significance of the impacts expected. Impact assessment is described as being an aid to the policy making process (pg. 6). Viewed as such, it should be embraced as a process that would strengthen decision-making. Secondly, the significance of the expected impacts is irrelevant. Impact should be documented regardless of whether it is direct or indirect. Outlining impact, effects and consequences at the outset would enable better policy making.

Q3. Are the appropriate questions being asked in the Impact Assessment guidelines? Are there other issues that the impact assessment should examine? How would this help to improve the quality of Commission policy proposals?

No response offered.

Q4. Do you have any other suggestions on how to improve the guidance provided to Commission services carrying out an impact assessment and drafting an impact assessment report?

In terms of assessing impact, the training, perspective and approach of assessors are extremely important factors. Impact assessment involves a number of variables (social, economic and environmental). Perspective is particularly important: the perspective of the assessor (operational, economic, political etc) may influence the weight given to different forms of evidence and, indeed, the extent to which the nature of different kinds of evidence and expertise is appropriately accounted for. Thus, while economic modelling might provide quantitative evidence of predicted economic impact, the evidence relating to societal impact will be more qualitative and may therefore appear more speculative. However it emanates from expertise in the same way as economic or environmental forecasting does. Thus, an appreciation of the complexity of the concept of societal impact and 'impact' per se is of vital importance.

Q5. Problem analysis: do you think the draft text in annex II.B provides a clear description of the issues to be taken into account when analysing a problem? If not, how should it be improved?

Annex II.B. identifies the five components of problem analysis as (i) establishing what the problem is and why; (ii) assessing the magnitude and the EU dimension of the problem; (iii) establishing the causes and assesses their relative importance; (iv) identifying the relevant stakeholders and (v) describing how the problem would evolve without EU intervention. Of particular importance in the context of societal impact and rights-based analysis is 'the stakeholders', described as those "who are affected by the problem and those whose behaviour causes it" (pg. 32). Involving stakeholder perspectives not only allows for a more effective identification of prospective impacts but also enhances the procedural and democratic legitimacy of the measure that is eventually introduced.

Identifying stakeholders ought to take into account the fact that impact is relevant only in relation to a referent, and that one such referent is 'who the measure impacts on', which ought to be considered on both an individual and societal level. Considering impact at the societal level entails exploring how measures affect our democratic values, practices and principles as well as having effects on rights directly (for those who are subjected to the measure) and indirectly (through broader procedural and substantive changes and implications for the rule of law).

Thus, while the draft text clearly describes the issues to be taken into account, the participation of stakeholders is a key element of enhancing legitimacy and enriching the process of impact assessment and ought to be especially rigorously pursued.

Q6. Subsidiarity: do you think the draft text in annex II.C provides a clear description of the issues to be taken into account when verifying compliance with the subsidiarity principle? If not, how should it be improved?

No response offered

Q7. Objectives: Do you think the draft text in annex II.D provides a clear description of the issues to be taken into account when setting out objectives? If not, how should it be improved?

Identifying clear objectives is a fundamental part of the IA. Impact assessments not only provide an evidence base for policy and legal decision-making, but can also shape ex post facto analyses of effectiveness and the operation of measures inasmuch as those measures are assessed by reference to the objectives outlined in the IA. Thus, while ex ante IA *primarily* aims to enrich and improve the decision-making process, it also has a function later in the life cycle of a measure. Recognition of this ought to be fully folded into the issues to be taken into account when setting out objectives.

In this respect, objectives identified at IA level ought to (i) identify the meta- and broader policy objectives of which the proposed measures are part, (ii) clearly identify the specific issues and problems to be addressed by the proposed measure, (iii) be expressed in a manner that allows the performance of the measure (once introduced and implemented) be measured against them in order to assess its effectiveness.

Q8. Option identification: do you think the draft text in annex II.E provides a clear description of the steps to be followed when identifying alternative policy options? If not, how should it be improved?

No response offered

Q9. Identification of impacts: Is the list of questions included in the 2009 guidelines (see annex II.F) considered complete and up-to-date? Are there any impacts that should be added or taken out?

Economic impact features strongly in the impact analysis undertaken by the EU in advance of a measure being adopted. In this respect, a wide range of potential economic implications is taken into account. Economic impacts are tangible and, especially as regards direct impacts, quantifiable. Other impacts such as societal impacts, psychological impacts, rights-related impacts, or political impacts are no less important but much more difficult to measure.

Our research suggests that operational impacts ought to be more clearly taken into account in the ex ante impact analysis. Operationalisation is a process by which abstract or imprecise commitments, principles, measures and policies are translated into ‘on the ground’ action. As a process it can be characterised as having three core elements: (1) the translation into concrete measures, steps and commitments of abstract policies, principles and obligations; (2) the execution of these concrete measures, steps and commitments, and (3) the measurement of the implications of executing these measures, steps and commitments (often considered by reference to multiple forms of measurement).

We conceive of the operational perspective as relating to the perspectives and experiences of all actors that are involved in the process of operationalising EU measures, broadly understood. In the context of EU counter-terrorism this conception captures all entities that are involved in the translation of an EU counter-terrorist measure (which include measures that are in some cases somewhat vague commitments to ‘counter’, for example, radicalisation or to enhance social cohesion) into actionable commitments that can be observed or measured. This can involve not only European institutions, but also actors operating at the member state level including but not limited to border agencies, police, military, aviation authorities, banks, corporations, and police forces. These actors are involved in progressing the measure from its original articulation into its practical form, in assessing the operation of the measure (including in determining what benchmarks would be used to measure it against), and in some cases in proposing reforms and revisions. Analysis of the ways in which these stages of operationalisation take place allows us to discern some key insights into the operational perceptions of impact, legitimacy and effectiveness.

This submission builds on the following reports

1. Ben Hayes and Chris Jones, Catalogue of EU Counter-Terrorism Measures Adopted Since 11 September 2001, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/12/Catalogue-of-EU-Counter-Terrorism-Measures1.pdf>
2. Ben Hayes and Chris Jones, Report on how the EU assesses the impact, legitimacy and effectiveness of its counter-terrorism laws, (SECILE Consortium, 2013) available at

<http://secile.eu/wp-content/uploads/2013/12/How-does-the-EU-assess-its-counter-terrorism-law.pdf>

3. Ben Hayes and Chris Jones, Report on the Transposition of EU Counter-Terrorism Measures, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/11/Report-on-the-Transposition-of-EU-Counter-Terrorism-Measures.pdf>
4. Fiona de Londras and Josephine Doody, Policy-Maker Perspectives on Impact, Legitimacy and Effectiveness in EU Counter-Terrorism, (SECILE Consortium, 2014) available at <http://secile.eu/wp-content/uploads/2014/07/Polycymaker-Perspectives-on-Impact-Legitimacy-and-Effectiveness-in-EU-Counter-Terrorism-.pdf>
5. Fiona de Londras and Josephine Doody, Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/12/Report-on-Operational-Perspectives-on-Impact-Legitimacy-and-Effectiveness.pdf>
6. Fiona de Londras, Josephine Doody, Signe Zalkalne and Janis Supe, Cross-Disciplinary Perspectives on Impact, Legitimacy and Effectiveness in the Context of EU Counter-Terrorism (SECILE Consortium, 2014) available at <http://secile.eu/wp-content/uploads/2014/02/Cross-Disciplinary-Report-.pdf>
7. Mathias Vermeulen, Daniel Deering and Sadhbh McCarthy (with research assistance from Carolin Möller), Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/12/Report-on-Legal-Understandings-in-Counter-Terrorism-.pdf>
8. Méderic Martin-Mazé, Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/12/Societal-Report.pdf>
9. Rosemarijn van der Hilst, Civil Society Perspective on the Impact, Legitimacy and Effectiveness of European Counter-Terrorism Measures, (SECILE Consortium, 2014) available at <http://secile.eu/wp-content/uploads/2014/07/Civil-Society-Perspective-on-the-Impact-Legitimacy-and-Effectiveness-of-European-Counter-Terrorism-Measures.pdf>
10. SECILE Consortium, The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism (2014)
11. Yulia Chistyakova, Report on Democratic Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context, (SECILE Consortium, 2013) available at <http://secile.eu/wp-content/uploads/2013/12/Report-on-Democratic-Perspectives-in-Counter-Terrorism-.pdf>