

# Evidence-Based Policymaking in European Union Asylum Law

## Potential and Pitfalls

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### Abstract

*Evidence-based policymaking has become crucial in the area of asylum. In an attempt to offer a critical overview of the role and weight of 'evidence' in the current phase of reform of the Common European Asylum System (CEAS), this article illustrates how evidence-based policymaking in EU asylum law presents a number of pitfalls. Lack of a full impact assessment, instrumentalization of data and oversimplification of the available evidence, adversely impact the effectiveness of the CEAS. Conversely, the article aims to unfold the potential that the use of evidence may have in improving the quality of the EU legislation, by reflecting on its impact on migrants. The article will, therefore, propose that the use of evidence from a user's perspective, namely from the point of view of those subjects that are mostly affected by the legislation, can contribute to the teleological effectiveness of the CEAS: ensuring adequate protection for third-country nationals in need for it.*

**Keywords:** asylum, migratory flows, risk assessment, user-friendly legislation, teleological effectiveness.

### A Introduction: Identifying Relevant 'Evidence' for the Common European Asylum System

The third phase of reform of the Common European Asylum System (CEAS), launched by the new European Pact on Migration and Asylum of September 2020,<sup>1</sup> offers a valuable opportunity to reflect on the quality of the proposed legislation.

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1 Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, On a New Pact on Migration And Asylum, COM(2020) 609 final, 23 September 2020. For a preliminary analysis see P. Minderhoud and S. Nicolosi, 'The New Pact on Migration and Asylum: A Paradigm Shift in Regulation and Enforcement?' (18 January 2021) *RENFORCE Blog*, at: <http://blog.renforce.eu/index.php/nl/2021/01/18/the-new-pact-on-migration-and-asylum-a-paradigm-shift-in-regulation-and-enforcement-2/>.

Despite the fact that, as acknowledged by the European Commission itself,<sup>2</sup> one of the main problematic aspects of European Union (EU) asylum legislation lies with its implementation deficit, part of this problem may be also due to the legislative design. This urges careful scrutiny of the EU legislation. The EU institutions, in particular the European Commission, have been especially focusing more systematically on post-legislative scrutiny of the EU asylum legislation,<sup>3</sup> while scholars have mostly focused on the substantive elements of this legislation,<sup>4</sup> but what about the preliminary or pre-legislative phase, which entails the collection and assessment of the evidence necessary to justify the proposed legislation?

In this context and in the light of the Interinstitutional Agreement on Better Law-Making<sup>5</sup> and the most recent European Commission's Communication on Better Regulation,<sup>6</sup> it is crucial to determine the role that 'evidence' has been playing in shaping the attempts to recast existing instruments of the CEAS legislative toolbox or to propose new measures. Defined by the European Commission as referring to

multiple sources of data, information, and knowledge, including quantitative data such as statistics and measurements, qualitative data such as opinions, stakeholder input, conclusions of evaluations, as well as scientific and expert advice,<sup>7</sup>

evidence in the areas of asylum and migration entails a diversified set of sources. Admittedly, the sense of emergency, characteristic of the most recent approach to EU migration and asylum law and policies, following the 2015 European Agenda on Migration,<sup>8</sup> has given prominence to the significance of data on migration flows to justify exceptional measures, such as the Decisions on the relocation of asylum

2 Communication from the Commission to the European Parliament and the council towards a reform of the common European asylum system and enhancing legal avenues to Europe, COM(2016) 197 final, 6 April 2016, 2.

3 See, in this sense, the report of the European Court of Auditors (ECA), 'Ex-post Review of EU Legislation: A Well-established System, but Incomplete', Special Report, No 16, 2018, at: [www.eca.europa.eu/Lists/ECADocuments/SR18\\_16/SR\\_BETTER\\_REGULATION\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/SR18_16/SR_BETTER_REGULATION_EN.pdf).

4 A thriving literature exists on the technical substantive aspects of the EU legislation on asylum and the attempts to reform it. See, inter alia, D. Thym (ed), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Baden-Baden, Nomos, 2022).

5 Interinstitutional Agreement between the European Parliament, the council of the European Union and the European Commission on better law-making [2016] OJ L 123/1.

6 Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, Better Regulation: Joining Forces to Make Better Laws, COM(2021) 219 final, 29 April 2021.

7 *Ibid.*

8 Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Agenda on migration, COM(2015) 240 final, 13 May 2015.

seekers.<sup>9</sup> Nonetheless, at least three categories of sources are usually considered for evidence in the broad area of migration: data on migration flows, stocks and migrant groups; research that investigates the efficacy of policy and the impact of migration on society.<sup>10</sup>

In an attempt to offer a critical overview of the role and weight of ‘evidence’ in the current phase of reform of the EU legislation on asylum, this article pursues a twofold goal. On the one hand, by following an explicative approach, the article aims to classify the sources of evidence in this policy domain in light of the three mentioned categories and explain how they have been used in the current CEAS legislative reform. On the other hand, the article aims to unfold, from a more normative perspective, the potential that the use of evidence may have in improving the quality of the EU legislation, by reflecting on its impact on migrants in the light of the policy goals established by the treaty. The article will, therefore, argue that the use of evidence from a user’s perspective, namely from the point of view of those subjects that are mostly affected by the legislation,<sup>11</sup> can contribute to the teleological effectiveness of the CEAS.

## B The Sources of Evidence in EU Asylum Law

Evidence-based policymaking constitutes a relevant element of the section on the results of *ex post* evaluations, stakeholder consultations and impact assessments in the Executive memorandum included in each legislative proposal. Normally, that section summarizes the main findings of the Staff Working Document and the impact assessment accompanying the legislative proposals. Even though these documents have technical and preparatory nature and are not legally binding, they constitute a valuable instrument to identify and understand the nature and role of evidence in EU asylum legislation. A systematic reading of the proposals underpinning the reform of the CEAS, also through the Commission Staff Working Document, provides elements to frame evidence in EU asylum law within three categories that will be shortly analysed in the following subsections.

### I Data on Migration Flows and Their Use to Adopt Emergency Legislative Measures

An important source of evidence in the fields of asylum and migration is data on migration flows. The migratory pressure of 2015, with more than one million asylum seekers arriving in the EU mainly through Greece and Italy,<sup>12</sup> prompted the

9 Council Decisions (EU) 2015/1523 of 14 September 2015 and 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece, [2015] OJ L239/146 and L248/8.

10 G. Lalić Novak, T. Giljević and R. Manojlović Toman, ‘(Never)mind the Evidence: Evidence-Based Law-Making in Croatian Regulation on Migration’ (2021) 21 *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave* 205, 206.

11 For references in this regard see, *inter alia*, E. Brems and E. Desmet, ‘Studying Human Rights Law from the Perspective(s) of Its Users’ (2014) 8 *Human Rights & International Legal Discourse* 111.

12 According to United Nations High Commissioner on Refugees (UNHCR), ‘Over One Million Sea Arrivals Reach Europe in 2015’, 30 December 2015, at: [www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html](http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html).

adoption of emergency measures at the EU legislative level and left its imprint to develop an emergency-driven approach to the reform of the CEAS.<sup>13</sup> Article 78(3) of the Treaty on the Functioning of the EU (TFEU)<sup>14</sup> provided a legal basis for the adoption of provisional measures in emergency migratory situations at the EU's external borders. The provisional measures are to be adopted through the Council's decision by a qualified majority, upon prior consultation with the European Parliament. A certain discretion is granted to the application of this provision, as the Council can decide the time duration of the provisional measures; similarly, discretion applies to the definition of 'emergency situation'. The Court of Justice of the European Union (CJEU) clarified that Article 78(3) TFEU can be used in exceptional circumstances, such as a sudden inflow of non-EU nationals, inasmuch as the flow makes the normal functioning of the CEAS impossible.<sup>15</sup>

Reliable data and information about the situation at the EU external borders constitute a relevant source of evidence especially to prevent the impact of a sudden influx of third-country nationals into the EU. It is, therefore, crucial to reflect on how these data are collected. A wide range of migration data is collected and institutional and normative frameworks have been set up by the EU to ensure that data on migration are of high quality, comparable across countries, as a result of legal harmonization, and easily accessible.

The normative framework is based on regular consultation with the Member States that, pursuant to Regulation 862/2007, are under the obligation to provide the Statistical Office of the EU (Eurostat) with statistics on the numbers of different categories of migrants, including EU citizens and third-country nationals.<sup>16</sup> Following the 2015 European Agenda on Migration, which has acknowledged the changing European and national systems administering asylum and managing migration, this Regulation has been amended, in order to improve the statistics on migration and migrants in line with stakeholders' needs, 'so as to build a stronger evidence base for policy-making and evaluation.'<sup>17</sup> According to the European Commission, improvements were especially necessary as regards the regularity of statistics on returns, and on resettlements, residence permits and migrant children.<sup>18</sup> The institutional setup is based on the coordination between the European Commission, especially the Directorate-General for Home Affairs and Eurostat, and EU migration agencies.

13 See in this regard S. Nicolosi, 'Addressing a Crisis through Law: EU Emergency Legislation and Its Limits in the Field of Asylum' (2021) 17 *Utrecht Law Review* 19-30.

14 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), [2016] OJ C202/1.

15 Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631, para 77.

16 Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (Text with EEA relevance) [2007] OJ L 199/23, Arts. 3 and 4.

17 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection, COM(2018) 307 final, 16 May 2018.

18 *Ibid.*

In this connection, the European Border and Coast Guard Agency (FRONTEX) plays a central role in risk analysis and assessment through strategic risk analysis products, such as Strategic Analysis, Operational Analysis and Third-Country Analysis.<sup>19</sup> Risk assessments are conducted within the framework of the Common Integrated Risk Analysis Model (CIRAM), introduced to harmonize Member States' intelligence activities and promote a common understanding of risk analysis, while simultaneously explaining how this tool can contribute to greater coherence in the management of the external borders.<sup>20</sup> This framework is mandated by the Schengen Border Code,<sup>21</sup> which pays attention to the need to monitor the risks at the external borders. Risk is defined as "a function of threat, vulnerability and impact".<sup>22</sup> According to the CIRAM, a threat is "a force or pressure acting upon the external borders that is characterized by both its magnitude and likelihood". This understanding, which provides some elements to determine the existence of a mass influx of third-country nationals, presupposes the collection of updated data about the number of irregular crossings at the external borders. As to vulnerability, the CIRAM model refers to 'the capacity of a system to mitigate the threat'. This is another important element that may require a prior check of whether the EU legal framework is equipped with the necessary toolbox to react to a threat raised by migratory flows. Finally, the definition of risk also refers to 'impact', understood as 'the potential consequences of the threat'. This will also allow an estimation of the effects of a risk on the goals and effectiveness of a legislative framework, including, for instance, the impossibility to realize the policy objectives or effectively implement the relevant EU legislation.

This structured breakdown of risk, therefore, provides helpful guidance to decision makers to interpret evidence based on statistical data in the area of asylum with a view to setting political priorities or adopting exceptional legislative measures. This risk analysis has been more recently used with reference to the Poland-Belarus border crisis in 2021, for which another set of provisional measures, based upon Article 78(3) TFEU, was proposed by the European Commission.<sup>23</sup> According to FRONTEX, on that occasion, the total number of irregular crossings detected at the EU's external borders in the first ten months of 2021 rose by nearly 70% and around 8000 migrants and asylum seekers were detected on the EU's eastern border compared to 257 in the entire 2020.<sup>24</sup>

19 Fore references see S. Horii, 'The Effect of Frontex's Risk Analysis on the European Border Controls' (2016) 17 *European Politics and Society* 242-258.

20 See relevant information available on the official website of the European Border and Coast Guard Agency (FRONTEX), at: <https://frontex.europa.eu/we-know/situational-awareness-and-monitoring/ciram/>.

21 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1-52.

22 FRONTEX (n 20).

23 European Commission, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM(2021) 752 final, 1 December 2021.

24 FRONTEX, 'Migratory Situation in October: Persisting Pressure on Eastern Border', Press Release, 22 November 2021, at: <https://frontex.europa.eu/media-centre/news/news-release/migratory-situation-in-october-persisting-pressure-on-eastern-border-ffAwY>.

In order to determine when a national system is under pressure, the New Pact on Migration and Asylum has expanded the set of data and sources which can be helpful to determine a situation of crisis, as a specific instrument has been proposed in that regard.<sup>25</sup> The crisis prevention mechanism proposed in the New Pact has more of an operational nature consisting of the synergic activation of all crisis management tools, including the Civil Protection Mechanism (UCPM) and its Emergency Response Coordination Centre (ERCC),<sup>26</sup> and is supported by a soft law framework based on the Recommendation on Migration Preparedness and Crisis Blueprint.<sup>27</sup> These operational tools are intended to provide the European Commission with timely and updated information to determine the existence of a situation of crisis and offer a framework for a coordinated and preventive European approach.

Additionally, the Commission aims to integrate support analysis from the Knowledge Centre on Migration and Demography in the Commission's Joint Research Centre. This Centre published a report on the use of 'innovative data' in migration policymaking, as a substitution for traditional data. Innovative data, or non-traditional data, include data derived from an individual's digital footprint, from sensor-enabled objects, and/or can be inferred using algorithms.<sup>28</sup> The report states that "[w]ith the consolidation of the culture of evidence-based policymaking, the availability of data has become central to policymakers". However, as in the area of migration policymaking, the traditional data sources have not always been able to provide sufficiently detailed or updated information to meet the policy needs, additional categories of data may need to be collected. The expansion of the internet and digital technologies "provides an opportunity to overcome some of these data gaps by providing large volumes of real-time and spatially detailed data on a range of demographic, mobility, and migration-related topics".<sup>29</sup>

Despite its potential, the report also warns about the ethical and scientific challenges of innovation data, calling for more transparency and auditability of processing algorithms.<sup>30</sup> As the New Pact on Migration and Asylum confirms this trend to rely on innovative data in migration policies, there is an urgency to integrate stringent standards of ethical conduct and guarantee full compliance with fundamental rights, especially as regards privacy and data protection.

25 European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613, 23 September 2020.

26 See Decision No 1313/2013/EU of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism [2013] OJ L347/924.

27 Commission, Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint), C(2020) 6469, 23 September 2020.

28 See C. Bosco *et al.*, *Data Innovation in Demography, Migration and Human Mobility* (EU Publications Office, 2022) 3.

29 *Ibid.*

30 *Ibid.*, pp. 20-21.



## II Consultation with Relevant Stakeholders and Its Influence on EU Legislation

Complex policy domains such as those covered by the Area of Freedom, Security and Justice (AFSJ) address different categories of actors, including European citizens, third-country nationals, state authorities, EU decision makers and pursue different interests. The CEAS is illustrative of the manifold interests encompassed by this policy area: while teleologically oriented to offer “appropriate status to any third-country national requiring international protection”,<sup>31</sup> it aims to address issues relating to border controls and internal security.<sup>32</sup>

This complexity contributes to explaining the importance of another important source of evidence for EU asylum legislation, namely consultation with relevant stakeholders. This corresponds with a well-known method that the European Commission has traditionally applied to its legislative proposals. At the constitutional law level, the consultation with relevant stakeholders interprets the democratic principle enshrined in Article 11 (3) TEU requiring the European Commission to “carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent”.<sup>33</sup>

The New Pact on Migration and Asylum was accompanied by a European Commission Staff Working Document but not by an *ex ante* impact assessment, which is a prerequisite to comply with the commitments under the 2016 Interinstitutional Agreement on Better Law-Making, according to which any new legislative initiatives, which are expected to have significant societal and fundamental rights impacts should be accompanied by robust evidence justifying their coherency, necessity and proportionality, and compliance with the EU Charter of Fundamental Rights.<sup>34</sup> This is quite unusual and, as will be explained in the next subsection, it was heavily criticized especially by the European Parliament.<sup>35</sup>

In the light of the Staff Working Document, the consultation with stakeholders involved institutional actors, such as the European Parliament, relevant international organizations, including the United Nations High Commissioner on Refugees (UNHCR) and the International Organization on Migration (IOM), Member States’ fora such as the High-Level Working Group on Asylum and Migration (HLWG), the Irregular Migration and Expulsion working party (IMEX), as well as various think tanks and civil society organizations.<sup>36</sup>

31 Art. 78 (1) TFEU.

32 For references in this regard see more broadly S. Léonard and C. Kaunert, *Refugees, Security and the European Union* (Routledge, 2021).

33 Art. 11 (1) TEU also establishes that ‘the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action’.

34 Interinstitutional Agreement (n 5), point 12.

35 European Parliament, ‘The European Commission’s Legislative Proposals in the New Pact on Migration and Asylum’. Study requested by the LIBE Committee, July 2021, at: [www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL\\_STU\(2021\)697130\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf), 11.

36 See the Commission Staff Working Document accompanying the document Proposal for a Regulation of The European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] COM(2020) 610 final, SWD(2020) 207 final, 23 September 2020.

This consultation has especially contributed to two driving items of the current phase of reform of the CEAS. Firstly, based on the position papers submitted by various political groups within the European Parliament, the need to preserve the holistic approach to the legislative framework on asylum has emerged as a distinct feature of the most recent reform. Secondly, the Member States and civil society organizations stressed the need “to establish a balanced framework of responsibility and solidarity, as a basis for a fully functioning CEAS”.<sup>37</sup> Stakeholders also acknowledged the political impasse delaying the reform of the CEAS,<sup>38</sup> owing to the thorny issue of how to ensure solidarity and responsibility-sharing. As highlighted in the Staff Working Document accompanying the New Pact,<sup>39</sup> the preparation of the Commission’s proposals could benefit from the feedback received following the publication of the Roadmap on the New Pact that was available for stakeholders’ comments on the Commission’s ‘Have your say’ portal between 30 July and 27 August 2020.<sup>40</sup> As reported, such feedback stressed the respondents’ concerns about the protection of borders, on the one hand, but also the integration of migrants, on the other hand.<sup>41</sup> These concerns also correspond with some of the major issues raised by scholars.<sup>42</sup>

As to the impact of these consultations, it is difficult to ascertain the degree of influence they will exercise on the ongoing negotiations. As a co-legislator the European Parliament is a privileged stakeholder that can eventually block the adoption of a specific proposal, it is institutionally established to echo the voice of civil society and European citizens more directly. On the contrary, little evidence can be drawn on the direct influence of civil society and academic stakeholders on the CEAS legislative proposals that often constitute the result of a difficult compromise between competing States’ interests. As will be delved into in greater detail in Section C, doubts about the influence of existing independent research result in a partial and improper use of evidence that frustrates the teleological effectiveness of the policy area.

37 *Ibid.*

38 According to the roadmap included in the New Pact on Migration and Asylum (n 1), most proposals had to be adopted by the end of 2021.

39 Commission Staff Working Document (n 36) 27 ff.

40 A total of 1753 unique responses were registered and can be consulted on the European Commission’s ‘Have your say’ portal, at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12544-New-Pact-on-Migration-and-Asylum/feedback\\_en?p\\_id=8267580](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12544-New-Pact-on-Migration-and-Asylum/feedback_en?p_id=8267580). Out of 1753 unique respondents, 1657 were citizens, fifty were organizations, six were public administrations and forty fell under the ‘other’ category. The vast majority of respondents were from Germany followed by Estonia, Austria, Hungary, Sweden, Belgium, the Netherlands, France, Italy and the United Kingdom.

41 Commission Staff Working Document (n 36) 28.

42 See especially Ph. de Bruycker, M. de Somer and J-L. de Brouwer (eds.), *From Tampere 20 to Tampere 2.0: Towards a New European Consensus on Migration* (European Policy Centre, 2019), at: [www.epc.eu/en/Publications/From-Tampere-20-to-Tampere-20-Towards-a-new-European-consensus-on-mi~2d99d4](http://www.epc.eu/en/Publications/From-Tampere-20-to-Tampere-20-Towards-a-new-European-consensus-on-mi~2d99d4).



### III *The New European Pact on Migration and Asylum and the Lack of a Full Impact Assessment*

The third source of evidence for evidence-based policymaking is impact assessment, namely “the ex-ante examination of potential social, economic and environmental impacts of European Commission proposals”.<sup>43</sup> Introduced by the European Commission in 2002, the impact assessment procedure examines whether there is a need for EU action and analyses the possible impacts of available solutions.<sup>44</sup> These are carried out during the preparation phase, before the Commission finalizes a proposal for a new legislative measure and thus provide evidence to inform and support the decision-making process.

Over the years, the impact assessment procedure has become a routine practice for the preparatory phase of the EU legislation, as it also offers an opportunity to reflect on compliance with the constitutional law principles of subsidiarity and proportionality.<sup>45</sup> This constitutes one of the major recommendations within the recent Better Regulation Agenda.<sup>46</sup> In 2017, in fact, the Commission created a “Task Force on subsidiarity, proportionality and doing less more efficiently”, as part of the Better Regulation Agenda, advising to incorporate a grid for assessing subsidiarity and proportionality in the Commission’s better regulation guidance and to use the grid to present the Commission’s findings in impact assessments, evaluations and explanatory memorandums.<sup>47</sup> Additionally, impact assessment contributes to substantiating the legal obligation to motivate any legal act also on the basis of proposals, initiatives, recommendations, requests or opinions required by the Treaties.<sup>48</sup>

However, while, as mentioned in Section B.II, under the 2016 Interinstitutional Agreement on Better Law-Making, the European Commission is committed to carrying out impact assessments of its legislative and non-legislative initiatives which are expected to have significant economic, environmental or social impacts, as to the New Pact, the Commission relied on the *ex post* assessment of the recast proposals, assessing the effectiveness, efficiency, relevance, consistency and EU-added value of the proposed instruments. Concerning the requirement for the European Commission to conduct impact assessments before proposing new legislation, in its 2021 Better Regulation Communication, the Commission

43 C. Robertson, ‘Impact Assessment in the European Union’, *EIPAScope* (September 2008, Special Issue 2008/2). See also A.C.M. Meuwese, ‘Inter-institutionalising EU Impact Assessment’, in S. Weatherill (ed), *Better Regulation* (Hart Publishing, 2007) 287-309.

44 European Commission, Communication on Impact Assessment, COM(2002) 276 final, 5 June 2002. The procedure was introduced upon recommendation from the Mandelkern Group, composed of Member State experts on better regulation and chaired by the French delegate Dieudonné Mandelkern.

45 Consolidated version of the Treaty on European Union, [2012] OJ C 326/13-390, Art. 5 TEU.

46 Interinstitutional Agreement (n 5), see also the official page, at: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how\\_en#objectives-of-the-better-regulation-agenda](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en#objectives-of-the-better-regulation-agenda).

47 See Decision of the President of the European Commission on the appointment of members to the task force on subsidiarity, proportionality and ‘doing less more efficiently’ C(2018) 406, 18 January 2018, and consult the official page, at: [https://ec.europa.eu/info/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently\\_en](https://ec.europa.eu/info/better-regulation/task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en).

48 Art. 296 (2) TFEU.

committed to explaining the absence of an impact assessment in the explanatory memorandum of a legislative proposal and set out the analysis and all supporting evidence in a Staff Working Document published with the proposals or at the latest within three months of its publication.<sup>49</sup>

The Staff Working Document should have also set out clearly how and when the legislative proposals accompanying the Pact will be subsequently evaluated.<sup>50</sup> In fact, it fails to clarify that the absence of an impact assessment should remain an exception, even though, as has been stressed, in the fields of migration and asylum, this is not the first time that major proposals have not been accompanied by a Commission's impact assessment.<sup>51</sup>

The lack of a full impact assessment may have legal implications as impact assessment could definitely strengthen the link between competence and evidence beyond the mere Commission's explanation of the use of a legal basis. Furthermore, as the impact assessment is inherently connected with the need to ensure compliance with the principle of subsidiarity, as this provides for a legal limit to European regulation,<sup>52</sup> one may even argue that a legal act that is adopted despite scant justifications in the light of the principle of subsidiarity, also because of the lack of a full impact assessment, may be subject to judicial review based on Article 263 TFEU.

Nonetheless, the lack of a full impact assessment for the New Pact's proposals has contributed to boosting the activism of civil society organizations as well as institutional actors, such as the European Parliament, that remedied the lack of an *ex ante* impact assessment with a critical analysis of whether and how the Commission's proposals under the New Pact would address the existing problems in practice. In this regard, it is worth paying attention to the Horizontal Substitute Impact Assessment, requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) and provided by the European Parliamentary Research Service.<sup>53</sup>

This document mostly echoes the views and concerns raised by the consultation with the stakeholders. More specifically, without unfolding the detailed technical aspects relating to the proposed legislative measures assessed by the Study, evidence from the Horizontal Substitute Impact Assessment shows that the reform does not effectively solve the existing problems with migratory flows, namely the lack of fair responsibility-sharing and risks of violation of migrants' fundamental

49 COM(2021) 219 final (n 6).

50 *Ibid.*, 14.

51 As noted by other Studies commissioned by the European Parliament, the proposal for a recast Return Directive and the proposal for an Asylum Procedure Regulation lacked also an impact assessment. Cf. European Parliament, 'The Proposed Return Directive (Recast), Substitute Impact Assessment' 2019, at: [www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2019\)631727](http://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2019)631727), 5; European Parliament, 'Asylum Procedures at the Border, European Implementation Assessment' (2020), at: [www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2020\)654201](http://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654201), 11.

52 O. Pimenova, 'Subsidiarity as a 'Regulation Principle' in the EU' (2016) 3 *The Theory and Practice of Legislation* 381-398.

53 European Parliamentary Research Service (EPRS), 'The European Commission's New Pact on Migration and Asylum. Horizontal Substitute Impact Assessment', August 2021, at: [www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank).

rights. Additionally, the Horizontal Substitute Impact Assessment questioned the European-added value of the proposals as to solidarity, compliance with the principle of subsidiarity, thereby with the Better Regulation Agenda's goals as well. The Horizontal Substitute Impact Assessment provides more reliable information, based on a methodology in line with the Better Regulation Agenda and integrates input from various stakeholders. These include representatives of the European Commission and relevant EU agencies, migration and asylum practitioners, national Member State authorities and civil society representatives. The Horizontal Substitute Impact Assessment also reflects in-depth research at the country level in a sufficiently heterogeneous number of Member States (Germany, Greece, Italy, Poland, Spain and Sweden).<sup>54</sup>

While normally understood in the function of technocratic lawmaking, impact assessment is crucial to connect with the economic and social dimensions of the whole legislative reform. Therefore, the lack of an adequate impact assessment risks disconnecting the phenomenon of migration from the whole fabric of EU law with the consequence of neglecting the social and economic implications of the human and social phenomenon of migration. As will be further elaborated in Section C, this may result in legislation that does not speak to the final users,<sup>55</sup> namely the asylum seekers.

## C Evidence as an Element to Improve the Quality of the EU Asylum Legislation

The previous sections offered an overview of the different sources of evidence in EU asylum law and how these have been especially used in the context of the current reform of the CEAS. In an attempt to explain how evidence can contribute to improving the quality of the EU asylum legislation, this section also contributes to addressing the criticisms that the use of evidence has raised. To this aim, the focus will be on how to use evidence from impact assessment to promote user-friendly legislation, thereby preserving the effectiveness of the CEAS.

### *I Evidence Used to Undermine the Teleological Effectiveness of the CEAS*

Good lawmaking requires a direct relationship between the measure adopted and the objective to be achieved; this makes genuine evidence essential and functional to the realization of the policy objectives. According to Article 78 TFEU, the legal basis for the CEAS, this body of EU law pursues the objective of "offering appropriate

54 *Ibid.* This impact assessment was conducted between April and July 2021. Data collection methods included extensive desk research and document and literature review of recently published studies and legal instruments; in-depth stakeholder consultations; and six country case studies. The research team held over thirty semi-structured interviews with and received additional (fifteen) written inputs from a range of experts, including representatives of the European Commission and relevant EU agencies, migration and asylum practitioners, national Member State authorities and civil society representatives.

55 On this understanding of the legislation as a channel of communication from the state to the users, see more extensively H. Xanthaki, *Drafting Legislation. Art and Technology of Rules and Regulation* (Hart Publishing, 2014).

status to any third-country national requiring international protection". In setting the goal of the CEAS, the treaty speaks about obligations for the States and the appropriate status of protection for migrants. In other words, to be effective, the legislation in the field of asylum should assure that those who genuinely need protection get an appropriate status under EU law.

This goal has been partly realized, but a closer look at the regulatory model of the CEAS explains the ongoing reform in the context of a normative *continuum* that over the years has progressively shifted from humanitarianism to securitization.<sup>56</sup> Such a shift reached its peak with the migratory pressure of 2015, when, beyond the emergency focus of the crisis regulation, it became clear that migratory movements and refugees from constituting a complex political problem were seen as a 'risk' for the security of the EU polity. This risk is mostly due to the difficulties for a regulatory framework to effectively manage the phenomenon of mixed flows of migrants with different motivations and different protection needs who travel together along the same migration routes, using the same means of transport and relying on the same smuggling networks.<sup>57</sup>

As a consequence, the whole migratory phenomenon has been captured through the paradigm of securitization. This resulted in conflating the policy objective of the CEAS with the objective of controlling migration in order to preserve the security of the EU. Over the past few years, the emphasis on securitization has determined schizophrenic legislation which frustrates the goal of the policy by trying to accommodate without any success the diverging positions of the Member States. The New Pact is the culmination of such an approach because, as Commissioner Johansson said on 23 September 2020 when presenting the New Pact, "no one will be satisfied with it".<sup>58</sup>

This shifting goal frustrates the teleological effectiveness of the CEAS, also owing to the lack or misuse of evidence. Studies commissioned by the European Parliament have raised doubts about the correct use or interpretation of evidence. In this connection, the Commission Staff Working Document accompanying the New Pact refers to the increasingly 'mixed' character of migratory flows, using as evidence the increasing number of migrants who are not in need of international protection. As has been reported, the Commission highlighted that, while the number of irregular arrivals in the EU has substantially decreased from 2015 to

56 V. Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection" Paradigm' (2018) 56 *Journal of Common Market Studies* 119, 121.

57 United Nations High Commissioner for Refugees (UNHCR), 'The 10-Point Action Plan in Action, 2016 – Glossary', December 2016, 282, at: [www.refworld.org/docid/59e99eb94.html](http://www.refworld.org/docid/59e99eb94.html). R Perruchoud and J. Redpath-Cross (eds), *Glossary on Migration* (2nd ed, International Organization for Migration, 2011) 63, define 'mixed flows' as: 'complex migratory population movements that include refugees, asylum-seekers, economic migrants and other migrants, as opposed to migratory population movements that consist entirely of one category of migrants'. For references see P. García Andrade, 'Initiatives of EU Member States in Managing Mixed Flows in the Mediterranean and the EU Distribution of Competences', in C. Matera and A. Taylor (eds), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies* (Asser Press, 2014), 51–63.

58 E. Zalan, 'Commissioner: No One Will Like New EU Migration Pact' (18 September 2020) *EU Observer*, at: <https://euobserver.com/migration/149475>.

2019, the share of third-country nationals arriving from countries with a recognition rate lower than 25% had risen over the same period: from 14% in 2015 to 67% in 2017.<sup>59</sup> This has been used to justify measures like pre-entry screening of migrants or return border procedures, which are a key feature of the ongoing CEAS reform. However, it seems to ignore that these figures decreased to 26% in 2019.<sup>60</sup> Also, the European Parliament's Study shed doubts on whether figures limited to a very short period of time, characterized by mobility restrictions to the pandemic, "may be used as an accurate predictor of future trends, and thus as a ground upon which to build a long-term revision of EU asylum rules".<sup>61</sup>

Additionally, the European Parliament's Study has pointed out how the composition of migratory flows depends on

a complex set of geopolitical, economic, and social factors in countries of origin, as well as a mix of policy and legal measures adopted in main countries of transit and destination.<sup>62</sup>

Also, data provided by the European Commission about the recognition rate of beneficiaries of international protection do not include those individuals that are granted permits to stay for humanitarian reasons on the basis of the national legislation. This, in countries, like Italy, at least before the recent legislative reform,<sup>63</sup> constituted the applicants' vast majority, compared to the more limited recognition rate for refugees and recipients of subsidiary protection according to the EU Qualification Directive.<sup>64</sup> More importantly, the Commission seems to ignore the huge discrepancies in recognition rates for applicants of the same nationality across the Member States, which, therefore, raises doubts as to whether this indicator can be objectively used as evidence to prove that applicants from low-recognition nationality should undergo accelerated border procedures.

Finally, a significant novelty of the Pact is its attempt to close the link between asylum and return policies by tabling a legislative proposal that essentially merges the asylum and return border procedure in a single process that facilitates the return of applicants whose applications are considered inadmissible at the

59 See European Parliament (n 35) 40.

60 For data on migration see Eurostat, 'Migration and Migrant Population Statistics', at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration\\_and\\_migrant\\_population\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics).

61 See European Parliament (n 35) 40.

62 *Ibid.*

63 Law Decree 113/2018, known as 'Salvini Decree' converted with amendments into Law 1 December 2018, n. 132, [2018] OJ n. 281.

64 See M. Giovannetti, 'Riconosciuti e "diniegati": dietro i numeri le persone' (2018) 2 *Questione giustizia*, at: [www.questionegiustizia.it/rivista/articolo/riconosciuti-e-diniegati-dietro-i-numeri-le-persone\\_533.php](http://www.questionegiustizia.it/rivista/articolo/riconosciuti-e-diniegati-dietro-i-numeri-le-persone_533.php).

preliminary border check.<sup>65</sup> This emphasis on return also seems unjustified. The Commission Staff Working Document reports that the data provided show, in particular, how the overall return rate in the EU has decreased over a four-year period: from 47% in 2016 to slightly above 30% in 2019.<sup>66</sup> Nevertheless, the European Parliament's Study has reported how the ineffectiveness of the return policy depends on many factors, including the cooperation with third countries that are difficult to control or influence.<sup>67</sup> This narrow emphasis on increasing the return rates also ignores issues related to the need to ensure return processes are in line with fundamental rights and rule of law.

## *II Using Evidence to Develop a User-Friendly EU Asylum Legislation*

The use of evidence to elaborate the CEAS legislative toolbox is illustrative of the criticism that has been raised on certain aspects of the Better Regulation Agenda.<sup>68</sup> The criticism relates to the risk of an overly technocratic and bureaucratic use of evidence. As explained in Section C.I, this approach may result in the unwillingness of policymakers "to take data or scientific and professional/expert insights into account", and in politically sensitive areas such as migration and asylum, evidence can be also highly disputed by policymakers.<sup>69</sup>

In this connection, a comparative analysis of the Staff Working Document accompanying the New Pact and the Horizontal Substitute Impact Assessment provided by the European Parliament shows significant diverging points. Despite pointing out the input provided by the consultation with the stakeholders, the European Commission's Staff Working Document fails to report the details of the stakeholders' input and how this has been taken into account to address the challenges that have been identified. The Staff Working Document essentially limits itself to state that this input was taken into account.<sup>70</sup> What is more, as has been emphasized, the Staff Working Document included "partial, erroneous and non-independent data which cannot be qualified as evidence".<sup>71</sup> On the contrary, the European Parliament's Substitute Impact Assessment concluded that

although interviewed stakeholders indicate that, in certain cases, the new pact stands to have positive impacts on various aspects of migration and asylum in the EU, the overall consensus is that the new pact [...], will have significant

65 This will be based on the provisions of three different legislative instruments: the proposal for the Asylum Procedures Regulation, the proposal for the Screening Regulation and the recast proposal for the Return Directive. See for references M. Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (14 January 2021) EU Immigration and Asylum Law Blog, at: <https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/>.

66 Commission Staff Working Document (n 36) 37.

67 See European Parliament (n 35) 45.

68 Lalić, Novak, Giljević and Manojlović (n 10) 209.

69 Ibid., 210.

70 Commission Staff Working Document (n 36) 27 ff.

71 European Parliament's Study (n 35).



negative consequences for the Member States, local communities and migrants.<sup>72</sup>

These controversial aspects confirm that evidence-based legislation in migration law is facing challenges. In an attempt to use evidence to develop more user-friendly legislation that can really meet the goals of the policy by integrating the perception of those subjects who are affected by the legislation,<sup>73</sup> it is worth reflecting on how to address these challenges. This would require avoiding oversimplification or, even worse, instrumentalization of evidence, as independent research commissioned by the European Parliament has shown. Also, instead of relying on a limited amount of evidence (such as statistical data over a short period of time), it is relevant to carry out a thorough impact assessment that takes into consideration the most complex evidence, such as independent research outputs supported by a significant amount of case law that has pointed out to discrepancies in the reception conditions of asylum seekers, degrading living conditions, legal uncertainty and discrimination.<sup>74</sup> These are factors against which statistical data have to be interpreted.

Still, whereas the objective of the CEAS is to offer an adequate status of protection to third-country nationals in need, the New Pact upholds and exacerbates the traditional punitive approach to secondary movements, namely those migratory flows from the EU country which is supposed to be responsible for an asylum application to another EU country.<sup>75</sup> Considering that the Commission itself acknowledged the difficulty to quantify the entity of these secondary movements,<sup>76</sup> the European Parliaments' Study observed existing independent evidence should be used in particular to

assess the added value and implications [...] of punitive measures towards asylum seekers engaging in onward movements, that have characterised EU policy responses as part of the 2016 CEAS reform and continue to be a core component of the approach laid down in the new Pact.<sup>77</sup>

<sup>72</sup> EPRS (n 53).

<sup>73</sup> Brems and Desmet (n 11) 111.

<sup>74</sup> CJEU, Cases C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI)*, 27 September 2012, C-79/13, C-79/13, *Saciri and Others*, 27 February 2014, Joined Cases C - 297/17, C - 318/17, C - 319/17 and C - 438/17, *Bashar Ibrahim and Others*, 19 March 2019.

<sup>75</sup> In this regard, L. Slingenberg 'Political Compromise on a Recast Asylum Reception Conditions Directive: Dignity Without Autonomy?' (3 March 2021) *EU Immigration and Asylum Law Blog*, at: <https://eumigrationlawblog.eu/political-compromise-on-a-recast-asylum-reception-conditions-directive-dignity-without-autonomy>, pointed out that limiting access to the material reception conditions for asylum seekers in the Member State where they were required to be, because of the responsibility criteria may contradict the case law of the CJEU and conflict with compliance with the Charter of Fundamental Rights of the EU.

<sup>76</sup> Commission Staff Working Document (n 36) 33, footnote 53.

<sup>77</sup> European Parliament's Study (n 35) 43. See also D. Thym, 'Secondary Movements: Overcoming the Lack of Trust among the Member States?' *EU Immigration and Asylum Law and Policy Blog*, 29 October 2020, at: <https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/>.

Also, as regards the emphasis on return, instead of insisting on increasing return rates, from a user's perspective the effectiveness of returns should rather be assessed in relation to the feasibility of returns in full compliance with fundamental rights guarantees. Along the same lines, the European Parliament in its draft report on the 2018 Proposal for recasting the Return Directive posited that the goal of increased effectiveness should be accompanied by "unambiguous and enforceable fundamental rights safeguards", which overall are presently lacking.<sup>78</sup>

The New Pact currently mirrors a difficult compromise between various groups of Member States and the EU, but it misses to speak to the migrants by integrating research on the impact of migration policy from a fundamental rights perspective. The Commission Staff Working Document mainly refers to data provided by national governments, but different pieces of research on the efficiency of and the impact on migrants are neglected. Regrettably, although there is a flourishing scientific production on issues related to EU migration and asylum legislation and its reform, they are not thoroughly used as evidence in the lawmaking process.

This is also illustrated by the recent position of the Council of the EU, which is notably one of the EU co-legislators. In 2019, the Council of the EU engaged with the Member States on the future of policymaking in migration.<sup>79</sup> In this context, the Council made a list of tools that the policymaking should consider, essentially including evidence from very specific sources, such as the Integrated Situational Awareness and Analysis (ISAA) report, providing information on the most relevant recent developments in migration and asylum in and towards the EU; the Early Warning Reports issued by the EU Agency for Asylum; the three-month forecasting reports produced by FRONTEX, presenting short-term risk analyses based on changes in the monitored push factors of migration); existing EU-funded projects aiming at building scenarios on what migration to Europe might look like in the future.

The Presidency of the Council also pushed to put these tools to greater use, in order to base strategic migratory discussions on scientific research and evidence, addressing the structural aspects which shape migration and forced displacement and helping to design evidence-based policies.<sup>80</sup> This might be a step in the right direction, but it is important that relevant evidence is not used with bias or instrumentalized.

78 European Parliament, LIBE Committee, Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals (recast), 21 February 2020, 89.

79 Council of the EU, 'Evidence-based and Forward-Looking Migration Policies' Presidency Discussion Paper, 12608/19, 1 October 2019.

80 *Ibid.*

## D Concluding Remarks

The EU strategy for better lawmaking has a long history, dating back to 2002.<sup>81</sup> Since then a plethora of institutional initiatives, in the light of the Better Regulation Agenda, as well as flourishing literature,<sup>82</sup> have progressively emphasized the need for evidence-based policymaking. This approach has been also followed in the areas of EU asylum law, where evidence has been categorized in the light of statistical data, consultation with stakeholders and impact assessment.

However, the recent reform of the CEAS through the legislative proposals underpinning the New Pact on Migration and Asylum has contributed to showing the risks associated with the use of evidence in particularly politicized areas of law, such as migration and asylum. From the lack of a full impact assessment, as required by the 2016 Interinstitutional Agreement on Better Law-Making, to the instrumentalization of data and oversimplification of the available evidence, evidence-based policymaking in EU asylum law presents a number of pitfalls. This impacts the effectiveness of the policy area which pursues the goal of ensuring an adequate status of protection for those third-country nationals in need for it. The current reform of the CEAS seems to exacerbate the nature of a compromise between the different Member States of legislative proposals to the detriment of a truly migrant-oriented perspective.

A user's perspective to evidence in EU asylum law can contribute to a significant paradigm shift which makes the EU legislation in the field more sensitive about the impact on the ultimate users, namely migrants and asylum seekers. Coupled with the principles of better lawmaking, such a user's perspective can contribute to smart use of evidence, which is to be collected from different sources, including available scientific research, should be used in a transparent, objective and unbiased way, avoid the risk of political instrumentalization and acknowledge the reasons for the lack of an impact assessment and the alternative solutions for evidence-based policymaking. This approach will not only contribute to preserving the teleological effectiveness of the CEAS but also to consolidating the EU rule of law, as it strengthens the compliance with constitutional principles, such as subsidiarity and fundamental rights that are at the core of the legislative activity of the EU.

81 European Commission, Action plan 'Simplifying and Improving the Regulatory Environment', COM(2002) 278 final 5 June 2002.

82 See, inter alia, S. Garben and I. Govaere (eds), *The EU Better Regulation Agenda. A Critical Assessment* (Bloomsbury, 2018).