

Strikes (Minimum Service Levels) Bill

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| Lead department | Department for Business, Energy and Industrial Strategy |
| Summary of proposal | The Department are introducing powers to enable the government to set minimum service levels, for sectors in scope, on days where strikes occur. |
| Submission type | Impact assessment (IA) – 02 February 2023 |
| Legislation type | Primary legislation |
| Implementation date | 2023 |
| Policy stage | Final |
| RPC reference | RPC-BEIS-5259(1) |
| Opinion type | Formal |
| Date of issue | 20 February 2023 |

RPC opinion

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| Rating¹ | RPC opinion |
| Not fit for purpose | The IA is not fit for purpose. The Department has sufficiently considered the impacts of the primary legislation, in line with RPC guidance ² , given that the specific choice of sector and minimum service level will be defined by later secondary legislation. The RPC would expect detailed analysis to be conducted at the secondary legislation stage. The IA's assessment of the impact on small and micro businesses (SMBs), does not adequately address whether SMBs will face disproportionate impacts, and whether exemption or mitigation for disproportionately affected SMBs has been considered. |

Business impact target assessment

| | Department assessment | RPC validated |
|---|---|--|
| Classification | Qualifying regulatory provision | Qualifying regulatory provision |
| Equivalent annual net direct cost to business (EANDCB) | Not quantified, further legislation necessary | Further IAs to be submitted at secondary legislation stage for EANDCB validation where required by the better regulation framework |
| Business impact target (BIT) score | | |

¹ The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). RPC ratings are fit for purpose or not fit for purpose.

² <https://www.gov.uk/government/publications/rpc-case-histories-primary-legislation-ias-august-2019>

Business net present value

Overall net present value

RPC summary

| Category | Quality³ | RPC comments |
|---|----------------------------|--|
| EANDCB | Green | The IA provides a scenario 2 outline assessment of the impacts of the Bill, in line with RPC guidance concerning primary legislation that enables secondary legislation; although it has limited discussion of the scope of potential impacts and the extent to which they are sector-dependant. The RPC would expect detailed analysis to be conducted at the secondary legislation stage, including a sufficient assessment of the impacts upon employers and trade unions, together with an appropriate counterfactual that would occur in the absence of legislation being introduced. |
| Small and micro business assessment (SaMBA) | Red | The Department includes some statistics outlining the number of SMBs across affected sectors, but does not include sufficient discussion of the specific impacts SMBs may face. The IA has not considered mitigation for SMBs who may be disproportionately impacted. |
| Rationale and options | Satisfactory | The IA discusses market failures that may arise due to the lack of provision of key services. It considers a range of options, including a non-regulatory option. It demonstrates that similar policies have been adopted in multiple comparable countries. |
| Cost-benefit analysis | Weak | While the analysis that is included in the IA is clearly set out, the Department makes use of assumptions in the analysis which are not supported by evidence. It focusses on familiarisation costs and does not properly consider other costs of the measure. This is to an extent mitigated by the commitment to undertake analysis when the specific instance of applying this general legislation is decided on a case-by-case basis. The IA does well to include an in-depth discussion of the potential risks of the policy. |
| Wider impacts | Satisfactory | The IA includes a detailed equalities assessment, covering a breakdown of employees in affected key sectors, as well as including a brief trade and investment assessment. |
| Monitoring and evaluation plan | Satisfactory | The Department does commit to undertaking some form of monitoring and evaluation (M&E) for the MSLs brought into effect and discuss potential evaluation questions. The IA should be improved by considering more specific M&E plans to assess |

³ The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. Please find the definitions of the RPC quality ratings [here](#).

the impacts upon individual sectors and aspects of
the wider economy.

Summary of proposal

In response to concerns raised during recent strike action taken across the UK, the government is introducing legislation that will allow for the implementation of minimum service levels (MSLs) across key sectors⁴. The MSL legislation will ultimately set the minimum standard of service that affected sectors must provide for days on which strike action is taking place, to ensure the public has sufficient access to the services provided.

The IA discusses four options, with option 2 being the preferred option that the Department is introducing via the Bill:

- Option 0 – Do nothing;
- Option 1 – Voluntary MSLs (derogations) without legislative intervention within key public services;
- Option 2 – Provide Secretaries of State the power to implement MSLs via regulations for key sectors; and
- Option 3 – Outright ban on strikes in some critical emergency sectors.

The IA presents the main costs of the preferred option to be the initial familiarisation costs (for employers, trade unions and government), the broader administrative and enforcement costs faced by government, operational costs (for employers and trade unions), and the impacts to public service workers relating to their reduced capacity to strike. In addition, the IA discusses the benefits (illustratively) of the preferred option as the potential recovered working days lost from those no longer striking, as well as the wider benefits felt across the economy from the minimum provision of key services.

At this point in time, due to uncertainty over necessary secondary legislation, the Department is unable to provide an EANDCB for validation and put forth a scenario 2 assessment (as set out in RPC primary legislation guidance⁵) of the impacts of the Bill.

RPC's scrutiny process in the context of this policy

The Department did not follow its own policy for the timely submission of an IA to the RPC for scrutiny⁶, to enable Parliament to consider both the IA and the RPC's opinion. The Bill had already passed through the House of Commons and had moved on to the House of Lords when the IA was submitted to the RPC.

Consequently, the RPC has issued this formal opinion without first issuing an initial review notice (as is standard practice when red-rated issues are identified in final stage IAs), in order to inform as much of the Parliamentary debate as possible. As a result, the Department will not have the opportunity to rectify these shortcomings via the usual process before any enactment stage IA. We proceeded in this way to

⁴ The sectors that will be in scope of these MSLs will include health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security.

⁵ <https://www.gov.uk/government/publications/rpc-case-histories-primary-legislation-ias-august-2019>

⁶ <https://www.gov.uk/government/news/strikes-minimum-service-levels-bill-ia-statement-from-the-rpc>

ensure that this opinion could be issued on a timescale that might be of some use to parliamentary scrutiny.

The IA submitted for RPC scrutiny includes measures that are not regulatory provisions as set out in the Better Regulation Framework (BRF) (e.g., requirements upon the public sector and those working on behalf of the public sector). These are not the primary focus of the RPC's scrutiny in this opinion or reflected in the red-rating issued. This opinion's assessment of the quality of the submissions, and evidence to support them, focuses on those measures that seek to introduce new regulatory requirements on business, including firms in privatised or part-privatised sectors (e.g., rail) and trades unions.

EANDCB

Identification and quantification of impacts

The Department has provided a consideration of the impacts of both the primary and expected secondary legislation, in line with RPC guidance on primary legislation IAs, providing a scenario 2 assessment at this time.

The IA indicates that further IAs will be produced to support the introduction of necessary secondary legislation covering the specific minimum service levels across each sector. The RPC expects more detailed qualitative and quantitative cost-benefit analyses in the IAs accompanying the relevant secondary legislation enabled by the Bill. The RPC would welcome and encourage discussion with the departments responsible for developing future policy, prior to the submission, as necessary based on the requirements set out in the BRF, of IAs produced to accompany future secondary legislation.

The levels of the future minimum service levels have not yet been chosen by the Department, and hence the specific impacts that may arise are unclear. For example, the impact upon business and unions is likely to vary significantly across different sectors, if the minimum service level was set on a per business basis (e.g., every business had to provide a certain percentage of regular services) as opposed to the businesses in a sector in aggregate providing a set percentage of regular service.

With respect to the costs to employers and trade unions, the IA has monetised the initial familiarisation costs. However it has not provided further analysis of other impacts - specifically an indication of the likely scale for businesses across the varied sectors of complying with a minimum service provision, given the specific policy choices to be made later. We would expect the Department to provide a more detailed description of the affected sectors and the costs to trade unions alongside secondary legislation.

In addition, it is not clear that the IA considers all of the impacts of the new requirements that will be introduced via the Bill. For example, the IA notes the introduction of work notices, but it does not consider these impacts in any detail. The Department must ensure that all direct business impacts (including those to trade unions) have been clearly identified and discussed, as well as appropriately (indicatively) quantified, to provide a better understanding of the scale of the impact upon business of the Bill at secondary stage.

Direct/indirect impact classification

The Department has not been able to set out the direct impacts of the Bill, nor the direct impacts upon business that would ultimately comprise an EANDCB figure, given the current uncertainty. As currently presented, the impacts discussed in the IA could all be interpreted as being classified as direct costs and benefits. At secondary stage, the IA must clearly indicate which impacts arising from the Bill that are direct and which are indirect, as well as saying which requirements fall on business and which are subject to the BRF.

Counterfactual/baseline

The Department has included data on the scale of strike action in the UK, in particular for 2022, citing this recent rate of strike action and working time lost within the rationale for intervention section. However, the IA later uses strike action figures from 2015-2019 in its illustrative analysis. The department should justify why it considers this an appropriate benchmark for future strike action.

In addition, the IA has not clearly established a counterfactual supported by evidence, outlining what is expected to occur in the absence of legislation being introduced. The Department describes, within the policy background section that voluntary action already occurs, yet later in the IA (paragraph 110 refers to the illustrative analysis), the Department assumes a baseline service level of provision of zero. This is a conservative position to take, given that voluntary provision of service in sectors is uncertain. The Department must ensure that the evidence, approach and assumptions made in establishing the counterfactual position, from which impacts of the proposals are assessed, are clearly explained, justified and consistent.

SaMBA

Scope

The IA includes some statistics covering the presence of trade union members within SMBs, as well figures on those affected by strike action in 2022 across all industries (including those not in scope of the policy). The IA has not provided a breakdown of the likely affected SMB population across the sectors in scope.

As with the assessment of impacts overall, the Department states of the intention to consider the impacts upon SMBs further, when introducing further legislation. The IA initially states that the Department's view is that SMBs would not be disproportionately impacted, however a clear case for this position is not made within the IA. The Department acknowledges that SMBs would likely not have the same capability to bear the familiarisation costs as larger businesses to meet this requirement.

Additionally, the IA also discusses the fixed costs that may limit some businesses from operating cost-effectively on strike days without a full complement of staff. The IA must consider whether this impact may be more likely for SMBs who are required to provide a minimum service. Further, the IA discusses the impacts to SMBs across the UK economy from strike action and therefore the potential benefit that SMBs may stand to gain from this policy, more generally.

Exemption and mitigation

The Bill does not exempt SMBs, and the IA does not justify this choice. Given that the IA does not clearly establish the size of the SMB presence in affected sectors, the Department cannot fairly assess whether the policy would be undermined if SMBs were exempted. If the case for not exempting SMBs was there, the IA must also consider what mitigation for disproportionately impacted SMBs there could be.

Medium-sized business exemption

As with the consideration of exemption for SMBs discussed above, the IA should have discussed whether medium-sized businesses (MSBs) should also be exempt. This would align with the principle behind the Government's announcement⁷ that, from October 2022, that departments should first look to exempt MSBs from new regulation.

Rationale and options

Rationale

The Department identifies market failures arising due to the lack of provision of key public services, namely the negative externalities faced by members of society who are not party to the labour disputes. Further, the IA presents data outlining the number of strikes occurring in the UK in recent years, focusing on the working time lost due to strikes in 2022.

The IA's rationale could have been improved by demonstrating the market failure in terms of the difference between such monopoly services to receive MSLs and usual competitive products produced in the wider economy. Strikes by workers of competitive businesses damage the market propositions of those companies and

⁷ <https://www.gov.uk/government/publications/better-regulation-framework/medium-sized-business-regulatory-exemption-assessment-supplementary-guidance>

hence provide an incentive on management to reach an agreement with unions. Customers of such companies have alternative choices, and the negative externalities are limited. Strikes by workers in monopoly services cannot damage the market propositions of monopolies because their users have no (or limited) alternatives. This lack of choice for users increases the negative externalities from strike action.

The Bill balances the minimum level of service, with the right for workers to strike, however the IA does not consider or discuss the rationale behind workers' decisions to strike, or consider the actions short of striking that may be taken. The IA could have considered this, in particular as the IA notes the risk of further (and even increased) strike action.

The IA lists similar MSL policies introduced in six comparable European countries; while no-strike policy precedents in some service areas are cited from Canada, Australia and the USA. While the IA establishes the precedent of restrictions on strikes and MSLs for some services, the IA could have been improved with a discussion of the respective levels at which these countries have set MSLs, or the effectiveness of these MSL policies in counteracting the potential negative effects of the under-provision of key services.

Options

The IA initially considers a range of options, including a non-regulatory option seeking the introduction of voluntary MSLs, however the IA only discusses the preferred option in any detail, providing only a summary sheet for this option. The IA could have attempted to provide a more complete assessment of the impacts of all options considered, to provide an illustration of their respective merits.

Cost-benefit analysis

Evidence and data

It is not always clear what evidence has been used, or the continued relevance of that which is used (e.g., some sources are almost a decade old), to inform the content of the IA. The Department should have provided a clearer description of what evidence has been used to support the analysis and discussion in the IA and explain why this evidence is the most recent and most appropriate to be used informing the assessment of impacts.

Assumptions, risk and sensitivity

The IA makes a number of assumptions, both in its consideration of the potential impacts of the Bill, and in attempting to quantify its impacts. For example, the time estimates informing the familiarisation costs are not appropriately explained and the Department does not justify important assumptions regarding the level of provision established in the counterfactual. The Department needs to support all assumptions made with appropriate evidence and analysis or further explanation.

The Department includes a sizeable section in the IA setting out potential risks arising from the policy, which includes the acknowledgement that the intervention may lead to further strike action.

Wider impacts

Competition

We note that the overriding majority of services cited in the IA are monopolistic and as such, the opportunity for competing provision for the customers of the service providers is limited, however in its review of secondary legislation, the Department should consider whether MSLs in particular sectors would give rise to competition impacts.

International trade and investment

The IA briefly comments on the expected trade impacts, stating that there is not expected to be any impact on international trade, however the IA does not comment on the potential impact on investment. The Department should discuss whether the introduction of MSLs, as well as the potential elevated risk of strike action, may lead to changes in the attractiveness of investing in the UK (by both foreign and domestic parties).

Equity/distributional impacts

The IA includes a detailed in-depth equalities assessment, looking at various protected characteristics across the in-scope key public sectors. The IA would benefit from also considering the localised/regional impact of strikes and MSLs (in particular whether any areas are disproportionately affected), as the IA notes early on that current service provision varies by location.

Monitoring and evaluation plan

The Department does not make a statutory commitment to reviewing the impacts of the MSL legislation, however, it signals the intention to undertake appropriate M&E for the policy. The IA includes a discussion of the likely direction of the evaluation that will take place, including a selection of key research questions that will be used to assess whether the policy objectives have been met. The IA would have been improved if the Department was able to include more specific information on how impacts in individual sectors may be assessed and what metrics that the Department may look to monitor to support the evaluation process.

Regulatory Policy Committee

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