

RPC case histories: assessment and scoring of primary legislation measures

Summary and key points

IAs supporting primary legislation must consider the impacts of the whole policy, i.e. including related secondary legislation.

The ideal scenario (scenario 1 below) is where a department can provide a robust assessment of the impacts of the whole policy at the primary legislation stage, including direct impacts on business arising from related secondary legislation. In this scenario, the EANDCB would be validated by the RPC and there would be no need to submit an IA to the RPC at secondary legislation stage, unless there is a significant change in policy affecting the EANDCB.

In practice, the most common scenario (scenario 2 below) is where uncertainty over the contents of the secondary legislation means that departments need to submit a further IA at the secondary legislation stage for EANDCB validation. In this scenario, the primary legislation stage IA must still indicate the potential scale or nature of impacts of the whole policy, for example if the enabling powers are used, and an explanation for why a more robust assessment is not possible at this stage.

Similarly, an assessment of whether a primary legislation measure falls below the *de minimis* threshold must, in line with framework guidance, take account of the impact of related secondary legislation. For measures to be *de minimis*, departments need to show that the direct impacts on business of the primary and secondary legislation combined is under $\pm£5m$ EANDCB. If there is uncertainty regarding the detailed effects of the secondary legislation, the primary legislation IA should be considered as not being below the *de minimis* threshold unless it can be demonstrated reasonably that the combined primary and secondary legislation will have impacts under $\pm£5m$ EANDCB in all likely scenarios.

This case histories document is structured as follows:

- Background and introduction
- Framework requirements
- How the RPC applies these requirements
 - rating a department’s assessment of the impacts of a proposal
 - classification and accounting for BIT purposes
- *De minimis* assessment

- Enactment IAs
- Enabling powers and ‘voluntary’ action by business

Background and introduction

Ministers carefully consider new enabling powers, particularly those that confer powers to introduce new regulatory regimes (including the setting up of new regulatory bodies). While actual costs and burdens on business usually arise from a combination of primary and secondary legislation, ministers want to be assured, before agreeing primary legislation, that there is a clear justification for the proposed intervention, and supporting evidence regarding likely overall impacts of a proposed measure (including both primary and secondary legislation) is set out in the impact assessment at the primary legislation stage. This includes identification of at least the scale of costs, and on which business sectors they fall and how. As well as facilitating clearance, this information also helps departmental ministers in justifying and defending in Parliament the taking of enabling powers.

This guidance document describes how the RPC applies framework guidance for the assessment of the impacts of a policy at the primary and secondary legislation stages. It also reflects the RPC’s position on how policies should be categorised in terms of BIT scope, and what should be scored and when, at the primary and secondary legislation stages of a policy. The document provides guidance on how *de minimis* assessments should be applied to measures at primary legislation stage. It also covers some other potential issues that departments may find helpful to note.

Framework requirements

Paragraphs 1.2.9-10 of the Better Regulation Framework guidance (August 2018) state:
“Primary and secondary legislation can be part of a single policy development process. Therefore, where a measure is implemented through a combination of primary and secondary legislation, the RIA will evolve and develop as the requirements of both sets of legislation are finalised and the underlying information and modelling is refined.

“Where the RIA for the primary legislation covers all the expected impacts of the secondary legislation, the existing RIA can be re-used to support the clearance of the secondary legislation. If the policy alters significantly during the process, or further information – that was unavailable at the time of the primary legislation – substantially alters the impact of the measure, then the RIA for the secondary legislation should be revised proportionally to ensure it reflects:

- *changes to the scope of the secondary legislation;*
- *greater clarity on the impact of the secondary legislation, if this had been uncertain when the RIA for the primary legislation was prepared;*

- *new information that has become available, which changes the assumptions underlying the RIA for the primary legislation*

This revision should be proportionate to the scale of the measure and the difference that the revision makes to the estimated impact of the measure.”

How the RPC applies this requirement – rating a department’s assessment of the impacts of a proposal

The table below sets out three main scenarios, ranging from where a department is able to provide a robust assessment of the impacts of the whole policy at the primary legislation stage (scenario 1a), to where a department provides little or no assessment (scenario 3).

Scenario 1a is where the RPC is able to validate an EANDCB figure for the whole policy at the primary legislation stage. This is something that departments should, wherever possible, aim to achieve. An example is provided in the box below scenario 1b.

Scenario 1b is where the RPC is able to validate an EANDCB figure for parts of the proposal at the primary legislation stage (for example, where some of the primary legislation is implemented without the need for related secondary legislation and where the detail of all the secondary legislation is not known). Where there is uncertainty at the primary legislation stage over the full impacts of the proposal, it is necessary to also submit an adjusted, or new, IA to the RPC to validate an EANDCB figure at the secondary legislation stage. Sometimes it will be necessary for departments to seek validation for the whole proposal at the secondary legislation stage.

The box below provides an example of the type of assessment that combines scenarios 1a and 1b.

Pubs Statutory Code and Adjudicator (BIS-1717(4)): The impacts of the whole of the policy were set out in the Pubs Statutory Code and Adjudicator impact assessment (IA) at the primary legislation stage (The Small Business, Enterprise and Employment Act 2015). These were considered in the relevant RPC opinion. This opinion validated an EANDCB figure of £3.4 million.

The secondary legislation includes a code that sets legal definitions of the terms and processes provided for in the primary legislation. It also sets any exemptions from the code requirements. As a result of the parliamentary process, franchises were exempted from the code requirements for a market rent only assessment. Since this was not anticipated in the IA at the primary legislation stage, the Department subsequently submitted an IA taking account of this policy change. Since this change was beneficial to pub companies, the overall EANDCB was reduced slightly, to £3.3 million.

(See also later box on 'Registration of Overseas Entities Bill RPC-4242(1)-BEIS').

Scenario 2 is where departments provide an indication of the likely scale of impacts but are unable to provide a robust assessment for validation until the secondary legislation stage. It applies where, for example, substantive policy decisions will not be taken until the secondary legislation stage or uncertainty over the impacts of a proposal is too great to provide a meaningful EANDCB figure for validation at the primary legislation stage. This scenario is the most common one. Departments still have to explain at the primary legislation stage why they are unable to provide a scenario 1-type assessment and commit to provide an updated IA at the secondary legislation stage. Three case studies are provided in the boxes below.

The RPC interprets the need for monetisation/quantification flexibly, with an acceptance that providing an appropriate range of scenarios for outcomes, and their related costs and benefits, may be preferable to a point estimate EANDCB at the primary legislation stage, particularly if there is a significant risk of spurious accuracy with the latter. The level of analysis that is proportionate will be judged by the RPC on a case by case basis because it will depend upon how much is known about the context of the secondary legislation. Nevertheless, an assessment, normally involving quantification, of the overall policy will be required in all cases.

Introducing a requirement for businesses to check that individuals have received appropriate financial advice before transferring, or otherwise dealing with, their pension annuity payments (HMT-3183(1)). The primary legislation requires the FCA to ensure that authorised firms are able to check whether individuals with an annuity valued above a set threshold have received appropriate financial advice; and gives HM Treasury the power to set the threshold value. The impact on business depends significantly on the level of the threshold value, which will be set through secondary legislation. A robust estimate of the impacts of the proposal was, therefore, not possible at the primary legislation stage. However, the IA provided a detailed indicative assessment of the impacts of the proposal based on anticipation of the threshold value. HM Treasury explained clearly that the IA covering the secondary legislation, when the threshold value would be known, would provide a more robust estimate of the EANDCB of the whole proposal. The EANDCB for the whole proposal would, therefore, be validated by the RPC at the secondary legislation stage.

Consolidation of defined benefit pension schemes (DWP-4338(1))

The proposal would introduce a legislative framework within which pension ‘superfunds’ are authorised and required to operate, requiring these funds to be authorised to operate within the defined benefit market and to provide the Pensions’ Regulator (TPR) with new powers to regulate. The Department has provided a monetised assessment of the expected impacts of the policy at the primary legislation stage and was assessed as fit for purpose. The IA presented an EANDCB figure of -£109.6 million. Given that the impacts presented in the IA are dependent upon decisions taken at the secondary legislation stage, the Department would need to submit an adjusted IA to the RPC to validate an EANDCB at the secondary legislation stage. This would also potentially allow the IA to incorporate decisions on the amount of the TPR and Pension Protection Fund levies, even if these impacts were outside of the scope of the EANDCB.

Modern Transport Bill – ultra-low emission vehicles (DfT-3567(1))

The proposal would put in place powers enabling government to ensure the provision of the necessary infrastructure to support electric and hydrogen fuel cell powered vehicles. The Department explained that most of the impacts cannot be accurately appraised at this stage because there is still significant uncertainty regarding the timing of any use of the powers and the content of any secondary legislation. More detailed IAs would be developed at the consultation and implementation stages for any secondary legislation. The Department provided descriptions of the potential costs to business, including an indicative scale where possible. The IA also provided an indicative scale of the potential societal benefits of increases in the use of low emission vehicles as a result of improved access to charge points.

Scenario 3 is one that departments will wish to avoid - where there is no assessment of the impact of the overall policy. This is very likely to result in an IRN/red-rated opinion from the RPC.

Level of detail of the impact of the whole proposal (including delegated/secondary legislation) provided at primary legislation stage	Likely RPC rating/action	Likely RPC opinion text
<p>1a. Full details and robust assessment of the whole proposal (i.e. the primary legislation, and where the content of the related secondary legislation is known).</p>	<p>Validate costs of the whole proposal – no further submissions required for the related secondary legislation unless the policy changes.</p>	<p>The RPC is able to validate the EANDCB [of the whole of the proposal] as £x.x million. The RPC will need to see further IAs for related secondary legislation only if there is a change in policy that affects the EANDCB figure.</p>
<p>1b. Details and robust assessment of some of the impacts on business (e.g. where primary legislation affecting business is brought into force ahead of, and without, related regulations and/or where the impacts of some of the related secondary legislation is known and the content of (other) related secondary legislation is not known).</p>	<p>Validate costs of the proposals as far as possible/provided; further submission(s) required for the (other) secondary legislation.</p>	<p>The RPC is able to validate the EANDCB relating to [the primary legislation] [and some related secondary legislation] as £x.x million. The RPC will need to see an updated/further IA(s) when the detail of the [other] related secondary legislation has been decided.</p>
<p>2. Full robust assessment of the proposal as a whole is not possible because substantive policy decisions will not be taken until the secondary legislation stage (e.g. where some details of the proposal are still to be decided/developed, say, for related secondary legislation). Uncertainty over some of the impacts of the proposal is, therefore, too great to provide a robust</p>	<p>The RPC is unable to validate an EANDCB figure at this stage. Revised/further IA(s), supporting secondary legislation, to be submitted and validated.</p> <p>This will be acceptable in most cases where policy decisions in respect of related secondary legislation, which materially affect the impacts, have not been taken at</p>	<p>Identification and an assessment of the scale of the impacts of the measure as a whole have been provided but these are not sufficiently robust at this stage for the RPC to be able to validate an EANDCB figure. This is because the level of detail currently available on the expected content of related secondary legislation is insufficient to enable assessment of a</p>

<p>EANDCB figure for validation at the primary legislation stage. But identification and an assessment of at least the scale of the impacts of the measure as a whole, including the business sectors that will be affected, and how, is provided. An explanation of why a full robust assessment of the proposal as a whole is not possible is also provided.</p>	<p>the primary legislation stage, but <u>not</u> where the department simply hasn't gathered sufficient evidence.</p>	<p>robust EANDCB figure at this stage. The RPC will need to see an updated/further IA when the detail of related secondary legislation has been decided before it can validate an EANDCB figure.</p>
<p>3. No assessment of scale/indication of likely impacts provided and no satisfactory explanation for this.</p>	<p>Red rating. An IA supporting primary legislation/enabling powers must provide an assessment of the total expected overall impact of the measure (including both primary and secondary legislation), quantifying the costs and benefits of the policy as a whole or, where this is not possible, provide a clear explanation why and at least an indication of the likely scale of impacts arising from use of the powers.</p>	<p>The IA is not fit for purpose. The IA must, at the primary legislation stage, assess the total expected overall impact of the measure (including both primary and secondary legislation), quantifying the costs and benefits of the policy as a whole. This must include at least some identification and assessment of the scale of the impacts and on which businesses they would fall and how.</p>

How the RPC applies this requirement – classification and accounting for BIT purposes

The terms “direct” and “indirect” should not be used to differentiate between the impacts of primary and secondary legislation. In particular, the impacts of secondary legislation should not be considered to be “indirect” purely because a proposal is only at the primary legislation stage. The impacts should be considered to be direct (unless they are indirect for another reason¹) but will not be accounted for BIT purposes until the date of implementation.

The rest of this section assumes that the proposal is a regulatory provision and does not fall within a BIT exclusion.²

The BIT assessment at the primary legislation stage should be based upon the whole policy, i.e. if a measure has direct impacts on business only when secondary legislation is implemented, this would still be classified as a qualifying regulatory provision at the primary legislation stage.

Proposals are scored for BIT purposes on the basis of the implementation date of the measure resulting in the impacts being felt (and, therefore, appear in the BIT report covering the implementation date).

In summary:

- i) Primary legislation that, itself, has a direct impact on business, even without secondary legislation – a QRP and accounted for at the primary legislation stage implementation date(s).
- ii) Primary legislation that, alone, has no direct impact on business but where use of a power, with related secondary legislation, has a direct impact on business – a QRP at both the primary and secondary legislation stages and the RPC opinion on the primary legislation stage IA will note that a further IA is to be submitted at the secondary legislation stage for validation of an EANDCB figure. Direct impacts on business to be accounted for at the secondary legislation stage implementation date(s).
- iii) Primary legislation that has no direct impact on business and where the use of a power, with related secondary legislation, also has no direct impact on business - *de minimis* NQRP.

When should measures be accounted for under the BIT?

¹ For information more generally on how to classify impacts as direct or indirect please see: <https://www.gov.uk/government/publications/rpc-case-histories-direct-and-indirect-impacts-march-2019>

² Exclusions are listed and described at Annex 1 in the better regulation framework guidance.

A measure attributed to a change in regulation (for both primary and secondary legislation) is accounted for under the BIT from the date the relevant legislation (or other implementing mechanism) comes into force, or (if applicable) expires or is revoked:

- Direct impacts on business from regulatory (or deregulatory) provisions contained in primary legislation should be accounted for under the BIT on the date the relevant provisions come into force.
- Direct impacts on business from regulatory (or deregulatory) provisions contained in the secondary legislation should be accounted for under the BIT on the date that secondary legislation comes into force.

De minimis assessment

Paragraph 1.2.11 of the BRF guidance states: *“If the direct impacts on business of either the primary legislation itself, or the exercise of the secondary powers arising from it, are greater than ±£5m EANDCB, then the legislation is subject to the better regulation framework and may need independent scrutiny. If the direct impact of the primary legislation and subsequent secondary legislation on business is below the de minimis threshold or falls under the safer building exclusion, then a proportionate impact assessment would be required (see paragraph 9). The secondary legislation, if the direct impacts are above the de minimis threshold, would be subject to independent scrutiny, as set out in paragraph 9. Commencement orders to bring primary legislation into force do not require RIAs.”*

An assessment of whether a primary legislation measure is *de minimis* must, therefore, take account of the impact of related secondary legislation.

For the measure to be *de minimis*, the IA would need to show that the direct impacts on business of the primary and secondary legislation combined is under ±£5m EANDCB. If there is uncertainty regarding the detailed effects of the secondary legislation, the primary legislation stage IA should be considered as not being eligible for the *de minimis* unless it can be demonstrated reasonably that the impact of the combined primary and secondary legislation will be less than ±£5m EANDCB in all likely scenarios.

Registration of Overseas Entities Bill (RPC-4242(1)-BEIS). The Department's assessment was sufficient for the RPC to validate the EANDCB of this IA on a draft Bill. The Department provided a qualitative assessment where monetisation was not possible or proportionate. Although there were significant uncertainties around the overall impacts of the proposal, these were principally around the indirect effect of potentially deterring legitimate investment in the UK and the Department explained why it was unable to monetise these impacts, providing reasonable argument for why they would be small. The Department's assessment was sufficient to demonstrate that the impact on business was below the *de minimis* threshold. The RPC opinion noted that, should the proposals change significantly during scrutiny of the draft bill or subsequently such as at the secondary legislation stage, and this could affect the *de minimis* assessment, the Department will need to submit a revised IA for RPC scrutiny.

The case below falls within category 2) a) in the following summary box.

Downstream Oil Supply Resilience Bill (RPC-3792(2)-BEIS). Although the EANDCB was well below the £5 million *de minimis* threshold, there were non-monetised costs and uncertainty around reporting requirements for the control test, which would be defined in regulation and/or guidance. Nevertheless, it was extremely unlikely that net direct costs to business would increase sufficiently to above the *de minimis* threshold and the RPC was able to confirm that the proposal is non-qualifying.

Summary

1) Department provides a robust EANDCB covering the impacts of both the primary and secondary legislation

- i. RPC validates EANDCB.
- ii. RPC confirms as qualifying or non-qualifying depending upon whether above or below +/- £5 million EANDCB.
- iii. Departments do not need to submit an IA at secondary legislation stage unless there is a policy change which affects the EANDCB.

2) Department is unable to provide a robust EANDCB covering both the primary and secondary legislation but provides sufficient analysis to demonstrate that impacts are clearly above or below +/- £5 million EANDCB.

a) Where below +/- £5 million EANDCB:

- i. RPC confirms as non-qualifying (de minimis).
- ii. Departments do not need to submit an IA at secondary legislation stage unless there is a policy change which could take the EANDCB above +/- £5 million EANDCB.

b) Where above +/- £5 million EANDCB:

- i. RPC confirms as qualifying.
- ii. RPC opinion notes that a further IA must be submitted at the secondary legislation stage for validation of an EANDCB figure.

3) Department is unable to provide a robust EANDCB covering both the primary and secondary legislation but should submit an IA at primary stage if the impacts are potentially above +/- £5 million EANDCB

RPC opinion notes that a further IA must be submitted at the secondary legislation stage for:

- i. validation of an EANDCB figure; and
- ii. confirmation of BIT status (with QRP as default)

Enactment stage IAs

Paragraph 1.2.15 of the BRF guidance states: *“Enactment RIAs are required only for primary legislation that has been amended in its passage through Parliament in such a way as to significantly change the impacts of the policy on business. An enactment RIA replaces the final RIA and is then published alongside the enacted legislation on www.legislation.gov.uk. If the impacts of the Act remain unchanged then an enactment RIA is not needed.”*

The following example is where the EANDCB was re-validated, following a policy change during parliamentary passage of the legislation, through an enactment stage IA.

Trade Union Act 2016 (BIS-3002(4)): The Department’s EANDCB at the final stage was validated in January 2016 at -£1.4 million. During parliamentary passage, there were some policy changes, notably that the requirement to opt into a political fund would now apply only to members joining after a transition period, rather than to all existing members. This, combined with some other changes, led to a change in the EANDCB to -£2.6 million, which was validated in December 2016.

Enabling powers and ‘voluntary’ action by business

In some cases, primary legislation will provide the Government with power to require businesses to do something if they do not agree to do it ‘voluntarily’. Unless it can be shown that businesses are genuinely already doing this of their free will, then the cost to business of the ‘voluntary’ measure will be considered to be a direct cost to business and, if a QRP, accounted for BIT purposes. This principle was re-affirmed by the committee in February 2019.

Community right to buy into renewable electricity developments (RPC14-DECC-2027)

This policy aimed to help encourage more support for renewable electricity developments by giving local community groups a right to buy into projects. The intention was that this would be undertaken with industry on a voluntary basis with primary powers being taken as a backstop if agreement was not reached. The consultation stage IA correctly identified the measure as an IN with the cost to energy companies of complying with the regulation as a direct cost to business.